



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL APPEAL NO. 32 OF 2020

JOSECK MUTHURI MWARANIA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the conviction and sentence of the Principal Magistrate Court Nkubu

(Hon. Irura) in PM Cr. Case No. 332 of 2017 delivered on 27th February 2020)

JUDGEMENT

1. The appellant herein was charged with the offence of Malicious damage to property contrary to **section 339 (1) of the Penal Code**.
2. The particulars of the offence were that on the 19th Day of April 2017 at Nkubu Township in Imenti South Sub County within Meru County maliciously damaged three banana stools, one coffee stem and five arrow roots plants all valued at Kshs. 4,400/= the property of **Isabella M' Marete Arwaru**.
3. The trial court found the appellant guilty of the offence and convicted him pursuant to Section 215 of the Criminal Procedure Code. The court sentenced him to a fine of Kshs. 20,000/= in default 1 year imprisonment.
4. Aggrieved by the aforesaid decision the appellant filed his memorandum of appeal on 11th March 2020 raising eight (8) grounds of appeal that may be summarised as hereunder;
 - (i) **The learned trial magistrate erred in law and fact in that she relied on contradictory evidence to convict the appellant.**
 - (ii) **The Learned trial magistrate erred in law and fact in her interpretation of the law and analysis of the evidence before her.**
 - (iii) **The Judgement/conviction of the learned magistrate is against the weight of the evidence and applicable law.**
 - (iv) **That the learned trial magistrate erred in law and fact in that she closed the case and gave a date of judgement prematurely without waiting for surveyors and land registrars report which she had ordered thereby causing prejudice to the appellant.**
 - (v) **The learned magistrate erred in law and fact in that she shifted the burden of proof to the Appellant.**
 - (vi) **The learned trial magistrate erred in law and in fact in that she failed to notice that none of the witnessed saw the appellant do the damage and that he had given instructions to the casual workers to do damage to the crops.**
 - (vii) **That the learned trial magistrate failed to note that the complaint and her son were in a mission to fix the appellant because of the boundary dispute.**
 - (viii) **The learned magistrate sentence is harsh and excessive under the circumstances of this case.**
5. On 26/8/2020 the court directed that the appeal be canvassed by way of written submissions. The appellant submitted that the trial

magistrate relied on contradictory evidence. That the testimony of the Pw1, the agriculture officer stated that the appellant had destroyed banana stools, one coffee stem and five arrow roots plants all valued at Kshs. 4,400/= contradicted with OB report and the testimony of the investigating officer who stated that he found that bananas had been cut. There was also no photographs for damaged coffee trees and arrow roots. Pw2 did not also record a statement in the first instance. In this respect he cited the case of **Erick Onyango Odeng vs Republic (2014) eKLR**.

6. That the appellant was ambushed during the hearing and was not allowed to call the surveyor to tender the report, an action that prejudiced the appellant's case. He relied on the case of **Richard Munene v Republic (2018) eKLR**. It was also his submission that the trial court shifted the burden to the appellant as none of the witnesses had identified him as the one who committed the offence. Then he cited the case of **Johannes Matiko & Another v Republic (2014) eKLR**. The appellant took considerable exception to the complainant's approach to the court in the first instance, hence making the first trial magistrate to recuse himself, clearly showing her intention to fabricate the appellant.

7. The Respondent submitted that the ingredients for malicious damages as cited in **Simon Kiama Ndiagui versus Republic (2017) eKLR** had been fulfilled and that the appeal should be dismissed as the conviction and sentence were lawful.

Analysis and Determination

8. This being a first appeal it is now the duty of this court to re-evaluate the evidence afresh and arrive at its independent conclusions. The court must however bear in mind that it has neither seen nor heard the witnesses and give due regard for that. See **Njoroge v Republic (1987) KLR, 19 & Okeno v Republic (1972) E.A, 32**.

