Ngui v Republic (Criminal Appeal E037 of 2023)
[2025] KEHC 11626 (KLR) (31 July 2025) (Judgment)

Neutral citation: [2025] KEHC 11626 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CRIMINAL APPEAL E037 OF 2023

EN MAINA, J

JULY 31, 2025

BETWEEN

HENRY KITONGA NGUI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an Appeal against the judgment by Hon. C.N ONDIEKI (PM) in Machakos Chief Magistrate's Court in Cr. Case No. 549 of 2019 Delivered on 31st July , 2023)

JUDGMENT

1. The Appellant herein Henry Kitonga Ngui, was charged with the offence of malicious damage to property contrary to Section 339(1) of the *Penal Code*. The particulars of the offence being that on 14th August 2019, at Katelembo Area of Machakos Sub county within Machakos County jointly with others not before court willfully and unlawfully damaged a barbed wire and poles fence valued at Kshs 75,000 the property of John Senge Mathias.

2. After hearing and analyzing the testimonies of the two prosecution witnesses and also the testimony of the appellant and his witness, the trial Magistrate found the appellant guilty on the charge of malicious damage to property, convicted him and sentenced him to pay a fine of Kshs 30,000 in default six months imprisonment. In addition, the appellant was ordered to, within 2 months from the date of the judgment, compensate the complainant by a sum sum of Kshs 75,000 with interest at court rates.

3. Aggrieved by the Judgment the appellant preferred this appeal which is premised on the following grounds;

> " 1. That the Learned Magistrate erred in law and in fact in convicting the appellant against the weight of the evidence tendered which was insufficient.

2. That the Learned Magistrate erred in law and in fact in failing to believe the appellant's defence of alibi that the appellant was not at the scene of the crime as he was at Makueni which alibi defence was not controverted

3. That the Learned Magistrate erred in law and fact in convicting the appellant while the evidence of PW2 is clear that the fence was uprooted by one Mutisya Kitonga who was not charged hence shifting blame on an innocent party.

4. That the Learned Magistrate erred in law and fact in convicting the appellant when no eye witness saw him uprooting and damaging the fence,

5. That the Learned Magistrate erred in law and in fact in failing to appreciate that although PW2 alleged that the appellant threatened him no criminal charges of threatening or causing disturbance were preferred against the appellant.

6. That the Learned Magistrate erred in law and in fact in failing to believe the appellants defence of alibi was corroborated by DW2.

7. That the Learned Trial Magistrate erred in law and in fact in failing to believe the evidence of DW2 that the fence was demolished by squatters who were on the land which evidence was credible.

8. That the Learned Trial Magistrate erred in law and in fact in failing to find the prosecution had not proved its case beyond reasonable doubt for the offence of malicious damage to property as serious doubts had been raised by the appellant in his defence.

9. That the Learned Trial Magistrate erred in law and in fact in failing to appreciate that as admitted by PW1 there was ownership dispute of his plot numbers 833 to 842 with the appellant claiming ownership of plot No 833 and 834 comprised therein which has not been resolved by the parties and Katelembo Athiani Muputi Co-operative Society hence the acrimony.

10. That the Learned Trial Magistrate erred in law and in fact in failing to appreciate that PW1 did not prove that he was the registered owner of the land where the alleged offence was committed.

11. That the Learned Trial Magistrate erred in law and in fact in failing to appreciate that no surveyor was called as a witness to confirm that the complainant was fencing on the correct boundary and produce a beacon certificate

12. That the Learned Trial Magistrate erred in law and in fact in sentencing the appellant to pay a fine of kshs 30,000 in default to serve 6 months in prison which fine was based on unproved offence and was excessive in the circumstances.

13. That the Learned Trial Magistrate erred in law and in fact in ordering the appellant to compensate the complainant the sum of kshs 75,000 when no valuation report was tabled in court to prove the value of the damaged fence.

4. The Appeal was canvassed by way of written submissions.

5. For the Appellant, it was submitted that failure to produce ownership documents for plot 835 where the poles were uprooted renders the charge unproved and the appellant ought to have been acquitted. The Appellant also submitted that the evidence of PW2 which placed the appellant at the scene of the crime was uncorroborated yet the evidence of alibi by the defence was corroborated. The court therefore arrived at the wrong conclusion that the appellant was sufficiently identified by PW2 and placed at the scene of the crime. Counsel placed reliance on the case of Republic vs Brian Nzioki Muli Machakos Criminal appeal No 98 of 2018.

6. The appellant also contended that the prosecution did not tender sufficient evidence to prove the offence of malicious damage to property beyond reasonable doubt against the appellant. He urged the court to quash his conviction and set aside the sentence and order that the appellant be acquitted.

7. For the Respondent it was submitted that the prosecution discharged its burden of proving the offence beyond reasonable doubt; that the fence was destroyed and it belonged to the complainant.

