



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 73 OF 2017**

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

**GREGORY NGONGA WARINGA.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

1. The Appellant Gregory Ngonga Waringa was charged, tried, convicted and sentenced to serve 6 months imprisonment on 27/7/2017 by Hon. C.A. Okore in Siaya PM Cr. Case No. 691 of 2013. He was charged with Malicious Damage to property **contrary to Section 339(1) of the Penal Code**.

2. It was alleged that on the 16<sup>th</sup> day of July 2013 at Bar Olengo sub-location in Siaya District within Siaya County, he willfully and unlawfully damaged assorted trees on Land Parcel no. SIAYA/BAR OLENGO/182 valued at Kshs. 259,350/= the property of Maurice Odhiambo Aloo. This is as per the substituted charge sheet read out to the Appellant on 3/9/2014. The Appellant pleaded not guilty and the trial commended on 18/9/2014.

3. In determining this Appeal, the court must fully understand its duty as the first Appellate court as stated in the case of **Okeno v. R [1972] EA 32** and **Kiilu & Another vs. Republic [2005]1 KLR 174** which is to subject *“the evidence as a whole to a fresh and exhaustive examination* and for this court to arrive at its own decision on the evidence, it must weigh evidence and draw its own conclusions and its own findings while making allowance for the fact that the trial court had the advantage of hearing and seeing the witnesses.

4. **On** what transpired during the pendency of the case in lower court, **PW1, Maurice Odhiambo Oloo** testified that he was a teacher from Bar Malanga sub-location. That he is a joint registered owner of land parcel no. Siaya/Bar Olengo/182 with his elder brother William Omondi. That the land had many indigenous trees uphill on 16/7/2013 he went to till the same land and saw three people cutting the trees. He approached them and asked them why they were cutting trees but they kept silent. He called William and Samson, his brothers who went to the scene and as they approached the people cutting down trees, two of them ran away and the appellant was arrested and escorted him to Siaya Police Station. As at that time, the title was registered in their late father’s name. He identified the Title Deed and the said certificate which were marked MFI & MFI 2 respectively. He stated that he had known the accused for a long time. On being cross examined by the advocate of the appellant Mr. Jamsumba, PW1 stated that he was a teacher at Rakwom Primary School and that the land in question belonged to his father Aggrey Aloo Obare. He stated that he had never done succession to transfer the land in his name. He stated that he knew the accused very well and the denied that they shared a boundary. He also denied that there was any land dispute between his father and the appellant’s father. He maintained that they caught the 3 people cutting down trees. He denied beating the appellant but admitted that they tied him up and escorted him to the police station using their vehicle. He denied recovering the panga from the appellant. He could not tell the number of trees cut and he could not quantify the loss suffered. He denied that the police visited the scene. He denied that there was any grudge between him and the appellant.

5. **PW2, William Danish Omondi**, a farmer from Bar Malanga testified that on 16/7/2013 he was at his home when his brother called him at about 11.30am and informed him that he had seen 3 people cutting down trees in their shamba. He proceeded with his brother Samson to the scene on LR No. Siaya/Bar Olengo/182. On arrival, they saw 3 people but two ran away. They were cutting trees and arranging them on the ground. They caught up with one of them and took him to Siaya Police Station. He identified the accused as Gregory Ngonga Wasonga. He stated that the trees were indigenous but he could not know their number. On being cross-examined Mr. Jamsumba Advocate, PW2 stated that he was born in 1957 and that he jointly owned the land in question with his brother Maurice Odhiambo and that they had inherited it from their father Aggrey Aloo Obare in 2013. He died in 1987. Succession was done in 1988. He stated that the offenders were using a panga to cut the trees. He could not tell how many trees they were. He stated that he did not know if the trees were never taken to the police. He used his car to ferry the accused to the police station. He denied that they tied him up. He denied knowing the accused’s father. He denied that there was any land dispute.

6. He denied seeing the accused cut the trees but that he was carrying a panga which he had not known where it went. He denied telling that he saw the accused with a panga. He stated that he had a grant of Letters of Administration but that he could not get a confirmed grant. In re-

examination, he stated that the land previously belonged to his father but they did succession vide Succession No. 63/1988 in Siaya Court and they got it transferred in their name.

