



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

CRIMINAL APPEAL NO. 117 AND 119 OF 2017 (CONSOLIDATED)

(CORAM: HON. R.E. ABURILI - J)

JUSTUS OTIENO OREK.....1ST APPELLANT

MARGARET NDEGE.....2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being An Appeal from the conviction and sentence in Judgment dated 27/11/2017 delivered at Ukwala Law Courts vide Criminal Case No. 200 of 2017 before Hon. G. Adhiambo, SRM)

JUDGMENT

1. The Appellants in these two consolidated appeals are **Justus Otieno Orek** and **Margaret Ndege**. They were co-accused persons in Ukwala SRM Cr. Case No. 200/2017 wherein they were jointly charged with the offence of malicious damage to property contrary to **Section 339(1) of the Penal Code**. They were also jointly charged with the offence of forceful detainer of land Parcel No. E.Ugenya/Lugega/2136 belonging to Moses Oduol Ademba and in Count III they were jointly charged with the offence of cutting down trees contrary to **Section 334(c) of the Penal Code**.

2. The property allegedly damaged and the trees allegedly cut down all belonged, according to the charge, to **Moses Oduor Ademba**.

3. The Appellants were jointly charged with two other people, Johannes Odhiambo and Gabriel Omondi.

4. The Appellants pleaded not guilty and after a full trial, they were all found guilty of the offence of malicious damage to property in Count I and were acquitted of Counts 2 and 3 of the charge. After mitigation, they were all sentenced to see six (6) months imprisonment.

5. Being dissatisfied with the judgment, conviction and sentence imposed on them by the trial court on 27/11/2017, the appellants herein filed their respective appeals on 27/11/2017 citing the following grounds of Appeal: -

(1) The trial magistrate erred in law in arriving at a decision which was against the weight of the evidence on record.

(2) The trial magistrate erred in law in relying on the single evidence of an untruthful witness in convicting the appellant.

(3) The trial magistrate erred in law in failing to appreciate the statutory right to protect individual property, when the prosecution had not discharged the burden of proof as to ownership of the contested parcel.

(4) The trial magistrate went against the principle maxim volenti non fit injuria.

6. The Appellants urged this court to allow the appeals, quash the conviction and set aside the 6 months imprisonment and set them free.

7. Revisiting the evidence before the trial court which evidence was relied on by the trial court to convict the appellants with the offence of malicious damage to property, the complainant **Moses Oduor Ademba** testified as PW1 and stated that in 2014 he bought parcel E.Ugenya /Lugala/2136 from Charles Okoth Odhiambo and he had a title deed to the said land issued on 10.7.2013. He also produced another title deed in name issued on 24.8.2016. He also produced a sale agreement for the said land as an exhibit and stated that the land he bought was 0.82 hectares, at KShs. 450,000/= . He also produced a search certificate done on 16.5.2017 showing that the subject land was registered in his name.

8. He further testified that the suit land had trees of difference species. He recalled that on 13.5.2017 at 8.00 am his employee Simweyo Climate rung him and informed him that there were strangers in his land and that he found when the said strangers had cut the wire at the fence and entered his farm and that they were hostile to him when he inquired from them as to who they were. He reached out to the area Assistant Chief PW4 - Joanes Ngesa Odundo who went to the scene and found the appellant constructing a structure in the appellant's land. PW4 knew the land because in 2014 he witnessed the agreement between PW1 and the owner of the land, Mr. Charles Okoth Otieno. The intruders then told PW4 that they had a letter authorizing them to construct a house on the suite land and that they claimed that the land was theirs. PW1 reported to the police who accompanied him to the scene but the people were rowdy and attracted mourners attending a funeral nearby who also came to the scene. The police retreated to avoid more trouble. PW1 and PW4 saw a barbed wire which had been vandalized, poles destroyed and trees on the land cut down.

9. The appellants herein were at the scene. PW1 saw the 2nd appellant shout that there was a land thief at her farm while the 1st appellant was breaking the poles with hands and cutting other poles with a panga. He other accused were said to have been breaking the poles at the fence and cutting poles; as he watched.

10. The following day, he found the whole fence destroyed and poles cut. According to PW1 there was bright moonlight hence the complainant was able to see the accused persons who were well known to him as they talked to him telling him to bring his mother so that they could sleep with her. PW1 claimed that the poles cost him Kshs. 150,000/=.

