



REPUBLIC OF KENYA



KENYA LAW
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**Taro v Republic (Criminal Case E033 of 2021)
[2022] KEHC 12328 (KLR) (23 June 2022) (Judgment)**

Neutral citation: [2022] KEHC 12328 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VOI
CRIMINAL CASE E033 OF 2021**

**A. ONG'INJO, J
JUNE 23, 2022**

BETWEEN

PETER MASHOMBO TARO APPELLANT

AND

REPUBLIC RESPONDENT

JUDGMENT

1. The Appellant Peter Mashombo Taro was accused in Voi CMC CR. Case No. 1092 of 2019 with the offence of directing and blocking a wetland from its natural and normal cause without a prior written approval. From the authority given after an Environmental Impact Assessment contrary to section 144 of the *Environmental Management and Co-ordination Act*.
2. Particulars to Count 1 are that the appellant on the 24th day of October 2019 at around 10.00hrs at Soko ya Zamani area of Mwatate town was found blocking and directing a wet land being a seasonal water way by placing a heap of soil/earth along its normal water course thus blocking it and redirecting its course without EIA approval from the National Environment Management Authority.
3. In the 2nd Count the appellant was charged with the offence of depositing soil/Earth onto a wetland and posing adverse environmental effects on the wetland contrary to section 42(1) (E) as read with section 144 of the *Environmental Management and Co-ordination Act*.
4. The trial Magistrate considered the evidence of 4 prosecution witnesses as against the Appellants defence as well as the evidence of Appellants witnesses DW 2 & DW 3 and found the accused/ Appellant guilty for breaching provisions of the *Environmental Management and Co-ordination Act*. The appellant was sentenced to serve 2 years imprisonment in each count to run concurrently.
5. The appellant was aggrieved and dissatisfied with the conviction and sentence and he lodged the petition of Appeal herein on the following grounds:-



- i. That the learned Magistrate erred in law & fact in failing to find and rule that the evidence adduced by the prosecution was insufficient to sustain a conviction and sentence of the appellant and in convicting the appellant herein against the weight of the evidence adduced.
 - ii. The learned Magistrate erred in law while exercising her discretion and not informing the appellant that he had a right to representation.
 - iii. The learned Magistrate erred in law in convicting the accused based on evidence of site visit which was conducted during dry season and not during rainy season.
 - iv. The learned Magistrate erred in convicting the accused without the prosecution having proved all ingredients of the offence.
 - v. The learned Magistrate erred in law and in fact by failing to consider the mitigation adduced by the appellant.
6. The appellant prayed that his appeal be allowed and the trial Magistrates judgment, order, conviction be quashed and sentence set aside.
 7. The prosecution's case was that a complaint was made to PW 1 – Inspector with NEMA at Voi offices by people living in the old market area of Mwatate to the effect the appellant was constructing a dam and that there would be a problem when it rains.
 8. PW 1 visited the site at Soko ya Zamani in company of his colleague Edith Kalo and the Complaint and they found a pool of stagnant water in one place and it was overflowing to another landys place and had caused soil erosion.
 9. That accused needed a license from NEMA after submitting designs with spillways and a fence to award drowning. That the Appellant was found at the scene and he didn't have permit police officers were informed and they arrested the accused ad he was charged. PW 1 said accused had been charged in Wundanyi Court with a similar offence in 2018 after he failed to comply with a notice to stop.
 10. PW 2 County Director, NEMA Edith Kalo testified that on October 24, 2019at 10.00am, she was on duty with PW 1 when they visited many places including old market when they found the appellant stopping water at the wetland and the water had damaged the road. She said that there was a borehole nearby in use by the public and which the accused persons action interfered with its use for fear of contamination. That when they found accused and told him he needed to do an environmental impact assessment and that he had breached the law he didn't listen.
 11. That they proceeded to Mwatate and reported to the OCS for his action on arrest of accused. That prior to October 24, 2019a letter had been written to the accused to improve the damage occasioned but he didn't abide by the order.
 12. PW 3 Sub-County Road Engineer of Public Works Mwatate testified that on September 16, 2019he reported the accused to NEMA offices for blocking the waterway. He said accused had built on the way of the box cut went which ensured human and vehicles passage. That the accused didn't heed the oral warnings. That when rains came in August 2019 the water deviated from its normal course due to the blockage causing erosion and hardships on the road.
 13. That PW 3 took some NEMA officers to the scene and appellant was implored to remove the blockage but he refused and the road became impassable and they ended up repairing the road at a great cost. PW 3 prepared report on the damages.



