REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NUMBER 30 of 2016.

WILSON GATHUNGU CHUCHU.....APPELLANT.

VERSUS

REPUBLIC.....RESPONDENT.

(An appeal from the original conviction and sentence in the Senior Principal Magistrate's Court at Githunguri Cr. Case No. 96 of 2014 delivered by Hon. E.O. Wambo, RM on 27th April, 2015).

JUDGMENT

Background

1. The Appellant herein was charged with the offence of malicious damage to property contrary to Section 339 of the Penal Code. The particulars of the offence were that on diverse dates of the month of November 2013, at Kimathi village, Githunguri District within Kiambu County willfully and unlawfully damaged Kei Apple fence and one indigenous tree (Prunus Africanum) the property of David Njoroge Chuchu. The Appellant was arraigned in court and at the conclusion of his trial found guilty. He was sentenced to serve a two year suspended sentence. He was dissatisfied with the conviction and sentence against which he has lodged the present appeal.

2. The Appellant's grounds of appeal were set out in a Petition of Appeal dated 4th February, 2016 filed by his counsel, M/s Mitiambo & Co. Advocates. In summary they were that; (i) the honorable magistrate erred when he convicted the Appellant against the weight of the evidence, (ii)the learned magistrate erred when he relied on contradictory, unreliable and insufficient evidence to found the conviction, (iii)the trial magistrate erred in failing to record all the evidence adduced by the defence, (iv)the honorable magistrate erred in failing to exercise neutrality before making his decision, and (v)the trial magistrate erred in handing down a sentence that was contrary to the law.

Evidence.

3. **PW1, David Njoroge Chuchu** the complainant recalled that between 14th and 23rd November, 2013 he was in Mombasa and when he returned home his employees informed him that the Appellant had damaged his fence. The fence was made of live Kei Apple trees located on the boundary of his land and the Appellant's farm. He visited the site of the damage and found that an indigenous tree in the vicinity had also dried up. He observed that the fence had been cut on the Appellant's side. He reported the matter to the area chief and elders. He was referred to a Forest Officer to assess the damage. In cross examination, he stated that although the Appellant cut the fence on his side he penetrated to his side, thus trespassing into his land.

4. **PW2, Stephen Gathecha** and **PW3, Charles Irungu Githinji** were employees of PW1 on his farm. They testified that in November, 2013 the Appellant cut down their employer's fence. They testified that the Appellant was cutting the fence on the side

adjacent to his land and that they did not know what made the live fence dry up. Further that there was a barbed wire fence inside the live fence.

5. **PW4, Benard Njuguna** a Forest Officer in Githunguri Sub-County carried out his assessment and filed a report with findings that a chemical had been applied to destroy the fence although he did not ascertain what chemical was used. He assessed damages at Kshs. 285,620/-. In cross examination, he stated that he indicated that the fence was damaged in the process of pruning and that his duty was to ascertain whether there was malice in the pruning. He added that his assertion that a chemical was used was merely a suspicion as laboratory tests were not carried out to ascertain the same. He observed that the burning affected about $3^1/_2$ feet of the ground from the fence and that the heat did not affect the fence itself. In addition, he observed that a tree inside the complainant's compound also dried up.

6. **PW5, No. 67619 Coast Cyrus** was the investigating officer. He visited the scene on 31st January, 2014 and found that the live fence had been maliciously damaged. Photographs of the fence were taken and the Appellant arrested before being charged in court. He testified that the fence had been pruned from the Appellant's side and sprayed with unknown chemicals that led to the destruction of the entire fence. He produced the crime scene photographs.

7. In cross examination, he stated that the Appellant could not prune the fence without trespassing on the complainant's land. That the barbed wire fence was intact and marked the boundary of the land. Further, that according to the agricultural report there was a toxic substance sprayed on the fence. **PW6, No. 79063 PC Derrick Kiprono Cherotich** a crime scene officer took the photographs of the fence referred to by PW5.

