



**Republic v Kang’ethe (Criminal Case E054 of 2025)  
[2025] KEMC 211 (KLR) (18 August 2025) (Judgment)**

Neutral citation: [2025] KEMC 211 (KLR)

**REPUBLIC OF KENYA  
IN THE LAMU LAW COURTS  
CRIMINAL CASE E054 OF 2025  
FM MULAMA, RM  
AUGUST 18, 2025**

**BETWEEN**

**REPUBLIC ..... PROSECUTOR**

**AND**

**JOSEPH NGIGI KANG’ETHE ALIAS KAGEMA ..... ACCUSED**

**JUDGMENT**

**A. Introduction.**

1. The accused is charged with malicious damage to property contrary to section 339(1) of the Penal Code.
2. The particulars were that on the diverse dates between 1<sup>st</sup> day of January 2025 and 29<sup>th</sup> day of March 2025 at around 0800hours in Manda sub location in Lamu county wilfully and unlawfully destroyed ten mango trees valued at Kshs.94,200/= by cutting them, property of Samuel Kamau Njoroge.
3. He is further charged with injuring an animal contrary to section 338 of the Penal code and particulars were that on 8/2/2025 at around 0800hours in the same area wilfully and unlawfully maimed an animal capable of being stolen namely goat valued at Kshs.10,000/= the property of Samuel Kamau Njoroge.
4. A total of 6 witnesses were called in support of the prosecution case and in defence the accused gave sworn evidence and closed its case.

**Prosecution’s case.**

5. It is the evidence of the prosecution that the complainant and the accused’s mother agreed to subdivide a piece of land jointly owned with her among other household items and an agreement was reached and a surveyor was called and the parcel of land was demarcated in the presence of the accused’s mother, the accused and nyumba kumi elders.



6. Soon thereafter but even before the exercise was concluded the accused's mother fell ill and travelled upcountry and never returned and effectively in his view the piece of land was effectively left to the care of the accused and another boy called Njoroge.
7. In the year 2024 the complainant got reports that the accused was planning to evict him from the land as it belonged to his mother and in the year 2025 in January he had cows grazing on his portion of land but they strayed and passed through the accused's portion and went to Faraj's portion and the accused came furious warning that if that happens again he'd cut the cows into pieces and also cut him into pieces as well.
8. 10 minutes later he came back and repeated the said threats and even threatened to remove the beacons. The complainant then reported the matter to the assistant chief and who advised to report the matter to the police. The chief then advised that the accused be granted a month to return the beacons he had removed and after the lapse that had not been done and he was advised to report the matter to the DCI.
9. One morning as he prepared to go and report the matter to the DCI as advised, the accused then cut down 7 mango trees that were on his portion of land and it later also emerged that he had been summoned to also record a statement and that the previous evening he had injured one of his goats.
10. The complainant further stated that 10 days after recording their statements, the accused came again and cut down another mango tree that had mango fruits and reported and after having information that he had been reported the accused then cut down 2 mango trees again.
11. Pw 2 the village elder where both the accused and complainant reside stated that after the complainant made a report of the destruction of his mango trees, he visited the parcel of land together with PW5 the agricultural officer who assessed the damage and prepared a report.
12. Pw 5 visited the scene and in her testimony she stated that she prepared 2 reports dated 11/2/2025 and 29/3/2025 for 7 mango trees and 3 mango trees and in her assessment the loss was to a tune of Kshs.94,200/= and also identified the photos produced as those of the cut mango trees.

### **Defence case**

13. It is the defence case that the charges are not true and that even count 2 does not have the OB No and well as date and time of the report and as such it is not clear to him on which date and time was the goat injured because the complainant said that the goat was injured on 8/2/2025 yet the IO said it was on 4/2/2025. To him he could not have committed any crime on 8/2/25 as it is the day he was summoned to the DCI and recorded his statement at 10am and further on 29/3/2025 he was also summoned to the DPP to try and solve the issue.
14. He insisted that he did not destroy the mango trees as alleged as during that time he was enroute to the DCI to record his statement.

