REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 112 OF 2018

WILSON MAITA KILONZO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the conviction and sentence delivered by Hon C.A. Ocharo (Senior Principal Magistrate) in Machakos Chief Magistrate's Court in Criminal Case Number 433 of 2016 on 31.10.2018)

JUDGEMENT

1. The Appellant was charged with one count of Malicious Damage to property c/s 339 (1) of The Penal Code. It was alleged that he on 15th and 20th October, 2016 at Kyanganga Village, Wetaa sub-location, Mango Location in Mwala sub-county within Machakos County willfully and unlawfully damaged barbed wire and cider posts all valued at Kshs 60,000/- the property of Joseph Muthini Wambua. He faced the alternative count of cutting down trees contrary to Section 334 of the Penal Code.

2. During the trial, the prosecution adduced evidence from five witnesses. P.W.1 Joseph Muthini Wambua testified that the appellant is his neighbor and that his farmhand saw the appellant cutting the trees on the boundary. He gave the plot reference as **LR/ Mwala/Mango/974** and that the title was issued on 18/3/1977. He presented in court the forest officers report dated 15.11.2016 as well as the surveyors report dated 27.2.2017. On cross-examination, he stated court that the appellant had ancestral land whereas Pw1 had bought the land from Nzioki and that the appellant has been a nuisance. On re-examination he testified that there was a criminal case in 2012 in which the appellant was also the accused who had cut down Pw1's barbed wire. Upon being recalled he stated that his herdsman called Kivuva had seen the appellant cutting down his trees and fence and on cross-examination he stated that the appellant had no shamba in the place.

3. Pw2 was Josphat Kivuva who testified that he saw the appellant cutting the trees on Pw1's farm and duly notified him.

4. Pw3 was Richard Mukunga who testified that in October, 2016 he was Pw1's worker and that he received a report from Pw2 who claimed that he had seen the appellant cutting trees from Pw1's farm and when he went to the farm he saw the appellant transporting the cut trees. On cross-examination, he testified that neighbours did not like the appellant because of his bad character and on re-examination, he testified that he knew that the shamba belonged to Pw1 because he has a title deed.

5. Pw4 was James Masambu a forest officer who testified that he received a complaint concerning trees that had been cut and he went to assess the damage on 13.11.2016 and valued the same at Kshs 78,000/-. On cross-examination, he reminded the appellant that he had testified over a case where the appellant had destroyed four trees in 2011.

6. Pw5 No. 92876 Pc Joshua Osoi was the investigating officer in the instant matter who received the report on 1.11.2016 from Pw1 that the appellant had damaged barbed wire and sisal fence and cut trees on his farm reference Mwala/Mango/974 and that the title deed was in the names of Pw1. He recovered the poles and barbed wire and produced the photographs taken at the scene. He then arrested the appellant on 14.11.2016. He also instructed the survey officer to prepare a report which he presented in court as an exhibit. On cross-examination, he testified that he was not aware that the appellant purchased the property in 1970. The court found that there was a prima facie case against the appellant who in his defence denied cutting trees and stated that he had purchased the land in 1970 and had been living there since. He told the court that Pw1 came on the land in 1979 and had fenced the place and he told him to remove the fence but when it was not done, he himself removed it. When cross-examined on the sale agreement in respect of the land, he told the court that the same had no land parcel number but he did not know where the complainant got the title deed from. He told the court that Pw1 purchased the land from Muoki who did not have the right to sell it.

7. Dw2 – Philip Kithi testified that when the appellant bought the subject land in 1970, Pw1 was not there and on cross-examination he told the court that the shamba had no number but that he knew that titles were processed but did not know if the appellant had a title and that he had not been to the place where the appellant was alleged to have damaged. He told the court that Muoki was the appellant's uncle who is deceased and who had his portion of land that was allocated to him by his grandfather. On re-examination, he told the court that the appellant purchased the land from Kieti and possibly Muoki who encroached on the land and sold it.

8. In her judgment, the trial magistrate found that the complainant purchased the land from Muoki and had a title deed; that there was evidence from the Forest officer that the damages were occasioned and that the appellant admitted to the damage. She noted that thought the appellant had a claim to have purchased the land, the agreement he produced had no land reference number and in any event he ought to pursue his claim in a court of law and not remove anything from the complainant's land without express permission. She convicted the appellant on both counts after finding him guilty and sentenced him to two years imprisonment in respect of count one and five years in respect of count two and which sentences were to run concurrently.

