REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CRIMINAL APPEAL NO. 47 OF 2020

PHILIP ZACHARIA ETALE.....APPELLANT

VERSUS

REPUBLIC.....DEFENDANT

(Being an appeal from the conviction and sentence in Criminal Case No. 755 of 2018 at the Chief Magistrate's Court, Eldoret (Hon. R. Odenyo, SPM) dated 13 October 2020)

JUDGMENT

[1] This appeal arises from the Judgment, conviction and sentence passed in **Eldoret Chief Magistrate's Criminal Case No. 755 of 2018: Republic vs. Philip Zacharia Etale**, in which the appellant was the accused person. He was therein charged with two counts. In the 1st count, the appellant was charged with the offence of malicious damage to property contrary to **Section 339(1)** of the **Penal Code, Chapter 63** of the **Laws of Kenya**. The particulars of the charge were that on 31st day of January 2018 at Mwivona Village in Lugari Sub-county within Kakamega County, jointly with others not before the court, he willfully and unlawfully destroyed the house of **Helimina Otanga** valued at **Kshs. 58,100/=.**

[2] In the 2nd count, the appellant was charged with the offence of stealing, contrary to **Section 275** of the **Penal Code**. It was alleged that on the 31st day of January 2018 at Mwivona Village in Lugari Sub-county within Kakamega County, jointly with others not before the court, the appellant stole 20 iron sheets, roofing timbers, 2 wooden doors, 4 table chairs, 1 table, 1 stool, 1 sufuria, 1 basin, 1 thermos flask, 5 bags of dry maize, 2 blankets, 1 mattress, 1 bed, 14 kilograms of beans and 2 kilograms of wimbi; all valued at **Kshs. 79,800/=** the property of **Helimina Otanga.**

[3] As the appellant denied the charges, the facts were tried before the subordinate court; to which end, the Prosecution called 4 witnesses. Having heard both the Prosecution and the Defence, the learned trial magistrate came to the conclusion that the two counts had been proved beyond reasonable doubt in a Judgment delivered on **13 October 2020**. Consequently, the appellant was convicted and sentenced to concurrent terms of 2 years' imprisonment on each count.

[4] Being dissatisfied with his conviction and imprisonment, the appellant filed this appeal on **23 October 2020**, basing it on the following grounds:

> **[a]** That the trial magistrate erred in matters of law and fact by failing to hold that the appellant was on hospital bed when the offence was alleged to have been committed.
>
> **[b]** That the trial magistrate erred in matters of law and fact in failing to observe that the damages to the property was caused by the complainant herself who is the appellant's blood sister.
>
> **[c]** That the trial magistrate erred in law and fact in failing to observe that the Prosecution evidence was not credible to prove this case beyond any reasonable doubt.
>
> **[d]** That the trial magistrate erred in matters of law and fact by failing to find that the charges were trumped-up with the object of swindling him of his inheritance.
>
> **[e]** That trial magistrate erred in matters of law and fact by disregarding the appellant's evidence in defence.

[5] With the leave of the Court, the appellant filed Supplementary Grounds of Appeal on **6 April 2021** contending that:

[a] the learned trial magistrate erred in law and fact when he arrived at the conclusion without considering that the Prosecution side never availed essential witnesses in court to prove the charges beyond reasonable doubt;

[b] The learned trial magistrate depended on hearsay evidence and hence arrived at a harsh penalty of 2 years' imprisonment;

[c] That the conviction was arrived at without the presence of the alleged exhibits;

[d] That the mode of light mentioned was insufficient to safeguard the conviction;

[e] That the investigation was not conducted in a proper manner;

[f] That the Court be pleased to consider the present situation of COVID-19 pandemic and order his immediate release from custody for lack of amenities to facilitate social distancing.

[6] The appellant accordingly prayed that his appeal be allowed, the conviction quashed and the sentence imposed on him be set aside. He urged his appeal by way of written submissions following directions in that regard by the Court. He submitted, in respect of Grounds 1 and 2, that, since it was the evidence of the complainant that she was not at home when the incident occurred; and that she merely received a report of it from her son, one **Wafula**, it was imperative for the Prosecution to call the said **Wafula** as a witness; which was not done. It was therefore the submission of the appellant that the learned trial magistrate erred in relying on hearsay evidence as the basis of his conviction. The appellant relied on **Bukenya vs. Uganda** [1973] EA 549 and urged the Court to draw the inference that had **Wafula** and the other witnesses who were mentioned but not availed been called, their evidence would have been adverse to the Prosecution case.

