REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

(APPELLATE SIDE)

(Coram: G.V Odunga, J)

CRIMINAL APPEAL NO. E017 OF 2020

TIMOTHY MUTUKU KITONYI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the proceedings, Judgment and conviction delivered

on 23rd November, 2020 by E.W Wambugu Senior Resident

Magistrate in Criminal Case No.1135 of 2017, Kithimani Law Courts)

BETWEEN

REPUBLIC.....PROSECUTOR

VERSUS

TIMOTHY MUTUKU KITONYI.....ACCUSED

JUDGMENT

1. The Appellant, herein, **Timothy Mutuku Kitonyi**, was charged before the Principal Magistrate's Courts at Kithimani in Criminal Case No. 1135 of 2017 with two counts. He was however only convicted in respect of Count II in which he faced the offence of Malicious Damage to Property Contrary to Section 339(1) of the ***Penal Code***. The particulars of the said offence were that on the 30th day of October, 2017 at Kondo Village in Yatta Sub-county within Machakos County, he wilfully and unlawfully damaged a water pipe line valued at Kshs.120, 000/-the property of **Benard Kyalo Mutuku**. He pleaded not guilty to the said charge.

2. The prosecution called 8 witnesses in support of its case.

3. PW3, **Dismuk Muthesi Nzasi**, a casual labourer in the employment of the Complainant, PW1, testified that on 23rd October, 2017 he heard sounds of tractor ploughing land in PW1's farm and since he was unaware of anybody having been retained to do so, he rushed to the farm which is about 150 meters from PW1's homestead. Upon his arrival, he found the appellant who had brought a tractor with a driver and two other people whose names he did not know. He then returned home and relayed the information to the Complainant's wife, PW2.

4. According to PW3, when he was employed about 8 months before in 2017, he was shown that land and was told that it belonged to PW1. Upon relaying the information to PW2, PW2 who was similarly unaware of the said developments, in the company of PW3 returned to the land. According to him, an altercation erupted between PW2 and the appellant over the ownership of the land with the Appellant, who had a *panga* grabbing PW2. As a result of the noise generated by the said altercation, neighbours were alerted they arrived and started reprimanding the Appellant. However, they were restrained by PW4, a community policing member.

5. According to PW3 the nappier grass and plastic water pipes which were on the land were damaged though he could not recall the number of the pipes. The same were damaged by the tractor whose registration number he could not recall. It was his evidence that he never saw the Appellant utilising the land which was being utilised by the complainant who was cultivating maize thereon. While he gathered from the Complainant the land that the land was owned by the complainant, the complainant did not tell him that it had been purchased from the

Appellant and he did not know if the Appellant had a title deed over the land. He was neither aware of the Appellant's demand to the complainant to vacate the land nor of the existence of any dispute between the complainant and the Appellant over the land before the said incident.

6. PW2, **Joyce Kyalo,** the complainant's wife, testified that the land in question was sold to them by the Appellant. According to her, on 30th October, 2017 at 3 pm, PW3 inquired from her whether they had bought a tractor since he heard one on the land. PW2, then proceeded to the land with PW3 and upon their arrival, they found 5 men and a tractor which was ploughing the land with the Appellant planting on the same land he had sold the land to PW2's husband 8 years ago. It was her evidence that two other men were holding *pangas*. When PW2 inquired from the Appellant, the Appellant shouted at her at which PW2 screamed causing the neighbours to come out. PW2 then reported the matter at Yatta Police Station. She identified the photographs showing the damaged trees, maize crops and water pipes by the tractor.

7. According to PW2, there had been a push over the said parcel of land as the title deed had not been released by DW2, the accused person's wife. The said land measuring 3 acres was purchased at Kshs. 120,000/- vide an agreement which she identified as having been signed by her husband, the complainant and the appellant. It was her testimony that the purchase price was handed over before Kimongo, the headman in Sofia but the title was yet to be handed over to them despite numerous promises. It was her evidence that a sum of Kshs 100,000.00 was paid as part purchase price but she could not recall when the balance of Kshs. 20,000/- was paid but confirmed that they had taken over the possession of the land with her husband. She however admitted that at one point in 2017, the Appellant's lawyer sent them a demand letter demanding that the Complainant removes the crops on the land and vacate over the outstanding balance of Kshs. 20,000/-. However, no suit was filed against them.