9. Being dissatisfied with the decision, the appellant appealed on grounds summarized as follows;

a) The prosecution did not prove its case.

b) The learned trial magistrate failed to consider the appellant's defence hence breaching his right to a fair hearing.

10. The appeal was canvassed vide written submissions. The appellant submitted that the longstanding grudge has not been resolved and that the same should be referred to Alternative Dispute Resolution. Submitting in opposition to the appeal, counsel for the Respondent argued that the trial court properly evaluated all the evidence and came to the right conclusion wherefore the appeal ought to be dismissed. He cited the case of **Wison Gathangu Chuchu v R (2018) eKLR.**

11. This being a first appellate court, it is under a duty to reappraise the evidence, subject it to an exhaustive scrutiny and draw its own inferences of fact, to facilitate its coming to its own independent conclusion, as to whether or not, the decision of the trial court can be sustained (see ***Okeno v R (1972) EA 32***).

12. An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination, (see ***Pandya v. Republic [1957*** *EA. 336*) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion (see ***Shantilal M. Ruwala v. R. [1957] EA. 570***). 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 finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court had the advantage of hearing and seeing the witnesses, (see ***Peters v. Sunday Post [1958] E.A 424***).

13. The prosecution has the burden of proving the case against the accused beyond reasonable doubt. The burden does not shift to the accused persons and the accused are only convicted on the strength of the prosecution case and not because of weaknesses in their defence, (See ***Ssekitoleko v. Uganda [1967] EA 531***). By the plea of not guilty, the appellant put in issue each and every essential ingredient of the offences with which he was charged and the prosecution had the onus to prove all the ingredients beyond reasonable doubt. Proof beyond reasonable doubt though does not mean proof beyond a shadow of doubt. The standard is satisfied once all evidence suggesting the innocence of the accused, at its best creates a mere fanciful possibility but not any probability that the accused is innocent, (see ***Miller v. Minister of Pensions [1947] 2 ALL ER 372***).

14. Under section 339 (1) of *The Penal Code*, the offence of malicious damage to property is committed by any person who willfully and unlawfully destroys or damages any property. In the instant case, the burden was on the prosecution to prove that tangible property belonging to the complainant was willfully and unlawfully vandalized and that the appellant participated in the wilful and intentional vandalizing or damaging of that property. This therefore required proof of three elements; (a) tangible property belonging to the complainants was damaged or destroyed, (b) the said property was damaged or destroyed through wilful and unlawful actions, and that (c) the property in issue was damaged or destroyed by the appellant.

15. I have subjected the evidence on record to fresh scrutiny. I have also considered the submissions presented by the parties herein. I find that the trial court properly directed itself on the law and applied it correctly when it concluded that the fact of the complainant's trees and fence having been destroyed and the complainant finding the same, the eye witness account of Pw2 as well as the conduct of transporting the trees as seen by Pw3 and the appellant's admission proved that tangible property which was damaged or destroyed beyond reasonable doubt.

16. The second ingredient required proof that whoever destroyed that property, did so willfully and unlawfully. "Willfully" within the context of section 339 (1) of *The Penal Code* means "intentionally as opposed to accidentally, that is, by an exercise of [one's] free will" (see ***Arrowsmith v. Jenkins[1963] 2 QB 561***). *Black's Law Dictionary* defines it as *'voluntary and intentional, but not necessarily malicious'*. The act done need not be malicious in the sense of being motivated by spite or hatred against an individual, or *malus animus*, as denoting that the perpetrator is actuated by improper and indirect motives. The prosecution is not required to prove malice in the sense of an improper motive. All that has to be proved is that a wrongful act was intentionally done, without cause or excuse. Mere knowledge that it is likely to cause wrongful loss to the owner of the property is sufficient.

17. In ***Regina v. Pembliton [1874-80] All ER 1163***, the accused was fighting in the street. He picked up a large stone and threw it at the people he had been fighting with. He missed and broke a window causing damage of a value exceeding £5. The jury convicted the accused, although finding that he had not intended to break the window. Quashing his conviction, the House of Lords held that the words 'unlawfully and maliciously' import the wilful doing of an intentional act. Intention could not be shown by proof of reckless disregard of a perceived risk.

18. In the instant case the prosecution had to prove before the trial court that the destruction was in fact intentional and wilful. The intention and will may be proved by the fact that the perpetrators knew that damage to the property would be the probable result of their unlawful act, and yet did the act regardless of such consequences. In this regard, the possibility that the appellant took advantage of the fact that he had an agreement of sale in respect of the land and resided there since 1970 before the complainant came in 1979 presented evidence of intentional and willful conduct.

