

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NANYUKI
CRIMINAL APPEAL NO E061 OF 2024

JESSEE MAINGI

GICHOGO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

**(Appeal from Original Conviction and Sentence dated 23/08/2024 in
Nanyuki CM Criminal Case No E1196 of 2021- V
Masivo, RM)**

J U D G M E N T

1. The Appellant, **JESSEE MAINGI GICHOGO** (1st accused during trial) was convicted after trial of **malicious injury to property** contrary to **Section 339(1)** of the **Penal Code** (count II), and two counts of **assault causing actual bodily harm** contrary to **Section 251** of the **Penal Code** (count III and IV). He has appealed against count II only. The particulars for count II were that on 06/02/2021 at Solio village in Laikipia Central Sub-county wilfully and unlawfully destroyed a camera make Sony XD Cam PMWx 200 and a wrist watch all valued at Kshs.855,200/- the property of Paul

Ngauro Muguro. On 23/08/2024, he was sentenced to a fine of Kshs.50,000/- in default 12 months imprisonment.

2. The Appellant was dissatisfied with the conviction and the sentence hence his appeal to this court. Vide a Petition of appeal dated 06/09/2024, he raises the following grounds;

- i. The learned magistrate erred by basing conviction on count 2 on contradictory and inconsistent evidence by prosecution witnesses.
- ii. The learned magistrate erred by failing to resolve the contradictions and doubts arising from prosecution evidence in favour of the Appellant.
- iii. The learned magistrate erred by shifting the burden of proof to the Appellant.
- iv. The learned magistrate erred by disregarding his defence.
- v. That the conviction in count 2 was not supported by evidence.

3. The appeal was canvassed by way of written submissions. The Appellant's counsel submitted that there

was no conclusive determination by the trial court that the destroyed camera and wrist watch belonged to PW1 as during cross examination, PW1 appeared not to be aware of who took the photograph of his camera prior to its destruction and this raised doubts as to the probative value of the photographic evidence. Further, he did not produce a receipt to show he paid for the purchase of the camera and this denied trial court crucial evidence to ascertain ownership of the camera. Therefore, the prosecution failed to prove ownership. That though the camera was destroyed during a scuffle between him and PW1, no prosecution witness including, the eye witnesses, placed the Appellant at the scene of crime setting the camera ablaze. There was no evidence that he took part in destruction of the camera and watch and based on the fact that there was no direct evidence that he took part in destruction, the link between him and the destruction was speculative. The complainant also failed to state whether the wrist watch was destroyed by the Appellant during the scuffle.

4. In rejoinder, the Respondent's counsel submitted that PW1 testified that he was the owner of the destroyed camera and he produced a receipt for the destroyed camera. He testified that the word invoice on exhibit1 was cancelled leaving the word receipt hence exhibit1 was a receipt and this proved that he owned the camera. Nevertheless, **Section 339** of the **Penal Code** makes no reference to ownership of property as a mandatory ingredient and the court in **Simon Kiama Ndiagui vs Republic (2017) eKLR** held that proof of ownership of the property is not the determining factor in proving the offence of malicious damage to property. No one else laid a claim on ownership and the substratum of the case was not on ownership but whether a camera was destroyed. Further, the Appellant bore the responsibility to prove that the camera did not belong to PW1 per **Section 116** of the **Evidence Act**.

5. As to who destroyed the camera, it is submitted that PW1 testified that the Appellant grabbed the camera which was kicked and broken into pieces and that he was familiar with the Appellant. Further PW4 testified that he

witnessed the Appellant throwing PW1's camera to the ground and urging the youth to torch it. He also witnessed him stepping on it. Therefore, the evidence was sufficient to prove the charge. He submitted that the Appellant's defence was an afterthought as he did not deny that he was at the scene, he did not raise his defence that he was assaulted by PW1 during prosecution's case and there was no allusion of bad blood between them.

