| | |
|---|---|
| Case Number: | Criminal Case122 of 2017 |
| Date Delivered: | 19 Nov 2018 |
| Case Class: | Criminal |
| Court: | High Court at Nyahururu |
| Case Action: | Judgment |
| Judge: | Roseline Pauline Vunoro Wendoh |
| Citation: | Joseph Wambugu Gatheru v Republic [2018] eKLR |
| Advocates: | - |
| Case Summary: | - |
| Court Division: | Criminal |
| History Magistrates: | - |
| County: | Nyandarua |
| Docket Number: | - |
| History Docket Number: | - |
| Case Outcome: | - |
| History County: | - |
| Representation By Advocates: | - |
| Advocates For: | - |
| Advocates Against: | - |
| Sum Awarded: | - |

**REPUBLIC OF KENYA**

**IN THE HIGH COURT KENYA AT NYAHURURU**

**CRIMINAL CASE NO.122 OF 2017**

***(Appeal Originating from Nyahururu CM's Court Cr.No.1887 of 2016 by: Hon. V.A. Ochanda – R.M.)***

**JOSEPH WAMBUGU GATHERU.....APPELLANT**

**V E R S U S**

**REPUBLIC.....RESPONDENT**

**J U D G M E N T**

**Joseph Wambugu Gather**u, the appellant, was convicted by Hon. Ochanda on 18/8/2016 and sentenced to 36 months imprisonment for an offence of destroying crops of cultivated produce Contrary to Section 334(a) of the Penal Code.

The particulars of the charge are that on 3/7/2016, at Kenda Farm, Subukia Sub-County in Nakuru County, unlawfully allowed his herd of cattle to graze on the 4½ acre wheat farm, destroying wheat estimated at ½ acre, worth Kshs.36,500/= the property of **Peter Ng'ang'a** and **Robert Njenga**.

When the appellant was arraigned before the trial court on 12/8/2016, the charge was read to him and he pleaded guilty. The case was reserved for facts. On 18/8/2016, the appellant persisted in the plea, the facts were read to him and he confirmed that the facts as read to him were correct. A plea of guilty was entered and he was convicted and sentenced after mitigation.

The appellant was dissatisfied with the conviction and sentence and filed this appeal, citing 10 grounds which can be summarized into two; that the plea was not unequivocal and the sentence was harsh. Some of the grounds do not make sense because the case did not go to full hearing.

Section 348 of the Criminal Procedure Code bars an appeal where one pleads guilty except on the extent and legality of the sentence. Section 348 Criminal Procedure Code provides as follows:

"***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***."

In the case of ***Olel v Republic (1989) KLR 444***, the court held:

***"When a plea is unequivocal, an appeal against conviction does not lie. Section 348 of the Criminal Procedure Code does not merely limit the right of appeal in such cases but bars it completely."***

A reading of the above section clearly shows that an appellant is barred from challenging the conviction but can challenge the length/severity or legality of the sentence.

In this case, since the appellant has challenged the conviction, this court is required to examine the facts presented to the trial court, evaluate them to determine whether indeed a proper plea was taken and whether the plea was unequivocal.

The proper manner of taking plea of guilty was set out by the E.A. Court of Appeal in ***Adan v Republic 1973 EA 446***, where Spry V. P. stated as follows:

***(i) the charge and all the essential ingredients of the offence should be explained to the accused in his language or in a***

***language which he understands;***

***(ii) the accused's own words should be recorded and, if they are an admission, a plea of guilty should be recorded;***

***(iii) the prosecution should then immediately state the facts and the accused should be given an opportunity to dispute or explain the facts, or to add any relevant facts;***

***(iv) if the accused does not agree the facts or raises any question of his guilt his reply must be recorded and change of plea entered; and***

***(v) if there is no change of plea a conviction should be recorded and a statement of facts relevant to sentence together with the accused's reply should be recorded.***

Also *see* ***Kariuki v Republic (1984) 809***.

In this case, after the appellant stated that he was still pleading guilty, the prosecution read to him the following facts.

***"On 31/7/2016 at Kenda Farm, the complainant Ng'ang'a and Njenga of Kabazi area reported they planted wheat which was destroyed by accused (Wambugu's) cows. Accused has six cows. He let them enter the farm. Complainants were preparing to spray wheat when cows entered farm, they tried to remove them. The owner, accused came and tried to remove them. Before that, they had destroyed wheat. When accused was removing the sixth one, complainant took his photo in the farm. It was not the 1st time complainant reported to police. Officers went to the farm. They called Agricultural Officer who assessed the damages at Kshs.36,000/=. I produce reported as exhibit. There is a photo which was taken.***

***Report – P.Exh.1***

***2 photo – P.Exh.2a, b***

***Accused was arrested and charged."***

The court entered a conviction on his own plea and the prosecutor stated that the appellant had no previous records. He was asked to state his mitigation and he stated:

***"I ask the court to have sympathy on me. It went in by bad luck."***

The mitigation was that the cattle did not go into the complainant's farm intentionally but by 'bad luck', whatever that meant. It means that he did not intentionally leave his cattle to enter into the complainant's wheat farm.

Section 334 of the Penal Code provides that:

***"Any person who willfully and unlawfully sets fire to, cuts down, destroys or seriously or permanently injures:-***

***(a) a crop of cultivated produce, whether standing, picked or cut; or***

***(b) a crop of hay or grass under cultivation, whether the natural or indigenous product of the soil or not, and whether standing or cut; or***

***(c) any standing trees, saplings or shrubs, whether indigenous or not, under cultivation, is guilty of a felony and is liable to imprisonment for fourteen years."***

From a reading of the above provision,

the act complained of must be willful, meaning there has to be an intention on the part of the accused. In the instant case, the act may have been unlawful but having stated that it was by bad luck (mistake), the appellant was denying that the act was willful or that he intentionally did it, and the court should have at that stage entered a plea of not guilty. The plea was equivocal and I hereby quash it and set aside the sentence.

Should this court order a retrial" In the case of ***Makupe v Republic CRA.98/1983 Kneller, JA***. Chesoni and Nyarangi (Ag.JJA) set out the general test to be applied in determining whether or not a retrial will be ordered. In general, a retrial will be ordered where the conviction is set aside because of insufficient evidence. In ***Muiruri v Republic (2003) KLR 553***, the court in considering whether or not to order a retrial stated:

***"1. Generally, whether a retrial should be ordered or not must depend on the circumstances of the case;***

***2. It will only be made where the interest of justice require it and if it is unlikely to cause injustice to the appellant. Other factors include illegalities or defects in the original trial, length of time having lapsed since the arrest and arraignment of the appellant, whether the mistakes leading to the quashing of the conviction were entirely the prosecution's making or not."***

The appellant was convicted on 18/8/2016 and sentenced to 36 months imprisonment. He applied and was released on bond by 7/10/2016 where a cash bail was paid. He had only served two months imprisonment. The complainants are the appellant's neighbours and can easily be found. I find that this is a good case in which to order a retrial which I hereby do.

In conclusion, I hereby order that there be a retrial in this case. The appellant should present himself before the Chief Magistrate's Court Nyahururu on 26/1/2018 for fresh plea to be taken. He will be released on the same bond terms till 26/11/2018. It is so ordered.

**Dated, Signed** and **Delivered** at ***NYAHURURU*** this ***19th*** day of ***November,*** 2018.

**……...**

**R.P.V. Wendoh**

**JUDGE**

**PRESENT:**

Ms. Rugut – State Counsel

Soi – Court Assistant

Appellant – present in person