8. In her evidence, the land was still in the name of **Agnes Mwende Ngosi** despite it having been sold. At the time of the sale, the land in question had an allotment letter and the title ought to have come out in her husband's name. It was her evidence that the balance was to be paid upon the transfer. They were however, not notified that when the title deed was acquired and the Appellant only became aware of the same in 2017 after conducting a search at Machakos land office. She insisted that they had been in possession of the land for 8 years and that the Appellant had refused to take the balance of the purchase price of the land whose value had risen to Kshs. 5 million.

9. The evidence of PW3 was supported by that of PW4, **Susan Ndulu Kimeu,** according to whom, on the same day, heard noises on a piece of land belonging to either **Joyce Mutuku Kyalo, DW2** or the Appellant, **Kyalo Mutuku**, her husband. Upon proceedings to the land, she found a tractor ploughing land and saw two men on tractor in possession of *pangas*. She also saw the Appellant in possession of a *panga* threatening to assault PW2. PW4, then told those who were working to stop and separated the Appellant and PW2 and told the Appellant to leave with the tractor while telling PW2 to go and report to the police. It was her evidence that the tractor damaged the water pipes, nappier grass and some bananas though she did not count the water pipes but identified the same in the photos. According to her, the photos showed damaged bananas as the tractor went over them. It was her evidence that she found the bananas and pipes which were cut. She was however not aware of the alleged land dispute but believed that the land was owned by PW2 who was utilising it. In cross-examination and re-examination, she clarified that it was only one water pipe that was damaged at different points since the tractor was moving around.

10. The Complainant, **Bernard Kyalo Mutuku,** testified as PW1. According to him, he was the Appellant's neighbour. It was his testimony that DW2, the appellant's wife, **Agnes Mwende**, sold to him land on Plot No. Kithimani B/169 located in Kithendu Sub-location at a cost of Kshs. 120,000/-, an agreement which was witnessed by the Appellant and the Assistant Chief of Kithendu, **Peter Mutisya**. Pursuant to the said agreement, which he exhibited, he took possession of the land in 2008 and was in occupation by the time of the incident that was the subject of the criminal case. He however stated that the title to the said property was still in the name of DW2 who failed to effect the transfer. As a result, criminal charges were levied against DW2 at Kithimani law courts for obtaining money by false pretences after PW1 reported to the Assistant Chief and District Officer.

11. According to PW1, he connected piped water on the land, planted bananas, trees and nappier grass which developments were worth Kshs.12 million. However, on 30th October, 2017 he was called by his wife **Joyce Kyalo**, PW2, who was at the farm on that day. According to PW1, PW2 told him that she found the Appellant with 3 other people with *pangas* cultivating the land using the tractor under the guard of armed and that damage had been caused to the water pipes, bananas, nappier grass and trees. The said water pipes were worth about Kshs.100, 000/-.

12. It was his evidence that after PW2 reported the matter to the police, the police visited the scene and took photographs of the damage which photos he identified. PW1 however averred that he had not received any court order prohibiting him from using the land.

13. The Complainant however admitted that the agreement showed that he had only paid Kshs. 100,000/- to the Appellant's wife and that that was the subject of the criminal proceedings against DW2. It was his evidence that the balance of the purchase price of Kshs.20, 000/- was to be paid upon transfer of the land which he paid. He admitted receiving a letter from DW2 asking him to vacate the land but clarified that the said letter was received two months before the incident after DW2 had been charged in court. The letter did not, however, state why PW1 was to vacate the land but in the letter, Agnes stated that she wanted to refund of the money since PW1 did not pay the balance. PW1, however, denied that there was a breach of contract and insisted that as per the sale agreement, he owned the land.

14. PW5, **John Muthama Nzomo,** an Agricultural Officer confirmed that he prepared and signed a crop damage assessment report dated 30th October, 2017, which he exhibited, after he was summoned at Yatta Police station to carry out the assessment. According to PW5, the damaged plants/bananas were 250 worth Kshs.345, 000/-. Though the assignment was given to him by the police, PW5 stated that the land in question was identified to him by the Complainant. It was his evidence that complainant to the police by PW1 was made 1 day before he prepared the report and that the complainant took the photos attached to his report in his presence. PW5 could not however recall if the land had a mango tree. He denied the suggestion that he prepared the report in 2018 to fix the accused person and was not compromised to prepare the report. He stated that he prepared the report on 30th October, 2017 and that his assignment was to do the assessment of the damaged crops.

