



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NAMBUYE, KARANJA & KOOME, JJA)

CRIMINAL APPEAL NO. 48 OF 2019

BETWEEN

PATRICK MACHARIA MWANGI.....APPELLANT

AND

REPUBLIC.....RESPONDENT

*(An appeal from the Judgment of the High Court of Kenya at Machakos (D.K. Kimei, J.) dated 17<sup>th</sup> January, 2018*

in

H.C.RA. No. 48 of 2018)

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JUDGMENT OF THE COURT

[1] In the charge sheet that was presented before the Senior Principal Magistrate at Kangundo, *Patrick Macharia Mwangi* (appellant) and another were charged with three (3) counts of the offence of malicious damage to property contrary to **Section 339 (1)** of the Penal Code. The particulars being that on 21st April, 2015 at Jericho Villas Koma Location in Matugulu within Machakos County, the appellant with others who were not before the court willfully and unlawfully damaged a house valued at Kshs. 25,000,000 the property of *Dorcas Mbuluka Mbithi*. As regards, the 2nd count, the particulars were that on the same date and place the appellant and others not before court willfully and unlawfully damaged a house valued at Kshs. 4,900,000 property of *Serah Nthenya Nzuku* and on the 3rd count the property that was willfully and unlawfully damaged belonged to *Ogenje Hitler*.

[2] The appellant denied the charges and upon trial, he and his co- accused were found guilty, convicted and sentenced to three years imprisonment for each of the counts which sentence was ordered to run concurrently. The appellant's appeal before the High Court was dismissed hence this second appeal which by dint of the provisions of **Section 361 (1)** of the **Criminal Procedure Code (CPC)** must rest on points of law only. The section provides as follows:-

“A party to an appeal from a subordinate court may, subject to subsection (8), appeal against a decision of the High Court in its appellate jurisdiction on a matter of law, and the Court of Appeal shall not hear an appeal under this section-

a) on a matter of fact, and severity of sentence is a matter of fact; or

b) against sentence, except where sentence has been enhanced by the High Court, unless the subordinate court had no power under Section 7 to pass that sentence...”

(See also Karani vs. Republic (2010) 1 KLR 73, 77)

[3] The evidence that led to the impugned judgment, the subject matter of this appeal was given by a total of seven (7) prosecution witnesses. It is necessary to capture the gist of it so as to place this judgment in perspective. **Dorcus Mbulwa (PW1)** testified to support count 1 of the charge. She stated that on 21st April, 2015, while she was at her place of work, her son, **Edel Wayua (PW2)** called her to tell her that her house was being demolished by a squad of about thirty (30) people. However, by the time she made her way to the scene, demolition of her property had already taken place.

**PW1** reported the destruction of her property at KBC Police. She produced her title deed to the property as well as photographs that were taken at the scene to demonstrate ownership and the extent of the damage to her property which she put at the cost of Kshs. 25,000,000.

[4] Her son who testified as **PW2**, confirmed having called his mother **PW1** after receiving a call from one **Musembi** who informed him that their house was being demolished; upon going to the scene he was shocked to see houses being brought down by people who were claiming that they had a court order. He requested to be furnished with the order which turned out to be a hearing notice issued by the court dated 21st February, 2015. **PW2** was categorical that he saw the appellant at the scene armed with an iron bar directing the demolition; that the appellant was known in the area by the name **Bonny**, and he named him as the one who was in charge of the demolition.

[5] **Sarah Nthenya Nzioki (PW3)** was the complainant in count 2; she too testified that her house was destroyed in a similar fashion like that of **PW1**; that on 21st April, 2015 she was also called by neighbours who informed her of the demolitions but by the time she arrived at the scene, her house was already demolished to the ground. She put the value of the house at Kshs. 3.4 million and the valuables in the house that were also destroyed at Kshs. 1.9 million. She however did not find the appellant at the scene but relied on what she was told by her worker by the name **Josphat Mutiso (PW5)** whose evidence was a narration of how he saw a pick-up carrying about thirty (30) people armed with hammers and iron rods. The appellant whom he described as **Bonny** led the gang to demolish the houses while claiming that he had a court order and at the time the appellant was accompanied by a lawyer called Mr. **Masake**.

