



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MERU**

**CRA NO. 1 OF 2011**

**LESIIT, J**

**MURIUNGI MUTUGI MAKERWA.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

***(An appeal against conviction and sentence in Marimanti SRM'S NO.574 of 2010-KIAMA SRM)***

**JUDGEMENT**

The appellant MURUNGI MUTUGI MAKERWA was convicted on his own plea of guilty in one court of injuring an animal contrary to Section 338 of the Penal Code, and one count of creating a disturbance in a manner likely to cause a breach of the peace contrary to section 95(1) (b) of the Penal code. The appellant was sentenced to 3 years imprisonment in count 1 and to a fine of Kshs. 5000/= in default 2 months imprisonment in count 2.

Mr. M. Mwenda filed this appeal on behalf of the appellant. The grounds of the appeal are cited in the petition of appeal as follows:

1. The trial magistrate erred in law by convicting the Appellant on a plea that was not unequivocal.
2. The trial Magistrate erred in law in proceeding with the trial in a language that the appellant was not conversant with; and therefore prejudiced the appellant.
3. The sentence passed against the appellant is excessive in the circumstances of this case.

The appeal is opposed by the state.

I have considered the appeal. The counsel for the appellant argued that since three languages were indicated as the ones used when the charge was read to the appellant, there was no proof the appellant understood the language. Mr. Kimathi for the state disagreed with him and urged that the record was very clear that the charge and every element of the particulars was read and explained to the appellant in Kitharaka, and therefore the appellant understood the language. Learned state counsel submitted that the appellant's offer to pay for the cow he killed was proof of same.

I do not wish to delve into the issue of language save to observe that when it comes to the talking of plea, a trial court should be very careful in order to ensure that the person accused understands both the charge and the proceedings. It is not an exercise of care if the actual language used to explain a charge to an accused person is not properly indicated.

If more than one language is indicated as the one used to explain a charge to an accused person, I think that the court is not serious or intent on showing what language the accused person elected should be used in reading the charge to him. He cannot use more than one language. It has to be one or the other.

A distinction should however be drawn here in order not to cause confusion. The court should indicate the language of the court at its Coram column, every sitting. The court should during plea, in the certificate it signs to show that the charge and particulars were read and explained to the accused, indicate the actual language the accused indicated he understood, and to which the charge was explained.

Failure to indicate the language used is a procedural defect in the proceedings. An appellate court will then be required to determine whether the appellant was prejudiced; and whether his constitutional rights to interpretation in a language he understood the proceedings was breached. The appellate court will then determine whether or not to order retrial.

In the instant case I observed that the facts led by the prosecution after the charge was admitted by the appellant were brief. They stated as follows:

***“On 20.11.2010 the accused went to the shamba of the complainant and picked a quarrel. The accused was grazing the complainant’s cattle. He chased the complainant with arrow. When the complainant ran away, the accused shot one cow with an arrow. The cow died in the process. The accused ran away but was later arrested.”***

The facts are confusing as they introduced controversy and contradiction. Did the appellant go to the complainant in his shamba? Or was the appellant working for him? Was the appellant shooting at the complainant when the cow was shot? Or did the appellant shoot at the cow after failing to get the complaint?

There is a further issue with the case. The second count against the appellant was creating a disturbance in a manner likely to cause a breach of the peace contrary to section 95 (1) (b) of the Penal Code. It cannot be an offence of creating a disturbance if the alleged “Manners” complained of being committed took place in private property like ‘a shamba’ as in this case.

The facts clearly did not support the offence charge. Faced with such facts, and controversy in the facts, the trial court ought to have entered a plea of not guilty and should then have set the case down for hearing.

The issue now is whether to order a retrial.

***“In the case of Ahmed Sumar Vs. Republic (1964) E.A. 481, at page 483, the predecessor to this court stated as follows:-***

***“It is true that where a conviction is vitiated by a gap in the evidence or other defect for which the prosecution is to blame, the court will not order a retrial. But where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame it does not, in our view, follow that a retrial should be ordered.***

***The Court continued at the same page at paragraph II and stated further:-***

***“We are also referred to the judgment in Pascal Clement Braganza Vs. R. [1957] EA 152. In this judgment the Court accepted the principle that a retrial should not be ordered unless the court was of the opinion that on a consideration of the admissible or potentially admissible evidence a conviction might result. Each case must depend on the particular facts and circumstances of that case but an order for the retrial should only be made where the interest of justice require it and should not be ordered where it is likely to cause an injustice to an accused person.***

***Taking the queue from that decision, this Court in the case of Bernard Lolimo Ekimat Vs. Republic Criminal Appeal No. 151 of 2004 (unreported) had the following to say:-***

***“There are many decisions on the question of what appropriate case would attract an order of retrial but on the main, the principle that has been acceptable to courts is that each case must depend on the particular facts and circumstances of that case but an order for retrial should only be made where interests of justice require it.”***

The applicant has been in prison serving sentence since December 2010. He had offered to compensate the complainant for the cow which was killed during the incident in question. I think that even if the appellant were to be found guilty in either or both counts, considering his offer to compensate the complainant, a jail sentence was not an option to impose.

I think to order a retrial after the appellant has served such period in prison will not meet the ends of justice and will only serve cause the appellant hardship. I decline to order a retrial.

The complainant can still sue the appellant if he wishes to be compensated for the loss of his cow. Unless of course the appellant's offer to compensate him still stands and he wishes to do so.

Having come to the conclusion I have of this appeal I set aside the sentence imposed against the appellant.

I order that the appellant be released forthwith unless he is otherwise lawfully held.

Dated signed and delivered this 28<sup>th</sup> day of July 2011.

**LESIT, J  
JUDGE**