



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISII**

**CRIMINAL APPEAL NO. 7 OF 2021**

**CONSOLIDATED WITH**

**CRIMINAL APPEAL NO. 8 & 9 OF 2021**

**MATARE GETANGE**

**JOSEPH ORANGI GETANGE..... APPELLANTS**

**SAMWEL NYANGOTE OMBASA**

**VERSUS**

**REPUBLIC ..... PROSECUTOR**

**(Being an appeal against the conviction and sentence in Kisii Criminal Case No.3126 of 2016**

**before Hon. N.S. Lutta (C.M) delivered on the 17<sup>th</sup> December 2020)**

**JUDGMENT**

1. The appellants, **MATARA GETANGE, JOSEPH ORANGI GETANGE** and **SAMWEL NYANGUTE OMBASA** were charged jointly with the offence of malicious damage to property contrary to section 339 (1) of the Penal Code. The particulars of the offence were that on diverse dates between 2<sup>nd</sup> and 4<sup>th</sup> October 2016, at Kerina area within Kisii County, jointly with others not before the court, willfully and unlawfully damaged the fence of **JOHN MAGARA OICHOE** valued at Kshs. 110,000/=.
2. Being aggrieved by the trial courts' decision on conviction and sentence them to probation to 2 years each the appellants filed criminal appeals nos. 7, 8 and 9 respectively. In due course, the appeals were consolidated, with Criminal Appeal No. 7 of 2020 being the lead file.
3. It is now the duty of this court to reevaluate the evidence afresh and arrive at its independent conclusions bearing in mind that it has neither seen nor heard the witnesses and give due regard for that. (See **Okeno v Republic (1972) E.A, 32.**)
4. The prosecution called 8 witnesses to testify in support of its case against the appellants. The victim John Magara Oichoe (PW1) testified that he had bought land parcel No. Bonchari Bokeire Plot No. 4543 in the year 2009 from PW2 and obtained title to the land in 2015. He recalled that on 2<sup>nd</sup> October 2016, he had sent his children Ernest Ondieki Nyabuto, Solomon Joginder Magara and Zebedeo Matobo Magara to fence the land with barbed wire. His son later called him to inform him that the fence had been destroyed. He went to the land with the police and took photographs of the destruction. He then engaged a valuer who assessed the damage at Kshs. 110,000/=. PW1 insisted that his title was genuine. He also stated that before the incident, he did not know the appellants.
5. Annah Nyaboke (PW2) confirmed that she had sold the parcel of land to PW1. She testified that on 4<sup>th</sup> October 2016, she found the fence destroyed and the trees on the land cut down. She stated that she was only told by other people that it was the appellants who had destroyed the fence. She admitted that her name was not among the people who had the title to be able to sell but stated that she had bought the land from one Magara Makori before she sold it to PW1.
6. Solomon Jodinda Magara (PW3) testified that he, PW3 and Zepherio fenced their father's parcel of land no. 4548 on 2<sup>nd</sup> October 2016. The following day, his brother informed him that the fence had been destroyed. He went to the scene and confirmed that the destruction had taken place. PW3 stated that he had not seen the people who destroyed the property.
7. Zepherio Matogo Magara (PW4) recalled that as they were fencing PW1's land, the 3 appellants came by and told them that they were doing nothing. On 4<sup>th</sup> October 2016, he found the fence had been destroyed. He called his father and reported the matter to the police. He

stated that he had bought the fencing materials at Kshs. 110,000/=. He too had not witnessed the destruction of the fence but reiterated that the accused persons had threatened to destroy it.

8. Inspector Leyrice Ligama Mukutsi (PW5) attached to the crime scene investigation, testified that he had visited the scene on 5<sup>th</sup> October 2016 and taken photographs of the destroyed property, which he produced before the court.

9. Corporal Daniel Odongo (PW6) who was initially stationed at Gesonso police station recalled that on 4<sup>th</sup> October 2016, the complainant went in to report the destruction of a fence. He stated that the complainant gave him the names of the people involved. He visited land parcel no. Wanjare/Bokeire/4548 in the company of the complainant and the scenes of crime personnel. He then went to the land's office to ascertain ownership of the land and found that it was registered in the name of the complainant. He informed the court that the appellants had lodged a claim at the lands dispute tribunal and lost. During cross examination, PW6 stated that he was not aware that the complainant's title had been cancelled. He also admitted that there was a subdivision of land parcel no. 427 which was later subdivided and there was an indication that a succession cause had taken place. He acknowledged that the appellants had showed him titles but according to him, they were irrelevant as their title deeds came from a sub-division and they had not produced a green card.

10. Donald Mutinda (PW7), a valuer working with Ragos Valuers and Estate Agents Limited, recalled that in December 2016, he received instructions to carry out valuation of land parcel Wanjare /Bokeire / 4548. He conducted a search at the Kisii lands registry and confirmed that the land belonged to the complainant. He also obtained a survey map which confirmed that the land belonged to him. PW7 proceeded to the land and did a survey for the cost of replacement of the fence. In his assessment, the damage amounted to Kshs. 110,000/=.

