**Wachira v Republic (Criminal Appeal E016 of 2024)**
**[2025] KEHC 1342 (KLR) (27 February 2025) (Judgment)**

Neutral citation: [2025] KEHC 1342 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT NYERI**

**CRIMINAL APPEAL E016 OF 2024**

**DKN MAGARE, J**

**FEBRUARY 27, 2025**

**BETWEEN**

**PATRICK MAINA WACHIRA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

***(Being an Appeal from the Judgment of the Hon. N.W. Wanja, Resident Magistrate in Othaya PMCCRC No. E1066 of 2021 delivered on 16.4.2024)***

## JUDGMENT

1. This appeal arises from the Judgment of the trial court, Hon. N.W. Wanja, Resident Magistrate in Othaya PMCCRC No. E1066 of 2021 delivered on 16.4.2024. The trial court considered the case and rendered judgment. The Court acquitted the Appellant on Count I and convicted him on Count II. He was also sentenced to Kshs. 60,000 fine in default imprisonment for a term of 9 months.

2. The Appellant had been charged jointly with one Daniel Ndungu Gatu, who is an Appellant in E061 of 2024. Count I was the offence of preparation to commit a felony contrary to Section 308(1) of the *Penal Code*. It is not of essence in this appeal. In Count II he was charged with the offence of malicious damage to property contrary to Section 339(1) as read with 339(2) of the *Penal Code*. The particulars of the offence were that the Appellant together with another before the court, on 24.8.2021 at 1420 hrs at Gachigiriri village of Kamoko Village within Nyeri South Subcounty maliciously damaged one tent and one steel tube valued at Kshs. 85,000, property of Urumwe wa Athuri Self Health Group.

3. When the Appellant was arraigned in court he denied the charges and a plea of not guilty was recorded. The matter proceeded to full trial resulting in the conviction. The Appellant, aggrieved, lodged this appeal jointly with the Appellant in E061 of 2024. I directed the appeals be separated and granted leave to Daniel Ngungu Gatu to file an Appeal out of time, while the Petition of Appeal herein was amended to remove the co-accused. The Petition of Appeal raised the following grounds on conviction only:

a. The learned trial magistrate erred in law and fact in convicting the Appellant against the weight of evidence which was contradictory.

b. The learned trial magistrate erred in law and fact in convicting the Appellant on the offence of malicious damage to property when ownership and value of the tent was not ascertained.

c. The learned trial magistrate erred in law in convicting the Appellant on contradictory evidence.

d. The learned trial magistrate erred in law and fact in meting out excessive sentence.

e. The learned trial magistrate erred in law in relying on uncorroborated, inconsistent and incredible statement of the prosecution witnesses.

4. The order for separation of the appeal was based on the provisions of Section 347 of the *Criminal Procedure Code*, which provides as follows:

(1) Save as is in this Part provided—

(a) a person convicted on a trial held by a subordinate court of the first or second class may appeal to the High Court; and

(b) N/A

(2) An appeal to the High Court may be on a matter of fact as well as on a matter of law.

5. The decision was informed by the words of Ibrahim J, as he then was, in the case of Violet Muhenje & another v Republic [2006] eKLR, who considered the words of the then Chief Justice, Sir Jacob Barth in Rex –V- Sanja Taiga and Kodheta NdiagA (1931) 13, KLR 79, who stated as follows:

> " The appeal of each convict should be filed separately. There is no authority for a joint appeal by convicts sentenced in the same trial and it is obvious that in many cases such a procedure would not be in the interests of the appellant."

6. In the said case, the judge stated as follows:

> A careful study of the provisions in the *Criminal Procedure Code* will show that at all material times, the provisions contemplate "an appeal" and "an appellant" In my view conviction and sentence is personal to the convict. His grounds of appeal, facts of case touching on him, mitigation, personal circumstances etc cannot be similar to any other convict. It would not be convenient and practical to have joint appeals. Consolidation of appeals may be necessary for the convenience of the parties, court and to save judicial time. However it is quite a different thing to have so-called "Joint appeals".

