

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA
CRIMINAL APPEAL NO. E085 OF 2024

CORNELIUS MUNYWELE INGUTIA-----
APPELLANT

VERSUS

REPUBLIC-----
RESPONDENT

(Being an appeal from the original conviction and sentence by Hon. A. Odawo, Principal Magistrate, in Kakamega CM`s Criminal case 1877 of 2019 delivered on 22nd August 2024)

JUDGMENT

INTRODUCTION

1. The appellant herein was charged with the offence of malicious damage to property contrary to section 339(1) of the Penal Code. It was the prosecution's case that the appellant, on 21st May 2019, destroyed 30 posts and barbed wire, all valued at Kshs.377,000/=.
2. The trial court, upon hearing the case and mitigation, sentenced the accused to pay a fine of 40,000 or serve 6 months' imprisonment.
3. Being dissatisfied with the judgment of the trial court appealed against the entirety of the said judgment, decision, and orders based on the following grounds;
 - a. *That the learned trial magistrate erred in law and fact by relying on a defective charge sheet which contained material discrepancies, particularly in respect to the nature and value of the subject matter.*

- b. That the learned trial magistrate erred in law and fact by placing reliance on the testimony of a prosecution witness whose account indicated that the Appellant was arrested three (3) months prior to the date on which the alleged offence was said to have occurred.*
- c. That the learned trial magistrate erred in both law and fact in convicting the Appellant in the absence of any exhibits having been produced before the court in support of the prosecution's case..*
- d. That the learned trial magistrate misdirected herself in law and fact by relying on an assessment report which contained material inconsistencies concerning the items allegedly destroyed, their valuation, and further introduced particulars not reflected in the original charge sheet.*
- e. That the learned trial magistrate erred in law and fact by relying on the written statement of a prosecution witness who had died before testifying, and whose statement bore a different date for the alleged offence, thus casting doubt on the accuracy and reliability of the evidence.*
- f. That the learned trial magistrate erred in law and fact by admitting into evidence a photographic report prepared by the investigating officer who was not gazetted for such duties, and no gazette notice authorizing the same was produced in court.*

Submissions

4. The appellant raised a total of eight issues for determination in this appeal. The first issue concerns the validity of the charge sheet. The

appellant contended that the learned trial magistrate erred in law and fact by relying on a defective charge sheet. He argued that he was initially charged with damaging 30 fence posts and barbed wire, yet the assessment report presented in court indicated that approximately 130 posts, along with barbed wire and a chain-link fence, were destroyed.

5. The appellant further submitted that he did not formally take a plea to the charges as presented. He asserted that the charge sheet was inconsistent with the prosecution's documentary evidence, particularly concerning the valuation and quantity of the alleged damaged property. He cited the report by the Ministry of Land, Housing, and Urban Planning of 8th November 2019, which he said differed much from the particulars in the charge sheet.
6. On this basis, the appellant argued that his constitutional rights under the Bill of Rights were infringed, particularly the right to a fair trial. He claimed that the trial court proceeded to convict him based on a defective and contradictory charge sheet, thus rendering the proceedings a nullity.
7. The second issue raised by the appellant was that his arrest and subsequent prosecution occurred before the commission of the alleged offence. In support of this assertion, he referred to the testimony of PW1, who stated that the alleged criminal act occurred on 26th September 2019. However, according to the appellant, the charge sheet indicated that he was formally charged on 29th July 2019—almost two months before the incident allegedly took place.
8. The appellant also pointed to inconsistencies in the investigating officer's report, which indicated that the offence took place on 20th May 2019. He submitted that as at the date of his arrest—21st May 2019—no offence had been committed. He alleged that the prosecution had fabricated the charges against him without a legal basis.

