



REPUBLIC OF KENYA

High Court at Kitale

Criminal Appeal 67 of 2011

ANN WANJIKU MUCHAI ::: APPELLANT.

VERSUS

REPUBLIC ::: RESPONDENT.

(Being an appeal from the original conviction and sentence of D.M. Ochenja – PM. in Criminal Case No. 1202 of 2009 delivered on 8/09/2010 at Kitale.)

J U D G M E N T.

The appellant, **Anne Wanjiku Muchai**, appeared before the Principal Magistrate at Kitale charged with malicious damage to property contrary to section 339 (1) of the penal code.

It was alleged that on the 24th March, 2008 at Milimani Estate Trans Nzoia, the appellant willfully and unlawfully damaged seven (7) iron sheets valued at Ksh. 4,000/= the property of Bright Oyiera Amayamu Kandie.

The appellant pleaded not guilty to the charge but was convicted after trial and sentenced to pay a fine of Ksh. 5,000/= in default to serve three (3) months imprisonment. However, being aggrieved by the conviction and sentence, the appellant preferred the present appeal on the basis of the grounds filed herein on her behalf on 8th June, 2011 by the firm of **Samba & Co. Advocates**.

Learned counsel, **Mr. Samba**, appeared for the appellant and argued the six (6) grounds collectively. It was his submission that the case for prosecution was not proved beyond reasonable doubt since the property allegedly damaged consisted of iron sheets which formed part of a common boundary which was partly erected by the appellant.

Learned counsel argued that the posts and barbed wire holding the iron sheets were fixed by the appellant and that the iron-sheets were fixed by the complainant to reinforce security but became

dilapidated such that security was compromised. As a result, the appellant replaced the complainant's iron sheets with new ones.

Learned counsel contended that the old iron sheets were not damaged after their removal but were merely folded and handed over to the complainant's employee called Tom who confirmed that although the iron sheets were old, they were not damaged.

Learned counsel further contended that the appellant gave a candid statement in her defence by not denying the removal of the iron sheet and giving a good explanation for the act. Further, her action was done in good faith devoid of malice.

Learned counsel submitted that the learned trial magistrate erred by holding that the appellant admitted the offence and attributed the appellant's arraignment in court to a sour relationship existing between her and the complainant. Learned counsel indicated that the complainant had previously on several occasions lodged several complaints with the police against the appellant. He urged this court to allow the appeal.

The learned prosecution counsel, **Mr. Chelashaw**, opposed the appeal on behalf of the state/respondent. He submitted that the learned trial magistrate correctly convicted the appellant as there was a standing grudge between the appellant and the complainant and therefore, the appellant's act of replacing the iron-sheets was not done in good faith as she had not consulted the complainant.

Learned prosecution counsel contended that the removal of the iron-sheets in the absence of the complainant amounted to malice and that the act of removing the iron sheets from the fence was in itself a damage.

Learned prosecution counsel reiterated that the appellant was correctly convicted and urged this court to disallow the appellant's appeal.

In convicting the appellant, the learned trial magistrate stated that:-

“The act of removing the iron-sheets from the fence by the accused was unlawful, and it amounts to malicious damage. The accused has admitted that she removed the iron-sheets from the fence. In essence, she had admitted the offence.”

The duty of this court is to re-evaluate the evidence and draw its own conclusions bearing in mind that the trial court had the advantage of seeing and hearing the witness. In that regard, the case for the prosecution was briefly that on the material 24th Mach, 2008, the complainant, **Bright Oyiera Amayamu Kandie (PW1)**, arrived at her Kitale home from Nakuru and noticed that her iron-sheets had been removed from the fence and replaced by new ones. Upon enquiry, she was informed by a neighbour's shamba boy, **Edward W. Wekesa (PW2)**, that the iron-sheets had been removed from the fence by the appellant and another.

Edward, confirmed the information but said that he was asked by the appellant to take the iron-sheets to the complainant's home after they had been removed from the fence. He indicated that he did not see the appellant in the act of removing the iron-sheets from the fence and replacing them with new ones.

P.C. Aggrey Maiyo (PW3), based at Kitale police station, took over the case after it had already been investigated. His role in court was to produce the subject iron-sheets as exhibits.

It thus suffices to state that the prosecution case against the appellant was grounded mostly on the evidence of the complainant (PW1) and the shamba boy (PW2). It was on the basis of that evidence that the appellant was placed on her defence.