15. PW6, **Remmy Maanzi**, Sub County Forest, Yatta, visited the said farm of on 26th October,2017 upon being directed by the OCS, Yatta police station in regard to OB No.4 of 40/24/10/17 where trees were damaged and valued of the damaged trees at Kshs. 145,551.60. Since his

interest was only as regards the value of the trees, he was not given any ownership documents. It was his evidence that though he went to the land alone, he was directed there by the Complainant. Who gave him the land reference number B69. On the land, he found the complainant's wife waiting. He exhibited his report. According to him, he went onto the land in Kithimani Sub-location on 26th October, 2017 and prepared the report on 27th October, 2017. According to PW6, his task was to assess the damage on the trees. He stated that the tree shown to him on a photo was cut by a power saw.

16. PW7, **Sergeant Geofrey Mboya,** the Investigating Officer received the report of the complainant on 30th October 2017, at around 1530 hours from **Bernard Mutuku**, the complainant and his wife. That evening he accompanied the complainant to the land where he ascertained that the nappier grass was damaged and the tractor had destroyed the water pipe line. He stated that he took the photographs and gave the CD to the scene crime officer who printed them. He stated that he got the photographs together with the accompanying certificate. PW7 stated that the first photograph has cut bananas, 2nd photograph has cut trees and the 3rd photograph has damaged water pipes. He stated that he collected the damaged water pipes which were in court.

17. At the completion of his investigations, PW7 arrested the Appellant on 1st November, 2017 and thereafter charged him with two counts.

18. The said photos were processed by PW8, **PC Caleb Simbiri.**

19. Upon being placed on his defence, the Appellant testified that the land in question was a family land registered in the name of his wife **Agnes Mwende Ngosi**, PW2 and exhibited the title deed. He denied that he damaged the water pipes and that the complainant did not indicate in his statement any damage to crops or trees. According to the Appellant, he could not forcibly detain his own property. It was his evidence that the farm did not have crops or trees save for a mango tree that was there when he purchased the land. He confirmed that his wife had been charged for obtaining money by false pretence over the same land but was acquitted on 23rd March, 2019.

20. According to him, in 2008 the complainant gave them a deposit of Kshs.100, 000/- for the purchase of the land but remained with a balance of Kshs.20, 000/- which was not paid since the land was in dispute with Matungulu Ranch and he told the complainant that he would refund the money later. According to him, there is a pending case ELC No.5 of 2018 before court 1 over the land. He however confirmed that the complainant had been on that land since 2008 upto 2017 though his evidence was that the complainant was only grazing on the land and not farming. According to him when on 12th March,2017 he wanted to return the money, the complainant wanted to pay the balance and he declined to take the money. It was his evidence that one piece of the pipe was properly connected and complete but there were other pipes that were cut. According to DW1, the complainant had asked him to allow him graze on the land.

21. DW2, **Agnes Mwende Ngosi**, the wife of the Appellant stated that she owned the parcel of land No.Kithimani/Kithimani/B169 which she sold to the complainant in 2008 at a consideration of Kshs.120,000/- but the complainant paid Kshs.100,000/- and was left with a balance of Kshs.20,000/- which was yet to be paid. She however took back the land after the complainant failed to pay the full purchase price. According to her, the Complainant was not ploughing the land but was only grazing thereon. In cross-examination she admitted that the search would show that she sold the land to the Complainant and gave possession of the land. She also admitted that the Complainant owned the developments on the land. In her evidence, the complainant was left with a balance since the transaction was completed. She stated that she had not taken back possession of the land from the complainant.

22. In her judgement, the trial magistrate found on Count I that it was the Complainant who was in possession of the land and not the accused person as required under Section 91 of the Penal Code hence the Prosecution failed to prove the salient ingredient of the offence in Count I.

23. The trial magistrate convicted the Appellant on Count II for the offence of malicious damage to property contrary to Section 339(1) of the ***Penal Code***. According to the trial magistrate the accused person advocate failed to point out the inconsistencies in prosecution evidence and the defence of fabrication was an afterthought raised at defence stage.

