



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT KAPENGURIA**  
**CRIMINAL DIVISION**  
**CRIMINAL APPEAL NO. 8 OF 2018**

**BETWEEN**

**AUGUSTINO KETER MISOI.....APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

**(Being an appeal from original conviction and sentence in Kapenguria**

**PMCCR case No. 692 of 2018 by Hon. V O Adet, SRM, dated 8<sup>th</sup> May, 2018)**

**JUDGMENT**

**CORAM: LADY JUSTICE RUTH N. SITATI**

**Introduction**

1. The appellant herein was charged with the offence of *malicious damage to property contrary to Section 339(1) of the Penal Code*, the particulars thereof being that on the 6<sup>th</sup> day of May, 2018 at **Talan area within West – Pokot County**, jointly with others not before the court, willfully and unlawfully damaged the barbed wire fence valued at kshs 20,000/= the property of **COSTA MURIARENG**.
2. The appellant pleaded guilty to the charge. Upon conviction he was sentenced to serve 2 years imprisonment.

**The Appeal**

3. Being totally aggrieved and/or dissatisfied with the conviction and sentence by the learned trial magistrate the appellant filed appeal on the basis of the following supplementary grounds of appeal:-
  - a. **That the learned trial magistrate erred in law and in fact in convicting the appellant without taking into consideration [the] procedure used [for] obtaining a guilty plea.**
  - b. **That the learned trial magistrate erred in law and in fact in convicting the appellant without taking into consideration whether the appellant understood the language while taking plea.**
  - c. **That the sentence is harsh, excessive and unsafe in the entire circumstances.**
4. REASONS WHEREFORE, the Appellant prays that the appeal be allowed, conviction quashed and sentence set aside and the appellant set free, or in the alternative, the appellant be given an opportunity for retrial.
5. This being a first appeal, I am guided by the principles set out in *Gabriel Njoroge vs Republic (1982-88) KAR 1134* where the Court of Appeal outlined the duty of the first appellate court in the following words:-

**“As this court has constantly explained it is the duty of the first appellate court to remember that the parties to the case are**

entitled, as well on the question of fact as on the question of law, to demand a decision of the court of the first appeal and as the court cannot excuse itself from the task of weighing conflicting evidence and drawing its own conclusions though it should always bear in mind [the fact] that it has neither seen nor heard the witnesses and make due allowance in this respect. (See *Pandya vs Rex (1957) EA 336; Ruwala vs Rex (1957) EA 570*”.

6. The position therefore is that if this case had gone through a full trial I would have had to consider and evaluate afresh all the evidence on record with a view to coming to my conclusions in the matter. However, since the appellant was convicted on a plea of guilty, this court is required to carefully examine the procedure followed in taking the plea with a view to determining, whether it was unequivocal.

### The facts of the case

7. The facts to which the appellant pleaded guilty are as follows:-

The complainant in the case, Costa Muriareng bought a piece of land at Talan in the year 2016 from the father of the appellant and performed due process. On 6<sup>th</sup> May, 2018 the complainant and her husband hired some casual workers to fence the land by erecting barbed wire. While the complainant was carrying out the work, the appellant together with an unknown group of persons accosted the complainant and her workers without any provocation and started pulling down the wire fence while threatening to cause harm. Sensing danger, the complainant fled from the scene and went and made a report at Kapenguria Police Station.

8. Subsequently, the appellant was arrested and charged. A piece of the barbed wire, pole forming part of the damaged fence were produced as P exh1. The barbed wire was worth Kshs.20,000/=.

### Submission

9. Counsel for the appellant, relying on *Aden Vs Republic [1973] EA 445*, submitted that the plea of guilty entered against the appellant was not unequivocal and secondly that he appellant did not understand the charge to which he was pleading guilty. The appeal on conviction was opposed on the ground that having pleaded guilty to the charge the appellant could only appeal against the legality or extent of the sentence as provided under *Section 348 of the Criminal Procedure Code*. Prosecution Counsel Miss Kiptoo also submitted that the sentence of 5 years imprisonment meted out to the appellant was too lenient considering that he maximum is life imprisonment. Counsel urged this court to dismiss the appeal in its entirety.

