



REPUBLIC OF KENYA



**Gakondi v Republic (Criminal Appeal E033 of 2024)
[2025] KEHC 7380 (KLR) (28 May 2025) (Judgment)**

Neutral citation: [2025] KEHC 7380 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERUGOYA
CRIMINAL APPEAL E033 OF 2024
JK NG'ARNG'AR, J
MAY 28, 2025**

BETWEEN

JOHN MURIMI GAKONDI APPELLANT

AND

REPUBLIC RESPONDENT

*(From the conviction and sentence in Criminal Case Number E303 of
2024 by Hon. Waithira G. in the Magistrate's Court at Kirinyaga)*

JUDGMENT

1. The Appellant was charged with the offence of malicious damage to property contrary to section 339(1) of the *Penal Code*. The particulars of this offence were that on 15th April 2024 at Kiarugu Village, Kirinyaga Central within Kirinyaga County, the Appellant cut down ten stems of coffee valued at approximately Kshs 5,500/=, the property of Maureen Njoki Muthii.
2. A trial was conducted where the Prosecution called six witnesses in aid of its case and the Appellant was found to have a case to answer and was placed on his defence. The Appellant testified and called three witnesses in aid of his case.
3. In a Judgement dated 12th September 2024, the trial court convicted the Appellant for the offence of malicious damage to property and fined him Kshs 30,000/= in default to serve 6 months imprisonment.
4. Being aggrieved with the Judgement, the Appellant filed his Petition of Appeal dated 23rd September 2024 appealing against his conviction and sentence.
5. This being the first appellate court, I have a duty to re-evaluate the evidence on record and come to my own independent conclusion. See *Odhiambo vs Republic Cr. App No. 280 of 2004 (2005) 1 KLR*.



6. I hereby proceed to summarize the parties' cases in the trial court and their respective written submissions in the present Appeal.

The Prosecution/Respondent's case

7. It was the Prosecution's case that the Appellant maliciously cut ten coffee stems that belonged to Maureen Njoki Muthii (PW1). PW1 stated that her deceased husband, Fredrick Muthii Gachoki purchased land from his cousin, the Appellant and they lived on the said land until his death. PW1 testified that she was the deceased's sole wife and did not know Pauline Wambui Kamau (DW4).
8. It was PW1's testimony that she buried her husband on the said land and that the Appellant had refused to give her the Title Deed to the land.
9. In their written submissions dated 17th March 2025, the Respondent submitted that PW1 was a former wife to the deceased and hence had a legitimate interest in the land and that the Appellant's conviction was not against the weighty evidence they produced. They relied on section 29 of the *Law of Succession Act*.
10. It was the Respondent's submission that they had proved their case beyond reasonable doubt. That PW1, PW3 and PW4 witnesses the Appellant cutting the coffee stems and PW5 produced photographs which showed destroyed coffee stems. It was their further submission that the Appellant cuts coffee stems that had been cultivated by PW1 with the intention of evicting her.
11. The Respondent submitted that lack of proof of ownership of the land was not fatal to her case. She relied on *Republic vs Jacob Mutuma & another (2018) eKLR*.
12. It was the Respondent's submission that the trial court was lenient in issuing the sentence when compared with the provision of the law.

The Appellants'/Accused's case

13. The Appellant (DW1) testified that he owned the coffee stems as they were on his land, LR Number MUTIRA/KIRUNDA/2083. DW1 further testified that he leased the coffee to Fredrick Muthii Gachoki (deceased) and when Fredrick died, he left behind a widow, Pauline Wambui Kamau (DW4). He further testified that the lease period had lapsed.
14. It was the DW1's testimony that Pauline buried her deceased husband. It was his further testimony that after he paid DW4 Kshs 80,000/=, she removed a semi-permanent kitchen, tank and a semi-permanent gate and left his land. The Appellant testified that when Pauline left, Maureen (DW1) came to his land through a fence.
15. In his written submissions dated 20th March 2025, the Appellant submitted that the Respondent failed to call an Agricultural Officer to estimate the value of the cut coffee stems. That the Prosecution's value of Kshs 5,500/= was unsupported by evidence.
16. It was the Appellant's submission that the complainant did not provide any document to show that her property was damaged and further that the Prosecution failed to show that the complainant (PW1) was the owner of the subject land. That the Prosecution failed to produce Letters of Administration to prove that PW1 was the personal representative and wife of the deceased.
17. The Appellant submitted that a mere marriage did not mean marriage in law. That if PW1 relied on the narrative of being the deceased's wife by virtue of having children with him, nothing could prevent Pauline (PW4) from making a similar claim. He further submitted that the trial court erred in



convicting and sentencing the Appellant, the sentence of which was harsh. The Appellant wanted this court to set aside the conviction and sentence and order for the refund of the fine of Kshs 30,000/=.

