REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUNGOMA

Criminal Appeal 50 of 2004

Arising from original Kimilili Cr. Case No 435 of 2002

PATRICK WAFULA KABURU……..……APPELLANT

VS

REPUBLIC……RESPONDENT

J U D G M E N T

Florence Nasimiyu Sipitali and Patrick Wafula Kaburu were jointly tried for the offence of malicious damage to property contrary to section 339 (1) of the Penal Code. They were convicted and each sentenced to a fine of Ksh.8,000/= in and in default to serve 1 year in prison hence this appeal.

There were 7grounds listed in the petition of Appeal but Mr. Kraido who appeared for the appellants only argued 3 grounds and abandoned the remaining 4 grounds. It should be noted at this stage that each of the appellants filed a separate appeal which were consolidated upon the application of the appellant's Advocate. It was urged on the first ground that the charge facing the appellants before the trial court did not disclose an offence and that there was no evidence which proved that property was destroyed. It was argued that the complainant did not establish that he had title to the land where the said toilet was built and later destroyed. The appellants also averred that they honestly believed that they owned the property. The learned senior state counsel opposed the appeal on the ground that the prosecution proved its case to the required standards of beyond reasonable doubt. He further argued that there was no justification on that part of the appellants to destroy the complainant's toilet.

The facts leading to this case are short and straightforward. The complainant, Meshack Wekesa Simiyu, who testified as P.W. 1 claimed he bought a parcel of land known as LR NO. KIMILILI/KIBINGEI/1663 from one John Musoba Simiyu. After completing the transaction of acquisition he the contracted one Alex Kimungui (P.W. 2) to built three latrines on the property. On 11.7.2002 P.W2 with one P.W3, Fred Wafula Lubakaya commenced construction work. On 15.7.2002 the duo had built the aforesaid toilet to the level of six courses when the appellants visited the parcel of land and stopped them from further constructions. Florence Nasimiyu and Fred kaburu were armed with a panga and a club respectively. The duo then destroyed by pulling down the structure claiming that the building was on their parcel of land.

When put on their defence the appellants gave different versions of their story. Florence Nasimiyu

raised the defence of alibi saying that police officers came and arrested her while she was at home. She also denied that there was a structure on parcel no Kimilili/Kibingei/1663 which she claimed was the property of her brother Shem Sipitali. The 2nd appellant Patrick Wafula claimed that he was arrested when he went to report to the O.C.P.D. about the arrest of the 1st appellant, Florence Nasimiyu. He denied knowledge of the existence of a structure on the parcel of land known as KIMILILI /KIBINGEI/1663.

The evidence on record shows that P.W1's and P.W.3's were consistent in their testimonies. It is clear that P.W 1 had contracted P.W2 to build a latrine on L.R. NO. KIMILILI/KIBINGEI/1663. P.W.3 worked for P.W2 as a mason. The two i.e P.W 2 and P.W 3 were at the scene when the appellants came and chased them away and started demolishing the toilet. The evidence of these witnesses were unshaken on crossexamination. I have re-assessed the evidence and I think the trial magistrate correctly arrived at the right decision. The prosecution established their case to the required standards in criminal cases. The defences raised by the appellants were properly rejected.

In a charge under section 339 (1) of the Penal Code, the prosecution must prove the element of malice and the fact that property existed which was actually destroyed. In this appeal I find that the prosecution had established malice as manifested by the fact that there was a dispute over the ownership of L.R. NO. KIMILILI /KIBINGEI/1663.

This simmering dispute culminated the complainant to issue a quit notice against the 1st appellant who in her evidence admitted that they were disturbed by the complainant. Though the appellants denied that a structure stood on the disputed property I am satisfied that P.W1, PW 2 PW 3 and PW 4 told the truth. There was direct evidence that a structure was put up and that the same was destroyed by the appellants. The prosecution therefore established the existence of the property and the destruction of the same. The fact that the complainant did not establish title over L.R. NO. KIMILILI /KIBINGEI/1663 is not material in this case. The complainant only needed to establish www.kenyalaw.org Patrick Wafula Kaburu v Republic [2005] eKLR 4 proprietory interest of the structure which was damaged. There was no denial that the complainant was the owner of the structure put up by P.W 2 and P.W 3.

The appellants attempted to rely on the provision of section 8 of the penal code and claimed that they demolished the structure on the ground that they had a bonafide claim and right over L.R. NO. KIMILILI /KIBINGEI/1663. I find this argument rather strange because all along the appellants denied knowledge of the existence of the structure. Even if they had admitted the presence of the structure, still that provision of the law will not assist them because the title produced did not belong to them but one shem Nalianya Sipitali who did not testify. It was alleged that he was mentally retarded. The appellants did not claim they acted as agents or legal representatives of the above registered owner while carrying out the demolition of the structure. It should be noted that the appellants' action cannot be countenanced by a court of law even if they had known legal rights over the property. A court of law cannot allow hooliganism and anarchy to take a centre stage. There are better legal channels which the appellants should have taken to get legal redress. The appellants had absolutely no justification to take the course they took.

The last ground the appellants argument was that the trial magistrate erred in tendering a sentence which was harsh and excessive. I have perused the record of appeal and the same reveals that the appellants' advocate gave a lengthy mitigation which the learned Resident Magistrate considered before pronouncing the sentence. In fact the trial magistrate took into account the fact that the complainant had the advantage of instituting a civil claim. This court can only interfere with the lower court's discretion on sentence if it is shown that the lower court overlooked some material factors or took into account some immaterial factors or it acted on a wrong principle or that the sentence is manifestly excessive. In this appeal I cannot

fault the trial magistrate. He did not breach any of the above principles.

The upshot therefore is that this appeal has no merit. It is dismissed in its entirety.

DATED AND DELIVERED THIS 18th DAY OF February 2005

J. K. SERGON

JUDGE
