REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL APPEAL NO. 92 OF 2013

SIMON KIAMA NDIANGUI…..…….....APPELLANT

VERSUS

REPUBLIC…….....RESPONDENT

(Appeal from original conviction and sentence in Nyeri Chief Magistrates Court Criminal Case No. 1161 of 2011 (Hon. J. Wambilyanga, SRM) delivered on 13th September, 2013)

JUDGMENT

The appellant was charged with two counts of the offence of malicious damage to property contrary to **section 339(1)** of the **Penal Code**; in the 1st count, it was alleged that on 7th day of December, 2011 at Embaringo village Embaringo sublocation in Kieni West district within central province, jointly with others not before court, the appellant willfully and unlawfully damaged barbed wires all valued at Kshs 159,000/= the property of John Gicunju Ithatu. The particulars in the 2nd count were that on the same date and place, the appellant jointly with others not before court, willfully and unlawfully damaged barbed wires and posts all valued at Kshs 29, 450/= the property of Margaret Wangeci.

The appellant pleaded not guilty to the charges; at the conclusion of his trial, the appellant was convicted of the 1st count and fined Kshs 30,000/= and in default to serve 3 months in prison. He was dissatisfied with decision of the magistrates' court and therefore he appealed to this Honourable Court against both the conviction and sentence; in his petition of appeal filed in court on 25th of July, 2013 he raised the following grounds of appeal:

1. The learned magistrate misdirected herself in fact and in law by not appreciating the fact that the land on which the alleged damaged fence was erected does not belong to any of the complainant;

2. The learned magistrate misdirected herself in law and in fact by completely believing the prosecution witnesses despite the evidence of the prosecution being grossly contradictory and therefore unreliable;

3. The learned magistrate misdirected herself in fact and in law by not appreciating that the prosecution did not produce any implement allegedly used in the commission of the offence;

4. The learned magistrate misdirected herself in fact and in law by not appreciating that the prosecutor did not produce any photographs of the crime scene by the scenes of crime personnel to support the charge;

5. The learned magistrate erred in fact and in law by not considering the fact that the appellant had

a solid defence and by completely disregarding the evidence tendered in defence of the appellant which she regarded as a sham;

6. The learned magistrate erred in law and in fact by convicting the appellant against the weight of evidence.

The thrust of the appellant's case, as far as I can gather from the written submissions filed by his counsel in support of these grounds, hinged on the ownership of the land on which the destroyed fence was erected. He urged that the land did not belong to the complainant and the dispute over its ownership was pending for determination in the Environment and Land Court. Without proof of ownership of the land, so he submitted, the prosecution could not prove the offence of malicious damage to property. In support of his submissions, the learned counsel cited **High Court decision in Nairobi High Court Criminal Appeal No. 800 of 2002 Francis Ndungu Kinuthia versus Republic** in which the Court ruled that since the state admitted the ownership of the land went to the root of the two offences with which the appellant had been charged, a conviction of the offence of malicious damage to property could not be sustained when that very fact of ownership had not been proved; the court found as a fact, that indeed the complainant in that case had been arrested and charged for forgery of a court order which apparently formed the basis of the appellant's conviction. In the same vein counsel also relied on the High Court decision in **Criminal Appeal No. 127 of 2009 (Meru) Joshua Thuranira versus Republic** where the question of ownership of land was tied to the destruction of trees growing on the land. The court held that without the resolution of this question, the trial court erred in proceeding on the presumption that the land belonged to complainant and therefore the damaged property was also the complainant's.

The learned counsel also urged that the prosecution evidence was contradictory and in any event, there was no proof of the destruction of the fence since neither the photographs of the alleged destroyed fence nor the implements employed to destroy it were produced in court.

On his part, the learned counsel for the state opposed the appeal and urged that four of the prosecution witnesses confirmed that the appellant and his son destroyed the fence and barbed wires which the appellant himself conceded belonged to the complainants.

On the question of ownership of the land, counsel urged that lack of proof of ownership is not a licence to wanton destruction of property. In this regard counsel relied on the decisions in **Stephen Njoroge Kariuki versus Republic (2009) eKLR** and **Patrick Wafula Kabaru versus Republic (2005) eKLR** where the courts held that lack of proof of ownership of land on which properties are damaged, is not a sufficient defence to a charge of malicious destruction of property.

To appreciate the appellant's case and the submissions by both his counsel and counsel for the state, it is important that this court looks at the evidence adduced at the trial. The fresh evaluation of evidence at this appellate stage is also mandatory and a right to which the appellant is entitled. At the end of this exercise, this court may come to its own conclusions that may turn out to be different from the conclusions arrived at by the magistrates' court though it must be borne in mind that the latter court had an advantage of seeing and hearing the witnesses. **(See Okeno versus Republic (1972) EA 32).**

The prosecution evidence revolved around two issues; firstly, whether the complainant's fence was destroyed and, secondly, whether it was the appellant who destroyed it.

One of the complainant's neighbours **Francis Muriithi Kamama (PW1)**, testified that on 7th of December 2011, he noticed the complainant's fence had been destroyed. According to him, he could not see the fence and so he called its owner curious to know what could have happened. The complainant told him that he was aware of the situation.

