



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CRIMINAL DIVISION**

**CRIMINAL APPEAL NO.155 OF 2015**

*(An Appeal arising out of the conviction and sentence of*

*Hon. S. K. Arome (Mr.) - RM delivered on 28<sup>th</sup> April 2015 in*

*Kiambu CM. CR. Case No.823 of 2013)*

REPUBLIC.....APPLICANT

**VERSUS**

CHOI KORAM GICHINGA.....1<sup>ST</sup> RESPONDENT

JORAM GICHINGA NDUNGU.....2<sup>ND</sup> RESPONDENT

**JUDGMENT**

The Respondents, Choi Joram Gichinga and Joram Gichinga Ndungu were charged with offence of **malicious damage to property** contrary to **Section 339(1)** of the **Penal Code**. The particulars of the offence were that on 24<sup>th</sup> April 2013 at Kiambaa Village in Kiambu County, the Respondents maliciously damaged 650 seedlings of nappier grass valued at Kshs.6,500/- the property of Lucy Ngonyo Latrell, Julius Gathegi, James Mwaura Gutu and John Kahihu Gutu. They were further charged with **trespass** contrary to **Section 3(1)** of the **Trespass Act**. The particulars of the offence were that on the same day, the Respondents trespassed into the parcel of land No. Kiambaa/Waguthu/2992 situate at Kiambaa Village in Kiambu County without the permission of the owners. The Respondents pleaded not guilty to the charge. After full trial, they were acquitted. The prosecution was aggrieved by the verdict. It appealed to this court challenging the said acquittal.

In its petition of appeal, the prosecution raised four grounds of appeal challenging the acquittal of the Respondents. It was aggrieved that the trial magistrate had applied the wrong standard of proof and thereby reached a decision that resulted in miscarriage of justice. It faulted the trial magistrate failing to take into account the strong culpatory evidence that had been adduced by the prosecution witnesses and thereby reached a finding that flew in the face of such evidence. The prosecution was aggrieved that the trial court had been sidetracked and failed to uphold the evidence which established that the Respondents had indeed trespassed into the complainants' parcel of land and upon entry, uprooted nappier grass without the authority of the owners. The prosecution pointed out that the Respondents were apprehended while they were in the act of uprooting the nappier grass. In the premises therefore, the prosecution urged the court to allow the appeal, set aside the acquittal and substitute it with an appropriate decision.

Prior to the hearing of the appeal, the court was informed that the 1<sup>st</sup> Respondent Choi Joram Gichinga had in the intervening period died. He died on 19<sup>th</sup> July 2016. The appeal against him therefore abated. The court proceeded with the appeal against the 2<sup>nd</sup> Respondent only. Ms. Kimiri for the State urged the court to allow the appeal in terms of the proceedings and the judgment of the trial court. On his part, the 2<sup>nd</sup> Respondent told the court that the issue in dispute was a family dispute which ought not to have been criminalized. He urged the court to uphold the decision of the court and dismiss the appeal.

Before giving reasons for its determination, the following are the facts of the case as put forward by the prosecution witnesses: PW1 Lucy Ngonyo Latrell is one of the registered owners of the parcel of land known LR. No. Kiambaa/Waguthu/2992. The other co-owners are James Mwaura Gutu, John Kahihu Gutu and Julius Githegi Kamau. A copy of the Title Deed and the Green Card were produced as exhibits in the case by PW2 Jonathan Ndirangu Gikonyo, the Land Registrar. According to PW3 Joram Kamau Ngonyo, on 24<sup>th</sup> April 2013, he saw the Respondents uprooting nappier grass from the suit parcel of land. PW3 is the son of PW1. He inquired from them why they were uprooting the nappier grass in a land that did not belong to them. They retorted that if he had any issue with them he should report the incident to the police. PW3 did exactly that. Before going to the police station, he took photographs of the Respondents while they were uprooting nappier grass in the suit parcel of land. The photographs were produced into evidence by PW4 Corporal Frank Anonda, a Scenes of Crimes Officer based at CID Headquarters. The photographs were 27 in number.

PW1 testified that the Respondents uprooted the nappier grass on the suit parcel of land because they were laying claim on the same. She testified that the Respondents claimed that they had a right over the suit parcel of land by virtue of the fact that the same used to belong to their grandfather. While acknowledging that she indeed shared the same maternal grandfather with the Respondents, she denied the allegation by the Respondents that they were entitled to the said parcel of land. She told the court that her grandfather gave the suit parcel of land to her mother in 1964. She was in occupation of the said parcel of land until she transferred the same to the current registered owners in 2009.