In her sworn statement, the appellant indicated that the complainant was her immediate neighbour and that they shared a common boundary which is marked and defined by posts and wire which were erected by herself (appellant) in the year 2001 before the complainant moved into her parcel of land which she acquired from a private club in 2001. The appellant also indicated that the complainant went into occupation of her plot in the year 2005 when she (appellant) had already fenced her own plot. A few months thereafter, the complainant fortified the fence by putting up iron-sheets on the boundary separating her plot and that of the appellant and without the appellant's permission.

The appellant further indicated that after being informed by the complainant's employees that the iron-sheets had fallen off and that people were passing through her compound (i.e. appellants), she looked for somebody to tie up the fallen iron-sheets and return them to the complainant. The appellant supplied two ropes for that purpose. She then handed over the iron-sheets to the complainant's employee and replaced them with new ones with the sole intention of preventing people from passing through her compound. She contended that she did not damage the iron-sheets and indicated that she and the complainant were not in good terms as she (complainant) often abused her and at one time her husband (appellant's) was charged in court for assaulting the complainant but was acquitted by the court.

The appellant further contended that the complainant had on several occasions lodged complaints with the police against her and that she (complainant) was a very bad neighbour.

The appellant did not call any witness in support of her case. Nonetheless, the obligation to prove the case against her lay with the prosecution and did not at any one time shift to her.

Basically, a total consideration of the evidence by this court reveals that the main issue for determination was whether the appellant damaged the complainant's iron-sheets as opposed to the boundary fence which was undisputedly erected by the appellant and fortified in part by the complainant in the manner of adding iron-sheets on her side of the boundary in the already existing fence. If indeed the appellant damaged the iron-sheets, the next issue that followed was whether she did so maliciously.

In convicting the appellant, the learned trial magistrate held that the act of removing the iron-sheets from the fence was unlawful and that it amounted to malicious damage.

The learned trial magistrate attributed the removal to the appellant and held that she had in fact admitted to the removal.

However, in this court's opinion, the appellant did not admit having removed the iron-sheets from the fence. She indicated that the iron-sheets fell down due to their age and all that she did in having them replaced with new ones and in returning them to the complainant was done in good faith but was never appreciated by the complainant.

Indeed, no good deed by any of the two neighbours could be appreciated by the other as they had a long history of not being in good terms with each other. The complainant called the appellant her "blood enemy" while the appellant called the complainant a "very bad neighbour." To each other, the other would be as it were "a neighbour from hell".

Be that as it may, there was no evidence that the iron-sheets were removed from the fence by the appellant. She said that they fell down and that fact was not disproved by any evidence from the prosecution. The complainant did not see the appellant in the act of removing the iron-sheets. She relied on information allegedly given by the shamba boy (PW2) who clearly said that he did not see the person who removed the iron-sheets.

He only assisted at the request of the appellant to carry the iron-sheets to the complainant's home since

the complainant's employee called Tom was not traceable at the time.

Since nobody saw the appellant removing the iron-sheets from the fence, her defence that the iron-sheets actually fell down was overlooked by the learned trial magistrate. If that time of defence was given due and proper consideration, it would have obviously resulted an acquittal of the appellant.

Even if the iron-sheet were removed by the appellant, the fact that they were dilapidated and had to be replaced by new ones was not disputed and so was the fact that the iron-sheets were returned to the complainant without being specifically damaged by the appellant. All these factors indicated that the appellant acted in good faith. An act done in good faith is always devoid of malice.

In the present circumstances, malice could not be constructed on the basis that the appellant failed to seek the complainant's permission to remove the iron-sheets. This is because firstly, when the iron-sheets were attached to a fence already erected by the appellant, no permission was sought by the complainant from the appellant to do so and secondly, any of the two neighbours was at liberty to improve the common fence as long as the act was in good faith. Thirdly, given the history of their bad relationship, it was unexpected that permission would be granted by any of the neighbours to each other to perform any act for their common good in relation to the fence.

Clearly, there was no evidence to show removal of the iron-sheets by the appellant and if there was removal, there was no evidence that the appellant acted with malicious intent.

Consequently, it is the opinion of this court that the appellant's conviction by the learned trial magistrate was against the weight of the evidence and therefore unsafe.

This appeal must and is hereby allowed to the extent that the appellant's conviction by the learned trial magistrate is quashed and the sentence set aside. If the appellant paid a fine of Ksh. 5,000/= the amount be refunded to her forthwith subject to any lawful deductions. Ordered accordingly.

[Delivered and signed this 11th day of April, 2013.]

J.R. KARANJA.

JUDGE.