

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAHURURU

CRIMINAL APPEAL NO. E008 OF 2025

REPUBLIC.....APPELLANT

-VERSUS-

GODFREY CHELIMO KIRWA.....

.....RESPONDENT

JUDGMENT

1. Godfrey Chelimo Kirwa, the Respondent, was arraigned for committing the offence of **malicious damage contrary to Section 339(1) of the Penal Code**. Particulars of the offence were that on the 17th day of April, 2023, at Kipkandule Village, Mochongoi Sub-Location, Mochongoi Location, Marigat Sub-County within Baringo County by malicious damage sprayed herbicide to the maize farm of John Kering Cheruiyot to wit five (5) acres thus destroying all maize crops in the farm all estimated at seven hundred and eight thousand shillings.

2. Briefly, facts of the case were that on 17th April, 2023, John Kering Cheruiyot received information that his step-brother, the Respondent had sprayed his maize plantation with herbicides. He reported the matter to Ka Ben Police Post. He moved to the farm comprising of 5 acres with police officers and they found the Respondent and another person in the act of spraying the land. The police took photographs

of the scene. An assessment of the damage caused was done and investigations were conducted which culminated into the Respondent being arrested and charged.

- 3.** Upon being placed on his defence, the Respondent denied having committed the offence as charged. He testified that he went to his farm to spray his maize crops, at Mochongoi while in company of some people he retained to assist him. That he planted maize in April, 2023 and the people seen in the photographs were spraying foliar and the homestead seen in the photographs is their home. And, while in the process the Complainant arrived with a person who took photographs. Two other persons arrived and arrested him following allegations that he was spraying the Complainant's maize crop with the herbicide. That the portion of land was given to him by his deceased father in 2013 but the Complainant was trespassing on the land. He complained to the OCS Mochongoi Police Station and his advocate also wrote a letter of complaint to the OCS dated 19th December, 2023 and got a response thereto.
- 4.** Further, he stated that he had not seen any report from the government analyst of the herbicide alleged to have been used to spray the Complainant's land. That the casual labourers were not arrested because they were spraying foliar but not the herbicide. That the casual labourers wanted to testify but they were afraid of harassment by the police. That he has had a disagreement over the land with the Complainant which started after his father's death as the

Complainant alleges to be his brother a fact he is unaware of. That the Complainant would like to have him jailed so as to take over his parcel of land.

5. The court considered evidence adduced and reached a finding that ingredients of the offence lacked the words 'wilfully' and 'unlawfully' hence rendering the charge defective. But, it did not find that the Respondent destroyed the Complainant's crops as a result of the disputed parcel of land left by their deceased father. That the prosecution presented cogent evidence save for technicality highlighted of the poor draftsmanship of the charge sheet.
6. The court blamed the ODPP for failure read and scrutinize the particulars of the charge sheet since the police are not trained in legal matters. In the result, the Respondent was acquitted.
7. Aggrieved, the Appellant appeals on grounds that;
 - 1) ***That the learned Magistrate erred in law and fact and misdirected himself by holding that the prosecution failed to prove its case beyond reasonable doubt.***
 - 2) ***The judgment/acquittal by learned Magistrate is against the weight of the evidence and applicable law.***
 - 3) ***That the learned Magistrate erred in both law and fact by finding that the charge sheet was defective for the particulars were not in tandem with the law.***

- 4) The learned trial Magistrate erred in law in finding that the omission of the words “wilfully and unlawfully” in the particulars of the charge sheet rendered the charge sheet incurably defective.**
- 5) That the learned Magistrate erred in law and fact in failing to consider that the particulars of the charge sheet as laid out was not prejudicial to the accused as the accused understood the charges facing him and in fact proceeded to put up an appropriate defence.**
- 6) That the learned Magistrate erred in law by proceeding to acquit the accused on a mere technicality even after establishing and stating in no uncertain terms that the prosecution had presented cogent evidence.**
- 7) That the learned Magistrate erred in law and fact by failing to appreciate that the offence of malicious damage to property was such a serious crime that needed to be dealt with objectively without undue regard to technicalities.**

8. The appeal was canvassed through written submissions. It is urged by the Appellant that the court having observed that the prosecution had presented cogent evidence and the court having observed that it was pained to acquit the Respondent on technicalities, the decision of the court was

flawed and an affront to justice. That the Respondent having understood the charge he faced, the defect was mere technicalities. And that **Article 159 (d) of the Constitution** provides that justice shall be administered without undue regard to procedural technicalities. In this regard reliance was placed on the case of **Supreme Court of India in Willie (William) Slaney v State of Madhya Pradesh [A.I.R. 1956 Madras Weekly Noted 391]** held as follows;

“Whatever the irregularity, it is not to be regarded as fatal unless there is prejudice. It is the substance that we must seek. Courts have to administer justice and justice includes the punishment of guilt just as much as the protection of innocence. Neither can be done if the shadow is mistaken for the substance and the goal is lost in the labyrinth of insubstantial technicalities.”

