



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU
CRIMINAL APPEAL NO. 17 OF 2019
(CORAM: F. GIKONYO J.)

REPUBLIC.....APPELLANT

-versus-

ROBERT KAIBI BARABA.....RESPONDENT

(Appeal against the judgement of Hon P. M Wechuli (RM)

dated 7/11/2018 in Tigania CRC No. 1793 of 2013)

JUDGMENT

1. The respondent herein was charged with the offence of malicious damage to property contrary to **Section 339 (1) of the Penal Code**. The particulars of the offence were that on 4th October 2013 at Limoro Sub-location, Athwana Location in Tigania West District within Meru County jointly, willfully and unlawfully damaged a house valued at Kshs. 170,000 the property of **Cyprian Kuriu M'baabu**.
2. The trial court heard the matter to its conclusion and acquitted the respondent of the offence.
3. Aggrieved by the aforesaid decision the appellant filed this appeal on 29th January 2018, raising 6 grounds of appeal as summarized hereunder;

a. That the learned trial magistrate erred in law and fact, by failing to consider the ingredients of the offence of malicious damage to property contrary to section 339(1) of the Penal Code.

b. That the learned magistrate erred in law and in fact in that he failed to consider that the complainant's evidence was tight and well corroborated.

c. That the learned magistrate erred in law and in fact by entering judgment against the weight of evidence.

Submissions

4. The appeal was canvassed by way of written submissions. At the time of writing this judgement, only the appellant had filed their submission. The appellants submitted that the appeal court is competent to reverse the decision of the trial court if it finds that it has breached the provisions of the constitution, ignored statutory provisions or misconstrued the law. That this duty of the appellate court was summarized by the supreme court of India in the case of **K.Anbazhagan vs. State of Karnataka & Others** where it was held;

“The appellate court has a duty to make complete and comprehensive appreciation of all vital features of the case. The evidence brought on record in entirety has to be scrutinized with care and caution. It is the duty of the judge to see that justice is appropriately administered, for that it is the paramount consideration of a judge. The said responsibility cannot be abdicated or abandoned or ostracized even remotely”

5. According to the prosecution all the ingredients of the offence were proved; when it came to proof of ownership, they were able to demonstrate to the trial court that the house belonged to the complainant even when he did not have a title deed on which the house stood. On proof that the property was indeed destroyed PW1 who was in Isiolo at the time got information that his house had been destroyed and when he responded he witnessed its destruction. His evidence was corroborated by PW2 and PW3. On whether the destruction of the house was

occasioned by the accused it was submitted that PW2 and PW3 indicated that they recognized the respondent as the perpetrator as they knew him very well. Finally, on the proof that the destruction was willful and unlawful, it was clear that the respondent had nothing to lay claim of the ownership of the house and therefore his actions of calling a group of people and executing the demolition of the house showed a hidden motive.

Analysis and Determination

6. As this is the Appellant's first appeal, the role of this appellate Court is to re-evaluate the evidence and come to own conclusion, except to give allowance of the fact that it never heard the witnesses. See **Okeno vs. R (1977) EALR 32**.

7. **PW1 Cyprian M'Baabi**, the complainant told the court that on 4/10/2013 he was in isiolo when his wife informed him that she had found his house damaged. She told him that it was Joseph Muriuki and Robert Kaibi and others who were behind the destruction. He went home the next day and found that the house had been destroyed, items thrown out and the iron sheets cut. He reported the matter and as he went back to Isiolo he found the respondent together with others destroying another house.

8. **PW2 Agnes Kajuju** daughter to PW1 testified that on 4/10/2013 when leaving school she saw a congregation of people who were planning to demolish PW1's house. She went to the house to change her uniform but got out once she heard the people who had congregated at the accused house approaching. They proceeded to demolish the complainant's house using rungun and spears to which she screamed and they were chased away by a good Samaritan. When her mother came she found that the money she had hidden- a sum of Kshs. 21,500- had been taken.

9. On 20/10/2013 the same people led by the accused person went and demolished the second house. They used spears to pierce the house and rungun to demolish. Later they reported the matter to the police station.

10. **PW3 Rose Teeru** sister to PW1 and the accused told the court that she recalls that on 4/10/2013 there were people who had congregated at the accused house. They were led by the accused person and Joseph and proceeded to the complainant's house where they demolished. On 20/10/2013 the same group demolished another house.

11. **DW1 Robert Kaibi** when put to his defence told the court that he was the one who constructed the house in 1981. On 20/10/2013 the complainant reported that he had demolished his house but when they went to the Njuri Nceke he was punished for lying. On 11/12/2012 he was arrested by the police and the elders went to the police and reported that the complainant was the one on the wrong as the house belonged to him. He indicated that he demolished it since no one was staying in it.

12. **DW2 John Mwenda** told the court that the house belonged to the accused and that he demolished it. The accused thereafter called him to assist him to fetch other trees in order to construct another house. DW2's testimony was corroborated by that of DW3 Regina Kathure.

