REPUBLIC OF KENYA

Kioga v Republic

Court of Appeal, at Nyeri May 20, 1985

Simpson CJ, Nyarangi JA & Gachuhi Ag JA

Criminal Appeal No 163 of 1984

(Appeal from the High Court at Nyeri, VV Patel J)

May 20, 1985, Simpson CJ, Nyarangi JA & Gachuhi Ag JA delivered the following Judgment.

On May 14, 1982 the appellant was charged before the senior resident magistrate, Meru with the offence of willfully and unlawfully damaging property contrary to section 339(1) of the Penal Code (cap 63). He pleaded not guilty and according to the proceedings before the senior resident magistrate was released on bond of Kshs 5,000 on his own undertaking not to go to the material property before the trial. The bond was subsequently extended to the 20th day of July 1982 when the court prosecutor extended to the 20th day of July 1982 when the court prosecutor told the court that notwithstanding the undertaking the appellant went to the shamba with other persons on the 18th day of May 1982 to survey the land. The advocate then appearing for the appellant told the court in reply that the parties had agreed to seek reconciliation and that they had discussed and decided that the complaint would show the appellant.

> ***"The other side and the accused will be shown the place where to put up the building".***

The prosecutor observed that the complaint was too serious for reconciliation under section 176 of the Criminal Procedure Code (cap75) and the senior resident magistrate enquired of the advocate for the appellant what the position regarding a breach of undertaking was. The advocate having taken instructions, is recorded as stating as follows:

> ***"It is so the surveyors went to this land on Friday. The accused had no intention whatsoever of going against the court orders. Sometimes back the accused had made an application to the land registrar to have the piece of land in dispute between the complainant and the accused sub-divided.***
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> ***I am informed the application had been made in February this year. The consent to subdivide was obtained from the land registrar and on Friday the surveyors came to see the accused and asked him to show them the land. He was told it was the only day the surveyors were available. The accused is sorry. He had no intention of interfering with the investigation in any way. It was a case of malicious damage to property-not to do with the land. He did not attempt in any way to interfere with the place where the house was constructed. He did nothing prejudicial to the house in this case. I ask the court to proceed under section 176 Criminal Procedure Code".***

The senior resident magistrate was not in the least impressed by the explanation offered on behalf of the appellant by his advocate and made an order that the amount of the bond, ie Kshs 5,000 be forfeited and be paid to court. Later that after noon, Mr Mbaya appearing for the appellant told the senior magistrate that he had been asked by the accused to apologise among other things for :

> ***"The breach of his undertaking."***

The appellant's appeal to the High Court (VV Patel, J) was dismissed. The second appeal to this court is on the grounds which may be summarized as follows: the judge erred in implying that evidence on oath is

not required under section 131 of the Criminal Procedure Code, erred in not holding that it was wrong for the senior resident magistrate to order forfeiture of the bond on the statement of the prosecutor, in finding that the appellant had admitted breaching the undertaking and the judge erred in not reviewing the conditions of the bond and in failing to notice that the conditions of the bond were not stated in the court record.

The point of law raised in this appeal is whether under section 131(1) of the Criminal Procedure Code proof to the satisfaction of a court by which a recognizance has been taken requires evidence on oath as in section 130. All that a court requires under section 131(1) is proof to its satisfaction. There is no express indication how the proof is to be attained. That is in sharp contrast to section 130 where a court acts only on information on oath. An admission, oral or written, by an accused person would in certain circumstances constitute proof to satisfaction. A statement made by an agent to a party to a proceeding in terms of section 18(1) of the Evidence Act (cap 80) would be an admission, to the satisfaction of a court.

Mr Mwirigi who appeared for the appellant on July 20, 1982 was an agent of the appellant with the scope of authority usually possessed by advocates and the senior resident could properly regard the advocate as having been authorized, after he took instructions, to make the admissions on behalf of the appellant . Mr Mwirigi as advocte of the appellant admitted that the appellant and surveyors went to the land in connection with the appellant's application for sub-division. There was no excuse for the appellant's act. He had undertaken not to go to the land until the trial. The surveyors did not force him to take them there. The appellant led the surveyors to the land no doubt to carry out the survey and sub-division. That was contrary to his undertaking. It is immaterial that the appellant did not interfere with the particular site of the house. The purpose of the order stopping the appellant from going to the land until the trial must have been to eschew any further disturbance. The forfeiture of the recognizance was complete when the appellant, as he admits, went to the land. The second advocate of the appellant apologized to the trial court:

> ***"for the breach of his undertaking".***

A clear feeling of guilt on the part of the appellant. It was an admission to the fact of breach and not on a point of law: Pushpa v The Fleet Transport Company [1960] EA. 1025, and is therefore so binding on the appellant as to make the admission a matter of estoppel.

When under section 131(1) there is a dispute as to whether a recognizance has been forfeited, oral evidence or information on oath or both would be required to establish proof to the satisfaction of the court.

We must comment upon the deplorable conduct of the appellant in leaving the dock and walking to the cells, without being so ordered by the senior resident magistrate thus interrupting the proceedings. We are consoled by the happy knowledge that such conduct is virtually unknown to the advocates.

The appeal is without any merit. It is dismissed. That is the order of the court.