9. The third issue raised by the appellant relates to the learned magistrate's reliance on an assessment report that, according to the appellant, contained discrepancies in both the materials described and their corresponding valuation. He asserted that although the charge sheet was amended on 9th December 2020 to reflect the alleged destruction of 30 posts and barbed wire, the assessment report presented in court as an exhibit did not align with these particulars.
10. Citing the testimony of PW3, the appellant claimed that the barbed wire was valued at Kshs. 150/= per meter for three strands over 10 meters, amounting to Kshs. 4,500/=. When combined with the estimated cost of the 30 posts at KShs. 200/= each (totalling Kshs. 6,000/=, the entire valuation should have amounted to Kshs. 10,500/=.
11. The appellant maintained that the report by PW3, presented on behalf of the prosecution, was fraught with inconsistencies regarding the quantity of materials, cost estimates, and the specific plots in question. He submitted that the trial magistrate failed to properly evaluate these discrepancies, thereby erroneously relying on evidence that was not credible or reliable.
12. The appellant further denied the prosecution's assertion that he was involved in the destruction of properties located on two separate parcels of land. He took issue with the production of two distinct title deeds relating to Plot Nos. Butsotso/Esumeya/3190 and 4672, as well as two separate assessment reports for these parcels. He contended that it was illogical to infer that he could be present at both locations simultaneously, particularly as he averred that on the material date, he was physically present in court with his advocate, filing proceedings in Land Case No. CM/ELC 32 of 2019.
13. The appellant also challenged the admissibility and credibility of the prosecution's evidence, contending that the trial court improperly relied

on hearsay. He argued that there was no physical evidence, such as the damaged barbed wire itself, presented in court to substantiate the allegations.

14. He further faulted the trial court for admitting photographic evidence produced by PW4, arguing that there was no gazette notice or proof that PW4 was legally authorized to produce such evidence under the relevant evidentiary laws.
15. Finally, the appellant took issue with the trial court's failure to accord him an opportunity to present his defence. He asserted that the trial magistrate rendered judgment without giving him a hearing, thereby violating his right to a fair trial and occasioning a miscarriage of justice.

Summary of the Evidence adduced before the Trial Court.

16. **PW1, Edward Omwalo**, a businessman residing in Kakamega town, testified that the appellant was his neighbour and also his in-law. He stated that he had purchased land from the appellant and held valid title deeds for the parcels known as **Butsotso/Esumeiya/3190** and **Butsotso/Esumeiya/4676**.
17. He recalled that on 26th September 2019, he received a call from one of his farm workers informing him that someone was destroying property on his farm. Upon visiting the scene, he confirmed the incident and proceeded to report the matter at Navakholo Police Station. He maintained that he was the registered proprietor of the two subject parcels.
18. He further testified that the damage involved the destruction of a fence that enclosed his property, consisting of barbed wire and posts. He took photographs at the scene depicting the extent of the damage, including cut barbed wire and uprooted posts. He produced a bundle of these photographs and had them marked as PMFI 3(a-m).

19. According to PW1, the accused was subsequently arrested, and an official damage assessment was conducted. The report, dated 8th November 2019, was marked as PMFI 4. He stated that the total cost of the damage was assessed at Kshs. 377,000/=
20. During cross-examination, PW1 stated that although he received the call sometime in September, he could not recall the exact date. He also noted that he wrote his witness statement on 22nd May 2019, which preceded the alleged incident date.
21. He explained that his deceased worker, Luke, had seen the appellant committing the act in June and informed him accordingly. He confirmed that 30 fence posts were destroyed and carried away, while the barbed wire was left behind.
22. In re-examination, PW1 clarified that the police report was made on 21st May 2019. He stated that the two parcels of land were adjacent to each other, but his property was uniquely fenced with both barbed wire and chain link. He added that the police collected the chain link during their investigations.
23. PW2, Julia Okonya, testified that she was employed as a worker on the farm belonging to PW1, which bordered the appellant's property. She stated that she was familiar with both parties.
24. She recalled that on the material day approximately two years prior she received a call from one Oduor, a guard on PW1's farm, who informed her that the appellant was in the process of destroying the fence enclosing PW1's land.
25. PW2 stated that she, together with Oduor, proceeded to the scene and was able to identify the appellant as the person responsible for the destruction. She witnessed that several posts had been uprooted and were missing. She noted that this was not the first time such damage had occurred. Upon witnessing the incident, she contacted PW1, who later

arrived at the scene. She, alongside Oduor, accompanied PW1 to Navakholo Police Station to report the matter.