13. The trial court after analyzing the facts of the case acquitted the accused person based on the fact that there were contradicting opinions on the ownership of the house. The trial court opined that it was up to the state to prove the ownership of the house that was destroyed. It took the view that whereas PW1 stated that the house belonged to him, and his testimony was corroborated by PW2 and PW3, ownership documents were never produced. It found also that there was no evidence that the house was constructed on the complainant's land, that the complainant constructed the particular house, what materials were used or how much money was used in constructing the house. According to the trial court, the overall impression from these matters was that the state did not prove the ownership of the house which cast doubt on their case and therefore fatal to their case. It also observed that, although the letter by the Njuri Nceke does not in itself confer ownership, but it helped to show that ownership was in doubt.

14. The trial court then acquitted the accused under section 215 of the CPC.

Elements of the offence

15. According to Section 339(1) of the Penal Code;

“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.”

16. I am content to state that, elements of the offence of malicious damage to property under section 339(1) of the PC were stated in the case of **Simon Kiama Ndiagui vs. Republic (2017) eKLR**, as follows-

“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.

17. In the same case (ibid), the judge stated that: -

“I cannot find any 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.”

18. In **Republic vs. Jacob Mutuma & another (2018) eKLR**, the rationale for not tying down the offence of malicious damage to property to proof of ownership of the property 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.’

19. Accordingly, the law does not insist on strict proof of ownership of the property through documents or deed. Nonetheless, ownership is one of the relevant elements of the crime of malicious damage to property.

20. What does the evidence show? The evidence on record show that there was destruction of a house. This was stated by the prosecution witnesses and by the defence.

21. Who destroyed the house? PW2 and PW3 stated that they witnessed the accused person together with other individuals destroying the complainant’s house with pangas and spears. The accused person, in his testimony admitted to demolishing the said house.

22. The great question is whether the destruction was willful and unlawful. These terms insinuate that the destruction was without any colour of right. PW1 stated that the house was his and that it was destroyed by the accused. DW2 told the court that the accused person destroyed the said house and called him later so that he would assist him to find other trees for constructing another house. The accused person also pleaded a defense that he owned the house; he constructed it in 1981; and he demolished it in order to erect others. He even produced a letter from the Njuri Nceke (marked Dex1) to show he was the owner of the property. Whereas there is no requirement of strict proof of ownership of property through deed or formal documentation, when ownership of the property becomes hotly contested as is the case here, the prosecution must establish the complainant’s proprietary claim in the property in order to show that the destruction of the property by the accused was unlawful. In this case, ownership was an issue before the court. Needless to state that ownership need not registered proprietorship. It may be possessory or beneficial.

23. Of significance is that, the defence was able to cast doubt on ownership of the property in issue. And where such reasonable doubt exists, it is resolved in favour of the accused. The prosecution should take such defence seriously especially where there are no documents to show the complainant is the registered proprietor of the property, and dislodge it through cogent evidence. The aspects mentioned by the trial magistrate were important in such case, for example; that the house was constructed on the complainant’s land; that the complainant constructed the particular house and time of construction; the materials used or cost of construction; evidence by the fundi who constructed the house etc. etc.

24. In the upshot, there was doubt on the prosecution case and so they did not prove their case against the accused beyond any reasonable doubt. See **Republic v Ismail Hussein Ibrahim [2018] eKLR**, on the burden and standard of proof and reasonable doubt in criminal case where the Court stated:-

“To give meaning to this concept of burden of proof of beyond reasonable doubt in criminal cases, the Federal Court of United States in the case of United States V Smith, 267 F. 3d 1154, 1161 (D.C. Cir. 2001) (Citing In re Winship, 397 U. S. 358, 370, 90 S. Ct. 1068, 1076 (1970) (Harlan, J., concurring) the court stated:

“The burden is upon the state to prove beyond reasonable doubt that the defendant is guilty of the crime charged. It is a strict and heavy burden. The evidence must overcome any reasonable doubt concerning the defendant’s guilt, but it does not mean that a defendant’s guilt must be proved beyond all possible doubt. A reasonable doubt is a fair, actual and logical doubt based upon reason and common sense. A reasonable doubt may arise either from the evidence or from a lack of evidence. Reasonable doubt exists when you are not firmly convinced of the defendant’s guilt, after you weighed and considered all the evidence. A defendant must not be convicted on suspicion or speculation. It is not enough for the state to show that the defendant is probably guilty. On the other hand, there are very few things in this world that we know with absolute certainty. The state does not have to overcome every possible doubt. The state must prove each element of the crime by evidence that firmly convinces each of you and leaves no reasonable doubt. The proof must be so convincing that you can rely and act upon it in this matter of the highest importance. If you find there’s a reasonable doubt that the defendant is guilty of the crime, you must give the defendant the benefit of that doubt and find the defendant not guilty of the crime under consideration.”

25. In light of the foregoing analysis, I do not find anything on which to convert the acquittal into a conviction. The trial magistrate did not err in finding that the prosecution did not prove their case beyond reasonable doubt. Consequently, I find that the appeal herein is without merit and is therefore dismissed.

Dated, signed and delivered at Meru this 8th day of October 2020

F. GIKONYO

JUDGE

Representation

Maina for appellants

Respondent present

F. GIKONYO

JUDGE