7. **PW3, Samson Adongo Aloo** testified that he came from Bar Malanga sub-location and a businessman. That on 16/7/2013 his brother Maurice Called Denis who was with PW3 in the homestead and informed him that some people were cutting their trees, to burn to charcoal. Two people ran away and they arrested one and handed him over to Siaya Police Station and recorded statements. They presented the title deed and he identified the person. In cross examination by Mr. Jamsumba Advocate, PW3 stated that they tied the suspect with a rope and escorted him to the police station and that he resisted arrest. He denied that they assaulted the suspect. He did not know in whose name the title deed was. He stated that he saw the accused cut the trees and saw him running away with the panga but he could not tell where he threw it. He could not tell where the cut trees went. He stated that he was with Maurice and Denis and Maurice took the forester to the scene and the forester did a report. He denied cutting the trees. He could not tell if the logs were taken to the police station. In re-examination he stated that the trees were not in court. PW2 and PW3 were recalled for further cross examination.

8. **PW2, William Denis Omondi** stated that he saw the accused and other others on his father's land and that they ran away and left behind the cut trees which trees had not been produced in court. He stated that the said trees had been cut into small piece which could be carried by a police vehicle but that the police never carried them in his presence. He denied taking the trees away albeit they were not on the farm. He denied that any of his relatives took the trees away.

9. He denied knowing if there was any land dispute between his father and the accused person's father. He denied knowing the accused person's father. He was shown judgment in Court of Appeal 62/1979 and stated that he was first learning that there had been a court case between them. He stated that his brother PW1 Maurice Odhiambo Aloo took the forester to the scene. He maintained that he arrested the accused and sat him at the back of his small can and took him to the police station without exhibits.

10. In re-examination by the prosecution PW2 stated that he was not related to the accused and that he saw accused ran away and he caught him 10 metres away. He maintained that the trees were cut into pieces. He denied having seen the judgment DMFI-2.

11. **PW3, Samson Adongo** was also cross examined by the defence counsel and reiterated that his father is called Aggrey Oloo and that he was present when the accused was arrested. That PW1 called them when he heard trees being cut.

12. He also maintained that when they proceeded to the scene together with PW2 they found 3 people cutting the trees and the said people ran away but the accused was caught while the other two escaped. He stated that the accused had a panga which was recovered and handed over to the police but he had not seen the said panga in court.

13. He stated that the police took away the trees which had not been produced in court. He stated that Maurice took the police to the scene. That trees were chopped in short pieces as if they wanted to burn charcoal.

14. He denied knowing if his late father had any land dispute with the accused father. He could not know when the trees were collected. In re-examination by the Prosecution, PW3 stated that the trees were cut into pieces of about 2 feet each albeit he did not measure them.

15. PW1 was also recalled for further cross examination and he confirmed on Oath that he was one of the people who arrested the accused and that it was him who called his brothers to help him arrest the accused.

16. He reiterated his evidence that the land in issue was initially in his father's name but was now in his joint name with William his elder brother who did the transfer process but denied appearing before any court for the name change. He reiterated the name of his father as Aggrey Aloo Obado.

17. That he was downhill when he saw accused on top of the hill. That the land is in Mar Malanga sub location which used to be Bar Olengo sub-location. It maintained not knowing of any dispute between his father and accused person's father.

18. He also maintained that him and his two brothers went to where accused was, after he called them. He stated that the accused was alone harvesting the trees and he had a panga. He stated that the accused saw them and started running away but they caught up with him after about 20 - 30 metres.

19. That the area was bushy and accused tried to hide but they managed to catch him. He stated that he saw trees in court and he took the forester to the scene on the same day of the incident. He named the trees in Dholuo but on further questioning he said that the trees were never taken to court.

20. He stated that he learnt that after 2 days he learnt that someone had taken away the trees as police did not protect the scene of the crime nor take the trees to the police station. He denied taking police to the scene and stated that he left his elder brother following up the case. He stated that they only tied the accused person's hands but never assaulted him.

21. In re-examination by the prosecutor, PW1 stated that the land was owned by his father but ownership changed to him and his brother and that the accused was found cutting trees on the very land and when he saw them, he ran away. He denied knowing if the police went to the scene and stated that the trees were never brought to the court.

22. PW4 Romanus Oduor, an Ecosystem Conservation Officer in Siaya County testified that he was a holder of a Diploma in Forestry with 39 years' experience. That he did a report of damaged trees on Plot No. 182 Bar Olengo, Siaya. He visited the scene on 16/7/2015 and saw assorted trees damaged. They were fell down and muram dug up and taken away. He assessed the cost of the damage to be Kshs. 259,150/= . He produced the report as PEx 3.

