REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

CRIMINAL APPEAL NO. 43 OF 2012

PATRICK KAREBE MURIITHI …….APPELLANT

-VERSUS-

REPUBLIC ……...RESPONDENT

(Appeal from the original conviction and sentence in Criminal Case Number 862 of 2010 in the Senior Resident Magistrate's court at Wang'uru – HON. D.A. Ocharo (RM)

JUDGMENT

PATRICK KAREBE MURIITHI the appellant herein was charged with malicious damage to crops contrary to **Section 339 (1)** of the **Penal Code** before the Senior Resident Magistrate's Court at Wang'uru in criminal case NO. 862/10. After trial, the trial magistrate found him guilty and convicted him to served 2 years imprisonment. Being dissatisfied with the conviction and sentence, he has appealed to this court.

In his petition of appeal the appellant has cited 8 grounds. These are:-

1. That the Learned Magistrate erred in law and in fact in failing to find that the prosecution had not proved a charge of malicious damage to crops Contrary to Section 339 (1) of the Penal Code.
2. The Learned Magistrate erred in law and fact in failing to find that the evidence from the prosecution witness was incredible and biased and could not sustain the charge against the appellant.
3. The Learned Magistrate erred in law and fact in relying on manufactured and/or fabricated evidence to convict the appellant.
4. The Learned Magistrate erred in law and in fact in shifting the burden of proof from the defence thereby occasioning miscarriage of justice.
5. The Learned Magistrate erred in law and in fact by failing to find that **JOHN GITARI MBOGO** was in court when the complainant **MORRIS GIKURI KARIUKI** testified and that his evidence required corroboration.
6. The Learned Magistrate erred in law and in fact in convicting the appellant based on circumstantial evidence which evidence showed that the appellant was not guilty of the offence charged.
7. The Learned Magistrate erred in law and in fact failing to appreciate the evidence by the defence and giving it the weight it so rightfully deserved.
8. The Learned magistrate erred in law and in fact by failing to consider and appreciate that the appellant was first offender, the circumstances under which the alleged offence was committed and mitigating factors and thereby handing a harsh custodial sentence where none was deserved or warranted.

The appellant through advocate Mr Nduku Njuki filed written submissions in support of his appeal and also made oral submissions to highlight the main gist of this appeal. Mr Nduku submitted that the trial court erred by relying on evidence of PW4, John Gitari Mbogo who should not have been relied by virtue of the fact he was present in court when PW1 the complainant was testifying. The appellant also took issue with finding of the trial court that there is proof that the complainant's rice farm was the one that was maliciously destroyed and the trial court wrongly relied on circumstantial evidence to make the finding of guilty on the appellant. The appellant submitted that the evidence adduced by the prosecution at the trial was not sufficient to discharge the onus of proof. Finally the appellant faulted the sentenced meted out against him saying that being first offender and given the mitigating circumstances, the sentence meted out was rather harsh and he ought to have been considered for a noncustodial sentence.

Mr Omayo appearing for state opposed the appeal. He stated that the evidence of PW4 was well corroborated by evidence of PW1 and PW3. He told this court that PW4 was the only eye witness who found the appellant spraying some chemical on the rice farm belonging to the complainant (PW1). Mr Omayo further contended that the valuation report produced by PW3 was not challenged during the trial and it was therefore belated for the appellant to try and do so in this appeal. According to Mr Omayo the valuation report produced by PW3 was in respect to the rice holding plot NO. 1816 which belonged to the complainant and which was destroyed maliciously by the appellant.

On the sentence the state opined that the sentence prescribed by law was 5 years and the sentence of 2 years given was lenient. He urged the court to find no merit in this appeal and dismiss it.

I have considered both the submissions made by the appellant including all the grounds of appeal and the opposition made by the state through the office of Director of Public Prosecution represented by Mr Omayo. The work of an appellate court is to evaluate the evidence tendered before a trial court and see whether the trial court arrived at the correct conclusion and finding bearing in mind that unlike the trial court, I did not observe the witness giving the evidence first hand in court. This court has carefully considered the charge that faced the appellant visa Vis the evidence that was tendered.

The appellant as indicated above was charged with malicious destruction of crops belonging to the complainant (PW1). I do find that there are two important elements which the prosecution needed to establish and prove. These are:-

i. Motive -That the appellant willfully took the action and was driven by malice.
ii. Ownership-(that the complainant was the owner of the destroyed crops)

The appellant in his first ground of appeal holds that the charge of malicious damage to crops was not proved and that the exhibit produced (P.exhibit 3) by PW3 one BENSON MWANGI shows that the rice field that was assessed and found to have been destroyed was in Kiratina village while the rice farm was in Kangiciri village . I have however looked at the evidence of PW3 and the exhibit (P exhibit 3) tendered. It is clear that the rice farm that he visited was firm NO. 1816 at Mwea Thiba section. He told he had been an agricultural officer in the area since 1995 and I am therefore persuaded that he was familiar with the area well. The report shows that farm size was 4 acres and the estimated cost of damage was Kshs 211,110/-. I have considered the evidence of PW1 and the exhibit (P. exhibit 1) proving ownership of the lease on plot 1816 unit 9 at Mwea section. The evidence of PW1 and that of PW3 are consistent in demonstrating the ownership of the destroyed crop. I also find from the submissions of the appellant that the issue of the lease by the complainant of plot NO. 1816 is acknowledged. I am therefore not persuaded by the contention by the appellant that the valuation report produced by the agricultural officer referred to a different rice farm from the one that is referred on the charge sheet and that the same plot that does not belong to the complainant. In view of the evidence tendered I do find that the crop that was destroyed was on plot NO.1816 and belonged to the complainant. The trial court was correct and in order to arrive at that conclusion.

