



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KAKAMEGA**

**CRIMINAL APPEAL NOS. 57, 58 and 59 OF 2019**

**(From original conviction and sentence in Kakamega CMCCRC No. 2939 of 2015, Hazel Wandere, Senior Principal Magistrate, of 29<sup>th</sup> May 2019)**

**ABEL OMULAMA AKHONYA.....1<sup>ST</sup> APPELLANT**

**JONATHAN SHIUNDU AMUKABUA.....2<sup>ND</sup> APPELLANT**

**HENRY CHUMBA MUKUSHI.....3<sup>RD</sup> APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGEMENT**

1. The appellants were convicted by Hon. Hazel Wandere, Senior Principal Magistrate, of destroying cultivated crops, contrary to Section 334(a) of the Penal Code, Cap 63, Laws of Kenya, and were sentenced to a fine of Kshs. 50, 000.00 each or six (6) months imprisonment in default. The particulars of the charge against them were that on the 19<sup>th</sup> day of September 2015, at Endangalasia area within Kakamega County, jointly willfully and unlawfully, destroyed cultivated crops, being maize, sweet potatoes and groundnuts, all valued at Kshs. 535, 240.00, the property of Austin Muchere, within Butso/Indanagalasia/632.

2. They pleaded not guilty to the charges before the trial court, and the primary court conducted a full trial. The prosecution called six (6) witnesses.

3. Joram Akhonya testified as PW1. He stated that he managed the farm of the complainant, Zachary Muchere, which was next to his. He said that on 19<sup>th</sup> November 2015, he saw a tractor enter the complainant's farm and start ploughing over and uprooting crop on the farm, being sweet potatoes, groundnuts, maize and beans. When he confronted the driver, he informed him that he had been instructed to do so by the three appellants. Shortly after that he saw the three appellants walking towards him. The 1<sup>st</sup> appellant, Abel Mukwana, had a cutlass with which he was cutting maize stalks, while the rest had sticks. He sneaked out of the farm, and went to make a report at a nearby AP Camp and later at the Kakamega Police Station. The next morning the police referred him to an agricultural officer, who came to the scene and valued the crop damaged. During cross-examination, he stated that he was the one who had planted the crop that was destroyed. He said further that he was unaware that there was a case over the land. He said the maize was ready for harvest.

4. PW2, Josephat Luchevi Nyamu, said that he saw the tractor ploughing over maize, sweet potatoes and beans. He met PW1 at the scene, who stopped the tractor driver. Shortly the appellants appeared from behind the tractor, and stated to quarrel with PW1, who left after sometime. During cross-examination, he stated that he saw the offence being committed, and that PW1 ran away to avoid being assaulted by the appellants. Frankline Akhonya (PW3) testified that he was also at the scene when PW1 confronted the tractor driver, asking him why he was digging up crops, maize, sweet potatoes and groundnuts. He did not know the owner of the farm, but it was PW1, who was complaining. Two individuals showed up at the scene at that stage, persons who he met for the first time. PW1 addressed them, asking them why they had gotten the tractor to destroy the crops. During cross-examination, he stated that he met the appellant called Henry for the first time there, and he got to know his name when he was addressed as such by PW1. He stated that the maize was mature, but not ready for harvesting.

5. Austin Muchere testified as PW4. He was the complainant. On the material day, PW1 telephoned him to inform him that some persons had invaded his farm and destroyed his beans, maize, groundnuts and sweet potatoes. He visited the farm the next day, and made a report to the police. During cross-examination, he stated that it was PW1 who informed him that the appellants were involved. He stated that the property was registered in the name of his father. He stated that there was a court case over the land between his father and a son of the man who sold the land to him. He said that PW1 had planted the crop on the farm on his behalf. He stated that he visited the farm and confirmed the damage. Wycliffe Akhabi Oranje (PW5) was the agricultural extension officer who estimated the damage done, after he got instructions from the police. He stated that the farm had crops, which were uprooted when a tractor ploughed over them. He identified the crops as beans, sweet potatoes and groundnuts. He estimated the total damage at Kshs. 535, 240.00. Number 91732 Police Constable Salim Karakacha testified as PW6. He testified on behalf of the investigating officer. He detailed how a report was made to the police of damage done to

cultivated crops. The police visited the scene, scenes of crime personnel took photographs of the damage, and an agricultural officer was invited to assess and value the damage. The appellants were arrested thereafter. During cross-examination, he stated that he was not involved in the arrests. He said that none of the appellants were able to prove that they owned the land. He stated further that he was not aware that the matter had a land case in court. During reexamination, he explained that when items are photographed, there is usually no need to produce the actual items photographed as exhibits.

6. At the close of the prosecution case, the trial court ruled that a case had been made out to warrant the appellants being put on their defence. They opted to and gave sworn statements, and called four witnesses.

