REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

HCCRA. NO. 104 OF 2004

JOHN MUTEMBEI …… APPELLANT

VERSUS

REPUBLIC ……..…….. RESPONDENT

JUDGMENT OF THE COURT

The appellant herein JOHN MUTEMBEI filed his petition of appeal on 19.8.2004 having been dissatisfied by the conviction and sentence of the Senior Resident Magistrate in Criminal Case No. 880 of 2004. He has set out two grounds of appeal:-

1. The learned magistrate erred in law and fact in entering a plea of guilty against the appellant when the plea was not unequivocal.

2. The learned magistrate erred in law and in fact in sentencing the appellant excessively under the circumstances of this case.

The appellant was charged before the Senior Resident Magistrate's Court at Nkubu on the first count with creating disturbance in a manner likely to cause a breach of the peace contrary to section 95 (1) (b) of the Penal Code namely that on 14.5.2004 at Ngaitethia Village Gakiiri sub-location in Meru Central District within the Eastern Province he created a disturbance in a manner likely to cause a breach of the peace by threatening to beat Andriano Murimi. In the second count the appellant was charged with malicious damage to property contrary to section 339 (1) of the Penal Code, namely that on 2.8.2004 at Ngaitethia Village Gakiiri sub-location in Meru Central District, within the Eastern province he willfully and unlawfully damaged one lock valued at Kshs. 2,000/=, the property of Andriano Micheni Murimi. Although the appellant in his petition of appeal has indicated he is appealing against the conviction and sentence in Nkubu SRM's case No. 880 of 2004 both the charge sheet and the court record show that the case in which the appellant was charged as set out above was criminal case No. 1762 of 2004. As the appellant was represented by Mr. Kimathi Kiara the court can only hope that Mr. Kimathi will be more careful in the future about such details when drawing his pleadings.

The appellant appeared in court on 5.8.2004 for plea and it is shown on the record that the interpretation was from English to Kimeru. The charge was then read over and explained to the appellant whereupon the appellant told the court that each of the two counts was true.

The facts of the case were that on 14.5.2004 at about 3.00am, the appellant came home drank. He was shouting and threatening the complainant who was asleep with other family members. The appellant was said to have been armed with a panga and a huge stone, which stone he used to hit the door leading to the

complainants house and as a result of the impact therefrom, the door lock to the complainant's house was damaged, thereby forcing the door to open. The appellant tried to force his way into the house, but was prevented from doing so by the complainant and other members of the family. The appellant's mother's pleas to him to go and sleep fell on deaf ears. At about 6.00am the appellant again threatened to beat his mother, Charity Karimi whom he found making the morning meal. When the appellant failed to beat his mother, he started breaking utensils and in the process damaged two utensils. As the appellant's father was going to report the matter to the area sub-chief, that morning the appellant accousted him and beat him (father) with blows and fists and also apparently kicked the father on the left cheek leading to the breaking of one tooth. The matter was later reported to the police but when the appellant saw the police coming to the home, he ran away. On 2.8.2004, the appellant again came home drank at about 1.00am and threatened the complainant on the allegation that the complainant had taken his (appellant's) money. On this day, the appellant came home armed with a big stone which he used to smash the door to the complainant's house and damaged the lock which had since been repaired after the incident of 14.5.2004. After smashing the door, the appellant tried to force his way into the complainant's house, but once the complainant blocked the appellant's entry using a table. The complainant then shouted for help and neighbours came to the home where they found the appellant hurling insults and obscenities at the complainant. The appellant was subsequently arrested and charged. When the accused was asked whether the facts as given were correct, the accused told the court, **"the facts are true and I admit them"**. The court then proceeded to enter a plea of guilty on both counts and convicted him accordingly.

In mitigation the appellant told the court he did what he did because his father the complainant had told him he was not his son. In sentencing the appellant, the court noted that the offences were intended and that the appellant was not a victim of circumstances as alleged by him in mitigation. The magistrate noted further that the appellant deserved a deterrent custodial sentence and sentenced the appellant to serve 6 months imprisonment on count 1 and two (2) years imprisonment on the second count.

In support of the first ground of appeal Mr. Kimathi for the appellant submitted that the interpretation from English into *Kimeru* was prejudicial to the appellant who allegedly does not understand th*e Kimeru* language. Secondly, Mr. Kimathi submitted that since the appellant committed the alleged offences while under the influence of drink the trial magistrate should not have entered a plea of guilty. Mr. Kimathi also took issue with the fact that the two alleged offences were committed on two different dates that were far apart and that it was therefore not proper to have the two offences in the same charge sheet. On sentence Mr. Kimathi submitted that the sentences imposed upon the appellant were excessive. Finally, Mr. Kimathi submitted that if the court finds that the plea was equivocal, then the sentence imposed upon the appellant should be reduced. It was also Mr. Kimathi's submission that the appellant is aged under 18 years and was misled into pleading guilty to the charges against him.

Mr. Muteti for the state opposed the appeal arguing that since the appellant has not made a formal application to adduce fresh/new evidence, the court should rely only on the evidence before it. He submitted that from the record, the appellant did not indicate that he did not understand the *Kimeru* language, and that the appellant can therefore only appeal against sentence, and not against the conviction. Mr. Muteti also submitted that the joinder of counts did not cause any prejudice to the appellant, and he accordingly supported the sentence imposed upon the appellant.

