



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO.43 OF 2012

(An Appeal arising out of the conviction and sentence of MRS. MWANGI – DM.II delivered on 27th October 2011 in Kibera CM. CR. Case No.60 of 2009)

JESSE MUTHIGA ALBERT.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant, Jesse Muthiga Albert was charged with the offence of **willful and unlawful destruction of property** contrary to **Section 339(1)** of the **Penal Code**. The particulars of the offence were that on 26th November 2008 at Ongata Rongai Township in Kajiado County, the Appellant jointly with others not before court, willfully and unlawfully destroyed a stone wall and banana plants all valued at Kshs.100,000/- the property of Peter Njoroge Kagonga by pulling down the wall and cutting down the banana plants. When the Appellant was arraigned before the trial magistrate's court, he pleaded not guilty to the charge. After full trial, he was convicted as charged. He was sentenced to pay a fine of Kshs.50,000/- or in default he was to serve one (1) year imprisonment. The Appellant was aggrieved by his conviction and sentence. He has filed an appeal to this court.

In his petition of appeal, the Appellant raised several grounds of appeal challenging his conviction and sentence. He was aggrieved that he had been convicted against the weight of evidence. He was of the view that the prosecution had not established the charge to the required standard of proof. He took issue with the fact that the trial court had failed to properly evaluate the evidence and therefore failed to notice that the proceedings were grossly irregular and should have been declared a nullity. The Appellant was particularly irked that the trial court had relied on the evidence of PW2, PW3 and PW4 and therefore reached the erroneous decision of finding him guilty as charged. The Appellant urged the court to allow the appeal, quash his conviction and set aside the sentence that was imposed on him.

Prior to the hearing of the appeal, counsel for the Appellant and the Respondent agreed to file written submission. The written submission was duly filed. The same were highlighted before this court by Mr. Karoki for the Appellant and by Ms. Atina for the State. This court has carefully considered the said submission. Whereas the Appellant urged the court to allow the appeal, the prosecution was of the view that the case against the Appellant was established to the required standard of proof beyond any reasonable doubt. This court shall revert to the arguments made after briefly setting out the facts of the

case.

The complainant in the case Peter Njoroge Kagonga testified as PW1. It was his testimony that he was the owner of a parcel of land registered as LR. No.Ngong/Ngong/330. The Appellant owned a neighbouring parcel of land registered as LR. No.Ngong/Ngong/9888. Between the two parcels of land, there is a road of access. However, there was a dispute between the Appellant and the complainant in regard to the extent of and the boundaries of the road of access. The Appellant was of the view that the road of access cut into part of the complainant's parcel of land. From the evidence adduced, it was apparent that the complainant was the first to settle on the land. He had constructed a stone wall round his property. He had also planted bananas. The Appellant bought the land opposite that of the complainant. He lodged a complaint with the Land Registrar Kajiado with a view to seeking a solution to his complaint. However, it appeared that the Land Registrar did not prioritize the resolution of the complaint in a manner that the Appellant would have liked. This appears to have incensed the Appellant.

On 26th November 2008, while the complainant was out of the country, a group of people invaded the complainant's parcel of land. On the land lived PW2 Henry Kinyanjui Kiarie, a Caretaker employed by the complainant. He told the court that the group that invaded the land were about ten (10) in number and were led by the Appellant. He testified that he saw the Appellant direct the group to pull down the wall near the septic tank. The group also cut down bananas that had been planted near the fence. PW2 testified that it was the Appellant who gave the orders for the group of people to demolish the wall. PW2 reported the incident to the District Officer and the police. The police came and arrested a man who was at the scene. He was later released. PW3 Moses Mungai Charie and PW4 Peter Nduati Munyui were also at the scene when they saw the Appellant direct a group of people to demolish the wall and cut down the bananas. They were emphatic that it was the Appellant who mobilized the group to demolish the wall and cut down the bananas.

PW5 Corporal Johana Tanui, a Scenes of Crime Officer based at Ongata Rongai Police Station testified that he visited the scene of crime on 8th December 2008. He took photographs of the scene. The photographs that he took were produced in evidence. PW6 Corporal William Njure was the investigating officer in the case. He recalled that on 4th December 2008 he was assigned to investigate the case. He interviewed the witnesses, including the Appellant and the complainant. He established that there existed a dispute between the Appellant and the complainant that had not been resolved. He went to the Lands Registry in Kajiado and established that the complainant and the Appellant owned separate parcels of land that had no common boundary. The two parcels of land were separated by a road. The Appellant had filed a case in court which was however struck out. Upon conclusion of his investigations, he was of the view that the Appellant had no authority to demolish the wall. He charged the Appellant with the present offence.

