



REPUBLIC OF KENYA



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**Konga & another v Republic (Criminal Appeal E037 of 2022)
[2023] KEHC 23084 (KLR) (5 October 2023) (Judgment)**

Neutral citation: [2023] KEHC 23084 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KABARNET
CRIMINAL APPEAL E037 OF 2022
RB NGETICH, J
OCTOBER 5, 2023**

BETWEEN

BENARD KOSGEI KONGA 1ST APPELLANT

KENNEDY KEMBOI KONGA 2ND APPELLANT

AND

REPUBLIC RESPONDENT

***(BEING AN APPEAL ARISING FROM THE JUDGEMENT, CONVICTION
AND SENTENCE OF HON. RICHARD KOECH, S.P.M IN ELDAMA RAVINE
PRINCIPAL MAGISTRATE'S COURT CRIMINAL CASE NO. 364 OF 2020)***

JUDGMENT

1. The Appellants were charged with the offence of malicious damage to property contrary to section 339(1) of the Penal Code. The particulars of the charge were that on the night of 19th March, 2020 at Emining village within Mogotio sub-county of Baringo county, the accused persons jointly willfully and unlawfully damaged the Boundary fence valued at Kshs. 43,057/= erected by barbed wire of Land parcel Number Pokor/Keben/Kures/83 the property of Erastus Kipchumba Rotich.
2. The Appellants pleaded not guilty to the charge and the prosecution availed 6 witnesses in support of the case against the accused. Upon the close of the prosecution's case, the court found that the accused persons had a case to answer and were placed on their defence the appellant gave sworn statement in his defence but did not call any witness.
3. Upon hearing both parties, the trial court found that the prosecution had proved their case beyond reasonable doubt, convicted and sentenced each of the accused to pay a fine of Kshs. 100,000/= and in default to serve 12 months imprisonment.



4. The Appellants having been aggrieved and dissatisfied with the above mentioned judgment, appeals against the judgment on the following grounds:-
- i. That the learned trial magistrate erred in law and fact by failing to appreciate that essential ingredients/elements of the offence as charged were not proved beyond reasonable doubt as by law required.
 - ii. That the learned trial magistrate erred in shifting the burden of proof to the Appellant.
 - iii. That the learned trial magistrate misdirected himself in fact and in law in arriving at a finding that the Respondent had proved ownership of the land in issue beyond reasonable doubt thus arriving at a very erroneous finding.
 - iv. That the learned magistrate erred in law and in fact in ignoring the defence advanced by the appellant hence arrived at an erroneous finding.
 - v. That the learned trial magistrate erred in law and in fact in ignoring the appellant's defence of alibi thus arriving at an improper finding.
 - vi. That the learned trial magistrate erred in law and in fact in entering a conviction and sentence against the Appellants based on circumstantial evidence that was not corroborated thus arriving at a very erroneous finding.
 - vii. That the trial magistrate erred in law and in fact by failing to warn himself of the dangers of entering a conviction and sentence based on the identification of the appellants by the prosecution witnesses that was not corroborated.
 - viii. That the trial magistrate erred in fact and in law in relying on extraneous matters to convict the appellant.
 - ix. That the Honourable trial magistrate misdirected himself in fact and in law by not appreciating that the prosecution did not produce any implement used in the alleged commission of the offence.
5. The Appellants pray that this Appeal be allowed and this court does quash the trial magistrate's judgement and the Appellants be set at liberty forthwith.

SUBMISSIONS BY THE APPELLANT

6. On the 19th June, 2023, the appellants filed Written Submissions through Elizabeth & Co. Advocates and submit that essential ingredients/elements of the offence as charged were not proved reasonable doubt. He cited the case of Simon Kiama Ndianguí –vs – Republic [2017] eKLR and Wilson Gathungu Chuchu –vs- Republic [2018] eKLR. He submits that the prosecution did not prove that the complainant was the owner of the property in use and the sale agreements relied on by the complainant were marked for identification but were never produced in court; that it is utterly shocking that the trial court arrived at the findings in the judgement notwithstanding the complainant not being the owner of the subject property.
7. On whether the prosecution proved beyond reasonable doubt that the destruction or damage was occasioned by the appellants, Counsel for the appellants submitted that Pw 2 and Pw 4 are purported to have visually identified and/or recognized the accused persons at night but prosecution never bothered to make inquiries as to the nature of the light, the intensity of such light, the location of the source of light in relation to the accused and time taken by PW 2 and Pw 4 to observe the appellants so as to be able to identify them.



