



**REPUBLIC OF KENYA**

**IN THE SENIOR PRINCIPAL MAGISTRATE'S COURT AT MAKINDU**

**CRIMINAL CASE NO 535 OF 2019**

REPUBLIC.....PROSECUTION

**VERSUS**

**JULIUS**

**KIMUYU**

MWANIKI.....ACCUSED

**JUDGMENT**

**THE CHARGE**

Julius Kimuyu Mwaniki (hereinafter referred to as the accused person) was charged with the offence of malicious damage to property contrary to section 339(1) of the Penal code. The particulars of the offence are that on 15/4/2019 at Kathiani village in Kibwezi Sub-county within Makueni County, the accused person wilfully and unlawfully damaged indigenous trees valued at Ksh. 281, 265.10/= by cutting them down and burning charcoal, the property of Col. Mumo K. Nduva. When the plea was taken, the accused person pleaded not guilty, where after the matter was set down for hearing. In a ruling delivered on 28/5/2025, the court found that the accused person had a case to answer and proceeded to place him on his defence.

**THE EVIDENCE**

**The Prosecution Case**

The entire prosecution evidence was taken by another Magistrate who was subsequently transferred. The prosecution called a total of three (3) witnesses in a bid to prove its case against the accused person. PW 1 Retired Colonel Mumo Nduva (hereinafter referred to as the complainant) testified that the accused person was his neighbour. That the accused person trespassed onto the complainant's land in April, 2019 and cut down trees without the complainant's authority. The complainant was not present when the trees were allegedly cut down but was informed of the incident by his Herdsboy. The complainant went to the accused person's home but found him very drunk. He then reported the matter to the police and the Agriculture office.

That the Forest officer prepared a report on the assessment of the damage. It was the evidence of the complainant that 10 bags of charcoal were recovered from the accused person's home. The accused person was later arrested. PW 2 Johnson Kilonzo testified that he was the complainant's Herdsboy. That on 15/4/2019 he found the accused person cutting down trees on the complainant's compound. PW 2 further testified that on 17/4/2019 he found the accused person having cut more trees. That the accused person used the cut timber to burn charcoal. PW 3 testified that he was an employee of the complainant. That on 15/4/2019 he was fencing the complainant's land when the accused person's cows trespassed on the complainant's land and damaged his crops. That the accused person was told to fence. It is not clear from the record what or where the accused person was asked to fence. PW 3 stated that the police visited the scene and took away charcoal. They arrested the accused person.

### **The Defence Case**

When the accused person was placed on his defence, he opted to give a sworn testimony without calling any other witness. The accused person admitted that the complainant was his neighbour. He denied having cut down the complainant's trees. It was the testimony of the accused person that complainant asked him to place a barrier to prevent livestock from entering the complainant's farm. That the complainant assigned other people to erect the barrier. The accused person stated that it was the people that the complainant had assigned who cut down his trees. That the accused person reported to the complainant, who then instructed the accused person to send the people away.

The accused person further stated that the complainant then asked him to erect the barrier using the proper timber. That the accused person used timber from his own farm to erect the barrier. It was the evidence of the accused person that after two weeks, the complainant found the accused person burning charcoal at his own home. The complainant then claimed that the charcoal was from his trees. Police officer visited the complainant's home and arrested him. They also took away the complainant's charcoal.

### **MAIN ISSUES FOR DETERMINATION**

Having considered the evidence on record, I find that the main issues for determination are as follows:

- 1) Whether the complainant's trees were cut down on 15/4/2019;
- 2) If so, whether it was the accused person who cut down the trees;
- 3) Whether the accused person wilfully and unlawfully cut down the trees;
- 4) Whether the prosecution has proven its case against the accused person to the required standard.