9. That omission of the words “unlawful’ and “intentional” was not material as to affect the substance of the proceedings as to make the Respondent not understand the charges and the error was curable under **Section 382 of the Criminal Procedure Code**. Reliance is placed on cases **Peter Ngure Mwangi v Republic, [2014]KECA 405(KLR); and, Benard Ombuna v Republic [2019] Eklr.**

10. That as stated in **Obedi Kilonzo Kerero v Republic [2015] eKLR,** the Court of Appeal held that when

determining whether or not the charge sheet was defective, the applicable test is whether the conviction based on the defective charge occasioned the Appellant great prejudice. That the Respondent participated in the trial, cross examined witnesses and put up an appropriate defence. That the Respondent did not contend that the charge was defective.

11. As to the Respondent, it is urged that the appeal should be struck out because the Appellant filed a notice of appeal which is not recognized as a way of commencing an appeal from the subordinate court.

12. That on the subsistence of the appeal; that the charge sheet was incurably defective for failure to include the statutory ingredients of the offence under **Section 339(1) of the Penal Code** as held in ***Christopher Ngei v Republic [2000] eKLR*** where the court stated that;

13. This being a first appellate court

14. The Respondent was arraigned for contravening **Section 339(1) of the Penal Code** which provides that;

15. In ***Wilson Gathungu Chuchu v Republic [2018] eKLR*** the court stated ingredients of malicious damage to property as;

“

(i) Proof of ownership.

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

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

(iv) Proof that the destruction was wilful and unlawful.”

16. In **Kennedy Mugambi & 2 Others v Republic [2020] KEHC 3962 (KLR)** it was stated that;

17. The particulars of the offence were that;

“on the 17th day of April, 2023, at Kipkandule Village, Mochongoi Sub-Location, Mochongoi Location, Marigat Sub-County within Baringo County by malicious damage sprayed herbicide to the maize farm of John Kering Cheruiyot to wit five (5) acres thus destroying all maize crops in the farm all estimated at seven hundred and eight thousand shillings.”

18. Indeed, the particulars of the offence did not capture all the elements of the offence. Only four (4) of the requisite ingredients were stated. The question as to whether it was fatal to the prosecution’s case will be addressed at a later stage.

19. The prosecution had the duty to prove the allegations that were disputed by the Respondent who was presumed innocent until proven to the contrary. Ordinarily, the standard of proof is beyond reasonable doubt.

20. The damage was alleged to have been occasioned on the farm of John Kering Cheruiyot. Ownership had to be proved. The Complainant stated that he was using land that belonged to his late father measuring 5 acres on which he had cultivated maize. The Respondent stated that they disagreed

over the land after their father died. He claimed that on the material day he was spraying foliar on his own parcel of land that he was given by his father measuring 4 acres.

21. I have seen a letter authored by the defence counsel seeking to be furnished with an OB extract of a report previously made to be used in his defence in the instant case. What could be deduced from the above is a fact of there having been a disagreement over the farm that belonged to the estate of the deceased (their father) hence ownership was not proved as neither party adduced evidence of the right to possess, use or control the land following the demise of the deceased.

22. Statute refers to damage of any property. It could envisage legal ownership where the owner of the property in issue must be recognized by the law like acquiring ownership after parties were petitioned for letters of Administration and the estate of the deceased is distributed. Or it could be a question of beneficial ownership where the Complainant benefits from the property in question. The Complainant alluded to having been in possession of the land having been given by the late father which is in dispute.

23. Evidence was led by the prosecution of the Complainant having planted maize at a cost of Kshs.84,710/- and he expected returns of 130 bags of 90kgs each. But, after the herbicide was sprayed it all withered. PW3 Stephen Kiptoo the nephew of both the Complainant and Respondent referred to the land as the Complainants. And, he saw the Respondent spraying the land in question which the Complainant had

cultivated. The Complainant found the Respondent on the parcel in the act of spraying but the Respondent claims the portion was his.