6. This being the first appellate court, my duty is well spelt out namely; to re-evaluate the evidence tendered before the trial court and subject it to a fresh analysis so as to reach an independent conclusion as to whether or not to uphold the decision of the trial court. This duty was set out in **Okeno vs. Republic [1972] EA** by the Court of Appeal as follows;

"An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya vs. Republic (1957) EA. (336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala vs. R. (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 finding and conclusion; it must make its

own findings and draw its own 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, see Peters vs. Sunday Post [1958] E.A 424."

7. Similarly, in ***Kiilu & Another vs. Republic [2005]1 KLR 174***, the Court of Appeal stated thus:

"An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusions. 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; 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.

8. To this end a summary of the evidence at trial would be a suitable point of departure.

9. PW1, the complainant testified that he was a photographer and on the material day, he accompanied by his son, Nelson Kihara, went the farm of his other son, Ceizar Muguro, to plough. He had hired a tractor for the purpose to cultivate the land and, in the process, the 2nd accused

appeared with a crowbar and panga. The Appellant also appeared on a motorbike with other motorcycles trailing him. The Appellant and the 2nd accused ordered ploughing to stop and a dispute ensued and the Appellant requested for petrol to torch him and the tractor. That he had his video camera XD PMW 200 and the Appellant asked him why was he taking photos. The Appellant hit him with his head on the chest and snatched his camera from him and he was assaulted by 2nd accused and others. His camera was kicked like a football and broken into three pieces and he could hear them saying they destroy the evidence. He was told to leave the farm and never return. While leaving the farm, he saw smoke and when he returned to the scene with the police, he found that the camera had been burnt. The police took the ashes and metal pieces of the camera. He identified the receipt for the camera and photographs of the camera before and after damage. The Appellant was familiar to him prior the incidence.

10. On cross examination, he testified that the Appellant was his son's neighbour and the land belonged to his son. He did not know who took the photograph of the

camera prior to destruction. Exhibit1 was an invoice and he paid in cash. The invoice was not forged and the seller would say whether the invoice had the serial number of the camera and its warranty. That according to the witness statement of Gabriel who was a police officer, it stated that he was attacked by members of the public who snatched his camera and burnt it into ashes. That members of the public were incited by the accused persons.

11. On re-examination, he testified that the word invoice in Pexhibt1 was deleted leaving the word receipt. The Appellant questioned why he was taking the pictures and he snatched the camera.

12. PW2 was a clinician who produced the P3 form as Pexhibit3.

13. PW3 testified that he had been hired by PW1 to plough his farm and in the process, a man appeared armed with a rungu and panga. Few minutes later, four motor cycles arrived and a crowd gathered in the farm. The land owner started taking photographs and one of the people took his

camera and threw it on the ground. That the 1st Appellant and 2nd accused were at the scene and the Appellant hurt him.

14. On cross examination, he testified that PW1 had a similar camera as per Pexhibit2(a) which camera was torched. The burnt camera was not visible on the photos.

15. On re-examination, he testified that accused persons were not familiar to him and while leaving the farm, they saw smoke and upon return, he saw burnt pieces of the camera.

16. PW4 testified that the MCA candidate promised to destroy the camera and he witnessed Appellant assaulting the land owner and throwing the camera to the ground. The camera was then surrounded by a group of youth. The accused incited the youths to torch the tractor and one group remained where the camera was damaged. PW1 was picked by his son and driven away. A group of youth approached Ndungu for advice on the fate of the camera and the Appellant asked the youth to torch it. He even stepped on it. Mukorino joined in stepping on it and they then agreed to torch it. That a woman who had accused the land owner's son

of fracturing his sons' leg while escaping went for grasses to torch the camera and he witnessed them setting it on fire. He identified the photographs of the camera, and the scene where it was torched.

17. On cross examination, he testified that it was the first time to see the camera and he did not know the name of the lady who collected grass for torching the camera. Ndungu asked for the torching of the camera and he knew him prior the incidence. Ndungu was not in court. The Appellant slapped the land owner, grabbed him by the chest with one hand and the other hand grabbed his camera and threw it on the ground.

18. PW5 testified that he had gone to repair PW3's tractor and that there was a commotion. PW1 was taking photographs of the farm and a man who was on call hit PW1 on chest with his forehead and as a result, his camera fell down. The man on phone also hit the camera on the ground. The Appellant was the one who assaulted PW1 and 2nd accused was the man who was on a phone call.

