



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MAKUENI

HCCRA NO. 59 OF 2019

JAMES MWELELI MUSYOKI.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(Being an appeal from the Judgment of the Senior Principal Magistrate

Hon. J.O. Magori dated 18/02/2019 in Makindu SPMCR No. 502 of 2014.)

JUDGMENT

1. **James Mweleli Musyoki** the Appellant was charged and convicted of the offence of malicious damage contrary to section 339(1) of the Penal Code. The particulars were that on the 6th day of February 2014, at Malili village, Malili location in Mukaa sub-county within Makueni county, willfully and unlawfully demolished an iron sheet house and a fence wall valued at Kshs.150,000/= the property of **Joseph Katutu Kanyi**.

2. Upon conviction the Appellant was placed on 1½ years' probation on 18th February, 2019.

3. Being dissatisfied with the judgment he filed his appeal citing the following grounds: -

a. The learned trial Magistrate erred in both law and facts when he failed to appreciate that the Appellant had been charged with the offence of malicious damage to property contrary to section 339(1) of the Penal code and proceeded to convict the Appellant for what he described as creating disturbance contrary to section "339(1)" of the Penal Code.

b. The learned trial Magistrate erred in both law and facts when he failed to critically analyse the prosecution's evidence so as to find that the same was wanting and hence wrongfully convicted and sentenced the Appellant.

c. The learned trial Magistrate erred in both law and facts when he failed to consider that there was a dispute as to ownership of the property in question and hence wrongfully convicted and sentenced the Appellant.

d. The learned trial Magistrate erred in both law and facts when imposed excessive sentence upon the Appellant.

4. The prosecution relied on the evidence of three (3) witnesses. **Pw1 Joseph Katutu Kanyi** is the complainant. He testified that he bought two (2) acres of land from **Mr. and Mrs. John Mweli Wambua** from their land Malili Agricultural Plot No. 1425 on 06/04/2008. He produced the sale agreement as EXB1. He fenced the land with wooden posts and barbed wire. He also constructed a temporary structure on it. Later on 06/02/2014 he was called and informed by a neighbor that someone was damaging his fence. He reported the matter at Salama police station.

5. On 07/02/2014, he went to the site with a photographer and two police officers. They found the Appellant still damaging the fence and structure. The Appellant was arrested and photos of the scene were taken. He identified in court two of the photos taken (EXB2 and 3). He said the Appellant told them he had been sent to damage the structure.

6. In cross examination, he was referred to a plaint he had filed in Machakos Chief Magistrates' court civil case against the vendors of his two (2) acres of land as he had paid for it.

7. **Pw2 James Kitenge Ndeti** was a herdsman for one Mutuku. On 06/02/2014 he said he saw Mutuku's neighbor uproot posts and fence of a

land next to them. He identified the Appellant as the person who destroyed the posts and fence of a land Pw1 used to cultivate. He did not do anything as he had no phone.

8. **Pw3 No. 61765 Corporal Paul Komen** was attached to Salama police station. He confirmed receiving a complaint from Pw1 on 06/02/2014 in respect to his damaged property. He also confirmed that the Appellant is a son of the woman who sold him the land. He produced the sale agreement (EXB1). He visited the scene and even took photos.

9. In cross examination he said he visited the scene. He denied knowledge of any agreement of 25th June, 2008. He estimated the value of the damaged property to be Kshs.150,000/=, as he did not engage a valuer.

10. The Appellant when placed on his defence elected to make an unsworn statement, which was very brief. He said he knew nothing about the offence complained of by Pw1 or where he had constructed.

11. When the appeal came for hearing, Mr. Matata for the Appellant relied on his written submissions. He has addressed the court on grounds 1 and 2 only. On the 1st ground he submits that the judgment shows that the Appellant was charged and convicted of creating disturbance in a manner likely to cause a breach of peace contrary to section 339(1) Penal Code. He takes issue with this as the Appellant was charged with malicious damage contrary to section 339(1) Penal Code.

12. He submits that in spite of the particulars in the charge sheet, the court deliberately decided to proceed with a charge that was not made known to the Appellant at the beginning of the case. He therefore contends that the trial court considered the evidence of a charge of creating disturbance and not that of malicious damage, and as a result the Appellant was wrongly convicted and sentenced.

13. On ground 2, he submits that the trial court did not critically analyse the evidence before it, even assuming the case was that of malicious damage. He submits that the complainant did not prove ownership of the land in question. That having failed to prove ownership of the land he could not claim that the purportedly damaged property was his.

