



THE REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 62 OF 2011

DOMINIC MUTISYA KASINI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the conviction and sentence delivered by Hon. Munguti (SRM) in the Chief Magistrate's Court in Criminal Case 2151 of 2008 on 9.3.2011)

BETWEEN

REPUBLIC..... PROSECUTOR

VERSUS

DOMINIC MUTISYA KASINI.....ACCUSED

JUDGEMENT

1. **Dominic Mutisya Kasini** (hereinafter called the Appellant) being dissatisfied with the judgment of Hon. Munguti, SRM appealed to the High Court against his conviction and sentence whereby he was convicted of the offence of Malicious damage to property contrary to section 339 (1) of the Penal Code Act and sentenced to serve one year probation and pay the complainant Kshs. 10,000/- being the value of the damaged windscreen. The particulars of the charge were that **“the appellant on the 29th August, 2008 at Kola Market in Makueni District within Eastern Province, willfully and unlawfully damaged a windscreen of motor vehicle registration number KAA 375E Toyota Pick-up valued at Kshs 10,000/- the property of Robert Muli Matolo.”**

2. The facts of the case as they can be gleaned from the record of appeal are that the Appellant was charged with one count of malicious damage to property contrary to section 339(1) of the penal Code. The appellant pleaded not guilty to the charge and the respondent called eight prosecution witnesses who testified against the appellant. The Appellant gave evidence in defence, and called two witnesses. Pw1 was Robert Muli Matolo who testified that on 29/8/2008 at about 6.45p.m he was driving motor vehicle registration no. KAA 375P Toyota Hilux pickup when Mutisya the Appellant herein jumped over the grills and collected stones and tried to stone him. He went to report to the police post, and when he came out he found that the vehicle's windscreen had been smashed. He told the court that he suspected that it was the Appellant who had hit his vehicle and members of the public confirmed that it was the Appellant who had smashed his vehicle. He told court that his statement was recorded at Kilome by Cpl Musyoki and photos were taken of his vehicle. He testified that the person who smashed his vehicle was wearing a khaki jacket and a brown trouser. On cross-examination, he testified that he did not send any threatening message to the appellant and when the messages were read out to him he admitted that he was sending the same as a joke. He stated that on 29/8/2008 he and the appellant had a pending dispute over a piece of land not yet registered in Pw1's name. He told the court that his vehicle was damaged at about 7.00p.m.and he saw using torches and light from moonlight. He said he did not see the appellant hit the vehicle but was told by Robert who was at the scene that the appellant stoned the vehicle.

3. Pw2, Boniface Peter Mutiso testified that on 29.8.2008 he saw the appellant picking up stones as Pw1 had stopped to pick up passengers then he heard a loud bang and saw the appellant cross the road hence he knew that the appellant broke the windscreen of Pw1's pick up. On cross-examination, he testified that it was dark when the subject vehicle was stoned.

4. Pw3, Justus Kyalo Mulwa testified that he saw the appellant stone the subject vehicle's windscreen and on cross-examination he testified that it was partially dark at 6.45 pm on the material day and denied being bought to give evidence.

5. Pw4, Reuben Mulei testified that on 29.8.2008 at 6.30 pm he saw the appellant pick up stones and he heard a loud bang near the suit vehicle then he saw the appellant run away and he was thus convinced that the appellant hit the subject vehicle. On cross-examination he stated that the appellant was claiming Pw1's farm.

6. Pw5, Samuel Nyamai Waita testified that Pw1 gave him a lift at 6.30 pm and he told him that the appellant wanted to stone him and he went to his house and the following day he saw the subject vehicle's windscreen broken and Pw1 told him that the appellant was responsible. Pw5 told the court that he did not see the appellant stone the said vehicle. However he maintained that he saw the appellant and Pw1 fight and that he separated them.

7. Pw6 Pc Mwangi John testified that he was assigned to investigate the instant case and he went to the scene at Kola Patrol base and people at the scene told him that the appellant was responsible for the broken windshield. He recovered the clothes that the appellant was wearing namely a brown trouser and a khaki jacket. He told the court on cross-examination that the police file had a report by the appellant that Pw1 tried to stone him with a catapult and that the motive was a land dispute.

8. Pw7 Pc John Mutie testified that on 4.9.2008 he accompanied Cpl Musyoki to the parking yard of Kilome police station and he saw the subject vehicle with a broken screen. On cross-examination, he testified that the ownership of the suit vehicle was to be established.

9. Pw8 was Cpl Musyoki who testified that on 1.9.2008 he was informed that there was a report of malicious damage and he proceeded to investigate the same. He was informed that the appellant was the suspect thus he arrested him and collected the clothes he was identified as wearing. On cross-examination, he testified that he learnt that the appellant and Pw1 had quarreled at the scene, but he did not collect any stone or broken glass from the scene. The court found that the prosecution had established a prima facie case against the appellant and put him on his defence.