19. He testified on cross examination that the destroyed camera was similar to the one exhibited in Pexhibit 2(e)-(g). That when PW1 was hit, he dropped the camera and nobody took the camera from him.

20. PW6 was PW1's son. He testified that he had accompanied PW1 to the farm and when they had just started ploughing, two people appeared and shortly after, two motor cycles arrived and the people demanded ploughing to stop. PW1 insisted ploughing will continue as he was taking photographs. One man knocked PW1 to the ground and threw the camera on the ground. He drove to safety and after a while, the driver of the tractor reported to him the torching of PW1's camera. He testified that the 2nd accused hit PW1 on the chest and threw the camera on the ground.

21. On cross examination, he testified that though the witness statement stated that he saw them grabbing the camera, it was wrongly recorded as it was one person who grabbed PW1's camera. He did not witness the torching of the camera.

22. On re-examination, he testified that PW1 was initially attacked by one person being the Appellant.

23. PW7 only testified on the report made by PW1 and that his camera was destroyed and burnt. He produced an invoice/receipt as Pexhibit1, and photographs as Pexhibit 2(a)-(h) a and certificate of photographic print as Pexhibit 2. He testified that the Appellant also went to the post and reported that that he was knocked by a motor vehicle within football pitch. He also reported that he was contacted by 2nd accused with a report that the football pitch was being grabbed.

24. On cross examination, he testified that Pexhibit 1 did not indicate the issuer but the name of the purchaser was indicated. It was certified and during investigations, PW1 took to them the original receipt. That the Appellant was issued with a P3 form and he contradicted himself in his witness statement that he was knocked by a motor vehicle and again attacked by two people. The Appellant and others who reported failed to follow up on their case.

25. On re-examination, he testified that the receipt had the issuer name at the top and there was no contrary evidence to ownership of the camera by the complainant.

26. The Appellant in his defence testified that he heard screams and he went to a field where there was a crowd. He inquired what was happening and he was attacked by men who had metal rods and clubs. 7 men hit him on the head and chest and he was unconscious and after regaining consciousness he was told a young boy was hit by a vehicle and villagers assisted him in taking the injured to the police. He reported how he was attacked but the police failed to attend to his report. That he was able to identify PW1 as one of those who attacked him. He went to hospital and he was issued with a P3 form. He was also issued with an OB, Dexhibit2. He took the P3 form to the police but he was sent away to recover first. He was later arrested after one week. He denied attacking PW1 and testified that he was attacked by PW1's group. That he did not incite the crowd to burn PW1.

27. On cross examination, he testified that PW1 was a stranger to him and they attacked him on allegation that he

was inciting the public. PW1 assaulted him on the chest. He was attacked after asking what was going on. That PW1 assaulted him on his chest and the head while the other six attacked him everywhere.

28. DW2 testified of a commotion in the football pitch where there was a group of five people who were threatening to kill someone. There was also a crowd of villagers. The group of eight were armed with metal rods and clubs. Appellant was not among the villagers as he arrived when the crowd had increased. He questioned what was happening and he was attacked by the group of eight people. He did not talk to the crowd.

29. On cross examination, he testified that he was able to identify the attacker and they were attacked by villagers after attacking the Appellant. The attackers were strangers to him.

30. That was the totality of the evidence before the trial court. I have had occasion to consider the evidence at trial. In so doing, I have taken cognisance that I neither saw nor heard the witnesses testify and have given due allowance

for that fact. I have had due regard of the submissions made and case law cited. I have taken into account the applicable law. The broad issue for determination is whether the prosecution proved its case to the required degree. To answer this question, the court will have to scrutinize the evidence to find whether each ingredient of the offence was proved.

31. It is trite that for the charge of malicious damage to property to stand, the Prosecution must prove the following elements as was held in ***Dominic Mutisya Kasini v Republic [2019] KEHC 4279 (KLR)***

(a) The property belonging to the complainant was damaged or destroyed.

(b) That the said property was damaged or destroyed through willful and unlawful actions.