8. Counsel further submits that Pw 4 confirmed on cross examination that he was alone at the scene of crime and that there was no other person except the accused persons and that it was therefore not possible for Pw 2 to be at the same place and time with Pw 4; inconsistency which the trial court failed to take into account. The Appellants submits further submits that Pw 4 alleged that the appellants wore dark clothes and he did not talk to them and it was also not clear whether Pw 2 and Pw 4 were facing each other with the appellants at the time of the alleged recognition and relied on the case of John Chege Gacheru –vs- Republic [2014] eKLR.
9. The Appellant further submits that it is evident from the evidence on record that the prosecution failed to prove beyond reasonable doubt that the appellant destroyed the complainant’s property as charged and it is therefore evident that the trial court based its conviction of the appellants on circumstantial evidence without warning itself of the dangers of doing so and cited the case of Matare Getange & 2 others –vs- Republic [2021] eKLR.
10. The appellants submit that the prosecution failed to establish the ingredients of the offence the Appellants were charged with and that notwithstanding, the trial court proceeded to convict the appellants on account of pending dispute between the complainant and the appellants thus usurping the jurisdiction of the Environment and land court.
11. On whether the appellants’ defence was considered, the appellants cited the case of Republic –vs- Ben Simiyu Khwatenge [2020] eKLR and submit that the appellants raised the defence of alibi and demonstrated how it was not possible that they went to the suit property at night and prosecution did not dispute that at the material time there was presidential curfew running between 7:00p.m and 5:00a.m. and the prosecution did not tender any evidence to show that the appellants were seen around the suit property in the evening of the 19th March, 2020 save for the alleged identification by Pw 2 and Pw 4 at 8:00 a.m using a torch which was not produced as exhibit for trial court’s consideration.
12. That the defence of alibi raised by the appellants created doubts in the mind of the trial court and it was the duty of the prosecution to demonstrate that the appellants were present at the scene on the alleged night; the legal burden which the prosecution failed to discharge and the trial court erred in law and fact in ignoring the appellants’ defence and in particular, the defence of alibi hence arriving at an erroneous finding and determination.
13. The appellants argue that it is apparent that the trial court heavily relied on the allegations that the appellant’s father is claiming ownership of the suit property to find that the appellants were the ones who damaged the suit property.

RESPONDENT’S SUBMISSIONS

14. The Respondent submits that it was clearly demonstrated to the court by the prosecution that the complainant’s property namely the barbed wire fence around his land was pulled down and damaged; that the appellants’ conduct and action was unlawful and unwarranted in the circumstances. That the evidence led by the prosecution clearly show that the property in question was damaged by the appellants and the ingredients of malicious damage to property were proved against the appellant beyond reasonable doubt; that in this case, the burden of proof was squarely placed on the prosecution to show and demonstrate that the appellants committed the offence and at no point in time was the burden shifted to the Appellants.
15. On the issue of the ownership of land, the Respondents submits that it was established and proved by way of evidence that the complainant was in possession and use of the said land and that it was not disputed that the damaged fence belonged to him; further that there is clear evidence on record that the



Appellants were seen and properly identified by the witnesses at the scene of crime at around 8:00p.m; that the eye witnesses stated in their evidence that they saw and actually identified the appellants who were known to them before the incident and the means of identification was moonlight and the torches they had. They submit that although there is a standing dispute between the appellants and the complainant, that was not the only evidence relied upon by the court. That besides circumstantial evidence, there was direct evidence of seeing and condition of the environment were conducive for positive identification.

