REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL APPEAL NO. 66 OF 2016

CORAM: D.S. MAJANJA J.

BETWEEN

REPUBLIC.....APPELLANT

AND

JACOB MUTUMA.....1ST RESPONDENT

JORAM KABERIA.....2ND RESPONDENT

(Being an appeal from the original conviction and sentence of Hon. W.

Wanganga, RM dated 14th September 2016 at the Chief Magistrate's

Court at Maua in Criminal Case No. 984 of 2013)

JUDGMENT

1. Before the trial court, the respondents, **JACOB MUTUMA** and **JORAM KABERIA**, were charged with the offence of causing malicious damage to property contrary to **section 339(1) (b)** of the ***Penal Code (Chapter 63 of the Laws of Kenya)***. The particulars of the offence were that on the 17th and 28th November 2012 at Anjalu Machungulu Sub-location in Igembe North District of Meru County, they jointly with others not before the court, wilfully and unlawfully damaged a fence, maize crops and 1 macadamia plant all valued at Kshs. 30,000/-, the property of **JULIUS THEURI MIBUARI**. Following their acquittal under **section 215** of the ***Criminal Procedure Code (Chapter 75 of the Laws of Kenya),*** the State decided to appeal.

2. It is the duty of this court, being a first appellate court, to subject the evidence on record to a fresh review and scrutiny and come to its own conclusions all the time bearing in mind that it did not see the witnesses testify as to form its own opinion on their demeanour (see ***Okeno v Republic*** **[1972] EA 32**). In order to proceed with this task, it is necessary to set out the evidence as it emerged from the trial court.

3. Julius Thauri (PW 1) recalled that on 17th November 2012, he was called by his daughter, Makena Winfred (PW 2) and informed that the respondents, who are his nephews and their sisters, had entered the land and were removing the barbed wire fence and fencing posts. PW 2 who had gone to fetch fodder for the cows testified that she had found the 2nd respondent, who told her he was using a court order to cause damage, was leading other relatives to remove barbed wire from the posts. She immediately went to call PW 1 and returned and found the 2nd respondent on the land uprooting maize and feeding their cows. She went to call her father on phone.

4. At about the same time, Mercy Nkirote (PW 3) went to the shamba and found PW 1 and the 2nd respondent quarrelling and his son uprooting maize and feeding their cow. The 2nd respondent's wife told her that they had a court order. She told the court that she saw the maize and barbed wire being uprooted. She left and later recorded her statement. Both PW 2 and PW 3 stated that they knew the land belonged to PW 1.

5. PW 1 testified that on the day he found that his fence and posts had been cut and maize plants uprooted. One macadamia tree was damaged by removing its bark leading to it withering. He reported the matter to the Laare Police Station. He was issued with a note to the Agricultural Officer to assess the crop damage.

6. The Investigating Officer, Moses Kisimba (PW 4), testified that on 7th November 2012, PW 1 reported that the respondents had damageD his property. He visited the scene on that day and on 21st December 2012 and saw the barbed wire had been removed by removing the posts. He established that 1 macadamia tree, maize crops and fence on plot 5044 had been damaged. He noted that there were several plots and he prepared a sketch plan. He photographed the scene and handed over the film to PC John Munyi (PW 5), a Crime Scene Support Service Officer, who processed the films and produced the photographs in evidence. He concluded that the damage was done on Parcels 5044 and 9603 Akirangundu 'A' Adjudication Section in the name of PW 1. He arrested the accused on 17th April 2013. He also testified that there was a long standing property dispute over a piece of land which had not been determined by the High Court.

7. The Demarcation Officer at Akirangundu 'A' Adjudication Section, Ishmael Nchunju (PW 6) testified and produced two letters written by the District Land Adjudication and Settlement Officer, Patrick Munialo, dated 16th January 2013 and 14th September 2012 stating that parcels number 5044, 5043, 1516 and 9603 are recorded in the names of Julius Thauri Mugwiri and Parcel 5968 recorded in the name of Erustus Kaberua Mungathia. In cross-examination, he stated that the dispute touches on parcels 5044, 9603 and 1903 and that objection proceedings were appealed to the High Court.

