

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT BUSIA**  
**CRIMINAL APPEAL NO. E018 OF 2024**

**JOSEPH AKHUNGU MAKOKHA.....1<sup>ST</sup> APPELLANT**  
**EPHRAIM KIZITO MAKOKHA .....2<sup>ND</sup> APPELLANT**  
**PATRICK OKIYALA .....3<sup>RD</sup> APPELLANT**  
**VERSUS**  
**REPUBLIC.....RESPONDENT**

**(Appeal from conviction and sentence by Hon. P. Olengo, Senior  
Principal Magistrate, SPM, in Busia MCCRC No. 2408 of 2016, of 23<sup>rd</sup>  
May 2024)**

**JUDGMENT**

1. The 3 appellants were convicted on a count of malicious damage to property, contrary to section 339(1)(3)(b) of the Penal Code, Cap 63, Laws of Kenya. It was alleged that, on 7<sup>th</sup> June 2016, they damaged fence posts, belonging to Vitalis Nyamboga Barasa and Moris Bamba, at Madende village, Nambale Sub-County, Busia. A trial was conducted, where 4 witnesses were presented by the prosecution.
2. PW1, Moses Moris Pamba, was the owner of the land, where the boundary posts had been erected. He was not at the scene, when the damage was done. He had hired contractors to do the job. PW2, Ernest Levuni Nyamboti, was one of the contractors, who had erected the posts. After erecting the posts, he said the 2<sup>nd</sup> and 3<sup>rd</sup> appellants uprooted them. PW3, Vitalis Barasa, was one of the persons erecting the posts. They dug holes, planted the posts and cemented them to the ground. He found posts removed, and lying down on the ground. He did not see the appellants move them, but he was informed of it. PW4, Abdalla Bakari, was also among those who planted the posts. He said he saw the appellants pulling out the posts and carrying them. PW5, Chris Buluma, was also party to the planting of the posts. He did not see the appellants removing the posts from their holes, but he found the 2<sup>nd</sup> appellant carrying the last post.
3. The appellants were put on their defence, in a ruling delivered on 21<sup>st</sup> November 2022. The appellants made unsworn statements, on 3<sup>rd</sup> April 2023, denying the offence.

4. The appeal turns on lack of professional evidence to support the alleged damage, for surveyors and police officers did not testify; the matter was a civil dispute, framed as a criminal matter; and the case was not proved beyond reasonable doubt.
5. The principal element for malicious damage to property is destruction or damage to property. What ought to be proved is depreciation in value, however light. The *mens rea* is unlawfulness and wilfulness. There ought to be proof that the property belonged to the complainant.
6. On whether there was evidence to support the alleged damage, I note that the investigating officer did not testify. No exhibits, whether documents, photographs or other material were produced. No material evidence was presented to prove the damage alleged. Damage was not to the person of the witnesses who testified, but of property, that is posts planted or erected on land. Material proof was necessary. To show the posts damaged, or the place where they were removed from, that is the holes, where they were cemented. It was not enough to merely orally allege damage. There was need to provide material evidence of the damage. Pictorial evidence would have sufficed. It would appear photographs were shown to the witnesses, but the photographs were not produced as exhibits. The photographs did not get into the court record. They did not become evidence. In the absence of that, damage was not proved beyond reasonable doubt.
7. The other issue is about a civil dispute being converted into a criminal matter. The pendency of civil proceedings, of itself, does not bar criminal proceedings. However, in certain circumstances, depending on the pleadings in either matter, it may be imprudent to initiate criminal proceedings, if the issues raised in the criminal proceedings are likely to compromise or embarrass the civil proceedings, especially where the civil proceedings were initiated earlier. There could be a sense in which it could be argued that the criminal proceedings are initiated to defeat the civil proceedings.
8. Was that the case here? It is extremely difficult to tell. The appellants, in their defence testimonies, did not seek to present a case in that direction. They adduced no evidence. They merely made very short unsworn statements. I note that the trial court record reviewed pleadings, in a land matter, ELC No. 111 /2016. I have seen that document, marked as a defence exhibit. Yet, the trial notes, although, referring to it, did not mark it as such. I wonder how an exhibit could be

proved by a witness who had not taken an oath, and who was not going to be cross-examined. That document should not have been accepted and placed on record, for it could only be produced on oath, so that the prosecution could get a chance to cross-examine the witness producing it. It would be unfair or unjust for such a document to be placed on record, where the other side would not get a chance to confront the witness, producing it, on its authenticity and substance.

9. Anyhow, the mere production of pleadings, filed in other causes, without an exposition on what they are about, and how they relate or impact on the proceedings being conducted, would be of little help to the court. The court should not just draw conclusions on documents placed before it, it is the duty of the parties to describe the documents and expound on their contents, before the court can consume them. That is why witnesses testify, to breathe life into the documents that they place reliance on. As it is, there was no material before the court, upon which it could be said the criminal proceedings were primarily civil in nature, or were meant to defeat the pending civil proceedings.
10. The other issue is that the case was never proved beyond reasonable doubt. I agree. As discussed above, no material proof of the damage of property was presented to the court. Secondly, damage is malicious only if ownership is established. The damage is malicious only with respect to the relationships around it, that is as between the complainant and the accused. Damage, intended to hurt the owner, emotionally or financially, is malicious, and so is damage by the owner designed to hurt a second or third party, depending on it. No concrete proof was presented, on ownership of the land, on which the posts were planted. If they had been planted by the complainant, on land owned by him, and damage was meant to hurt him economically or to prejudice him in whichever way, then it was malicious. If they were erected on land belonging to another, without the consent of the owner, there would be issues that would militate against treating the damage as malicious. If they were planted at the boundary, or on the no-man's line, between the land belonging to either party, there could arise issues of consent, particularly if there was a land dispute, centred around the lands involved, and it would be inconvenient to raise the question of the damage, arguing that it was malicious. Proof of ownership, of all the lands around where the posts were erected, was critical to establish malice.

11. Overall, I find and hold that the appeal herein does have merit. I hereby allow it. The conviction of the appellants, in the Judgment, delivered on 3<sup>rd</sup> November 2023, is hereby quashed. The sentence, imposed upon them, on 23<sup>rd</sup> May 2024, to serve a probation order for 1 year, is hereby set aside. Orders accordingly.

**DELIVERED, DATED AND SIGNED IN OPEN COURT, AT BUSIA,  
THIS 2<sup>ND</sup> DAY OF FEBRUARY 2026.**

**W MUSYOKA  
JUDGE**

**Mr. Arthur Etyang, Court Assistant.  
Messrs. Ephraim Okonga, Patrick Okiyala and Joseph Makokha,  
appellants, in person.**

**Advocates**

**Ms. Onanda, instructed by the Director of Public Prosecutions, for the  
Republic.**