[6] **Richard Musembi Nyari (PW4)** lost his house and property the same way as his neighbours, **PW1** and **PW3**. He was also informed of the demolition and drove to the scene where he found the squad of young men armed with iron bars and other implements. They were with the appellant who had parked his vehicle KBZ 353A about 200 metres from the site and when **PW4** confronted the appellant, he told him that he had a court order that was with his advocate called Mr. **Masake**. The appellant was with police officers who were in plain clothes as they all stood guard as the young men went on to demolish the properties. He told the trial court how he saw the appellant throw cattle dip drugs and kerosene inside **PW1**'s borehole. He testified that he knew the appellant as a neighbour for four (4) years which was the period he had settled in the area having bought his land from **Naumi Miti**.

[7] Another witness who testified regarding the charges against the appellant was **Ogenje Hitler (PW6)**. He stated that he had bought his land from one **Wilson Xavier Mokwanya**. That on 21st April, 2015 he received a call that the land he had bought had been invaded and that men armed with iron bars and hammers had entered his compound. He produced the title deed and the sale agreement as exhibits. He testified that he went to the land and when the appellant arrived, the demolition began. Appellant's accomplice was also present standing near his vehicle KBZ wherein he refused to accept a court order from **PW6** but referred him to a lawyer. He testified that his four (4) room iron sheet structure with goats and chicken and toilet were also demolished. He reported the matter to KBC Police Station. On re-examination, he testified that the appellant was supervising the demolition and also owned the neighboring ACK land.

[8] The matter as aforesaid was reported at KBC Police Station and it fell on **PC Charles Oduol (PW7)** who carried out the investigations. Upon receiving the report on 21<sup>st</sup> April, 2015 of demolition of three houses at Jericho Village from **PW3**, he visited the scene and confirmed the report was true. He took some photographs which he produced during the hearing together with other documents of ownership of property that he gathered from the complainants. He arrested the appellant on 10th May, 2015 after he was positively identified by **PW3** and **PW4**. His investigations included conducting a search of vehicle KBZ 353 A. This is the vehicle that the appellant was seen driving by some of the witnesses and he had parked it near the scene. The outcome of the said search confirmed that the vehicle belonged to the appellant. **PW7** also interviewed the appellant, who told him that the land in question had been bought by the church and that he was present at the scene where he had gone to visit his plot.

[9] Based on this adverse evidence that connected the appellant with the malicious destruction of the properties belonging to the complainants, the trial court found he had a case to answer and on being placed on his defence, he tendered evidence under oath. He testified that on the material day, he went to the land in question to look for **PW5** who was to do some work for him. He testified that land title **Donyo Sabuk/ Komarock 1/33413** was his and he produced the title deeds and physical maps as exhibits. He denied supervising the demolition but he admitted being a member of ACK and that ACK men acquired land in the area.

[10] Upon analyzing the evidence in a judgment rendered on 24<sup>th</sup> May, 2018 the trial court found the appellant guilty as charged and convicted him accordingly. The appellant was then sentenced to three (3) years' imprisonment on each count and the sentences were to run concurrently. As aforesaid, the appeal in the High court was dismissed.

[11] This is a second appeal, the appellant faulted the impugned judgment on the grounds that the Judge failed to consider that the provisions of **Section 200 (2) and (3)** of the CPC were not followed; that the appellant was not accorded a fair trial; that the Judge failed to properly examine the lower courts findings on the existence of a court order that authorized the demolition and for failing to find that there was no common intention between the appellant and the co- accused or even the existence of *mens rea* that could be attributed to the appellant.

[12] During the plenary hearing of this appeal which was conducted electronically in view of the prevailing extreme conditions brought about by the COVID 19 Pandemic, **Mr. Muraguri** learned counsel for the appellant relied on the written submissions, list of authorities and made some oral highlights. Counsel submitted that the matter was heard by four (4) different magistrates and the appellant was not given an option during the transition from the 2nd to the 3rd magistrate. Counsel referred to the case of **Peter Karobia Ndegwa vs. Republic [1985] eKLR** where this Court emphasized that **Section 200** of the CPC should only be invoked sparingly and only in cases where the ends of justice will be defeated if the succeeding magistrate does not continue a trial commenced by his/ her predecessor. In counsel's view, this is a point of law which although not raised in the High Court was a fundamental flaw that affected the trial of the appellant.

