REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MAKUENI

HCCRA NO. E13 OF 2020

PAUL THADDAEUS MWANZIA..... APPELLANT

-VERSUS-

REPUBLIC .....RESPONDENT

(Being an appeal from the original judgment of Hon. A. Ndungu in Makindu Principal Magistrate's Court PMCR Case No.44 of 2016 pronounced on 26th August, 2020).

JUDGMENT

1. The appellant was charged in the magistrates' court with five (5) others with malicious damage of property contrary to section 339(1) of the Penal Code. The particulars of the offence were that on the night of 8th and 9th January 2016 at Kithio Village in Nzaui District within Makueni County, jointly with others not before the court willfully and unlawfully damaged by cutting 33 mango trees and 1 pawpaw tree all valued at Kshs.5,287,500/= on Land Reference Number Mbitini/Iteta/121 the property of one Augustine Kioko Suka.

2. All the six (6) denied the charges. After a full trial, the other five (5)co-accused were acquitted. The appellant was however convicted and fined Kshs.50,000/= and in default to serve 12 months imprisonment.

3. Dissatisfied with the conviction and sentence, the appellant has come to this court on appeal on the following grounds –

1. The learned magistrate erred in facts and law that the ingredients of section 399 of the Penal Code had been proved by the prosecution without regard to witnesses contradictions and key witnesses were not called to corroborate its evidence.

2. The learned magistrate erred in law and facts by convicting and sentencing the appellant herein on a charge not pleaded to.

3. The learned magistrate erred in law and facts by not considering in wide the defence adduced by the appellant.

4. The learned magistrate erred in law and facts by finding the appellant guilty without regard to the circumstances of events, existing dispute and weighty public demand interest.

5. The learned magistrate erred in law and fact by relying on recognition doctrine when the offence herein happened at night thus identification in issue.

6. The learned magistrate erred in law and facts by convicting the appellant on wrong, dubious charge sheet.

4. The appeal proceeded through written submissions. I have perused and considered both the submissions of the appellant and those of the Director of Public Prosecutions.

5. This being a first appeal, I am under a duty to evaluate all the evidence on record afresh and come to my own independent conclusions and inferences – see **Okeno –vs- Republic (1972) 32.**

6. I have re-evaluated the evidence on record. In proving their case, the prosecution called four (4) witnesses. All the six (6) accused persons on their part tendered sworn testimony denying the charge. The defence also called three (3) witnesses a Senior Chief Dw7 Michael Kitungu Ngunu, and Dw8 Norbert Mwendwa Wambua an Assistant Chief and Dw9 Mutua Musila a Government Surveyor.

7. The prosecution was required to prove all the elements of the offence beyond any reasonable doubts. In this regard, the section of the Penal Code used to charge the appellant and his five (5) co-accused states as follows –

339(1) 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.

8. The first element of the offence to be proved herein was whether there was destruction of the alleged plants. Indeed, from the evidence on record, both for the prosecution and the defence, and the technical evidence including photographs, there was destruction of 33 mango trees and one pawpaw tree that night. I find that the prosecution proved beyond any reasonable doubt that there was destruction of the crops.

9. The second element to be proved by the prosecution was whether the destruction of the crops was willful. There is no suggestion that any of the destroyers of the crops that night was under compulsion from anybody to do so. I find that the destruction of the crops that night by a number of people was willful.

10. The prosecution was also required to prove that the destruction of the crops was unlawful. From the evidence on record, a survey had been done in the presence of the Provincial Administration Officers. The results of the survey by the Government Surveyor Dw9, was that the said 33 mango trees and one pawpaw tree were on a road reserve. The charge sheet states that the said trees were on the land of the complainant (Pw1), while the evidence on record is different.

11. In my view, from the evidence on record, the unlawful act herein was not the destruction of the said trees, but infact the planting and growing of those trees on the public road by the complainant. It was an illegal act, and the clearance of the illegal plants, after the official survey was alone in my view, cannot be said to be unlawful as the prosecution did not have contra formal evidence to show that the plants were on the complainant's farm. I find that the prosecution did not prove beyond any reasonable doubt that the destruction of the crops was unlawful.

12. With regard to the identity of the appellant, in my view the evidence on record is clear that he was identified by Pw2 Sammy Mwangangi Maina by voice, as the two talked that night. Voice identification can be as good as visual identification. See the case of **Duncan Muchiri –vs- Republic (2013) eKLR** in which the case of **Karani –vs- Republic (1985) KLR 290** was reported. I find that the prosecution proved beyond any reasonable doubt that the appellant participated in the destruction of the trees that night.

13. Lastly, I have to mention that in my view the magistrate erred in convicting the appellant on a charge he was not tried for, and whose particulars were different from the charge he was tried for. In this regard the trial magistrate erroneously convicted the appellant on a charge which had been replaced, as the charge which the appellant was tried for had the plot number where the trees were alleged to grow, but which was not proved by the prosecution as the trees were on the road, and thus he should have found that the appellant not guilty of the offence charged as the particulars of charge were not proved.

14. In the above regard, I note that the first charge was dated 14/1/2016 in which four persons, excluding the appellant were charged. On 28/6/2016 the charge was amended to cover six (6) accused, including the appellant. However, on 1/11/2016 the said charge against the six (6) persons was amended now to include "Land Reference Number Mbitini/Iteta/121, the property of one

Augustine Kioko Suka". This, in my view was the charge on which the appellant should either have been convicted for or not convicted, depending on proof of the particulars of the charge.

15. The appellant was however, wrongly convicted by the trial court of the earlier replaced charge of 28/6/2016 which did not include the land ownership, thus prejudicing him, as the prosecution ultimately failed to prove that the 33 mango trees and one pawpaw tree, were growing on the said land of the complainant. On that account also the appeal will succeed as the prosecution failed to prove the particulars of their own charge.

16. Consequently, and for the above reasons, I allow the appeal, quash the conviction and set aside the sentence. If the appellant is in custody, I order that he be set at liberty unless otherwise lawfully held.

DELIVERED, SIGNED & DATED THIS 16TH DAY OF DECEMBER, 2021, IN OPEN COURT AT MAKUENI.

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GEORGE DULU

JUDGE