



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KEYA AT BUNGOMA**

**CRIMINAL APPEAL NO. 108 OF 2019**

**REPUBLIC.....APPELLANT**

**VERSUS**

**MZEE NYONGESA WANGILA ALIAS GACHANJA.....RESPONDENT**

***[An appeal from the judgment in original Sirisia SRM CR 1142 of 2016 delivered on 18.12.2018 by Hon. C.M Wattimah, Resident Magistrate]***

**JUDGMENT**

The respondent mzee Nyongesa Wangila alias Gachanja was charged in the trial court with the offence of malicious damage to property contrary to section 339 (1) of the Penal Code. On the 1<sup>st</sup> day of September, 2014 at about 0900hours at Malakisi Market, Malakisi location unlawfully maliciously damaged 14(fourteen) poles and 16(sixteen) frames used for fencing parcel of land known as LR.No.1408/32-Malakisi Bungoma County, all valued at Kshs 25,000/= the property of PETER MAOSA NYANG'AU.

After the hearing the trial court found the respondent not guilty and was acquitted under Section 215 C.P.C.

The state through the complainant appealed against the acquittal on the following grounds:

- 1. The learned Magistrate erred in law and fact by finding that the prosecution failed to prove that some property was destroyed in the face of glaring evidence by prosecution witnesses that the accused uprooted the complainant's fence and broke some of his posts.***
- 2. The learned magistrate erred in law and infact by finding that expert evidence was mandatory in proving that the complainants posts were valued at Kshs 28,000/- without any legal backing for this finding.***
- 3. The learned magistrate erred in law and fact by finding that there were glaring inconsistencies in the prosecution case without pointing out the inconsistencies.***
- 4. The learned magistrate erred in law and in fact by finding that none of the parties has title to the disputed land merely because there exists a pending case before the land and Environment court which finding was based on a mere allegation by the accused which was not supported by evidence as the proceedings of the said case were never produced in court during trial.***

Reasons wherefore, the appellant prays that:

- a) This appeal be allowed.***
- b) The orders of acquittal of the accused person be set aside and the accused be convicted.***

Briefly the evidence before the trial court was that PW1 Peter Mause Nyangau the complainant on 30.6.2014 bought land parcel No. LR 1408/32 from Abdullahi Hassan at a purchase price of Kshs 400,000.

The land belonged to Saiwani S.Jiwa who was then in the United States. He was handed the Allotment letter for the parcel of land which was in the names of Saiwani S.Ajiwa on 1.9.2016 he send workers to fence the plot. He was then informed that the respondent and his driver had gone there to attack his workers. He went there and found respondent had uprooted the fencing poles.

He reported the matter to Malakisi police station and investigations commenced.

PW2 Bashir Rashid was given work to fence the plot by the complainant. He and others dug holes erected poles and fixed frames. The respondent then came and uprooted the posts. He reported the events to the complainant PW3 Reuben Omulla who was with him testified on similar terms. Other witnesses also testified for the prosecution.

The Respondent was placed on his defence. He gave sworn evidence stating that the parcel of land belonged to him as he had bought it from Peter Matura on 3.6.2009 for KShs 120,000. They entered into a land sale agreement before Areba & Co. Advocates. He stated that there is a dispute over the ownership in Bungoma ELC Case No. 216/2014 between himself and Shaiwan Jelha Jiwa and the complainant. He admitted to have gone to the plot on the material day but denied seeing any posts there.

The learned trial magistrate upon analyzing the evidence concluded;

“secondly, who caused the damage if any? From evidence of PW2 and PW3 they stated that the accused went to the scene while in company of 2 other people. He said the accused went and uprooted 30 posts. The complainant stated that he had bought 30 posts, 16 posts and 14 frames add up to 30. So does it mean that PW2 and PW3 were already working at the parcel when the damage was done. Besides if the accused was in company of other two people, then it is safe for the prosecution to be specific on who did what? The prosecution witnesses stated that the accused uprooted the posts and broke others. Like I know for a fact, breaking a post is not easy, may be one may have to cut it with a panga or sharp object. I find that merely saying one damaged some property is neither sufficient nor convincing to infer guilt. It's safer to state what exactly was done, in fact how the destruction is done helps the court to determine whether it was unlawful. I find that there are glaring inconsistencies in the prosecution's evidence. Besides, the complainant stated that the posts were valued at KShs 28,000/=. No expert evidence was adduced to prove this allegation. I find that the prosecution failed to meet the threshold in this case. Having found that there is no proof of damage and who caused the damage. The question as to whether the damage was lawful or willful would therefore be purely academic if I am to deal with them. I am reluctant to take that course.

What is evident is that the parties herein have a dispute over that parcel of land. From evidence, they have sought intervention from several offices. In defence, the accused says that there is a pending case before the Land and Environment Court Case No. 216 of 2014 (see DEH1). It is clear that none of the parties herein has title to the disputed land. I believe that, that is one of the points of determination before that court. I find that since the matter is before the right forum, this court not with that issue. This court is only interested with the criminal element in it.

