REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL APPEAL NO.127OF 2009

LESIIT, J

JOSHUA THURANIRA…….....APPELLANT

V E R S U S

REPUBLIC…….RESPODNENT

(*From the original conviction and sentence of Senior Resident MagistrateS. MWENDWA atMAUA, Criminal Case No. 1975 of 2008).*

JUDGEMENT

1. The Appellant **JOSHUA THURANIRA** was charged with malicious damage to property contrary to section 339(1) of the Penal Code. The Appellant was alleged to have willfully and unlawfully maliciously damaged 7 grevelia robusta ssq valued at Ksh.39, 251/90 the property of Mechack Karuti. The Appellant was convicted of the offence and sentenced to two years imprisonment on 16th June, 2009.
2. The Appellant was aggrieved by the conviction and sentence and so filed this appeal on 29th June, 2009. He was granted bail pending appeal on 19th November, 2009.
3. The Appellant's petition of appeal he has pleaded six grounds as follows:

I.That the learned trial magistrate erred in law in convicting the appellant on the evidence before him.

ii. That the learned trial magistrate erred in law in dismissing the Appellant's defence.

iii. That the learned trial magistrate erred in law and fact by convicting the appellant in view of the glaring contradictions in the evidence adduced by the Prosecution witness.

iv. That the learned trial magistrate erred in law and fact in failing to appreciate the appellant's evidence that the land where the alleged offence occurred belonged to the appellant's father.

v.That the conviction of the appellant is against the weight of the evidence before the trial magistrate.

vi.That the sentence is manifestly excessive in the circumstances of the case before the

learned trial magistrate.

4. The Appellant was represented by Mr. Mwarania. In his submissions counsel urged that the offence of malicious damage to property was not proved because ownership of the land was not proved. Counsel urged that land belonged to Appellant's father and that the Appellant was unaware of the sale of the complainant before he died. Mr. Mwarania urged that the letter of confirmation by the Adjudication Officer showing the land was registered in Complainant's land was not sufficient to prove transfer of land from the Appellants father's name to the complainant. In light of an objection to the transfer filed by the Appellant.
5. Mr. Mungai represented the state in this matter but made no submissions. I am a first appellate court.
6. I have carefully considered this appeal and have subjected entire evidence to a fresh analysis and evaluation and have drawn my own conclusions. Since I did not see or hear any of the witnesses, I have given due allowance to same. I am guided by **OkenoVrs. Republic** 1972 EA 32 which is relevant. It was stated in that case as follows:-

> **"An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya Vrs. Republic (1957) EA. (336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. RuwalaVrs. R. (1957) EA. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters Vrs Sunday Post [1958] E.A 424."**

7. The Appellant faced a charge of malicious damage to property. The onus lies with the prosecution to prove its case against the accused beyond any reasonable doubt. The prosecution called the complainant who stated that he purchased the piece of land where the seven grevalia trees were cut by the Appellant from his late father. The complainant did not state when he bought that piece of land from the father of the Appellant except to say it was in 1998. He then produced a letter from the Adjudication Officer dated 11th July, 2008 confirming the land was his. The prosecution called a second witness one Edward. He is the one who reported the cutting down of the trees to the complainant. This witness said that the land where the trees were cut belong to the complainant and had nothing to support that statement.

8. The Appellant denied the offence and stated that the land in question belonged to his late father. He was not aware of any sale of the land and that in any case he is the one in occupation. He produced an objection he had placed on the piece of land as Exhibit 1. He said that he also sued the complainant in 2003 when he realized there was a fraudulent transfer of the land at the lands office from his father to the complainant. He then produced another letter of objection which was Exhibit 3 and a letter from the adjudication officer dated 2007.

9. The Appellant called his mother as a witness. His mother testified that the land and the trees on that land belong to her because her husband gave the piece of land to her.

10. She testified that the Appellant was her eldest son. She said that the land was sold by her husband to one Karuti the complainant, at a bar but that the husband was drunk at the time and that the sale was oral. It was an oral sale and that nobody in the family was informed. She admitted that the appellant put up barbed wire on the land while she was away doing casual labour. The other witness called was the Appellant's wife. Her evidence was that they planted trees on the land and that they have built on the land and live on the same land. She mentioned just like the Appellant that there was a land case over the same land at the D.O.'s Office.

11. I have looked at the learned trial magistrate judgment and noted that the court considered the prosecution case in very great detail. When it came to the defence the learned trial magistrate did not consider all the documentary exhibits adduced in evidence by the Appellant. The learned trial magistrate then went ahead to conclude as follows:

> "**Whereas the accused said that the land is his, he has nothing to prove he owns any piece of land No. 5674. All the documents of ownership show the (sic) and belongs to PW1 – who claims to have bought the land from the accused father. The accused and his relatives including his mother – DW2 – had nothing to show they have any interest on the land parcel no 5674. There is nothing to show the challenge the PW1 claim (sic) PW1 claim of title during the period when the accused father was alive to deny having sold the land to the PW1.**
>
> **As things stand now the land is registered in the names of PW1 who has fenced the whole of it ascertaining his claim of ownership and possession."**

12. It clear that the learned trial magistrate did not consider the documents adduced by the Appellant in his defence. He did not even mention them in his judgment. There is no evaluation of the defence case neither was there an analysis of the defence as against the prosecution case. Failure to consider a defence can be fatal to a conviction. This is one case in which such failure is fatal to a conviction.

13. The Appellant was charged of an offence under section 339(1) of the Penal Code. That section provides:

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

14. The evidence that was adduced before the court clearly demonstrates that there was a case pending before the D.O. and that there were objections placed over that land before the Adjudication Officer. The Appellant produced a letter written on his behalf by the Adjudication Officer but unfortunately the content of that letter was not considered neither is it discussed by the learned trial magistrate. That however goes to show that there is a dispute over the ownership of the parcel of land where the trees were allegedly cut. Most importantly since it is the complainant who was claiming that he bought the land from the Appellants late father the burden lay with him to produce the sale agreement since no land can be sold orally.

14. Also important is that the fact that this was an agricultural land and it is common knowledge that the consent of the Land Control Board is mandatory before agricultural land can be transferred from one owner to another. During that consent the immediate family members of the owner of such land must be present and must also give their consent before the transfer is effected. Without prove of the sale agreement and consent of the land Control Board any land transaction is null and void. The learned trial magistrate conclusion that the land in question belong to the complainant because of a mere letter from the adjudication officer, which letter is not a final proof of ownership was misleading.

15. Having carefully considered this appeal I find that the evidence before the court was controversial in regard to the ownership of the land where the alleged damaged trees were growing. I find that the controversy was not resolved by the learned magistrate at the trial or in his judgment. I find that the learned trial court's finding that the land belonged to the complainant was mere conjecture without any proof. There is no proper evidence to prove the trees belong to the complainant and therefore the prosecution failed to prove that when the Appellant cut the trees it was willful and unlawful and therefore malicious within the meaning of section 339 of the Penal Code.

16. The Appellant put forward a defence of claim of ownership. That defence was not considered by the learned trial magistrate and yet the Appellant produced documentary proof of his claim showing

that he had filed formal objection regarding the ownership of the land where the trees were with the relevant authorities and that the objection is yet to be heard.

17. Having come to the conclusion I have of this case. I find that the Appellant's Appeal has merit and therefore allow this appeal quash the conviction and set aside the sentence. If the Appellant deposited any securities for his bail pending appeal it should be returned to him.

DATED SIGNED AND DELIVERED AT MERU THIS 6th DAY OF FEBRUARY 2014.

LESIIT, J.

JUDGE