

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT ISIOLO
CRIMINAL APPEAL NO. E008 OF 2025

JOSEPH

KARITHI.....

...APPELLANT VERSUS

REPUBLIC.....

.....RESPONDENT

(Being an Appeal from the conviction and sentence of Hon. Maureen Odhiambo (SRM) in Isiolo Magistrate's Court Criminal Case No. MCCR/E344/2021 delivered on 24th April, 2025).

JUDGMENT

1. The Appellant, Joseph Karithi, was charged on two counts. In Count I, he was charged with Malicious damage to property contrary to section 339 (1) of the Penal Code. The particulars were that on the 26th day of February 2021 at Mwangaza area in Isiolo County, jointly with others not before the court, he willfully and unlawfully damaged a semi-permanent house which was under construction, valued at Kshs. 303,400, the property of George Itabari.
2. In Count II, the Appellant faced a charge of Stealing contrary to Section 268 as read with Section 275 of the Penal Code. The particulars were that on the 26th day of February 2021 at Mwangaza area in Isiolo County with others not before court stole 40 bags of cement, 40 pieces of Maisha mabati, assorted steel rods, and 3 wheelbarrows, all valued at Kshs. 93,000, the property of George Itabari.
3. At the conclusion of the trial, the Appellant was found guilty of the of the 1st charge, and acquitted of the

2nd. He was sentenced to pay a fine of Kshs. 100,000 or serve 2 years imprisonment in default.

Petition of Appeal

1. Aggrieved by the conviction and sentence, the Appellant filed the instant appeal raising 11 grounds, a summary of which is that , the prosecution did not prove their case beyond reasonable doubt; the trial court failed to evaluate material contradictions in testimony; and that the Complainant failed to produce proof of ownership of the property. Further, the Appellant state that the criminal charges were an abuse of the court process as the charge is being used to resolve an existing land dispute.
2. The Appeal proceeded by way of Written Submissions.

Appellant's Submissions

3. It is the Appellant's submissions that the essential elements of the offence were not proved and thus the offence was not proved beyond reasonable doubt.
4. The Appellant further contends that the Complainant (PW1) failed to adduce any evidence showing that he was the legal owner of the land where the alleged destruction took place. It is further submitted that the Complainant lacked approved construction plans, drawings, or approvals from the National Construction Authority (NCA) for the alleged commercial site. The Appellant points out that the receipts for construction materials were only obtained after the matter was reported to the police, suggesting they were fabricated to fix the Appellant. The Appellant argues

that is a mandatory ingredient of the charge. I this regard the decision in the case of **Wilson Gathungu Chuchu vs. Republic (2018) eKLR** to buttress his submissions.

5. The Appellant argues that there are glaring contradictions and inconsistencies in the testimonies of the prosecution witnesses. He cites for instance the testimony of PW1 in which he testified that he was alone at the time of the incident and was not in the company of (PW2) , while PW2 and PW3 testified to have been present. He further cites the testimony presented on the source of light; that whereas PW1 stated that he was using a torch, PW2 alleged that the light from the airport assisted him to see ,and PW3 claimed there was sufficient moonlight. The Appellant urges the court to find that these contradictions render the identification unreliable . He has relied on the case of **Cleophas Otieno Wamunga v Republic (1989) eKLR**, in which the court cautioned that even recognition of a known person can be mistaken if circumstances are unfavourable.
6. On the production of evidence, the Appellant faults the prosecution for failing to call the investigating officer or the scenes of crime officer to formally produce the photographs of the damaged property. It is submitted that without the testimony of these officers, the probative value of the physical evidence were not verified.
7. On the existence of a land dispute, the Appellant submits that the trial court failed to consider that the criminal charges were an attempt by the Complainant

to gain leverage in a civil dispute. He states that there existed **ELC Case No. E003 of 2021**, which involved the same parcel of land, and which suit had been dismissed for want of prosecution. He accuses the respondent of abuse of the court process by using the criminal process to intimidate him.

8. It is the Appellant final submissions that the prosecution's case was marked by material inaccuracies and inconsistencies that it fell short of the standard of proof in criminal cases. Therefore, he concludes, the conviction was against the weight of evidence.

The Respondent's Submissions

9. The Respondent opposes the appeal. It is argued that the prosecution established its case against the Appellant beyond reasonable doubt.
10. On the question of the proof of ownership of the damaged property, the Respondent has cited the decision in the case of ***Simon Kiama Ndiagui v Republic (2017) eKLR***, where it was held that ownership of the destroyed property is a relevant, but not the defining factor, for liability to attach. The Respondent points out that the Complainant (PW1) was in possession of the plot and was in the process of construction, a fact supported by the production of receipts for building materials and photographs. The Respondent maintains that the failure of PW1 to provide formal title documents did not negate the Appellant's liability for the damage caused.

11. On whether the property was destroyed by the Accused person, the Respondent submits that the testimonies of PW2 and PW3 are sufficient to sustain the conviction. It is contended that these two witnesses, who were construction workers at the site, clearly saw the Appellant among a group that arrived at the scene and witnessed him directing or performing the act of demolition using metal bars. The Respondent highlights that the Appellant was placed at the scene and did not deny being present
12. The Respondent argues that the Appellant's actions were full of malice because he was aware of the Complainant's investment on the land and the existence of an injunction in **ELC Case No. E003 of 2021**. The Respondent asserts that the Appellant acted intentionally to prevent the Complainant from continuing with the construction. While relying on the case of **Republic V. Jacob Mutuma & another (2018) eKLR**, the Respondent submits that a land dispute of itself is not sufficient to immunize a person from a charge of malicious damage to property. It is the respondent's case that the act of demolition was not authorized and therefore was unlawful.
13. It is the respondent's final submission that the Appellant's defence was a mere afterthought which could not dispel the overwhelming evidence tendered by the prosecution witnesses. Consequently, the Respondent urges this Court to find that the conviction safe.

