



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERICHO

CRIMINAL APPEAL NO. 37 OF 2017

MOSES KERING KIPCHIRCHIR.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the conviction and sentence in Criminal Case No. 4205 of 2016 (Hon. B. Limo (RM) dated 31st October 2017)

JUDGMENT

1. The appellant was charged with the offence of destroying crop of cultivated produce contrary to section 334(a) of the Penal Code. The particulars of the offence were that on the 10th day of November 2016, at Boborwet Village Kericho West Sub-county within Kericho County willfully and unlawfully destroyed crop of cultivated produce namely tea bushes valued at Kshs 3,000 the property of Daniel Maiywa.
2. He was tried and convicted and sentenced to seven (7) years imprisonment by the trial court on 31st October 2017.
3. Aggrieved by both his conviction and sentence, the appellant filed his petition of appeal on the 14th of November 2017 which contains four substantive grounds which I shall consider later in this judgment.
4. The following evidence was presented before the trial court. Daniel Maiywa, the complainant (PW1) had sent his son, Vincent Kiprono (PW2) to his land to check if his tea was ready for harvesting on 10th November 2016. PW2 had informed him that a cow had entered the land and destroyed the tea. PW1 went to the land and found footprints and cow dung. He reported to the police and was issued with an OB. An agricultural officer estimated the value of the 10 tea bushes which had been destroyed at Kshs 3,000. According to the complainant, the cow that had destroyed the tea bushes belonged to the appellant.
5. Vincent Kiprono (PW2), who was the complainant's son, had gone to the land and found the appellant's cow on the land. It had destroyed tea bushes. While he was on the land, the appellant's wife had seen him and had called her son, who had taken the cow from the land and taken it back to their cowshed.
6. PW3, Joseph Terer Koech had seen the appellant's cow on the complainant's land, eating and destroying crops. He had also seen the appellant's son remove the cow from the land and take it back to the appellant's homestead. PW4, Jennifer Cheron, whose sister was a neighbour of the appellant, had also seen the appellant's cow on the land.
7. The investigating officer, No. 83762 Corporal Caroline Kigulwi had visited the complainant's land after the complaint was received at the Kapsoit Police Post. She had visited the land and seen that some crops had been destroyed, and she also found cow dung on the land. She had established that the complainant was the owner of the land, having bought it from a brother of the appellant.
8. When placed on his defence, the appellant made an unsworn statement in which he denied that he had destroyed the complainant's crop. He observed that cows do not have a mind of their own to stay away from crops which do not belong to them. He was not aware that the complainant had bought any land at their place, though he was aware that his brothers had sold their share of land to various people.
9. At the hearing of his appeal, the appellant was represented by Learned Counsel, Ms. Koech, while the State was represented by Senior Prosecution Counsel, Mr. Ayodo.
10. Ms. Koech urged grounds 2, 3, 4 and 5 in the appellant's Petition of Appeal. The appellant argues in ground 2 that the court erred in sentencing him to serve 7 years in prison without considering that there was insufficient evidence. Ms. Koech submitted with respect to this ground that the appellant was charged with the offence of destroying tea bushes valued at Kshs. 3000/- the property of Daniel Maiywa. It was her submission that the 5 witnesses did not confirm that they saw the accused at the scene on 10th November 2016. According to Ms. Koech, PW2 was the only witness who went to the scene. The testimony of PW4 was that he did not see the accused. Further, that PW5 also testified

that he did not see the accused at the scene. There was therefore insufficient evidence to support the conviction of the accused.

11. The appellant's third ground related to his sentence. Ms. Koech submitted that the trial court failed to appreciate that the appellant is a first offender before meting out such a punitive sentence. It was her submission that the value of the property alleged to have been destroyed was Kshs. 3000/-. In her view, the sentence of 7 years was too harsh in the circumstances. Counsel relied on the decision in **Crim. Appl. No. 140 of 2003 – Patrick Muthiani Kathuku vs R** in which the court found that a sentence of 4½ years for malicious damage to property was excessive in the circumstances. Counsel further cited **Criminal Appeal No. 106 of 2003 – Albina Chepkemoi Soi v R** in which the court set aside a sentence of malicious damage to property of 3 years.

12. In his fourth ground of appeal, the appellant challenges his conviction on the basis that the charge sheet was defective. Ms. Koech submitted that the charge sheet is defective in that the crops alleged to have been destroyed were not destroyed willfully and unlawfully by the accused person. According to Ms. Koech, PW5's testimony was that he had formed the opinion that the appellant had unlawfully uprooted the tea bushes. However, when he visited the scene, he established that the tea bushes had been uprooted and he could see cow dung on the scene. The evidence of PW2 was that he found a cow belonging to the appellant at the scene. Her submission was that it was therefore not clear whether the appellant was being charged for the offence of malicious damage to property by uprooting the tea bushes or because of the tea bushes being destroyed by his cow.

13. At ground 5, the appellant argues that the trial magistrate erred in convicting him on contradictory evidence. Ms. Koech submitted with respect to this ground that all the testimonies of all the witnesses contradict each other. That in his defence, the appellant had told the court that he did not destroy the crop as alleged; and that with respect to the cows, they did not have any mind to stay away from the crops.

