THE REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL APPEAL NO. 15 OF 2018

(An appeal from Judgment of Hon. Shimenga SRM at Butere on 22/1/18 in CRC No. 236/2015)

JOSHUA OLUNGA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

INTRODUCTION

1. The Appellant herein Joshua Olunga was vide Butere RMCC No 236 of 2015 charged with the offence of willfully and unlawfully cutting down crops of cultivated produce contrary to Section 334(a) of the Penal Code. Particulars being that on the 27th May 2015 at 6.30pm at Nyamoga Village, in Dudi Location Khwisero Sub-County within Kakamega County willfully and unlawfully cut down crop cultivated produce namely arrow roots the property of Allan Ochieng. He was convicted of the offence and sentence to three years imprisonment or a fine of Kshs. 50,000/=.

The Appeal.

2. The Appellant dissatisfied with the conviction and the sentence filled a Petition of Appeal dated 9th May 2018. The Appellant raised the following Grounds of Appeal:

(a) That the learned Trail Magistrate erred in law and in fact in finding that the Complainant had locus standi to initiate Criminal Proceedings in a land where the registered owner is deceased.

(b) That the learned Trail Magistrate erred in law and in fact in finding that Plot Kisa/Doho/344 belonged to the Complainant.

(c) That the learned Trail Magistrate erred in law and in fact by convicting the Appellant in view of the glaring contradictions in the evidence adduced by the prosecution witness.

(d) That the learned Trail Magistrate erred in law and in fact by convicting the Appellant based on a charge sheet that did not indicate on which land the alleged property was destroyed.

(e) That the evidence of the Agricultural officer should not have been given weight as he did not visit the scene of the alleged offense.

(f) That the learned Trail Magistrate erred in law and in fact by convicting the Appellant without sufficient evidence.

(g) That the learned Trail Magistrate erred in law and in fact in falling to take into consideration judicial legal grounds in her findings.

(h) That the trial court shifted the burden of proving his innocence to the Appellant.

(i) That the Prosecution did not prove it's case beyond reasonable doubt.

3. The duty of the first appellate court is to re-evaluate and re-consider the evidence tendered before the trial court with a view to arriving at its own independent conclusions. See **Okeno Vs Republic [1972] EA 32.**

In **Kiilu & Another vs. Republic [2005]1 KLR 174,** where the Court of Appeal stated thus:

> ***"1. An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusions.***
>
> ***2. 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 findings and 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 has had the advantage of hearing and seeing the witnesses."***

The same was reiterated in the case of **David Njuguna Wairimu vs. Republic [2010] e KLR**.

The Prosecution's Case

4. The prosecution called 8 witnesses. Evidence was led that on 8th December while the Appellant was working on his farm, he saw five men armed with pangas cutting down his arrow roots. The Complainant testified that when he confronted the intruders, the Appellant ordered them to attack him. He stated that the Appellant continued destroying the crops and warned him not to return to the farm. The incident was later reported to the police and the crops valued by an agricultural officer. The Appellant was also arrested.

5. The complainant produced as evidence a sale agreement showing that they together with his brothers had purchased the property from one Henry Otuoch Okello on 5th November 2012 and a crop assessment report showing the damage caused to the crops.

6. PW2 corroborated his evidence of ownership stating that they bought land that was yet to undergo succession as per their agreement with the vendor and that the same was pending transfer of title. PW5 confirmed that he had sold the land to the Complainant and that he had been tilling the same since 2012.

Defence Case

7. The Appellant testified that he did not destroy the crops. He stated that he has had a long standing boundary dispute with the complainant's father. He however confirmed that he had no issue with the parcel 344 that belonged to the Complainant. He also confirmed that it was the complainant who planted the crops and that they were destroyed. His evidence was corroborated by DW2 and DW3.

8. In his submissions the Appellant challenged the prosecution evidence on the ownership of the land claiming the same was in the name of a deceased person and thus the Complainant had no locus. He relied on the case of **George Kimandio vs. Republic [2016].**

9. He also argued that the prosecution evidence was contradictory and that they did not prove their case to the required standards. The Appellant contended that the charge sheet was defective as it did not disclose the land where the crops were destroyed. He relied on the case of **Stephen Njoroge vs. Republic [2009].**

Issues for determination

> ***1. Whether there was proof of ownership of the land where the crops were and whether the same affected the locus of the complaint.***
>
> ***2. Whether the charge sheet was defective.***
>
> ***3. Whether the prosecution evidence was contradictory.***
>
> ***4. Whether in the final analysis the prosecution proved the case against the appellant beyond any reasonable doubt.***

Whether there was proof of ownership of the land where the crops were and whether the same affected the locus of the complaint

10. *The Appellant contends that the land on which the said crops were planted belong to a deceased person and thus the Complainant had no locus to institute the case. The prosecution adduced evidence to show that the Complainant bought the land from pw5 that belonged to his deceased father and that the succession proceedings are under way.*

Section 334 of the Penal Code Provides:

> ***"Any person who willfully 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***

(c) ***any standing trees, saplings or shrubs, whether indigenous or not, under cultivation, is guilty of a felony and is liable to imprisonment to fourteen years."***

11. In **Director of Public Prosecution vs. Margaret Shipai [2019] eKLR**

> **'It was stated that the land belonged to the deceased who was the husband to both the respondent and Pw2. It is not however clear whether succession cause has been filed and whether the property has been divided in accordance to the Laws of Succession Act, Cap 160. No evidence was tabled as to ownership of the property. There was however evidence by Pw1, Pw2 and Pw3 that the complainant had planted maize crops on the land. Pw6 produced pictures of the property that were taken after the respondent subsequently took possession of the land. The pictures indicate that the Respondent put up a house on the land and planted some sugar cane. I find that the dispute in ownership of the land where the destroyed crops were growing was not an ingredient of the offence. The prosecution need only to prove that the crops planted by the complainant were willfully and unlawfully destroyed by the respondent"**

In **Janefepher Ashali Malala & another vs. Republic [2019] eKLR**

> **"21. Secondly, there is no doubt that the crop belonged to the complainant. It is the complainant who planted the crop. PW3 testified that he is one of the people who planted the crop under the instructions of the complainant. The appellants did not claim the crop to have been theirs. Neither did Melisa Akumu DW5 claim the crop to have been hers. The prosecution had thereby proved that the crop belonged to the complainant.**
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> **22. There is a dispute over the ownership of the land where the crop was cut down between the complainant and Melisa Akumu. The question is whether the dispute has any effect on the issue of criminal liability of cutting down the complainant's crop. In Wambua Kameta & Another –Vs- Republic (2016) eKLR where there was a dispute over the ownership of the land the court was of the view that the prosecution had to prove ownership of the trees that were cut down and not ownership of the land. On a similar dispute in Stephen Matabari –Vs- Republic (2018) eKLR the Court held that: -**
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> > ***"[10] Clearly, ownership of land and the trees which were felled was adequately addressed by the trial court and reached correct decision in that respect. Notably, the core of the trial court's conclusion is that the ongoing civil case filed by the appellant's sister claiming ownership does not affect criminal liability which may attach to the Appellant in these proceedings."***
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> > **It is clear that proof of ownership of the land is not an element of the offence described under Section 334 (a) of the Penal Code. The existence of a land dispute between the complainant and Melisa Akumu was immaterial and had no effect on criminal liability on the part of the appellants.**
>
> **23. The question is whether the appellants are the ones who cut down the crop and if so whether they did so willfully and unlawfully."**

12. In **Republic vs. Christopher Bwanga [2019] eKLR** the court observed that:

> **"The ingredients of the offence of destroying a crop of cultivated produce are:-**
>
> **(i) evidence of destruction of a crop of cultivated produce.**
>
> **(ii) whether the act was willfully and unlawful.**
>
> **(iii) whether the crop belonged to the complainant.**
>
> **In my view the dispute in ownership of the land where the crop was growing was not an ingredient of the offence. The prosecution needed only to prove that the crop planted by the complainant was willfully and unlawfully destroyed by the respondent."**
>
> ***also see*** Pascal Wandera Odero & another v Republic [2019] eKLR

13. From the above authorities it is clear that ownership of the land where the crop was growing was not an ingredient of the offence. There was evidence that the complainant had been in beneficial use of the said land, a fact that the Appellant affirmed. PW5 also confirmed that he had sold the property to the complainant and being the only heir of the estate of the deceased he intended to pass the same to the Complainant.

14. As stated above, the main question that the court ought to determine is whether the crops destroyed belonged to the complainant and not ownership of the land. It is the finding hereof and this court holds that the issue of the suit land ownership is irrelevant t to the present inquiry.

Whether the charge sheet was defective

15. The Appellant contends that the charge sheet was defective as it did not state on which land the alleged property was destroyed. With

regard to defective charge sheets the Court of Appeal in **Benard Ombuna vs. Republic [2019] eKLR** held that:

> **"Be that as it may, as this Court appreciated in** *JMA vs. R [2009] KLR 671* **that not all defects in a charge sheet will render a conviction thereunder invalid. Over time, the test of determining whether a charge is fatally defective so as to render any conviction a nullity has been established, both in our jurisdiction and other jurisdictions. In that regard, the Supreme Court of India in Willie (William) Slaney vs. State of Madhya Pradesh [A.I.R. 1956 Madras Weekly Notes 391], held that:-**
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> ***"Whatever the irregularity, it is not to be regarded as fatal unless there is prejudice. It is the substance that we must seek. Courts have to administer justice and justice includes the punishment of guilt just as much as the protection of innocence. Neither can be done if the shadow is mistaken for the substance and the goal is lost in the labyrinth of insubstantial technicalities."***

16. In the instant case, we have already established that the ownership of the property is not an ingredient of the offence. The appellant testified that the Complainant was the one who planted the crops and that the land was adjacent to his. He also did not deny that the crops belonged to the Complainant. The Appellant has not in any way demonstrated how the failure to state the title affected his defense as he was able to state and corroborate the complainant's evidence on the ownership of the crops. This ground of appeal has no merit and must fail.