9. **Pw1 Cornelius Miriti** the Land Agriculture Officer for Nkuene land in Imenti South County testified that on 20/4/2017 testified that he visited land belonging to Isabella M'Marete where he observed that there were stools of banana, one coffee stem, five arrow roots and one cassava plant destroyed. He stated that the same were destroyed while the neighbour was fencing a farm boundary. He assessed the damage at Kshs. 4,400/=. In cross-examination he stated that there a stool one being stem which had been chopped off.

10. **Pw2 Patrick Mwangi** testified that on the material day he was at home with his mother, the complainant and aged 90 years when he heard his mother scream. That he went out and found his mother at the boundary between the accused person's residence and their shamba, a banana stump had been cut. There were also arrow roots and coffee stems which had been cut. That his mother informed him she had seen the appellant cutting the banana, coffee stems and arrow roots. He also stated that he found the appellant holding a panga but he did not talk to him. They later on reported the matter at Nkubu police station where they were referred to the Agriculture Officer who came and assessed the damage. He admitted that they had a boundary dispute with the Appellant and that they have since called a surveyor who aligned the boundary. He identified title deed to their land.

11. He also stated that the area in dispute was about 4 ft. and it was possible to differentiate between the plants that have fallen following strong winds and those that have been cut using a panga.

12. **Pw3 Pc Chome Ngonyu** testified that they received a report from the complainant and when they visited the scene they found the banana stools had been damaged, one coffee stem and five arrow root plants. There was a boundary dispute. The damaged crops were on the complainant's side. They interrogated the accused who said he was aligning the boundary at his fence. It was also his testimony that the title deed was in the name of Marete Gwakaro the deceased husband of the complainant.

13. When the Appellant was placed on defence he sought he be allowed to call a surveyor as the witness in his case and the court made an order that the county surveyor and the land registrar visit the locus in quo and establish the boundaries of the parcels of land for the accused person/Appellant and the complainant being parcel No.s Nkuene/Taita/3037 and 134. The Appellant was to meet the cost of the county and the Land Registrar and the OCS Nkubu police station was to provide security to the Surveyor and Land Registrar during the exercise as they align the boundary. The two officers were supposed to avail the reports and titles for respective parcels of land to be filed in court before 29th October 2019.

14. On 29th October 2019 when the matter was due for defence hearing and filing of the report, trial was adjourned to 23rd January 2020 to confirm if the report would have been filed. The matter was however mention on 2nd January 2020 when the court was informed that the Appellant was to have the case in the High court on 23rd January 2020. Defence hearing was therefore adjourned to 21st February 2020 and orders issued for the OCS Nkubu Police Station to avail OB of 22 of 19/4/2017, OB of 32 19/4/2017, OB 22 11/5/2017, OB 26 of 14/5/2017 which the Appellant intended to use in his defence

15. On 21/1/2020 the Appellant was in court and he confirmed that he was ready to proceed with his defence and he testified that he was repairing the fence between him and his neighbour because the neighbour's dogs were getting into his compound. That he gave the work for removing the barbed wire to two young men and instructed them not to cut any crops. That at around 11.00 a.m. he was arrested on allegations that he had destroyed his neighbour's crops. He stated that the crops that were cut were cut within the 4 ft boundary which belongs to him.

16. **In cross-examination** he testified that he only saw the damaged crops after he was brought back from the police station. He stated that he had earlier wrote to the Land Registrar about the boundary dispute. He had however not reported about the dogs before the case was brought to court.

17. In consideration of the grounds of Appeal the submissions in the Trial court and on Appeal as well as the Judgement of the trial court, the issues to be re-evaluated are whether the prosecution proved beyond reasonable doubt that the Appellant committed the offence as charged.

18. **Section 339 of the Penal Code provides as follows;**

“Any person who wilfully 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.”