14. Ms. Koech urged the court to allow the appeal and set aside the sentence. She noted that the appellant has been in custody for one year, and that the one year sentence that he had already served was sufficient.

15. In his response, Learned Senior Prosecution Counsel, Mr. Ayodo, opposed the appeal on behalf of the state. He submitted that the prosecution testimony was consistent and brought out the ingredients of the offence with which the appellant was charged. Three prosecution witnesses- PW2, PW3 and PW4- had testified that they found a cow belonging to the appellant destroying the complainant's crops. That PW2 testified that he saw the cow destroying the complainant's crops while the appellant's wife just stood there, watching, without intervening. PW2 had informed his father, the complainant, who had then asked the wife of the appellant to remove the cows. Mr. Ayodo submitted that the appellant had a duty to restrain his animals from causing havoc to other persons' property, and he had dismissed the appellant's statement that the cows had no mind of their own.

16. According to Mr. Ayodo, the appellant was the owner of the cows, a fact attested to by all the witnesses. He had control over the cows. That from the testimony of all the witnesses, including the appellant's witnesses, it was clear that there was a land dispute between the appellant and the complainant; that the appellant claimed that the land on which the appellant lived was his land, but no evidence was produced by the appellant to show his entitlement. On the contrary, the complainant had produced documents to show that the land belongs to him.

17. Mr. Ayodo submitted that the offence was committed willfully, out of hatred of the complainant by the appellant, and he and his family knew what he was doing.

18. With regard to the sentence, Mr. Ayodo submitted that section 334 (a) of the Penal Code under which the appellant was charged was clear with regard to the sentence. This was that upon conviction, one is liable to imprisonment for 14 years. His submission was that in this case, the trial magistrate had meted out a sentence of 7 years, which in the state's view was very lenient. That the trial magistrate had relied on a pre-sentence report from a probation officer whose recommendations were not favourable to the appellant, the report noting that the appellant was very rude to the authority and a threat to the complainant, and was not remorseful at all when released on bail. In his view, the court was guided by the pre-sentence report but was still lenient to the appellant.

19. As for the submission of Counsel for the appellant with respect to the value of the property, Mr. Ayodo's submission was that the value of the property destroyed was not relevant as the law does not provide that sentence should be pegged on the value of the property destroyed.

20. Finally, Mr. Ayodo submitted that the charge, contrary to the appellant's contention, was not defective but was drafted in accordance with the rules under section 137 of the Criminal Procedure Code. Counsel urged the court to find that the conviction and sentence were proper and safe and dismiss the appeal.

21. The appellant was charged with an offence under section 334 of the Penal Code. The section, which is titled '**Setting fire to crops, etc.**' provides that

“Any person who wilfully and unlawfully sets fire to, cuts down, destroys or seriously or permanently injures—

(a) a crop of cultivated produce, whether standing, picked or cut; or

(b) a crop of hay or grass under cultivation, whether the natural or indigenous product of the soil or not, and whether standing or cut; or...

is guilty of a felony and is liable to imprisonment for fourteen years.

22. The evidence against the appellant was that his cow-he does not dispute that it was his cow-was found on a parcel of land belonging to the complainant. It was found by Kiprono, the complainant's son, who called the complainant. The appellant's wife was standing by, it

would appear, watching the cow destroy the complainant's tea. Some 9 or 10 bushes worth Kshs 3,000 were destroyed.

23. In his defence, the appellant, while denying that he destroyed the complainant's crop, expressed the rather flippant view that a cow does not have a mind of its own to keep away from other people's crops. Whether he and his family set the cow onto the complainant's crop is not clear. There is a suggestion in the evidence that there was a dispute over the land, which may have led to the actions of the appellant to set his cow on the complainant's tea. As an animal does not 'have a mind of its own' to keep away from other people's crops, it is incumbent on their owners to keep them properly housed and away from their neighbour's property. I am therefore not satisfied that the trial court erred in reaching the decision that it did in this matter.

24. What is of concern, and I agree with Ms. Koech, learned Counsel for the appellant, is the severity of the sentence imposed on the appellant relative to the severity of the offence. For a person to serve 7 years' imprisonment for destruction of 9 or 10 tea bushes seems to me to be totally disproportionate. Indeed, and without getting into the history or rationale for the provisions of section 334 of the Penal Code, the penalty provided under the section does seem rather severe.

25. In the circumstances, I find that the appeal against sentence succeeds. The appellant has already served 15 months of the seven (7) year sentence imposed on him. I believe that this is sufficient punishment for the offence charged.

26. Accordingly, I hereby set aside the sentence of 7 years imprisonment imposed on the appellant and substitute therefor the period already served. The appellant shall be set at liberty forthwith unless otherwise lawfully held.

Dated and Signed this 4th day of April 2019

MUMBI NGUGI

JUDGE

Dated Delivered and Signed at Kericho this 9th day of April 2019

GEORGE DULU

JUDGE