



REPUBLIC OF KENYA

IN THE SENIOR PRINCIPAL MAGISTRATE'S COURT AT MAKINDU

CRIMINAL CASE NO 41 OF 2020

REPUBLIC.....PROSECUTION

VERSUS

KIPNGETICH

KOSGEI.....ACCUSED

JUDGMENT

THE CHARGE

Kipngetich Kosgei (hereinafter referred to as the accused person) is charged with four counts under the Penal code. In the first count, the accused person is charged with the offence of Stealing contrary to section 268 as read with section 275 of the Penal code. The particulars of the offence are that on the night of 19th and 20th October, 2019 at Muuani village in Kibwezi Sub-county within Makueni County, the accused person stole 12 pipes valued at Ksh. 15,000/=, the property of Pauline Mulei. The second count is also that of stealing contrary to section 268 as read with section 275 of the Penal code. The particulars of the offence are that on the night of 19th and 20th October, 2019 at Muuani village in Kibwezi Sub-county within Makueni County, the accused person stole 20 water pipes of three inches each pipes valued at Ksh. 30,000/=, the property of Rose Ndaka.

In the third count, the accused person faces a charge of malicious damage to property contrary to section 339(1) of the Penal code. The particulars of the charge are that on the

night of 19th and 20th October, 2019 at Muuani village in Kibwezi Sub-county within Makueni County, the accused person wilfully and unlawfully damaged 12 pipes of three inches each valued at Ksh. 15,000/=, the property of Pauline Mulei. The fourth count was a similar charge of malicious damage to property contrary to section 339(1) of the Penal code. The particulars of the charge are that on the night of 19th and 20th October, 2019 at Muuani village in Kibwezi Sub-county within Makueni County, the accused person wilfully and unlawfully damaged 20 water pipes of three inches each valued at Ksh. 30,000/=, the property of Rose Ndaka. The accused person pleaded not guilty where after the matter was set down for hearing.

THE EVIDENCE

The Prosecution Case

The entire prosecution case was heard by another Magistrate who was subsequently transferred. When the matter came up before me, the parties proposed and the court directed that the matter proceeds from where it had reached. The accused person had already been placed on his defence. The prosecution called four (4) witnesses in a bid to prove their case. PW 1 Pauline Mulei (hereinafter referred to as the 1st complainant) testified that on 20/10/2019 her pipes were stolen. That she was called on 19/10/2019 on phone by one Rose. Rose informed the 1st complainant that she had been informed by the guard that the pipes had been stolen. That the pipes had been found at the home of the suspect's mother in-law one Agnes Mutuku.

The 1st complainant informed the Nyumba Kumi Chairman and they went to the home of Agnes Mutuku. The 1st complainant stated that she lost 12 pipes but was able to identify one pipe at the home of Agnes. She saw 7 pipes at the home of Agnes. The matter was reported to the police. The police visited the home of Agnes and took away the seven pipes. The accused person was later arrested. PW 2 Rose Nzula Nzuki Ndala (hereinafter referred to as the 2nd complainant) testified that on 19/10/2019 she was called by her Shamba boy and informed that her pipes had been stolen. Later, the Shamba boy informed her that he had seen the pipes at the home of Mutuku. The 2nd complainant called the 1st complainant

and informed her. The following day, the 2nd complainant was called at the police station. She went and was able to identify six pipes as belonging to her.

PW 3 Mutinda Muia testified that he was a member of community policing. That on 20/10/2019 the 1st complainant called him and stated that her pipes had been stolen. The witness looked for the pipes and found them at the home of one Agnes Mutuku. That Agnes stated that the pipes had been taken there by the accused person. Seven pipes were recovered by the police. PW 4 Police Constable Said Godana Salim testified that on 21/10/2019 he was at Ulilinzi Police Post when the 1st complainant reported about the theft of pipes. PW 4 went to where the pipes had been seen and was able to recover seven pipes. The record indicates that the seven pipes and photographs were produced in evidence. PW 4 stated that they were informed that the pipes had been taken there by the accused person.