18. I have gone through and given due consideration to the trial court's proceedings, the Record of Appeal dated 11th March 2025, the Appellant's written submissions dated 20th March 2025 and the Respondent's written submissions dated 17th March 2025. The following issues arise for my determination: -
- i. Whether the Prosecution proved its case beyond reasonable doubt.
 - ii. Whether the Appellant's defence placed doubt on the Prosecution's case.
 - iii. Whether the sentence preferred against the Appellant was harsh and severe.

Whether the Prosecution proved its case beyond reasonable doubt

19. Regarding the charge of malicious damage to property, section 339(1) of the *Penal Code* provides: -
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.
20. Odunga J. (as he then was) in *Timothy Mutuku Kitonyi v Republic* [2021] KEHC 1388 (KLR) held: -
“I agree with Ngenye Macharia, J's finding in *Wilson Gathungu Chuchu vs. Republic* [2018] eKLR that under the above definition, the elements of the offence may be dissected as proof of ownership of the property; proof that the property was destroyed or damaged; proof that the destruction or damage was occasioned by the accused; and proof that the destruction was wilful and unlawful.”
21. Additionally, in *Simon Kiama Ndiangui v Republic* [2017] KEHC 8332 (KLR) Ngaah J. held: -
“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.....
.....suggestion in this provision that ownership of the destroyed property must be established for liability to attach. My take on this issue is that ownership of the property is a relevant but not the defining factor; it may be taken into account amongst other evidence that tends to establish that the offence was committed. It follows that failure to prove ownership is not fatal to the prosecution case and to this extent I agree with the learned counsel for the state.” (Emphasis mine)
22. Similarly, in *Republic v Jacob Mutuma & another* [2018] KEHC 6285 (KLR), Majanja J. (as he then was) held: -
“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.” (Emphasis mine)
23. For the present case and under the charge of malicious damage to property, this court was to determine whether there was actual destruction or cutting down of coffee stems and whether it was the Appellant who caused such destruction.



24. Maureen Njoki Muthii (PW1) testified that on the material day, she was tending to coffee in her land with her sister-in-law (PW4) when the Appellant came and cut down her coffee stems using a power saw and later a panga. When PW1 was cross examined, she restated that it was the Appellant who cut her coffee stems.
25. Joseph Murithi Kirigu (PW3) testified that he was PW1's neighbour. He testified that on the material day he heard a commotion from PW1's home and when he went to check out what the problem was, he saw the Appellant cut coffee stems while shouting to PW1 that "you will come out and go". PW3's evidence on the Appellant cutting the coffee stems was uncontroverted after cross examination.
26. Nancy Muthoni Muthii (PW4) testified that she was the deceased's sister and PW1's sister-in-law. She testified that on the material day, she went to visit PW1 and he saw the Appellant cut coffee stems while saying "this one will not stay here, she will go". PW4's evidence on the Appellant cutting the coffee stems was uncontroverted after cross examination.
27. No. 105808 PC Peter Macharia (PW5) testified that PW1 reported to them that someone had got into her shamba and cut her coffee bushes. PW5 further testified that he visited the shamba and found cut coffee bushes and he took photographs. PW5 produced photographs and their accompanying certificate as P. Exh 4 a-c and P. Exh 9 respectively. Section 78(1) of the Evidence Act provides: -

In criminal proceedings a certificate in the form in the First Schedule to this Act, given under the hand of an officer appointed by order of the Director of Public Prosecutions for the purpose, who shall have prepared a photographic print or a photographic enlargement from exposed film or an electronic and digital medium submitted to him, shall be admissible, together with any photographic prints, photographic enlargements and any other annex referred to therein, and shall be evidence of all facts stated therein.

