



GONE-KPAH, Appellant, *v.* REPUBLIC OF
LIBERIA, Appellee.

APPEAL FROM THE CIRCUIT COURT, SECOND JUDICIAL CIRCUIT,
GRAND BASSA COUNTY.

Argued May 7, 8, 1974. Decided June 14, 1974.

1. To justify a conviction under an indictment charging malicious mischief for the killing of another's domestic animal, the elements constituting the offense must be established beyond a reasonable doubt.
2. Malice is one of the elements of said offense and must be shown to have been directed against the owner of the animal and not the animal killed.

The appellant was charged with malicious mischief for having killed a cow owned by the husband of the complainant. The appellant denied his guilt, stating that he had given notice of damage being done to his crops by the roaming cows belonging to the husband and consequently could thereafter shoot the animal in protecting his property. The owner of the cow denied receiving notice and also testified to an agreement made with appellant for past and future damages to crops caused by his cows. The appellant was found guilty by the jury and an appeal was taken from the judgment. The Supreme Court surveyed the evidence taken at the trial and was of the opinion that the prosecution had not proved its case beyond a reasonable doubt, pointing especially to the issue of notice. The judgment was *reversed* and the appellant *discharged* without day.

Richard A. Diggs for appellant. *Solicitor General Barnes* and *Jessie Banks, Jr.*, for appellee.

MR. JUSTICE HORACE delivered the opinion of the Court.



The appellant was indicted on June 23, 1972, for the crime of malicious mischief by the grand jurors of Grand Bassa County during the May Term of the Second Judicial Circuit Court of said county.

The evidence presented at the trial by both sides clearly indicated that the cows of J. H. Brown Diggs, husband of the private prosecutrix in this case, had been destroying the crops of appellant and his town people for quite some time prior to the shooting of the cow. Mr. Diggs was approached about the destruction of crops by appellant, who demanded compensation in the sum of \$150.00 for the damage he and his people had sustained. Since Mr. Diggs did not have the money to pay for the damage, he offered them a cow to compensate for said damage. The offer was accepted and the cow was given to appellant, together with \$20.00 in cash which was paid by Cephas Cee, who apparently owned some cows in common with Mr. Diggs, his uncle. All this happened about the end of March, 1972. The cow given to appellant was slaughtered by him.

From this point, the facts as presented by the evidence offered by prosecution and the defense diverge. The appellee claims that at the time the compensation was given for the damage done to the crops of appellant and his people, a part of the consideration in return therefor was that appellant would help the caretaker of the Diggs' cows to keep the cows away from the crops in the future. A rebutting witness, introduced by the prosecution, testified that the compensation was in consideration of past, present, and future damages. Fixing future damages, if this witness' statement is to be seriously considered, would hardly be more than a mere figment of the imagination. The private prosecutrix and her husband denied during their testimony that any further notice was served on them after they had compensated appellant for the damages done to his crops.

The defense claims that upon payment for the dam-

ages, Mr. Diggs promised to remove his cows from the area where appellant and his people resided and farmed, which he failed to do. That upon his failure to remove the cows, appellant served personal notice on Mr. Diggs that his cows were still destroying crops, but to no avail.

There is a showing in the evidence that Mr. Diggs ordered John Bull, the caretaker of his cows, to build a fence to enclose them, but the cows broke the fence during the month of May, 1972, and continued to roam in the vicinity of appellant's property.

To our mind this case hinges on whether personal notice was served on Mr. and Mrs. Diggs by appellant before he shot and killed the cow. Our Penal Law addresses itself to the issue.

"A person is guilty of a misdemeanor who wrongfully, unlawfully, and maliciously . . . (e) Shoots, cuts, maims or otherwise injures the livestock or other domestic animals of another on the pretext that such livestock or domestic animal was committing damage to growing crops or trespassing upon the land or premises of the person so killing, cutting or maiming them, without giving personal notice of such damage or trespass to the owner of the animal or livestock; . . . and is punishable by a fine not exceeding two hundred dollars where the value of the property injured is more than one hundred dollars or by a fine not exceeding one hundred dollars where the value of the property injured is one hundred dollars or less. He shall be required to make restitution to the owner of the injured property." 1956 Code 27:294.

