



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KAPENGURIA**

**CRIMINAL DIVISION**

**CRIMINAL APPEAL NUMBER 11 OF 2019**

**BETWEEN**

**ALEX KIBET.....APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

*(Being an appeal arising out of original conviction and sentence dated 1.4.2019 by Hon. V. O. Adet SRM in Kapenguria PMC Cr Case no. 369 of 2019)*

**CORAM: LADY JUSTICE RUTH N. SITATI**

**JUDGMENT**

**Introduction**

1. The appellant herein pleaded guilty to the charge of malicious damage to property contrary to *section 339(1) as read with section 339(2)(a) of the Penal Code*. The particulars of the offence are that on the 30<sup>th</sup> day of March 2019 at Keringet area in West Pokot Sub-County within West Pokot County [the appellant] wilfully and unlawfully destroyed the dwelling house of Monicah Chemutai by breaking transparent window panes twenty four (24) in number valued at Kshs.4,320/-. Upon conviction the appellant was sentenced to 2 years imprisonment.

**The Appeal**

2. Being dissatisfied with both conviction and sentence, the appellant filed this appeal on grounds that he was a first offender; that the appellant was confused at the time of arrest and even when he was arraigned in court; that the appellant was not conversant with court procedures hence his plea of guilty; that the appellant was forced by the police to plead guilty to the charge. The appellant prays for a retrial.

3. Since this is a first appeal, this court is required to re-examine the record thoroughly with a view to determining whether the plea of guilty entered against the appellant was unequivocal. If the plea taking did not comply with all the steps set out in the case of *Adan versus Republic [1973] EA 445*, then this court will have a reason to allow the appeal and also decide whether the appellant should be set free or remit the case for retrial in accordance with the laid down rules for retrial.

**The Facts of the Case**

4. The facts as given to the court by the prosecution are that on the 30.3.2019 at about 3.00pm, the complainant Monicah Chemutai had left her home to attend a women's group meeting when she received a call from one of her sons that the appellant herein, who is her other son, was destroying her window panes. The complainant immediately returned home where she found the appellant knocking down the said windows and destroying the panes. A total of 24 window panes valued at Kshs.4,320/- were destroyed. The reason for the malicious damage was unknown. The complainant immediately reported the matter to Keringet Police Station. The appellant was thereafter arrested and charged. The destroyed window panes were produced in court as Pexhibit 1.

5. When the appellant was called upon to confirm whether or not the facts as given were correct, his answer, given in Kiswahili, was to the effect that the facts as given were correct. He was then convicted on his own plea of guilty and sentenced as indicated hereinabove.

#### **Issues for Determination**

6. From the proceedings, the grounds of appeal and the law, the issue for determination is whether the plea in this case was unequivocal or not, and if not should the appellant be set free or should the case go for retrial as urged by the appellant.

#### **Submissions**

7. The appellant wholly relied on his brief written submissions which were a reiteration of the grounds of appeal as set out in his petition of appeal. He pleads for retrial and for a chance to reconcile with his family.

8. The appeal on conviction was opposed on grounds that the plea of guilty was unequivocal, having been taken in accordance with established guidelines. Miss Kiptoo, prosecution counsel also submitted that having pleaded guilty to the charge, the appellant is estopped by the provisions of *section 348 of the Criminal Procedure Code* from appealing against the conviction. *Section 348 of the CPC* provides as follows:-

*“348. No appeal shall be allowed in the case of an accused person who has pleaded guilty and has been convicted on that plea by a subordinate court, except as to the extent or legality of the sentence.”*

9. Regarding sentence, Miss Kiptoo submitted that this court ought to consider interfering with the same since the sentence was imposed without the benefit of a pre-sentence report. Counsel also submitted that since the complainant in this case is the appellant's mother, the court ought to foster reconciliation by reviewing the sentence.

10. Finally prosecution counsel submitted that the appellant's allegations that he was confused and/or misled by the police to plead guilty to the charge are baseless since it is clear from the record that he clearly understood the charge that was read to him in Kiswahili, a language which he understood well.

#### **Analysis and Determination**

*11.* I have now carefully reconsidered the process of plea taking in this matter and I am satisfied that the plea was taken in accordance with the guidelines set out in the *Adan versus Republic case* (supra) and in accordance with the provisions of *section 207 of the Criminal Procedure Code*.

12. The record shows that the charge was stated to the appellant in Kiswahili and on being asked whether the allegations were true, the appellant answered in the affirmative. The facts were then given by the prosecution and thereafter the appellant confirmed to the court that the facts as given were correct. It was upon that confirmation that the trial court went ahead to convict the appellant on his own plea.

13. In the circumstances therefore I find no merit in the appellant's contention that he was misled into pleading guilty to the charge or that he was confused at the material time. These allegations are in my considered view, only intended to mislead the court and to draw pity from the court. That being the case, and applying the provisions of *section 348 of the Criminal Procedure Code* (supra) the appellant's appeal on conviction fails.

14. The next issue for determination is one of sentence. *Section 339(1) of the Penal Code* provides that any person who willfully and unlawfully destroys property, commits a felony, and shall upon conviction, if no other punishment is provided, be liable to imprisonment for five years. *Section 339(2) of the Penal Code* provides for the harsher sentence of life imprisonment if the property in question is a dwelling house or a vessel as was the case herein, and if the injury is caused by an explosive substance and if the destruction or damage endangers the life of a person.

15. In the instant case, the appellant was sentenced under *section 339(1)* where the maximum sentence provided is five years. Before the trial court passed the sentence, the prosecutor informed the court that the appellant had a pending criminal matter of creating disturbance before court 3. In mitigation, the appellant stated that he was drunk and had gone to take his money and that he acted so because he found out that his farm had been leased out.

16. This court has since obtained a re-sentencing report from the Probation and Aftercare Service. The report which is dated 8.10.2019 reveals that the appellant has had a disciplinary issue while in jail, namely that on 19.8.2019 he was charged with assault contrary to section 'F' of section 66 of the Prison Rules 1977, in that he assaulted another prisoner inside a segregation block. The appellant also has another case pending against him being Criminal Case No. 1698 of 2003. The same is for mention on 17.10.2019. The re-sentencing report also reveals that both the appellant and his mother the complainant are alcoholics. It is unlikely that the much hyped reconciliation is a possibility. The applicant does not therefore deserve a non custodial sentence.

17. Taking all the above circumstances into consideration, I do not find any cogent reason for interfering with the sentence of two years imprisonment meted out by the learned trial court. Accordingly the appellant's appeal on sentence also fails.

### **Conclusion**

18. From all the foregoing, I find no merit in the appellant's appeal on both conviction and sentence. The appeal is accordingly dismissed in its entirety. Right of Appeal within 14 days.

19. It is so ordered.

Judgment delivered, dated and signed in open court at Kapenguria on this 16<sup>th</sup> day of October, 2019

**RUTH N. SITATI**

**JUDGE**

### **In the Presence of:-**

Appellant present in person

Miss Kiptoo present for respondent

M/S Hellen Kaspan – Court Assistant



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