16. They submit that the evidence of the prosecution witnesses was corroborated to sustain a conviction against the appellants. That Pw 2 Cosmas Komen Chemjor in company of two others proceeded to the land to see whether the fence was still intact and upon arrival, they found the appellants removing the wires and cutting posts. That the 2nd accused was cutting the wires and the 1st accused had a panga busy cutting the posts.
17. The Respondent submits that the evidence of Pw 2 was corroborated by the evidence of Pw 4 who stated that he heard sound of a panga cutting from the direction of the farm, he proceeded there and found that it was the complainant's farm where he found the appellants cutting the wires and cutting posts; he said one had pliers and the other had a panga. He identified them because there was moonlight. Further that the complainant went to the scene and confirmed that indeed his farm had been damaged. The damage was also confirmed by the investigations officer; and looking at the totality of evidence by all the prosecution witnesses, there is no doubt that evidence of complainant was corroborated.
18. As to whether the implement to commit the offence was established, the respondents submit that the two eye witnesses categorically stated in their evidence that the appellants were armed with and used a pliers and a panga respectively and the mere fact that the same were not recovered to be produced as exhibits was not necessarily detrimental to the prosecution's case. The Respondent urged the court to find that the appeal is wholly devoid of merit and dismiss the same entirely.

ANALYSIS AND DETERMINATION

19. This being the first appellate court. I am expected to subject the entire evidence adduced before the trial court to a fresh evaluation and analysis. This I do while bearing in mind that I never had the opportunity to hear the witnesses and observe their demeanour. For this I give due allowance. The principles that apply in the first appellate court are set out in the case of OKENO VS REPUBLIC [1972] EA 32 where it was stated as follows:-

“The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala v. Republic [1957] EA 570.) It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, (See Peters v. Sunday Post, [1958] EA 424.)”

20. Further, in Kiilu & Another vs. Republic [2005]1 KLR 174, the Court of Appeal stated as follows:-
 1. An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusions.



2. It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's findings and conclusions; only then can it decide whether the Magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial Court has had the advantage of hearing and seeing the witnesses.
21. In view of the above, I have perused the record of appeal and what I consider to be in issue is whether the essential ingredients/elements of the offence as charged were proved beyond reasonable doubt. Section 339(1) of the Penal Code provides as follows: -
- “Any person who willfully and unlawfully destroys or damages any property is guilty of an offence, which, unless otherwise stated, is a misdemeanor, and is liable, if no other punishment is provided, to imprisonment for five years.
22. Elements of the offences are stated in the case of *Wilson Gathungu Chuchu vs. Republic* [2018] Eklr, by justice Ngenye Macharia, as follows:-
- i. proof of ownership of the property,
 - ii. proof that the property was destroyed or damaged,
 - iii. proof that the destruction or damage was occasioned by the accused; and
 - iv. proof that the destruction was willful and unlawful.
23. Further in the case of *Simon Kiama Ndiangu vs. Republic* (2017) eKLR, Ngaah J. stated as follows: -
- ‘In order to convict the court must be satisfied that, first, some property was destroyed; second, that a person destroyed the property; third that the destruction was willful and therefore there must be proof of intent; and fourth, the court must also be satisfied that the destruction was unlawful.
24. Further in *Simon Kiama Ndiangu vs Republic* (supra) the Learned Judge declined to accede to the suggestion that ownership of the destroyed property must be established for liability to attach. He stated that ownership of the property is a relevant but not the defining factor; that it may be taken into account amongst other evidence that tends to establish that the offence was committed; and it follows therefore that prove ownership is not fatal to the prosecution case.
25. And in *Republic vs. Jacob Mutuma & another* (2018) eKLR, the rationale for the offence was explained in the following terms –
- “In my view, it is not difficult to see why the offence is not necessarily tied down to ownership of particular property. It is to prevent wanton destruction of property that may lead to lawlessness and people taking the law into their own hands.”
26. In the instant case, record show that the prosecution witnesses testified that the Complainant was the legal owner of the property and on the fateful day, he had contracted Pw 3 and others to fence the said land using barbed wire and posts. The complainant said he purchased the said land parcel namely L.R NO. POKOR/KEBEN/KURES/83 measuring 7.2 Acres from one Chemjor Chepkuto on the 21st November, 2019; he produced the sale agreement which was marked exhibit 1 and, on the 19th March, 2020, he assigned some people to fence his land and he learnt from his workers that that they had been threatened- while fencing the land.