8. On the defence of alibi by the respondent termed it as an afterthought given that he raised it only in his unsworn evidence. The respondent also submitted that the sentence imposed was within the law and sufficient given the circumstances.

Determination.

9. This being a first appeal, I have re-considered and evaluated the evidence adduced in the court below so as to arrive at my own independent findings albeit bearing in mind that I did not see or hear the witnesses- see the case of Okeno v Republic [1972] EA 32 where the court stated:

> " An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya v. R., [1957] E. A. 336) 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. (Shantilal M. Ruwala v. R., [1957] E.A. 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] E. A. 424."

10. It is trite that all criminal offences require proof beyond reasonable doubt. In Miller vs. Ministry of Pensions (1947) 2 All ER 372, Lord Denning had this to say on that standard of proof:

> " 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."

11. The offence of malicious damage to property is provided for in Section 339(1) of the *Penal Code* which states:

> "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."

12. The prosecution was therefore required to prove beyond reasonable doubt the following ingredients of the offence of malicious damage to property contrary to section 339 (1) of the penal Code;

(a) The property belonging to the complainant was damaged or destroyed.

(b) That the said property was damaged or destroyed through a willful and unlawful action.

(c) That the property in issue was damaged or destroyed by none other than the accused person in the dock. See the case of Timothy Mutuku Kitonyi v Republic [2021] KEHC 1388 (KLR) where the court stated:

> "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."

13. Similarly, it was held as follows in the case of Simon Kiama Ndiangui v Republic [2017] KEHC 8332 (KLR):

> "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."

14. On the first element that property belonging to the complainant was damaged or destroyed, the complainant testified that he was running his errands when he was called by PW2 that his poles had been uprooted. He went to the scene and confirmed that indeed the poles had been uprooted. He reported the matter to the police who went to the scene and took photos. PW2 also testified that he was a casual labourer and was erecting a fence at PW1's plot, when the appellant and another man who, he knew ass Mutisya Kitonga, went and uprooted some of the poles he had already erected. He stated that the appellant also warned him against continuing to erect the fence. The complainant stated that he had purchased the plot and had allocation slips to confirm they were his. The appellant made an unsworn statement where he denied that he committed the offence. He contended that it was the children of a squatter who was deceased who did it. He alleged that he was framed as on that day he was in Makueni where he was working. He called one witness who testified that she lives next to the land whose fence was damaged. She exonerated the appellant and stated that she went to the scene on that day and told the squatters to produce the culprit. She alleged that the appellant was away at work

on that day; that he had told her that he was going to work in Makueni. She conceded that the fence was damaged.

15. it is not therefore disputed that the fence was damaged and the question would then be whether it was damaged willfully and unlawfully and whether it was damaged by the accused person.

16. The Black's Law Dictionary defines the term willful as follows- 'Willful' means proceeding from a conscious motion of the will; intending the result which actually comes to pass; designed; intentional; malicious. It differs essentially from a negligent act. Willful acts are positive and intentional, as opposed to accidental or involuntary acts. The appellants consciously destroyed the sugarcane belonging to the complainant..."

17. Guided by the above definition, it is evident that the action of uprooting the fencing poles was a willful act. Indeed, even DW2 stated that she went there and was not pleased with what had happened. She described the effect of what took place as destruction. This corroborated the evidence of both the complainant and PW2. The ownership of the land is not a relevant issue because even if it was then the lawful thing would have been to use the correct legal channels, not to take the law in one's hands. The damage was not only malicious but also willful and unlawful as there was no lawful order to remove it.

18. The third ingredient is whether the property in issue was damaged or destroyed by the accused person in the dock. PW2 testified that he was a casual labourer and while erecting a fence at PW1's plot, the appellant and another man Mutisya Kitonga went and uprooted some of the poles he had already erected and the appellant warned him against continuing to fence. This incident happened in broad daylight and the parties were not strangers to each other. The identification of the appellant by PW2is positive. I have considered his alibi and found it weak when juxtaposed with the testimony of PW2. They even spoke and he warned PW2 not to continue fencing. Dw2 could only say what the appellant told her, that he had gone to Makueni but unlike PW2, she was not at the scene when the poles were being uprooted. Her evidence did not rebut that of PW2 and I am satisfied therefore that the accused committed the offence. The complainant testified that the appellant had laid claim to the same land. That could have been the motive for uprooting the fence. Whatever the motive the act was unlawful.

19. With regard to sentence, the trial court sentenced the appellant to pay a fine of kshs 30,000 in default serve 6 months in prison while the law prescribes a sentence of imprisonment for five years. This was not therefore harsh or excessive.

20. In the upshot the appeal is without merit and is dismissed. The conviction and sentence of the trial court are upheld.

JUDGMENT SIGNED, DATED AND DELIVERED ON THIS 31ST JULY 2025.

E N MAINA

JUDGE

In Presence Of;

Miss Nyauncho for the State.

Mr Sila Advocate for the Appellant.

Miriam - Court Assistant.