[7] The appellant also submitted that the evidence of the complainant was so contradictory as to be unworthy of belief. He singled out the inconsistency in terms of time and pointed out that it created doubt as to whether the incident occurred at 8.00 p.m. on **31 January 2018** or **1 February 2018.** He added that the contradictions gave the impression that the complaint was made to the police as an afterthought. He also took issue with the fact that the complainant adduced no evidence to prove her ownership of the piece of land on which the demolished house stood.

[8] With regard to the allegations of theft, the appellant submitted that since none of the things alleged to have been stolen was availed as an exhibit, the lower court ought not to have believed the Prosecution witnesses; and that it was not sufficient for the Prosecution to rely on the verbal testimonies in proof of theft. He relied on **Mwangi vs. Republic** [1951] EA 104; **Buranya vs. Uganda** [1968] EA 123 and **Jagat Singh vs. Republic** [1963] EA to support his argument that it was imperative for the stolen items to be availed before the lower court as exhibits to prove beyond reasonable doubt that he had stolen them.

[9] Pursuant to Grounds 3 and 4 of the Grounds of Appeal, it was the submission of the appellant that his *alibi* defence was never given consideration at all by the trial court. His contention was that he was admitted in hospital on the night the offences are alleged to have occurred; and that he produced documents in proof thereof; which the trial magistrate ignored. He further submitted that the issue of identification was not properly inquired into by the lower court given that the incident is said to have occurred at night in difficult circumstances. In his view, the evidence was insufficient to link him with the two offences he was convicted of. He accordingly urged the Court to allow his appeal, quash his conviction and set aside the sentence imposed on him by the trial court.

[10] The appeal was resisted by **Mr. Mugun**, learned counsel for the State. He relied on his written submissions filed herein on **9 June 2021**. He made reference to the case of **Achira vs. Republic** [2003] eKLR for the proposition that, this being a first appeal, the Court is expected to analyze and re-evaluate the evidence adduced before the lower court while bearing in mind that the trial court had the advantage of seeing and assessing the demeanour of the witnesses.

[11] In respect of the charge of malicious damage to property, it was the submission of **Mr. Mugun** that the Prosecution proved all the key elements thereof, namely: ownership of the property, damage, and that the damage was willfully and unlawfully done by the appellant. Counsel relied on the case of **Anjononi & Others vs. Republic** [1976-1980] KLR 1566 to underscore his submission that the appellant was positively identified by close neighbours who saw him at the scene of crime. He added that there was similarly credible evidence to prove that the appellant was seen removing the complainant's property from her house, including iron sheets; and therefore that he was one of those who stole the complainant's property as charged in Count II. Counsel concluded his submissions by defending the sentence meted by the trial court and urged for the dismissal of the appeal.

[12] This being a first appeal, the Court is under duty to undertake an exhaustive re-evaluation of the evidence adduced before the lower court with a view of coming to its own findings and conclusions thereon, while giving allowance for the fact that it did not have the advantage of seeing or hearing the witnesses. The case of **Njoroge vs. Republic** [1987] eKLR, the Court of Appeal reiterated this principle thus:

> **"As this court has constantly explained, it is the duty of the first appellate court to remember that the parties to the court are entitled, as well on the questions of fact as on questions of law, to demand a decision of the court of first appeal, and that court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and to make due allowance in this respect."** (see also **Achira vs. Republic** [2003] KLR 707)

[13] Hence, a careful perusal and consideration of the record of the lower court reveals that the Prosecution called 4 witnesses; the first of whom was the complainant, **Helemina Mwanje Otanga (PW1).** She testified on **29 June 2018** and told the lower court that on the night of **31 January 2018** she was at her place of work at **Soini Secondary School,** where she spent the night. She added that on the morning of **1 February 2018** when she switched on her mobile phone, she saw several missed calls from her son, **Wafula;** and that **Wafula** thereafter called her and informed her that her houses, namely, main house and kitchen, had been demolished by the appellant and his gang. She

mentioned too that the appellant is her brother.

[14] It was further the evidence of **PW1** that she rushed home on hearing that information and confirmed the incident; and that although the walls were intact, the roof and doors had been removed along with her furniture and other items. She reported the incident to the area chief via the telephone but was advised to have the matter resolved at home. She thereupon had the incident reported to the police and police officers visited the scene and took photographs. She accordingly identified a set of 5 photographs which were produced before the lower court as the Prosecution's Exhibit 2 to be the photographs taken of her demolished house. She also mentioned that the land on which the damaged houses stood belongs to her, having been bequeathed to her by her parents.