26. She added that the police subsequently visited the scene and confirmed the damage. However, she stated that they did not collect any physical materials from the site during their visit.
27. In cross-examination, PW2 confirmed that she had been employed by PW1 for sixteen years, during which she had been tasked with supervising activities on his farms. She stated that she was present on the farm earlier on the day the destruction occurred, which she clarified took place in September. She reiterated that it was Oduor who called to inform her of the incident.
28. PW2 testified that more than fifteen fence posts had been destroyed. According to Oduor, who was at his home at the time, he had seen the individual responsible for the destruction. She stated that the person involved was allegedly armed with a pair of pliers and a panga (machete). PW2 noted that she left the farm at around 1:00 p.m. on the material day.
29. PW2 further claimed that the accused had previously issued threats to destroy the fence and to set fire to the sugarcane plantation, which she believed added context to the alleged incident.
30. The court noted that the charge sheet was read out in English and the accused confirmed that he had comprehended the charges and responded accordingly.
31. PW3, Fanuel Atsatsa, a retired officer formerly attached to the Ministry of Lands, gave sworn evidence. He confirmed that in 2019, while still serving at the Ministry, he was instructed to conduct an assessment of damage on land located in the Shinoyi area. Upon visiting the site, he assessed two separate

parcels of land, one measuring approximately three acres, and the other one acre.

32. According to his testimony, the entire fence surrounding the one-acre parcel had been destroyed. In contrast, only two sides of the fence enclosing the

Three acre parcel comprising barbed wire and chain link had been affected. Based on his assessment, the total estimated cost of damage was

Kshs. 377,000/=.

33. He produced his official damage assessment report, which was marked and admitted as Prosecution Exhibit 4 (PEXh 4).

34. In cross-examination by the accused, PW3 stated that he had worked for 35

years at the Ministry of Lands and had prepared numerous damage assessment reports throughout his career. He confirmed that he was assigned this particular assessment by his supervisor and that his role was strictly limited to assessing the extent of damage, not verifying land ownership.

35. He confirmed that the parcels in question were located in the Shinoyi area

and that he physically measured the damaged sections in metres. He further clarified that he identified the materials used in the fencing and applied prevailing market rates to estimate the cost of the damages.

36. PW3 identified the three-acre parcel as Parcel 1 and the one-acre parcel as Parcel 2. He stated that the fencing comprised wooden posts, barbed wire, and chain link. According to his report, the posts were each valued at Kshs. 200/=.

37. The barbed wire, consisting of four lines, was rated at Kshs. 150 per metre; Labour costs were included based on standard Ministry rates, not hardware prices.

38. He clarified that he did not distinguish whether the materials used were locally sourced or imported, as that was not within his mandate. He confirmed that 100 wooden poles were missing from the one-acre parcel, and that the entire fence on that parcel had been removed. He acknowledged a typing error in the report but affirmed that the total estimated damage remained Kshs. 377,000/=

39. currently attached to Webuye Police Station, having previously served at Navakholo Police Station. On 22nd May 2019, while on duty at Navakholo, a case was assigned to him regarding malicious property damage.

40. that 30 fence posts and barbed wire enclosing his property had been destroyed. Together with his colleague, Stanley Langat, PW4 visited the scene of the incident in Shinoyi area, where the complainant pointed out two parcels of land identified as LR No. Butsotso/Esumeiya/3190 and 4672.

41. ownership documents from the complainant. PW1 later presented the original title deeds, which were in his name. PW4 also recorded statements from witnesses and confirmed that the assessment of the damage was later conducted by an agricultural officer.