The Defence Case

Upon being placed on his defence, the accused person elected to give a sworn testimony and called two other witnesses. The accused person testified that he was a Farm Manager and that on the night of 19/10/2019 he sent three workers to dig out pipes from the land that his employer had leased. That the workers dug out seven pipes and left them at the home of the accused person's father in-law. The accused person stated that later, there was a complaint that some pipes were stolen. The seven pipes were taken away by the police and the accused person was arrested. The accused person denied that the pipes were stolen. DW 2 Emmanuel Mutuku Nzomo testified that on 19/10/2019 the accused person hired him to remove some pipes from a parcel of land that he had leased.

DW 2 and another person removed the pipes after being shown where they were by the accused person. The pipes were then taken to the home of one Mutuku. The following day, they were informed that the police had taken the pipes and that the accused person had been arrested. DW 3 Peter King'oo Manda testified that he was with DW 2 when they dug out the pipes. His testimony was similar to that of DW 2.

FACTS NOT IN DISPUTE

From the evidence of both parties, the following facts are not in dispute:

- a) The accused person caused pipes to be dug out from a farm;
- b) The pipes were taken to the home of one Mutuku;
- c) The pipes were recovered by the police;
- d) The pipes produced in evidence were the ones dug out at the instructions of the accused person.

MAIN ISSUES FOR DETERMINATION

In my opinion, the main issues that fall for the court's determination are as follows:

- i. Whether the complainants' pipes were stolen as alleged;
- ii. Whether it was the accused person who stole the complainants' items;
- iii. Whether the recovered pipes belonged to the complainants;
- iv. Whether the accused person maliciously damaged the complainants' pipes;
- v. 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. In my considered view, for the court to convict an accused person, the prosecution must have proved beyond reasonable doubt the following:

- a) That the offence complained of was indeed committed; and
- b) That the evidence links the accused person to the offence complained of.

It is my further opinion that in order to prove that the offence complained of was indeed committed, the prosecution must establish the key ingredients of the offence. The prosecutor must offer credible and cogent evidence in support of each element of the offence.

I will begin by addressing the offence of malicious damage to property. 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.

Judging from the evidence on record, it is my considered view that it was ill-advised for the prosecution to charge the accused person with both the offence of stealing and malicious damage to the same pipes. The prosecution ought to have made up its mind on which offence to prefer. The specific intent in both offences is different and given the circumstances of the case, there is no way both specific intents existed in the mind of the accused person. Be that as it may, there is absolutely no evidence on record to support a charge of malicious damage. None of the prosecution witnesses talked about damage to any pipes. The complaint that was lodged at the police station was that of stealing. The evidence on record relates to stealing. It is not clear how the prosecution came up with the offence of malicious damage to property. The complainants and other prosecution witnesses testified on the aspect of removal of pipes and not damage to the pipes. The evidence indicates that the offences were committed in the same transaction. As already indicated, there is no way the accused person could have intended to damage the property and at the same time intend to steal it. Consequently, counts three and four must of necessity fail.

I now move to the charge of stealing. Section 268 of the Penal code provides in part as follows:

"(1) A person who fraudulently and without claim of right takes anything capable of being stolen, or fraudulently converts to the use of any person, other than the general or special owner thereof, any property, is said to steal that thing or property.

(2) A person who takes anything capable of being stolen or who converts any property is deemed to do so fraudulently if he does so with any of the following intents, that is to say

(a) an intent permanently to deprive the general or special owner of the thing of it;

(b) an intent to use the thing as a pledge or security;

(c) an intent to part with it on a condition as to its return which the person taking or converting it may be unable to perform;

(d) an intent to deal with it in such a manner that it cannot be returned in the condition in which it was at the time of the taking or conversion;

(e) in the case of money, an intent to use it at the will of the person who takes or converts it, although he may intend afterwards to repay the amount to the owner;

and "special owner" includes any person who has any charge or lien upon the thing in question, or any right arising from or dependent upon holding possession of the thing in question."

Section 275 of the Penal code provides:

"Any person who steals anything capable of being stolen is guilty of the felony termed theft and is liable, unless owing to the circumstances of the theft or the nature of the thing stolen some other punishment is provided, to imprisonment for three years."

It is agreed that it was the accused person who caused the pipes to be removed from the farm. The complainants alleged that the pipes belonged to them and on the other hand, the accused person denied that fact and alleged that the pipes had been installed in the

farm that his employer had leased. For the prosecution to prove its case, the prosecution must establish, beyond reasonable doubt the following:

- a) The pipes belonged to the complainants;
- b) The pipes were removed from the complainants' farms;
- c) The removal of the pipes from the complainants' farms was without lawful authority;
- d) The removal of the pipes was with the intent to permanently deprive the complainants of the pipes.