8. After the close of the prosecution case, the court ruled that the Appellant had a case to answer and was accordingly put on his defence. He gave a sworn statement of defence and called two witnesses in support thereof. **DW1, Joseph Njuguna Kayo** was the Assistant Chief Kwamuhuni Location. He knew both the Appellant and Complainant. He was also privy to the dispute between the two as he had previously been called by the area chief to arbitrate in the matter. **DW2,** M**ary Nguluru Mwaura** was the Agricultural Officer, Githunguri. She stated that she was called to investigate a case involving a Kei Apple fence. That she went to the scene and made a report in which she found that the fence had overgrown and encroached into the Appellant's land. She recommended that the fence be cut. She produced her report to the court.

9. **DW3,** Appellant confirmed that the complainant was his neighbor and that there was an ongoing dispute about a Kei Apple fence that had been growing into his land since 2010. They called an Agricultural Officer to look into the matter. He stated that the fence had grown into his land and was too thorny hampering his ability to cultivate his land. The dispute was not resolved and he decided to prune it. He burnt the waste from the pruning on his land in the evening when the smoke would blow eastwards. He was of the view that smoke must have affected the fence as he did not use any chemicals while pruning it. He added that the grudge between him and the complainant emanated from the fact that his child had been bitten by the complainant's dog and that he had refused to sell his land to the complainant. He thought that the case facing him was malicious and urged the court to order that the fence be moved. In cross examination he stated that he burnt the waste about five feet from the fence.

Submissions.

10. The appeal was canvassed by way of filing written submissions. Counsel for the Appellant filed on 8th March, 2018 whilst for the Respondent were filed by learned state counsel, Ms. Sigei on 11th June, 2018.

11. Counsel for the Appellant submitted that the evidence of the complainant was contradicted by that of PW2 and PW3 with regards to the pruning of the fence and whether a chemical agent was applied by the Appellant. He added that the evidence of PW5 and PW6 introduced further contradictions with regards to the state of the live fence and tree when they visited the site. He relied on **Reagan Mokaya *v.* Republic [2006] eKLR** to buttress the submission that a court ought not to convict an accused when the evidence of the prosecution is contradictory and raises discrepancies. It was the counsel's submission that the learned magistrate failed to take into account that the fence formed a common boundary between the Appellant's and complainant's parcels of land, in which case that although the Appellant pruned the fence, the element of malice was not established.

12. The Appellant submitted that the trial magistrate erred when he made himself an eye witness in the matter as illustrated in the judgment which called into question his neutrality. Counsel did not point to specific incidences when the magistrate turned himself an eye witness save to add that he did not record the entire defence evidence. He also pointed to the fact that the conviction of the Appellant was based on circumstantial evidence which did not meet the threshold for reliance on it. He relied on **Solomon Kirimi**

M'Rukaria *v.* Republic [2014] eKLR to buttress the submission.

13. Ms. Sigei submitted that all the elements for the offence of malicious damage to property were established. She submitted that the defence adduced by the Appellant was an afterthought as he did not indicate that he sought permission from the complainant before pruning the fence. She submitted that the witnesses were consistent and their evidence corroborative, and urged the court to find that the conviction was safe.

14. As regards sentence, Ms. Atina in oral submission urged the court to uphold the sentence imposed.

Determination.

15. It is now the duty of this court to reevaluate the evidence afresh and arrive at its independent conclusions. The court must however bear in mind that it has neither seen nor heard the witnesses and give due regard for that. See **Njoroge v Republic (1987) KLR, 19 & Okeno v Republic (1972) E.A, 32.**

16. After considering the submissions of the respective parties and the record of appeal, I have summarized that the only issues arising for determination are whether the offence was proved beyond a reasonable doubt and whether the sentence passed was legal.

17. The offence of malicious damage to property is defined under Section 339 (1) of the Penal Code as follows;

"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."

18. Under the above definition, the elements of the offence may be dissected as;

(i) proof of ownership of the property.

(ii)) proof that the property was destroyed or damaged.

(ii) proof that the destruction or damage was occasioned by the accused.

