REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

CRIMINAL APPEAL NO. 8 OF 2020

REPUBLIC.....APPELLANT

VERSUS

1. GODFREY OKOU

2. LEONARD OMURAIT

3. DOUGLAS OTWANE

4. EDWIN ONYONDO

5. CHRISTOPHER OMUSE.....RESPONDENTS

(From the original conviction and sentence in Criminal Case No.570 of 2017 of the Chief Magistrate's Court at Busia by Hon. M.A Nanzushi–Senior Resident Magistrate)

JUDGMENT

1. The respondents herein were charged with an offence of malicious damage to property contrary to section 339 (1) of the Penal Code.

2. The particulars in count one were that on the 1st April 2017 at Aturet Market, Amukura Division within Busia County, jointly with others not before court wilfully and unlawfully damaged a kiosk valued at Kshs. 100,000/= the property of Vincent Omusungu Karani.

3. After trial, the respondents were acquitted. The appellant was dissatisfied and filed this appeal.

4. The appellant raised four grounds of appeal as follows:

a) The learned trial magistrate erred in law in acquitting the respondents herein despite of the overwhelming evidence.

b) The learned trial magistrate erred in law in finding that the evidence of two witnesses required corroboration.

c) The learned trial magistrate erred in law by failing to frame issues for determination.

d) The learned trial magistrate erred in law by failing to find that the defence did not raise any reasonable doubt.

5. The appeal was opposed by the respondents. They were represented by Mr. Wycliffe Okutta, learned counsel. They raised the following grounds of opposition:

a) That the prosecution case was rife with contradictions.

b) That two earlier complaints had been made over the same property against other people other than the respondents.

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. The respondents invited the court to consider the proceedings in *Busia High Court Criminal Appeal No. 6 of 2019* and *Miscellaneous*

Criminal Application No.12 of 2019 where both parties fully participated. These two cases did not form part of proceedings in the trial court and it would be improper to consider them in this appeal. This would be tantamount to admitting new evidence at the appellate stage.

8. Section 169 (1) of the Criminal Procedure Code provides:

> **Every such judgment shall, except as otherwise expressly provided by this Code, be written by or under the direction of the presiding officer of the court in the language of the court, and shall contain the point or points for determination, the decision thereon and the reasons for the decision, and shall be dated and signed by the presiding officer in open court at the time of pronouncing it.**

9. My humble view is that the requirement to frame the points for determination serves two main purposes; one is to ensure that the trial court appreciates the competing issues and two, it helps the trial court to remain focused on the issues raised without digressing. The compliance with section 169 (1) makes it easy for any persons who subsequently interacts with the judgment to be able to follow the arguments by the parties and the decision of the court and the reasons for the same.

10. The learned trial magistrate did not frame the points for determination in this case. It has been variously held that such non-compliance does not nullify the entire trial. One such a case is the **Republic v Edward Kirui [2014] eKLR.** The Court of Appeal said:

> **In an ordinary appeal, therefore non-compliance with the provisions of section 169 Criminal Procedure Code *though not invalidating a conviction*, would enable the court to consider the case on its merit and reverse a conviction if that be warranted.** [Emphasis added]

In the instant case though the learned trial magistrate did not frame the issues for determination, the failure cannot be a basis for nullifying the trial.

11. There are clear instances where the law requires corroboration of the evidence of a witness before the court hearing the case can base a conviction on it. The fact that some witnesses are close relatives is not such an instance. The appellant contended that the learned trial magistrate required corroboration of the evidence of the complainant and PW2. This, with respect, was not so. All the learned trial magistrate observed was that there was contradiction in the evidence of these two witnesses. This is what she stated:

> **The complainant according to the PW2 came to the scene after the incident, PW2 told court [sic] he watched as the accused persons demolished the structure. The complainant on the contrary says he was at the scene and saw them demolish the kiosk for 30 minutes before calling the police. PW2 says he came to the scene 20 minutes after the incident. The 2 are material witnesses in absence of other witnesses to clarify the disparity, I give the accused a [sic] benefit of doubts.**

I agree with the learned trial magistrate that there was contradiction in the evidence of these two witnesses. The prosecution did not attempt to call evidence that could reconcile the apparent contradiction.

12. What evidence was at the disposal of the learned trial magistrate for consideration? The evidence of Vincent Omusungu Karani (PW1) and the complainant herein, is that on 1st April 2017 he was inside his kiosk which he was building when the respondents went and destroyed it. The destruction took over 30 minutes before he went to report to the police.

13. The evidence by this witnesses suggest two scenarios; one that the kiosk was still under construction and two, that he was present when the destruction took place.

14. Benjamin Karani (PW2) on the other hand, testified that on 1st April 2017 he was inside the kiosk of PW1 which he was cleaning. The second respondent went to him and told him to prepare. He went away and returned at about 10.a.m. with the other respondents and embarked on destruction of the kiosk. After the destruction, he called PW1 who was at home. He went to the scene after about 20 minutes of the phone call.

15. Other than contradicting the complainant, he gave a different scenario of the alleged incident. His evidence suggested that the second respondent went to give him a warning before he returned to the scene with the other respondents. His evidence also painted a picture of a completed structure which he was cleaning and that the complainant was not present during the incident.

16. The Court of Appeal in the case of **Ndungu Kimanyi vs. Republic [1979] KLR 283**, (Madan, Miller and Potter JJA) held:

> **The witness in a criminal case upon whose evidence it is proposed to rely should not create an impression in the mind of the court that he is not a straightforward person, or raise a suspicion about his trustworthiness, or do (or say) something which indicates makes it unsafe to accept his evidence.**

These two witnesses could not be relied upon and the learned trial magistrate correctly applied their evidence to the law.

17. Michael Otito Obote (PW3) gave evidence that tended to mirror that of Benjamin Karani (PW2). He said he was about 30 meters from the kiosk. Though he denied during cross-examination, it was suggested that he had complained against the mother of the respondents about an incident of malicious damage. His evidence was contradicted by PC Nicholas Thubi (DW2) who testified that on 5th February 2017 he had made a report of malicious damage. He equally cannot be relied upon to tell the truth; he is not credible.

18. The contradiction by PW1 & PW2 and the dented credibility of PW3, coupled with the evidence that on 28th March 2017 Vincent

Omusungu Karani, the complainant had made a report of malicious damage to property over the same property by other persons raised reasonable doubts in favour of the respondents. I therefore find that the prosecution did not discharge its burden and therefore the decision of the trial magistrate cannot be faulted.

19. The appeal is, therefore, dismissed.

DELIVERED and SIGNED at BUSIA this 3rd Day of June 2020.

KIARIE WAWERU KIARIE

JUDGE