



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CRIMINAL CASE NO. 35 OF 2020

REPUBLIC.....STATE

VERSUS

JONATHAN KIPKOGEL.....ACCUSED

JUDGMENT

The appellant herein, one *Jonathan Kipkoge* was charged in the lower court with two counts;-

1. Creating disturbance in a manner likely to cause a breach of the peace, contrary to *Section 95(1) (b) of the Penal Code*.

The particulars of this offence being that on the 5th day of July 2020 at Ibanja Sub location, within Nandi county, the applicant herein created a disturbance in a manner likely to cause a breach of the peace by threatening to beat John Sigoei who is his father, while armed with an axe.

2. Malicious damage to property contrary to *Section 339(1) as read with Section (2) (9) of the Penal Code*.

The particulars herein being that on the 5th day of July 2020 at Ibanja sub location within Nandi county, the applicant herein willfully and unlawfully destroyed the windows valued at Kshs. 7,500/- of the dwelling house of *John Sigoei*, by using an axe.

The appellant was arraigned in court on 6/7/2020 where the charges were read to him and interpreted in Swahili language to which he responded in Swahili and agreed to both offences. The court as expected entered a plea of guilty against him on both counts.

The photographs in relation to count 2 were not available then and facts were deferred to 13/7/2020. On 13/7/2020 the applicant was not produced and matter was deferred to 16/7/2020. On this day, the prosecution informed the court that the complainant wished to withdraw the complaint and prayed for another date for such as the complainant was not in court then. The court declined the application and ordered facts to be stated. The facts were read as follows:-

On the night of 4th July at 12.30 a.m at Ibanja Sub Location, the complainant who is the accused person's father was asleep when he heard accused person shouting and hitting the door from outside. Accused person was demanding for a panga. At some point the accused picked an axe from the kitchen and broke the door using the axe. The complainant servant and neighbor went and privately arrested accused person. The photos of the damaged door was availed.

The appellant responded to the facts and stated:-

“The facts are true”.

The court entered a plea of guilty and convicted the appellant on own plea of guilty. The state prosecutor indicated there were no previous records.

The appellant in mitigation indicated that he was drunk.

The court indicated that the accused was a first offender and sentenced him on the first count to 30 days in prison and on the 2nd count to 6 months imprisonment. The prison terms are to run concurrently.

The appellant dissatisfied with the said conviction and sentences, appealed to this court on the grounds that:-

1. **The learned trial magistrate erred in law and fact in handing over 6 months sentence against the appellant.**
2. **The appellant's mitigation was not considered.**
3. **The learned trial magistrate erred in law and fact in failing to consider whether the appellant understood the language and the nature of the offence facing him.**
4. **The appellant mental status at the time of taking plea was not considered.**

The appellant in his submissions abandoned ground 3 of the appeal and argued grounds 1, 2 and 4 briefly. He averred that the indication that the complainant who is his father, wished to withdraw the complaint confused him as he did not know when that was to happen. The plea was therefore equivocal.

On ground 2 and 4 it was submitted that the appellant was drunk during commission of the alleged offences. The trial court ought to have weighed his mental status at the time of the offence. Such was not weighed. He is a first offender who have already served 3 months in prison and the appeal ought be allowed. The prosecution opposed the appeal on the grounds that the appellant pleaded guilty to the offences and was convicted. The plea process was in a language he understood and there was nothing to suggest that he was mentally unfit to plead. Intention by the complainant to withdraw the matter does not bar the court from proceeding with it. The conviction was safe and the sentences lenient. They urged the court to dismiss the appeal.

In all criminal matters, for a conviction to be rightly made or entered against an accused person, the facts of the case or the evidence must disclose an offence as charged. This was so held in the case of *Kevero -vs- Republic, Criminal Appeal No. 77 of 2015.*

In the appeal herein, the facts of the offence in the first court reads:-

“On the 5th day of July 2020 at Ibanja Sub-location, within Nandi County, the appellant herein created a disturbance in a manner likely to cause a breach of the peace by threatening to beat John Sigoei who is his father, while armed with an axe.

On the second count the facts reads:-

“On 5th day of July, 2020 at Ibanja Sub location within Nandi County, the appellant herein willfully and unlawfully destroyed windows valued at Kshs. 7,500/- of the dwelling house of John Sigoei, by using an axe.”

The facts which were read to the appellant and which applied to both counts, are:-

“On the night of 4th July at 12:30 am at Ibanja Sub-location, the complainant who is the accused person's father was asleep when he heard accused person shouting and hitting the door from outside. Accused person was demanding for a panga. At some point the accused picked an axe from the kitchen and broke the door using the axe. The complainant servant and neighbor went and privately arrested accused person.”

The photos of the damaged door was availed. The foregoing facts do not disclose that the appellant threatened to attack or beat his father, one John Sigoei, while armed with an axe. They disclose what the appellant wanted is a panga from his father. To the said extent the facts as read do not disclose an offence as charged in count 1.

On the second count the facts discloses that what the appellant destroyed was the door and even photos of the broken door were produced as exhibit. However the facts in the second count, in the charge sheet, alleges that the appellant destroyed windows valued at Kshs.7,500/-. Definitely the facts as were stated does not disclose an offence as charged in the second count.

Following the foregoing consideration, it is clear that the plea of guilty by the appellant on both counts is equivocal. It was not safe as alleged by the prosecution. The same should be vacated. The appeal is therefore merited and is allowed. Conviction is quashed and the sentences vacated.

The appellant has been in prison since 16/7/2020. The complainant had expressed wish to withdraw the charge of which if was allowed would have set the appellant at liberty. A retrial in the circumstances cannot be in the interest of justice. The appellant is therefore set free unless otherwise lawfully held.

S. M GITHINJI

JUDGE

DATED, SIGNED and DELIVERED at ELDORET this 11th day of November, 2020.

In the presence of:-

Mr. Misoi for the appellant

Ms. Limo for state

Ms Gladys - Court assistant