



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MAKUENI
CRIMINAL APPEAL NO. E078 OF 2024

ERICKSON MWENDO..... APPELLANT

VERSUS

REPUBLIC RESPONDENT

(From the original conviction and sentence in Criminal Case No. E252 of 2024 of the Senior Principal Magistrate’s Court at Makindu, by Hon. O. A. Nyandusi–Resident Magistrate)

JUDGMENT

1. Erickson Mwendo, the appellant herein, was convicted of the offence of cutting down trees contrary to section 334 (c) of the Penal Code.
2. The particulars of the offence were that on the 1st day of February 2024, at Nduti area, Kibwezi sub-County, within Makueni County, wilfully and unlawfully cut down one tree (*caryota urens*) valued at Kshs. 26, 147.50 the property of Stephen Musyoka Masai.
3. The appellant was sentenced to serve two years of imprisonment. He was dissatisfied and filed this appeal through Mbalu Associates, Advocates. He raised the following grounds of appeal:
 - a) The learned trial magistrate erred in law and in fact by sentencing the appellant to a jail term without the option of a fine, despite the minor nature of the offence.
 - b) The learned magistrate erred in law and in fact by convicting the appellant without sufficient evidence linking him to the offence. The conviction was based on circumstantial evidence, with no direct evidence presented before the court. Neither the complainant nor any of the witnesses testified to having seen the appellant cutting the tree. The evidence tendered was insufficient to support the conviction.
 - c) The learned trial magistrate erred by convicting the appellant when the prosecution failed to prove the case beyond a reasonable doubt.

- d) The learned trial magistrate erred in law and in fact by failing to consider alternative non-custodial punishments in view of the minor nature of the offence.
 - e) That the learned magistrate erred in law and in fact by failing to consider that the charges against the appellant were actuated by malice and vindictiveness.
 - f) The learned magistrate erred in law and in fact by misapplying the law to the facts of the case. The learned magistrate misdirected himself by applying the law to facts that were either irrelevant or unsupported by evidence. This misapplication of the law led to an unjust conviction and sentencing.
 - g) The learned trial magistrate erred in law and in fact by imposing a sentence that was manifestly excessive in the circumstances.
 - h) The learned magistrate erred in law and in fact by disregarding the appellant's evidence altogether.
4. The state opposed the appeal because:
- a) The offences were proven to meet the required standards.
 - b) The sentence was commensurate with the offence.
5. This is a first appellate court. As expected, I have analyzed and evaluated all the evidence adduced before the lower court afresh. I have concluded, considering I neither saw nor heard any witnesses. I will be guided by the celebrated case of **Okeno vs the Republic [1972] EA 32**.
6. Section 334 (c) of the Penal Code provides:
- Any person who wilfully and unlawfully sets fire to, cuts down, destroys or seriously or permanently injures—**
- (c) any standing trees, saplings or shrubs, whether indigenous or not, under cultivation,**
- is guilty of a felony and is liable to imprisonment for fourteen years.**
7. The evidence adduced by the prosecution was that the appellant's father had sold the land where the *Caryota urens*, commonly known as the fish tail palm, was standing. The appellant's father conceded that he was the one who had instructed the appellant to cut the tree. He argued that he had not sold the trees when he sold the land to the complainant.

8. For a crime to be established, the prosecution must prove both the *actus reus* and the *mens rea*. The Black's Law Dictionary (10th Edition) defines *mens rea* as follows:
The state of mind that the prosecution, to secure a conviction, must prove that a defendant had when committing a crime.
9. In the instant case, there was no evidence that the accused was privy to the land sale agreement. He could not have been expected to know that the tree in issue was sold together with the land, contrary to his father's contention that he only sold the land, except for the trees standing thereon.
10. The legal definition of land includes what is growing in it. The Black's Law Dictionary (10th Edition) states as follows:
An immovable and indestructible three-dimensional area consisting of a portion of the earth's surface, the space above and below the surface, and everything growing on or permanently affixed to it.
11. However, I take judicial notice that the practice in this country is that when a purchaser is unable to pay for the trees, they are excluded from the sale price. Since the prosecution did not prove that this contention by the father of the appellant was not the proper position, *mens rea* was not established to the required standard. The appellant, therefore, benefits from the benefit of the doubt.
12. From the foregoing analysis of the evidence on record, I find that the prosecution did not prove its case against the appellant to the required standards. I accordingly allow the appeal. The conviction is hereby quashed and the sentence set aside. The appellant is set at liberty unless otherwise lawfully held.

Delivered and signed at Makueni, this 21st day of October 2025

KIARIE WAWERU KIARIE

JUDGE