



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NANYUKI

CRIMINAL APPEAL NO. 3 OF 2016

LUSHUANA LEPERESHA KAOKA APPELLANT

versus

REPUBLIC..... RESPONDENT

(Being an appeal from the original conviction and sentence in Nanyuki Chief Magistrate's Court Criminal Case No. 1171 of 2015 by Hon. E. BETT Senior Resident Magistrate on 24th December 2015.)

JUDGMENT

1. **LUSHUANA LEPERESHA KAOKA** has appealed herein against his sentence after he was convicted on his own plea of guilt on two counts before the Nanyuki Chief Magistrate's Court. On the first count he was charged with the **offence of being in possession of dangerous weapons contrary to section 308(1) of the Penal Code**. On the second count he was charged with the **offence of entering protected area contrary to section 3(1) as read with section 9(1) of the Protected Area Act Cap 204**. The trial court sentenced the appellant to serve 7 years on the first count and 6 months imprisonment on the second count. Both sentenced were to run concurrently.
2. The appellant was arrested at Kenya Defence Forces (KDF) compound having in his possession 6 pieces of arrows. When the KDF personnel questioned him they confirmed he had no authority of being in that protected area.
3. The appellant, as I can confirm having seen him in court, is a Maasai. He submitted that on the day in question his cows had gone missing and he was arrested by Kenya Defence person on the day in question as he was looking for the cows. He stated that his cows had entered First Rifles compound. He said that he was illiterate and did not realize the consequences of entering the protected area. He pleaded guilty before the trial because he said that it was true that he was found in the protected area.
4. The appeal against sentence was opposed by learned senior principal prosecution counsel Mr. Tanui. Learned counsel submitted that the appellant having pleaded guilty to the two counts the sentence meted out by the trial court was commensurate to the offence.
5. I have considered submission of the appellant and the respondent. As stated before appellant is a Maasai. He submitted before this court that he was arrested with arrows and a club which he said he used to protect his cows when herding them. By custom and culture some Maasai, just like other rural tribal groups, carry clubs, spears, knives and even arrows in their daily lives. The people of Kenya when they gave themselves the constitution of 2010 recognized in that Constitution that culture is the foundation of the nation of Kenya. Bearing the above in mind it was necessary for emphasis to be made when plea was taken in respect to the first count that if the appellant pleaded guilty he was conceding that he carried the

arrows and with intent to commit a felony.

6. I have perused the trial court's record and I am satisfied that all the steps laid down in **ADAN –V- REPUBLIC (1973) EA 445** were followed. Indeed the learned trial magistrate when the appellant indicated he wished to charge his plea, from 'Not Guilty' to 'Guilty', informed the appellant that minimum sentence for first count was 7 years. It is also important to note that when the appellant stated to the trial court that he wished to changed his plea the learned trial magistrate noted the demeanor of the appellant and stated:-

‘I have reservation on his mental well being’.

That observation was correct because in the mental examination of the appellant by the psychiatrist at Nanyuki Teaching and Referral Hospital the psychiatrist stated the following as his diagnosis:-

“Possible hypermania – mild mood disorder.”

The psychiatrist however proceeded to declare appellant fit to plea and on that basis the trial court received appellants plea of guilt and convicted him on both counts.

7. Having received the submissions of the appellant, where he stated that he was simply looking for his cows and unintentionally entered protected area; and bearing in mind that it is culturally acceptable among the Maasai to carry arrows; and due to the psychiatrist diagnosis that appellant suffered with hypermania, I am of the view that appellant's appeal on sentence ought to succeed. It is important to note that hypermania is a severe form of mania.

8. Appellant stated before this court that he pleaded guilty because he was found in protected area. It would seem from the above and bearing in mind his mental condition that his plea of guilty particularly on count No.1 was not unequivocal.

9. In view of the above the judgment of this court is that the appellant's appeal in respect to count one succeeds. The conviction on count one is hereby quashed and the sentence on that count is hereby set aside. The conviction and sentence on the 2nd count is upheld. Since the appellant has more than served the sentence on second count the order of this court is that **he be set free from custody unless he is otherwise lawful held.**

DATED AND DELIVERED THIS 19TH DAY OF DECEMBER 2016.

MARY KASANGO

JUDGE

CORAM:

Before Justice Mary Kasango

Court Assistant

Appellant: Lushuana Leperesha Kaoka

For the State:

COURT

Judgment delivered in open court.

MARY KASANGO

JUDGE