24. On 23rd November, 2020, upon considering the accused person mitigation and the presentencing report, the trial magistrate placed the accused person on probation for a period of 1 year on Count II.

25. Aggrieved by the trial court decision, the Appellant appealed citing the following grounds:-

> ***(1) <u>THAT</u> the Learned Magistrate erred in law and fact by delivering a judgment which was not reflective of the facts presented by the parties.***
>
> ***(2) <u>THAT</u> the <u>Learned</u> Magistrate erred in law and fact by failing to appreciate the law as it relates to burden of proof required in proof of criminal cases.***
>
> ***(3) THAT the Learned Magistrate erred in law and fact by failing to find a <u>doubt</u> in favour of the appellant on the face of glaring contradictions of prosecution witnesses.***
>
> ***(4) THAT the Learned Magistrate erred in law and fact by failing to appreciate <u>that</u> the offence of malicious damage to property had not been proved beyond reasonable doubt against the appellant.***
>
> ***(5) The Learned Magistrate erred in law and fact by failing to consider the appellant's defence.***
>
> ***(6) The Learned Magistrate erred in law by shifting the burden of proof to the appellant.***

26. The Appellant urges this court to set aside the conviction and sentence of the trial court.

27. On behalf of the Appellant, it is submitted that the evidence in support of the offence of malicious damage to property was not proved beyond reasonable doubt hence the trial court should have acquitted the Appellant.

28. As regards the ingredients necessary to prove the offence, reliance was placed on the case of **Wilson Gathungu Chuchu vs. Republic [2018] eKLR**. It was submitted that no receipts were produced by PW1 to prove ownership of the pipes in question. As to whether the prosecution proved that the property was damaged, it is submitted that the alleged damaged pipes did not show any damage on the pipes but pointed pipes which had been disconnected or cut by something other than a tractor. As to whether the damage was wilful and unlawful, it was submitted that the prosecution never proved that the damage was caused by the Appellant. According to the Appellant, he did not have knowledge or information that there were pipes buried on the ground as the *locus in quo*. It was submitted that the trial court never considered the piece of evidence hence an error in law and fact.

29. According to the Appellant, there exists a reasonable doubt as to the evidence in support of the charge of malicious damage to property hence the Court was urged to find that the said offence was not proved beyond reasonable doubt and the conviction should be set aside/quashed. Reliance was placed on the case of **Republic vs. Ismail Hussein Ibrahim [2018] eKLR.**

30. On behalf of the Respondent, it is submitted that PW1 stated that based on the evidence on record, the Appellant's wife had water pipes laid on the land and the destruction thereof was witnessed by PW2, PW3 and PW4 and that the pipes destroyed were produced in court as exhibit. Reliance was placed on **Simon Kiama Ndiangui vs.Republic [2017]eKLR** as regards the non-production of the receipts. It was submitted that the destruction was wilful since the complainant had occupied the land for a period of 9 years since 2008 without any interference and that no eviction notice served on them but only a demand letter dated 22nd October,2017 asking the Complainant to vacate the land and remove any crops on the land.

31. As to whether the destruction was unlawful, it is submitted that the complainant had not authorized the Appellant to enter the land. According to counsel, it is not denied that the Appellant's wife sold the land to the complainant which the complainant had occupied with his wife since 2008. It is submitted that the argument by the Appellant that the land belonged to his wife as the registered owner cannot stand as held in the case of **Republic vs. Jacob Mutuma & Another (2018) eKLR**.

32. According to counsel, the prosecution proved the offence of malicious damage to property against the Appellant.

Determination

33. I have considered the grounds of appeal, the evidence, the submissions and authorities relied upon.

34. This is a first appellate court. As expected, I have analysed and evaluated afresh all the evidence adduced before the lower court and have drawn my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses. See **Okeno vs. Republic [1972] EA 32** where the Court of Appeal set out the duties of a first appellate court as follows:

> **"An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya vs. Republic (1957) EA. (336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala Vs. R. (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 finding and conclusion; 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 vs. Sunday Post [1958] E.A 424."**

35. Similarly in the duty of the first appellate court remains as set out in the Court of Appeal for Eastern Africa in **Pandya -vs- Republic [1957] EA 336** is as follows:-