(iv)) proof that the destruction was willful and unlawful.

19. It was the onus of the prosecution to discharge the burden of demonstrating that it is the Appellant who willfully and unlawfully damaged the identified property. In the present case, the Appellant was convicted of damaging a Kei-Apple fence and an indigenous tree. Agreed facts are that the Appellant and the complainant owned adjoining pieces of land and that in November, 2013 the Appellant pruned a Kei-Apple fence planted on the boundary. The prosecution's case was that the pruning was malicious in nature as it led to the destruction of the fence and that the malicious nature of the Appellant's acts was confirmed by the use of an unknown chemical to dry up the fence.

20. The assertion that a chemical was used to damage the fence only arose in the testimonies of the complainant and PW4, a forest officer who visited the scene. While PW4 was an expert witness, the court underscores the fact that his suspicion that chemicals were used to cause the damage was not corroborated by tests to ascertain the same. In the report he filled on 19th January, 2014, Ref. No. Gith/For/Ext./TPP & M/87, he indicated that he reached this conclusion based merely on observation. The tree was within the complainant's compound and none of the witnesses testified to the Appellant having access to the tree. The evidence of PW4 was clearly not based on any scientific evidence. He did not adduce any iota of evidence that his observations were consistent with a chemical attack.

21. While the Appellant did not deny pruning the fence, there was no evidence that he interfered with the tree. PW2 and PW3 clearly testified that the Appellant simply pruned the fence that was adjacent to his land. No evidence also indicated that he crossed over the boundary of barbed wire marking the two parcels of land. Hence, it is untenable to arrive at a conclusion based on visual observation that a chemical was used to damage the tree or the fence. I find no nexus between the Appellant and the destruction of the tree. Any reliance on its damage to his culpability is not plausible.

22. I underscore the fact that the prosecution evidence was that the fence suffered damage consequent to the pruning carried out by the Appellant. I then grapple with the question of whether the destruction was malicious. Malice according to **Black's Law Dictionary, 9th Ed.**, in relation to the instant offence means, ***"(i) the intent, without justification or excuse, to commit a wrongful act or (ii) reckless disregard of the law or of a person's legal right."***

23. This calls into interrogating whether the act occasioning the damage was unlawful. The court finds the defence exhibits quite instructive. Defence exhibit 1 was a report dated 14th January, 2014 (Ref. No. Kom/ADM/24/Vol./ IX/ 213) in relation to a visit by elders to try and resolve a boundary dispute. The matter was heard on 23rd December, 2013 and there was a site visit by the elders during which they observed that the Kei-Apple fence had encroached approximately five feet into the Appellant's plot. They also observed that due to the prevailing issues between the parties it was not possible for the complainant to access the fence for trimming.

24. The fact of encroachment of the fence was corroborated by a report of Githunguri Agricultural Officer dated 12th January, 2010 in which she stated that she visited the land and observed that while the Kei-Apple fence had been planted a half ($^{1}/_{2)}$ foot from the boundary between the property it had overgrown and passed over the boundary into the Appellant's land causing him inconvenience. Recommendations made in the report were that the complainant should make efforts to maintain the fence from along and within his compound without interfering with the Appellant's property.

25. The relevance of the reports is that they clearly indicated that the fence was trespassing into the Appellant's land and causing a nuisance. Although this is a criminal trial, the law of nuisance does allow a defendant (in this case the Appellant) to quell the persisting nuisance. The manner in which such a nuisance can be abated varies and the need to involve the party from whom the nuisance emanates before determining to quell it is necessary in most cases. However, an exception exists with regards to tree branches as was set out in the case of **Earl of Lonsdale *v.* Nelson [1823] 2 B. & C. 302.** The Court of Appeal in England in a case of trespass for breaking and entering the Plaintiff's manor, held that;

"Nuisances by an act of commission are committed in defiance of those whom such nuisances injure, and the injured party may abate them, without notice to the person who committed them; but there is no decided case which sanctions the abatement by an individual, of nuisance from omission except that of cutting branches of trees which overhang a public road, or the private property of the person who cuts them. The permitting these branches to extend so far beyond the soil of the owner of the trees is a most unequivocal act of negligence, …"