To begin with, there is absolutely no evidence to prove that any pipes were removed from the farms belonging to the complainants. The 1st complainant testified that she was informed of the theft by the 2nd complainant. The 2nd complainant stated that she was informed of the theft by her farm guard. The farm guard who discovered the alleged theft was not called to testify. From the evidence of the prosecution, it would appear that neither the complainants nor the police visited the farms belonging to the complainants to establish that the pipes which had been installed were missing. How did the investigating officer establish the theft? There is also no evidence to prove that indeed the complainants owned the alleged farms and had installed pipes thereon.

Did the pipes belong to the complainants? The evidence indicates that seven pipes were recovered. The 1st complainant stated that she was able to identify one pipe belonging to her as it was marked "MF." She did not identify the physical pipe in court but identified a photograph produced in evidence as P Exhibit 1(b). It is not clear whether it was the 1st complainant who marked the pipe and when. MF is not a unique mark. The circumstances under which the pipe was marked are not clear. The 2nd complainant did not also physically identify her alleged pipes in court. She stated that her pipes were marked "CM" and identified a photograph produced as P exhibit 1(c) bearing an image of a section of what appears to be a pipe with the letters "CM" inscribed. It is not clear whether all the six pipes were inscribed "CM". That would have been ascertained had the 2nd complainant physically identified the pipes in court. Similarly, it is not clear how the mark "CM" identifies with the 2nd complainant and not any other person.

There is absolutely no evidence, whether documentary or otherwise, to prove that the complainants owned any pipes and that they had installed the same in their farms. There is no positive identification that the pipes in issue belonged to the complainants. The investigating officer did not mark the pipes for identification upon recovery. He did not clearly state how the complainants identified the pipes as belonging to them. It is unfortunate that the photographs were admitted in evidence contrary to procedure. It is not even known who took the photographs and whether he/she was duly gazetted. It is not known how and by whom the photographs were processed. No certificate was produced in evidence. The photographs ought not to have been admitted. As such, since I cannot reverse the order of admitting the photographs in evidence, I will decline to rely on them.

I have considered the accused person's defence. I am aware that the accused person is not under duty to prove his defence or innocence. The accused person was not obliged to adduce evidence to prove his allegations. The duty is on the prosecution to prove the charge against the accused persons beyond reasonable doubt. This standard of proof "*beyond reasonable doubt*" is grounded on a fundamental societal value determination that it is far worse to convict an innocent man than to let a guilty man go free. A reasonable doubt exists when the court cannot say with moral certainty that a person is guilty or that a particular fact exists. It must be more than an imaginary doubt, and it is often defined judicially as "such a doubt as would cause a reasonable and prudent person, in one of the graver and more important transactions of life, to pause or hesitate before or taking the represented facts as true and relying and acting thereon" (*see Clarence Victor, Petitioner 92-8894 v. Nebraska, 511 U.S. 1 (1994); Rex v. Summers, (1952) 36 Cr App R 14; Rex v. Kritz, (1949) 33 Cr App R 169, [1950] 1 KB 82 and R. v. Hepworth, R. v. Feamley, [1955] 2 All E.R. 918*).

Beyond reasonable doubt is proof that leaves the court firmly convinced that the accused is guilty. Reasonable doubt is a real and substantial uncertainty about guilt which arises from the available evidence or lack of evidence, with respect to some element of the offence charged. It is the belief that one or more of the essential facts did not occur as alleged by the prosecution and consequently there is a real possibility that the accused person is not guilty of the crime. This determination is arrived at when after considering all the evidence, the court cannot state with clear conviction that the charge against the

accused is true since an accused may not be found guilty based upon a mere suspicion of guilt.

I have no reason to disregard the accused person's defence. It is not enough to merely show that the accused person was found with the pipes or took the pipes to the place where they were recovered from. There was need for the investigator to establish whether the complainants owned any pipes and whether they were actually stolen. The prosecution had a duty to dispel the explanation given by the accused person concerning the pipes. It is my considered view that investigators, in the discharge of their statutory and constitutional mandate, are under a legal duty to actively interrogate, test, and where appropriate dispel any defence raised by a suspect in the course of criminal investigations. This duty flows from constitutional principles, statutory obligations, and well established judicial authority, and is essential to the integrity of the criminal justice process. Failure to do so not only weakens the prosecution case but may render the investigation partial, incompetent, or oppressive, exposing the resulting prosecution to collapse.

