

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT BUSIA
CRIMINAL APPEAL NO. 11 OF 2004
(From Original Conviction and sentence in criminal case no. 349 of 2004)

MUSA KWA MAJI MAREFU APPELLANT

VS

REPUBLIC RESPONDENT

J U D G M E N T

The appellant pleaded guilty to a charge containing two counts. The first court relate to a charge of malicious damage contrary to Section 339 (I) of the Penal Code. The particulars of this charge were that on the 8th day of February 2004 at Nambale township in Nambale Sub-location Nambale Location in Busia District within Western Province willfully and unlawfully damaged one shirt valued at Ksh.850/= the property of Fredrick Ongaya.

The second count is in respect of a change of malicious damage to property contrary to Section 339 (I) of the Penal Code. The particular of this charge are that on the 8th day of February 2004 at Nambale township in Nambale location in Busia District within the Western Province willfully and unlawfully damaged one shirt valued at Ksh.500/= the property of Bernard Nyandoto.

The appellant was convicted and sentenced to serve 12 months imprisonment on each count with an order to have the sentences to run concurrently. Being dissatisfied with this decision the appellant now appeals against both the conviction and the sentence.

The appellant submits that the learned trial Senior Resident Magistrate erred in law and fact by failing to appreciate that the facts adduced by the prosecution did not support the charge.

The second ground argued on appeal is that the plea was not unequivocal. The appellant's counsel stated that the language used at the trial was not stated. It is his view that the appellant did not understand the language of the court.

The learned Senior State counsel, Mr. Onderi opposed the appeal stating that the plea was unequivocal. It was his view that the facts supported the charge that the appellant faced. He further stated that the element of malice is inferred from the appellant's resistance to arrest. I have perused the placed evidence placed before me. I have also taken into account the able submissions by the learned state counsel and also those of the appellant's learned counsel.

On the first argument whether the plea was equivocal or not. It is clear from the record that the charge was read to the appellant both in English and Kiswahili being the languages of the trial court. It is also stated that the charge was read to the appellant in a language he understands and his response to the charges read to him were "guilty on both counts". The language in which the appellant is said to have used is not disclosed by the record. This court dealt with such a situation in the case of **WAITHAKA C/O KABERA VS REPUBLIC (1962) E.A. 38**

In which it was stated that 'word' guilty should not be used in recording a plea unless it is used by the accused in which case the record should show that the accused spoke in English.

I think I am in the opinion that the plea in respect of the charges was equivocal hence the same could not have sustained a conviction.

On the second limb it is stated that the facts read did not support the charge. I have also perused the

facts submitted before the learned Senior Resident Magistrate. The facts disclose that the appellant damaged the property indicated in the charge. However the facts do not disclose the ingredient of malicious intent on the part of the appellant. It cannot be said that malice can be inferred from the appellant's act. It would appear the appellant acted spontaneously to resist arrest. He acted at the spur of the moment. I have formed the opinion that the ingredient of malicious intent has not been established by facts presented before learned trial Senior Resident Magistrate. Consequently the facts do not support the charge.

I have come to the conclusion that the appeal must succeed. The conviction is quashed and the sentence set aside and the appellant set free forthwith unless held for some other lawful cause.

READ AND DATED THIS 26th DAY OF March 2004.

J.K. SERGON

JUDGE