11. The County Land Registrar, Steve Mokaya (PW8), testified that the land parcel Wanjare/ Bokeire/427 measuring 2.0 hectares was first registered on 1<sup>st</sup> August 1976 under the names of Magara Makori, Obaigwa Makori and Nyamatura Makori who each got 1/3 share. A registration was done on 20<sup>th</sup> July 2011 whereby Pius Nyagwanga Nyamatura was registered as the administrator of the property under Succession Cause No. 437 of 2010 High Court Kisii. He then subdivided the property on 19<sup>th</sup> November 2012 and opened 12 new numbers which he went ahead to sell to other parties. PW8 stated that it was difficult to know how the succession was done although the grant had a High Court seal. He produced the documents in relation to the property.

12. On being placed on their defences, each of the appellants gave sworn testimonies denying the charges facing them. In his defence, Matara Getange denied that he had committed the offence. He stated that on the day in question, he had gone to church. He stated that the land in question was far from his home and belonged to a person known as Maisiba Magara.

13. Joseph Getange also denied committing the offence. He testified that he had gone to church on the material day. He testified that the owner of the land was known as Christopher Magara and the complainant was not in occupation of the land and did not have a title deed.

14. Samuel Nyangate Ombaso told the trial court that he was at his shop on the day the alleged offence was committed.

15. Thomas Maisiba Magara (DW4), testified that he was the owner of the land. He produced the gazette notice with respect to the estate of Magara Makori, mutation forms and a copy of a green card to support his claim. He informed the trial court that he was the one who had removed the fence with the help of his church members and stated that the complainant was not the owner of the land and did not come from the area.

## **PARTIES' SUBMISSIONS**

16. Aggrieved by the trial court's decision, the appellants lodged the instant appeal which was canvassed by way of oral and written submissions. In his submissions, the appellant's counsel argued that the prosecution had not proved its case beyond reasonable doubt. He also submitted that the trial court failed to give reasons for its decision in accordance with **Section 169 (1)** of the **Criminal Procedure Code** and did not specify at the end of the judgment, the specific section under which it had convicted the appellants.

17. He also observed that the trial court did not consider the defence case, particularly that of DW4 who had admitted to committing the offence. Counsel cited the case of **HAK & Another v Republic [2016] eKLR** where the court held that an accused person's defence had to be weighed as against the evidence of the prosecution in compliance with Section 169 of the Criminal Procedure Code and that a trial court had to give reasons for agreeing or disagreeing with the defence of an accused person.

18. Counsel also faulted the trial court for finding that PW2 had seen the appellants destroy the fence yet it was her evidence that she had not seen them destroy it.

19. He further argued that based on the evidence of PW8, the title to land parcel no. 4548 was canceled and new numbers issued after confirmation of the grant. He therefore submitted that the prosecution had failed to prove that the land existed at the time of the offence and had not proved that the fence that was removed was lawfully in place.

20. For his part, counsel for the state submitted that the appellants' argument that the subject land did not exist was not factual, as the title to the parcel of land had been produced.

21. With respect to adherence to **Section 169 (1) (2)** of the **Criminal Procedure Code** counsel submitted that the trial court had analyzed all the evidence and the ingredients of the offence. He argued that the failure by the court to state the section under which the conviction had been made at the end of the judgment could not cause the appellants any prejudice. Lastly, he submitted that the sentence of 2 years' probation was lenient since under the section the sentence provided for 5 years' imprisonment.

## ANALYSIS AND DETERMINATION

22. Having considered the petition of appeal, the evidence and the submissions before this court, I find that the issues for determination are;

**a. Whether the trial magistrate failed to appreciate the law and evaluate the entire evidence in coming to its decision; and**

**b. Whether the prosecution proved that the land belonged to the complainant and that the property that was removed was lawfully in place from where it had been removed.**

23. The appellants were charged with the offence of malicious damage to property, which is defined under **Section 339 (1) of the Penal Code** thus;

*“Any person who willfully and unlawfully destroys or damages any property is guilty of an offence, which, unless otherwise stated, is a misdemeanor, and is liable, if no other punishment is provided, to imprisonment for five years.”*

24. The trial court properly identified the elements of the offence of malicious damage to property as;

a. proof of ownership of the property.

b. proof that the property was destroyed or damaged.

c. proof that the destruction or damage was occasioned by the accused.

d. proof that the destruction was willful and unlawful.

25. On the first ingredient of the offence, the appellants argued that the prosecution had not proved that PW1 owned the parcel of land where the alleged offence took place. The prosecution’s witness PW8 produced various documents to shed light on the ownership of the property. He produced a copy of a green card for land parcel Wanjare/ Bokeire/ 427 which showed that PW1’s land parcel no. 4548 had been excised from parcel no. 427. Subsequently the entry was canceled and parcel no. 427 was transferred to one Pius Nyagwanga Nyamatura in Succession Cause No. 437 of 2010 and the land later subdivided.

26. PW8 also produced the green card for parcel no. 4548, which also showed that the property was transferred to PW2 by the original owners of the land and later transferred to PW1. The copy of the green card also showed that PW1 was issued with the title to for land parcel no. 4548 in March 2015.

