

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MURANG'A

CRIMINAL APPEAL NO 2 OF 2015

**(From original conviction and sentence in Kandara SPM Criminal Case No 553 of 2014 – C. Kithinji
Ag SRM)**

SIMON MUCHUNU KIBE.....APPELLANT VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

1. The Appellant herein, **Simon Muchunu Kibe**, was convicted upon his own plea of **cutting down crops of cultivated produce** contrary to **section 334(a)** of the **Penal Code**, and also of **injuring an animal** contrary to **section 338** of the same code. The complainant was his own mother. He was on 18/12/2014 sentenced to serve 5 years imprisonment on each count, sentences to run concurrently. He has appealed against both conviction and sentence.

2. Learned prosecution counsel does not support the convictions upon the ground that the plea was not unequivocal on account of the Appellant's mental status.

3. I have examined the record of the trial court. The Appellant's pleas were taken on 09/12/2014. On 10/12/2014 the prosecution gave the facts of the case. The Appellant's response to the facts was –

“That was it.”

The trial court then convicted him and reserved sentencing to 18/12/2014 pending a probation report. On that date the Appellant addressed the court thus –

“I do not know why I am in remand or why I am in court. When I came to court I had a big spiritual fight.”

4. The probation report presented to the trial court revealed that the Appellant had abused *cannabis sativa* for many years to the extent of affecting his mental status. His mother informed the probation officer that he had been committed to **Mathare Mental Hospital** 3 times on account of smoking the stuff. The probation officer herself observed as she interviewed him that his speech was not coherent and that he seemed to hallucinate, claiming he communicates with superpowers”. Nonetheless the probation officer recommended a custodial sentence “...as a way of natural detoxification...to enable him make a choice regarding his life”.

5. A psychiatrist's report on the Appellant dated 28/07/2016 obtained upon the order of this court revealed that the Appellant was well known to the psychiatric clinic at **Thika Level 5 Hospital** as he had been attending the facility as well as **Mathari Teaching and Referral Hospital** (commonly known as **Mathare Mental Hospital**). When examined he was in a good state as he was compliant to the treatment. But the Consultant Psychiatrist recommended that he should continue with treatment and follow up.

6. It appears that there were indications that the Appellant was not okay mentally which the trial court ignored. It should have followed up with an inquiry under **section 162** of the **Criminal Procedure Code**.

7. Upon my own evaluation of the circumstances in which the plea was taken, I am not satisfied that the plea was good and unequivocal. The plea of guilty was wrongly entered and the convictions cannot be allowed to stand. They are hereby set aside, along with the sentences imposed.

8. I have agonized whether I should order a retrial of the Appellant. I note that he has now served about 2½ of his 5-year sentence. He appears to be doing well with the treatment he is now receiving. In these circumstances I do not consider it just to order his retrial. While ordering his immediate release unless otherwise lawfully held, I strongly advise him to continue with his treatment, and certainly also desist from smoking *cannabis sativa*. It is so ordered.

DATED AND SIGNED AT MURANG'A THIS 18TH DAY OF MAY 2017

H P G WAWERU

JUDGE

DELIVERED AT MURANG'A THIS 19TH DAY OF MAY 2017