REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KERICHO

CRIMINAL APPEAL NO.12 OF 2019

LEORNARD KIPKURUI NG'ENY....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being An Appeal From The Conviction And Sentence In Kericho CM Criminal Case No.424 Of 2019 – B. K Kipyegon SRM)

JUDGMENT

1. The appellant was convicted in the magistrate's court at Kericho in Criminal Case No.424 of 2019 with two others on their own plea of guilty for the offence of malicious damage of property contrary to section 339 (1) of the Penal Code (Cap.63). The particulars of the offence were that on 27th January 2019 at Kivogo area Kericho township sub location, within Kericho County, willfully and unlawfully damaged one iron sheet 2½ meters, one wooden door and one skyplast container of 100 litres all valued at 4,530/= the property of Ronald Kiprono Kigen.

2. Each of the three was sentenced to serve three (3) years imprisonment.

3. The appellant being dissatisfied with the conviction and sentence has now come to this court on appeal through counsel on the following grounds –

> 1. That the learned trial magistrate erred in law by convicting and sentencing the appellant to 3 years imprisonment on the basis of an equivocal guilty plea as the appellant who was barely schooled could have been comfortable in taking plea in the Kipsigis language and did not comprehend Kiswahili language very well.
>
> 2. That the learned trial magistrate erred in law by imposing an unduly harsh sentence for a minor offence

4. During the hearing of the appeal, Mr. Onesmus Langat counsel for the appellant submitted that the plea of guilty herein was not taken properly in accordance with section 207 of the Criminal Procedure Code (Cap.75) and the steps laid down in the case of **ADAN – VS – REPUBLIC [1973] EA** – in which the court stated that the charge should be read and explained in the accused's own language or a language he/she understood. In counsel's view, since the appellant was a Kipsigis speaking person, Kipsigis language should have been used instead of Kiswahili. Counsel was also of the view that the response of the appellant to the charge should have been recorded by the trial court verbatim, which in this case was not done. Counsel was further of the opinion that two languages were used in the proceedings, and thus it was not clear which language the accused used in this response. The plea of the appellant, according to counsel was thus not unequivocal.

5. With regard to sentence, counsel submitted that the offence was minor and section 339 (1) of the Penal Code classified it as a misdemeanor. Though counsel appreciated that a pre-sentencing report was considered the court, counsel felt that the sentence pronounced by the court was excessive as sometimes pre-sentencing reports were biased. Counsel emphasized that under section 354 of the Criminal Procedure Code, and the Sentencing Guidelines of the Kenya Judiciary, this court had discretion in sentencing as sentencing was not merely a punishment but was meant also to serve as rehabilitation. As the appellant had served 9 months at the time of hearing of the appeal, counsel urged this court to release him from prison.

6. Mr. Ayodo for the State in response opposed the appeal and stated that the appellant clearly understood the language used and responded in Kiswahili language. He was charged with two others and the appellant and the others responded, and also asked for forgiveness in their mitigation. The appellant thus according to counsel, understood the language used in court.

7. With regard to the pre-sentence report, counsel submitted that a number of people were interviewed in compiling the report. These included both the victim and appellant's families. Counsel added that the motivation for the offence was to attack the complainant who had

been a member of the community fight against production and sale of illicit brew, and that the trial court considered all this. As such counsel concluded, the sentence of three (3) years imprisonment was not excessive.

8. Having considered the grounds of appeal, the submissions of the appellant's counsel and those of the state, and perused the record, I agree with the appellant's counsel that there is a clear requirement under section 207 of the Criminal Procedure Code (Cap. 75) of the Laws of Kenya, and Article 49 and 50 of the Constitution of Kenya, 2010 that criminal proceedings be conducted in a language that an accused person understands.

9. In the case of **ADAN – VS – REPUBLIC [1973] EA 445** the defunct East African Court of Appeal set specific steps to be taken by trial courts for recording a proper unequivocal plea of guilty. One of the requirements is the importance to use the language of the accused person or a language which the accused person understands.

10. Counsel for the appellant herein, has complained that the language used was not Kipsigis language which the appellant understands. Indeed Kipsigis language was not used, as the record clearly shows that Kiswahili language was used. I note that the record is fairly short and the charge and particulars were also not technical in nature. The appellant and this two co-accused responded to the charge and also asked for leniency. There was no complaint by any of them that they did not understand Kiswahili, which in Kenya has now become a common language on radio, television, as well as public meetings conducted by the State and State officials.

11. In my view, it cannot be said that merely because the appellant did not go far in formal education, then he could not understand Kiswahili language. If he had a handicap in that language he should have raised it in the trial court, which he did not. I find that the appellant understood Kiswahili language which was used in the trial and also find that it was not true as alleged by counsel for the appellant that two languages were used except English and Kiswahili both of which are official languages in Kenya. I dismiss the ground that the conviction was not unequivocal. I uphold the conviction of the appellant.

12. With regard to sentence, section 339 (1) of the Penal Code (Cap.63) describes the offence of malicious damage to property as a misdemeanor, unless otherwise stated, and provides a maximum sentence of five (5) years imprisonment.

13. Counsel for the appellant submitted that the sentence for 3 years imprisonment imposed by the trial court herein was harsh and excessive, and emphasized that the appellant was a young man, that the damaged items were valued at merely Kshs.4,530/=, and that the pre-sentence report made by Probation Officers were sometimes biased.

14. Indeed, the appellant had no previous conviction and was thus to be treated as a first offender. He was a young man of 28 years. However, in my view each case has to be considered on its own peculiar facts and circumstances in determining sentence. I note that this is a case where a person trying to enforce the law against manufacture and sale of illicit brew was being threatened with death at night and his property being damaged by the appellant in the company of others. I have not been told that the narrative herein as given at the trial court by the prosecution was wrong and in what respects. Thus a general statement by counsel that pre-sentence reports by Probation Officers are biased and should not be given weight by this court is misplaced. The facts given by the prosecutor were short and clear that –

> "**…** the accused persons stormed the home of the complainant armed with weapons and damaged complainants iron sheets, skyplast of 100 litres on allegations of the complainant's crackdown on illicit brew"

15. The incident occurred at night and the above facts were not challenged. In my view, taking into account the facts of the case, the sentence imposed was both lawful and justified in the circumstances of the case. I thus will uphold the sentence imposed.

16. Consequently, I find no merits in the appeal. I dismiss the appeal and uphold both the conviction, and sentence of the trial court.

Dated and delivered at Kericho this 10th March 2020.

GEORGE DULU

JUDGE