

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO. 77 OF 2016

PETER MBURU.....APPELLANT

VERSUS

REPUBLICRESPONDENT

(Being an appeal from the original conviction and sentence in the Chief Magistrate's Court at Kibera Cr. Case No. 39 of 2016 delivered by Hon. C. Ondieki, RM on 26th April, 2016)

JUDGMENT

The Appellant was charged with the offence of malicious damage to property contrary to **Section 339(1) of the Penal Code**. It was alleged that on 1st January, 2016, at Kiserian Township within Kajiado County, willfully and unlawfully damaged a window pane valued at Kshs. 500/= the property of Charles Gitau Mwaura.

The Appellant was first presented in court on 5th January, 2016. It is noteworthy that this date in the typed proceedings is shown as 5th October, 2016. The Appellant pleaded not guilty and was released on a cash bail of Kshs. 10,000/=. On 4th February, 2016, the Appellant pleaded guilty and was convicted on his own plea of guilty. After the facts were read, he informed the court that he was mentally ill and was usually treated at Mathari Mental Hospital. The court ordered that he be committed to the hospital and be brought back to court on 10th February, 2016. Pursuant to the order of the court, a psychiatrist report was filed from the hospital by Dr. Mucheru Wang'ombe dated 17th February, 2016. The same indicated that the Appellant was not fit to plead owing to his mental incapacitation. He had been admitted to the facility between 29th January, 2012 and 2nd February, 2012 for alcohol use disorder. On presentation of this report to court on 17th February, 2016 the court further committed the Appellant to the mental facility to continue with his medication. In an interesting turn of events, on 26th April, 2016, the court found the Appellant guilty of the offence of malicious damage to property and convicted him accordingly. It noted that he was insane at the time he committed the offence and therefore ordered that he be held in prison at the pleasure of the president. It is on this basis that the Appellant has been in prison and filed the instant appeal.

His only ground of appeal is that he committed the offence when he was mentally insane and therefore was not criminally liable. Pursuant to this, the plea of guilty entered was not unequivocal. He urged the court to either set him free or order a retrial.

Learned State Counsel, Miss Kimiri did not oppose the appeal. She noted that the Appellant having committed the offence when he was mentally unstable the court ought to have set him free on humanitarian grounds. She urged the court to take into account the nature of the offence which was minor and that considering the period the Appellant has served in prison, it was only fair to have him released.

I have accordingly considered the appeal and the respective submissions. It is trite that the Appellant was convicted at a time when he was mentally unstable. He was therefore not in a position to comprehend what he was doing at the time he committed the offence. I note that the Appellant took plea

on 4th February, 2016 and it was at the time he was asked to respond to the facts of the case that informed the court that he was mentally ill. The court accordingly referred him to Mathari Mental Hospital where he was receiving treatment. When a mental report was presented to court on 17th February, 2017, it showed that the Appellant was not mentally fit to take plea. At this juncture, the court ought to have expunged the proceedings it had recorded on 4th February, 2016 and ordered for a mental treatment of the Appellant. I have also noted that the progress report from Mathari Hospital dated 21st April, 2016 certified that he Appellant had since been treated and was fit to plead. At that moment the court would have proceeded to take a plea. However, based on the mental report of 17th February, 2016, if the Appellant pleaded guilty, the court would nevertheless have found him guilty but noted that he was mentally sick at the time he committed the offence and accordingly made appropriate orders. Unfortunately, the plea was taken when the Appellant was not mentally fit to comprehend the proceedings of the court. Therefore, the trial process was ultimately a nullity. This notwithstanding, a retrial would not serve justice as the Appellant has been serving an illegal sentence since 21st April, 2016. It is for this reason that this appeal must succeed.

I quash the conviction and set aside the sentence. I order that the Appellant be forthwith set free unless otherwise lawfully held. It is so ordered.

Dated and Delivered at Nairobi this 12th June, 2017.

G.W. NGENYE-MACHARIA

JUDGE

In the presence of:

- 1. Appellant present in person.*
- 2. Ms. Sigei for the Respondent.*