[15] Japheth Kasimbeli Wafula testified as **PW2** and told the lower court that he was asleep on the night of **31 January 2018** when, at around 12.00 midnight, he heard some noise outside. He got out of his house and saw people removing iron sheets from the roof of **Helimina's** house while others were busy damaging the two houses belonging to **Helimina**. He mentioned that **Helimina (PW1)** was a close neighbour and that many people were attracted to the scene. **PW2** further testified that among the people who were damaging **PW1's** house was the appellant, **Philip Etale**; and that he saw him carrying away **PW1's** iron sheets. He confirmed that the complainant and the appellant are siblings; and that the land on which the demolished houses stood belonged to the complainant.

[16] The Prosecution also called **Daniel Andeya (PW3),** one of the complainant's neighbours. His testimony was that while sleeping on the night of **31 January 2018,** he heard some noise at around 12.00 midnight and got out of his house. He realized that the house of the complainant was being demolished by the appellant and others. He noted that the appellant had a hammer in hand and that he observed the goings-on for about one hour before going back to his house.

[17] The last Prosecution witness was **PC Philip Ndambuya,** who was then attached to Lumakanda Police Station. He stated that he was on duty on **2 February 2018** when the complainant filed a report of malicious damage to her house. He proceeded to the scene and confirmed that one of the complainant's houses had its roof, windows and doors destroyed; and that the roofing sheets were not at the scene. He further testified that the complainant informed them that several items had been found missing from the house, all valued at **Kshs. 79,800/=. PW4** took photographs at the scene which he later printed and produced before the lower as exhibits. He also produced a map of the area to augment the complainant's assertion that the land on which the damaged house stood belonged to her.

[18] On being placed on his defence, the appellant told the lower court that when the complainant's house got demolished, he was away in hospital; and that he was arrested on the 3rd day after the incident. He denied having committed the offences with which he was charged. He also conceded that the complainant is his sister and that they disagreed during the funeral of their mother. He posited that the complainant damaged her own house and proceeded to accuse him falsely for ulterior motives. He further impugned the evidence of **PW2** contending that he has a grudge against him over a boundary dispute and therefore had reasons to give false testimony against him.

[19] From the foregoing summary of evidence, there is no dispute that the complainant and the appellant are siblings; and that there was an underlying dispute between them over the land on which the complainant was then residing. It is also common ground that the house of the complainant, which she inherited from her parents, was damaged on the night of **31 January 2018.** The evidence of the complainant in this regard was corroborated by the evidence of **PW2** and **PW3**, who were eye-witnesses to the occurrence. In addition, the police also visited the scene and took photographs thereat. The photographs were duly processed and produced herein by **PW4** along with an appropriate certificate, in compliance with **Section 78** of the **Evidence Act, Chapter 80** of the **Laws of Kenya.**

[20] The offence of malicious damage to property is provided for in **Section 339(1)** of the **Penal Code** thus:

> **"Any person who willfully and unlawfully destroys or damages any property is guilty of an offence, which, unless otherwise stated, is a misdemeanour, and is liable, if no other punishment is provided, to imprisonment for five years."**

[21] Consequently, it was incumbent on the Prosecution to prove beyond reasonable doubt that the subject house was damaged; that the damage was not only wilful but also unlawful; and that the damage was attributable to the appellant. Hence, I am in full agreement with the position taken in **Charles Weta Wandengu vs. Republic** [2019] eKLR by **Hon. Musyoka, J.** that:

> **"The offence the subject of these proceedings is malicious damage to property, and is defined in section 339 of the Penal Code. It can be simple or aggravated. In this case the appellant faced a charge on the simple form of malicious damage to property, which is defined in section 339(1). The *actus reus* elements of it is the destruction or damage to any property. It must be proved that the property was destroyed or damaged, and that it depreciated in value, however slight. The *mens rea* is that the act must be unlawful and caused intentionally or recklessly, but not by accident or inadvertence…"** (see also **Wilson Gathungu Chuchu vs. Republic** [2018] eKLR)

[22] One of the allegations made in the particulars of the charge was that the damaged house belonged to the complainant; and from the evidence presented before the lower court, there is no dispute about this. She explained before the lower court that the house was bequeathed to her by her parents. Her testimony was corroborated by the evidence of **PW3** who testified that, to the best of his knowledge, the complainant is unmarried and has been living in the house of her deceased parents. There was therefore no dispute before the lower court that the damaged house belonged to the complainant. Indeed, in his written submissions, the appellant made it clear, at page 10 that:

> **"...I am not in dispute that there was no demolishing but I am here to dispute that I did not involve myself in the damaging and stealing. My being mentioned here is a grudge between I and my sister due to the land dispute..."**

[23] There is likewise no dispute that the destruction was willfully and unlawfully done. Both **PW2** and **PW3** testified that they saw the culprits destroy the house and cart away property, including iron sheets from the complainant's house. Thus, the fact that the incident was undertaken at night in the absence of the complainant and by people who also stole the complainant's property is proof enough that the

damage was willful and unlawful.

