



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MERU**  
**CRIMINAL CASE NO. E030 OF 2023**

**JOYCE KAIMURI.....1<sup>ST</sup>**

**APPELLANT**

**JOSEPH NANGA .....2<sup>ND</sup>**

**APPELLANT**

**DAVID GITONGA NCHEENE ..... 3<sup>RD</sup>**

**APPELLANT**

**VERSUS**

**REPUBLIC..... ACCUSED**

**JUDGMENT**

1. **JOYCE KAIMURI, JOSEPH NANGA** and **DAVID GITONGA NCHEENE**, were charged in the Lower Court with the offence of Malicious damage to property, contrary to **Section 91(1) of the Penal Code.**

2. The particulars of this offence being that on the 14<sup>th</sup> day of February, 2020 at Karie Sub-location, Nchooro Location,

Tigania West Sub-County within Meru County, they jointly, willfully and unlawfully cut down growing trees of Grevilla Robusta, valued at Kshs 397,000 on a parcel of land No. Tigania West/Akithi III/1241, the property of PETER KAILEMA AMBARUKUA.

3. The Prosecution case is that the complainant herein who gave his evidence as PW-1, bought land parcel No. Tigania West/Akithi III/1214 from Anna Kiko Kanai, a relative of the first accused person. The first accused was living in the said land. She was informed about the sale and had agreed to move out. PW-1 obtained a title to the said land in his name and started farming therein. However, the first accused person did not move out and claimed ownership of the said land by way of adverse possession. She even filed a matter in the Environment and Land Court in Meru, ELC No. 3 of 2020 which is pending hearing and determination.

4. PW-1 had planted macadamia trees and bananas among other trees, along the border.

5. On 14/2/2020 at about 6.00 Am, PW-1 had called his employee, Edward Kahuna Linguli - (PW-3) to accompany him to the farm for harvesting. When they got there they were surprised to find the 1<sup>st</sup>, 2<sup>nd</sup>, and 3<sup>rd</sup> Accused persons (now Appellants), who are all related, destroying the trees and crops which complainant had planted along the border. The 1<sup>st</sup> and 3<sup>rd</sup> accused had pangas while the 2<sup>nd</sup> accused had an axe. PW-1 and PW-2 decided not to interfere but went and reported the matter at Tigania Police Station.

6. At the Police Station he was asked for a Title Deed and had to go to the Lands Office for it, and a copy of the Green Card. He got them on 15/2/2020 when he launched his complaint and recorded a statement.

7. PW-2 who's also a relative to the accused persons had witnessed them in the morning of 14/2/2020, cutting down the trees and destroying the barbed wire in the said parcel

of land. He also together with PW-3 recorded their statements.

8. PW-4 the Land Registrar Tigania West, produced a copy of the Title Deed to land parcel No. Akithi III/1241 and a copy of Green Card, confirming that the land belonged to the complainant.

9. PW-5 Investigated the case. They visited the scene and took photographs of the destroyed trees and crops. An Agricultural Officer was called who did valuation of the damaged crops. He made a report to the effect that it was worth Kshs 397,000/-.

10. The Accused/Appellants were then arrested and charged with the offence carried in the charge sheet.

11. The first accused's defence is that she has lived on the said land for 25 years. She has her house in the said land and does farming. She's the one who planted the crops and trees allegedly damaged.

12. On 14/2/2020 the complainant, Gideon Kibara and Maore, together with others whom she did not identify, went to the farm and destroyed the alleged trees and crops. The named three had power saw. She reported the case to the police but the police told her the complainant had cut down the plants as he wanted the accused to vacate his land. She denied that she, together with the other accused persons destroyed the alleged plants.

13. The second accused stated that the first accused is his Aunt. He knew the complainant as he had been sold the land in which the Aunt was living.

14. On 14/2/2020 he was at Timau. The Aunt called him and told him that the plants were being destroyed. He's a neighbour and knows his Aunt had lived on the said land for 25 years.

15. The 3<sup>rd</sup> accused person defence is that he's a son of the first accused. All his life they have lived on the said land. On

14/2/2020 the complainant went there with a team of people. They had pangas. They told them to move out of the land as they wanted to cut down trees. He claimed that Anne Kiko had sold the land to him. They cut down the trees the 3<sup>rd</sup> accused had planted claiming he had bought the land together with the trees. They reported to the police but were not helped.

16.The three also called 2 witnesses who alleged it's the complainant and his team who cut down the alleged crops and trees.

