



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISII**

**CRIMINAL APPEAL NO.109 & 110 OF 2012 (CONSOLIDATED)**

**(Appeal from original Kisii Chief Magistrate's Court Kisii Criminal Case No.1570/2010 Republic –vs- Transirao Otero & Tom Otero)**

**TOM OTERO & TRANSRAO OTERO.....1<sup>ST</sup> & 2<sup>ND</sup> APPELLANTS**

**-VERSUS-**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

1. Tom Otero hereinafter referred to as 1<sup>st</sup>the appellant and Tansirao Otero hereinafter referred to as the 2<sup>nd</sup> appellant were jointly charged with the offence of, “Malicious damage to property contrary to section 339 (1) of the Penal Code.” The particulars of the offence are that, “ On the 4<sup>th</sup> September 2010 at Bogiakumu location in South Kisii District within Nyanza province jointly willfully and unlawfully damaged thirty five (35) irons sheets valued at Kshs. 26,250, the property of Peter Nyangaresi that were in a house that was under construction.

2. The appellants were found guilty of the offence of malicious damage to property and was fined Kshs. 20000/- or serve 3 months imprisonment. The appellants being aggrieved by the conviction and sentence has filed this appeal. Their grounds of appeal are as follows that ;

1. The Learned Trial magistrate erred in law and in fact in not appreciating the Provisions of Section 45 of Cap 160 Laws of Kenya and Section 6 and 22 of Cap 302 Laws of Kenya

2. The learned Trial magistrate was very wrong in law in holding that the complainant was the owner of the disputed land and yet she found as a fact that the person who sold the land to him did not have Title to pass and that the land was registered in the name of the deceased person who died in 1981 and no Succession had been done.

3. The Learned Trial Magistrate erred in Law in fact in holding that the Tribunal gave the disputed land to the complainant and since there was no stay orders he was entitled to proceed work and use the Suit Land.

4. The Learned Trial Magistrate totally misunderstand the Law and misapplied the same as regards the ownership of the disputed land when she held that the complainant was legally the owner of the disputed land.

5. The Learned Trial Magistrate intentionally refused to appreciate the fact that the complainant had committed an offence punishable in Law.

6. The learned trial Magistrate erred in Law and in fact in convicting the Appellant on a piece of evidence which was contradictory in material particulars.

7. The Learned Trial Magistrate erred in Law in believing the prosecution evidence as consistent and water tight which evidence was completely inconsistent and unbelievable and disjointed and/or with a lot of holes or gaps.

8. The Learned trial magistrate erred in law and fact in reflecting the Appellants evidence together with all his witnesses and the documents/exhibits he produced which piece of evidence was consistent and water tight.

9. The Learned Trial Magistrate erred in law and fact in not appreciating the fact that there was bad blood between the Appellant and the complainant because of the long standing land dispute.

10. The Learned trial Magistrate convicted the Appellants on a charge which had not been proved.

11. The sentence of the Learned Trial Magistrate was against the weight of evidence.

3. As the first court of appeal it's my duty to reconsider the evidence, evaluate and draw my own conclusions in deciding whether the judgment of the trial court should be upheld, bearing in mind that the trial court had the advantage of hearing and seeing the witnesses. (see **Okeno vs. R [1972]E.A pages 32-37**)