7. Subsequently the Appeals were heard together, hence this judgment.

**Evidence**

8. At the hearing, PW1 Bonface Watuthu Muriithi testified that on 21.8.2021 at 11.00 am, he was on his way to Mweiga from Nyeri Town when he received a call from his uncle, James Mwangi Watuthu, PW2, informing him that the Appellant and his co-accused one Daniel Ndungu Gatu were at the burial of his father at Kamoko. He thought that the Appellant and his co-accused had gone to offer condolences as his father the late Simon Muriithi had just died. Later on PW2 again informed PW1 that the duo had gone and demolished tents erected for the day's requiem Mass. PW1 informed the area Chief and the OCS of Munyange Police Station and the OCS requested him to go to the police station where after,

the OCS and other police officers accompanied them to the scene and they confirmed that indeed the tents that had been erected were now removed and scattered.

9. On cross examination, it was his case that the Appellant's mother was a step sister to his father and there was a land dispute pending at the ELC Court involving parcel Nos. 366 and 367 which were adjacent. However, it was his case that there was no animosity between the two families, which was of course not true. He could also not confirm whether the tent was torn before it was brought to the scene. At this time the charge sheet was amended to read that the owner of the tent was Urumwe wa Athuri.

10. PW2, was James Mwangi Watuthu. It was his testimony that on 21.8.2021, he had attended the funeral meeting of his brother Simon Muriithi Mwangi and around 11.00 am the Appellant and Daniel Ndung'u came and stood in the tent. He asked why they were in the tent and they uttered 'pole' and left saying they would be back. Later at 2.30 pm, the Appellant and Daniel Ndung'u together with other people in a group burst out of a car and matched to the tent whereupon they pulled down the two tents. The big tent was red and white in colour and was damaged. He did not know the owner of the tent.

11. On cross examination, PW2 stated that the tent was on PW1's father's land. He did not know who broke the tent but the tents were both new. He knew the two families had a land dispute. He stated that they stayed on parcel number 367 which belonged to their father's brother while parcel number 366 is registered in the names of Samuel Wacece Wachira. That this is the disputed parcel.

12. PW3 was Jane Wangui who testified that on the material day she was at the scene at 11.00 am when two people came and greeted the mourners. Later at about 2.30 pm, she was in the land collecting grass for the goat and calf when she saw about 10 people damaging the tent which was red and black in colour by tearing and its metallic stand was also broken. The Appellant and Daniel Ndungu were giving the other people instructions. On cross examination, she stated that the driver was son to the Appellant. She saw the people destroying the tent. She also confirmed that she knew there was a land dispute between the two families.

13. PW4 was Peter Koine. It was his account that on the material day, he was at Outspan Hospital paying the deceased's bills. The deceased was his brother in law. PW1 and PW2 called informing him that the Appellant and Daniel had come to the funeral and he wondered why, since he knew the duo used to abuse [or is it insult] the deceased very badly. At 2.30 pm, PW2 called him again informing that the duo had come in company of 10 other people and had brought down the tent. He informed the chief who said he already had the information. When he reached the scene, he confirmed the tent was damaged and brought down and the stand broken. And there was also a sack with 4 pangas and two containers containing liquid.

14. On cross examination PW4 stated that he did not witness the tent being damaged as he was at the Outspan Hospital. He also did not know the owner of the land the tent was erected on. It was his stated case that the Appellant and Daniel were not present when the sack was opened.

15. PW5 was Dennis Munyari Kihuro. On the material day he had gone to mourn the deceased. At about 3.00 pm, he met the Appellant in a group of 4 people with a car registration KCT 879M. He recognized Daniel Ndungu and the Appellant's son. He heard Wachira who was the Appellant's son and a police officer say that they would continue to disturb the family of the deceased as the deceased who was feared was no more. On cross examination, he stated that he arrived at the scene at around 4.00 pm and found the priest conducting the mass. There was one tent standing. It was green. Wachira was not a witness or accused in the case.

16. PW6 was Erastus Wachira Wa Kahora. He was the chairman of Urumwe wa Athuri Self Help Group. On 19.8.2021, PW1 informed him that his father had died and he needed a tent as the deceased was a member of the Self-help group. He authorized the group's caretaker to take the tent to the deceased's home. On 21.8.2021 at 4.00 pm, the caretaker called informing him that there was chaos at the funeral and one of the tents had been removed.

17. PW6 went to the scene and found only one tent and was informed that the other tent had been taken to the police station having been destroyed. On cross examination, it was his case that the tent was torn on one part. The torn part can be made by a fundi. According to him, it was intact when it was brought to the funeral. The broken stand could also be welded and reused. He could not know the amount that would be used to repair.

18. PW7 was Dennis Owino Onyango, a Government Analyst based in Nairobi. He produced his report dated 2.11.2021. It contained the red liquid that was forwarded to the Government Laboratory. The liquid was confirmed to be petrol, a fire accelerant. There was also green liquid which was found to be mixture of kerosene and petrol.