11. PW2, Monicah Aluoch Ademba is the wife to PW1. She went to the farm and found the appellants and other people. She found when they had already cut the barbed wire. She did not see the people cut the wire or destroy the poles but saw them dig holes as if they wanted to build a structure but that they chased her threatening to beat and kill her.

12. PW3, Alex Simiyu Chemiati, the caretaker of the subject farm on behalf of PW1 testified that on 13.5.2017 at about 7.00 am while he was from selling milk, on reaching the farm of PW1 he found the fence wire having been cut. The 2nd appellant was in the farm with other people whom he did not know. They were 8 people in total. One person was cutting a tree while the other was digging a hole. When he inquired from them they ordered him to leave.

13. He saw the fence cut to create access to the farm. He moved out and called PW1 and informed him of what had happened. PW1 told PW4 to inform the Chief Joanes which he did and after PW1 came to the farm, PW4 left at around 1 pm to cut fodder at an adjacent farm. The following day he saw barbed wire and poles destroyed. He identified photographs showing the destroyed fence and the cut trees.

14. PW5 NO 86640 PC Douglas Wamalwa of CID Scenes of Crime Siaya County processed photographs taken at the scene by CPL Lukwa of Ukwala Police Station. The photographs showed general view of the part of the fence that was alleged damaged and the cut trees.

15. PW6, a forester, Mr. Romanus Oduol testified on the value of the trees allegedly cut down hence his evidence is not relevant to count 1.

16. PW7 CPL Nixon Lukwa of Ukwala Police Station received a report of the damage on Land Parcel E. Ugenya/Ligega/2136 visited the land, gathered documentary evidence from PW1 and recorded statements of witnesses. He produced the Title Deed for the land, search certificate, sale agreement for the same land as exhibits. When he visited the scene, he found people constructing a mud house. He saw a fence which was cut to gain entry into the said land. He urged the people to stop the destruction in view of the title documents PW1 had but that the 2nd appellant told him that she could not leave her husband's land. Despite calling for reinforcement of APs for Ligega, they could not contain the rowdy group so they left and at 7.00 pm the complainant called him and informed him that the same people had invaded the farm and were cutting the fence plus the trees inside the land.

17. PW7 went to the scene in company of OCS CIP Kwemoi and IP Opicho and found all fencing posts had been cut all round the shamba and some trees cut. There was nobody at the scene as the offenders had escaped so they only took photographs. PW1 was recalled to produce invoice and receipt for the purchase of the fencing materials valued at Kshs. 150,000/= as an exhibit.

18. The trial court also invited the surveyor who visited the parcel of land to identify and clarify the boundaries on the ground and who clarified that there was a fence.

19. Placed on their defences, the 2nd appellant testified land Parcel No. E.Ugenya/Ligega/867 belonged to her late husband Ndege Ouma Aloo. She produced a search certificate of the land. She stated that she did not know anything about land parcel No. E.Ugenya/Ligega/2136 which PW1 was claiming to belong to him. She stated that she only went to the land belonging to her husband, and not to the complainant's land.

20. She stated that on 13/5/2017 they had gone to construct a house on her husband's land with her sister in-law Antonina Tala Ndege. She claimed that her husband never gave any land to Charles Okoth Otieno who sold land to the complainant as Charles Okoth Otieno was mentally deranged.

21. She denied demolishing the fence which she stated was only done after the complainant learnt that the 2nd appellant had moved to Ligega from Migori where she had buried her husband.

22. The 1st Appellant testified as DW3 and denied the charges facing him. He stated that on 13th May 2017 was a Saturday so he was in the church as an SDA. He denied going to Land Parcel No. E.Ugenya/Ligega/2136 on the material day. He stated that land No. E.Ugenya/Ligega/867 belonged to Margaret Abiero and Ndege Aloo. He stated that title No. E.Ugenya/Ligega/2136 was not genuine. He could not tell where the allegedly destroyed fence was erected. He stated that the 2nd appellant was his sister inlaw, his brother's wife. He however admitted in cross examination that he saw the fallen fence.

23. DW4 Gabriel Omondi in the trial court denied the charge but in cross examination he admitted that a small part of the fence was cut so that they could access the land after the 2nd appellant invited him to assist her built a house on the land as he was a mason. He also stated that he did not ask about the fence because he knew the land belonged to his grandfather.

