



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MAKUENI

HCCRA NO. 108 OF 2019

MIKE MBUVI NDAMBUKI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the original judgment of Hon. E. Muiru (SRM) in Kilungu

Senior Resident Magistrate's Court SRMCR No. 50 of 2018

delivered on 14th June, 2019).

JUDGMENT

1. The Appellant was charged in the magistrates' court at Kilungu with malicious damage to property contrary to section 339(1) of the Penal Code. The particulars of the offence were that on diverse dates between 4th and 5th October 2017 at around 15:00 hours in Musalala location Kyenzani village, Kilungu Sub-county within Makueni County, with others not before court maliciously damaged 1,500 bricks worth Kshs.12,000/= the property of Duncan Muoki Mwololo.

2. He denied the charge. After a full trial he was convicted of the offence and sentenced to pay a fine of Kshs.30,000/= and in default to serve one (1) year imprisonment.

3. Dissatisfied with the decision of the trial court the Appellant has come to this court on appeal through counsel J.K Ngeresa & Company on several grounds as follows –

1. That the learned magistrate erred in law and fact in convicting the accused person solely on circumstantial evidence which was laced with contradictions and inconsistencies.

2. The learned magistrate disregarded the Appellant's evidence in arriving at the erroneous decision.

3. The learned magistrate failed to appreciate the glaring contradictions in the prosecution case and thus misleading herself to convict the Appellant.

4. The learned magistrate erred in law and fact in holding that the Appellant was involved in malicious damage to property whereas it was clear from all the prosecution witnesses that the alleged damaged bricks were not in court nor the jembe purportedly used to occasion the damage by the Appellant.

5. The learned magistrate misdirected herself by relying on the inconclusive evidence of three witnesses to convict the accused while disregarding the evidence of the eyewitness who exonerated the Appellant of the charges.

6. The learned magistrate failed to take into account all the facts and circumstances surrounding the alleged commission of the offence. She particularly ignored the fact that one of the defence witnesses who happened to be working with the other in the brick making declined to record a statement as there was no damage witnessed on the alleged all material day.(sic)

7. The learned magistrate failed to appreciate the Appellant's submissions that crucial witness was omitted more specifically Patrick, who was adversely mentioned in the evidence as having the responsibility of fetching water for making the bricks.

8. The learned magistrate erred in law and fact in not interrogating her mind as to who indeed was the rightful owner of Plot No. 498 Kyenzi/Musalala adjudication section whereas the Appellant adduced evidence confirming that he was one of the administrators of the estate inclusive of the subject land.

9. The learned magistrate erred in law and fact in adopting her own experiences, opinions, prejudices, and fanciful theories in convicting the Appellant when the evidence was extremely inadequate and deficient.

10. The learned Magistrate erred in law and in fact and in a large extent disregarding issues arising from cross-examination of prosecution witnesses.

11. The learned magistrate disregarded the fact that the photographs adduced in court by the prosecution witnesses were taken much later after the alleged damage.

12. The learned magistrate erred in law and fact in convicting the Appellant whereas from the evidence adduced, no jembe or equipment was found on him and or recovered from him that was allegedly used to damage the bricks at the time of arrest.

13. The learned magistrate erred in law and fact in convicting the accused person when the evidence on record by the prosecution did not prove the case beyond any reasonable doubt.

14. The learned magistrate erred in law and fact in that, the conviction and sentence of the Appellant was laced with bias against the accused person although since the commencement of investigations to trial, the learned magistrate ignored the apparent vindication and persecution of the Appellant.

15. The learned magistrate erred in law and fact in meting out a very harsh sentence anchored on no tangible evidence proper to prove the charges against the accused person.

16. The learned magistrate erred in law and fact in ignoring the Appellant's mitigation and past clean record awarding the harsh sentence, had she done so, she conceivably could have arrived at a different decision.

17. The learned magistrate did not appreciate the ingredients of proving charges of malicious damage as leveled against the Appellant.

4. The appeal proceeded by way of filing written submissions. Both the Appellant's counsel J.K. Ngeresa & Company and the Director of Public Prosecutions filed their submissions and relied on a number of legal authorities. I have perused and considered the submissions on both parties.

5. This being a first appeal, I have to start by reminding myself that I am duty bound to re-evaluate all the evidence on record and come to my own independent conclusions and inferences – see **Okeno –vs- Republic (1972) E.A 32.**

6. In proving their case, the prosecution called seven (7) witnesses. The Appellant on his part tendered a sworn defence statement and called two defence witnesses.

