REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL CASE NO. 98 OF 2019

REPUBLIC.....APPELLANT

VERSUS

SILAS KIRAITHE Alias DISO.....RESPONDENT

(Being an appeal from the decision of Hon. G. Sogomo PM in Tigania Cr. Case No. 2364 of 2016 made on 31/5/2019)

J U D G M E N T

1. On 11/10/2016, **Silas Kiraithe Alias Diso ("the respondent"),** entered **Land Parcel No. 8624,** claimed by **Mercy Nduuru Kairuthia ("PW1)** and pruned and cut trees thereon. **PW1** reported the matter to the police at Nchiru Police Station.

2. **PW3 Lucy Mwathwana** was passing by at about 6 am when she saw the respondent pruning the trees while **PW2 Cecilia Karegi** saw from her home at abouit 10 am of the material day the respondent felling the trees. **PW4 Clp. Evan Chebon** investigated the case. He established that the land on which several tress had been felled was recorded in the name of the complainant and referred her to **PW6** Phineus Earnest Lewa, a forester to assess the damage.

3. **PW6** assessed the damage of the trees felled to be 3 Ficus natalensis (mugumos), 9 Gravelliea robusta (mukima) and Cordial Africana (muringa). He prepared a report showing that the total value of the felled trees was Kshs.50,000/-. He appeared in Court and produced a report to that effect.

4. On his part, **PW5 Richard Kimoi,** the Lands Officer, Tigania West appeared and produced the record showing that the Land Parcel No. 8624, Mbeu Adjudication Section had been recorded in favour of the complainant.

5. Pursuant to the foregoing, the Director of Public Prosecutions lodged a charge against the respondent before the Tigania Law Courts on 14/11/2016 charging him with malicious damage to property contrary to ***section 339 (1) of the Penal Code.***

6. It was alleged in the particulars of the charge that, on 11/10/2016 at Kimerei village of Mbeu Location, jointly with others not before Court, the respondent willfully and unlawfully damaged "mugumo, mukima, and muringa" trees by cutting them down all valued at Kshs.50,000/- the property of Mercy Nduuru Kairuthia.

7. The respondent denied the charges and the trial proceeded along the foregoing terms. In his defence, the respondent stated that he had a dispute over the property and had sued the complainant in a civil case. That there were orders therein in his favour.

8. In a two sentence judgment, the trial Court acquitted the respondent on the grounds that the charge sheet was defective. That by use of the vernacular words "mugumo, mukima and muringa" it was in breach of ***section 198(4) of the Criminal Procedure Code*** which requires the use of English or Kiswahili language. That that was a deplorable technical lapse that called for the acquittal of the respondent.

9. Aggrieved by that decision, the state has preferred the present appeal setting out 6 grounds. The grounds upon which the appeal was based were that; ***the trial Court erred in dismissing the charges on flimsy grounds by misapplying section 198(4) of the Criminal Procedure Code (CPC), that the trial Court erred in failing to consider that the ingredients of the charge were proved, that the judgment was against the weight of evidence.***

10. It was submitted by **Mr. Namiti,** the Prosecution Counsel, that the import of ***section 198(4) of the CPC*** was that the entire proceedings should be recorded in either English of Kiswahili language. That descriptive words in a charge sheet can be used in any language understandable by all the parties and that in any event, **PW6** an expert testified and gave those words in English and was cross-examined accordingly.

11. On his part, the respondent stated that he had the Summons that he was arrested with and that he had the letter of permission to fell the

trees.

12. This Court has taken regard to the principles set out in **Okeno v. Republic [1972] EA 32**, that as a first appellate Court, it is duty bound to re-appraise the evidence afresh and come to its own independent conclusions and findings. In so doing, the Court must have regard that it did not have the advantage of seeing the witnesses testify.

13. The issue is whether the trial Court was entitled to dismiss the charge for reason of use of the vernacular language in the charge sheet in naming the trees that were alleged to have felled.

14. ***Section 198 of the CPC*** generally provides for interpretation of evidence to the accused or his advocate. It provides that: -

> ***"(1) Whenever any evidence is given in a language not understood by the accused, and he is present in person, it shall be interpreted to him in open court in a language which he understands.***
>
> ***(2) If he appears by advocate and the evidence is given in a language other than English and not understood by the advocate, it shall be interpreted to the advocate in English.***
>
> ***(3) When documents are put in for the purpose of formal proof, it shall be in the discretion of the court to interpret as much thereof as appears necessary.***
>
> ***(4) The language of the High Court shall be English, and the language of a subordinate court shall be English or Swahili".***

15. It is clear that the said provision addresses the issue of evidence tendered in Court. The mischief sought to be cured is that what transpires in Court must be understood and be for the benefit of an accused. In the present case, the entire proceedings proceeded in both English and Kiswahili and was at all times translated to Kimeru for the benefit of the appellant. The trial Court seems to have taken into issue, the use of vernacular words in identifying the trees in the charge sheet.

16. In my view, that was a misdirection as; firstly, the respondent knew what sort of trees he was being charged of having cut, and secondly, the names of the trees as used in the charge sheet are popularly and commonly known as such and did not cause any prejudice. Indeed, at no point whatsoever was there any indication that either the respondent or any other party did not understand what sort of trees were the subject of the proceedings.

17. **PExh 2** was the report dated 9/11/2016 from the Kenya Forest Service, Tigania East sub-county. It gave the scientific names of the subject trees as; Ficus natalensis **(mugumo)**, Gravellea robusta **(mukima)** and Cordial Africana **(muringa).** No doubt if those were the terms or names that would have been used in the charge sheet, as the learned trial magistrate would have wanted, it is doubtful if the respondent would have understood it.

18. The entire proceedings before the trial Court were regular save for the said misdirection. In the premises, the judgment of the trial Court cannot stand. The order of acquittal is accordingly set aside.

19. ***Section 354 of the CPC*** provides for the powers of this Court on appeal. ***Sub-section 3 (bb)*** provides:-

> ***"in an appeal from an acquittal, an appeal from the order refusing to admit a complaint or formal charge or an appeal from an order dismissing a charge, hear and determine the matter of law and thereupon reverse, affirm or vary the determination of the subordinate court, or remit the matter with the opinion of the High Court thereon to the subordinate court for determination, whether by way of rehearing or otherwise, with such directions as the High Court may think necessary, and make such other order in relation to the matter, including an order for costs, as the High Court may think fit".***

20. In view of the foregoing, I hereby remit this matter back to the trial Court to determine the matter on merit having regard to this Court's determination aforesaid on the issue of law raised by the said Court.

It is so ordered.

DATED and DELIVERED at Meru this 30th day of January, 2020.

A. MABEYA

JUDGE