Ogeto v Republic (Criminal Appeal E028 of 2025)
[2026] KEHC 4436 (KLR) (5 March 2026) (Judgment)

Neutral citation: [2026] KEHC 4436 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYAMIRA

CRIMINAL APPEAL E028 OF 2025

TW CHERERE, J

MARCH 5, 2026

BETWEEN

WYCLIFF BOB OGETO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

1. The Appellant was charged for malicious damage to property contrary to section 339(1) of the Penal Code. The particulars of the charge were that on 30th August 2023 at Central Kitutu/Mwogeto/2414 within Nyamira County, he willfully and unlawfully destroyed tea bushes valued at Kshs. 1,880,000/=, the property of Jeremiah Nyakundi Salimo.

2. The Appellant pleaded not guilty and the matter proceeded to full hearing. The complainant, PW1 Jeremiah Nyakundi Salimo, testified that he is the registered proprietor of land parcel Central Kitutu/Mwogeto/2414 and produced a copy of the Title Deed, which was admitted as Prosecution Exhibit 1. He stated that on the morning of 30th August 2023 at approximately 5.30 a.m., he proceeded to his tea farm accompanied by workers and upon arrival found four individuals uprooting tea bushes, one of whom he recognized as the Appellant. He testified that approximately 2,700 tea bushes had been uprooted and further produced a receipt for KES. 13,000 relating to damaged barbed wire, which was admitted as Prosecution Exhibit 2.

3. PW2, William Mageto, who testified that he was an employee of the complainant, confirmed that he accompanied PW1 to the farm on the material morning and that there was sufficient moonlight to enable him to recognize the Appellant, whom he knew prior to the incident, as one of the persons present at the farm. He corroborated the evidence that numerous tea bushes had been uprooted.

4. PW3, Amos Bosire Atuti, similarly testified that he was present at the farm and observed uprooted tea bushes, although he conceded during cross-examination that they did not physically count each individual bush that had been destroyed.

5. PW4, Frankline Oigo Nyachieo, the Sub-County Crop Officer, testified that upon request by the police he visited the scene on 31st August 2023 and physically counted 2,700 medium tea bushes that had been uprooted. He prepared an Agricultural Assessment Report dated 31st August 2023, which was admitted as Prosecution Exhibit 3, and assessed the damage at KES.1,880,000 calculated at KES. 400 per bush plus ten percent miscellaneous expenses.

6. PW5, CIP Leyrice Ligaka Mukutsi, produced seven photographs of the scene and damaged crops which were admitted as Prosecution Exhibit 4(a)–(g), together with a Certificate under section 106B of the *Evidence Act* dated 30th August 2023 which was admitted as Prosecution Exhibit 5.

7. PW6, PC David Abira, testified regarding the report made to the police, the visit to the scene, and the subsequent arrest of the Appellant.

8. In his defence, the Appellant gave sworn testimony in which he denied committing the offence and asserted that the matter arose from land disputes between himself and the complainant, contending that he was being falsely implicated.

9. Upon conclusion of the trial, the learned trial Magistrate found the Appellant guilty as charged and sentenced him to ten (10) years' imprisonment.

10. Aaggrieved by both conviction and sentence, the Appellant preferred the present appeal vide a Petition of Appeal dated 05th January 2026.

11. This being a first appeal, this Court is enjoined to reconsider and re-evaluate the entire evidence on record and to draw its own conclusions while bearing in mind that it did not have the benefit of seeing and hearing the witnesses testify, as was succinctly stated in Okeno v Republic [1972] EA 32. It is therefore not the function of this Court merely to ascertain whether there was some evidence to support the findings of the trial court, but rather to subject the evidence to fresh and exhaustive scrutiny and to determine whether the conviction can properly stand.

12. Having carefully considered the grounds of appeal and the record of proceedings, the following issues arise for determination:

    1. Whether the prosecution proved beyond reasonable doubt that tea bushes belonging to the complainant were damaged

    2. Whether the Appellant was positively and reliably identified as one of the persons who committed the alleged act of malicious damage.

    3. Whether the defence advanced by the Appellant raised reasonable doubt sufficient to displace the prosecution case.

    4. Whether the sentence of ten (10) years' imprisonment imposed by the trial court was lawful and proportionate in the circumstances of the case.

13. Concerning the damage, the Appellant submits that the prosecution failed to discharge the burden of proof as required in criminal proceedings and that the conviction was therefore unsafe.

14. The law on the burden and standard of proof is well settled. In Woolmington v DPP [1935] AC 462, the House of Lords authoritatively stated that throughout the web of criminal law, the golden thread is

that it is the duty of the prosecution to prove the prisoner's guilt. That principle has been consistently applied in our jurisdiction.

15. The meaning of proof beyond reasonable doubt was explained in Miller v Minister of Pensions [1947] 2 All ER 372, where Lord Denning stated that proof beyond reasonable doubt does not mean proof beyond the shadow of doubt but must carry a high degree of probability. The Court of Appeal reiterated that position in Moses Nato Raphael v Republic [2015] eKLR, emphasizing that fanciful or remote possibilities do not amount to reasonable doubt.The Appellant further relied on the persuasive decision in Osman v Republic [2025] KEHC 3500 (KLR) in which the Court outlined the essential ingredients of the offence of destruction of property, namely proof of ownership of the property, proof that the property was destroyed, and proof that the destruction was willful and attributable to the accused.

16. Applying those principles to the present case, the complainant produced the Title Deed for land parcel Central Kitutu/Mwogeto/2414, which was admitted as Prosecution Exhibit 1. That evidence was not rebutted. In law, a certificate of title is prima facie evidence of ownership and remains conclusive unless challenged on statutory grounds, none of which were demonstrated here.