PW6 Judith Achieng Durai, an Agricultural Extension Officer visited the suit parcel of land on 25<sup>th</sup> April 2013. She assessed the cost of the damaged nappier grass at Kshs.6,500/-. She produced her report as an exhibit in the case. The case was investigated by PW5 Corporal Philip Nzambo of Karuri Police Station. He testified that a complaint was lodged with the police on 24<sup>th</sup> April 2013 concerning malicious damage to property. He visited the scene and found the Respondents uprooting the nappier grass. He arrested them and later had them charged with the two offences.

When the Respondents were put to their defence, they did not deny that they indeed uprooted the nappier grass. They explained that they were at the time in possession of the suit parcel of land. They accused the complainant of obtaining the title in respect of the suit parcel of land without informing them. They reiterated that the suit parcel of land was theirs by right by virtue of the fact that they had inherited the same from their maternal grandfather. They did not however produce any documentary evidence to support this assertion. It was apparent from their evidence that no civil suit was pending before any court or before any forum of dispute resolution in relation to the ownership of the suit parcel of land.

In acquitting the Respondents, the trial court held that there was dispute in relation to the ownership of the land and therefore the Respondents could not be held to have trespassed or maliciously damaged the crop which they had planted. It is on this basis that the Respondents were acquitted.

This being a first appeal, it is the duty of this court to re-consider and to re-evaluate the evidence adduced before the trial court in light of the submission made before this court and reach its own independent determination whether or not to uphold the decision of the trial court. In doing so, this court must be cognizant of the fact that it neither saw nor heard the witnesses as they testified before the trial court. The issue for determination by this court is whether the trial court reached the right verdict in acquitting the Respondents. The prosecution has challenged the said acquittal as it is entitled to under **Section 348A** of the **Criminal Procedure Code**.

This court has carefully re-evaluated the evidence that was adduced before the trial court. The prosecution was able to establish the following facts: Firstly, that the complainants were the registered owners of the suit parcel of land; that there was no dispute pending in any legal forum in relation to the ownership of the suit parcel of land; that the Respondents were found by the police destroying the nappier grass in the suit parcel of land; the Respondents in their defence did not deny this fact; that although the Respondents claimed that they were entitled to the suit parcel of land, they did not produce any documentary evidence to support this assertion; that what was established by the prosecution beyond any reasonable doubt is that the complainants produced the Title Deed of the suit parcel of land which established the ownership of the same.

These proven facts taken in the context of the charges brought against the Respondents, in the view of this court, established that indeed the trial court fell in error when it acquitted the Respondents. The evidence adduced by prosecution witnesses indeed established to the required standard of proof beyond any reasonable doubt that the Respondents, without any lawful excuse, trespassed into the suit parcel of land, and while therein, maliciously damaged the nappier grass that had been planted in the same. There was no basis upon which the trial court could reach the verdict that there was a dispute in relation to the ownership of the suit parcel of land where cogent evidence has been produced to establish the registered owners of the suit parcel of land. The trial court fell in error when it found that there existed a dispute over the ownership of the suit parcel of land. The evidence adduced clearly showed that there was no dispute in existence in any legal forum other than what the Respondents stated in their defence. In any event, the Respondents produced no documentary evidence to prove that they had presented the case for resolution at any legal forum.

For the above reasons, it is clear to this court that the prosecution did indeed prove to the required standard of proof the two charges brought against the Respondents. The Respondents' defence did not dent the otherwise strong culpatory evidence which was adduced by the prosecution witnesses against them. In the premises therefore, the appeal lodged by the prosecution has merit and is hereby allowed. The order made by the trial court acquitting the 2<sup>nd</sup> Respondent of the two charges is hereby set aside and substituted by an order of this court convicting the 2<sup>nd</sup> Respondent of the two charges of **malicious damage to property** contrary to **Section 339(1)** of the **Penal Code** and **Trespass** contrary to **Section 3(1)** of the **Trespass Act**. The 2<sup>nd</sup> Respondent shall be given an opportunity to mitigate before this court sentences him. It is so ordered.

**DATED AT NAIROBI THIS 1<sup>ST</sup> DAY OF FEBRUARY 2017**

**L. KIMARU**

**JUDGE**