



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT HOMA BAY

CRIMINAL APPEAL NO. 3 OF 2019

1. PETER ODHIAMBO OLOO

2. JOSEPH ODHIAMBO OKETCH.....APPELLANTS

VERSUS

REPUBLIC.....RESPONDENT

(From the original conviction and sentence in Criminal case No. 611 of 2014 of the Chief Magistrate's Court at Homa Bay by Hon. Susan Ndegwa–Principal Magistrate)

JUDGMENT

1. Peter Odhiambo Oloo and Joseph Odhiambo Oketch, the appellants herein, were convicted for the offence of malicious damage to property contrary to section 339(1) of the Penal Code.
2. The particulars of the offence are that on 14th day of April, 2014 at Gongo location, Rangwe Division within Homa Bay County jointly wilfully and unlawfully damaged School fence and Sukuma wiki vegetables all valued at Kshs.25,360/= the property of Magwar Primary School.
3. Each appellant was fined Kshs.15, 000/= or in default to serve eighteen months imprisonment. They were aggrieved and filed this appeal against both conviction and sentence. They were represented by the firm of Nyauke & Company Advocates.
4. The appellants raised five grounds of appeal as follows:
 - a) That the learned trial magistrate erred in law and facts by finding that the appellants maliciously destroyed property that was on their parcel of land.
 - b) That the learned trial magistrate erred in law and facts by failing to consider the cogent and plausible defence of the appellants.
 - c) That the learned trial magistrate erred in law and in finding that the prosecution had proved its case beyond reasonable doubts.
 - d) That the sentence was illegal.
 - e) That the learned trial magistrate erred in law and facts by ignoring the surveyor's report.
5. The appeal was conceded by the state through Mr. Ochengo, learned counsel, on grounds that the Surveyor's report and evidence indicated that the land belongs to the 1st appellant.
6. This is a first appellate court. As expected, I have analyzed and evaluated afresh all the evidence adduced before the lower court and I have drawn my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses. I will be guided by the celebrated case of **Okeno vs. Republic [1972] EA 32**.
7. Before the trial magistrate could make a finding that the appellants had maliciously damaged the property of the complainant herein, either of the following circumstances ought to have been proved beyond reasonable doubts:
 - a) That the damaged property was on the owned by the complainant, or

b) That the complainant had leased the land on which the crops stood from the appellants or from a third party who had title to the land.

8. The appellants were acquitted of the offence of trespass upon private land without authority. It was incumbent upon the prosecution to prove that the complainant was either the owner of the land on which the crops stood or was in lawful occupation. This was not done and the prosecution counsel was right in conceding the appeal.

9. I accordingly quash the conviction and set aside the sentence. If the fine was paid, the same to be refunded .Each appellant is set at liberty unless if otherwise lawfully held.

DELIVERED and SIGNED at HOMA BAY this 5th Day of May, 2021

KIARIE WAWERU KIARIE

JUDGE