14. PW 4 P.C. Mudibo John Terry was then arrested, the appellant and investigated the complainant. He said he visited scene in company of P.C. Owino and the complainant and saw the place had been destroyed by sand blocking the road and making it inaccessible. He interrogated the accused at his home near the scene and escorted him to the station.
15. PW 4 said he was given expert report by name showing the damage and effect on the road as well as Inspection Report. Correspondence to accused from County Gov't as well as photographs of scene were produced.
16. In defence accused produced title to his land no. 1450 and said that he was working on his land. He said he had been away upto 2010 when he returned and found people were harvesting said from his land and he was trying to reclaim it and stop soil erosion. That he decided to make a trench and plant trees and grass to rectify the land. He said he was making the land productive.
17. The appellant said that a neighbour complained that he had damaged her land in the process and he was charged in court. That in 2019 he got a letter saying he was interfering and yet he had improved the land. He said he had grown bananas and sugarcane on the land as well as maize and bamboo.
18. DW 2 and DW 3 testified in support of the accused and said he is their neighbour and that what he did was to reclaim his land and prevent soil erosion by planting trees, grass and other crops to develop his land.
19. The trial Magistrate framed issues for determination as
 - a. Whether the accused interfered with a wetland blocking the normal and natural course and redirecting it by heaping soil on its course with adverse effects to the environment and human life without necessary approvals as required under the *Environmental Management and Coordination Act*.
20. The Appeal was canvassed by way of written submissions.
21. The appellants submissions dwelt more on the issue of legal representation under article 50(2) (g) which it was claimed was breached as the Appellant was not informed of the right and therefore the proceedings were vitiated by that failure and that the appellant should therefore be acquitted. The Appellant also submitted that the prosecution failed to prove its case beyond all reasonable doubt and the appeal should be allowed.
22. The respondents submissions were that they proved their case beyond all reasonable doubt and that the conviction was justified because appellant's actions affected the course of wetland and that he didn't have authority from NEMA. It was argued that the effect of appellant's action was damage to a road made by PW 3.
23. On issue of right to representation, it was argued that the appellant ably participated throughout the hearing and called 2 witnesses and many he was not facing a capital offence to require legal representation to be provided. The respondent argued that issue of legal representation was never raised during trial and cannot be raised on appeal.
24. The authority in *Owuor v Republic* (Criminal Appeal No 16 of 2019) [2022] KECA 18 and Supreme Court decision in *Charles Maina Gitonga v Republic* [2020] eKLR were relied upon to support position that failure to provide legal representation cannot vitiate a conviction unless it is shown that prejudice was suffered.



25. The respondent argued that undisputed facts were confirmed on the trial courts visit to the site and appellants contention that site should have been visited during rainy season was unfounded and misconceived.
26. On the ground that defence evidence was not considered the respondent submitted that was baseless as the appellant admitted he received a letter in 2019 and he didn't challenge it in cross examination.
27. On the sentence meted against the appellant the respondent relied on the authority of *Bernard Kimathi Gacheru v Republic* [2002] to submit that sentencing is a discretion of the trial court and that the appellant was charged under section 144 of the Environmental Management & Co-ordination Act and the sentence imposed by the trial court was reasonable and not excessive in the circumstances.

Analysis and Determination

28. The evidence in the trial courts record as well as the judgement of the trial Magistrate have been analysed and re-evaluated and the issues that fall for determination are:-
 - i. Whether appellant was convicted against the weight of the evidence.
 - ii. Whether the appellants right under articles 50(2)(g) of *the constitution* of Kenya was breached by the trial court.
 - iii. Whether a site visit by the trial court during rainy season would have made the trial Magistrate arrive at a different verdict.
 - iv. Whether the prosecution evidence raised doubts that could have been resolved in favour of the appellant
 - v. Whether the appellants mitigation was considered.
29. To start with the last ground after appellant had been convicted by the judgment delivered on August 5, 2021 he was allowed to give his mitigation and from the record the trial Magistrate considered his mitigation in arriving at the sentence meted out. It is not true that appellants mitigation was not considered. It may not have been considered in the manner we thought but there is a mention of his mitigation before he was convicted.
30. From the initial stage of appellants trial he pleaded guilty and explained that he had put soil on the water way that passes through his farm to prevent soil erosion and he was to repair damage occasioned on the road by his actions but that the prosecution witnesses failed to co-operate with him.
31. He was warned by PW 1, PW 2 & PW 3 but he defile the warnings and notices to make good the damage to the environment. The trial Magistrate visited the scenes and observed the damage cause. This court therefore finds the Appellant did not deny having caused environmental degradation and damage to the road as alleged by the prosecution witnesses and his allegation that he was convicted against weight of evidence cannot arise.
32. The appellant didn't also point out any doubt in the prosecution evidence that he felt should have been resolved in his favour.
33. On the issue of whether the trial Magistrate complied with provisions of article 50(2)(g) or (h), I have perused the record of the trial court and it is silent on whether the court addressed the appellant on the rights stated in article 50(2)(g)&(h) of *the constitution* of Kenya 2010. That suggests that the court did not inform the Appellant of those rights and therefore provisions were not complied with. That



would mean the fair trial principle stated in that provision were not observed and the appellants rights with respect to the same were violated.

34. The consequence of that was that the trial was compromised for these constitutional guarantees to a fair trial were not observed. Going by the standards of fair trial provided under article 50(2)(g) &(h) I do find that the appellant was not treated fairly and I do allow the appeal herein on the finding that there was a mistrial.
35. The conviction is quashed and sentence hereby set aside.
36. I direct that the matter be referred back to the trial court for purposes of re-trial. Mention – June 30, 2022 in Voi Chief Magistrates Court.

DATED, SIGNED AND DELIVERED AT MOMBASA IN OPEN COURT/ONLINE BY MS TEAMS, THIS 23RD DAY OF JUNE 2022.

HON. LADY JUSTICE A. ONG'INJO

JUDGE

In the presence of:-

Ogwel - Court Assistant

Respondent – Mr. Sirma for Respondent

Appellant – Present in person

Mr. Mwazighe Advocate for Appellant – No appearance

Mr. Mwawasi hold brief

Hon. Lady Justice A. Ong'injo J

23/06/2022