27. Record show that Pw 2 one Cosmas Komen confirmed that his father sold the land herein to Pw 1 for a sum of Kshs. 21,600,000/= and that there was a land dispute between his father, Amos Kemboi and Michael Konga which was determined by the court of appeal in favour of his father. He produced a copy of the court of appeal judgment which was marked as exhibit 6 and a ruling touching on the dispute which was produced as exhibit 7.
28. Pw 5 No. 61062 Sergeant Johnson Wambulwa who was the investigations officer produced an agreement showing that Pw1 bought plot No. 83 from one Chemjor Chepkuto on the 21st November,2019. He produced a title deed for plot No. 83 and an agreement by the family of the accused to cease interfering with the land. He said the land is registered in the name of Chemjor Chepkuto and produced sale agreement of the land to pw1 and title deed. From the above there is no dispute that the complainant purchased the land herein though the land was not registered in his name at the material time.
29. Evidence was adduced to the effect that the fence on the land herein erected by pw3 and others was destroyed the night of 19th day of March, 2020 and the said workers had earlier been threatened by accused 1. He later learnt from Pw2 that accused persons had destroyed the fence
30. Pw 2 stated that he went to check fencing work at Pw 1's land in the day and found eight people fencing. He stated that he later went to check on the fence at around 8:00p.m while in the company of two others and as they approached the land, they heard some sounds and saw both accused persons damaging the fence. PW4 confirmed that he also heard noise from complainant's land and ongoing to check, he saw the two appellants' herein destroying the fence of Pw1. Pw5 the investigations officer and Pw6 who was scenes of crime officer confirmed that the fence was destroyed and produced photographs in court.
31. In respect to identification Madan J.A in Anjononi & 2 Others v Republic [1980] eKLR stated as follows: -
- “ This, however, was a case of recognition, not identification of the assailants; recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other. We drew attention to the distinction between recognition and identification in Siro Ole Giteya Vs. The Republic (unreported)”.
32. Further in the case of Cleophas Otieno Wamunga v Republic [1989] eKLR the court dealt with the issue of complexities of an identification of an assailant in difficult circumstances and stated as follows:-
- “ It is trite law that where the only evidence against a defendant is evidence of identification of recognition, a trial Court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of a conviction”. Emphasis ours.
- “Recognition may be more reliable than identification of a stranger, but even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.”
33. Pw4 testified that he heard some sound from the direction of Pw 1's farm on 19th march, 2020 and went to check where he found both accused destroying the fence of Pw 1. He stated that the 1st accused was using a panga to cut fencing posts while accused 2 was using pliers to cut wires; he stated that he was standing some 10 meters away and he used moonlight to identify the accused persons who are his



neighbors. The prosecution's eye witnesses being Pw2 and Pw 4 said the appellants were well known to the witnesses as they were close neighbors. Pw 2 and Pw 4 were in close proximity to the scene of crime and there was moonlight at the material time; there was therefore no doubt that the appellants were positively identified by the two eye witnesses.

34. Having reminded myself of the dangers of mistaken identity and or recognition, I am satisfied that in the present circumstances, the appellants were recognized by the two eye witnesses who placed them at the scene of the crime. The chances of both eye witnesses having mistaken the appellants are very remote. This was a case of recognition and not visual identification of a stranger. From the foregoing, there is no doubt that the complainant boundary fence was destroyed by the appellants. I will not therefore interfere with finding of trial court on conviction.

35. Final orders: -

This appeal is dismissed.

JUDGMENT DELIVERED, DATED AND SIGNED IN VIRTUALLY AT KABARNET THIS 5TH DAY OF OCTOBER 2023.

RACHEL NGETICH

JUDGE

In the presence of:

Mr. Kemboi & Mr. Momanyi - Court Assistants.

Ms Ratemo for State.

Ms Mukira for Appellants.

1st Appellant present.

2nd Appellant present.