27. Although the ownership of for land parcel no. 4548 was not conclusive from the evidence, the prosecution proved that PW1 had a legitimate interest in the land. I concur with the persuasive decision of the court in **Simon Kiama Ndiagui vs. Republic [2017] eKLR** the court held that proof of ownership of the property is relevant but is not the determining factor in proving the offence of malicious damage to property. The court in the above matter held;

*“I cannot find any 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.”*

28. Similarly, the court in **Republic vs. Jacob Mutuma & another (2018) eKLR**, 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.”*

29. I find that it was sufficient for the prosecution to prove that PW1 had a genuine interest in land parcel Wanjare/ Bokeire no. 4548. PW1 also showed that the fence enclosing the land was his property and had been erected by PW 3 and PW4.

30. It is not disputed that the fence was destroyed between 2<sup>nd</sup> and 4<sup>th</sup> October 2016. What the appellants strenuously contest is the finding by the trial court that they were the responsible for taking down the fence. The trial court held that PW2 had seen the appellants destroying the fence but an analysis of the evidence before the trial court shows that this finding was not correct. None of the prosecution witnesses saw the appellants destroying the fence. During cross examination, PW2 testified that she had been told that the appellants were the persons who had destroyed the fence. Her evidence was hearsay evidence which is inadmissible and was not inadequate to sustain a conviction.

31. PW4 also told the trial court that the appellants had threatened to destroy the property at the time they were putting up the fence but the prosecution did not lead evidence on the circumstances under which PW4 identified the appellants. PW4 merely identified the appellants in the dock yet dock identification is generally worthless unless it is preceded by a properly conducted parade. (See **Gabriel Kamau Njoroge – vs- Republic (1982-1988) 1KAR 1134**)

32. The prosecution also sought to rely on the evidence of PW6 that the appellants had a motive to destroy the fence for the reason that they had lodged a complaint at the Lands Dispute Tribunal and lost. The said decision of the Lands Dispute Tribunal was not produced as evidence. Even in the event that it had been produced, it would not have been sufficient evidence to sustain a conviction. While the motive of

a crime is essential where the prosecution's case is solely based on circumstantial evidence, the inference of guilt to be drawn from the evidence must be firmly established. (See **Dishon Litwaka Limbambula v Republic [2003] eKLR** and **Joan Chebichii Sawe v Republic Criminal Appeal No. 2 of 2002 [2003] eKLR**)

33. I find that there was insufficient evidence to link the appellants to the destruction of PW1's fence. Suspicion however strong could not be the basis upon which the appellants were convicted.

34. The appellants were also justified in faulting the trial court for failing to consider their defences as provided under **Section 169** of the **Criminal Procedure Code** which states;

*169 (1) Every such judgment shall, except as otherwise expressly provided by this Code, be written by or under the direction of the presiding officer of the court in the language of the court, and shall contain the point or points for determination, the decision thereon and the reasons for the decision, and shall be dated and signed by the presiding officer in open court at the time of pronouncing it.*

*(2) In the case of a conviction, the judgment shall specify the offence of which, and the section of the Penal Code or other law under which, the accused person is convicted, and the punishment to which he is sentenced.*

35. On the application of the above provision in the consideration of an accused's defence, the Court of Appeal in **James Nyanamba v Republic [1983] eKLR** held;

*The judgment failed to comply with the provisions of section 169(1) of the Criminal Procedure Code which requires every judgment to contain the point or points for determination, the decision thereon and the reasons for the decision. It was after the trial magistrate had considered and decided on the prosecution evidence, that he rejected the defences as false, again without giving any reasons. He should have considered the evidence as a whole; see Okale Okethi and Others v Republic (1965) EA 555.*

36. Regarding the requirement to indicate the provision under which a conviction has been found under Section 169 (2). the Court in the above case held;

*Again the magistrate transgressed subsection (2) of section 169 of the Criminal Procedure Code which requires that in the case of a conviction, the judgment must specify the offence of which and the section of the Penal Code or other law under which the accused person is convicted. Since in his opening statement of the judgment, the magistrate did not state which accused was charged alone in which count of the counts 3 and 4 it cannot be said that the omission to comply with section 169(2) (ibid) did not occasion the appellant injustice.*

37. The trial court set out the provision under which the appellants had been charged at the introduction of the judgment. Hence, the failure to specify the provision under which they had been convicted towards the conclusion of the judgment was not prejudicial to the appellants. However, the court failed to comply with requirement under Section 169 (1) as it made no mention of the evidence of DW4 and did not give a reason for rejecting the appellants' defence.

38. My conclusion is that the prosecution did not prove its case against each appellants beyond reasonable doubt. I therefore find the appeal to be merited. I allow the appeal, quash the convictions and set aside the sentences against the appellants and hereby set them free unless otherwise lawfully held.

**DATED, SIGNED AND DELIVERED AT KISII THIS 7TH DAY OF OCTOBER 2021.**

**R.E. OUGO**

**JUDGE**

**In presence of:**

**Mr. Nyambati**                      **For the Appellant**

**Mr. Kaino**                        **Prosecution Counsel - ODPP**

**Ms. Rael**                         **Court Assistant**