Having said so, PW1 was not at the scene at the time the offence is said to have been committed. PW2 and PW3 were at the scene but their evidence is not consistent as to who did what. How? PW4, PW5, PW6 and PW7 talked about the land sale agreements and the documents of ownership to this parcel. I find that their evidence would be more useful in the Civil case. The upshot of it all is that I have considered evidence adduced, I do find that the prosecution failed to prove this case beyond reasonable doubt against the accused herein. I acquit the accused under Section 215 of the CPC.

This is a first appeal. The duty of the first appellate court is to reconsider and re-evaluate the evidence before the trial court and make its own conclusions but bearing in mind that it did not see or hear the witnesses (see Ekeno –vs- Republi 1972 EA)

The respondent was charged with the offence of malicious damage to property contrary to section 339 (1) of the Penal Code section 339(1) provides:

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 provides, for imprisonment for five years.***

From a plain reading of the provision the ingredients of the offence of malicious damage are:

- 1. That the property was damaged.***
- 2. The same was damaged willfully and unlawfully***
- 3. The accused person participated in damaging the property.***

The use of the term 'unlawful' in the offence denotes contrary to law. Therefore, when a person does something unlawfully it means he or she has done that thing in a manner contrary to law. 'willfully' means an act deliberately done intentionally not by accident or inadvertence so that the mind of the person who does the act is with it.

The first issue the prosecution was to establish is whether property was destroyed. PW2 Bashir Rashid who is among the people who had been contracted by the complainant in his evidence stated:

***“On 1.9.2014 I do recall well, we were given some work by Peter. We started working at 8.00 a.m We were to fence Peter Nyongesa's plot. The plot is in Malakisi. Owere and I were given the work. We dug the holes, we put posts and also did frames. We did not count the posts. At 3.00 p.m Nyongesa came, he was with Reuben and Musa. Nyongesa asked why we were working in his plot. He then started destroying the posts. They were uprooting the posts. We called Maosa Peter. He told us to go and report to Malakisi police station. (photos shown to the witness) this are the posts that we had that day. I knew Nyongesa well. I had not differed with him. I did not know if the parcel was owned by him. Nyongesa is before court. That is all”.***

PW3 Reuben Omulla also stated

These witnesses evidence in court confirmed that the posts which were the subject of the charge were destroyed. I therefore find the first ingredient of the charge was proved.

The second issue is whether the destruction was done willfully and unlawfully done. The evidence of the prosecution witnesses was that the uprooting and destruction of the property was willfully done and that the act was done not in accordance to the law. PW3 Reuben Omulla in this evidence stated.

***“on 1.9.2014 we went to Mzee Peter Maosas property and started working there. We proceeded on, then we saw three people come, it was Mzee Wangila Nyongesa, Musa and Reuben. They started uprooting the fence that we had put up. They destroyed the posts and pulled them out of their holes. They were 14 posts, the frames were 16 pieces, they were all broken. We called the owner of the farm. He told us not to fight the accused, we then went to report to the police. This are the pictures that show the posts that had been damaged. The posts are before court as an exhibit.***

The evidence of the prosecution witness is that the damage or destruction of the property was done by the people willfully and not by accident. It was deliberate and willful and not by inadvertence. There was no lawful justification for doing so and therefore unlawful.

The first issue is whether it is accused/respondent who destroyed the posts. The prosecution witnesses identified the accused and others as the persons who damaged the property. The accused in his defence stated:

***“On 1.9.2016 at 9.00 a.m I was on duty. I was called and told that some people were at the plot digging. I went to see what was happening. I went alone. I arrived at the scene and found people digging holes, nothing had been put in the holes. I stooped them and told them it was my plot. I asked them who had sent them, they told me one Peter Maosa had sent them. I called the D.O and informed him about what was happening. I did not damage my posts at the scene. I did not see any posts at the scene. I called the DO who told me he would deal with it. D.O Summoned us but he could not solve the matter, thus the case was filed in the High Court”.***

The Respondent in his evidence admits that he went to the plot which places him at the scene of the offence. He admits he stopped the people who were fencing on the basis that plot which they were fencing was his. PW2 and PW3 testified that the respondent was with other people when destroying the property. I am satisfied from the evidence that Respondent with others participated in the destroying the poles which had been placed for fencing.

An offence of malicious damage to property is proved when the 3 ingredients above have been established. The offence does not relate to the ownership of the land. The only ownership to be proved is that of the damaged property. The trial magistrate contention that ownership of the land was disputed, is irrelevant in a case of malicious damage to property unless the accused is alleging that he did so lawfully, in which case the act being unlawful is not established.

Upon considering the appeal and submission, I find that the prosecution proved its case against the respondent beyond reasonable doubt. I hereby set aside the finding of not guilty and acquittal and substitute thereof that the appellant is found guilty of the offence of malicious damage to property contrary to section 339 (1) of the Penal Code and convicted accordingly. This file is hereby remitted to the trial magistrate C.Wattimamah or if not at the station, the head of station for mitigation and sentencing.

**DATED AND DELIVERED AT BUNGOMA THIS 10TH DAY OF MARCH, 2021**

**S.N. RIECHI**

**JUDGE**