42.

- a) Title deeds confirming ownership: marked and produced as Prosecution Exhibits;
- b) Photographs of the damaged fence: produced and marked as PExhibits 3(a)-(m);
- c) Certificate from the Ministry (identifying the officer): marked as PExhibit 5;
- d) Damage assessment report: previously produced and admitted;
- e) Burial permit for one Anthony Nyangweso, a deceased witness: produced as PExhibit Witness statement of the deceased, recorded by PW4 produced as PExhibit 7.

43.

arrested and charged following investigations. He added that Anthony Nyangweso, now deceased, had been an eyewitness to the incident and that he had personally recorded his witness statement. He presented the burial permit as confirmation of the witness's death and sought to have his statement admitted into evidence.

44.

for nearly twenty years at the time. He confirmed that the report of the damage was made on 22nd May 2019, and he visited the scene on the same day. At the scene, he observed cut barbed wire and approximately 30 fence posts, some of which had been uprooted, removed, or destroyed.

45.

missing posts. Although he acknowledged that the barbed wire was still available, he conceded that it was not produced as an exhibit in court, attributing this to an oversight. He further confirmed that the barbed wire fence was not

specifically included in the charge sheet, and that he could not recall whether he had estimated its total length.

46.

photography was issued on 19th September 2022, and that the photographs clearly illustrated the locations from which the posts had been removed. He confirmed that the accused was arrested on 26th July 2019 and was arraigned in court on 27th July 2019.

47.

although only a section of the fence had been destroyed. He stated that he was not aware of any pending Environment and Land Court (ELC) matter relating to the land and clarified that his investigations were limited to the offence of malicious property damage.

48.

from the late Anthony Nyangweso and another officer recorded a third statement. While he had the burial permit for the deceased witness, he did not know the exact location of the burial. He reiterated that the total damage recorded in the assessment report amounted to Kshs. 377,000/=

49.

specifically on the barbed wire fence, and that he took photographs of the same, which were produced as exhibits. He emphasized that his role in the investigation was to establish whether the accused person committed the offence as alleged.

50.

responsible for the destruction of 30 fence posts. Upon visiting the scene, he

verified this claim by observing the missing posts and the resulting holes. He noted that due to their size and weight, it would not have been possible to physically carry all 30 posts away from the site during the investigation.

ANALYSIS AND DETERMINATION

51.

evidence

adduced before the trial court to a fresh evaluation and analysis. This I do while bearing in mind that I never had the opportunity to hear the witnesses and observe their demeanour. For this, I give due allowance. The principles that apply in the first appellate court are set out in the case of **OKENO VS REPUBLIC [1972] EA 32**, where it was stated as follows:-

“The first appellate court must itself weigh conflicting evidence and draw its conclusion. (Shantilal M. Ruwala v. Republic [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 findings and conclusions; it must make its findings and draw its 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.

Issues for Determination

52.

the following issues arise for determination:

a) *Whether the charge sheet was defective and rendered the proceedings null.*

- b) Whether there were inconsistencies and contradictions in the prosecution's case that undermined the conviction.*
- c) Whether the appellant's right to a fair trial was violated.*
- d) Whether the evidence adduced was sufficient to sustain a conviction.*
- e) Whether the sentence meted out was lawful and proportionate.*

a) Defectiveness of the Charge Sheet

53.

particulars, especially regarding the nature and quantity of property allegedly damaged and its valuation. He asserted that while the charge sheet referenced 30 posts and barbed wire, the assessment report spoke of up to 130 posts and other materials like chain link.

54.

the accused of the nature of the offence and particulars of the alleged acts (**see Yongo v Republic [1983] KLR 319**). However, not every error or inconsistency in a charge sheet invalidates proceedings unless it causes prejudice or a miscarriage of justice (see Section 382 of the Criminal Procedure Code).