4. Pw1 Peter Nyangaresi Ombati the complainant testified that on the 4/9/2010 a Saturday he was working on his house. Tansirao Otero went to him and asked him why he was working Saturday and he replied he would rest on Sunday. Tom his son also went to him and asked him the same question and he gave him the same answer. Shortly thereafter Caren Otero's wife went screaming asking why they were working on Saturday. Thereafter the 2 appellants went with pangas and started damaging his iron sheets and poles. He called the chief whom informed him to go and collect report at the chief's camp. He did so and he was given two officers who went with him to his home and the 2 appellants were arrested. He identified photos of the house, iron sheets and poles which were damaged. He testified further that the land he was constructing the house on was sold to him by Joseph Mandi in 1999 the seller died before he got the title. Issues came up after the seller died. During cross examination he testified that Tansirao and Tom worship on Saturdays and that he saw them on the material day. The rest on his cross examination was on how he got the land and the photos he had identified in court. He denied bringing the appellants to court because they had prevented him from tilling the land. He was with 2 boys his son and a neighbor. The iron sheets were taken to Gensoso police station. Pw2 Elvis Atima testified that on the 4/9/2010 he was assisting his dad to construct a house on land he had bought. The appellants went and asked them why they were working. They had screams they went to check and saw Tom and Tansirao approach armed with pangas. They ran away. The 2 began damaging iron sheets and poles. His father called the chief. They watched them damage the iron sheets. Tansirao was arrested in church and Tom in his house. During cross examination he stated that the 2 appellants were known to him, they went with his father to the AP camp at 10am. 35 iron sheets and 30 poles were destroyed. That the police omitted to record some information in his statement, that the 1<sup>st</sup> accused came and left and 2<sup>nd</sup> accused too came. Pw3 Wycliffe Ouro testified that on the 4/9/10 at 10.00am he was working in the neighbor's farm. He saw the appellants go to where Pw1 and Pw2 were constructing a house. The 1<sup>st</sup> appellant spoke to Pw1 and left. He heard screams and saw the 2 appellants with pangas. The complainant ran away. They damaged iron sheets and poles. Pw4 No 75788 P C Nuno recalled he rearrested the appellants from AP's on allegations that they had damaged a structure under construction on the complainant's piece of land. He also received 3 iron sheets that had been cut using a piece of panga. He charged the appellants with malicious damage to property. Pw5 No. 94221743 testified that on the 4/9/10 he was at the chief's camp Bogiakumu patrol base when they received a report from a middle aged man that one known to him had destroyed his house by cutting iron sheets and that he had ran away for security. He rushed to the scene and the appellants were not there. The complainant directed them to the appellants' home where they arrested them. They did not find the pangas used but he had the iron sheets removed. Pw6 No.76925 visited the scene of malicious damage on the 5/9/10 at Nyaono village with P.C Nono. He found a house under construction with two iron sheets removed he took photos of the house and iron sheets.

5. The 2<sup>nd</sup> appellant Tansirao gave a sworn statement. He testified that he knows the complainant. He is preacher at Roho Israel church. On the 4/9/10 he was at his home at 6am. Church began at 8am. 3 cops came at 10.00am in the company of the complainant and he was arrested. He was told he had damaged his house. He never damaged the complainant's house. The said house was constructed in his father's land and there is a pending case in court. He is a church elder. He does not know why Peter alleges he damaged the iron sheets. Dw2 Tom Okenyo the 2<sup>nd</sup> appellant gave a sworn statement. He testified that on the 4/9/10 he was in his house his father and fellow worshippers were outside the house. He heard a commotion outside, it was alleged a house had been damaged. He went out briefly and went back to his house. Shortly thereafter his daughter told him that his father had been arrested. He went to check and the complainant told the cops that he was also there. He was arrested. During cross examination he denied damaging the complainant's iron sheet. He saw Elvis Atima record a statement at the police station. Dw3 Bonchari Bomariba testified that the 2<sup>nd</sup> appellant is a church elder. He is also a church elder. They worship on Saturdays. 4/9/10 was their Sabbath day. He went to the 1<sup>st</sup> accused's home at 6am and he opened the church at 8am. At about 10am Tansirao was arrested. He never left the church. During cross examination he told the court that he was blind and that Tom was not at Church. Dw4 Esther Kerubo testified that on the 4/9/10 she was at church at Roho Msalaba at Tansirao home. She is an usher. She arrived at 7am. The church began at 8am. She saw 3 cops they arrested Tansirao and his son Tom. She never at any time see Tansirao leave the church. Dw5 Jane Nyachoka testified that her late husband Joseph Merari rented land to the complainant for 10 years in return for construction of a house. Her husband is the brother of Tansirao. After her husband's death Peter began claiming the land. She asked Peter to leave the land since his tenancy had ended. Peter took her to the tribunal.

