Case Number:	Criminal Appeal 60 of 2009
Date Delivered:	09 Dec 2016
Case Class:	Civil
Court:	Court of Appeal at Nairobi
Case Action:	Judgment
Judge:	Festus Azangalala, George Benedict Maina Kariuki, Fatuma sichale
Citation:	Leonell Mwangi Kahugu v Republic [2016] eKLR
Advocates:	-
Case Summary:	-
Court Division:	Civil
History Magistrates:	-
County:	Nairobi
Docket Number:	-
History Docket Number:	-
Case Outcome:	Appeal dismissed
History County:	Nairobi
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: G.B.M KARIUKI, AZANGALALA & SICHALE, JJ.A.)

CRIMINAL APPEAL NO. 60 OF 2009

LEONELL MWANGI KAHUGU.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(An appeal from the judgment of the High Court of Kenya

at Nairobi by (Ojwang, J.) dated 23rd February, 2009

in

H.C.CR. A. No. 250 of 2008*)*

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JUDGMENT OF THE COURT

The appellant **LEONELL MWANGI KAHUGU** was charged with two counts of malicious damage to property contrary to **Section 339(1)** of the **Penal Code** in the Chief Magistrate's Court in Thika. The particulars of count 1 were that on the 10th day of October, 2001 at Githurai Kimbo village in Thika District within the Central Province jointly, with others not before court, wilfully and unlawfully damaged 12 rooms, 2500 pieces of roofing tiles, 150 pieces of moulds, 1080 metres of barbed wire and personal documents all valued at Kshs.154,504/= the property of **PAUL MUHIA KARANJA**. In count II the particulars were that on the 10th day of October, 2001 at Githura Kimbo village in Thika District within the Central Province jointly, with others not before court, willfully and unlawfully damaged 5 rooms, iron sheet fence, sign post board, 8 water drums, a generator-make Peter, domestic items and office equipment all valued at Kshs.268,932/= the property of **MICHAEL TIBI MUIGAI**.

The appellant pleaded not guilty to the two charges and the trial proceeded before Betty Rashid, the then Chief Magistrate Thika who, in a judgment delivered on 12th day of September, 2003 found the appellant guilty of the two counts. She sentenced the appellant to pay a fine of Kshs.50,000/= in default to serve 12 months imprisonment on each of the counts. The sentences of imprisonment were to run concurrently.

The appellant was dissatisfied with the outcome of the trial and he preferred an appeal in the High Court.

On 23rd day of February, 2009, Ojwang, J (as he then was) dismissed the appellant's appeal, hence provoking the appeal before us. In a memorandum of appeal filed on 31st day of August, 2016 the appellant listed 7 grounds of appeal which can be summarized as follows:-

i. That the charge sheet was defective.

ii. That the charges were not proved beyond reasonable doubt.

iii. That the 1st appellate court applied wrong legal principles to the prejudice of the appellant.

iv. That the 1st appellate court failed to re-evaluate the evidence.

v. That Sections 70, 71, 72 and 75 of the retired Constitution allowed use of reasonable force to protect property.

vi. That the 1st appellate court erred in shifting the burden of proof to the appellant.

vii. That a first registration is indefeasible and that there was no claim of adverse possession.

On 6th day of October, 2016 the matter came before us for plenary hearing. Mr. Ondieki, learned counsel for the appellant, urged the appeal. It was his contention that the charges against the appellant were not proved beyond reasonable doubt; that a charge of malicious damage connotes an unlawful, intentional and reckless act/s; that one cannot destroy his own property; that the appellant had served quit notices on persons residing on his property and further that the appellant had given a plausible defence made under oath and which was disregarded.

Mr. Omirera, the learned counsel for the State, opposed the appeal on the basis that there had been sufficient evidence to warrant the conviction of the appellant.

We have considered the memorandum of appeal, the oral rival submissions made before us, the record and the law.

This being a second appeal, **Section 361 (1)** of the **Criminal Procedure Code** provides as follows as regards our mandate in a second appeal, that is:

361. ***(1) A party to an appeal from a subordinate court may, subject to subsection (8), appeal against a decision of the High Court in its appellate jurisdiction on a matter of law, and the Court of Appeal shall not hear an appeal under this section -***

a. ***on a matter of fact, and severity of sentence is a matter of fact; or***

b. ***against sentence, except where a sentence has been enhanced by the High Court, unless the***

subordinate court had no power under section 7 to pass that sentence.

The above provision has been enunciated in several decisions of this Court. In **Chemagong vs R (1984) KLR 213,** at page 219, this Court held,

"A second appeal must be confined to points of law and this Court will not interfere with concurrent findings of facts arrived at in the two courts below unless based on no evidence. The test to be applied on second appeal is whether there was any evidence on which the trial court could find as it did. (Reuben Karari s/o Karanja vs Republic 17 EACA 146)."

From the evidence, it is clear that **PAUL MUHIA KARANJA (PW1)** and **MICHAEL TIBI MUIGAI (PW2)** had rental houses and a garage respectively on a piece of land that the appellant claimed to have bought. PW1 and PW2 had leased the plots from PW3 who also claimed to be the owner of the plots. The appellant wanted the two to move out of the land. PW1 and PW2 asked for 6 months so as to vacate the land, a period that the appellant thought was too long. PW1 and PW2 testified that they saw the appellant and 3 others demolishing their structures. This is the evidence that the trial court evaluated and analyzed before finding the appellant guilty. The High Court as the 2nd appellate court re-evaluated and re-analyzed the evidence and came to the same conclusion. By dint of Section 361 (1) of the Criminal Procedure Code, we are precluded from delving into issues of fact and will not interfere with concurrent findings of fact by the trial court as upheld by the first appellate court unless the said findings were not based on evidence or constitute findings that are plainly wrong and therefore the conviction was bad in law. See **Stephen M'Irungi & Another v Republic [1982-88] 1 KAR 360**.

In our view, the evaluation by the trial court and the re-evaluation by the 1st appellate court was proper as the conviction was based on the evidence adduced which evidence proved the case beyond reasonable doubt and the conviction was safe in law.

It was Mr. Ondieki's further submission that the court erred in convicting the appellant because the latter could not maliciously damage his own property. With respect, the items as particularized in the charge sheet did not belong to the appellant. Whereas there was a dispute over the ownership of the land, this did not justify the demolition of PW1's and PW2's structures on the plots. Ojwang, J summarized the position as follows:

"It emerges that the subject land is disputed, even though the appellant herein could show title thereto which he had come by. In the finding of the trial Magistrate, there was a tussle over ownership and possession of the said land; and the appellant herein jumped the onerous motions of civil litigations, stole a march on the complainants (notably PW3), and came to hold documents of title; and this came to pass only in 2001, whereas PW3 was claiming title over a period longer than a decade."

The dispute notwithstanding, we too find that the appellant's actions of damaging property belonging to PW1 and PW2 were in breach of the law.

As regards the contention that **Sections 70, 71, 72** and **73** of the retired **Constitution** allows use of reasonable force, we do not see the application of reasonable force as the appellant was not attacked by anyone. Suffice to state that the appellant took it upon himself to destroy PW 1's and PW2's property in a bid to evict them from the plot occupied by the two as lessees of PW 3.

It is in view of the foregoing that we find that this appeal is devoid of merit. It is hereby dismissed.

Dated and Delivered at Nairobi this 9th day of December, 2016.

G. B. M. KARIUKI

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JUDGE OF APPEAL

F. AZANGALALA

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR