



**Mwangi & 2 others v Republic (Criminal Appeal 99 of 2023)
[2025] KEHC 7352 (KLR) (Crim) (29 May 2025) (Judgment)**

Neutral citation: [2025] KEHC 7352 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYANDARUA
CRIMINAL
CRIMINAL APPEAL 99 OF 2023**

KW KIARIE, J

MAY 29, 2025

BETWEEN

GRACE WANGUI MWANGI 1ST APPELLANT

JOSEPH WAINAINA MUTAHI 2ND APPELLANT

JULIUS GITHAIGA MWANGI 3RD APPELLANT

AND

REPUBLIC RESPONDENT

(From the original conviction and sentence in Criminal Case No. E1024 of 2022 of the Senior Principal Magistrate's Court at Engineer by Hon. Daffline Nyaboke Sure, Principal Magistrate)

JUDGMENT

1. Grace Wangui Mwangi, Joseph Wainaina Mutahi and Julius Githaiga Mwangi, the appellants herein, were convicted of the offence of malicious damage to property contrary to section 339(1) of the [Penal Code](#).
2. The particulars of the offence are that on the 21st day of April 2022, at Geta area, Kipipiri sub-county, within Nyandarua County, jointly, wilfully and unlawfully destroyed one timber house and a barbed wire fence, all valued at Kshs. 200,000.00, the property of Paul Karuga Kahari.
3. The appellants were also convicted of trespassing upon private land, contrary to section 3 (1) of Kenya's [Trespass Act](#), CAP 204, laws.
4. The particulars of the offence are that on the 21st day of April 2022, at Geta area, Kipipiri sub-county, within Nyandarua County, jointly without reasonable excuse entered into land parcel number Nyandarua/Geta/3XX1 without the authority of the owner.



5. Each appellant was sentenced to pay a fine of Kshs. 50,000.00 on each count or serve six months' imprisonment.
6. They were dissatisfied and filed this appeal based on the following grounds:
 - a. The learned trial magistrate erred in law and fact by shifting the burden of proof from the respondent to the appellants, based on which the appellants were convicted and sentenced.
 - b. The learned trial magistrate erred in law and fact by basing her judgment on the purported weakness of the appellants' defence instead of proof beyond a reasonable doubt on the part of the respondent.
 - c. The learned trial magistrate erred in law and fact in failing to consider the Appellants' evidence as well as their written submissions. Consequently, there was a miscarriage of justice to the detriment of the appellants.
 - d. The learned trial magistrate erred in law and in fact by failing to find that the counts with which the appellants were charged were not supported by the evidence adduced by the respondent's witnesses, a matter which, had she addressed herself to, would have led to the appellants' acquittal.
 - e. The learned trial magistrate erred in law and fact by failing to observe and find that the charge sheet was fatally defective, a matter which, had she addressed herself to, would have led to the appellants' acquittal.
 - f. The learned trial magistrate erred in law and in fact by failing to observe and find that the issue of ownership of the land, which is the subject matter of the case, had not been resolved and was the focus of ongoing investigations by the Directorate of Criminal Investigations. It would have led to a different finding and judgment if she had addressed this matter.
 - g. The learned trial magistrate erred in law and fact by finding that the Appellants had jointly damaged a timber house and a barbed wire fence worth Kshs. 200,000/—, yet no expert witness was called to prove so, a position which, had she addressed herself to it, would have led to the appellants' acquittal.
 - h. The learned trial magistrate erred in law and fact by failing to consider the defence of alibi as pleaded by the 3rd appellant, which defence had she considered would have led to the acquittal of the 3rd appellant.
 - i. The learned trial magistrate erred in law and fact by believing the respondent's witnesses' evidence, which was full of contradictions and inconsistencies, which, if she had not done so, would have led to an acquittal of the appellants.
 - j. The learned trial magistrate erred in law and fact by convicting and sentencing the appellants on an offence of malicious damage to crops worth Kshs. 120,000/- yet the same had not been pleaded in the charge sheet, which matter had she addressed herself to would have resulted in an acquittal of the appellants.
7. The respondent opposed the appeal through M/s Odera Vena, learned counsel, and contended that:
 - a. The prosecution proved that the complainant is the registered proprietor of land parcel number Nyandarua/Geta/3XX1.



- b. The prosecution proved that the appellants entered the land and willfully destroyed some properties therein.
8. This is a first appellate court. As expected, I have analysed and evaluated all the evidence adduced before the lower court. I have concluded, considering I neither saw nor heard any witnesses. I will be guided by the celebrated case of *Okeno vs the Republic* [1972] EA 32.
9. For the trial magistrate to determine that the appellants had maliciously damaged the complainant's property, either of the following circumstances should have been proven beyond a reasonable doubt:
 - a. That the complainant owned the damaged property, or
 - b. The complainant had leased the land on which the house and the fence stood from either the complainant or a third party who held title to the land, and
 - c. The complainant was not a trespasser.
10. In the case of *Kahuhu Wang'ang'a vs Republic* [2002] eKLR, Mbogholi Msagha J (as he then was) held:

The key words in an offence of malicious damage to property are that the damage must have been done "wilfully" and "unlawfully". That wilful and unlawful act carries with it the intention and cannot, therefore, be complete unless mens rea is proved. Above all, the said act must be attributed to the person charged "directly". I emphasize the word "directly" because, in an offence of this nature, unlike in a civil jurisdiction, vicarious liability cannot attach. This is because malice, by its own nature, is a conception of the mind which cannot be assigned. And so, in the instant case, the prosecution was duty-bound to prove beyond any reasonable doubt that the appellant did wilfully and unlawfully damage the alleged properties.
11. Land parcel number Nyandarua/Geta/3XX1 was established during the trial to belong to Paul Karuga Kahari. The prosecution produced a copy of a title deed issued on December 23rd, 2015. They also presented a copy of the decree issued in favour of the complainant in the Senior Principal Magistrate's Court, ELC case number E1 of 2020. The court declared that the land parcel number Nyandarua/Geta/3XX1 belongs to the complainant.
12. The appellants denied the offences. The first appellant contended that she was attacked in her home by Njane Kamau, Joseph Muiruri, and Mark Kahari. The second appellant's witness conceded that he (the second appellant) removed the fence and assisted him in doing so. The third appellant tendered an alibi, stating that he was in Naivasha on the 21st day of April 2024. When an accused raises an alibi defence, they do not assume any burden to prove that it is the truth. This was stated in the case of *Kiarie vs Republic* [1984] KLR, where the Court of Appeal held:

An alibi raises a specific defence, and an accused person who puts forward an alibi as an answer to a charge does not, in law, thereby assume any burden of proving that answer. It is sufficient if an alibi introduces into the mind of a court a doubt that is not unreasonable.
13. There was overwhelming evidence that the three appellants trespassed onto the complainant's land. They damaged some buildings and a fence and planted crops where carrots had been planted. This came from the evidence of Maina Kahari Wakasa (PW2). He went to report to the police, and when he returned to the scene with some police officers, they found many other people had joined the appellants. They were still carrying on the destruction. This displaced the denial of involvement in the offences by the appellants. The alibi defence by the 3rd appellant was not true.



14. The above analysis of the evidence on record concludes that the prosecution proved the two counts against each appellant to the required standards. The conviction was based on the evidence in the record.

DELIVERED AND SIGNED AT NYANDARUA THIS 29TH DAY OF MAY 2025

KIARIE WAWERU KIARIE

JUDGE

