



REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

CRIMINAL APPEAL NO. 1072 OF 1986

JANE WAIRIMU NGIGIAPPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from the Resident Magistrate's Court at Naivasha, Githinji Esq)

JUDGMENT

The appellant was convicted of wilfully and unlawfully damaging property contrary to section 339(1) of the Penal Code (cap 63) and in count 2 of creating disturbance in a manner likely to cause breach of peace contrary to section 95(1) of the Penal Code. She was sentenced to 12 months' imprisonment on count one and 6 months' imprisonment in count 2. The sentences were to be concurrent. She has appealed to this court against the conviction and the sentence.

The facts are that during the night of July 26, 1986, the complainant was asleep in his house when at about 2.00 am the appellant knocked at his door requesting him to open it. However, fearing that she might be with thugs the complainant refused to open the door. It appears that she became angry and went away only to come back later at about 3.00 am and smashed two window panes of the complainant's house. Before going away she locked his door from outside using a padlock. On the following morning the complainant could not open his door until about 8.00 am when he managed to attract the attention of a neighbour to break the padlock. The complainant reported the incident to police who arrested the appellant.

When the appellant came before the resident magistrate, Naivasha, she pleaded guilty to the both counts of the charge and she was convicted and sentenced.

The appellant has now appealed through M S Kibunja & Co, Advocates, of Nairobi, and has advanced four grounds of appeal on which she seeks to attack the trial court's conviction and the sentence.

Before considering each of the grounds of the appeal raised by the appellant the question that I have to review first is whether the appellant has any right at all to appeal against conviction seeing or bearing in mind the fact that she pleaded guilty to both counts of the charge. Mr Maosa who appeared before me on her behalf argued that this plea was not unequivocal and cited the case of *Yonasi Esalu and 3 others v Rex* and that of *Kalumo*

Mulumba v Republic [1967] EA (K) 397. In view of the challenge to the pleas I consider it necessary to set out in full the relevant portion of the record of the proceedings which is as follows:

“The substance of the charge and every element of it / then has been stated by the court to the

accused person who being asked whether he/they admit or denies/deny the truth of every element of the charge replies/reply Accused:

Count 1: I admit the charge. I broke window panes.

Count 2: I admit the charge

I locked him from outside.

PROSECUTION:

On July 26, 1986 late in the night the complainant was asleep in his house. The accused person went to the

complainant's house and knocked the door requesting the complainant to open the door for her. The complainant refused to open the door as it was around 2.00 am and he was suspicious that the accused could have gone with thugs. Accused went away and came back later at 3.00 am. She smashed two window panes valued at Kshs 160. The accused then using a padlock locked the complainant inside his house from outside and went away. The complainant went to check and found the door locked from outside. He waited for people to pass by. The following morning at 8.00 am a neighbour passed by and complainant sought his help. The neighbour then broke the padlock which was locked on the outside and the complainant came out of his house. He made a report to the police and after investigations the accused was arrested and charged.

Accused: The facts are all true.

Court: Accused convicted on own plea of guilty

Prosecution: The accused was convicted before this court on a charge of creating a disturbance and discharged on condition that she be of good behavior for one year. This was May, 1985, and complainant was the same person.

Accused: It is true. I was convicted but I was of good behaviour for one year ending June, 1986.

Accused in mitigation: I was drunk and had taken beer at Equator inn.

Court: Offences serious and prevalent. Accused not remorseful with one previous relevant conviction. Accused very daring custodial sentence as a deterrent.”

From the above it is clear that the learned Resident Magistrate strictly complied with the provisions laid in *Adan v Republic* [1973] EA 445. After the charge had been read and all the ingredients thereof had been explained the appellant not only said she admitted but qualified the same by saying she broke the window panes in respect to count one and that she locked him from outside in count 2.

The facts of the case were enumerated and at the end of it she again told the court that the facts were all true and was then convicted. She also admitted a previous relevant conviction as true and in mitigation she told the court that she was drunk. This statement of being drunk in my mind was meant by her to be pure-mitigating factor and not a change of plea and if she had wanted to change her plea she would have done so when she was given opportunity after the facts of the case had been stated.

The case of (1) *Yonasi Egalu*, (2) *Obula S/O Emwalu*, (3) *Ogutu S/O Okolodyan*, (4) *Yoweri Arweu v Republic* cited to me differs from the instant case. At page 67 the court said:

“Finally, we would observe that in view of the nature of the charge, and the paucity of particulars

given in the information we regard the pleas of the second, third and fourth appellants as somewhat scantily recorded.”

This observation cannot be applied to the record of the proceedings in the instant case. This record is complete with all particulars and as stated earlier on, it complies with the procedure of recording of pleas laid down in *Adan's* case. It is this observation which led the court to state in the sentence that followed:

“In any case in which a conviction is likely to proceed on a plea of guilty (in other words when an admission by the accused is to be allowed to take place of otherwise necessary strict proof of the charge beyond reasonable doubt by the prosecution), it is most desirable not only that every constituent of the charge should be explained to the accused but that he should be required to admit or deny every element of it unequivocally. In the present instance no particulars at all were given in the information as to how the accused had made themselves accessories.”

The particulars in this case were lacking.

As regards the case of *Kalumo Mulumba v Republic* [1957] EA (K) 397, the appellant had stated in plea:

“It is true I cut him with a knife.” After the prosecutor had given the facts the appellant said:

“We were drinking beer at the house of the complainant. I cut the string of his bow and also his chest.”

In his appeal the appellant expanded his explanation and said that as they were drinking at the complainant's house, the complainant threatened him with a bow, and arrow and he cut the string of the bow with a knife which was lying nearby and at the same time cut the complainant's chest unintentionally. The court held that that plea as it stood was capable of being construed as an unequivocal plea of guilty as well as an admission that he caused the injury stated in the charge without admitting that this was done in the circumstances that amounted to an offence.

In the instant case there is no ambiguity in the construction of the plea of the appellant. For the above reasons I hold that the appellant's plea was an unequivocal plea of guilty and for this reason the appellant is barred by section 348 of Criminal Procedure Code (cap 75) from challenging the conviction.

As to the appeal against the sentence I consider that the sentence of 12 months for the offence of willfully and unlawfully damaging two window panes is on the higher side in the circumstances and especially as the appellant claims to have been drunk. There appear to have been some relationship between the appellant and the complainant which made the appellant to knock at this house at night.

The second count of creating disturbance is related to the first count.

In the circumstances I reduce this sentence to the extent that she is immediately released.

Dated and delivered at Nairobi this 6th day of March, 1987.

B. K. TANUI

JUDGE