23. In cross examination by Mr. Ooro Advocate for accused, PW4 stated that he was a Forest Officer and a Valuer as he was taught how to value. He stated that he visited the site personally after the complainant took him to the scene. He did not find anyone else there. He denied knowing the accused. He did not have a Surveyor to confirm the parcel of land.

24. PW5, No. 63518 CP Francis Mutinda testified that he was attached at Siaya Police Station. He took over investigations from CPL Penina who was transferred to Nairobi. He stated that on 16/7/2013 the Complainants William and Maurice brought the accused to the station after arresting him when they found him cutting down trees on their land Siaya/Bar Lengo/182. They recorded their statements and booked the accused to the cells and the complainants referred to the forest officer for assessment of damages after which they brought a report and Land Title Deed, after which the accused was charged. He produced Title Deed as exhibit 1 and Title Deed as PEx 2.

25. In cross-examination he confirmed that he only took over investigations from the initial I/O and that he did not visit the scene.

26. The accused person was found to have a case to answer and placed on his defence. He called 2 witnesses. He gave his testimony on oath and stated that he lived in South East location in Alego. He was a farmer. He denied the charges and stated that on 16/7/2013 he was on their shamba No. 497 which neighbours the complainant's land which land belongs to his late father although he did not have any documents to show that the land No. 497 belonged to his father. He maintained that the complainant's land no. 182 neighbours land no. 497.

27. He stated that on the material day he was herding animals when his neighbors went and beat him up on allegations that he was cutting then trees which he denied as he was on his father's land. His father died in 2009.

28. In cross examination, he stated that he was on the shamba and that no trees were being cut at that time. He stated that the allegations made by the complainants were false. That his witness took to him food and found him arrested,

29. DW2 Millicent Lubanga from Randago Magwa Village testified that she was a farmer and wife to the accused. She stated that the accused left to graze cattle in the fields on a date she could not recall and on 16/7/2013. She took him food and found cattle alone as the accused had been arrested by their neighbours. She drove cattle home and followed the accused to the police station.

30. DW3 Pius Owino from Randago stated that accused was his neighbour and that on 16/7/2013 he was at the farm with the accused and when he went to bring food, he found cattle alone. He look cattle at home. He denied seeing the accused cut trees.

31. The trial court found that the prosecution had proved its case against the accused person and dismissed the defence as afterthought. She considered the allegations that the 2 parcels were neighbouring and held that they could not be as one was in a different location from the other and that the defence witnesses were not at the scene at the alleged time of offence; further, she found the Prosecution witnesses to have been consistent and their evidence cogent. She convicted the accused as charged and sentenced him to serve 6 months imprisonment on 27/7/2017.

32. Being dissatisfied with the conviction and sentence, the Appellant filed his Petition of Appeal on 9/8/2017 setting out 7 main grounds of appeal namely:

***(a) That the Learned trial magistrate erred in law and in fact by convicting the Appellant when the prosecution had failed to prove its case beyond reasonable doubt.***

***(b) That the Learned trial magistrate erred in law and in fact by convicting the Appellant without ascertaining that the land where trees were allegedly cut from is SIAYA/BAR OLENGO/182.***

***(c) That the Learned trial magistrate erred in law and fact by failing to find that the police officers did not investigate the complaint presented by the complainant by: -***

***(i) Failing to visit the alleged scene of crime.***

***(ii) Failing to secure the scene of crime.***

***(iii) Failing to take custody of the exhibits (the unlawfully harvested trees) if any***

***(iv) Failing to request a surveyor to ascertain and/or verify that the land where the trees were allegedly harvested from was SIAYA/BAR OLENGO/182 registered in the name of the complainants.***

***(d) That the Learned trial magistrate erred in law and in fact in shifting the burden of proof to the accused person (Appellant).***

***(e) That the Learned trial magistrate erred in law and fact in asserting that the Appellant did not prove the proximity of the land that belonged to his late father and that that belonged to the complainants.***

33. The appeal was canvassed by way of oral submissions on 8<sup>th</sup> October, 2018 with Mr. Ogonda advocate appearing for the appellant whereas Mr. Okachi Senior Principal Prosecution Counsel appeared from the Respondent.

34. Mr Ogonda submitted that the Appeal challenges judgment and decision in Siaya SRM Cr. Case No. 691/2013 delivered in 27/7/2017 Hon. C.A. Okore. He relied on the Petition of Appeal and all the 7 grounds of appeal. On ground one, it was submitted that the conviction of the appellant was not sound because the prosecution failed to prove his guilt beyond reasonable doubt. Further, that the trial court failed to

appreciate that the allegations that the appellant destroyed trees from LR Siaya/Bar Olengo/182 were never proven.