### **B. Issues for Determination.**

15. The following are the key issues for determination;
  - a. Whether some property was destroyed;
  - b. That a person destroyed the property;
  - c. Whether the destruction was willful; and
  - d. Whether the destruction was unlawful.



16. Section 339(1) of the Penal Code states as follows:

“Any person who willfully 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.”

17. Justice Ngenye Macharia in *Wilson Gathungu Chuchu vs. Republic* [2018] eKLR held that under the above definition, the elements of the offence may be dissected as proof of ownership of the property; proof that the property was destroyed or damaged; proof that the destruction or damage was occasioned by the accused; and proof that the destruction was wilful and unlawful.

18. In *Simon Kiama Ndiangu vs. Republic* (2017) eKLR, Ngaah J. held that-

‘In order to convict the court must be satisfied that, first, some property was destroyed; second, that a person destroyed the property; third that the destruction was willful and therefore there must be proof of intent; and fourth, the court must also be satisfied that the destruction was unlawful.

19. As regards the first condition, in *Simon Kiama Ndiangu vs Republic* (supra) the Learned Judge declined to acceded to the:-

“suggestion in this provision that ownership of the destroyed property must be established for liability to attach. My take on this issue is that ownership of the property is a relevant but not the defining factor; it may be taken into account amongst other evidence that tends to establish that the offence was committed. It follows that failure to prove ownership is not fatal to the prosecution case and to this extent I agree with the learned counsel for the state.”

20. Similarly, in *Republic vs. Jacob Mutuma & another* (2018) eKLR, the rationale for the offence was explained in the following terms –

“In my view, it is not difficult to see why the offence is not necessarily tied down to ownership of particular property. It is to prevent wanton destruction of property that may lead to lawlessness and people taking the law into their own hands.”

21. According to the Black’s Law Dictionary 8<sup>th</sup> Edition ‘wilful’ means:-

“the word ‘wilful’ or ‘wilfully’ when used in the definition of a crime, it has been said time and again, means only intentionally or purposely as distinguished from accidentally or negligently and does not require any actual impropriety; while on the other hand it has been stated with equal repetition and insistence that the requirement added by such a word is not satisfied unless there is a bad purpose or evil intent.”

22. From the foregoing authorities it is indeed clear that one judge is of the view that proof of ownership must be proved whereas the other 2 judges are of the view that ownership need not be proved.

23. I am persuaded by the reasoning advanced in the *Jacob Mutuma* case (supra) and that is the position I take in this matter consequently in this matter the prosecution is duty bound to prove the following elements in order to sustain a conviction against the accused person;

- a. some property was destroyed;
- b. that a person destroyed the property;



- c. that the destruction was willful and therefore there must be proof of intent; and
  - d. the court must also be satisfied that the destruction was unlawful.
24. I will therefore hereinafter interrogate the said elements and reduce them into issues for determination via a vis the evidence on record by both the state and the accused.

