REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT MERU

Criminal Appeal 181 of 2008

JOHN NYAGA MAEMBO ……..……APPELLANT

VERSUS

REPUBLIC ……..RESPONDENT

CRIMINAL LAW

Criminal Procedure – Plea of guilt – Unequivocal –

(Appeal against the conviction and sentence passed against the Appellants by the

Resident Magistrate Hon. Obutu T.A. in Marimanti Criminal CMC NO. 382 of 2008).

JUDGMENT

The appellant herein was charged and convicted on his own plea of guilty to three counts (1) cutting, felling, burning and injuring forest produce contrary to section 52 (1) (a) as read together with section 52 (2) of the forest Act 2005 (No. 7 of 2005), (ii) clearing, cultivating and breaking land for cultivation contrary to section 52 (1) (f) as read wit section 52 (2) of the Forest Act and (ii) failing to comply with a lawful requirement or order made or given by a Forest officer contrary to section 54 (1) of the Forest Act.

The Appellant was sentenced to a fine of Khs. 20,000/= on each count and in default to ones year's imprisonment on each count, and that the sentence was to run consecutively. The Appellant has appealed to this Court on three grounds:-

(1) That the learned resident Magistrate erred in law by convicting the Appellant upon a plea that was not unequivocal

(2) That the learned Resident Magistrate erred in law by convicting the Appellant for offences that were not supported by the facts as presented by the prosecutor,

(3) That the sentence passed against the appellant was manifestly excessive in the circumstances,

And that for those reasons the Applicant prayed that his appeal be allowed, conviction quashed and sentence set aside.

Mr. Murango Mwenda learned Counsel for the Appellant who urged the appeal on behalf of the Appellant summarised his arguments into three submissions.

Firstly, he submitted, that the plea was not unequivocal, that the language of the proceedings was not indicated. That omission counsel submitted was a serious defect in the trial, and it cannot therefore be said with certainty that the appellant knew what charge he was pleading to.

Secondly, the facts narrated by the prosecutor do not in any way support the conviction and sentence. Thirdly the sentence of Kshs. 20,000/= or one year's imprisonment is manifestly excessive in the circumstances of the case, that is was harsh to order that all the sentences were run consecutively, and counsel consequently urged the Court to quash the conviction and set aside the sentence.

Mr, Kimathi, learned State Counsel for the Republic shared the sentiments by the Appellant's Counsel and told the court that he was not opposed to he appeal on the grounds of what he called a "technical lapse" that the trial court does no show that the offences were read and explained to the appellant (accused), in a language which he understood, and the state did not wish to have an order for a re-trial.

This appeal raises two issues. Firstly whether the plea of guilty was unequivocal, that is to say clear, unambiguous, without requiring any explanation. It was Mr. Murango's submission that the plea was not unequivocal, and it was unsafe to sustain a conviction on a plea, which was not unequivocal. As indicated above, Mr. Kimathi learned State Counsel shared the other view.

The procedure relating to calling upon the accused person to plead is governed by Section 207 of the Criminal procedure Code. It requires that the substance of the charge shall be stated to the accused by the court and he shall be asked whether he admits or denies the truth of the charge. If it can be shown that an accused person has admitted all the ingredients which constitute the offence charged, it is then proper to enter a plea of guilty. The words "**it is true"** when used by an accused person may not amount to plea of guilty, for example, in a case of where there may be a defence of self-defence or provocation.

In the case of KATO **VS REPUBLIC [1971] E.A. 542,** the court of appeal referred to is decision the case of R VS YONASANI EGALU (1942) 9 E.A.C.A. 65 at p 67 –

"**In any case in which a conviction is likely to proceed on a plea of guilty (in other words an admission by the accused is to be allowed to take the place of the otherwise necessary strict proof of the charge beyond reasonable doubt by the prosecution) it is most desirable not only that every constituent of the charge should be explained to the accused but that he should be required to admit or deny every constituent and that what he says should be recorded in a from which will satisfy an appeal court that he fully understood the charge and pleaded guilty to every element of it unequivocally"**

I think that is the true import of the words of Section 77 (2) (b) of the Constitution of Kenya, that every person who is charged with a criminal offence shall be as soon as reasonably practicable in a language that he understands and in detail of the nature of the offence with which he is charged.

In the present case, with respect, the trial magistrate should have explained to the appellant in clear language every ingredient of the charged and have required him to admit or deny the same and recorded the exact words the appellant used in his admissions or denials, as the case may be, in a form indicating that the appellant fully understood the charges be unequivocally pleaded thereto. In this case the appellant admitted facts which do not support the offences charged.

The record of the trial Magistrate simply says- "**charges read"** the record does not say whether the charges were explained to the accused in a language which he understood. He facts read to the appellant were:-

"**Between September 2007 and 12th September 2008 accused were found having felled trees and prepared the forest for cultivation. They were arrested and charged with the offences before court"**

The charge sheet clearly says "**cutting, felling, burning and injuring forest produce, clearing, cultivating and breaking the soil, and failing to comply with order of the Forest Officer.** There is no

connection for instance that the trees felled or orders given were in relation to Gikingo Hill Forest, in Kanyoro Sub-Location, Kanyoro Location in Tharaka District within Eastern Province. It is therefore accurate to say that in this case, the appellant admitted facts which do not support the offences charged.

It is my view that the appellant did not plead to he offences charged in all the courts. I therefore quash the conviction and set aside the sentences in respect of all the charges.

The Appellant's appeal therefore succeeds, and the appellant be released forthwith unless otherwise lawfully held.

Those are the orders of the Court.

Dated, delivered and signed at Meru this 15th day of May 2009.

M.J. ANYARA EMUKULE

(JUDGE)