



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 60 OF 2015**

**(CONSOLIDATED WITH HCR.A NO. 101 OF 2015)**

**WAMBUA KAMETA.....1<sup>ST</sup> APPELLANT**

**MUTISYA KAMETA.....2<sup>ND</sup> APPELLANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal from the original conviction and sentence in **Mutomo Senior Resident Magistrate's Court Criminal Case No. 225 of 2013** by **Hon. Z. J. Nyakundi Ag. P M** on 11/08/14)*

**J U D G M E N T**

1. **Wambua Kameta** (1<sup>st</sup> Appellant) and **Mutisya Kameta** (2<sup>nd</sup> Appellant) were charged with two (2) counts:
  1. **Malicious Damage to Property** contrary to **Section 339(1)** of the **Penal Code**. Particulars of the offence were that on diverse dates between **31<sup>st</sup> August, 2013** and **1<sup>st</sup> September, 2013** at unknown time, at **Uini Village** of **Athi Location** in **Ikutha District** within **Kitui County** willfully and unlawfully damaged Terraces, Grazing area, Maize Stoopers and Fence of **Peter Nzuki** all valued at **Kshs. 56,725/=**.
  2. **Cutting down trees** contrary to **Section 334(c)** of the **Penal Code**. Particulars of the offence were that on diverse dates between **2<sup>nd</sup> September, 2013** and **3<sup>rd</sup> September, 2013** at unknown time, at **Matinga Village** of **Athi Location** in **Ikutha District** within **Kitui County** willfully and unlawfully cut down trees valued at **Kshs. 91,364/=** the property of **Moses Ndunda Kyungu**.
2. Having denied the charges they were subjected to trial. Both appellants were found guilty and convicted on the 1<sup>st</sup> count and fined **Kshs. 10,000/=**. In default of payment of the fine they were required to serve **three (3) years imprisonment**. The 2<sup>nd</sup> Appellant was acquitted of the second count, while the 1<sup>st</sup> Appellant was convicted and fined **Kshs. 10,000/=**. Similarly, in default of payment of the fine he was required to serve **three (3) years imprisonment**. The sentences were to run consecutively.
3. Being dissatisfied with the conviction and sentence thereof the Appellants appealed on grounds that:
  - i. Selective bits of the evidence was applied in convicting the Appellants while exonerating evidence was disregarded.

- ii. Evidence of the Agricultural Officer an expert was disregarded thereby the Appellants being convicted on inadmissible evidence.
- iii. No evidence of ownership of respective properties was adduced in evidence to sustain a conviction.
- iv. The defence of *alibi* tendered by the 1<sup>st</sup> Appellant was dismissed without any consideration.

4. The case as presented by the Prosecution was that on **30<sup>th</sup> August, 2013**, **Peter Nzuki** the Complainant in the first count assigned PW3, **Mangee Musyoka** some casual work of digging terraces. On **31<sup>st</sup> August, 2013** he found the area he had worked on having been filled up. He found the Appellants and others filling up the terraces. He informed PW1 who in turn notified **Richard Mulwa Kiema**, PW5, the person who sold to him that portion of land. When he went to the land he found the Appellants erecting thereon a fence. They reported the matter to the area Chief and subsequently to the Police.
5. PW2, **Moses Ndunda Kyongo** the Complainant in the second count on the other hand was called by PW4 **Nzomo Ndonye** who notified him that people were cutting down his trees. He moved to the portion of land and found the Appellants cutting trees. He went back the following day, on the **3<sup>rd</sup> September, 2013** and found them with other people cutting trees. A week later he reported to PW6, **Munyalo Makau**, the District Forest Officer who assessed the damage done and prepared a report thereof. The Appellants were arrested and charged.
6. When put on their defence the 1<sup>st</sup> Appellant denying having committed the offence stated that he was away in **Mombasa** from **January, 2013**. He returned on the **5<sup>th</sup> September, 2013**.
7. The 2<sup>nd</sup> Appellant stated that they keep domestic animals. September was a dry season, the animals which are left to graze on their own destroyed the terraces and maize. He denied having either damaged terraces or cut trees on the second Complainant's farm.
8. The learned trial magistrate considered evidence adduced and reached a finding that there was evidence of destruction of pasture and other produce by the Appellants as the owners of the cows that damaged the crop were the persons liable. With regard to the 2<sup>nd</sup> count he found that the 1<sup>st</sup> Appellant was one of the persons who cut down the trees, hence convicting them.
9. This being the first appellate court, I am duty bound to re-consider the evidence, re-evaluate it and come to my own conclusion bearing in mind the fact that I never had an opportunity of either seeing nor hearing witnesses who testified. (**See Okeno vs. Republic (1972) EA 32**).
10. In count I the Prosecution had a duty of proving beyond any reasonable doubt that:

- i. The property in issue was damaged by the accuseds.
- ii. It was done willfully and unlawfully.

