



REPUBLIC OF KENYA

IN THE HIGH COURT

AT KAKAMEGA

Criminal Appeal 122 of 2010

MINIC ALPHONCE MITAMBO APPELLANT

VERSUS

REPUBLIC RESPONDENT

(Appeal against the conviction and sentence of the Chief Magistrate's

Court at Kakamega in Criminal Case No. 2326 of 2005 [P. N. ARERI, RM)

JUDGMENT

The appellant, **MINIC MITAMBO** was charged and convicted of two counts of malicious damage to property contrary to Section 339 (1) of the Penal Code.

In Count I, the particulars are that on the night of 20th/21st day of September, 2005 at Kaluni Sub-location, Shikumu location in Kakamega District within Western Province unlawfully damaged fencing plants namely Euphobia valued at Kshs.1,000/= by uprooting them the property of **JOSEPH LWANGU MUSONYE**.

In Count II, the particulars are that on the 30th day of September 2005 at Lanaswa village, Kaluni S/Loction, Shikumu Location in Kakamega District within Western Province , willfully and unlawfully uprooted fencing plants namely Euphobia valued at Kshs.500/-the property of **JOSEPH LWANGU MUSONYE**.

After a full trial, the lower court found the appellant guilty and convicted him in both Count I & II. The appellant was fined Kshs.10,000/= in default one year imprisonment in each count.

The appellant was aggrieved by the conviction and sentence and appealed to this court. He raised several grounds of appeal which can be summarized as; that no tests were carried out to verify what type of plants were damaged; lack of valuation report; that the complainant does not own any land at the scene and that evidence of PW1 and PW2 is that of a husband and wife.

The prosecution case was that on the night of 20.9.05 at about midnight, the complainant, PW1, **LWANGU MUSONYE** was in his house sleeping when heard the dogs barking. PW1 went outside to see what was happening. He found the appellant who is a neighbour digging and uprooting his fence and

throwing the plants into a pit latrine. PW1 called a neighbour Alex Musungu (PW3) who came and witnessed what was happening. PW3 went out with a torch and saw the appellant cutting the boundary fence. A report was made to the police. The appellant was arrested and released on bond. On the 30.9.05, at about 2.00 p.m. the complainant's wife, PW2 **REGINA BUSOLO** and their mentally challenged daughter were at home when the appellant came there and started cutting the fence using a panga. The matter was reported to the police. The cut plants and the panga were collected as exhibits by the police officers who visited the scene. The appellant was subsequently charged with the present offence.

In his defence the appellant stated that he was arrested and handcuffed and escorted to the police station with PW1 when carrying some cut plants. The appellant was released on bond but on 30.9.2005 he was arrested again and charged. According to the appellant, there were no boundary features between land parcel No. **IDAKHO/LUKOSE/141** and **IDAKHO/LUKOSE/144** where they had a boundary dispute. The appellant denied the charge.

As a first appellate court, I have considered the evidence and re-evaluated the same.

I have considered the grounds of appeal and the submissions made by the appellant. Mr. Limo for the State did not make any submissions.

PW1, **JOSEPH LWANGU MUSONYE**, PW2 **REGINA BUSOLO** and PW3 **ALEX LITALI MUSUNGU** are the eye witnesses from the scene. According to PW1 and PW3 they both witnessed the appellant cutting the fence on the night of 20th & 21st September 2005. The offence in count 1 took place at night. There was moonlight and they also used a torch and saw the appellant cutting the boundary features which consisted of Euphorbia plants, flowers and other plants. PW2 testified that she saw the appellant cutting the fence again on 30.9.05.

The evidence of the prosecution witnesses is corroborated by that of PW4, P.C. Julius Lijodi who visited the scene upon receiving the report. PW4 produced the cut Euphorbia plants as exhibits.

The appellant in his defence stated that there is a boundary dispute and the boundary features were removed by somebody. The appellant did not name the said somebody. There is however no reason given why the neighbour, PW3 Alex Utali Musungu and the police officer (PW4) would give false evidence against the appellant.

The evidence of PW1 and PW3 is that of recognition of the appellant who was their neighbour and they also used torch light and were able to see the appellant at the material time. There was no possibility of mistaken identity.

The Prosecution case was proved beyond any reasonable doubts. The sentence of Kshs.10,000/= fine in each count was reasonable. The default sentence of one year imprisonment in each count is however illegal. For a fine of Kshs.10,000/= the law provides for a default sentence of three to six months imprisonment.

The default sentence is therefore reduced to a period of 3 months imprisonment in each count. Save for the above, the conviction and sentence of the lower court is upheld.

Delivered, dated and signed at Kakamega this 11th day of July, 2012

B. THURANIRA JADEN
JUDGE