8. The Agriculture Officer in Laare Division, Ronald Gitonga (PW 7) confirmed that the Commanding Officer Laare Police Station requested him to do a valuation of the damage on the farm belonging to PW 1. He visited the shamba in the company of police officers and PW 1. He prepared a report for the parcel known as Akirangundu A 5044.He found ½ acre of crops damaged expected to produce 4 bags of maize with a market value of Kshs. 4,000/- per bag yielding a total of Kshs. 20,000. The macadamia tree had been damaged and it was valued at Kshs. 5,000/-.

9. When put on their defence, the respondents elected to rely on the advocate's address. Their counsel submitted that PW 1 is an uncle to the accused and according to his evidence the property belongs to his father's estate. Further that the respondents had moved the High Court in Misc No. 33/2012 which restrained PW 1 from interfering with Parcels No. 5054, 5043, 5968 and 5632 among other plots. They contended that it is PW 1 who was in contempt of court. Counsel submitted that PW 1 transferred the properties to himself without doing succession proceedings. He contended the respondents should be acquitted as there was clearly a dispute.

10. The trial magistrate considered the evidence and came to the conclusion that there was no evidence putting the 1st appellant at the scene. He found as a fact that from the testimonies of PW 1, PW 5 and PW 7 the properties in a *"certain"* farm were damaged and that the damage was done maliciously. The trial magistrate however found that the prosecution did not prove that the destruction took place on the property belonging to PW 1 as the property was not disclosed in the charge sheet. He opined that there was evidence of several pieces of land, some of which were claimed by the 2nd respondent and it was difficult to know exactly where the offence took place. In the circumstance, he held that the uncertainty would be resolved in the respondent's favour. He pointed to the evidence of PW 4 who, he stated was not sure which land he visited. Finally, the trial magistrate held that there was a land dispute which could not be ruled out as PW 4 and PW 7 acknowledged existence of a court order.

11. Mr Kiarie, counsel for the appellant, contended that all elements of the offence were proved hence the court ought to have convicted the respondents. In response, Mr Nyagaka, counsel for the respondents, contended that the charge sheet did not show the parcel number of the property that was damaged thus the charge was defective and the offence was not proved.

12. **Section 339(1)** of the ***Penal Code*** provides:

> *339. (1) Any person who wilfully 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.*

13. I have re-evaluated the evidence and the collective testimony of PW 2 and PW 3 is that the 2nd respondent was at the scene where the fence was being destroyed and the maize uprooted. PW 4 and PW 7 visited the scene and saw destruction of the property which was evidenced by the photographs in evidence. The evidence of PW 2 and PW 3 is also clear that the 1st respondent was not involved in the destruction while both PW 2 and PW 3 saw the 2nd respondent leading members of his family in the destruction. The incident took place in broad daylight and I have no doubt that the 2nd respondent who was known to PW 2 and PW 3 was involved in the destruction.

14. The key issue in this appeal concerns the basis upon which the respondents were acquitted. First that the charge sheet did not identify the land on which the destroyed property was situated and second, whether PW 1 owned the land. The answer to these questions depends on the definition of the offence which I have set out above. A reading of **section 339(1)** of the ***Penal Code*** is clear that the reference is to any property and not necessarily the property of one person. In this respect, I agree with the observation of Ngaah J., in ***Simon Kiama Ndiagui v Republic*** **NYR HCCRA No. 92 of 2013 [2017] eKLR** where he held as follows;

> *In order to convict the court must be satisfied that, first, some property was destroyed; second, that a person destroyed the property; third, that the destruction was wilful and therefore there must be proof of intent; and fourth, the court must also be satisfied that the destruction was unlawful.*
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> *I cannot find any suggestion in this provision that ownership of the destroyed property must be established for liability to attach. My take on this issue is that ownership of the property is a relevant but not the defining factor; it may be taken into account amongst other evidence that tends to establish that the offence was committed. It follows that failure to prove ownership is not fatal to the prosecution case and to this extent I agree with the learned counsel for the state.*

15. In my view, it is not difficult to see why the offence is not necessarily tied down to ownership of particular property. It is to prevent wanton destruction of property that may lead to lawlessness and people taking the law into their own hands.