6. At the hearing of this appeal Mr. Momanyi submitted he would argue grounds No.1 to 5 as the 1<sup>st</sup> ground. Ground No.6 as one, 7 and 8 as the 3<sup>rd</sup> ground, ground No.9 independently, grounds No.4 and No. 10 & 11 as the 5<sup>th</sup> ground, and grounds 12& 13 as the 6<sup>th</sup> ground. On grounds No.1 to 5 it was submitted that the property where the alleged house was standing belonged or was registered in the name of the deceased who died in 1981. The complainant alleged he bought the property from a son of the deceased. The son is also deceased and left a wife. As per the evidence of the wife DW5 late husband told her he had leased the land to the complainant and after the expiry of the 10 years the she requested the complainant to move out of the land and then he went to the tribunal at Suneka. The tribunal documents were produced. The High Court quashed the proceedings when the Tribunal awarded the land to the complainant. The person who sold the land had no capacity to sell the land and didn't pass any title to the complainant. The alleged seller was intermeddling with the deceased's estate under section 45 of Cap 160. That the magistrate had a legal duty to so find that they were intermeddling with the estate. The complainant admitted there was no succession done. Under Section 6 & 22 of Cap 302 if the complainant bought that land it is a mandatory requirement that he must get a land control consent within six months. That the charge was malicious damage to property. All agreements produced became null and void within six months and we refer the court to Section 22 of Cap 302.

7. On the 6<sup>th</sup> ground it was submitted that the court will evaluate the evidence of the lower court. It was contradictory and the court relied in that evidence to convict the 2 appellants. That what was contained in the statements of the prosecution witness which were recorded when the facts were fresh in their minds is not what was stated in court. On grounds 7 & 8 it was submitted that the court will notice from the proceedings that the defense evidence was not rebutted. DW1 to DW3 were very consistent and especially DW4 who stated that the 2<sup>nd</sup> appellant being Tansirao Otero who was said not be in the scene of crime was in church as an elder and was conducting the worship. DW4 confirmed that the 2<sup>nd</sup> appellant was in church from 8 up to time of arrest at 11.00a.m. Though the complainant said the church is a shed all the witnesses said they were meeting under a tree. That the complainant house is about 250 meters from the worship place. The iron sheets removed from the house were not produced in court. They were taken to Lesoso police station but were not produced. Even the pictures produced by the prosecution are suspect as the complainant was not featured in any of them. DW4 said he went to the scene and took the

pictures. There was no complainant to point out this is my house and this not was destroyed. That this was a fabrication of the charge against the appellant because of bad blood of a long pending land dispute which had even gone to the Tribunal. There is doubt if there was damage to the house or iron sheets. If the 2 applicants were involved. On grounds No. 9 to 13 it was submitted that there was no sufficient evidence to warrant the court to convict the appellants. There were some inconsistencies in the evidence and there was doubt which should have been given to the accused persons. The judgment was against the weight of evidence and we ask the court to quash the conviction and set aside the sentence.

8. The appeal was opposed. It was submitted that the main question the trial court was faced with is whether the 2 appellants destroyed the property of the complainant. PW1 testified to seeing the 2 appellants destroying his house. His testimony was corroborated by PW2 and PW3 who also saw the 2 appellants destroy the house. The court addressed the issue of ownership of the house. As per the time of judgment the dispute had been resolved by the Tribunal in favor of the complainant. Even though the complainant had no title it was a fact confirmed by the appellants in their defense that the complainant had an interest in the disputed land. Both the applicant acknowledged the complainant was building a house in the land. Their defense was merely a denial that they were involved destroying the house. No judgment was produced to reverse the Tribunal's decision and therefore at the time of destruction of the house it was the complainant and his witness's evidence which placed them at the scene of destruction. There is no requirement that the complainant features in the photos of the destroyed and in any case at page 9 the complainant in re-exam that he appeared in one photo and they were also shown to PW2 who confirmed it is the house he saw destroyed. That the fact that there was a land dispute didn't give them a right to destroy the complainant's property, that the appeal should be dismissed.

9. Mr. Momanyi in reply stated that it was acknowledged there was a land destroyed therefore there was bad blood between the parties. That the fact that the complainant went back to the Tribunal was sufficient reason to frame the charges against the appellants.