SUBMISSIONS

24. In support of the grounds of appeal, Mr. Oduol Advocate submitted orally and stated that at paragraphs 174-176 of the judgement of the trial court record, the trial magistrate cast doubt as to the ownership of the suit land, but that she nonetheless went ahead to convict the appellants on the basis of the same evidence.

25. In opposing the appeal, Ms. Odumba Prosecution Counsel submitted that the trial court dwelt on many issues in the bulky proceedings. That the issue was on the parcel of land allegedly sold and subdivided. Counsel submitted that there was evidence of a sale of land agreement showing ownership of the land E.Ugenya/Ligega/2134 whose original title was E.Ugenya/Liagala/867 and that PW1 had fenced the said land at a cost of Kshs. 150,000/=.

26. She submitted that in their defence, the appellants admitted to entering the land and damaging only part of the fence, which according to PW1 was his as per the purchase receipts from the hardware shop, produced as exhibits.

DETERMINATION

27. I have reconsidered the evidence adduced before the trial court, the grounds of appeal as per the Petition of appeal, submissions for and against the grounds of appeal.

28. In my humble view, the main issue for determination in the two appeals as consolidated is whether the Prosecution proved their case against the appellants beyond reasonable doubt on the first count of malicious damage to property. The charge sheet filed in the trial court at Count I reads:

Charge: Malicious damage to property contrary to Section 339(1) of the Penal Code.

Particulars: 1. Margaret Ndege, 2. Johannes Odhiambo, 3. Justus Otieno and 4. Gabriel Omondi on the 13th day of May, 2017 at Ligega sub-location, Ugenya sub-county within Siaya County jointly with others not before court, unlawfully damaged barbed wire fence valued at Kshs. 150,000/= the property of Moses Oduor Ademba.

29. Albeit the appellants in their grounds 1 of appeal they claimed that the conviction was against the weight of the evidence on record, no submission was made to support this ground.

30. On ground two, the appellant claimed that the trial magistrate erred in law in relying on the single evidence of an untruthful witness in convicting the appellants. Again, no submissions was made to identify which single witness was untruthful since the prosecution in a bid to prove their case against the appellants called 7 witnesses. There is nothing on the trial record to show that the trial record relied on evidence adduced by only one witness to convict the appellants.

31. In addition, the appellants have not stated which witness was untruthful for this court to assess evidence of that witness. PW1 proved by documentary evidence that he had purchased a barbed wire and fenced the subject land, and even the appellants herein conceded that the fence was cut only for purpose of accessing the land. They off course denied damaging the fence but their defence was found not to have, in any way, dislodged the cogent prosecution witnesses' evidence of PW1 the complainant who witnessed the appellants cut his fence and destroy it. Accordingly, the ground of appeal is found to be devoid of merit and is hereby dismissed.

32. The appellants in their ground No. 3 of their petitions of appeal claim that the trial court failed to appreciate the statutory right to protect property, when the prosecution had not discharged the burden of proof as to ownership of the contested parcel.

33. In support of the above ground of appeal, the appellants through their counsel Mr. Oduol submitted that the court cast doubt as to the ownership of the suit land yet she went ahead to convict on the basis of same evidence.

34. I have perused the entire trial court record and considered the evidence adduced by the prosecution witnesses who included PW1 the complainant, the surveyor's report on the scene of crime visit and the evidence of the investigating officer and compared that evidence with that adduced by the two appellants herein in their defences. No doubt, the burden of proof lies entirely on the prosecution throughout the trial to prove its case against the accused persons beyond reasonable doubt.

35. What is clear on record and what was proved beyond any reasonable doubt is that Parcel No. E.Ugenya/Ligega/2136 is a subdivision from Parcel No. 1838 which was derived from Parcel No. E.Ugenya/Ligega/867 which latter, the 2nd appellant claims belonged to her husband. However, PW1 demonstrated and this was supported by the Title Deed and search certificates produced in evidence as exhibits that PW1 the complainant is the absolute owner and registered proprietor of land Parcel No. E/Ugenya/Ligega/2136 which he fenced and which fence was destroyed as shown by the photographs produced by the Scenes of Crime Officer.