We have mentioned before that we feel that this case was ineptly handled in the court below by both the prosecution and the defense.

On the one hand, an examination of the indictment reveals it is alleged *inter alia* that prior to the shooting and killing of the cow, the private prosecutrix had given defendant one cow and \$20.00 to take care of all the cows

on her farm, which is located in the area where defendant resides, whereas the evidence adduced at the trial shows that the \$20.00 and cow were given for damages done to the crops of appellant and his people. Even if the testimony of the prosecution witnesses to the effect that appellant promised to take care of the cows is taken at its face value, that promise was merely incidental to the payment of damages.

On the other hand, an examination of the motions for a new trial and arrest of judgment, as well as the unduly lengthy bill of exceptions, clearly reveals that the defense attorney was not an artful pleader. As a result of this, appointed counsel for appellant waived most of the counts in the bill of exceptions in argument before this Court and concentrated on (1) the prejudicial rulings of the trial judge in a few instances; (2) that restitution need not be made, for the private prosecutrix took possession of the carcass of the cow that was killed by appellant, (3) that the verdict was contrary to the weight of the evidence.

Our concern in attempting to resolve this matter is whether or not the prosecution proved beyond a reasonable doubt that the shooting and killing of the cow was maliciously done, that is, that it was done without serving personal notice on the owner after the compensation for damages had been paid by the owner, at or about the end of March, 1972.

Both Mr. Diggs and his wife testified that no notice was served on them after payment of damages. The appellant, however, testified that he did serve personal notice on Mr. Diggs, once by a letter to Mayor Oswald T. Dillon complaining about the cows destroying his crops, and once by a letter from his lawyer requesting Mr. Diggs to remove his cows from the area within fifteen days, which he delivered in person. This testimony was corroborated in detail by Wrookueh, a witness for the de-

fense, who stated that a copy of the letter to Mr. Diggs was even placarded on a tree in the area.

It is surprising that in view of the corroborated testimony of the appellant that he did serve personal notice, the prosecution made no attempt to rebut such testimony, especially the part that related to the notice served through Mayor Oswald T. Dillon. Why was not Mayor Dillon called to the stand to rebut this testimony?

Although the record does not show that the prosecution gave any notice of rebuttal, yet it was permitted by the trial court over the objections of the defense to produce a rebutting witness, Daniel Flashaw, who also owned cows in the same area. To give an idea of the ineptitude in the handling of this case we quote hereunder the question put to this rebutting witness by the prosecution.

"The Republic of Liberia has charged the defendant in the dock with the crime of malicious mischief to which he has pled not guilty. You are brought here as a special witness to give evidence on that portion of the matter that relates to the payments of a cow by Hon. Diggs to the defendant and the circumstances under which Mrs. Diggs gave the defendant the cow in question, as well as reference that has been made here on record by the private prosecutrix that a cow was also given to you under similar circumstances; the facts and circumstances in this part of the evidence is what you are now to give to this court and jury as far as you know?"

Just what this witness was called upon to rebut is impossible to gather from that question, since no one had denied that Mr. Diggs had given appellant a cow in satisfaction of damages done by his cows to growing crops of appellant and his people.

A question put to the witness on cross-examination shows the same quality.

"Q. Mr. Witness, can you say upon your oath that

at any time or anywhere on the St. John River that any notice was published by defendant concerning cows destroying his crops?

“A. I don’t remember seeing any notice placarded, but I do remember that defendant wrote me a letter through his lawyer, attorney Reeves, complaining of my cows destroying defendant’s crops, and that I should remove my cows from the area.”