[24] I note that, in his written submissions, the appellant pitched the argument that it was imperative for the complainant to prove that she was the registered owner of the land on which the damaged house stood. Whereas the Prosecution exhibited copies of a Certificate of Official Search and a Mutation Form, the said documents go to show that the subject piece of land **No. Kakamega/Chekalini/982** measuring 0.4 Ha. was still in the name of the complainant's deceased father, **Etale Munzala Otanga**. The question to pose then, is whether this omission was fatal to the prosecution case.

[25] To my mind, proof by the complainant that she was the occupier and therefore special owner of the damaged house was sufficient for purposes of **Section 339(1)** of the **Penal Code** pursuant to which Count I was laid. In this respect, I would agree with the position taken in **Republic vs. Jacob Mutuma** [2018] eKLR, as to the rationale for the foregoing provision of the law, that:

> **"…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] It is therefore not a requirement that legal ownership be proved. Thus, having found that the damaged house was then occupied by the complainant and that it was damaged willfully and unlawfully, the next issue to consider is whether indeed it was destroyed by the appellant. The appellant denied having participated in the commission of the crimes he was charged with and therefore it was incumbent upon the Prosecution to prove his involvement beyond reasonable doubt; more so because the incident occurred at night when it was undoubtedly dark and visibility was poor. Authorities abound to show that, in such circumstances, the trial court is enjoined to test evidence of identification with greatest care, so as to rule out the possibility of mistake or error.

[27] Hence in **R. vs. Turnbull & Others** [1973] 3 AllER 549, it was held that:

> **"...The Judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have with the accused under observation? At what distance: In what light: Was the observation impeded in any way? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance?**

[28] Likewise, in **Wamunga vs. Republic** [1989] eKLR the same principle was restated thus:

> **"It is trite law that where the only evidence against a defendant is evidence of identification or 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 conviction."**

[29] The evidence that linked the appellant to the crimes was given by **PW2** and **PW3** who were persons to whom the appellant was well-known. **PW1** told the lower court that the appellant is a relative of his; and that he saw him with a hammer on the roof of the complainant as he removed the iron sheets from the complainant's roof; and thereafter as he carried the iron sheets away. He added that he stayed at the scene till morning and therefore had sufficient time to observe the persons involved in the offensive act. He was not under pressure of any kind. Likewise, **PW3** was categorical that when he went to the scene, he was able to observe the activities for about one hour before going back to his house. He explained that there was moonlight and that the appellant was well known to him before the incident. The two eyewitnesses immediately notified the complainant that the appellant was one of the people responsible for the damage. In the premises, there was credible evidence inculpating the appellant. Indeed, this was a case of recognition as opposed to identification of a stranger. Such evidence has been found to be more reliable. For instance, in **Anjononi & Others vs. Republic**, it was held that:

> **"...This was however, 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 personal knowledge of the assailant in some form or other."**

[30] Nevertheless, the appellant having raised an *alibi,* the learned trial magistrate was duty-bound to consider it alongside the evidence presented and take a decision as to whether or not that *alibi* had been sufficiently displaced by the Prosecution. In **Kiarie vs. Republic** [1984] eKLR, the Court of Appeal had the following to say in this regard:

> **"An *alibi* raises a specific defence and an accused person who puts forward an *alibi* as an answer to a charge does not in law thereby assume any burden of proving that answer and it is sufficient if an *alibi* introduces into the mind of the court a doubt that is not unreasonable…"**

[31] Similarly, in **Athuman Salim Athuman vs. Republic** [2016] eKLR, the Court of Appeal held that:

> **"It is trite that by setting up an *alibi* defence, the appellant did not assume the burden of proving its truth, so as to raise a doubt in the prosecution case...The burden to disprove the *alibi* and prove the appellant's guilt lay throughout on the prosecution...the purpose of the defence of *alibi* is to account for so much of the time of the transaction in question as to render it impossible for the accused person to have committed the imputed act..."**

[32] Whereas it was a misdirection for the trial magistrate to ignore this aspect of the appellant's case, it is plain that the *alibi* was untenable, granted that the appellant himself told the lower court that he went to hospital on **2 February 2018.** The Prosecution evidence that placed

him at the scene on the night of **31 January 2018** was therefore unshaken.