Article 50 of the Constitution of Kenya guarantees the right to a fair trial. Embedded within this right is the concept of a fair investigation, which obliges investigators to pursue both inculpatory and exculpatory lines of inquiry. An investigation that merely seeks to confirm guilt, while ignoring or leaving untested a suspect's explanation, offends constitutional values of fairness, objectivity, and equality before the law. Investigators are therefore constitutionally bound to consider and evaluate any defence put forward at the earliest stage. The role of investigators is not that of advocates for conviction, but of fact-finders. The law requires investigators to establish the truth, gather all relevant evidence, and present a complete and accurate evidential picture to the prosecution. A defence raised by a suspect constitutes relevant material. Leaving it unexplored is a dereliction of investigative duty.

Every suspect enjoys the presumption of innocence until proven guilty. While the burden of proof rests on the prosecution, investigators play a foundational role in ensuring that the prosecution can meet that burden. Where a suspect raises a defence, the prosecution must ultimately displace that defence beyond reasonable doubt, in order to sustain a conviction. Investigators are therefore required to test the defence, collect

evidence that either supports or negates it, and ensure that it does not remain as an unresolved doubt at trial. Unchallenged defences often become fatal gaps in the prosecution case. Courts have consistently held that uninvestigated defences weaken the prosecution case. Failure to rebut a plausible defence may lead to acquittal regardless of the strength of the remaining evidence. Investigators must not wait for trial to confront a defence; it must be addressed at the investigative stage, where evidence is still available and memories are fresh.

Modern criminal justice systems impose a duty of objectivity on investigators. Investigators must not selectively collect evidence, ignore inconvenient explanations, or tailor investigations to fit a preconceived theory. Dispelling a defence does not mean suppressing it; rather, it means testing its credibility, verifying or disproving it through independent evidence, and documenting the outcome. This enhances the credibility of the investigation and shields it from accusations of bias or malice. An investigation that ignores a suspect's defence is incomplete, constitutionally infirm, and legally vulnerable. Whereas there is sufficient and undisputed evidence to show that the pipes were found where the accused person had taken them, the prosecution has failed to prove that the pipes belonged to the complainants and that they were stolen.

The defence raised by the accused person is plausible and in my considered view, the prosecution has failed to rebut the explanation given by the accused person. As already indicated, I have no reason to disregard the accused person's defence. There is room for reasonable doubt and as a matter of law, the doubt must be resolved in favour of the accused person. What we have on record is mere suspicion. In the case of *Joan Chebichii Sawe v Republic [2003] eKLR*, the Court of Appeal held thus:

“The suspicion may be strong but this is a game with clear and settled rules of engagement. The prosecution must prove the case against the accused beyond any reasonable doubt. As this court made clear in the case of Mary Wanjiku Gichira v Republic (Criminal Appeal No. 17 of 1998 (unreported), Suspicion however strong, cannot provide a basis for inferring guilt which must be proved by evidence”

Suspicion, however grave, cannot form a basis for conviction. The evidence does not irresistibly point to the accused person's guilt to the exclusion of all others or at all. The evidence against the accused person is not cogent. There is room for assumption. The accused person may or may not have committed the offence.

DISPOSITION

Having considered and analysed the evidence on record, I find that the evidence does not meet the threshold of "proof beyond reasonable doubt." Consequently, I make the following orders:

- 1) The accused person is found **NOT GUILTY** of the offences of Stealing contrary to section 275 of the Penal code as alleged in counts one and two;
- 2) The accused person is found **NOT GUILTY** of the offences of Malicious damage to property contrary to section 339(1) as alleged in counts three and four;
- 3) As the glove does not fit, I must, as I hereby do, **ACQUIT** the accused person of all the charges accordingly.

**DATED, SIGNED AND DELIVERED IN OPEN COURT AT MAKINDU THIS 4TH DAY OF FEBRUARY,
2026.**

Y.A SHIKANDA

SENIOR PRINCIPAL MAGISTRATE.