As when the court put a question to the same witness:

“Q. Was it an understanding between Mr. Diggs, John Bull, yourself and defendant, that for the cow given defendant, he was to assist in taking care of the cows of Mr. Diggs?

“A. That was not the understanding, but the cow was given in consideration of past, present, and future damages.”

All in all, the evidence both sides presented on the issue of services of notice to Mr. Diggs leaves a doubt that appellant failed to give notice as charged, which should have favored appellant in resolving the issue.

We must also state that we have not been able to discover the necessary element of malice in this case on the part of appellant. Since the word “malice” imports a criminal motive, intent, or purpose, we do not feel that the prosecution has sufficiently proved that appellant acted maliciously against the owner when he killed the cow. Obviously appellant must have been infuriated over his inability to prevent the cows from destroying his crops, but that does not make his act of killing the cow a malicious act.

“Under appropriate statutory provision, malice is a necessary ingredient of the offense, but in some jurisdictions express malice need not be shown if it may be inferred from the nature of the act and the accompanying circumstances; in other jurisdictions actual malice must be shown and it will not be inferred merely from

the wilful doing of a wrongful act. At common law and under the statutes in affirmation thereof, the malice, which is an essential ingredient in the offense of malicious mischief or injury to animals must be against the owner of the animal and not against the animal itself." 3A C.J.S., *Animals*, § 319 (1973).

"Many courts have taken the view that the malice necessary to constitute the offense of malicious mischief must be directed toward the owner of the damaged or destroyed property, or the possessor thereof, and not merely against the property itself. Thus it has been held that the killing or injuring of a domestic animal does not constitute malicious mischief unless the act is done with malice against the animal's owner; malice against the animal itself is not sufficient, no matter how brutal or cruel the act may be." 52 AM. JUR., 2d, *Malicious Mischief*, § 38 (1970).

"Where a person accused of malicious mischief can show that the injury or destruction complained of was necessary to protect his own property from damage or perhaps destruction, he thereby overcomes an inference of malice, which his acts might otherwise justify, and establishes a good defense to the action."

Id., § 14.

In the record we find that for about three years prior to payment of compensation by Mr. Diggs to appellant for the damage he and his people had sustained, cows owned by Mr. and Mrs. Diggs and others had been destroying the crops of appellant. This being the case it is difficult to believe that one who had shown such patience and endurance would suddenly become so malicious as to wantonly kill a cow as charged here. It does not seem reasonable to us.

Because of our conclusion in this matter we have refrained from passing on some other interesting aspects of the case, such as the several adverse rulings of the trial judge, and the question of restitution argued by counsel

for both sides. Appellant holds that since the private prosecutrix recovered the carcass of the animal she was not entitled to restitution. Appellee contends that restitution embodies a living animal or its cash equivalent. We might mention in passing, however, that delivery of the dead animal to the owner is no defense, although some authorities hold that if the remains of the animal killed have value, plaintiff's measure of damages is the difference between the value of the animal when killed and the value of the carcass, or as the rule is otherwise stated, the difference between the market value before and after the injury.

"Following the rules as to proof required in criminal cases generally, in order to justify a conviction for killing or injuring animals the elements of the offense must be established to the satisfaction of the jury beyond a reasonable doubt. Guilt may be established by circumstantial evidence, but the proof must be sufficient to exclude every other reasonable hypothesis."

3A C.J.S., *Animals*, § 328 (1973).

A careful review of the entire evidence in this case, and a study of the law controlling, leave us with the conviction that the prosecution did not prove its case beyond a reasonable doubt. It is our holding as aforesaid, that the testimony in the matter leaves a doubt that the private prosecutrix or her husband had not received notice, as charged by the prosecution. That doubt should have operated in favor of appellant. It is our opinion, therefore, that the judgment of the trial court should be and the same is hereby reversed and appellant ordered discharged without day from further answering in this case. And it is so ordered.

Reversed; appellant discharged.