17. Once ownership of the land was established and destruction of tea bushes thereon was proved, the existence of a broader land dispute did not, without more, negate criminal liability. The criminal inquiry is concerned with whether property belonging to another person was willfully destroyed, not with civil boundary disagreements unless such dispute negates ownership or intent, which was not demonstrated here.

18. On the question whether property was destroyed, the complainant testified that 2,700 tea bushes were uprooted. Evidence of destruction was confirmed by PW2, PW3 and the Agricultural Officer, PW4 who testified that he counted 2,700 medium tea bushes as shown on the Agricultural Assessment Report dated 31st August 2023 as Prosecution Exhibit 3. Further evidence of the destruction was also demonstrated by photographic exhibits (PExh 4(a)–(g)).

19. On the third issue, the Appellant submits that the trial court failed to properly evaluate contradictions in the prosecution case. It is trite that contradictions must be material and must go to the substance of the charge before they can render a conviction unsafe.

20. The Court of Appeal in Richard Munene v Republic [2018] eKLR, held as that not every trifling contradiction or inconsistency in the evidence of the prosecution witness will be fatal to its case. It is only when such inconsistencies or contradictions are substantial and fundamental to the main issues in question and thus necessarily creates some doubt in the mind of the trial court that an accused person will be entitled to benefit from it.

21. In this case, the complainant's evidence that he lost 2700 tea bushes was confirmed by the Agricultural officer and the contention of any inconsistency in the prosecution case has therefore not been demonstrated.

22. As regards the identification of the Appellant, he contends that identification at 5.00 a.m. was unsafe and that the trial court erred in finding that he was positively identified. As stated in Okeno v Republic (supra), this Court must reconsider the evidence and make its own findings. The evidence of PW1 and PW2 was that there was moonlight and that they recognized the Appellant, whom they knew prior to the incident. The evidence was therefore one of recognition rather than identification of a stranger.

23. While caution must always be exercised in cases of visual identification, recognition of a known person under favourable conditions is generally more reliable. Upon re-evaluation of the record, I am satisfied

that the trial court properly directed itself on this issue and that the recognition evidence was not displaced by the defence.

24. From the totality of the evidence placed before the trial court, and upon my own independent re-evaluation thereof, I am satisfied that the prosecution discharged the burden of proof required in criminal proceedings. The complainant established ownership of land parcel Central Kitutu/ Mwogeto/2414 through production of a valid title deed, which evidence remained unchallenged. The destruction of a substantial number of tea bushes was consistently and coherently testified to by the prosecution witnesses, and that evidence was corroborated by the agricultural assessment report and the photographic exhibits produced at the trial. The recognition of the Appellant by witnesses who were familiar with him prior to the incident was clear and unequivocal. The evidence, taken as a whole, formed a consistent and mutually reinforcing account which proved that tea bushes belonging to the complainant were willfully and unlawfully destroyed and that the Appellant participated in that destruction. In the circumstances, the prosecution established its case beyond reasonable doubt.

25. Consequently, I am satisfied that the learned trial magistrate properly directed himself on the elements of the offence, evaluated the evidence in a balanced manner, and reached findings that were firmly grounded in the record. I find no misdirection on matters of fact or law that would justify interference by this Court.

26. An appellate court is entitled to interfere where the trial court acted on wrong principles or imposed an unlawful sentence, as held in Wanjema v Republic [1971] EA 493 and Ogolla s/o Owuor v Republic [1954] EACA 270.

27. The Appellant was sentenced to ten (10) years' imprisonment upon conviction for the offence of malicious damage to property contrary to section 339(1) of the Penal Code. The said provision expressly limits the custodial penalty to a term not exceeding five (5) years. It follows, therefore, that the sentence imposed exceeded the statutory maximum prescribed by law. A court exercising criminal jurisdiction cannot lawfully impose a penalty beyond that which Parliament has authorized for the offence in question, and any sentence that surpasses the statutory ceiling is illegal and void to the extent of the excess. In the premises, the sentence of ten (10) years' imprisonment was unlawful and cannot be allowed to stand.

28. In considering the appropriate substituted sentence, this Court is guided by the Judiciary Sentencing Policy Guidelines (2016), which underscore proportionality and the imposition of the least severe sentence necessary to achieve sentencing objectives. The Supreme Court in Francis Karioko Muruatetu & Another v Republic [2017] eKLR emphasized individualized and proportionate sentencing.

29. The Appellant relied on Murungi & Another v Republic [2022] KEHC 18126 (KLR) to urge that compensation or a fine may be imposed in appropriate circumstances. While the court indeed has discretion to order compensation, such discretion must be exercised within statutory confines and the circumstances of the case.

30. Given the deliberate nature of the destruction and the significant economic impact, a custodial sentence is justified. However, proportionality dictates that the sentence must not exceed the statutory maximum and must reflect both the gravity of the offence and the mitigating factors.

31. In the circumstances, and guided by the sentencing guidelines and jurisprudential principles, a custodial sentence below the maximum is appropriate.

32. From the foregoing analysis, I make the following orders:

    1. The appeal against conviction is dismissed.

2. The appeal against sentence succeeds to the extent that the sentence of ten (10) years' imprisonment is hereby set aside for being illegal

3. In substitution thereof, the Appellant is sentenced to four (4) years' imprisonment, which shall run from 25th July 2025 being the date of conviction by the trial court.

DELIVERED AT NYAMIRA THIS 05TH DAY OF MARCH 2026

WAMAE.T. W. CHERERE

JUDGE

Appearances

Court Assistant - Anita

Appellant - Present

For Appellant - Mr. Maraga for M.W.Maraga & Co. Advocates

For the DPP - Mr. Chirchir (SADPP)

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