19. PW8 was No. 46369, CPL Peter Kariuki attached to Munyange Police Station. He was the Investigating Officer. He accompanied the OCS to the scene on the material day. At the scene, they found a damaged tent. On cross examination, it was his case that the tent was erected on the disputed land. He was not present when the events occurred and was only informed. He further testified that the exhibits were not in possession of the accused persons.

20. PW9 was No. 235526, Inspector Stephen Natembeya. He was the Photographic Officer. His predecessor, Isaac Kituyi is the one who processed the photographs. He produced the photographic prints as exhibits. On cross examination, he stated that Isaac Kituyi who signed the document had left the station. He could not ascertain if the said Isaac Kituyi attended the scene as he stated that the documents had been forwarded to him. There was also no exhibit memo.

21. The Prosecution closed its case. The trial court then considered the case and established a prima facie case and called the accused persons to defend themselves.

22. DW1 was the Appellant. He had attended the funeral preparations for his uncle who was the deceased. He attended together with his cousin and co-accused, Daniel Ndungu. He denied damaging the tent. The relation between his and the family of the deceased was not good and the complainants held a grudge with his family. On cross examination, it was his case that he had no problem with the place the deceased was to be buried and where the tents were mounted. He confirmed that there was land dispute.

23. DW2 was Daniel Ndungu Gatu. He testified that on the material date he had gone to condole at his deceased uncle with the Appellant. They did not come out of a car as they travelled using a matatu. They did not damage the tent or carry any pangas or petrol and the charges were framed up. On cross examination, he testified that the deceased had taken them to court for a land dispute. The family had mounted tents on land subject of the dispute.

24. The court found the Appellant guilty and convicted them of count II. The court did not find evidence in support of the first count. It is in respect of the second count that this Appeal relates. The evidence was hilarious as it was unbelievable. It is surprising that no one saw through the façade and dismissed the spurious charges.

**Submissions**

25. The Appellant filed submissions dated 13/1/2025. He submitted that the critical elements of the crime were not proved beyond reasonable doubt and the court was wrong in convicting the Appellant on the offence of malicious damage to property.

26. The Appellant submitted further that ownership and value of the tents were not proved and it was in error for the court to convict the Appellant. He argued that ownership of the land was not proved. Further the ownership of the tent was shown not to belong to the Complainant. He relied on the decision of Joshua Thuranira v Republic [2014] KEHC 7243 (KLR), where Lesiit, J. posited as follows:

> 15. Having carefully considered this appeal I find that the evidence before the court was controversial in regard to the ownership of the land where the alleged damaged trees were growing. I find that the controversy was not resolved by the learned magistrate at the trial or in his judgment. I find that the learned trial court's finding that the land belonged to the complainant was mere conjecture without any proof. There is no proper evidence to prove the trees belong to the complainant and therefore the prosecution failed to prove that when the Appellant cut the trees it was willful and unlawful and therefore malicious within the meaning of section 339 of the *Penal Code*.

27. They stated that the property destroyed must belong to the Complainant. In this case, they stated that the land and tents did not belong to the complainant. They also impugned damage of Kshs. 10,000/= since there was no evidence of a tent or extent of damage and the value thereof. They relied on the case of Dominic Mutisya Kasini v Republic [2019] KEHC 4279 (KLR), where Kemei J stated as follows:

> 22. Under Section 339 (1) of the *Penal Code*, damage to any property is an offence. In the case of Wison Gathangu Chuchu v R (2018) eKLR, court observed that the offence of malicious damage to property requires that the property damaged or destroyed must be of the complainant.

28. They argued that I allow the appeal and set aside sentence and compensation. On sentencing, it was submitted that the sentence was excessive.

29. The Respondent did not file submissions despite the matter being adjourned twice to accommodate them.

**Analysis**

30. The duty of the first appellate court remains as set out in the Court of Appeal for Eastern Africa in Pandya -vs- Republic [1957] EA 336 is as follows:-

> "On a first appeal from a conviction by a Judge or magistrate sitting without a jury the appellant is entitled to have the appellate court's own consideration and views of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the witnesses before the Judge or magistrate with such other material as it may have decided to admit. The appellate court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises which witness is to be believed rather than another and that question turns on manner and demeanor, the appellate court must be guided by the impression made on the Judge or magistrate who saw the witness but there may be other circumstances, quite

apart from manner and demeanor which may show whether a statement is credible or not which may warrant a court different.