16. In this case, the charge sheet did not necessarily refer to a specific parcel of land. What was in issue was the damage to the fence, maize

crop and macadamia tree. These clearly belonged to PW 1. He confirmed in cross-examination that he is the one who had planted the maize. In addition, PW 4 confirmed that the land on which the damage was done was Parcel 5044 and PW 7 did the assessment of the damage of parcel 5044 which PW 6 confirmed was in the name of PW 1. This was sufficient evidence to prove not only that the crops and fence belonged to PW 1 but the parcel 5044 was in the name of the PW 1.

17. In as much as there was a land dispute, I find that the prosecution proved that the evidence pointed to PW 1 as the owner of the macadamia tree, crops and fence as stated in the charge. I also reject any suggestion that a land dispute, of itself, is sufficient to immunize a person from a charge of malicious damage to property. Further, even though PW 1 acknowledge there was a court, such an order would not permit wanton destruction of property. The respondents had an evidential burden to show that the destruction was not malicious and was lawful on a balance of probabilities.

18. When put on their defence, the respondents did not testify. Their counsel purported to produce a court order from the bar which, from the testimony of PW 2 and PW 3, allowed the 2nd respondent to destroy the fence and crops. The court order referred to had been marked for identification but was not produced as the respondents elected not to testify or call witnesses. It therefore could not be referred to in evidence as it is also not a matter for which the court may take judicial notice under **section 60** of the ***Evidence Act (Chapter 80 of the Laws of Kenya)***. In ***Kenneth Nyaga Mwige v Austin Kiguta and Others*** **NRB CA Civil Appeal No. 140 of 2008 [2015] eKLR** where the Court stated that;

> *22. Guided by the decisions cited above, a document marked for identification only becomes part of the evidence on record when formally produced as an exhibit by a witness. In not objecting to the marking of a document for identification, a party cannot be said to be accepting admissibility and proof of the contents of the document. Admissibility and proof of a document are to be determined at the time of production of the document as an exhibit and not at the point of marking it for identification. Until a document marked for identification is formally produced, it is of very little, if any, evidential value.*

19. The totality of my analysis is that the 2nd respondent was part of the group leading members of his family in destroying, unlawfully and maliciously, PW 1's fence, maize crop and macadamia tree. I therefore allow the appeal and set aside the acquittal of the 2nd respondent. I accordingly convict him of the offence of causing malicious damage to property contrary to **section 339(1)(b)** of the ***Penal Code***.

20. This court's jurisdiction as set out in **section 348A** of the ***Criminal Procedure Code*** was amended by the ***Security Laws (Amendment) Act, 2014***. The section allows the Director of Public Prosecutions to appeal against an acquittal on the basis of fact and law and provides as follows;

> *348A. (1) When an accused person has been acquitted on a trial held by a subordinate court or High Court, or where an order refusing to admit a complaint or formal charge, or an order dismissing a charge, has been made by a subordinate court or High Court, the Director of Public Prosecutions may appeal to the High Court or the Court of Appeal as the case may be, from the acquittal or order on a matter of fact and law*
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> *(2) If the appeal under subsection (1) is successful, the High Court or Court of Appeal as the case may be, may substitute the acquittal with a conviction and may sentence the accused person appropriately.*

21. Since I have convicted the 2nd respondent, I now invite the parties to address me on the sentence.

DATED and DELIVERED at MERU this 7th day of June 2018.

D.S. MAJANJA

JUDGE

Appellants in person.

Mr Kiarie, Prosecution Counsel, instructed by the Office of the Director of Public Prosecutions for the respondent.