REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYAMIRA

CRIMINAL APPEAL NO. 74 OF 2016

ABOKO KUMENDA.....................................APPELLANT

=VRS=

REPUBLIC..RESPONDENT

[Being an Appeal from the Conviction and Sentence of Hon. A. P. Ndege – SRM

dated and delivered on the 11th day of February 2011 in the original Keroka

Senior Resident Magistrate's Court Criminal Case No. 999 of 2011]

JUDGEMENT

The appellant was the 1st accused in the court below. He together with his co-accused persons were charged with two counts of Malicious damage to property contrary to Section 339 (1) of the Penal Code.

On count I, the particulars were that on 16th September 2011 at Keroka Township in Masaba North District within Nyamira Province they jointly and unlawfully destroyed a timber fence valued at Kshs. 10,000/= the property of Keroka Pentecostal Church.

On count II, it was alleged that on 17th September 2011 at the same place they jointly wilfully and unlawfully damaged Keroka Pentecostal Church building valued at Kshs. 200,000/=.

They all pleaded not guilty to the charge.

The prosecution called five witnesses. There was no eye witness in respect of the first count but several witnesses including Constable Japhet Ngetich (Pw4) testified that on 17th September 2011 they witnessed the appellant and his co-accused persons destroying the church and that they were all arrested and taken to Keroka Police Station where they were charged.

The complainant (Pw1) testified that he was a Pastor at the church which was destroyed and that he had purchased the land on which the church was built from one Nahashon Mwebi way back in the year 2003. To support this contention, he produced an agreement for sale signed by himself and the said Nahashon Mwebi and two witnesses. The sale agreement is marked as Exhibit 1. The prosecution also produced a broken glass window and implements found at the scene which they alleged were used by the appellant and his co-accused to damage the church (Exhibit 2 – 11). They also produced a Certificate of Registration No. 27939 issued under the Societies Rules, 1968 and photographs of the damaged church (Exhibit 12, 13). Japhet Ngetich (Pw4) testified that he was still investigating a report by Pw1 that the person who had sold the plot to the church had sold it to another person.

When the court put the accused and his co-accused on their defence the appellant testified on oath and while denying that he had committed the offence on 16th September 2011, he admitted having damaged the church on 17th September. He however stated that the land belonged to him and that he was clearing his land by removing the iron sheets structure so that he could build a better one. He stated that he had bought the land and the structure from Nahashon Mwebi who transferred the same to him upon obtaining the necessary consent. The appellant further stated that he had not allowed the church to use the structure which he believed was his. He contended that he had bought the land without any encumbrance and that upon doing a search he had discovered that no such organization as Keroka Pentecostal Church or Pentecostal Calvary Church Keroka existed. He contended that it was him who had hired his co-accused persons.

After evaluating the evidence, the trial magistrate found that although the 1st accused, the appellant in this appeal, had acquired ownership of the land, the structure was being used as a church and the claim by the appellant that the church did not exist or that Pw1 was not a bona fide

member of the church amounted to insulting Pw1's religion and place of worship. He acquitted the accused persons of the charge of Malicious damage and in exercise of what he stated was his discretion under Sections 179 and 191 of the Criminal Procedure Code, proceeded to convict them for insulting, destroying/damaging the complainant's place of worship contrary to Section 134 of the Penal Code.

The appellant was then required to execute a bond of Kshs. 50,000/= to keep peace and be of good behaviour for a period of 8 months. His co-accused were discharged under Section 35 (1) of the Penal Code.

The appellant being aggrieved by the conviction and sentence preferred this appeal. The grounds of appeal are that: -

> **"1. The Learned Trial Magistrate erred in Law and in fact by proceeding to convict and sentence the Appellant for an offence of insult to religion under Section 134 of the Penal Code whereas there was no such charge before him and neither was any credible evidence tendered before him.**
>
> **2. The Learned Trial Magistrate erred in law and fact by violating the Appellant's constitutional rights as spelt out under Article 49, 50 and 51 of the Constitution of Kenya 2010.**
>
> **3. That Learned Trial Magistrate acted in error and demonstrated explicit biasness by proceeding to cancel the Appellant's bail, without basis or cause and convicting and sentencing the Appellant for offence which was never the subject of trial and never proved.**
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> **4. The learned Trial Magistrate erred in Law and in fact by conducting proceedings in a language the Appellant did not understand occasioning miscarriage of justice.**
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> **5. That the Learned Trial Magistrate erred in Law by failing to appreciate that the alleged organization (Keroka Pentecostal Church) the basis of the charge before him and the alleged offence of insulting a religion, was never a registered entity as revealed by Exhibit D6 and thus could not form a basis of any complaint and charge.**
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> **6. The Learned Trial Magistrate erred in Law and in fact by failing to appreciate that charge facing the Appellant was defective."**

The appeal was canvassed by way of written submissions and this court has considered those submissions, the grounds of appeal and the authorities cited by Counsel. I have also, as is my duty as the first appellate court, evaluated the evidence in the lower court while making provision for the fact that I neither saw nor heard the witnesses give evidence. At the risk of being seen to delving into the land dispute between the parties, it is my finding that although there was no evidence to support count 1 of the charge, count 2 was proved beyond reasonable doubt. The appellant defiantly admitted that he had destroyed the church. It was his evidence that the structure was his as he had bought it together with the church. This despite admitting that the matter was under investigation as the complainant also alleged to have purchased the same piece of land. The lawful thing would have been either to await resolution of the dispute or to obtain an order from the court directing the complainant to remove the structure. By taking the law into his own hands he acted unlawfully. The trial magistrate did however acquit him of the charge and as there was no cross appeal by the prosecution, this court cannot **"hold"** the proper sentence as submitted by the Principal Prosecution Counsel.

As for the conviction for the offence under Section 134 of the Penal Code, it is my finding that the same cannot stand. First of all, insult to religion contrary to Section 134 of the Penal Code is a distinct offence and not a lesser offence to that of malicious damage to property contrary to Section 339 of the Penal Code and the trial magistrate did not, with due respect, exercise his power under Section 179 of the Criminal Procedure Code carefully. This is more so because the ingredients of the offence of insult to religion were not proved. The words of that Section are: -

> ***"134. Any person who destroys, damages or defiles any place of worship or any object which is held sacred by any class of persons with the intention of thereby insulting the religion of any class of person or with the knowledge that any class of persons is likely to consider such destruction, damage or defilement as an insult to their religion, is guilty of a misdemeanour."***

There was no evidence that the appellant and his co-accused damaged the church with the intention of thereby insulting the religion of any class of persons or the complainant for that matter. Neither was there evidence that they did so with the knowledge that any class of persons was likely to consider such destruction or damage religion. The complainant did not even allude to it and the trial magistrate erred by imputing it in his judgement. For that reason, I shall allow the appeal, quash the conviction and set aside the sentence.

It is so ordered.

Signed, dated and pronounced in Nyamira this 8th day of November 2018.

E. N. MAINA

JUDGE