### **ANALYSIS AND DETERMINATION**

I have carefully considered the evidence on record as well as the law applicable. Section 339(1) of the Penal Code provides as follows:

***"Any person who wilfully and unlawfully destroys or damages any property is guilty of an offence, which, unless otherwise stated, is a misdemeanour, and is liable, if no other punishment is provided, to imprisonment for five years."***

In the case of *Simon Kiama Ndiangui v Republic [2017] eKLR*, Ngaah J while elucidating the ingredients of the offence of Malicious damage to property held as follows:

***"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 wilful and therefore there must be proof of intent; and fourth, the court must also be satisfied that the destruction was unlawful."***

The Penal code does not define the phrase *wilfully and unlawfully* nor define the terms separately. The word *wilfully* is defined in the ***Black's Law Dictionary*** as; "*voluntary and intentional, but not necessarily malicious*". The word *unlawful* is defined in the same dictionary as; "*violation of law, an illegality*".

Unlawful is also said to include moral turpitude. The online legal dictionary defines the term "Malice" as follows:

- a) The intention or desire to cause harm (as death, bodily injury or property damage) to another through an unlawful or wrongful act without justification or excuse;
- b) Wanton disregard for the rights of others or for the value of human life;
- c) An improper or evil motive or purpose.

At the very outset, I wish to point out that the proper charge ought to have been one of cutting down trees contrary to section 334(c) of the Penal Code and not the general charge of malicious damage to property. Section 334 of the Penal Code provides:

***"Any person who wilfully and unlawfully sets fire to, cuts down, destroys or seriously or permanently injures—***

***(a) a crop of cultivated produce, whether standing, picked or cut; or***

***(b) a crop of hay or grass under cultivation, whether the natural or indigenous product of the soil or not, and whether standing or cut; or***

***(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."***

However, the decision to charge the accused person under the general provision on malicious damage was not fatal to the prosecution case. I say so because the accused person understood what he was being accused of and was not under any illusion. No miscarriage of justice was occasioned and the particulars of the offence would still fit under the provisions of section 339(1) of the Penal code. I will allow the charge to stand despite the defect.

The only direct evidence linking the accused person to the offence is that of PW 2. The witness claimed that he saw the accused person cutting down trees on the complainant's farm on 15/4/2019. That the accused person then used the timber to burn charcoal. In his defence, the accused person stated that he used timber from his own land. The testimony of the accused person tends to admit that trees were cut down from the complainant's farm. However, it is the accused person's defence that the trees were cut down by persons hired by the complainant himself.

The investigating officer was not called to testify. It is not known why he chose to believe PW 2 and not the accused person. The evidence of the investigating officer would have confirmed or disputed the fact that trees were cut down from the accused person's farm. PW 3 stated that on the material day he was putting up a fence on the complainant's land and when he got to the between the complainant's land and that of the accused person, the accused person's livestock entered the complainant's land and damaged his crops. That the accused person was told to erect a fence. PW 3 did not state that he saw the accused person cutting down the complainant's trees. His evidence was that he was later told to go and see the accused person who had burned charcoal at his home. That the accused person "*cut trees and crossed over to Mumo's land*".

From PW 3's testimony, it is not clear where the trees were cut down from. It would appear that both PW 2 and PW 3 were on the complainant's land on 15/4/2019 when the accused person was said to have cut down the trees in issue. The two seem to have witnessed different scenarios. It is not clear whether they were on the land at the same time or period. From PW 3's testimony, it is not clear whether the trees were cut down on 15/4/2019 or on a subsequent date. I must say that the prosecution evidence was presented so casually and a lot of important details were left out. It is not clear what time the incident occurred. The chronology of events on the material day are not clear. From the prosecution evidence, one would have the impression that the accused person was arrested on the material day or soon thereafter.

However, the charge sheet indicates that the accused person was arrested on 1/6/2019. That was after almost two months from the date of the alleged incident. No explanation was given for the delay in arresting the accused person, yet he is the complainant's immediate

neighbour. It is not known when the incident was reported to the police. In my view, it is not enough for the prosecution evidence to merely show that the accused person committed an offence or the offence complained of. The evidence must contain a narrative showing the chronology of events leading to the commission of the crime. It must draw a clear picture from which the court can make a conclusion that the offence was indeed committed. Where there are gaps in material particulars, it cannot be said that the case is proven beyond reasonable doubt.