31. The first appellate court must itself weigh conflicting evidence, make its own findings and draw its own conclusions. The principles that apply in the first Appellate Court were also set out in the case of Okeno Vs Republic [1972] EA 32 where it was stated as follows:-

> " The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala v. Republic [1957] EA 570.) It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, (See Peters v. Sunday Post, [1958] EA 424.)"

32. This court dealing with the instant appeal is entitled to consider the evidence in the trial court as a whole as being submitted a fresh to be subjected to exhaustive examination to guide the court towards its own decision on the evidence. Further, in Kiilu & Another vs. Republic [2005]1 KLR 174, the Court of Appeal stated as follows:-

> An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusions.
>
> It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's findings and conclusions; only then can it decide whether the Magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial Court has had the advantage of hearing and seeing the witnesses.

33. The issue for this court's determination is whether the prosecution proved the offence of malicious damage to property as against the Appellant beyond reasonable doubt.

34. Proof beyond reasonable doubt does not impose a standard of proof beyond the shadow of a doubt. Where the evidence tendered is so strong as to leave only a remote possibility in favour of the accused person, which can be dismissed with the sentence "of course it is possible, but not in the least probable", then it can be said in law that the case is proved beyond reasonable doubt. It was held by the Court of Appeal in Moses Nato Raphael vs. Republic [2015] eKLR as doth:

> " What then amounts to "reasonable doubt"? This issue was addressed by Lord Denning in Miller v. Ministry of Pensions, [1947] 2 ALL ER 372 where he stated:-
>
> > 'That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence of course it is possible, but not in the least probable, the case is proved beyond reasonable doubt, but nothing short of that will suffice.'"

35. The Prosecution's case was that the Appellant and Daniel Ndungu both damaged the tent. This evidence was chiefly tendered by PW2, PW3 and PW5 whose case was that they were present and witnessed the acts of the Appellant and his co-accused who acted while in a group of other about 10 people. The court notes PW2's testimony that at 2.30 pm, the Accused persons came with a group of people and pulled down the big tent which was red and white in colour and damaged it. That the tent was in good condition when they erected it. Prior to this, the Appellant and Daniel Ndungu had come to the subject tent at around 11.00 am whereupon they stood and upon being queried on why they were in the tent uttered "pole" and went away saying they could come back.

36. Another account of the offence committed by the Appellant and his co-accused was by PW3, Jane Wangui. On her part, she testified that two people came at the scene, greeted the gathering and tore the tent and broke the metallic stand. She stated that she saw about 10 people damaging the tent and the Appellant and Daniel Ndungu were also present damaging the tent and giving the other people instructions. On cross examination, it was her case that she saw the people destroying the tent and that the people who destroyed the tent were not in court. I note however, that PW3 contradicted PW2 in describing the colour of the tent. Whereas PW2 testified that the damaged tent was red and white in colour, PW3's account was that the said tent was black and red in colour.

37. On his part, PW5 testified that he was at the scene of the crime on the material day. He met the Appellant in a group of 4 people with car registration No. KCT 879M and also recognized Daniel Ndungu. The Appellant and Daniel Ndungu entered the scene and threatened people and then left. It was also his case that he saw one tent when he arrived.

38. The Appellant's case is that the prosecution did not prove its case to the required standard and the witnesses were contradictory, inconsistent and incredible. This court is called upon to reevaluate the evidence. The trial court acquitted the Appellant on the offence of preparing to commit a felony contrary to section 308(1) of the *Penal Code*. The Appeal is thus against the conviction and sentence on the offence of malicious damage to property contrary to section 339 (1) of the *Penal Code*.

39. 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."

40. The elements of the offence of malicious damage to property were stated in the case of Wilson Gathungu Chuchu vs. Republic [2018] eKLR as follows:-

    i. proof of ownership of the property,

    ii. proof that the property was destroyed or damaged,

    iii. proof that the destruction or damage was occasioned by the accused; and

    iv. proof that the destruction was willful and unlawful.

41. Actus reus and mens rea are crucial parameters of criminal law that must both be established to sustain a conviction and the prosecution ought to have established that the Appellant acted with malice. This court is persuaded by the reasoning of the Court in the case of Simon Kiama Ndiagui vs. Republic (2017) eKLR where Ngaah J. stated 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 willful and

therefore there must be proof of intent; and fourth, the court must also be satisfied that the destruction was unlawful.