### Issues, analysis and determination

10. I have now carefully considered the record and in my considered view the plea of guilty entered herein was not unequivocal. First of all, when the charge was read out to the appellant on 8<sup>th</sup> May, 2018 before giving of the facts the trial court did not indicate whether the charge was read and explained to the appellant in Kiswahili language as had been done on 7<sup>th</sup> May, 2018 or in some other language, but unlike the appellant's answer on 7<sup>th</sup> May, 2018 which was in Kiswahili, the answer on the 8<sup>th</sup> May, 2018 was given in English. It is therefore not clear to this court whether the appellant understood both Kiswahili and English and if so, why the trial court did not take the trouble to make the record clear.

11. Secondly from the record, after the appellant had said “**true**” to the charge the court wrote “*plea of not guilty entered*” which then means as correctly stated by Appellant’s counsel, that the trial court should have gone ahead to hear the case instead of proceeding to take the facts and convicting the appellant.

12. It was necessary, in my humble view, for the trial court to make the record clear because the appellant was not represented. In *Paulo Malimi Mbusi vs Republic Kiambu Cr Appeal No 8 of 2017 Ngugi Joel J* persuasively noted that:-

**“In those cases [where there is an unrepresented accused charged with a serious offence], care should always be taken to see that the accused understands the elements of the offence especially if the evidence suggests that he has a defence.....To put it plainly then one may add that where an unrepresented accused person pleads guilty to a serious charge which is likely to attract custodial sentence the obligation of the court to ensure that the accused person understands the consequences of such a plea is heightened. Here, the court took no extra effort to ensure this. In these circumstances, given the seriousness of the charge the court was about to convict and sentence the accused person for, it behooved the court to warn the accused person of the consequences of a guilty plea”**

13. In the instant case, the learned trial magistrate never warned the appellant of the consequence of a guilty plea nor was a plea of guilty ever entered before conviction. Secondly the courts have stated over and over again that such responses as “**it is true**” or “**true**” do not form a guilty plea. The problem in this case is compounded by the fact that the plea that is on record is one of not guilty before the facts were given. It may therefore be that the appellant said something though not recorded by the trial court which translated into a plea of not guilty. The appellant must in the result, get the benefit of the doubt.

14. In the third ground, the appellant alleges that the sentence of 2 years imprisonment was excessive in the circumstances. Far from it, the sentence of 2 years imprisonment even for a first offender was lenient considering the fact that the maximum sentence upon conviction for the offence charged is life imprisonment. In my humble view nothing turns much this ground of appeal.

15. The last issue for determination is whether there should be a retrial of this case. Taking everything into account, I am satisfied that this is a proper case for retrial. In *Opicho vs Republic [2009] KLR 369*, the court held *inter alia*,

**“In general a retrial will be ordered only when the original trial was illegal or defective. It will not be ordered where the conviction is set aside because of insufficiency of evidence or for the purpose of enabling the prosecution to fill up gaps in its evidence at the first trial, even where a conviction is vitiated by mistake of the trial court for which the prosecution is not to blame, it does not necessarily follow that a retrial should be ordered; each case must depend on its own facts and circumstances and an order for retrial should only be made where the interests of justice require it.”**

16. Other authorities in this regard are *Muiruri vs Republic [2003] KLR 552; Mwangi vs Republic [1983]KLR 522, Lolimo Ekimat vs Republic – Court of Appeal Cr appeal No 151 of 2004(UR)*.

17. In the instant case, it is hardly 6 months down the line since the appellant took plea. Further the mistake herein was entirely that of the trial court and there is no chance that an order for retrial will enable the prosecution to fill gaps in its case. Nor was the mistake made by the trial court to be blamed on the prosecution.

### **Conclusion**

18. From all the above, I make the following final orders;-

- a. That appeal is allowed.**
- b. The conviction is quashed and sentence set aside.**
- c. The case is remitted for retrial before a magistrate other than the Hon. V. O Adet who handled the case previously.**
- d. The lower court file in Kapenguria PMCCR case No. 692 of 2018 be and is hereby returned to the lower court for purposes of retrial.**
- e. The appellant shall remain in custody pending appearance before the lower court for plea.**

19. It is so ordered.

**Judgment delivered, dated and signed in open court at Kapenguria on this 28<sup>th</sup> day of November, 2018.**

**RUTH. N. SITATI**

**JUDGE**

### **In the presence of**

M/S Bartilol holding brief for M/S Chebet for appellant

M/S Kiptoo for respondent

Mr. Juma - Court assistant