### **C. Analysis and Determination.**

#### **a. Whether there was destruction of property;**

25. It is the complainant's testimony that on the diverse dates between 1/1/2025 to 29/3/2025 at 0800 hours the accused cut down his mango trees. It was his testimony that they had a land dispute and on the date he was to go and formally report to the DCI on the issue of threats, the accused cut down 7 mango trees and later he realized that the accused had also been summoned on the same day. This according to him the accused cut them down before heading to the DCI.
26. It was the complainant's testimony that 10 days they had been summoned to the DCI to record statements, the accused again cut down a mango tree that had fruits and he reported the matter and on the day he was summoned by the DCI the second time, he again cut 2 mango trees.
27. Pw 1,2 and 5 in their testimonies all confirm having seen mango trees having been cut and even identified photos that were produced as having been the photos of the mango trees, however, there is doubt as to how many they were. The complainant and Pw 5 states they were 10 in number and so are the 2 reports however, Pw 2 who was in the company of Pw 5 states that he saw a total of 14 mango trees that had been cut.
28. None of the other witnesses saw the accused cut down the mango trees except the complainant. The photos that were produced in court did not account for the 10 mango trees and as such there is serious doubt as to the number of trees that were cut.
29. It can never be possible that Pw 2 and 5 who visited the piece of land counted or saw different number of mango trees that were cut. It is further shocking that the agricultural officer never saw it fit to attach in her report photos of what she saw to inform her opinion that for instance the stage of development was medium or mature and as such there is doubt as to the number of trees that were cut down as against the number in the charge sheet.
30. It was expected that there would be clear photographs of 7 trees that were initially destroyed then followed by the one tree and finally the 2 trees that were destroyed last
31. Consequently, it is the finding of the court that whereas destruction of property was proved by way of the photos shown, it is not clear how many were destroyed and on which particular date this therefore creates a doubt and which doubt is resolved in favour of the accused person. It is therefore not safe to convict with such doubts in the evidence of the prosecution.

#### **b. Whether the accused person destroyed the property?**

32. All the other witnesses save for the accused never saw the accused cut down the mango trees. What is clear from the evidence of the accused is that in the month of February 2025 the accused cut down 7 mango trees that was on his portion of land and subsequently on 2 occasions cut 1 and 3 mangoes in that order. It is my understanding from his testimony that he saw the accused cut down the mango trees in all the three occasions and thus satisfied that the prosecution proved that indeed the accused person destroyed the mango trees.



33. Despite the overwhelming evidence as to the accused being responsible to the destruction, he did very little to counter that evidence in cross examination.

**c. Whether the destruction was willful and was there intention to destroy.**

34. It is now not in dispute that there was destruction by cutting down of mango trees the numbers being in doubt.

35. An analysis of the evidence by all the prosecution witness speak to a dispute that may have led the accused to destroy the property. The issue is about the ownership of the land between the complainant and the accused's mother of whom the accused wants to be the one in place of his mother.

36. A look at the photos it is clear that the person who destroyed them had all the intentions of destroying the said trees as the person destroyed both mature and immature trees and this was for lack of a better word wanton destruction of property and the indiscriminate manner in which he destroyed the trees makes his actions as deliberate and willful. I do find and hold in similar terms.

**d. Whether the destruction was unlawful.**

37. Having found that the destruction was willful and/or intentional the same was equally unlawful. The accused had no right to cut down any of the trees considering that they were on the part where the complainant was living. The accused has not in any way claimed ownership of the said mango trees. He neither planted nor looked after them and he had no rights whatsoever to destroy them and as such the destruction was unlawful.

38. On the 2<sup>nd</sup> count, it is the evidence of the Pw 1 the complainant that he never saw the accused injure the animal. None of the other witnesses saw the accused injure the animal and as such that count has not been proved to the required standards as it is not known who actually injured the complainant's goat.

**D. Conclusion and Disposition**

39. The totality of the foregoing is that whereas destruction of property was proved, it is not clear how many were destroyed and on which particular date this therefore creates a doubt and which doubt is resolved in favour of the accused person and as such the 1<sup>st</sup> ingredient was not proved to the required standard and the accused benefits from that doubt only.

40. Taking cue from the Jacob Mutuma case(supra), all the elements have to be proved beyond reasonable doubt for a conviction to ensue.

41. The accused is thus not found guilty of the offence of malicious damage to property, injuring an animal contrary to section 338 of the penal code and he is accordingly acquitted under section 215 of the CPC.

42. It is so ordered.

**DATED, SIGNED AND DELIVERED AT LAMU LAW COURTS THIS 18<sup>TH</sup> DAY OF AUGUST, 2025.**

**F.M. MULAMA**

**RESIDENT MAGISTRATE**

In the presence of:

Court Assistant:- Fathiya Loo

Ahmed Omar-DPP



Joseph Ngigi Kang'ethe.