10. Dw1 (the appellant) testified that Pw1 provoked him on the material day and later he came out armed with a catapult and threatened to kill the appellant and he reported the matter on 30.8.2008 but it was not investigated. He told the court that he was arrested on 1.9.2008 and that the enmity with Pw1 emanated from a land dispute. He stated that Pw2 was not at the scene on the material day, but Pw5 was there though he gave selective information and did not mention the catapult. On cross-examination, he testified that he collected a stone from the ground to defend himself but did not hit the windscreen of the subject vehicle.

11. Dw2, Pauline Muthoki Mutua testified that on 29.8.2008 she saw Pw1 threaten the appellant with a catapult and threatened to kill him. On cross-examination, she testified that she saw Pw1 pulling a stone.

12. Dw3 Daniel Masila Kitila testified that he borrowed a plane from the appellant's wife on 29.8.2008. The court found that the prosecution had proved its case against the appellant beyond reasonable doubt and proceeded to convict him.

13. The appellant filed this appeal based on grounds summarized as follows:-

a) The learned Magistrate erred in law and in fact when he held that the prosecution had proved the offence of malicious damage to property beyond reasonable doubt against the appellant.

b) The learned Magistrate erred in law and in fact when he relied upon the evidence of Pw1 to convict the appellant yet the same was not corroborated.

c) The learned Magistrates erred in law and in fact when he failed to note the contradictions in the evidence in the prosecution case.

d) The learned Magistrate erred in law and in fact when he ordered the appellant to pay compensation to the complainant yet he had not resolved the issues of the acrimony between the appellant and Pw1, and the value of the windscreen had not been proved by the complainant; further this is a matter that could be solved in a civil suit.

14. The appellant urged the court to give effect of his prayers in the petition of appeal to quash the conviction, set aside the sentence and set the appellant free and order him not to pay the Kshs 10,000/-.

15. Counsel for the appellant submitted that the evidence of Pw1 was not corroborated by independent evidence and only from his workers and therefore the appellant ought to have been acquitted. Counsel submitted that circumstantial evidence was used to convict the appellant yet the same was not free from circumstances that ruled out the guilt of the appellant. He further submitted that the trial court failed to consider that there was acrimony between the appellant and Pw1. Counsel pointed out to court that there was contradiction in the evidence of Pw1; he denied sending hateful messages and later admitted the same and there were also contradictions on the time the offence was committed. Counsel submitted that the order for compensation is of a civil nature that ought to have been pursued in a civil claim.

16. In his submissions, counsel for the Respondent submitted that lighting was favourable to identify the appellant as the perpetrator. He cited the case of **Simon Kiama Ndiangui v R (2017) eKLR** where it was held that proof of ownership was an element but not a determining factor in the proof of an offence of malicious damage to property. He submitted that the prosecution had established all the elements of the offence and proven the same and in that regard no sufficient reason has been shown to warrant this court to interfere with the decision of the trial court.

17. I now turn to consider the merits of the appeal. I am considering grounds 1, 2, 3, 4, 5 and 8 together because they do overlap when considering the evaluation of the evidence on record. I will treat ground 6 and 7 separately. And then conclude with the findings and orders that will embody the decision of the court.

18. It is trite law that the duty of the first appellate court, among other things, is to re-evaluate the record of the proceedings so as to make its own findings and conclusions in the case. This court has a duty to review the entire evidence on record including that which it may decide to admit, re-evaluate it and to make its own findings of fact bearing in mind it did not have the opportunity which the trial Magistrate had, of seeing the witnesses testify and observe their demeanours. In this regard, this court must give great weight to the impression of the trial court

as to where credibility lies based on the demeanours and the manner the witnesses gave evidence.

19. As pointed out earlier, grounds 1, 2, 3, 4, 5 and 8 criticize the trial magistrate for failing to consider the evidence on record and hence came to the wrong conclusion when he convicted the appellant of malicious damage to property. The learned Magistrate when resolving issue number 1, of whether the appellant was properly identified as the perpetrator of this crime, wrote in his judgement; that there was circumstantial evidence that the appellant was seen fleeing from the motor vehicle immediately after the bang was heard. Further on the issue of ownership of the suit vehicle he found that the complainant was in possession of the same and was proof of being a special owner. On contradictions of time, he observed that witnesses were not expected to confirm time from watches and on the issue of the bad blood, he observed that there was strong evidence on the same. He found that the defence of alibi did not hold and held that :-

“The prosecution case has been proved beyond reasonable doubt.”