(c) That the property in issue was damaged or destroyed by none other than the accused person in the dock.

32. In the case of ***Wilson Gathungu Chuchu vs. Republic [2018] eKLR*** the court stated of elements of the offence as follows:

“Under the above definition, the elements of the offence of malicious damage to property may be dissected as:

(i) Proof of ownership of the property.

(ii) Proof that the property was destroyed or damaged.

(iii) Proof that the destruction or damage was occasioned by the accused.

(iv) ***Proof that the destruction was wilful and unlawful. It was the onus of the prosecution to discharge the burden of demonstrating that it is the Appellant who wilfully and unlawfully damaged the identified property.***

33. Court have also interpreted the law to the effect that ownership is not a prerequisite ingredient to prove the offence. In the case of ***Simon Kiama Ndiangu vs. Republic [2017] eKLR*** Ngaah J stated of elements of the offence of malicious damage to property 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.

I cannot find any suggestion in the 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 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.”

34. Similarly, Majanja J stated of elements of the offence of malicious damage to property in ***Republic vs. Jacob Mutuma & another [2018] eKLR*** as follows:

“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.”

35. F. Gikonyo in ***Kennedy Mugambi & 2 others v Republic [2020] KEHC 3952 (KLR)*** stated thus;

“From the wording of section 339(1) of the Penal Code, ownership of the damaged property is not the only or predominant element of the offence of malicious damage to property. I should also think that the section does not envisage only proof of formal registration of ownership of property, for it has a wide opening for any evidence in proof of such differing ownership to be given. In judicial practice, concepts have arisen to describe varied other forms of ownership: say, actual ownership; beneficial ownership; possessory ownership etc. A person who enjoys any of such other categories of ownership, is for purposes of this section, the owner of the damaged property. The section has used carefully chosen words... Any person who wilfully and unlawfully destroys or damages any property is guilty of an offence...In my view, wilfully denotes intent whilst unlawfully entails lack of any colour of right or lawful authority. I will apply this test.”

36. In the instant case, there is no dispute that PW1 was in possession of a camera which was destroyed by burning during the fracas. He produced an invoice which he informed the court that the word invoice had been cancelled and the word receipt remained. He further testified that he

paid in cash. There is also no dispute that a camera was destroyed as photographs of the destroyed camera were produced.

37. As to whether the Appellant destroyed PW1's camera, PW1 testified that he was hit by the Appellant who also snatched his camera. His camera was kicked like a ball and broke into three pieces. He was ordered to leave the farm and while leaving, he saw smoke and when he returned, he found out that the camera had been burnt.

38. The Appellant was the trigger that dispossessed PW1 of the camera, kicking it and breaking it into pieces leading to the eventual burning by the others present. Whether other persons participated in the burning of the camera eventually in neither here nor there. The fact is that there is evidence that the Appellant snatched the camera and damaged it.

39. PW4 testified that the MCA candidate promised to destroy the camera and he witnessed Appellant assaulting the land owner and throwing the camera on the ground. The camera was then surrounded by a group of youth. A group of

youth approached Ndungu for advice on the fate of the camera and the Appellant asked the youth to torch the camera and even stepped on it. Mukorino joined in stepping on it and they then agreed to torch it. That a woman who had accused the land owner's son of fracturing his sons' leg while escaping went for grasses to torch the camera and he witnessed them setting it on fire.

40. These acts of other players in the saga were a direct follow up on the Appellant initial action of snatching the camera and kicking it and the Appellant remains the initiator of the destruction process. While any other persons involved, if at all, ought to answer for their individual transgression(s), this in no way absolves the Appellant from his active destruction of the camera in question.

41. On the issue of prove of ownership, I am in agreement with the jurisprudence laid down by Ngaah, J, Majanja J and Gikonyo J and I find no difficult in making a finding that whether actual ownership was proved or not, the main elements of the charge would have been proved. It is

worthy of note that in this case, evidence of ownership was produced.

42. On the whole, the appeal herein lacks merit and is dismissed in its entirety.

Dated signed and delivered virtually this 16th day of January 2026.

A.K. NDUNG’U
JUDGE