55.

assessment report exists, the trial court appears to have relied solely on the 30 posts and barbed wire as specified in the amended charge dated 9th December 2020. The accused responded to the charge and cross-examined witnesses effectively. Therefore, no material prejudice is demonstrated. On this ground, of appeal fails.

b) Contradictions in Dates and Witness Testimony

56.

Specifically, he was allegedly arrested on 26th July 2019, but PW1 testified that the destruction occurred in September 2019. Additionally, a statement by a deceased witness (Anthony Nyangweso) was dated June 2019, and the police recorded a complaint on 22nd May 2019

57.

inconsistencies and contradictions in prosecution evidence may be fatal if they go to the root of the case.

58.

witnesses themselves during cross-examination. However, PW4's police diary, along with photos taken, indicated the damage occurred before the arrest date.

59.

PW1's oral testimony, which appears to have been a lapse in recollection. While discrepancies exist, they do not render the entire prosecution case unreliable. This ground partially succeeds but is not fatal.

c) Use of Statement by a Deceased Witness

60.

under section 33 of the Evidence Act as a dying declaration or a statement made by a deceased person. However, no justification or ruling was given by the trial court on the admissibility of the said statement, and there was no *voire dire* or compliance with the rules of admissibility.

61.

emphasized that such statements must meet strict standards before being admitted. The failure to lay this legal foundation vitiates the admissibility of the said statement.

62.

relied upon

d) Admissibility of Photographs and Lack of Gazettement

63.

produce a gazette notice confirming his qualification as a forensic

photographer under the Evidence Act, particularly sections 65–66 on secondary evidence and authentication of documents.

64.

that in criminal cases, documentary and photographic evidence must be accompanied by proper certification or authorization if not produced by an expert.

65.

produced. Accordingly, the photographic evidence should have been excluded.

66.

conviction.

e) Failure to Produce Physical Exhibits

67.

were presented in court. While this may not always be fatal, in this case, where the entire offence hinges on physical destruction, the failure to produce any tangible exhibits weakens the prosecution's case. In **Ramadhan Ali v Republic [2007] eKLR**, the Court emphasized the importance of corroborative physical evidence in offences involving malicious damage. In conclusion, the omission to produce critical exhibits was a material failure. This ground succeeds.

f) Alleged Denial of Right to Present Defence

68.

defence. However, the trial record does not conclusively support this claim. The burden of proving such a fundamental omission lies on the appellant. Absent clear evidence that the trial court denied the accused the chance to testify, this ground fails.

g) Evaluation of Evidence and Sufficiency

69.

testimonies, lacked physical corroboration, and relied on documents improperly admitted. The court in **Sawe v Republic [2003] KLR 364** held that the conviction of an accused person must be based on cogent and consistent evidence that proves guilt beyond a reasonable doubt.

70.

inadmissible evidence. The burden of proof, which lies with the prosecution, was not discharged.

Final Determination

71.

and having considered the law and cited authorities, I find as follows:

- a) The charge sheet, while not fatal, was inconsistent with the evidence.
- b) Evidence was undermined by contradictions and procedural violations.
- c) Inadmissible documentary and hearsay evidence was wrongly relied upon.
- d) Critical physical exhibits were never produced.
- e) The threshold for proof beyond a reasonable doubt was not attained.
- f) The appeal, therefore, succeeds on grounds C, D, E, and G above.

Orders

72.

- a) The conviction entered against the appellant in Kakamega CMCC No. 1877 of 2019 is hereby quashed.
- b) The sentence imposed is set aside.
- c) The appellant shall be set at liberty forthwith, unless otherwise lawfully held.

d) Right of Appeal 14 days explained.

**DATED SIGNED, and DELIVERED in open court at KAKAMEGA THIS
13TH OF OCTOBER, 2025.**

S.N. MBUNGI
JUDGE

In The Presence of;

Court Assistant: Angong'a

Appellant present.

Ms Osoro present for DPP