35. That there was no sufficient evidence linking the appellant with the offence charged. That ground 3 clearly analyses the failures of the trial court. In ground no. 4, it was submitted in contention that the trial court shifted the burden of proof from the prosecution to the accused person, yet the law is clear that he who alleges must prove.

36. The appellant's counsel urged the court to find that the shifting of the burden of proof was erroneous.

37. On the issue of ownership of the land where the trees were allegedly cut from, it was submitted that the trial court assumed proximity of the land. That there is a long standing land dispute between the family of the complainant and that of the accused. That there was aggression from the complainant's family which would have been a mitigating factor in the entire circumstances.

38. It was further submitted that when the appellant was put on his defence, the trial court rubbished it out as an afterthought yet it was evidence on oath. That the trial magistrate did not appreciate and analyze that evidence by the defence.

39. It was further submitted that the trial court failed to discern that the prosecution evidence was all contradictory and activated with malice. Counsel urged the court to examine the record entirely and allow the appeal and quash the conviction and set aside the sentence of the lower court and set the appellant free.

40. Mr. Okachi for the State opposed the appeal contending that there were no sufficient grounds advanced to interfere with the lower court's decision. He relied on the court records, facts and evidence - oral and documentary as advanced by the prosecution and maintained that the prosecution adduced watertight and uncontroverted evidence. He further denied that the trial court shifted any burden of proof to the Appellant.

41. It was the Respondent's submission that the Appellant was given a chance to cross examine witnesses and that the prosecution case was consistent. Further, that the Appellant was claiming under his deceased father's ownership of the land and he had the opportunity to prove that he owned the trees which he cut but that he did not. Counsel maintained that the Prosecution case was proved beyond all reasonable doubt and urged the court to uphold the decision of the Lower court.

## **DETERMINATION**

42. I have carefully considered the evidence adduced by both the prosecution and the defence in the lower court, the findings of the trial court, the grounds of appeal and the submissions for and against the appeal. None of the parties relied on any authority to advance their respective positions.

43. In my view, the main issue for determination is whether the prosecution proved their case against the appellant beyond reasonable doubt to warrant the conviction and sentence meted out on the appellant and therefore whether this appeal is merited.

44. What this court observes from the onset is that the trees allegedly cut by the appellant were never produced in court and neither were any photographs of the said trees as allegedly assessed by the valuer taken and or produced in court as exhibits.

45. This being a criminal case, the burden of proof lay on the prosecution to establish that the trees were cut and that indeed the said trees belonged to the complainant and that the cutting of the said trees was malicious. In addition, there was no proof that the land in question belonged to the appellant and that therefore the trees belonged to him. No letters of administration intestate were also produced to show that the land in question had been succeeded from the complainant's father as alleged in his evidence. The appellant is also alleged to have been arrested with a panga used to cut the trees but the said panga was never produced as an exhibit and no explanation was given as to why the same was not produced. None of the witnesses testified that they saw the appellant cut the trees.

46. The prosecution was under a duty to prove beyond reasonable doubt that the cutting of the trees was willful and unlawful. The key words in the offence of malicious damage to property are that the damage must have been done 'willfully' and 'unlawfully'. That willful and unlawful act carries with it the intention and cannot therefore be complete unless *mens rea* is proved.

47. In addition, the act must be attributed to the person charged 'directly' because in the offence of this nature, unlike in civil jurisdictions vicarious liability cannot attach. This is because malice by its own nature is a conception of the mind which cannot be assigned.

48. It was therefore the duty of the prosecution in this case to prove beyond reasonable doubt that the appellant willfully and unlawfully damaged the alleged trees.

49. The prosecution evidence in my view fell short of the threshold of proof beyond reasonable doubt.

50. In the end, this appeal herein against conviction and sentence is allowed. The conviction of the appellant by the trial court is quashed and sentence set aside. The appellant is set at liberty unless otherwise lawfully held. The surety is discharged. Security documents to be released to sureties forthwith.

51. Orders accordingly.

**Dated, Signed and Delivered in open court at Siaya this 4<sup>th</sup> Day of December 2018.**

**R.E. ABURILI**

**JUDGE**

**In the presence of:**

Appellant Gregory Ongonga

Ms Odumba Prosecution Counsel for state

Mr Ogonda Advocate for Appellant

CA: Brenda