11. According to charge sheet, the offence is alleged to have been committed on diverse dates between **31<sup>st</sup> August, 2013** and **1<sup>st</sup> September, 2013**. Evidence adduced was that PW3 went to the farm on **31<sup>st</sup> August, 2013** on which he had dug terraces on the **30<sup>th</sup> August, 2013** and found them filled up. He found the Appellants and others in the act of filling them up. On cross examination however he stated that he was assigned a job of digging a foundation for a house which was filled up. He denied having seen the Appellant destroying pasture.
12. PW7 **Reuben Maleve**, the Animal Production Officer visited the farm and did the assessment. The nature of damage he noted was caused by animals. Pigeon peas plants were browsed and trampled on by animals, the nature of damage that he considered serious. The terraces were destroyed; the grazing area was damaged, maize stovers were consumed. The fence was destroyed. He alluded the destruction to be damage done by animals because animal hoof prints and droppings were evident on the farm.
13. His evidence contradicted that of PW3 who alleged that he saw the Appellants damaging the properties. It was upon that basis that the learned trial magistrate found that since the cows did the damage the owner of the animals was the person liable.
14. No evidence was adduced of animals having been seen causing the damage by witnesses who testified. PW3 claimed that the Appellants were filling up the terraces he had dug. These as admitted on cross examination was for the foundation of the house he was digging for PW1. The expert, PW7 however stated that the terraces were destroyed by animals.
15. In the case of **Raible vs. The State 1991 BLR 315 (HC) Botswana elaws**, it was held:

*“The mensrea of the offence created by the Section is expressed in the words “Willfully and Unlawfully”. The injury to the property should not only be willful but it should also be unlawful. The ordinary meaning of willful is “deliberate” or “intentional”. When the act is said to have been done unlawfully it means that it was done deliberately and intentionally not by accident or inadvertence”.*

16. PW3 having not alluded to any animals which did the damage as found by PW7 would be a suggestion that he did not see the persons who did the actual damage to the portion of land in issue. There is therefore no evidence as to who owned the animals that did the damage in issue, therefore it cannot be established whether or not the damage caused was done deliberately or intentionally.
17. With regard to the 2<sup>nd</sup> count the 1<sup>st</sup> Appellant was convicted for cutting down trees the property of **Moses Ndunda**. The Prosecution had a duty of proving that the Complainant owned trees that were cut down. And the act of cutting them was done willfully and unlawfully.
18. In his evidence PW4 **Nzomo Ndonye** stated that he found **Wambua Kameta** (1<sup>st</sup> Appellant) **Kameta** and **Mulwa Mwakavi** cutting trees. PW2 who was called said he saw the 1<sup>st</sup> Appellant and others cutting down trees.
19. Claiming ownership of the land in issue, he stated that he inherited it. He revealed that there was a land dispute between him and **Anna Kameta** who had encroached on his land.
20. PW6 **Munyalo Makao**, the District Forest Officer did an assessment of damage caused. Per his report to the Chief – (For **Moses Ndunda Kyungu**) he gave the extent of the damage caused on trees (Acacia species). However on cross examination he stated that he did not establish ownership of the land. He said that he found the trees having been cut “long ago”. How long ago the trees had been cut was not stated.
21. A land dispute having existed between the Complainant and the family of the Appellants’ mother, it was important for the Prosecution to prove ownership of the trees that were allegedly cut down. This having not been done, it was not proved whether or not the alleged trees were the Complainant’s property.
22. In the premises it was unsafe for the trial court to convict the Appellant on evidence adduced. Therefore the appeal is meritorious. The conviction is quashed and the sentence imposed set aside. The fine imposed if paid, shall be refunded forthwith.
23. It is so ordered.

**Dated, Signed and Delivered at Kitui this 11<sup>th</sup> day of February, 2016.**

**L. N. MUTENDE**

**JUDGE**