



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT BUSIA**

**CRIMINAL APPEAL NO. 33 OF 2017**

**IAN KARANI WAMBOMA.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(From the original conviction and sentence in Criminal Case No.274C of 2017 of the Chief Magistrate's Court at Busia by Hon. M.A Nanzushi-Senior Resident Magistrate)*

**JUDGMENT**

1. **IAN KARANI WAMBOMA** the appellant, was convicted after pleading guilty to the offence of hate speech contrary to section 13 (1) (b) as read with subsection 2 of the National Cohesion and Integration Act No. 12 of 2008.

2. The particulars of the offence were that on 18<sup>th</sup> July 2017 at unknown place in the Republic of Kenya he published two hundred and forty eight (248) leaflets to wit **“watu wa Jubilee wahame Busia County mara moja or else watakiona”**, words which were intended to stir up ethnic hatred between jubilee supporters and other political party supporters.

3. He was sentenced to pay a fine of Kshs.500, 000/= or serve 2<sup>1/2</sup> years imprisonment. He now appeals against the conviction and the sentence.

4. The appellant was represented by Mr. Okeyo, learned counsel. He raised the following grounds:

- a) That the trial magistrate erred in law and in facts by convicting the appellant without sufficient evidence.
- b) That the trial magistrate erred in law and in facts by convicting the appellant on an equivocal plea.
- c) That the trial magistrate erred in law and in facts by failing to appreciate that the facts of the charge were not supported by the evidence adduced.
- d) That the trial magistrate erred in law and in facts by convicting the appellant on a defective charge.
- e) That the trial magistrate erred in law and in facts by failing to appreciate that the appellant had varied the facts during mitigation.
- f) That the trial magistrate erred in law and in facts by convicting the appellant without jurisdiction.

5. The state opposed the appeal through Mr. Omayo, learned counsel.

6. The facts of the prosecution case were briefly as follows:

On 18<sup>th</sup> July 2017, police officers received information that a group of people were planning to travel to Malaba from Webuye to burn Jubilee tee shirts and caps in full glare of cameras. They were also to distribute leaflets to warn Jubilee supporters to leave Busia which was a **NASA** zone. Police laid an ambush. The appellant was arrested with a luggage. When the luggage was searched, it contained 8 Jubilee tee shirts, 5 Jubilee caps and 248 leaflets which read as follows:

**“Watu wa Jubilee wahame Busia County mara moja or else watakiona”**

7. He pleaded guilty to the offence.

8. Section 348 of the Criminal Procedure Code provides as follows:

***No appeal shall be allowed in the case of an accused person who has pleaded guilty and has been convicted on that plea by a subordinate court, except as to the extent or legality of the sentence.***

In the instant case I will endeavour to establish whether the appeal by the appellant satisfies this section.

9. Section 13 (1) (b) of provides as follows:

***(1) A person who—***

***(b) publishes or distributes written material; which is threatening, abusive or insulting or involves the use of threatening, abusive or insulting words or behavior commits an offence if such person intends thereby to stir up ethnic hatred, or having regard to all the circumstances, ethnic hatred is likely to be stirred up.***

The sentence is provided at subsection 2 as follows:

***(2) Any person who commits an offence under this section shall be liable to a fine not exceeding one million shillings or to imprisonment for a term not exceeding three years or to both.***

10. The reality of Kenyan politics is that the political parties are formed and run along ethnic lines. However, it would be overstretching the ambit of the National Cohesion and Integration Act No. 12 of 2008 to charge political offences under the Act unless where the utterances are clearly and unequivocally directed to some ethnic group or groups. The preamble to the Act states the purpose of the Act in the following terms:

***An Act of Parliament to encourage national cohesion and integration by outlawing discrimination on ethnic grounds; to provide for the establishment, powers and functions of the National Cohesion and Integration Commission, and for connected purposes.***

11. In his mitigation, the appellant offered an explanation that qualified his plea. The plea was equivocal. The learned trial magistrate ought to have entered a plea of not guilty and set the matter for hearing.

12. I therefore quash the conviction and set aside the sentence. The matter will be remitted to Busia Chief Magistrate for a fresh plea. The appellant to be taken to the Chief Magistrate's Court On 5<sup>th</sup> June 2018 for that purpose. The plea and the hearing thereof to be by any magistrate of competent jurisdiction other than Hon. Martha Nanzushi

**DELIVERED and SIGNED at BUSIA this 29<sup>th</sup> day of May, 2018**

**KIARIE WAWERU KIARIE**

**JUDGE**