[13] On the second ground that the appellant was denied a fair trial because he was not given the statements by the prosecution witnesses, counsel argued that the record shows that the appellant kept on asking for statements and it was after the 5th request that the statements were supplied; and that notwithstanding he was not allowed to recall the witnesses. Counsel combined the arguments in regard to ground No 3, 4 and 5 that faulted the Judge for failing to re-evaluate the evidence to find out whether there was *mens rea* to commit the offence; whether the demolition was pursuant to a court order and urged us to allow the appeal as prayed.

[14] The appeal was opposed by **Ms. Wang'ele** learned counsel for the respondent. She submitted that there were factual concurrent findings by the two courts below regarding the identification of the appellant as the one who supervised the demolition claiming that he had a court order which turned out to be a hearing notice. As regards compliance with the provisions of **Section 200** of the CPC, counsel pointed out that the requirements were fulfilled when parties appeared before **Hon. Opanga** and **Mr. Shimaka** was holding brief for **Mr. Masake** for the appellant. **Mr. Shimaka** applied to have the matter proceed from where it had reached with the previous magistrate, prayed for the proceedings to be typed and a mention date. That is what happened and the new magistrate proceeded to hear the evidence of **PW3** and completed the case. The appellant did not apply to recall any witness and therefore he cannot claim to have suffered any prejudice.

[15] Further on the issue of witness statements, counsel for the respondent was of the view that it was only requested for once on 13th December, 2016 and the prosecutor undertook to supply them. Since the appellant did not renew that application, and he was represented by a lawyer, it is too late to raise the issue in the second appeal as it involved a question of fact. In conclusion **Ms. Wang'ele** urged us to dismiss the appeal as the appellant failed to provide the court order, pursuant to which the demolitions were carried out and to specifically provide proof of the fundamental violations or lapses that occurred during his trial.

[16] We have considered the record of appeal; submissions by both counsel and the law. We discern three issues of law that are for our determination, that is; whether the appellant was accorded a fair trial as regards the provisions of **Section 200** of the CPC; whether he was denied a fair trial for not having been supplied with witness statements and therefore was prejudiced in the conduct of the trial and finally whether the first appellate court failed in its duty to re-analyze the evidence and draw its own conclusions on whether there was proof to the required standard that the appellant committed the offence of demolition willfully.

[17] On the first issue on whether the provisions of **Section 200** of the CPC were not complied with, the record shows the following as having happened when it was invoked;

*Coram:*

*Before*

*Hon. M. Opanga –SRM*

*Court prosecutor – Ms Musembi*

*Court Clerk - Pauline*

*Both accused present*

*Mr. Shimaka holding brief for Mr Masake for accused 1*

**PROSECUTOR: Matter is part heard. I pray for directions**

**COURT: Directions to be taken under section 200 of the Criminal Procedure Code.**

**MR SHIMAKA: I do pray that matter proceeds from where it had reached. Proceedings be typed. Mention on 5/4/2017.”**

Subsequent proceedings show the matter was mentioned, and a hearing date was given when PW3 proceeded to testify. The appellant was represented by counsel throughout and there was no request made to recall the two (2) witnesses who had testified earlier or even to start the hearing *de-novo*. It was the appellant’s counsel who asked for the matter to proceed from where the previous magistrate had left it.

[18] The question we have to ask ourselves is whether the appellant was prejudiced.

**Section 200 (4) of the CPC is what is of concern to us and it states:-**

**“Where an accused person is convicted upon evidence that was not wholly recorded by the convicting magistrate, the High Court may, if it is of the opinion that the accused person was materially prejudiced thereby, set aside the conviction and may order a new trial”**

We cannot see how the appellant was materially prejudiced, as the appellant was represented by counsel from whose mouth came the application to proceed with the matter under the said section. That notwithstanding we have also looked at the evidence of **PW1** who did not identify the appellant. The appellant was identified by the evidence of **PW2, PW4 and PW5** as having taken part in the demolition of the properties. Even if the evidence of **PW2** were to be discounted, that would not affect the final conclusion for reasons we have stated above with regard to the identification of the appellant at the scene of demolition. Accordingly, this ground of appeal has no merit.