Analysis and Determination

14. This being a first appeal, this Court is under the duty to review the evidence, re-evaluate it, and arrive at its own findings. In the case of **Okeno Vs Republic (1972)EA 32**: the court held :

"The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala v. Republic (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 findings and conclusions; 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".

15. I have identified the following issues for determination:

- a) *Whether the identification of the Appellant was positive and free from error.*
- b) *Whether the prosecution's case was marred by contradictions and inconsistencies*
- c) *Whether the essential elements of the offence were proved.*

Whether the identification of the Appellant was positive and free from error

16. The Appellant contends that the identification of the perpetrator was unreliable , as the incident occurred during the dark.

17. The reliability of the evidence of identification as a basis for conviction has been a subject of the numerous past decisions of the superior courts. In **Cleophas Otieno Wamunga v Republic (Supra)**, the court had this to say:

“Where the only evidence against a defendant is evidence of identification or recognition, a trial Court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of a conviction. Recognition may be more reliable than identification of a stranger, but even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made”.

18. In the present case, the incident occurred around 7:30 PM, it was dark . The destruction was going on , with a attendant mayhem, normally associated with demolitions. There was also inconsistency between the thre eye- witnesses on the source of light for purposes of identification. **PW1** told the court that he used a torch; according to **PW2** the light from the Airport provided sufficient illumination; while according to PW3, the moon was the source .

19. The discrepancy on the above statements, raises doubt on the source of light and hence proper identification. For instance, if indeed the electric light from the Airport was present (the court notes that the distance from the Airport to the crime scene was not ascertained) , it raises the question of the

need for a torch or the moonlight as the source of light. In other words, the intensity of the 'Airport light' rendered the moonlight unnecessary.

20. In the case of **R v Turnbull & Others (1976) 3 ALL E.R. 549**, the court held that the courts must closely examine the circumstances; distance, lighting and time under which an identification is made. In the instant case, the distance between the Airport and the crime scene was not stated to enable the court to ascertain whether such a light would have provided enough light to the scene of crime. Further it is not known how long the witnesses had the incident under observation so as to ascertain that the Appellant was one of those who were carrying out the destruction.

21. The illumination in my view, coupled with the circumstances of the crime, could not have allowed the three eye witnesses to properly identify the perpetrator of the crime.

22. It is important to remember at this point that the critical evidence in this case was the evidence of identification. In the circumstances, It was incumbent upon the prosecution to provide more and better particulars of identification, to establish positive identification. The threshold of proof in this regard fell short.

Whether the prosecution's case was marred by contradictions and inconsistencies

23. The Appellant has highlighted some of the contradictions and inconsistencies on the Prosecutions case. He points out for instance that whereas PW1 testified that he was alone at the time

of the incident, this was contradicted by PW2 and PW3 who told the court that they witnessed the demolition. These inconsistencies in my view were however minor and did not dent the prosecution's case.

Whether the subject offence was proved.

24. **Section 339(1) of the Penal Code** defines the offence of malicious damage to property as follows:

"Any person who willfully 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".

25. While expounding on the above section of the law, the court in **Wilson Gathungu Chuchu vs. Republic (Supra)** the court set out the elements of the offence as follows:

- a) proof of ownership of the property;
- b). proof that the property was destroyed or damaged,
- c). . proof that the destruction or damage was occasioned by the accused;
- d). proof that the destruction was willful and unlawful".

26. On proof of ownership, in **Simon Kiama Ndiagui vs. Republic (Supra)**, the Judge held:

"I cannot find any 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”.

27. The court is persuaded by the decision of **Simon Kiama’s case**(supra) as it echoes a number of past decisions of the superior courts on the same issue; namely proof of ownership is not a mandatory ingredient of the offence of malicious damage to property.

28. The next element is proof that property was destroyed. The respondent testified of some photographs of the scene. The record however does not show that such photographs being produced. In the absence of such photographs, there was nothing to prove that any destruction of property took place. Considering the nature of the charge, I do not consider the complainant’s oral evidence alone to be sufficient proof that the property was indeed destroyed. The respondent also produced receipts for purchase of various building materials. However, the evidence of the receipts , at its best, was simply to prove that a building was constructed, but does not testify about the destruction of any property . There was no sufficient evidence therefore to prove this element of the offence.

29. On whether the damage was carried out by the Appellant, in the light of my findings on the aspect of identification and absence of other circumstances

implicating the Appellant , there was no proof that the destruction of the property was carried out by the Appellant. Thus, this ingredient of the offence was not proved.

30. On the last element, the **Black's Law Dictionary** defines the term willful as follows- *'Willful' means proceeding from a conscious motion of the will; intending the result which actually comes to pass; designed; intentional; malicious. It differs essentially from a negligent act. Willful acts are positive and intentional, as opposed to accidental or involuntary acts. ...*". The word " *unlawful*" on the other hand is self- explanatory ; It means that the destruction was not authorized by law , order of the court or consent of the owner of the property. In this case, the fact that the destruction was done under the cover of darkness was indicative of the willful nature of the act. Further there was no evidence that there was prior authorization by any lawful order or consent of the complainant herein. It is therefore my finding that this element of the offence was proved.

31. To sustain a conviction all the ingredients of the offence must be present. The prosecution failed to prove all the elements in this case and therefore the Appellants conviction was unsafe.

32. In the end, the Appeal is allowed. The conviction is quashed, and the sentence is set aside. The Appellant is hereby set at liberty forthwith unless otherwise lawfully held.

Dated , signed and delivered at Isiolo this 19th day of March 2026

S. Chirchir

Judge .

ORIGINAL