



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

HCCRA NO. E028 OF 2021

KENNETH OMONDI KOMBO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

[Being an appeal against the Judgment and decision of the Chief Magistrate's Court at Kisumu

(Hon. P. N. Gesora (CM) dated the 13th August 2021 in Kisumu CMCCRC No.E607 of 2021]

JUDGMENT

The Appellant was convicted for committing two offences, being;

(a) Threatening to kill, contrary to Section 223 (1) of the Penal Code; and

(b) Malicious Damage to Property contrary to Section 339 (1) of the Penal Code.

1. The conviction was on the Appellant's own plea of guilty.
2. He was then sentenced to 4 Years imprisonment for the offence of threatening to kill; and another 1 Year for the offence of malicious damage to property.
3. He has challenged the conviction, reasoning that the Charge, as drafted, was incurably defective. He also submitted that the plea was equivocal.
4. In answer to the appeal, Ms Odumba, learned Principal Prosecution Counsel, conceded that the Charge Sheet was defective, as it had failed to meet the standards required in framing of charges.
5. In particular, the Respondent observed that the charge failed to contain a verbatim citation of the words which the Appellant had allegedly uttered.
6. Accordingly, I find that the charge was defective, in relation to the first offence.
7. As regards the offence of malicious damage to property, the charge-sheet indicated that the Appellant had unlawfully damaged a window.
8. However, the facts which the prosecution provided at the time when the Appellant was taking plea, was that the Appellant damaged some utensils.
9. I find that the Respondent was right when it conceded that the facts which were read out did not support the charge.
10. Accordingly, as the facts were at variance with the charge-sheet, the conviction cannot be sustained because the facts which the Appellant admitted, are not those for which he was convicted.
11. I also note that it was the prosecution which told the court that;

“Accused appeared there drunk and started quarreling his mother for favouring his other siblings.”

12. In other words, it was not the Appellant who had put forward a defence of intoxication.

13. As the prosecution knew that the Appellant was drunk at the material time, it is arguable whether or not the Appellant was capable of “wilfully” damaging the Complainant’s property.

14. Indeed, the record of the proceedings reveals that during mitigation the Appellant stated thus;

“I am remorseful. I was confused.

I pray for a chance.”

15. I am of the considered view that because the prosecution had said to the court that the Appellant was drunk; and because the Appellant said that he was confused at the material time, the plea ought to have been construed as being equivocal.

16. In the result, the appeal is allowed. I quash the conviction and set aside the sentences.

17. I order that the Appellant be set at liberty forthwith, unless he is otherwise lawfully held.

DATED, SIGNED and DELIVERED at KISUMU

This 31st day of **March** 2022

FRED A. OCHIENG

JUDGE