14. The Respondent through Mrs. Owenga opposes the appeal. She submits that the Appellant was convicted of the offence of malicious damage contrary to section 339(1) Penal Code. That the appearance of a reference to the offence of creating disturbance in the trial court's judgment was a typing error, mix up and slip of the tongue. She asked for the file to be sent back to the learned trial Magistrate to correct the error. She submits further that the ownership of the damaged property was proved.

15. Finally, she submits that the placement on probation for 1½ years was sufficient punishment.

16. In a rejoinder, Mr. Matata submits that the judgment being challenged was signed and read to the Appellant by the learned trial Magistrate. It cannot therefore be returned to him to correct it as that would be prejudicial to the Appellant.

Analysis and determination

17. This is a first appeal and this court has a duty to re-analyse and re-evaluate the evidence on record and arrive at its own conclusion. An allowance should be given by this court as it did not see or hear the witnesses. See **Okeno –vs- R [1972] E.A,32; Kiilu and Another –vs R [2005] I KLR 174; and Simiyu and another –vs- R [2005] I KLR 192.**

18. I have considered the evidence on record, grounds of appeal and the submissions by both counsel. I find the issues falling for determination to be as follows:

- i. Whether the Appellant was convicted of the offence of malicious damage or creating disturbance.
- ii. Whether there was sufficient evidence to sustain a conviction.
- iii. Was the sentence excessive?

Issue no. (i) Whether the Appellant was convicted of the offence of malicious damage or creating disturbance.

19. I have perused the entire record of the lower court. The Appellant was charged with the offence of malicious damage contrary to section 339(1) Penal Code and the particulars are as set out at paragraph 1 of this judgment. The evidence adduced by Pw1, Pw2 and Pw3 is all in respect to the said charge of malicious damage. In his defence the Appellant after introducing himself stated thus:

“I stay at Salama. I am a farmer. I am aware of the offence facing me. I know nothing about the charges. I was arrested from the shamba by the arresting officer. I don't know the complainant here and where he had constructed.” (*emphasis is mine.*)

20. From the statement of the Appellant's defence, there is no doubt that he knew the charge he was facing before the court. He denied the charge, knowledge of Pw1 and even where he had constructed.

21. The only issue that arose is the introductory sentence of the trial court's judgment where the learned Magistrate refers to the offence of

creating disturbance allegedly contrary to section 339(1) Penal Code which is not correct. The particulars cited by the learned Magistrate all refer to the offence of malicious damage and not creating disturbance. At the end of the judgment the learned trial Magistrate convicted the Appellant for the offence of malicious damage contrary to section 339 (1) of the Penal Code. This is how the judgment reads:

“I find the accused guilty as charged and convict him under section 215 of the Criminal Procedure Code for the offence of malicious damage to property contrary to section 339(1) of Penal Code”.

22. My finding is that the Appellant knew and understood very well what offence he pleaded to and was facing. It follows that the mention of the offence of creating disturbance in the introductory part of the judgment was an error. Can this error be arrested?

23. Section 382 Criminal Procedure Code provides:

“Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice:

Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings.

26. I find section 382 Criminal Procedure Code to be the answer to correcting this error and not returning the file to the learned trial Magistrate to correct the judgment. I am satisfied that the charge, evidence adduced by the prosecution witnesses and the Appellant’s defence, point to the charge of malicious damage as the one facing the Appellant.

27. I find no injustice caused to the Appellant through the reference to creating disturbance as the offence the Appellant was charged with. By virtue of section 382 Criminal Procedure Code. I hereby direct the sentence referring to the offence of **“creating disturbance in a manner likely to cause a breach of peace”** in the opening sentence of the trial Magistrate’s judgment to be amended to read **“malicious damage”**.

Issue no. (ii) Whether there was sufficient evidence to sustain a conviction.

26. The evidence of Pw2 is that he witnessed the Appellant damaging Pw1’s fence and posts on 06/02/2014. Pw1 and Pw3 went to the scene and found the Appellant still damaging the fence, posts and structure. He was arrested at the scene by the officers who had accompanied Pw1. The issue here was the damaging of Pw1’s property and not ownership of the land. An agreement EXB1 was produced and was never challenged.

27. The alleged seller who sent the Appellant to damage the property never appeared to testify to having sold the land. Even if there would have been a denial that in itself did not call for the Appellant’s action. The Appellant’s defence is a mere denial. He admitted having been arrested from the shamba. My finding is that the charge was satisfactorily proved to the required standard by the prosecution.

Issue no. (iii) Was the sentence excessive?

28. The sentence of 1½ years on probation was in the circumstances very lenient.

29. The upshot is that the appeal lacks merit and is dismissed. The conviction and sentence are upheld.

Orders accordingly.

Delivered, signed & dated this 20th day of May 2020, in open court at Makueni.

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H. I. Ong’udi

Judge