42. Therefore, on ownership of the property, in the instant case, the tent in subject was said to be property of a Self-help group known as Urumwe wa Athuri and together with its broken metallic stand was stated to be valued at Kshs. 85,000/-. PW6 testified that he was the chairman of the said Self-help group and he authorized the tents to be used for the funeral of Simon Muriithi and that the tents were in good condition when they were released. The evidence that the tents were property of Urumwe wa Athuri self-help group was, however conjectural and remote as PW6 failed to produce evidence that he was a member or chairperson of the Self-help group and in fact he released the tent in its good condition. Worse still, the charge sheet stated the value of the tent to be Kshs. 85,000/- but no material was produced to ascertain this fact. In totality, it was wrong for the trial court to affirm that the ownership and prior good condition of the allegedly destroyed tent were proved to the required standard.

43. It is my understanding that prove of ownership of the damaged property is not a stricto sensu requirement to found criminal culpability. The rationale of the law of crime in prohibiting malicious damage to property has its roots in protecting against the destruction of property. In Republic vs. Jacob Mutuma & another (2018) eKLR, the rationale for the offence was explained in the following terms:

> " In my view, it is not difficult to see why the offence is not necessarily tied down to ownership of particular property. It is to prevent wanton destruction of property that may lead to lawlessness and people taking the law into their own hands.

44. There was no complaint from the owners. What in fact happened is that self-serving statements were made by PW1 and 2. It is surprising that the calls were made before any action was done. It is thus clear that the plot to fix the Appellant was hatched when they came to say pole. It is a family feud that has gone for generations and was rearing its ugly head. I have looked at evidence which is a collection of half truths, conjecture and hyperbole. Even the alleged owners, Urumwe wa Athuri Self Health Group, were not certain of the damage. No action was taken by the group, even to ascertain the damage. The fact that the tents were erected illegally in a disputed parcel militates against malice. The Appellant was entitled to unhinge the tents and request that the trespassers erect the same in plot 367.

45. It is preposterous for the original complainant to trespass into disputed property and erect a tent and expect that it cannot be removed. I recall the words of the Court of Appeal, that I referred to in the case of Republic v Chala (Criminal Case 11 of 2017) [2023] KEHC 20836 (KLR) (3 July 2023) (Judgment), where I posited that Justice Ouko, JA as then he was, used the following poetic words in Elizabeth Wambui Githinji & 29 others v Kenya Urban Roads Authority & 4 others [2019] eKLR:

> " Just as the sanctity of a person's property in the English common law was recognized in the famous dictum that "an Englishman's home (or occasionally, house) is his castle and fortress", *the Constitution* and land laws in Kenya protect, as fundamental the right to acquire and own property of any description; and in any part of Kenya. This sanctity was so important in the days of old that one Right Honourable, William Pitt, 1st Earl of Chatham graphically explained it thus;
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> > "The poorest man may in his cottage bid defiance to all the forces of the Crown. It may be frail - its roof may shake - the wind may blow through it - the storm may enter - the rain may enter - but the King of England cannot enter."

46. The owners of property are entitled to defend their property. They are not entitled to destroy the trespassers goods. However, even without malice, destruction can occur. The evidence tendered, even

in absence of the defence evidence does not amount to malicious destruction. This is because it lacked most of the elements of malicious destruction as identified in the case of Wilson Gathungu Chuchu v Republic [2018] eKLR, where G.W.NGENYE-MACHARIA, J, as then she was, posited as follows:

> 18. Under the above definition, the elements of the offence may be dissected as;
>
> (i) proof of ownership of the property.
>
> (ii) proof that the property was destroyed or damaged.
>
> (iii) proof that the destruction or damage was occasioned by the accused.
>
> (iv)) proof that the destruction was wilful and unlawful.

47. There was no evidence tendered on the ownership of the property. In particular, the amendment changed the owners without the said owners being complainant. There was no basis for the original complainant making the complaint. He was not even the special owner for purpose of the offence. Further, there was no proof that property was damaged and by the accused. It is surprising no-one heard what kind of instructions the Appellant was giving the people destroying. Who were they? The court should have taken cue from the allegation of the pangas being hidden in the property. There was no independent witness who testified of the crime alleged against the Appellant.

48. Further, the tear being alleged was inconsistent with the destruction by 10 people. The court should have read through the machinations by PW1 to fix the Appellant. I do not find the charge to have been proved.