7. The first appellant testified as DW3. He stated that on 19<sup>th</sup> November 2015, he was assisting the 3<sup>rd</sup> appellant who wanted to lease his land to raise money for school fees. They harvested maize. Later the 3<sup>rd</sup> appellant brought a tractor that ploughed the land. He escorted the 3<sup>rd</sup> appellant to the police station to report the case, but he was arrested in the process. He stated that he did not go to the disputed farm on the material day. During cross-examination, he stated that PW1 was his brother, and that he had participated in the planting of the maize on the subject farm.

8. The 2<sup>nd</sup> appellant testified as DW1. He stated that he was the village elder for the area. He denied uprooting the maize. He stated that he had planted the farm which belonged to the 3<sup>rd</sup> appellant. The 3<sup>rd</sup> appellant had leased it to him, and so he planted maize, and harvested the same. He said that when he went to the farm on 19<sup>th</sup> September 2015, he had already harvested the crop, and there was nothing on the farm. He stated that he was not present when the other appellants took a tractor to the farm. He said that he had a grudge with PW1, but confirmed that PW1 saw him on the material day. He denied having a cutlass with him.

9. The 3<sup>rd</sup> appellant testified as DW2. He stated that the subject farm belonged to him, having inherited it from his father. He stated that there had been a court case that terminated in his favour, with the court allowing him to plough the land. He engaged his co-appellants, and as he wanted to plant sugarcane, he asked them to harvest their crops, as he had gotten someone to lease the land. He hired a tractor, and got some individuals to assist him. The tractor took cane to the farm, but PW1 chased the driver away. He decided to report the matter to the police, but he and his co-appellants were arrested instead. He asserted that there was no maize crop that was uprooted. During cross-examination, he stated that the land on which the crops were destroyed belonged to his late father, adding that he had no title to it. He said that the High Court was yet to give him the land, saying that the matter was still pending, although the court had allowed him to continue developing it. He said he claimed it on basis of adverse possession, and that he had not done succession to his father's estate.

10. DW4, Cres Bakhoya Akhonya, was a sister-in-law of the 3<sup>rd</sup> appellant. She stated that the other appellants were nephews of the 3<sup>rd</sup> appellant. She testified that it was not true that the three had uprooted maize, since the maize on the farm had been harvested in August, they were arrested in September, yet the third appellant had in that September planted cane on the land. DW5, Japheth Matete Akhonya, testified that there were no crops on the farm that the appellants could have destroyed. He stated that he never saw the crops that were destroyed. DW6, Samson Peter Shifumba, stated that the 3<sup>rd</sup> appellant had planted maize on his farm, then he harvested the same and was arrested. He stated that he had seen a tractor ploughing the land. He said that there were no crops on the land when it was alleged the offence was committed. He said that he had himself grazed his cattle on the land. He said he was not at the scene on 19<sup>th</sup>. DW7, Janetrices Afiter Andaji, testified that the appellants had maize which they wanted to sell. She went to the land in question and saw the maize. They removed the maize and she called a tractor which carried away the maize. She paid the 3<sup>rd</sup> appellant for the maize.

11. After reviewing the evidence, the trial court convicted them of the main charge, and sentenced them as stated in paragraph 1 of this judgment.

12. Being dissatisfied with the conviction and sentence the appellants appealed to this court separately, raising several grounds of appeal. They averred that the evidence tendered did not support the charge, the evidence was contradictory, burden of proof was shifted to them, among others.

13. Being the first appellate court, I have re-evaluated all the evidence on record. I have drawn my own conclusions, whilst bearing in mind the fact that I did not have the benefit of observing the witnesses as they testified. The decision of the Court of Appeal in the case of **Okeno vs. Republic (1972) EA 32** has consistently been cited on this issue. In its pertinent part, the decision is to the effect that: -

*“An appellant 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. 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; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrates' findings can 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.”*

14. Due to Covid-19, the appeal was to be canvassed by way of written submissions, in line with directions given by the court on 11<sup>th</sup> March 2011. There has been no compliance with the said directions as at the time I was preparing this judgment, on 23<sup>rd</sup> June 2020, none of the parties had filed their respective written submissions.

15. Going by the record of the trial court, there were only two issues for determination. Firstly, the ownership of the land on which the crops in question were grown, and who had planted the crops in question. Secondly, whether there was any damage to the crops, and if so, who was responsible.