> **"On a first appeal from a conviction by a Judge or magistrate sitting without a jury the appellant is entitled to have the appellate court's own consideration and views of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the witnesses before the Judge or magistrate with such other material as it may have decided to admit. The appellate court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises which witness is to be believed rather than another and that question turns on manner and demeanor, the appellate court must be guided by the impression made on the Judge or magistrate who saw the witness but there may be other circumstances, quite apart from manner and demeanor which may show whether a statement is credible or not which may warrant a court differing from the Judge or magistrate even on a question of fact turning on the credibility of witnesses whom the appellate court has not seen."**

36. It was therefore appreciated by the Court of Appeal in **Kiilu & Another vs. Republic [2005]1 KLR 174,** that:

> **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.**

37. Section 339(1) of the ***Penal Code*** states 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."***

38. I agree with **Ngenye Macharia, J's** finding in **Wilson Gathungu Chuchu vs. Republic [2018] eKLR** that under the above definition, the elements of the offence may be dissected as proof of ownership of the property; proof that the property was destroyed or damaged; proof that the destruction or damage was occasioned by the accused; and proof that the destruction was wilful and unlawful.

39. In **Simon Kiama Ndiagui vs. Republic (2017) eKLR**, **Ngaah J.** held that-

> **'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.**

40. As regards the first condition, in **Simon Kiama Ndiangui vs.Republic (supra)** the Learned Judge declined to acceded to the:-

> **"suggestion in this provision that ownership of the destroyed property must be established for liability to attach. My take on this issue is that ownership of the property is a relevant but not the defining factor; it may be taken into account amongst other evidence that tends to establish that the offence was committed. It follows that failure to prove ownership is not fatal to the prosecution case and to this extent I agree with the learned counsel for the state."**

41. Similarly, 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."**

42. In this case the witnesses including DW2 testified that the Complainant had undertaken developments on the said land. There was evidence that the water pipes were destroyed on that day. Neither the Appellant nor DW2 lay any claims to ownership of the said pipes. Therefore, in light of the evidence on record, it could only be concluded that the pipes belonged to the Complainant.

43. In this case the only evidence connecting the Respondent to the offence in question was that of PW2, PW3 and PW4. These three witnesses all testified that the Complainant's water pipe was one of the damaged items as a result of the invasion of the Complainant's land by the Appellant.

44. The trial Court heard the said witnesses and believed their testimonies. This Court has no basis for finding that that decision was wrong as there was evidence on the record on which the trial court could arrive at its findings based on the facts as presented. This Court does not interfere with findings of fact simply because it would have arrived at a different one had it been the trial court.

45. In this case there was ample evidence that the Complainant's said pipes were destroyed and the person who destroyed them was the Appellant. He went there with a tractor knowing that the property had been sold by his wife, DW2, a sale which had not been legally rescinded. His action was clearly unlawful. He took the law into his hands instead of following the lawfully laid down process. His contention that he was unaware of the pipes that were laid down underground cannot assist him. He ought to have known that his actions could lead to destruction of anything underground. If he took his action without caring whether or not damage was caused, he must be deed to have wilfully set out to damage anything that could be underground.

46. According to the ***Black's Law Dictionary 8th Edition*** *'wilful'* means:-

> ***"the word 'wilful' or 'wilfully' when used in the definition of a crime, it has been said time and again, means only intentionally or purposely as distinguished from accidentally or negligently and does not require any actual impropriety; while on the other hand it has been stated with equal repetition and insistence that the requirement added by such a word is not satisfied unless there is a bad purpose or evil intent."***

47. In the premises, it is my finding that the learned trial magistrate's decision cannot be faulted. Based on the evidence on record, though she did not set out the ingredients of the offence, she arrived at the correct decision.

48. As regard the sentence, in **Bernard Kimani Gacheru vs. Republic [2002] eKLR**, it was restated that:

> **"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."**

49. Under Section 339 (1) of the ***Penal Code*** an offender is liable to a serve a maximum of five years. The trial magistrate was persuaded by

the probation officer's report and placed the Appellant on probation. That sentence, in my view, cannot be faulted as being manifestly excessive. To the contrary, it was very lenient.

50. In the premises, this appeal fails and is dismissed in its entirety.

51. Judgment accordingly

JUDGEMENT READ, SIGNED AND DELIVERED AT MACHAKOS THIS 14TH DECEMBER, 2021.

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Ngetich for the Respondent

CA Susan