



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT EMBU**

**CRIMINAL APPEAL NO. 4 OF 2014**

ANTHONY NYAGA WEGA.....APPELLANT

VERSUS

REPUBLIC.....PROSECUTION

**(Being an Appeal from the Conviction and Sentence by M.W. WACHIRA Chief Magistrate Embu in Criminal Case No. 23 of 2014 on 20th January, 2014)**

**J U D G M E N T**

**ANTHONY NYAGA WEGA** the appellant herein was charged with the offence of **Malicious damage to property contrary to Section 339(1) of the Penal Code**. The particulars as stated in the charge sheet were as follows:-

***On the 6th day of December 2013 at Kirigi Sub-location, Embu North Division, Embu County willfully and unlawfully damaged seven gravalia trees valued at Kshs.105,000/= the property of EVANS KARIRA NDWIGA.***

1. The appellant was arraigned in court on 6.1.2014 for plea. He was eventually convicted on 20.1.2014 on his own plea of guilty. He was then placed on 6 months probation on 3.3.2014.
2. And being dissatisfied with the conviction he filed this appeal through Mr. Kathungu advocate. He raised the following grounds.
  - i. ***The learned Chief Magistrate erred in law, when she failed to come to the conclusion that his plea of guilty was not unequivocal.***
  - ii. ***The learned Chief Magistrate erred in law and seriously misdirected herself when she failed to realize that the language of interpretation was not clear.***
  - iii. ***The learned Chief Magistrate erred in law and seriously misdirected herself when she failed to realize that he had planted the trees in 1976 after the plea had been read out to him and further that he had entered the land in 1961 and was applying for the charge sheet and statements to check on his Advocate in mitigation, he was technically either changing his plea or pleading not guilty.***
3. When the matter came for hearing Mr. Kathungu elaborated on the grounds of appeal. It was his submission that the statements made by the appellant in Court clearly indicated that he was not admitting the charge. The Chief magistrate therefore erred in convicting him.
4. He also took issue with the language of interpretation.
5. Mr. Wanyonyi the learned State Counsel conceded the appeal saying the plea was not unequivocal. He referred to the case of **LUSITI VS REPUBLIC [1977] KLR 143** where such matters were dealt with. He however requested that an order be made for a fresh plea to be taken.
6. The issue for determination is whether the plea taken by Mrs. Wachira Chief Magistrate on 6.01.2014 was unequivocal.

7. There are many authorities giving guidance on how pleas should be taken e.g.

***ADAN VS REPUBLIC [1973] EA 445 EACA***

***DESAI VS REPUBLI [1971] EA 542 EACA***

***KATO VS REPUBLIC [1971] EA 416 EACA***

***LEBIRIGIN VS REPUBLIC [1974] EA 103***

***LUSITI VS REPUBLIC [1977] KLR 143***

8. In the case of ***LEBIRIGIN VS REPUBLIC (Supra)*** Sir Jame Wicks Chief Justice & Hancox Judge very succinctly reviewed the various authorities on the taking of a plea and pointed out that it was important that there should be no ambiguity in the plea and that the Magistrate is so to speak, a trustee to ensure that the accused person wishes to admit his guilt, and so satisfy himself/herself on this point and thus relieve the Prosecution of that which may sometimes be an onerous task of proving all that they allege beyond reasonable doubt.

9. The Magistrate must be certain that an accused person wishes to admit without any qualification each and every essential ingredient of the charge, especially if he is not asked to admit or deny the facts outlined by the Prosecution. The language of interpretation must also be clearly indicated. In this case it was not.

10. From the facts in this appeal the charge was read out to the appellant in a language not indicated but he responded in Kiswahili admitting the charge. The Prosecution asked for an adjournment for two (2) weeks to read the facts.

11. This was the Appellant's response;

***“No objection. I planted the trees in 1976”***

12. In addressing the Appellant's response the Court stated thus;

***“Case not going to merits of case for now. Facts on 20/01/2014”.***

To me this is where the learned trial Magistrate got it all wrong. The Appellant was accused of damaging another person's trees. The moment he said it's him who had planted the trees in 1976 the learned trial Magistrate ought to have entered a plea of not guilty without further ado.

13. The matter next came up on 20/1/2014 for facts. This was 14 days since the plea was taken on 6/1/2014. The learned trial Magistrate ought to have reminded the Appellant of the charge before taking the facts. She did not and instead she went straight into taking the facts. After conviction the Appellant stated the following in mitigation;

***“I pray for leniency. I have had cases with the complainant. A case in Count 3 was dismissed with costs. I was not issued with charge sheet. I have a ruling of the case. This case was finalized in 1989. I entered the land in 1961. I apply for charge sheet and statements to check on my advocate”.***

14. The underlined sentences by the Appellant clearly show that he was not pleading guilty to the charge. Again the learned trial Magistrate had another opportunity to enter a plea of not guilty. She did not. She instead remanded him in custody for two weeks for a Probation Officer's Report.

15. From the above facts it's clear that the plea was not unequivocal hence the conviction cannot be allowed to stand.

16. The Appeal is allowed, and the conviction quashed. The sentence is set aside. On the request that the plea be taken afresh, I will decline the same for the reason that the parties appear to be having a land dispute which should be sorted out by the Environment and Land Court.

**DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 24TH DAY OF APRIL, 2014.**

**H.I. ONG'UDI**

**J U D G E**

**In the presence of:-**

**Ms. Mbae for State**

**Mr. Kathungu for Appellant**

**Appellant**

**Mutero CC**