26. A similar position was held by the House of Lords though in a civil suit in **Thomas Warne Lemmon vs Walter Webb [1984] UKHL 1** where Lord Macnaghten delivered himself thus;

"my lords , I am of the same opinion. I think it is clear that a man is not bound to permit a neighbours tree to overhang the service of his land, however long the space above may have been interfered with by the growth of the tree. Nor can it, I think, be doubted that if he can get rid of the interference or encroachment without committing a trespass or entering upon the land of his neighbor he may do so whenever he pleases, and that no notice or previous communication is required by law. That, I think, is the good sense of the matter; and there is certainly no authority or dictum to the contrary. Whether the same rule would necessarily apply to the case of trees so young that the owner might remove them intact if he chose to lift them, or to the case of shrubs capable of being transplanted, may perhaps be worthy of consideration. That, however, is not the case here, it is admitted that the trees here are of great age, and the only possible remedy was by cutting or lopping the offending branches.

I am, therefore, of opinion that Mr. Webg has not exceeded his legal right, and that the appeal must be dismissed."

Earlier in the latter decision, Lord Hershell L.C. had cited with approval the paragraph I have replicated from the case of **Earl of Lonsdale v Nelson (Supra)** as the only dictum on the subject.

27. In this case, the Appellant merely cut down the branches of the fence that were on his property whilst trying to quell a persisting nuisance due to the continued encroachment of the fence onto his property. In his testimony he acknowledged pruning the fence but only the part that was located on his property. No doubt then, his actions were not inherently unlawful. True, they did affect the fence, but were not done with malice but to quell a nuisance. That could not be deemed as unlawfully within the definition accorded to the word *"malice"* in the Black's Law Dictionary. I find that in the circumstances, the conviction under Section 339(1) of the Penal Code was unsafe. I find that the prosecution did not prove its case beyond a reasonable doubt.

28. Having found that the conviction was unsafe, it serves little purpose to delve into the issue of sentence. However, for purposes of offering guidance, I would re-affirm that suspended sentences are legal as set out in Section 15 of the Criminal Procedure Code. The same reads as follows;

"(1) Any court which passes a sentence of imprisonment for a term of not more than two years for any offence may order that the sentence shall not take effect unless during the period specified by the court (herein called the "operational period") the offender commits another offence, whether that offence is punishable by imprisonment, corporal punishment or by a fine.

(2)Where the offender is convicted of an offence during the operational period the sentence for the first offence in respect of which the offender was convicted under subsection (1) shall thereupon take effect.

(3) Where under subsection (2) the sentence passed for the first offence under subsection (1) takes effect the sentence passed for the subsequent offence shall run consecutively to the sentence passed for the first offence."

29. It is trite from the provision that the trial court before suspending the sentence must first impose it. It applies to where the sentence imposed is not more than two years imprisonment. It is applied as a contingent discretionary measure premised on the circumstances of a case. More so, it is provided that the suspended sentence is conditional. This implies that it serves as a grace period within which the accused should not commit an offence. Conditions must be set by the trial in the event that the accused commits an offence during the period the sentence is suspended, paramount being that the suspension period stops to run if he commits another offence and that he serves the sentence imposed. The court must also state the period of the suspension. It must also spell out that the subsequent sentence should run consecutively to the first sentence.

30. Clearly, the learned magistrate in the present case did not follow this procedure. He suspended the sentence without first imposing it. The learned trial magistrate did also err in failing to state the period the suspension would remain in operation.

31. The upshot of my findings is that this appeal succeeds. I quash the conviction, set aside the sentence and order that the Appellant be and hereby set free unless lawfully held. It is so ordered.

Dated and Delivered at Nairobi This 24th October, 2018.

G.W.NGENYE-MACHARIA

JUDGE

In the presence of;

1. Mirango h/b for Mitambo for the Appellant.

2. Mr. Momanyi For the Respondent.