[33] The appellant also complained that the Prosecution failed to call crucial witnesses, such as **Wafula** who was mentioned by the complainant as the first person to report the incident; and the area chief to whom the complainant made a report. His submission was that the failure ought to have been taken against the Prosecution and inference drawn by the trial court that had the witnesses been called their evidence would have been adverse to the Prosecution. It is now trite that al*though the Prosecution was not obliged to call a superfluity of witnesses, it is a requirement of* ***Section 143*** *of the* ***Evidence Act, Chapter 80*** *of the* ***Laws of Kenya****, that it calls such number of witnesses as are sufficient to establish the charge beyond reasonable doubt; and where, as in this case, crucial witnesses are not called to testify, the presumption that, had the witnesses been called, their evidence would have been adverse to the Prosecution, would apply. Thus, in* ***Bukenya & Others vs. Uganda*** *[1972] EA 549, it was held that:*

> **"The prosecution must make available all witnesses necessary to establish the truth even if their evidence may be inconsistent.**
>
> **Where the evidence called is barely adequate, the Court may infer that the evidence of uncalled witnesses would have tended to be adverse to the prosecution."**

[34] The principle was restated by the Court of Appeal in Sahali Omar vs. Republic [2017] eKLR thus:

> **"The principle used to determine the consequences of failure to call witnesses was succinctly stated in Bukenya & Others v Uganda (1972 E.A; where the court held that: -**
>
> > **i. "The prosecution must make available all witnesses necessary to establish the truth even if their evidence may be inconsistent.**
> >
> > **ii. The court has the right and duty to call witnesses whose evidence appears essential to the just decision of the case.**
> >
> > **iii. Where the evidence called is barely adequate, the court may infer that the evidence of uncalled witnesses would have tended to be adverse to the prosecution."**
>
> **The prosecution reserves the right to decide which witness to call. Should it fail to call witnesses otherwise crucial to the case, then the court has the mandate to summon those witnesses. But should the said witnesses fail to testify and the hitherto adduced evidence turn out to be insufficient, only then shall the court draw an adverse inference against the prosecution. This is because the prosecution is not obliged to call a superfluity of witnesses, but only such witnesses as are sufficient to establish the charge beyond any reasonable doubt."**

[35] Granted that the incident occurred at night while the villagers were asleep, there is nothing on record to indicate that the evidence of **Wafula** would have been different from what **PW2** and **PW3** told the Court. As for the area chief, **PW1** told the court that she did not find him when she went to make her report of the incident; and that she had to talk to him on the telephone instead. Thus, having taken the step to report the matter to the police it can hardly be argued that the evidence of the chief was so crucial that without it the Prosecution case would collapse.

[36] I am therefore satisfied that the evidence of identification was reliable enough to found a conviction and that failure by the Prosecution to call **Wafula** and the area chief did not adversely affect the Prosecution case. As the complainant's property was stolen on the same night on which the house was damaged, there was clear evidence to prove the elements of Count II as well.

[37] Turning now to the appellant's appeal against the sentence, it is instructive that the offence of malicious damage to property carries a penalty of 5 years' imprisonment; while the charge of stealing has a penalty of 3 years under **Section 275** of the **Penal Code**. The appellant was given 2 years' imprisonment on each count, which terms were to run concurrently. There is nothing perverse about that bearing in mind that early on in the case, the lower court gave the parties an opportunity to reconcile and have the matter resolved out of court, to no avail. Moreover, sentence is a matter within the discretion of the trial court; and an appellate court ought not to interfere simply because it would have meted a lesser or stiffer sentence. Hence, in **Bernard Kimani Gacheru vs. Republic** [2002] eKLR, the Court of Appeal restated the position thus:

> **It is now settled law, following several authorities by this court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor or took into account some wrong material, or acted on a wrong principle. Even if, the appellate court feels that the sentence is heavy and that the appellate court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exist**.

[38] It is therefore my finding that the sentence was lawful and commensurate with the offence. I find no reason to interfere therewith.

[39] In the result, I find no merit in the appeal. The same is hereby dismissed in its entirety.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 16TH DAY OF SEPTEMBER, 2021

OLGA SEWE

JUDGE