Whether the prosecution evidence was contradictory

17. The Appellant contends that the prosecution evidence was contradictory with regard to the ownership of the land and that the date on the damage assessment report differed with PW7's evidence. It should be noted that the contradictions alleged were not challenged during the trial hearing. The Appellant confirmed that it was the complainant who planted the crops and that the land was his. PW5 confirmed and stated that he had sold the parcel to the complainant.

With regard to contradictions, the court in Philip Nzaka Watu vs. Republic [2016] CR APP 29 of 2015, *had this to say:*

> ***"The first question in this appeal is whether the prosecution's case was riddled with contradictions and inconsistencies of the magnitude that would make the conviction of the appellant unsafe. It cannot be gainsaid that to found a conviction in a criminal case, where the trial court has to be satisfied of the accused person's guilt beyond reasonable doubt, the prosecution evidence must be cogent, credible and trustworthy. Evidence that is obviously self-contradictory in material particulars or which is a mere amalgam of inconsistent versions of the same event, differing fundamentally from one purported eyewitness to another, cannot give the assurance that a court needs to be satisfied beyond reasonable doubt.***
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> ***However, it must be remembered that when it comes to human recollection, no two witnesses recall exactly the same thing to the minutest detail. Some discrepancies must be expected because human recollection is not infallible and no two people perceive the same phenomena exactly the same way. Indeed, as has been recognized in many decisions of this Court, some inconsistency in evidence may signify veracity and honesty, just as unusual uniformity may signal fabrication and coaching of witnesses. Ultimately, whether discrepancies in evidence render it believable or otherwise must turn on the circumstances of each case and the nature and extent of the discrepancies and inconsistencies in question."***

18. Turning to this case it is clear from the evidence that the contradictions alleged were minor as the same were clarified through the corroborated evidence of the prosecution witnesses. The appellant did not raise any objection as to the production of the damage assessment report and in fact he confirmed to court that the crops where indeed damaged. The alleged contradictions were minor and did not go to the root of the prosecution's case.

Whether the prosecution proved the case against the appellant beyond any reasonable doubt.

19. As stated in the case of ***Republic vs. Christopher Bwanga [2019] eKLR*** *in order for the prosecution to succeed, they have to prove the* ingredients of the offence of destroying a crop of cultivated produce which are

- ***evidence of destruction of a crop of cultivated produce.***
- ***whether the act was willfully and unlawful.***
- ***whether the crop belonged to the complainant.***

20. From the evidence, it is clear that there was destruction of cultivated produce and this was proved by the evidence of PW6 and corroborated by the Appellant who in cross-examination confirmed that indeed the yams had been cut. The appellant also confirmed that it was the Complainant who planted the yams on the land. Evidence was also adduced that the Appellant with others cut down the crops with no express authority from the Complainant thus their actions where willful and unlawful. This court finds that indeed the prosecution proved all the ingredients of the offence and thus the conviction was proper.

Sentencing

21. The trial magistrate sentenced the Appellant to a fine of Khs 50,000 and or to serve a jail term of three years imprisonment.

Section 334 of the Penal Code Provides:

"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

(c) any standing trees, saplings or shrubs, whether indigenous or not, under cultivation, is guilty of a felony and is liable to imprisonment to fourteen years."

22. The court in **Francis Ncubiri Lurima vs. Republic [2019] eKLR** while sentencing the appellant to six month probation observed that:

9. The Judiciary's Sentencing Policy Guidelines provides that:-

"Where the option of a non-custodial sentence is available, a custodial sentence should be reserved for a case in which the objectives of sentencing cannot be met through a non-custodial sentence. The court should bear in mind the high rates of recidivism associated with imprisonment and seek to impose a sentence which is geared towards steering the offender from crime. In particular, imprisonment of petty offenders should be avoided as the rehabilitative objective of sentencing is rarely met when offenders serve short sentences in custody. Further, short sentences are disruptive and contribute to re-offending".

10. Further, the guidelines provide that non-custodial sentences are best suited for offenders who are already remorseful and receptive to rehabilitative measures. That age, where it affects the responsibility of the individual offender, should be a mitigating factor.

23. According to the probation report presented to court, the Appellant was at the time of sentencing aged 77 years old. He is also described as a frail man who has a leg disability and has hearing and chest complications. However, the offence was a serious one which requires to be punished. It is noted however that the learned trial magistrate was very lenient in sentencing. For that reason, this court will not interfere with the sentencing. I confirm both conviction and sentence. The appellant shall pay fine of Kshs. 50,000/= in default he shall be jailed for three years with effect from the date of conviction.

Dated, Signed and Delivered in Open Court at Kakamega this 13th day of December, 2019.

E. K. OGOLA

JUDGE