### **DETERMINATION**

The appellants were convicted of malicious damage to property. Grounds 1 to 5 relate to the issue of ownership of the land and the tribunal findings. I note that the trial magistrate made findings on the ownership. The issue before the trial court was not ownership of the land but the issue of malicious damage to property. The appellants' conviction was not based on ownership of the land but what happened on the 4/9/2010. It was not the trial magistrate finding that the appellants were convicted because of the land dispute. The findings on the ownership of the land was not the basis of the conviction but the actions of the appellants on the 4/9/10. The trial magistrate's findings was that the testimony of Pw1 was corroborated by that of Pw2 and Pw3 and that Pw4, Pw5 and Pw6 visited the scene and witnessed the damage that was occasioned to the complainant's house. It was stated further that the appellant's action were malicious and that from the evidence it was the complainant was claiming to have bought the land from the 2<sup>nd</sup> appellant's brother. The trial court stated that the evidence of the prosecution witnesses as against the appellants was consistent and watertight. That the incident happened in the day light in the presence of Pw1, Pw2 and Pw3 and the photos and the iron sheets produce in court as exhibits speak for themselves.

10. The next set of grounds 7, 8, 9 and 10 relate to the evidence adduced by the prosecution. It was submitted that the trial court convicted the appellant on contradictory evidence. Mr. Momanyi submitted that the evidence of the witnesses contradicted their statements. Counsel did not elaborate on the contradictions. I have reviewed the evidence of the 3 witnesses the complainant Pw1, his son Pw2 and Pw3 the neighbors worker. They gave evidence on what they heard and observed on the 4/9/2010. They saw the appellants go to the place the complainant was constructing and the 2 returned with pangas and destroyed the iron sheets and poles. When challenged about their statements, Pw1 stated *"I read the statement after it was recorded before signing. ... true I had 2 sons at the scene, Atima, Elvis and Jephther Momanyi. Japher is too young. He could not record a statement. I told cops the accused threatened to cut us into pieces. I did not tell the court this. I don't see any difference between what I have stated in court and what is in my statement"*. Pw2 stated as follows, *"It is true I went to the construction site at 10.00am. They omitted to record some information on my statement. ... They omitted to state that Accused 1 came and left and Accused 2 also. They never included that Tansirao's wife screamed. The main points are the ones that recorded in my statement. What I have told court is also true"*. Pw3 had this to say on the statement, *"I am telling the court what I witnessed. Some information was omitted from my statement. They only wrote that I saw accused come with panga."* From the cross examination counsel for appellants took issue with what was not in the statement but not their evidence in court. A statement which recorded before trial contains the evidence to be adduced. It is not made on oath. The statements made on oath are what the trial court considered and relied on and I find no contradictions in the said statements. From the evidence of the 3 witnesses Pw1, Pw2 and Pw3 they saw the appellants approach the complainant and return with pangas which they used to cut the iron sheets and poles. The appellants in their defense only testified of their arrests. There is nothing in the evidence of the three witnesses that indicates they were out to fix the appellants or to frame them. The defenses raised do not dislodge the prosecution case. The defence witness too spoke only of the arrest of the appellants. The witnesses gave clear evidence of what they observed. The actions of the appellants' can only be termed as malicious as they had no good reason to destroy the complainants iron sheets and poles. Even if they were unhappy with the complainant's action of working on Saturday on land they claim is theirs they had no right to destroy the property of the complainant. I find that the prosecution evidence was consistent, believable and had no loop holes.

11. On the ground that the trial court failed to appreciate the bad blood between the appellants and the complainant. In the judgment the trial magistrate noted that the appellants had issues with the complainant working on Saturday and noted that there was the issue of land ownership which she then dealt and concluded that the appellants had no right to interfere with the complainant's possession. Having noted this the trial court observed that the evidence of the 3 witnesses was consistent and their evidence was further corroborated by the photos produced in court. The exhibits were seen by Pw5 who rushed to the scene after getting the report from the complainant, he saw the irons which were still on the roof damaged. There was damage to the iron sheets and poles as was reported. The damage was seen by the two officers who visited the scene. The submission that the complainants photo was not in any of the photo does not cast any doubt on the prosecution evidence, it's not a must that one must take photos with the damaged items.

12. On grounds 11, 12 and 13, there is sufficient evidence upon which the conviction was based. The appellants were convicted as charged of the offence of malicious damage to property and were fined. The sentence provided is up to five years imprisonment. The appellants were fined Kshs. 20,000 in default 3 months in jail. The sentence was fair and justified. All in all there is no merit in the appellants appeal. It is dismissed.

**Dated signed and delivered this 1<sup>st</sup> day of November 2018**

**R.E. OUGO**

**JUDGE**

In the presence of;

Mr. Momanyi For the Appellant

Mr. Otieno For the State

Appellants In person

M/s Rael Court/ Clerk