



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL APPEAL NO. 87 OF 1994

WILLIAM MAKERE KENES.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The appellant was charged in the lower court with the offence of contempt of court contrary to section 121 (1) (b) of the Penal Code. He allegedly pleaded guilty. Facts were outlined and he allegedly accepted the same and he was convicted on own plea and sentenced to serve six months imprisonment.

Being aggrieved with that decision he has now appealed to this Court on 4 grounds of appeal namely;

That the learned Resident Magistrate erred in law in convicting the appellant when the plea was not unequivocal, the learned Resident Magistrate erred in law in convicting the appellant when there was no evidence on record that there was an order of prohibition from the High Court in HC P&A 55/91 which had prohibited the appellant from being in possession of the suit land Irong/Sergoit/777, the learned Resident Magistrate erred in law in failing to enquire and find out if there was a court order in force which had been served upon the appellant and the appellant had flouted the said court order, the learned Resident Magistrate erred in law in failing to take judicial notice of the fact that the wrong procedure had been followed in charging the appellant with the offence of contempt of court when there was no motion in the High Court filed asking the Court to grant leave for the prosecution of the appellant for contempt of court.

The 4 grounds were argued separately. The first one has attacked the plea taking while the rest have argued that the facts of the case herein do not either fall into civil contempt of court or criminal contempt of court.

The State on the other hand supports that conviction on the grounds that plea was properly taken, facts given accepted and as such conviction was proper and that the sentence is very lenient.

Having heard submissions of both parties and having assessed the evidence on the record I find that appellant replied; "it is true" when the charge was read to him. It was held in the case of *Wanjiru vs Republic* [1975] EA 5 that the words 'it is true' may not amount to a plea of guilty.

However, where there was followed by narration of facts and the appellant accepts the facts narrated and a conviction is based on these facts the same is deemed to be unequivocal and proper. In this case the facts were outlined and appellant qualified them and gave an explanation. Where an accused person gives

an explanation and qualifies the facts it means that he is not accepting the facts and a plea of not guilty should be entered.

In this case since the appellant qualified the facts and gave an explanation he brought himself within the ambit of the principles in *Aden vs Republic* [1973] EA 445 and a plea of guilty should have been recorded.

Coming on to the contention that facts do not disclose the offence I agree that there are 2 aspects of contempt of court one based on court proceedings and another based on criminal procedure. The procedure to be followed in civil proceedings relating to contempt of court in the case of *Mwangi H C Wangonde vs Nairobi City Commission* CA No 95/88 (Nai). Had the proceedings been conducted in respect of P&A 55/91 then it would have been mandatory to applicant to seek leave to file the same, take steps to serve personally on the breaching party the order alleged to be breached, accompany it with a notice of penal consequences and after which is when contempt proceedings can be served.

The Court herein proceeded under section 121(1) (b) of the Penal Code. I have perused the same and I agree with the submission of the appellant's counsel that it donates a situation where the offending party is a party to the proceedings from which the offence arises. In this case it has been argued that the appellant was not party to these proceedings in P&A 55/91 and as such section 121 (1) (b) could not have been invoked.

This coupled with the fact that the plea was not properly taken makes the conviction unsafe.

For the reasons given the appeal is allowed, conviction set aside and sentence quashed.

The appellant is ordered to be set at liberty forthwith unless otherwise lawfully held.

The dispute seems to relate to inheritance of land and the parties should be advised to file appropriate proceedings to determine their rights. If the appellant feels that the step mother should not take the land wholly he should take steps to challenge the succession proceedings and after his rights have been adjudicated upon is when he can take steps to get

his rightful share. He would be advised not to take the law into his own hands. These sentiments of the court should be brought to his attention by his counsel.

Orders accordingly.

Dated and Delivered at Eldoret this 6th day of June 1994.

R.NAMBUYE

JUDGE