19. Under the above definition, the elements of the offence may be dissected as;

- (i) Proof of ownership of the property.**
- (ii) Proof that the property was destroyed or damaged.**
- (iii) Proof that the destruction or damage was occasioned by the accused.**
- (iv) Proof that the destruction was wilful and unlawful.**

20. Whether the land from which the crops were allegedly destroyed belonged to the Appellant or the Complainant. The Appellant in his defence and cross-examination said that he had written to the Land Registrar and complained about the boundary dispute between him and the complainant and the complainant son PW2 confirmed that there was a boundary dispute between his family and the appellant and the crops that were allegedly cut were planted near the boundary. He said that the area in dispute is about 4ft. PW2 did not however say whether the boundary was aligned during the pendency of the trial in the lower court or before the commencement of the charge against the Appellant.

21. The Investigating Officer in his testimony and cross examination said that the Appellant had tried to talk to the complainant to align the boundary and even paid Ksh. 2000 for the said alignment. I think that it is in view of the alleged boundary dispute that the trial magistrate on 7th October 2019 made an order for the County surveyor and Land Registrar directing them to establish the boundary between the Complainant and the Appellant herein. When the Appellant concluded his testimony there was no mention of the report that was required to be filed by the Land Registrar and the County Surveyor to establish whether the crops allegedly damaged were on the land belonging to the complainant or the Appellant. The complainant did not testify due to her age and memory lapse and therefore her son PW2 who allegedly responded to her screams recorded his statement much later and testified on her behalf saying that he found the Appellant standing at the scene while holding a panga. He didn't see the Appellant cutting the crops. The Appellant however did not deny that crops were cut but he said the ones cut were on his side of the land. He explained that he was mending the fence between his land and that of the complainant. It is my view that this cannot be termed as wilful and intentional destruction or damage to property considering that the crops had grown on the boundary between the 2 parties. The nature of banana stools and arrow roots is that they multiply very fast and easily encroach on boundaries to the extent that one may not know where their land start and end and it is only a Surveyor and the Land Registrar who can establish such boundaries. The Land Registrar and the Districts surveyors report dated 2nd November 2017 and filed 17th November 2017 pursuant to an order of the previous trial magistrate shows that the 2 parcels of land in question were visited on 2nd November 2017 and survey were conducted and boundaries pegged but that the Appellant had objected to the survey done but in the presence of the Area chief they were instructed to maintain and fence the boundary. This report also does not say whether the crops were on either side of the parties' pieces of land.

22. The Appellant had also sought for the production of OB extracts from Nkubu Police Station which he intended to rely on in his defence and an order was issued to the OCS to produce them. They were however not produced and there is no mention of the said OB extracts to confirm what reports were made. In the Appellant Exh. 3 he produced a letter from the office of the Chief Taita location dated 8th June 2016 in which the chief wrote to the Land Registrar in respect to outstanding boundary dispute between LR. Nkuene/Taita/3067, 134, 344,345 and 369. There is also a receipt for Ksh. 14000 paid by the Appellant on 14th June 2016 being survey fees on account of survey fees in respect to the boundary disputes of the above parcels of land and it is the view of this court that the paramount consideration of the trial magistrate pursuant to Article 159(2) (c) and (e) ought to have been resolution of the boundary dispute between the 2 neighbours rather than punishing one or the other in order to settle the matter once and for all.

23. The appellant in his **first ground** stated that there was contradictory evidence in the prosecution witness's statement. I have considered the statement of the Agriculture Officer and that of the investigating officer. They both stated that banana stools, arrow roots and cassava were destroyed. The same property was listed in the charge sheet together with one coffee stem. I find that inclusion of one coffee stem which was not mentioned by 2 officers is not fatal to the prosecutions case.

24. In consideration of the courts view as to the relationship between the Appellant and the complainant and in consideration that the ingredients of the offence of malicious damage were not proved beyond all reasonable doubt, the appeal herein succeeds. The Conviction is quashed and the sentence set aside. The Appellant is hereby set at liberty unless lawfully detained.

HON ANNE ADWERA ONG'INJO

JUDGE

JUDGMENT DATED, SIGNED AND DELIVERED AT MERU THIS 15TH DAY OF OCTOBER 2020.

HON ANNE ADWERA ONG'INJO

JUDGE

In the presence of:-

CA: Kinoti

Appellant :

Respondent:

HON ANNE ADWERA ONG'INJO

JUDGE