[19] On the ground that the appellant was not furnished with the witness statements, the record shows the appellant stated on 13th December, 2016 that he had not been given a witness statement and the OB. However, this issue was not raised again in the subsequent proceedings. We are cognizant of the provisions of **Article 50 (2) (j)** of the Constitution which provides for the right of the accused person to be informed in advance of the evidence the prosecution intends to rely on, to have reasonable access to that evidence and to have adequate time and facilities to prepare his defence. Also, in the case of **Thomas Patrick Gilbert Cholmondeley vs. Republic, Criminal Appeal No. 116 of 2007**, though decided before the promulgation of the 2010 Constitution this Court aptly expressed itself as follows:-

**“We think it is now established and accepted that to satisfy the requirements of a fair trial guaranteed under section 77 of our Constitution, the prosecution is now under a duty to provide an accused person with, and to do so in advance of the trial, all the relevant material such as copies of statements of witnesses who will testify at the trial, copies of documentary exhibits to be produced at the trial and such like items. If for any reason the prosecution thinks it ought not to disclose any piece of evidence in its possession, for example, on the basis of public interest immunity, they must put their case before the trial judge or magistrate who will then decide whether the claim by the prosecution not to disclose is or is not justified.”**

[20] As indicated above, the appellant or his counsel did not raise the issue of witness statements again throughout the proceedings. What compounds the matter further is that the issue was not raised even in the High Court. The act of supplying or not supplying the witness statement is a matter of fact which when it is ruled on by the trial court the outcome of the ruling is what becomes a matter of law. Since the issue was not pursued any further, we have no determination to show the appellant was denied the witness statements. All we see is that the appellant’s counsel subjected all the prosecution witnesses to vigorous cross-examination. We are therefore unable to agree with counsel for the appellant that he was denied a fair trial.

[21] On the last issue that the learned Judge failed to subject the evidence to fresh analysis and to find that the appellant lacked motive to destroy the properties, this contention is not correct. The judgment shows the Judge, re-analysed the evidence that was before the trial court, he cited the guiding principles as stated in time, honoured authorities and went on to identify the encompassing issue which he identified as: -

***“Whether or not the prosecution had proved its case beyond reasonable doubt”***

The Judge gave reasons why he agreed with the findings of the trial court that the appellant was positively identified as the leader of the gang of young men who carried out the demolitions. This is how he put it in his own words:-

***“... I have reason to doubt the credibility of the appellant’s evidence due to the contradictions. Initially he denied being a neighbour to the complainants therefore one would wonder what he was doing at the scene of the demolitions. He alleges that he came to look for Pw5, however he has not demonstrated this fact and therefore I am unable to accept this explanation. In addition, his conduct in refusing to accept a court order points toward his having a stake in ensuring the demolitions continued. He was positively identified by the witnesses who rushed to the scene and witnessed the demolitions being carried out under the supervision of the appellant herein. According to the evidence in the trial court, it is clear that the appellant was present when the demolitions were going on and was identified as a ring- leader; Pw4 testified that “Patrick stood by the fence and gave orders on demolition” this is corroborated by the evidence of Pw6 who stated in cross-examination that “Accused 2 supervised the demolition.....”***

This complaint also fails as it has no basis. We therefore find no justification to disagree with the concurrent findings by the two courts below who found the appellant was positively identified as the ring leader of the demolition squad.

[22] In the upshot of the foregoing, we find this appeal lacking merit and order it dismissed.

*Dated and delivered at Nairobi this 25<sup>th</sup> day of September, 2020.*

**R. N. NAMBUYE**

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**JUDGE OF APPEAL**

**W. KARANJA**

.....

**JUDGE OF APPEAL**

**M. K. KOOME**

.....

**JUDGE OF APPEAL**

*I certify that this is a true copy of the original.*

*Signed*

**DEPUTY REGISTRAR**