There are several issues for determination by this court. First the issue of the age of the appellant. Mr. Kimathi submitted that the appellant is aged under 18 years. That submission was only an allegation from the bar. The details on the charge sheet give the appellant's estimated age to be 23 years. Though Mr. Muteti did not address this issue during submissions, it is my humble view that the estimated age of the appellant has not been contested and I am persuaded to accept that estimate as being correct and therefore have no basis for finding that the appellant is aged under 18 years in the absence of medical evidence to that effect. I will say a little more about this issue later on in the judgment.

The second issue is whether indeed the plea as taken by the trial court was unequivocal. The major point raised by Mr. Kimathi for the appellant is that the interpretation from English to *Kimeru* was not understood by the appellant meaning therefore that the appellant could not answer correctly to what he was being asked. As rightly pointed out by Mr. Muteti this court can only go by what appears on the

record of the lower court. There is nothing on the record to show that the appellant raised the issue of his inability to follow the translation of the proceedings from English to Kimeru . I therefore have no basis upon which to find that the appellant did not understand the Kimeru language. Mr. Kimathi also alleged that the appellant was induced into pleading guilty to the charges against him. No evidence was adduced by the appellant to prove that allegation. It is my view however that if indeed that allegation is true then evidence should be adduced by the appellant on the issue of inducement. On the bare facts before the court, I do not think that the appellant was prejudiced by the translation for if he had he would have taken the first opportunity to raise the issue with the trial magistrate. That notwithstanding I think that it is necessary for the case against the appellant to be taken afresh and to hear evidence from both the complainant and other witnesses, including medical evidence to ascertain the age of the appellant. The reason for reaching this conclusion is that whereas the particulars on count one are that the appellant threatened to beat the complainant Andriano Murimi the facts given show that the appellant not only threatened but actually beat the complainant on 14.5.2004 when he attacked him with blows, fists and kicks with one of the kicks landing on the complainant's cheek and knocking out one of his teeth. Since there is some doubt in my mind as to whether the appellant could infact be aged under 18 years, and whether or not the drunken state in which he was when he committed the alleged offences could avail him a defence I would order that this case goes back to the trial court for retrial. The facts of the case as given also reveal that the appellant threatened more than one person, and especially the appellant's mother in addition to the complainant who is said to be the appellant's father. It is for these reasons that I think that it is proper for a retrial of this case. Mr. Kimathi also submitted that charging the appellant with two different offences in the same charge sheet was prejudicial to the appellant, especially because according to Mr. Kimathi the two offences took place several months apart. To this Mr. Muteti submitted that joinder of counts in the same charge sheet has not caused any prejudice to the appellant since the facts presented to court supported both of the two counts.

Section 135 of The Criminal Procedure Code provides as follows:-

> **"135 (1). Any offences, whether felonies or misdemeanors, may be charged together in the same charge or information if the offences charged are founded on the same facts, or from or are part of a series of offences of the same or a similar character.**
>
> **(2) Where more than one offence is charged in a charge or information, a description of each offence so charged shall be set out in a separate paragraph of the charge or information called a count.**
>
> **(3) …….**

The Court of appeal dealt with this issue in its decision in **NGIBUINI V. REPUBLIC** (1987) KLR 517 where it was held:-

> (1) Where the offences charged are founded on the same facts or form or are part of a series of offences of the same or similar character, they ought to be charged together.
>
> (2) The court has the discretion to direct that offences in the same charge or information be tried separately where it is of the opinion that the accused may be embarrassed in his defence or for any other reason it is undesirable.
>
> (3) …….
>
> (4) It is undesirable to have separable trials as it denies the court the opportunity to look at the accused vis-à-vis the series of offences as a whole when sentencing.
>
> (5) ……"

Without going into the facts of the NGIBUINI case (supra), the two counts with which the appellant herein was charged form part of a series of offences of the same or similar character and in my view, the

prosecution was perfectly right in charging the appellant with the two offences together in the same charge sheet. I would therefore find no reason to order that the two counts should have been charged separately. There is no prejudice caused to the appellant. Mr. Kimathi's contention that the fact of the two counts appearing in the same charge caused prejudice to the appellant has no basis. To the contrary the appellant stood to gain from this state of affairs as the same would have the effect of affording the appellant the possibility of the trial court exercising in his favour the sentencing discretion provided for in section 14 of The Criminal procedure Code which provides as follow:-

> **"14. (1) Subject to the provisions of sub section (3) when a person is convicted at one trial of two or more distinct offences, the court may sentence him for those offences, to the several punishments prescribed therefore which the court is competent to impose; and those punishments when consisting of imprisonment shall commence one after the expiration of the other in the order the court may direct, unless the court directs that the punishments shall run concurrently.**
>
> **(3) For the purposes of appeal, the aggregate of consecutive sentences imposed under this section in case of convictions for several offences at one trial shall be deemed to be a single sentence."**

The above are the benefits accruing to the appellant from being charged for the two offences in the same charge sheet.

The sum total of what I have said is that I allow the appeal to the conviction on each of the two counts is quashed and the sentences set aside. The case is referred back to Mr. J. Omburah Senior Resident Magistrate for retrial. It is so ordered.

Dated and delivered at Meru this 20th day of Dec. 2004.

RUTH N. SITATI

Ag JUDGE