16. With respect to ownership of the land, that is to say Butsotso/Indangalasia/632, a land certificate for that land, dated 19<sup>th</sup> October 1973, was put in evidence as prosecution Exhibit Number 3. It shows the registered owner of that parcel of land as at that date as one Zechariah

Godfrey Alushulla Muchere. PW1 and PW4 had identified the land as belonging to Zachary Muchere, the father of PW4. The 3<sup>rd</sup> appellant testified that Butso/Indangalasia/632 belonged to him, having inherited the same from his father. He referred to court proceedings, but he did not provide any proof that the said land was subjected to any succession proceedings, neither did he place before the court any title documents to evidence that ownership of Butso/Indangalasia/632 had changed from the proprietor reflected in Exhibit Number 3, Zechariah Godfrey Alushulla Muchere. For all practical purposes the property belonged to Zechariah Godfrey Alushulla Muchere, the registered proprietor.

17. On the question as whom the crops damaged belonged. PW1 stated that he managed the farm for PW4, and stated that he had planted the crops for PW4. That testimony was confirmed by PW4. PW4 stated that he grew the crops on his father's land. It was not disputed that he was a son of the registered proprietor of the subject land. The 3<sup>rd</sup> appellant asserted that he had planted the crops. However, the land in question was not registered in his name, nor that of his father. He alluded to some court proceedings, where the court had allowed him to use the land. He put in evidence a ruling that was delivered on 19<sup>th</sup> December 2012, in Kakamega HCCC No. 115 of 2010 (OS), which was marked as Defence Exhibit Number 1. That ruling, however, did not allow him to use the land. It merely dismissed an application, by the registered owner for a temporary injunction, on grounds that he had not filed a counterclaim to the 3<sup>rd</sup> appellant's suit for adverse possession. There is, therefore, no evidence that the court allowed the 3<sup>rd</sup> appellant to utilize the property. Since the property is registered in the name of the father of PW4, the story by PW4, that the crops on the land were his, has more credence.

18. On whether there was damage to the crops on the land, the two sides presented two conflicting positions. According to prosecution, there were crops on the land, which the appellants ploughed over. According to the appellants there were no crops on the land which could be destroyed, since the 3<sup>rd</sup> appellant had just harvested his maize crop before the tractor ploughed the land. Curiously, the 3<sup>rd</sup> appellant was equivocal as to the ploughing, he said that the tractor came to the farm to deliver cane that he intended to plant, but it was chased away by PW1. The prosecution called PW1, PW2 and PW3 who testified that they saw the tractor plough over crops. PW1 was said to have confronted the driver of the tractor. PW4 visited the farm the next day and confirmed the damage. PW5 was the agricultural officer who saw the damage and assessed it, while PW6 was a police officer who testified on a report of the damage being made at the police station, visits by the police to the scene and the taking of photographs of the damage by scenes of crime personnel, whose photographs he put in evidence as Prosecution Exhibit Number 1 (1-11) and the certificate for the photographs as Prosecution Exhibit Number 2. The evidence tendered by the prosecution on the damage was convincing, and I agree with the trial court that the prosecution discharged its duty and proved its case in that respect.

19. On who was it that caused the damage, there is no dispute that there was tractor on the scene. The prosecution witnesses were very clear that it ploughed over the crops. The appellants case also placed the tractor on the scene. Some of the defence witnesses stated that they never saw it, others said they saw it ploughing, while others say it came to the scene to remove maize or to deliver cane, while other came on a different date other than that in the charge. Whatever the case, the tractor was at the scene at the behest of the 3<sup>rd</sup> appellant, who was claiming to own the land in question. The damage was caused largely by the tractor, ploughing over the crops. It was the 3<sup>rd</sup> appellant, as alleged owner, who caused it to do so. The 1<sup>st</sup> appellant was allegedly seen by PW1, cutting maize stalks with a cutlass. The role of the 2<sup>nd</sup> appellant was not given. As he was not alleging ownership of the land, it cannot be said that he had any control over the tractor and the acts of its driver. He was not said to have had caused any damage to any of the crops.

20. I would agree with the trial court with respect to findings relating to ownership of the subject property and responsibility for the damage. However, the trial court ought to have considered the roles of the three appellants in causing the damage in order to determine liability of each of them. Other than just being present, it would appear that the 2<sup>nd</sup> appellant did not damage any of the crops by a positive act, such as cutting stalks, neither did he claim to own the land to justify instructing the tractor driver to come over and plough over growing crops. Consequently, he should not have been held liable.

21. Taking everything into account, I hereby come to the conclusion that the appeals herein by the 1<sup>st</sup> and 3<sup>rd</sup> appellants have no merits, but that by the second appellant is merited. I shall accordingly uphold the conviction of the 1<sup>st</sup> and 3<sup>rd</sup> appellants, the sentence imposed upon them is hereby confirmed. The conviction of the 2<sup>nd</sup> appellant is hereby quashed and the sentence imposed upon him hereby set aside. It is so ordered.

**DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 2<sup>nd</sup> DAY OF July 2020**

**W MUSYOKA**

**JUDGE**