36. Albeit the trial court at pages 175-176 in analyzing the evidence stated that there were competing interests arising from the same parcel of land E.Ugenya/Ligega/2136 as DW1 believed that it was the same as E.Ugenya/Ligega/867, I observe that the analysis by the trial court was in respect of the charge (counts) of forcible detainer which the appellants were acquitted of on the ground that the Land Registrar had created confusion by issuing the 2nd appellant with a Search Certificate of a title that had already been closed on subdivision.

37. What this court is concerned with is with regard to the charge of malicious damage to property and whether the prosecution established beyond any reasonable doubt that the barbed wire belonged to the complainant and whether the fencing was done by him by law, not whether the land was owned by the complainant as this court is devoid of jurisdiction to determine matters ownership of land. However, prima facie, the complainant produced title document to the fenced land and therefore in the absence of any other evidence to the contrary and to be determined by a court of competent jurisdiction, the complainant was entitled to the protection of his fence. The appellants did not claim ownership of the said fence. The 2nd appellant did not claim that the barbed wire was erected by her or her late husband. It was therefore important that if she believed that the fenced land was her late husband's then she should have followed due process to reclaim it and not to damage the fence. A search certificate issued to her in my humble view, was not a title document of ownership and neither was the land registered in her name for her to allege the land and built a house. She did not have an order of the court to forcibly evict the complainant from the land by cutting his fence hence any damage that was occasioned to the barbed fence was malicious as it was reckless and unjustified.

38. The 2nd appellant in her defence and evidence in cross examination admitted that she and her co-accused only cut a small portion of the barbed wire fence to gain entry into the land. This confirmed the testimonies of PW1, PW2, PW3 and PW4 who went to the farm and found part of the barbed wire fence cut and the accused persons were constructing a structure on the land.

39. PW1 who had been chased from the land earlier in the day remained at his home which was close to the land which was fenced and witnessed his fence being cut by the invaders at about 8.00 pm. He tried to get help from the police but the police feared the crowd. The complainant was only 30-50 metres away and he saw the damage being occasioned to his fence as there was bright moonlight. He saw and heard the 2nd appellant hurl insults and the 1st appellant cut and pull the fence.

40. I have considered the analysis by the trial court of the evidence on the charge of malicious damage to property and I am satisfied that the trial court correctly arrived at the decision that she did without making any errors of law or fact. The photographs produced in evidence show exactly how the fence was damaged.

41. In my humble view, the Prosecution discharged the burden of proof that the fence was the property of PW1 and that he had title to the land which he had fenced. That being the case, if the 2nd appellant herein had evidence of ownership of the same land as she never claimed to own the fence, she should have sought for legal intervention before an Environment and Land Court and not use extra legal means. The ground of appeal No. 3 therefore is found to be devoid of merit and the same is hereby dismissed.

42. On ground No. 4 that the trial magistrate went against the *maxim volenti non fit injuria*, this court was not addressed on the applicability of this principle to this appeal and therefore I find no reason to belabor analyzing it. Accordingly, the ground of appeal is found to be bare and barren and is hereby dismissed.

43. In the end, all the grounds of appeal are found to be devoid of any substance and are hereby dismissed. The judgment, and conviction of the trial court is therefore upheld and sustained.

44. On sentence, no submission was made challenging the six (6) months imprisonment meted out on the appellants and no ground of appeal touched on the sentence meted out on them. I find no reason to interfere with the sentence imposed which is lenient and lawful. **Section 339(1) of the Penal Code** stipulates that 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**. The maximum penalty for a conviction for the offence of malicious damage to property is five (5) years. The appellants were sentenced to serve 6 months imprisonment which is lawful and too lenient considering the mitigations put forward by the appellants and the Probation Officer's Report, and the value of the damaged property. The trial court found the offence prevalent deserving of deterrent sentence.

45. In my humble view, the sentence meted out was extremely lenient. However, I am cognizant of the fact that the sentence cannot compensate the complainant who nonetheless has a legal right to sue for damages. The appellants are elderly people who should demonstrate good character in society and not to take the law into their own hands. They were convicted in 2017 which is over two years ago. As the appellants have already served their prison terms, I of 6 months, this appeal as dismissed is settled on both conviction and sentence. The file is closed.

46. Orders accordingly.

Dated, signed and delivered in open court at Siaya this 2nd day of October 2019.

R.E. ABURILI

JUDGE

In the presence of:

Mr. Okachi SPPC for State

Appellant 1 absent Appellant 2 present

CA: Brenda and Modestar