17.The trial Court evaluated the evidence and found the three accused persons guilty as charged. They were convicted of the offence and sentenced:-

- **First accused to serve 3 years on probation.**
- **Second accused to pay a fine of 50,000/- in default to serve 1 year imprisonment.**
- **Third accused to pay a fine of 60,000/- in default to serve One years imprisonment.**

18. Dissatisfied with the said conviction and sentence, they appealed to this court on the ground that:-

**(1) That Learned Magistrate erred in law and in fact by failing to evaluate with much accuracy and find that the prosecution evidence was full of discrepancies and not conclusive which rendered the whole evidence scanty and unworthy to sustain conviction and sentence against the Appellant.**

**(2) That Learned Magistrate erred in law and in fact by completely disregarding the Appellant's defence, submissions and authorities and based her judgment on illogical and unfounded grounds which lead to an inescapable conclusion that she was biased against the Appellants.**

**(3) That Learned Magistrate erred in law and in fact, by not finding any mischief why the complainant reported the alleged offence weeks after the 1<sup>st</sup> Appellant herein had sued him in Meru High Court ELC No. 3 of 2020.**

**(4) That Learned Magistrate erred in law and in fact by shifting the burden of proof from the prosecution to the Appellant.**

**(5) That Learned Magistrate erred in law and in fact by not applying her mind to the fact that the probation officer might have been compromised to maliciously tarnish the character of the Appellants.**

**(6) That Learned Magistrate erred in law and in fact by giving a custodial sentence of 2 years to the 2<sup>nd</sup> and 3<sup>rd</sup> accused whereas a non-custodial sentence would have sufficed under the circumstances.**

19. As the first Appellate Court I have re-evaluate the charges, evidence adduced, Judgment of the Lower Court, sentences meted, grounds of the Appeal and submissions by both sides.

20. The two issues for determination is whether the charge was proved by the prosecution beyond reasonable doubt; and if proved, whether the custodial sentences in default of

payment of fine, meted against 2<sup>nd</sup> and 3<sup>rd</sup> accused persons is harsh and excessive.

21. **Section 339 (1) of the Penal Code** creates the offence of Malicious Damage to property. It states as follows:-

**“Any person who willfully and unlawfully destroys or damages any property is guilty of an offence, which, unless otherwise stated, is a misdemeanor and is liable, if no other punishment is provided, to imprisonment for five years.”**

22. The key ingredients for the offence which the prosecution must prove beyond reasonable doubt are:-

- **Proof of ownership of property.**
- **That the property was destroyed or damaged.**
- **That the destruction or damage was occasioned by the accused.**
- **That the damage was intentional or reckless, not accidental.**

23. The foregoing ingredients were well pronounced in the case of **Caroline Vugutsa Olusala -vs- Republic [2020] KEHC 1435 (KLR)**.

24. On the first ingredient of the said land ownership, the complainant and the Land Registrar availed a copy of Title Deed and Green Card to Land Title Number Tigania West/Akithi III/1241 showing it belongs to Peter Kailema Ambarukua the complainant herein. The said Title Deed was issued on 15/5/2018. The Green Card shows the land was for Anna Kiku Kanai and changed hands on 17/4/2018 in favour of the complainant (PW-1).

25. The 1<sup>st</sup> Accused claims ownership by virtue of Adverse possession of which issue is still pending before Court.

26. It should however be noted that a claim to land by way of adverse possession, however strongly asserted, does not confer ownership rights ipso facto; such rights crystallize only

upon formal determination and declaration by a competent Court.

27. As such, before such happens in favour of the 1<sup>st</sup> Appellant, as of now or at the time of the alleged offence, the land belonged to the person who had the Title to it, and that is the complainant (PW-1).

28. The Law is also settled that **quicquid plantatur solo cedit** – whatever is affixed or annexed to the land becomes part of the land and passes with the title to it. The 1<sup>st</sup> Appellant can't therefore legitimately claim that the land belonged to the complainant, but the trees and crops to her.

29. The trial Court properly analyzed the evidence and indicated the reason why it believed the evidence of the prosecution against that of the defence. The trees cut by their look on the produced photographs were younger than it was alleged by the defence and could not have been planted by 1<sup>st</sup> and 3<sup>rd</sup> accused in the year they claimed they did. The cuts on

them were not smooth and a power saw could not have been used as claimed by the defence.

30. The trial Court, having had the advantage of seeing and hearing the witnesses testify, was better placed to assess their demeanor, credibility, and veracity, an advantage not available to the Appellate Court. I find no sound reason to hold against the finding of the trial court on this issue.

31. The trial Court had logical grounds to hold that it's the accused who destroyed the plants rather than the complainant and his group.

32. The Appellants are family members. The first Appellant live on the land in dispute. The destroyed trees and crops were planted by the complainant (PW-1). Given the circumstances the said destruction must have been intentionally done.

33. The Prosecution therefore established all the ingredients for the offence beyond reasonable doubt as was found by the trial Court. The conviction is safe and proper.

34. On sentence, the Court requested for pre-sentence reports. For the 1<sup>st</sup> Appellant it was in favour of a non - custodial sentence and she was placed on probation for a period of 3 years.

35. For the rest the reports were not favourable and were considered for fine, and in default custodial sentence. The sentences are consistent with the Law and given the circumstances of the case, cannot be said to be harsh. and excessive. I find nothing in favour of more lenient sentence.

36. Given the foregoing, it goes without saying that the Appeal lacks merit and is hereby dismissed.

**DATED AND DELIVERED AT MERU THIS 29<sup>TH</sup> DAY OF APRIL, 2026.**

**S.M. GITHINJI -JUDGE**

**29/4/2026**

**In the presence of:-**

Mrs Mwanzia for the Appellants

1<sup>st</sup> Appellant – Present

2<sup>nd</sup> Appellant – Out on fine.

3<sup>rd</sup> Appellant – Out on fine.