It is not even known how many trees were allegedly cut down. The charge mentions 15/4/2019 only as the date of the offence but the testimony of PW 2 indicates that the offence was committed on several days. It was stated by the complainant that a Forest officer assessed the damage and prepared a report. The report was marked for identification but the same was not produced in evidence.

I have considered the accused person's defence bearing in mind that he bears no responsibility to prove his innocence. His version is that he cut down his own trees and that the complainant's trees were cut down by the people that the complainant had hired to put up a barrier on the land. It is the duty of the Prosecution to prove the charge against the accused person beyond reasonable doubt. In *Philip Nzaka Watu v Republic [2006] eKLR*, it was held that to find a conviction in a criminal case, the trial court has to be satisfied of the accused person's guilt beyond reasonable doubt. On proof beyond reasonable doubt, the court stated in *Stephen Nguli Mulili v Republic [2014] eKLR*:

***"It is not in doubt that the burden of proof lies with the prosecution. The locus classicus on this is the case of DPP V WOOLMINGTON, (1935) UKHL 1 where the court eloquently stated that the "golden thread" in the "web of English common law" is that it is the duty of the prosecution to prove its case. The Kenyan Courts have upheld this position in numerous cases. See FESTUS MUKATI MURWA V R, [2013] eKLR."***

In the famous case of *Miller v Ministry of Pensions [1947] 2 All ER 372*, Lord Denning stated with regard to the degree of proof beyond reasonable doubt:

***"That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a***

**doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence of course it is possible, but not in the least probable, the case is proved beyond reasonable doubt, but nothing short of that will suffice."**

In *Bakare v State (1987) 1 NWLR (PT 52) 579*, the Supreme Court of Nigeria emphasized on the phrase proof beyond reasonable doubt, stating:

***"Proof beyond reasonable doubt stems out of the compelling presumption of innocence inherent in our adversary system of criminal justice. To displace the presumption, the evidence of the prosecution must prove beyond reasonable doubt that the person accused is guilty of the offence charged. Absolute certainty is impossible in any human adventure, including the administration of criminal justice. Proof beyond reasonable doubt means just what it says it does not admit of plausible possibilities but does admit of a high degree of cogency consistent with an equally high degree of probability."*** (Emphasis mine)

PW 3 confirmed that he had been hired by the complainant to erect a fence on his land. He also confirmed that the accused person was told to put up a fence. As already indicated, PW 3 was not clear on whether or not he saw the accused person cutting down the trees. With the two versions on who cut down the complainant's trees, there was need for proper and thorough investigations. The investigating officer would have attended court to adduce evidence that would disprove the accused person's version on what transpired. There was also need for evidence to show beyond reasonable doubt that the trees in issue were cut down from the complainant's farm and not the accused person's farm.

This would have required photographic evidence and perhaps some kind of survey report showing the boundary between the complainant's land and that of the accused person as well as the location of the cut trees. In the absence of such or similar evidence, the court is unable to tell who between PW 2 and the accused person told the truth. That is where reasonable doubt is created in the mind of the court. Prosecution counsel should be meticulous in extracting evidence from their witnesses. It is neither the duty of the accused person nor that of the court to fill in the gaps or tie up the loose ends in the prosecution

case. With all the pitfalls in the prosecution case, I have no reason to disregard the accused person's defence. It cannot be said that the prosecution has proven its case against the accused person beyond reasonable doubt.

**DISPOSITION**

Having considered the evidence on record, I find that the prosecution has failed to prove its case against the accused person beyond reasonable doubt as required by law. Consequently, I make the following orders:

- 1) The accused person is found **NOT GUILTY** of the offence of Malicious damage to property contrary to section 339(1) of the Penal code;
- 2) The accused person is hereby **ACQUITTED** accordingly, pursuant to section 215 of the Criminal Procedure Code.

**DATED, SIGNED AND DELIVERED IN OPEN COURT AT MAKINDU THIS 11<sup>TH</sup> DAY OF  
DECEMBER, 2025.**

**Y.A SHIKANDA**

**SENIOR PRINCIPAL MAGISTRATE.**