7. The prosecution evidence was that – Pw1 Duncan Muoki Mwololo had given work to people to make bricks at his land in Kyenzi, and while the said workers among them Pw7 Alex Sila, did so on 4/10/2017 a man came and told them to stop the work. On the next day 5/10/2017 the Appellant Alex came with one Mutwithya and asked why they were still making bricks then Mike (*the Appellant*) damaged bricks.

8. According to the prosecution, the subject land belonged to Pw1 though no title had been issued yet. The prosecution relied on the evidence of Pw4 Joel Nzuki who had issued a letter dated 10/10/2017 to confirm that the land was surveyed during Land Adjudication as Plot No. 498 and belonged to Pw1 Mwololo Duncan, though there still existed a dispute on ownership of the land yet to be resolved through the Government Land Adjudication Dispute System.

9. In his sworn defence, the Appellant stated that he was an administrator of the estate of a deceased person who was the owner of the subject land which was fraudulently sold by Pw3 Aloise Mutuku Masila and that a dispute was still pending in Government offices for resolution. He admitted stopping workers from making bricks on the land, but denied damaging the bricks.

10. I note that the section in the Penal Code under which the Appellant was charged states as follows –

339(1). 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.

11. The allegation of the prosecution was that the Appellant willfully damaged property. Under section 117 of the Evidence Act (Cap. 80), the burden was on the prosecution to prove the allegation.

12. The burden is always on the prosecution in a criminal case to prove its case against the accused person beyond reasonable doubt. This is the standard of proof in criminal cases.

13. In the present case, there is no dispute that the Appellant went to the subject land on 5/10/2017 and saw the workers of Pw1 making

bricks thereat. There was also no dispute that he stopped them from making bricks. The Appellant however denied destroying bricks.

14. The evidence of the eye witness Pw2 Evans Mutua who was grazing livestock on a neighbouring farm on 5/10/2017 at 5pm was that he witnessed the incident and saw Mike (*the Appellant*) holding something that looked like a hoe but did not see him destroy the bricks. Pw3 Aloise Mutuku Masila who went to the scene on information on the said 5/10/2017, said he saw Mike holding a hoe. Muthea poured water on the bricks and stepped on the same, while Mike (*the Appellant*) smashed the bricks with hoe. Pw7 Alex Sila, who was employed by the Complainant Pw1 to make the bricks, also said that Mike (*the Appellant*) instructed Mutwithya to damage the bricks, and then Mike (*the Appellant*) also cut the bricks with a hoe.

15. From the evidence on record, it is clear to me that though the Appellant denied damaging the bricks, he did so as there was sufficient consistent evidence from the prosecution side, that he did so directly, and also through instructing Mutwithya. There was also reason for the said destruction as the evidence is that the Appellant had said the previous day 4/10/2017 that the making of bricks on the land should stop, but he found bricks still being made when he visited the land the next day on 5/10/2017 in the afternoon.

16. For the offence of malicious damage to be proved however, there has to be proof that the item is property, and property of the Complainant who should be a person other than the accused person. One cannot maliciously damage his own property or ownerless items.

17. In the present case, did the prosecution establish that the Complainant was the owner of the subject land, thus the bricks? It is the evidence of the prosecution and the defence that there was a dispute on ownership of that land and that the Appellant was a claimant in that dispute as an administrator of the estate. Though Pw4 Joel Nzuki (the Complainant) relied on a letter from the Land Adjudication Office to demonstrate ownership of the subject land, produced as PExh 1 dated 10/10/2017 the Appellant relied on another letter ExhD1 dated 10/10/2017 from the same office showing that Plot 498 had a pending ownership dispute. I thus find that the prosecution did not establish beyond reasonable doubt that the subject land belonged to the Complainant pw1. He could thus not claim to be owner of the bricks as against the Appellant while both claimed ownership of the land.

18. I thus find that the prosecution did not prove beyond any reasonable doubt that the land belonged to Pw1 the Complainant on 5/10/2017, and in effect also owner of the bricks which were manufactured from the soil of the land No. 498 Musalala Adjudication Section.

19. The prosecution not having proved ownership by the Complainant of the subject land No.498 on 5/10/2017 when the incident occurred, the conviction of the Appellant cannot be sustained.

20. Consequently, I allow the appeal, quash the conviction and set aside the sentence. In case the Appellant is in prison, he should be set at liberty unless otherwise lawfully held.

Dated and delivered and signed at Makueni this 9th day of March 2021

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GEORGE DULU

JUDGE