28. The production of the photographs was not challenged in the trial court and were therefore admissible as they were compliant with the law. I have considered the exhibits above and their accompanying certificate and it is my finding that the photographs marked as P. Exh 4 a-c are admissible. The photographs showed trees that have been cut down coffee bushes.
29. Having analysed the above, it is my finding that there was evidence of malicious destruction of coffee bushes. The same was shown through the photographs (P. Exh 4 a-c) and the testimonies of the complainant (PW1), Joseph Murithi Kirigu (PW3) and Nancy Muthoni Muthii (PW4) The Appellant and his witnesses (DW2, DW3 and DW4) testimonies which majorly focused on the issue of ownership of the subject land and marital status of the deceased, PW1 and DW4 did not controvert the Prosecution's evidence above.
30. From the evidence and analysis above, it is clear that the issue of identity of the Appellant was beyond doubt. The Appellant was placed in the scene by PW1, PW3 and PW4 whose testimonies as I have earlier noted, remained uncontroverted. Further, the Appellant and PW1 were not strangers as the Appellant was the cousin of PW1's deceased's husband. It is therefore my finding that the Appellant was positively identified as the perpetrator of the offence.
31. On the issue of ownership of the subject land, I am inclined to agree with the authorities stated earlier on in this Judgement that ownership of the subject land was not a key ingredient to proving the charge of malicious damage to property. It may be used alongside other evidence in determining whether the charge of malicious property has been proved but its absence was not fatal.
32. I have noted that both parties' cases in the trial court majorly focused on the ownership of the suit land and the marital status of the deceased (PW1's husband), Maureen Njoki (PW1) and Pauline Wambui



Kamau (DW4). From the record, there was a Sale Agreement produced as P. Exh 1 which indicated that the Appellant had sold land to Fredrick Muthii (deceased). The Appellant also produced a Lease Agreement as D. Exh 1 which indicated that he leased the land to Fredrick Muthee (deceased). The ownership of the subject land can only be determined by an Environment and Land Court and not a criminal court.

33. What is clear is that there was a nexus between the subject land, the complainant (PW1) and the Appellant. They were not strangers on the said land. What was important in this case was that the Prosecution prove that there was malicious damage to the coffee bushes and that it was the Appellant who caused such damage, which they have.
34. Flowing from the above, it is my finding that the Prosecution proved their case on the charge of malicious damage to property against the Appellant.

Whether the Appellant's defence placed doubt on the Prosecution's case.

35. The Appellant (DW1) did not deny cutting the coffee bushes but testified that the said coffee bushes belonged to him. DW1's testimony focused majorly on the ownership of the subject land Mutira/Kirunda/2083 and how the deceased was not married to Maureen Njoki (PW1) but to Pauline Wambui Kamau (DW4).
36. I have also gone through the Appellant's witnesses (DW2, DW3 and DW4) testimonies and they also focus on the ownership of the subject land Mutira/Kirunda/2083 and how the deceased was not married to Maureen Njoki (PW1) but to Pauline Wambui Kamau (DW4). None of the testimonies addressed the issue of the Appellant cutting down coffee bushes.
37. In the circumstances thereof, it is my finding that the Appellant's defences are weak, did not address the main charge of malicious damage and thus did not create any doubt on the Prosecution's case which I have already found proven.

Whether the sentence preferred against the Appellant was harsh and severe.

38. Sentencing is at the discretion of the trial court but such discretion must be exercised judiciously and not capriciously. The trial court must be guided by the evidence and sound legal principles and can only interfere with a sentence if it is demonstrated that the trial court acted on the wrong principle, ignored material factors, took into account irrelevant considerations or on the whole that the sentence was manifestly excessive.
39. For the offence of malicious damage to property, section 339(1) of the *Penal Code* provided: -

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 trial court convicted and fined the Appellant Kshs 30,000/= and in default to serve 6 months imprisonment.
41. Having considered the circumstances of the case, I am satisfied that the trial court did not err when it sentenced the Appellants to a fine of 30,000/= and in default to serve 6 months imprisonment. The sentence in my view was just, fair and proportionate.
42. In the final analysis, I uphold the conviction and the sentence meted by the trial court.
43. In the end, the Appeal dated 23rd September 2024 has no merit and is dismissed.



JUDGEMENT DATED AND SIGNED AND DELIVERED VIRTUALLY THIS 28TH DAY OF MAY, 2025.

.....

J.K.NG'ARNG'AR

JUDGE

Judgement delivered in the presence of the Appellant and Mamba for the Respondent. Siele/Mark (Court Assistants).