20. With regard to the offence that the appellant was charged with, and as specified in the charge sheet, the prosecution was under the law required to prove beyond reasonable doubt the following ingredients of the offence of malicious damage to property contrary to section 339 (1) of the penal Code;

(a) The property belonging to the complainant was damaged or destroyed.

(b) That the said property was damaged or destroyed through willful and unlawful actions.

(c) That the property in issue was damaged or destroyed by none other than the accused person in the dock.

21. According to the record of appeal Pw1 did not mention in his evidence that he saw the person who damaged the property in issue. Pw3 allegedly saw the appellant stone the subject vehicle and save for his evidence, there is no evidence on record to pin down the appellant with the offence of malicious damage to property belonging to PW1. The evidence of Pw1, 2 and 4 amount to hearsay. Pw5 testified that he did not see the appellant stone the suit vehicle and in this regard the court ought not to have relied on the evidence of Pw2 who was claimed by Dw1 not to have been at the scene. The trial court seemed to rely on circumstantial evidence that the appellant was seen running being cognizant that there is no evidence to link the damage of the suit property with the appellant. From the prosecution's evidence on record, the trial magistrate also had erred in law and fact when he held that the appellant had a case to answer. The appellant ought to have been acquitted at that stage.

22. Under Section 339 (1) of the Penal Code, damage to any property is an offence. In the case of **Wison Gathangu Chuchu v R (2018) eKLR**, court observed that the offence of malicious damage to property requires that the property damaged or destroyed must be of the complainant. Pw1 testified that he was driving the vehicle and according to the charge sheet, the particulars of offence state that the suit vehicle is the property of (PW1). The evidence of PW1 is not very clear about the issue of the ownership and the court cannot tell that the property was his. In fact one of the photographs taken of the damaged vehicle had the details of the owner written on the vehicle's body as **“Beatrice N. Muli “Kavuku” P.O Box 64 Kola”**. The said Beatrice Muli was not called to shed light on the question of who owned the subject vehicle. Further there was no documentary evidence availed showing that the complainant was indeed the registered owner or in the least a beneficial owner. Therefore, this ingredient of malicious damage to property as charged was never proved by the prosecution. There is evidence that there is a dispute between the appellant and (PW1) and it was alleged that Pw1 provoked the appellant and he picked up a stone. The appellant alleged that Pw1 drew a catapult at him, and Pw6's evidence indicated that there was a report to this effect on the OB. The evidence of the appellant and Dw2 is to the effect that Pw1 was armed with a catapult hence the doubt created that possibly the appellant was defending himself ought to have been cleared by the prosecution. It is the law in criminal proceedings that the burden of proof is always on the prosecution and the judgement indicated that the court never weighed the defence case. The appellant having been found to have a case to answer tendered a sworn testimony where he up a defence of self defence and the trial court appeared to have imputed a defence of alibi that it found was dislodged by the prosecution evidence. The appellant's defence clearly raised the existence of a dispute with the complainant confirmed by the various phone messages exchanged between them and issue should have been considered by the trial court. Indeed the appellant and some of the witnesses confirmed that the appellant and complainant had earlier clashed when they met along the road.

23. **Section 17 of the Penal Code** provides the defence of a person or property. It reads:-

“Subject to any express provisions in this Code or any other law in operation in Kenya, criminal responsibility for the use of force in the defence of person or property shall be determined according to the principles of English Common Law.”

24. With such defence, the learned Magistrate should not have found the appellant guilty of the offence. The element of **“willfully and unlawfully”** which is one of the ingredients of the offence of malicious damage to property ought to be proven and from the record the trial magistrate failed to interrogate this element of self defence that was raised by the appellant and the same cast doubt on the proof of willful and unlawful nature element of the offence and in this regard, the offence of malicious damage to property could no longer stand as against the appellant.

25. The learned Magistrate ordered for compensation of Kshs, 10,000/= for the value of the damaged windscreen. First of all, the court never assessed the value of the same. There is no evidence on record to show that the complainant (PW1) suffered any loss or showed the value of the said windscreen as no damage assessment was carried out. Further and as noted above the issue of the legal owner was not established since there were names of someone else inscribed on the body of the vehicle and who was not called to testify.

26. In my findings, herein in this judgment, the suit vehicle was not proven as having belonged to PW1 and in this regard it was wrong for the learned Magistrate to award compensation against the appellant in favour of Pw1.

27. In the result, I allow the appeal, quash the conviction, set aside the sentence of one year probation and set aside the order on

compensation of Kshs 10,000/- to Pw1. Accordingly the appellant is acquitted of the offence of malicious damage to property contrary to section 339 (1) of the Penal Code Act. He is ordered to be set at liberty forthwith unless otherwise lawfully held.

It is so ordered.

Dated and delivered at Machakos this 17th day of September, 2019.

D.K. Kemei

Judge