When he was put on his defence, the Appellant denied the charge. He explained that there existed a road of access between his parcel of land and that of the complainant. He was of the view that the complainant had used a "fake" mutation to fence off part of the land that constitutes the road of access. He produced mutation documents to show that the complainant occupied part of the road of access. He expressed his frustration with the fact that although he had lodged a complaint with the Land Registrar, no action was taken for more than fourteen (14) years. It was his evidence that the complainant had no right to occupy part of the parcel of land that constitutes road of access. He explained that on the material day of the incident, the District Officer was supposed to arbitrate the dispute. Unfortunately, he did not appear. People had gathered in the area to hear the dispute. They got annoyed when the District Officer did not come. They marched to the complainant's compound and demolished the wall. They also cut banana plants within the complainant's compound. The Appellant denied that he participated in the destruction of the particular wall and the banana plants.

This being a first appeal, it is the duty of this court to reconsider and to re-evaluate the evidence adduced so as to reach its own independent determination whether or not to uphold the conviction of the Appellant. As was held by the Court of Appeal in **Njoroge –Vs- Republic [1987] KLR 19 at P.22:**

“As this court has constantly explained, it is the duty of the first appellate court to remember that

the parties to the court are entitled, as well as on the questions of facts as on questions of law, to demand a decision of the court of first appeal, and that court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions though it should always bear in mind that it has neither seen or heard the witnesses and to make due allowance in this respect (see Pandya v R [1957] EA 336, Ruwala v R [1957] EA 570)”.

The issued for determination by this court is whether the prosecution adduced sufficient evidence to connect the Appellant with the commission of the offence.

Having re-evaluated the evidence, in light of the submission made before this court, it was apparent to this court that the trial court relied on eye witness account of PW2, PW3 and PW4 to convict the Appellant. From the evidence adduced, it was clear that there existed a dispute between the complainant and the Appellant as to the location of the road of access between their two parcels of land. What is interesting is that the Appellant appeared to have been intent on seeking to enforce a public right. This is because the Appellant did not own the road of access. Access to his parcel of land was not impeded by the wall erected around the complainant’s parcel of land. That notwithstanding, it was clear from the evidence adduced that the Appellant had special interest in having the road of access demarcated into part of the parcel of land owned by the complainant. The Appellant had, for several years, attempted to have the dispute resolved firstly, through the Provincial Administration, then through the Office of the Land Registrar and finally in a case he filed in court. All these attempts did not yield the result that the Appellant desired. From the evidence adduced, it was clear that on the material day of 26th November 2008, the Appellant mobilized a group of people to demolish the wall. He took the law into his own hands. This day was opportune because the complainant was out of the country. The Appellant’s denial that he was not present when the wall was being demolished is contradicted by the evidence he himself adduced in his defence. The Appellant confirmed that he was at the scene when the wall was demolished. However, he gives the lame excuse that it was members of the public who were annoyed by the failure of the District Officer to attend the meeting which had been called to resolve the dispute that demolished the wall. The credible evidence adduced by the prosecution witnesses is that the Appellant had a special interest in having the wall demolished due to the long standing dispute that he had with the complainant concerning the road of access.

The Appellant argued on this appeal that he did not participate in the actual demolition of the wall. However, the evidence on record proves that he was the one who mobilized and facilitated the gang that demolished the wall. The Appellant may not have physically demolished the wall or cut the banana plants, he was however a principal offender because he was the main beneficiary of the demolition of the wall. The Appellant’s culpability falls under **Section 20(1)(d)** of the **Penal Code** which provides thus:

“When an offence is committed, each of the following persons is deemed to have taken part in committing the offence and to be guilty of the offence, and may be charged with actually committing it, that is to say –

(a)...

(b)...

(c)...

(d) Any person who counsels or procures any other person to commit the offence.”

In the premises therefore, this court finds no merit with the grounds of appeal put forward by the Appellant. It was clear from the evidence adduced by the prosecution witnesses that the Appellant took the law into his hands and procured others to demolish the complainant’s wall. The Appellant’s conduct was criminal. He was properly convicted by the trial court. His appeal is hereby dismissed. The conviction and sentence is upheld. It is so ordered.

DATED AT NAIROBI THIS 4TH DAY OF NOVEMBER 2015

L. KIMARU

JUDGE