

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

CRIMINAL APPEAL NO. E042 OF 2023

DAVID KAWINO KATEI

APPELLANT

VERSUS

REPUBLIC

RESPONDENT

(An appeal from the conviction and sentence in the SPM Magistrates Court at Kilungu, Criminal Case No. E951 of 2021, Judgment delivered on by Hon. G. L. Okwengu, SRM.)

JUDGMENT

1. The Appellant was charged with the Offence of Malicious Damage to Property contrary to **Section 339 (1)** of the **Penal Code**. The particulars of the charge were that on the 12th day of November, 2021 at Sultan Hamud township in

Mukaa Sub-County within Makueni County, with others not before Courts, the Appellant willfully and unlawfully damaged a perimeter fence valued at Kshs.320,000/=, the property of Joseph Nzamalu Mutungi. The Court found him guilty and convicted him of the said offence. He was sentenced to pay a fine of Kshs.200,000/= and in default to serve 3 years in prison.

2. The Appellant was dissatisfied with the Judgment and brought this Appeal against the conviction and the sentence. The appeal was canvassed through written submissions. Both parties filed their respective submissions and the Court has considered the same at length.
3. Having considered the Grounds of Appeal and the submissions made by the parties, I find that there are two issues for determination:

a) Whether the offence of Malicious Damage to Property was proven to the required standard thereby warranting a conviction.

b) Whether the sentence imposed was fair and justifiable.

4. This being a first Appeal, this Court has a duty to revisit the evidence tendered before the trial Court afresh, evaluate, analyze it, and come to its own independent conclusion, but always bearing in mind that the trial Court had the advantage of observing the demeanor of the witnesses and hearing them give evidence, and give allowance for that.

(See **Okeno vs. Republic (1972) EA 32** and **Mark Oiruri Mose vs. R (2013) eKLR**.)

5. The essential elements of the offence of malicious damage to property are well-settled in law. In **Dominic Mutisya Kasini v Republic [2019] KEHC 4279 (KLR)**, the Court restated the essential elements as follows;

20. With regard to the offence that the appellant was charged with, and as specified in the charge sheet, the prosecution was under the law required to prove beyond reasonable doubt the following ingredients of the offence of malicious damage to property contrary to section 339 (1) of the penal Code;

(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.

6. I have relooked at the record to determine whether these elements were proved. There is no doubt that the property (perimeter fence) belonged to the Complainant, Joseph Nzamalu Mutungi. The Complainant, **PW1**, produced documentary evidence to show that he owns the land on which the fence was erected. He also produced evidence to show that he hired the services of **PW2**, **PW3**, and **PW4** to put up the fence.

7. In addition, there was evidence to show that the said perimeter fence was damaged. **PW7**, the investigating officer testified that he visited the scene and saw the damaged fence. He also produced photographs showing the

damaged fence. I have seen a valuation report which attested the fact that the fence had been damaged. It also contains photographs of the said damaged fence. The valuer, **PW5**, assessed the damage as Kshs.320,000.00.

8. Lastly, there was sufficient evidence to show that the Appellant was responsible for the damage. **PW3** testified that he saw the Appellant with young men at the scene on 12th November, 2021, at around 3 am and that the Appellant was instructing the young men to demolish the fence. The **PW3's** testimony was corroborated by **PW4** who told the Court that he also found the Appellant at the scene on the same day at around 3 am in the morning, and that he found the Appellant instructing a group of people to demolish the fence.

9. I have seen the Appellant's defense, in which he denied the offence. I have considered the said defense at length. On cross-examination, he admitted that he did not have evidence to show that the ownership documents produced by the Complainant were a forgery. In my view, the

Appellant's defense was a mere denial and did not cast any reasonable doubt on the prosecution's case.

10. Based on the above facts, I find that the prosecution proved its case beyond any reasonable doubt and established all the elements necessary to prove the offence of malicious damage to property.

Whether the sentence imposed was fair and justifiable

11. **Section 339(1) of the Penal Code** provides for the sentence for the offence of Malicious Damage to Property and stated 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.”

12. The lower Court sentenced the Appellant to pay a fine of Kshs.200,000/= and in default to serve 3 years in prison. The Appellant argued that this is excessive and also brought

an appeal against it. This Court is being required to re-examine the facts and determine whether the said sentence was fair and justifiable.

13. I have seen the Appellant's mitigation. He asked the Court to consider a non-custodial sentence or an alternative of a fine, arguing that he is a civil servant and that he was at risk of losing his job. I have also noted that he was a first-time offender. However, I am not convinced that the sentence imposed by the lower Court was excessive. I find that the fine imposed and the alternative term of imprisonment is fair and reasonable in the circumstances of this case. The said sentence is also hereby upheld.

14. In the end, I find no merit in the Appeal and the same is dismissed.

15. Orders accordingly.

DATED, DELIVERED and SIGNED at NAIROBI through the Microsoft Teams Online Platform on this 14TH day of APRIL, 2026.

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HON. C. KENDAGOR

JUDGE

In the presence of:

Court Assistant: Beryl

Appellant - Absent

Mr. Kiluva Advocate holding brief for Mr. Makunde Advocate
for the Appellant

Ms. Musango, ODPP