He testified further that he witnessed Kiama, the appellant's son demolishing the fence while the appellant himself stood by. He then accompanied the complainant to administration police camp at Embaringo where they reported the incident.

It emerged during his cross-examination, however, that in his statement to the police he did not state that he saw either the appellant or his son destroy the fence.

The other witness who testified that he witnessed the destruction of the complainant's fence was **Joseph Mathenge (PW2)**. He said that on 7th of December, 2011 at about 6:30 AM he saw four people, two of whom were the appellant and his son, destroying the complainant's fence.

One other witness, **Simon Gatoroko Gichuhi(PW3)** did not witness the destruction of the fence but his evidence was that on the material day at around, 6:30 AM **Francis Mureithi Kamamia (PW)** called to tell him that his uncle and other people were destroying a fence. He went to the scene with police officers and noted that indeed the fence had been brought down. Similarly, **Jacob Thumbi Gikunju (PW4)** also found the fence destroyed; however, the fence he referred to in his testimony was that of Margaret Wangeci (PW5), the complainant in the second count in respect of which the appellant was acquitted. Margaret Wangeci herself testified that the 1st complainant called her and informed her that her fence which was being destroyed; she went to the scene and confirmed that indeed it is was her fence that was destroyed; she said 70 posts had been destroyed. She identified 11 posts in court as some of the ones which had been destroyed and which the police carried from the scene.

The 1st complainant himself testified that on 7th of December, 2011 he found four people cutting his fence; two of them were the appellant and his son. He testified that the 2nd complainant was his mother and that she had a separate fence. He witnessed the appellant, his son and two other people he could not identify destroy his mother's fence. He called his mother to inform her of this destruction.

The investigations officer police **Constable Charles Okar (PW7)** visited the scene in the course of his investigations; he established the fence close to the appellant's house had been destroyed and 300 posts of the first complainant's fencing posts had been uprooted. 70 posts of the 2nd complainant's fence had also been destroyed. Of these posts, he carried eleven and a barbed wire as exhibits; he explained that he could not carry everything due to the limited space of his vehicle. Upon cross-examination, he admitted that according to his own statement the complainant's reported that they were surprised to find their fences destroyed when they woke up on the 7th December, 2011. I understand this to mean that contrary the complainants' testimony that they witnessed the destruction of their property, they only learnt of it after the event.

The appellant gave sworn testimony and said that he woke up on the morning of 7th of December 2011 to find the complainant's fence demolished. The same day while he was on his way to the trading centre he encountered police officers who arrested him on allegations that he had destroyed the fence. He denied having destroyed the complainant's fence. The appellant's wife who testified on his behalf said that in fact she's the one who first noticed that the fence had been destroyed and it is she who alerted her husband.

That is the furthest the evidence went. The law on this question, and in particular the provision under which the appellant was charged, states as follows: -

> ***339. Malicious injuries to property***
>
> ***(1) Any person who wilfully and unlawfully destroys or damages any property is guilty of an offence, which, unless otherwise stated, is a misdemeanour, and is liable, if no other punishment is provided, to imprisonment for five years.***

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.

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.

But it must be proved that some property was destroyed by a person; I suppose that it is after proof of the destruction that the court can concern itself with other aspects of this offence such as whether the destruction was willful and unlawful. The immediate question therefore is, was the complainant's property destroyed as alleged?

In considering the appropriate answer to this question, it must be borne in mind that there were two complainants whose properties are allegedly to have been destroyed by the appellant. The properties were obviously distinct as the particulars of offence in each of the two counts showed. It was therefore incumbent upon the prosecution to prove beyond reasonable doubt that each of the complainant's property was destroyed. For purposes of this appeal, it is not necessary to bother with the 2nd complainant's property because the appellant was acquitted in respect of the count in which her property was central. I may refer to it only as far as it is necessary in determining the viability or lack thereof of the appellant's conviction.

According to the evidence of the investigations officer 370 fencing posts were destroyed; of these posts 300 belonged to the 1st complainant while 70 belonged to the 2nd complainant. These figures were not included in the particulars of the offence in both counts though they ought to; be that as it may, the officer picked 11 of the posts which he presented in court as evidence of the destruction. Although the investigations officer himself did not specify which of the two sets of the damaged posts and barbed wire he picked the exhibits from, the second complainant was clear that he picked the sample from her lot.

Now, the appellant was acquitted in respect of the second count for which the exhibits of posts were produced; it is apparent from the record that no exhibits whatsoever, whether the posts or barbed wire, were produced in respect of the count for which the appellant was convicted.

In the absence of the exhibits, the very first component of this offence was lacking; there is therefore some force in the appellant's assertion that there was no proof of damage to the complainant's property. It follows that the appellant was convicted in the absence of proof, beyond reasonable doubt, that the property alleged to be destroyed had in fact been destroyed. To this end, I agree with the learned counsel for the appellant that his client was convicted against the weight of evidence.

If there was no proof of damage the other questions as to who was behind the destruction and whether the damage was willful or unlawful cannot arise; if I was to venture into them, it would only be for academic purposes and I am reluctant to take that course. I am satisfied for this reason that the appellant's appeal is merited and I hereby allow it. I order that the fine of Kshs 30,000 which the appellant paid be refunded to him.

Signed, dated and delivered in open court this 13th day of January, 2017

Ngaah Jairus

JUDGE