19. The damaged poles were exhibited in court, as well as photographs of the same and the fact that they were found at the scene by Pw5

corroborates the testimony of the complainant and is proof of the fact that whoever cut them intended to destroy them specifically or, in the alternative, that he or she knew that what he or she was doing would or might destroy them and nevertheless did what he or she did recklessly and not caring whether they were destroyed or not. There is no evidence of a legal justification for such conduct, however the possibility that the appellant took advantage of the fact that he had an agreement of sale in respect of the land and resided there since 1970 before the complainant came in 1979 was possibly semblance of a hypothesis that is inconsistent with the guilt of the accused. The court rejected the said agreement, hence concluded that the prosecution proved beyond reasonable doubt that the destruction was done willfully and unlawfully. In any case the appellant was expected to use legal means to deal with the complainant over the land dispute but not to take the law unto his own hands.

20. Lastly, the appellant could not be convicted unless there was credible direct or circumstantial evidence placing him at the scene of the crime as an active participant. The last ingredient that was required to be proved in respect of all the two counts is that the appellant participated in committing the offences with which he was charged. In ***Wamunga v. Republic (1989) KLR 424*** it was held at page 426 that,

> *It is trite law that where the only evidence against an accused is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from the possibility of error before it can safely make it the basis of a conviction.*

21. To sustain a conviction, a court may rely on identification evidence given by an eye witness to the commission of an offence. The judge should examine closely the circumstances in which the identification came to be made, particularly, the length of time the accused was under observation, the distance, the light, the familiarity of the witness with the accused. All these factors go to the quality of the identification evidence. If the quality is good, the danger of a mistaken identity is reduced but the poorer the quality, the greater the danger. In my view, the appellant was a person who was well known by Pw1, Pw2 and Pw3 before and therefore the court safely convicted the appellant. There were no significant factors that could have hampered the ability of these witnesses to recognize the appellant. I noted that there was a long-standing dispute over the land and the same was motivation enough for the appellant to commit the offence.

22. All in all, having scrutinized the entire evidence on record, I have reached the conclusion that the prosecution satisfactorily proved the case beyond reasonable doubt in respect of both counts and the conviction is hereby upheld. Therefore the appeal against conviction fails.

23. Upon the appellant being convicted, although he had no previous record of conviction he said nothing in mitigation and I find that the destruction was uncalled for in a civilized society. The sentences imposed ought to be deterrent enough to enable him reconsider his conduct and in his submissions on appeal, he proposed that the matter be handled under Alternative Dispute Resolution. The matter arose out of a land dispute that has not been resolved. The maximum punishment for the offence of Malicious Damage to property c/s 339 (1) of *The Penal Code* is imprisonment for five years if no other punishment is provided by the Act.

24. In the instant case, the offence was committed within the context of a dispute over land. The appellant chose to take the law into his own hands in the process of which he destroyed property belonging to the complainant. According to section 28 of the Penal Code the discretion to impose the sentence of a fine is exercised where the relevant penal provision renders the offence punishable with a fine or a period of imprisonment or alternatively imprisonment as well as a fine. Neither section 334 nor section 339 (1) of *The Penal Code* provides for the option of a fine as part of the possible sentence.

25. I am cognizant of the judicial practice of imposing fines in respect of first offenders instead of custodial sentences, by virtue of section 28 of the Penal Code which permits a sentencing court to impose a fine in addition to or instead of imprisonment. Although the appellant is a first offender and approaching advanced age, the offence he committed deserves a deterrent custodial sentence considering the level of damage, the repeated actions involved and the rampant incidents of violence erupting from disputes over land and on that basis I substitute the sentence of the trial court with two years under probation under supervision of the probation officer Machakos County. The appellant is hereby advised that if he engages in any other criminal activities or fails to adhere to the probation order then the said probation sentence stands cancelled and he shall be seized and be made to serve custodial sentence of two years without considering any period served under probation.

26. In the result the appeal partly succeeds. The conviction by the trial court is upheld. However the sentence is hereby set aside and substituted with an order that the appellant is ordered to serve under probation for a period of two years to be supervised by the Machakos County probation officer. To that extend the appellant is to be released from custody to enable him serve the sentence under probation unless he is otherwise lawfully held.

It is so ordered.

Dated and delivered at Machakos this 19th day of September, 2019.

D.K. Kemei

Judge