24. PW5 PC Joshua Munene on receiving a report from the Complainant moved to the scene and found the Respondent in the act of spraying some substance he called herbicide - Kausha 480 SL on the maize farm. He adduced in evidence some receipts the Complainant allegedly provided proving the Complainant purchased some seedlings and paid for labour. The Complainant claimed he planted 50kgs of seeds but he never identified the stated receipts. But, PW2 William Kibet the paternal uncle of both the Complainant and Respondent, stated that the maize on the 5 acres of land was planted by the Complainant and when he went to the subject land on the fateful date on being called he found the Respondent spraying the maize that the Complainant had planted. Evidence was adduced of use of land by the Complainant and the maize having been planted by the Complainant.

25. The Complainant reported the matter to the Ministry of Agriculture and PW4 Timmy Albert Tsuma the Agricultural Officer who visited the farm carried out an assessment whereby he ascertained that there was some damage. He opined that the farmer was expecting a maize yield of about 130 bags x 90kgs maize from the land destroyed.

26. Evidence adduced by the Agricultural Officer establishes that some damage was occasioned on the maize. He observed that some herbicide was used to spray the growing maize

although in cross examination he denied having expertise in agricultural chemistry.

27. PW5 No. 197985 PC Joshua Munene who visited the scene and found the Accused in the act stated that he took photographs of the scene which he processed. According to him the land was L.R. Baringo/Mochongoi/Block 1/1064 which belonged to the Complainant's deceased father. On cross examination he claimed that he concluded that the liquid branded Kausha 480 SL was a herbicide. That a complaint had been made to Mochongoi Police Station by the mother of the Respondent that the Complainant had forcefully cultivated the land and he could not tell if the Respondent was granted permission to till the deceased's land.

28. Photographs were adduced in evidence by No. 78498 PC Joseph Kipsamo. He stated that he received a memory card from Joshua Munene a scene of crime officer and certified the photographs which he produced as Exhibit 1. He did not tender any introduction by giving his professional summary, experience and qualifications. The introduction ought to have been guided by the prosecution counsel for the court to gauge the credibility as he tendered evidence. The witness produced a certificate to process and print photographs on behalf of the photographer pursuant to **Section 78 of the Evidence Act**. According to the certificate he forwarded nine photographs together with the processing certificate. There was no explanation whatsoever of what the photographs depicted. The stated photographs were not identified by

either the Complainant or any of the witnesses and even PC Munene PW5 who was alleged to have taken them.

29. The damage that was alleged to have not been trivial, stated to be occasioned by the Respondent called for proof that it was wilful and unlawful. The damage must have been done without any justification and maliciously. The way the prosecution portrayed what happened, what transpired was intentional.

30. However, there was an omission in the particulars of the offence to include the element of the destruction having been wilful and unlawful. That element is crucial because it is what proves the *mensrea* of the offence stipulated in **Section 339(1) of the Penal Code**. The act in question must not only have been committed but, it must have been done wilfully and unlawfully.

31. The charge on particulars of the offence stated that "...by malicious damage" ... repeating the statement of the offence as framed. He was stated to have sprayed some herbicide yet the liquid substance was not subjected to analysis by the government chemist to prove the same. There was need for testing through chemical analysis to confirm if indeed it was a pesticide(herbicide) which was capable of supressing/killing the plants.

32. Indeed, the charge was defective. It is argued that it was curable by **Section 382 of the Criminal Procedure Code** which provides thus;

Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice:

Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings.

33. This is not a case where the Respondent brought up the question of the defect in the charge sheet. It was the finding of the court after interrogating evidence placed before it. The charge failed to disclose the essential element of the offence. Mwera J (as he then was) confronted with such a scenario in the cited case of ***Christopher Ngeri (supra)*** stated that;

“ But the ingredients of the offence appear in the particulars. It can thus be said that the appellant was charged with an offence unknown to law. It ought to have been stated in the particulars of the offence of

malicious damage to property that he willfully and unlawfully damaged Nzuki's crops. Son on the technicality alone this appeal is allowed."

34. As correctly found by the learned Magistrate the *mensrea* was a mandatory element. Failure to include it made the charge fatally defective. It could not be salvaged by the issue of not hinging on technicalities as envisaged by **Article 159(d) of the Constitution.**

35. This is a case where investigations carried out were wanting. The office of Director of Public Prosecutions was vested with the duty of deciding when to charge based on the evidence availed by the police. The charge which was wrongly drafted upon being presented to the ODPP for advice, the decision made based on the prosecutorial authority should have been based on a sound conclusion. This was not the case in the instant case.

36. For that reason, the appeal lacks merit, accordingly, it is dismissed.

37. It is so ordered.

Dated, signed and delivered virtually this 17th day of February, 2026.

.....
L.N. MUTENDE
JUDGE