I have also considered the evidence adduced from PW1 the complainant at the trial court. It is clear that he leased the rice farm from the appellant's father and he told the court that the appellant was unhappy about the duration of the lease and had attempted to lease the same rice plot to a third party. I have

considered what the appellant told the court in his sworn defence. He told the court that upon the demise of his father, he inquired about the duration of the complainant's lease and took the trouble of going to the area sub-chief who showed him the lease. I find this instructive because earlier in his testimony he had confirmed that he knew about the lease which according to him began in 2005. If he knew about the lease I do find that he was dissatisfied with the lease because why did he go to the sub chief?

The appellant faulted the reliance of the trial court on the evidence of PW4 (John Gitari Mbogo) on the basis that he was present in court when PW1 was adducing his evidence. It is of course desirable that when a witness is testifying in court, other witnesses line up to testify should ordinarily and in the interest of justice be outside court. It is the duty of the prosecution and a trial court to ensure that is done to guard against exposing an accused person to unfair trial. However due to inadvertent mistake at times errors during trial can occur when calling witnesses and at times courts have been faced with such problems when it is realized that the next witness to be called is not outside court but infact inside. In such instances, it is prudent not to automatically disqualify the witness but note the same and proceed to take his/her evidence. The weight of such evidence is however lessened but due weight is and should be placed on the same depending on circumstances. My view is informed and persuaded by the holding in the decision of the case of **RAMADHAN SEIF KAJEMBE –VS- RETURNING OFFICER, JOMVU CONSTITUENCY & 3 OTHERS (2013) e KLR** where Justice G.V.Odunga made the following observations.

"The ***practice is that a witness ought not to be in court while a co-witness is giving evidence. This rule is meant to avoid a possibility that a witness may derive an advantage from the manner in which the earlier witness gave evidence and hence tailor his evidence accordingly. The rule, however, does not apply to the parties to the suit. Where this rule is breached the court may take into account in deciding what weight to attach such a witness. However the mere fact that a witness was present in court while another was giving evidence does not ipso facto render his evidence inadmissible".*** The judge went ahead and placed due reliance on the evidence of the witness that was present in court. This position was also apparent in the decision the case of **DAVID MUGO KIMUNGES & ANOTHER – VS REPUBLIC** where the court in dismissing a similar ground of appeal made the following observations.

" We find that his by itself cannot invalidate the trial process but is a factor the court may take into account in assessing the weight it should give the testimony of such a witness".

In view of the above, I find that the trial magistrate was correct in allowing PW4 to testify and placing due weight to his evidence. The appellant submitted that the evidence needed corroboration and I find that the evidence of PW4 was consistent with the evidence adduced by PW1 who testified that after being called at night, he went the following day and indeed confirmed that the rice crop was withering due to chemical spray. He further told the court that he reported to the police who came and took photographs. The photographs were produced as P exhibit 2 by PW2 (a scene of crimes officer) who confirmed the destruction. I have looked at the exhibits and shows clearly that there are dry patches and empty spaces where rice was supposed to be growing. I do find that the trial magistrate was correct in finding that PW4 had no benefit to falsely accuse the appellant and infact in his defence the appellant did not allude any past bad relationship between him and the said witness which could have prompted the witness to lie in order to fix him.

I have evaluated the evidence adduced by PW1 particularly on the issue that the appellant had attempted to lease out the same rice plot to another third party. The appellant himself hinted to court that he was anxious about the lease arrangements between the complainant and his late father. In my assessment the prosecution established the motive by the appellant in destroying the rice crop belonging to the complainant. The trial court in my view was correct to conclude that the appellant action was meant to frustrate the complainant with a view to surrendering the lease to enable him lease it out to 3rd party and derive some benefit. This was wrong and malicious on his part. The evidence adduced by the prosecution was sufficient and I agree with the state that the evidence tendered before the trial court proved beyond reasonable doubt that the appellant committed the offence with which he was charged.

On the sentence I find that the appellant being a first offender and taking into consideration the mitigating circumstances, he deserved a non-custodial sentence. In the circumstances do find merit in this appeal, on the issue of sentence only. Otherwise on the issue of conviction, the appeal is dismissed. The conviction is upheld. The sentence however us altered under **Section 354 3 (b)** of the **Criminal Procedure Code** from an imprisonment of 2 years to an option of fine of kshs 50,000/-. Since there is a cash bail of kshs 50,000/- deposited, the same can be treated as a fine. It is so ordered.

R.K.LIMO

UDGE

DATED, SIGNED AND DELIVERED AT KERUGOYA THIS 5TH DAY OF FEBRUARY 2015 in the presence of

Mr Nduku Njuki counsel for the appellant

Mr Sitati for state

Willy Court Clerk