49. The property was described by various witnesses differently as aforesaid. One of the witnesses indicated that the tent was old. The nature of the destruction appears to be from wear and tear but not cuts.

50. Thirdly, there was no evidence that the tear was wilful and unlawful. Further, the one remarkable thing that the prosecution left out of its case is the manner in which the tent was allegedly damaged and who in fact carried out the destruction as to infer malice in the acts of the Appellant and his co-accused. The witnesses testified that the Appellant and Daniel Ndungu were among the group of about 10 people that destroyed the tent. PW5 moved closer by testifying that the tent was torn. The manner in which the tent was torn ought to have been clearly laid in evidence. Whether this was by use of sharp or blunt objects or fists, fingers and kicks, would have been crucial to establish willful damage in a malicious manner or otherwise, the motive. Malice according to Black's Law Dictionary, 9th Ed., in relation to the instant offence means, "(i) the intent, without justification or excuse, to commit a wrongful act or (ii) reckless disregard of the law or of a person's legal right."

51. PW6 was also categorical that the destroyed tent was torn on one end and could be repaired and the metallic stand was bent and could be welded. Therefore, the value stated as Kshs. 85,000/= in the charge sheet was without basis as it was unfounded.

52. On sentence, the court picked a figure of compensation of 60,000/= without a basis. It was not enough that there was destruction. The order for compensation must be merited. The order for compensation was without basis at all. The complainant was changed midstream. They never complained. Had they suffered any loss, nothing could have been easier than report and find value of the loss.

53. There is no evidence on record to show that the complainant suffered any loss or showed the value of the said tent and stand as no damage assessment was carried out. The contradiction in the colour of the allegedly damaged tent as given by PW2 and PW3 also remained unexplained.

54. It was the common position of the parties that there was a land dispute emanating on two adjacent properties described as parcel No. 366 and 367 and that the site where the subject funeral was staged was parcel 367 also a disputed spot. In the circumstances, I find that the prosecution ought to have clearly identified the Appellant as perpetrator of the crime out of the group of people that was said to have invaded the burial proceedings. It was not enough for the witnesses to mention the Appellant as one of the perpetrators without direct correlation of his individual contribution in the wrong doing. In failing to do so, the prosecution also failed in discharging its duty-bound requirement to prove that the act of the Appellant was willful and unlawful. The word willful is defined in the Black's Law Dictionary Eighth Edition as:-

> " the word 'willful' or 'willfully' when used in the definition of a crime, it has been said time and again, means only intentionally or purposely as distinguished from accidentally or negligently and does not require any actual impropriety; while on the other hand it has been stated with equal repetition and insistence that the requirement added by such a word is not satisfied unless there is a bad purpose or evil intent."

55. Therefore, although it was not in dispute that the Appellant was at the scene of the crime, the Appellant's case was that he had come to mourn his deceased uncle and had no hand in the alleged damage to the tent. It was the prosecution's duty to avail evidence to place the Appellant as one of the persons said to have attended the burial as mourners but descended on the tent and tore it. The trial court did not give any raison d'etre for dismissing the Appellant's defence, which was cogent and unshaken. The decision of this court in the case of Cleophas Otieno Wamunga v Republic [1989] eKLR stated as follows:-

> " where the only evidence against a defendant is evidence of identification or recognition, a trial Court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of a conviction. Recognition may be more reliable than identification of a stranger, but even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made."

56. I am unable to find reason to sustain the conviction. The prosecution failed to prove its case beyond reasonable doubt and the court was wrong in convicting the Appellant. Having found that the Appellant ought to have been acquitted in the first place, I find no utility in venturing into the path of the severity of the sentence imposed. I set the Appellant free. My findings are that this appeal succeeds. I quash the conviction, set aside the sentence and order that the Appellant be and is hereby set free unless lawfully held.

**Determination**

57. In the upshot, I make the following orders:

    i. This appeal succeeds. The conviction is quashed, the sentence is set aside and the Appellant be and is hereby set free unless lawfully held.

    ii. Any fine paid be refunded.

**DELIVERED, DATED and SIGNED at NYERI on this 27th day of February, 2025. Judgment delivered through Microsoft Teams Online Platform.**

**KIZITO MAGARE**

**JUDGE**

In the presence of: -

Mr. Kimani for State

Mr. Kanyi Ngatia for Kanyi Ndurumo for the Appellant

No appearance for Appellant.

Court Assistant – Michael

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