



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO.100 OF 2011

(An Appeal arising out of the conviction and sentence of Hon. J. OLE TAMAR - RM delivered on 22nd March 2011 in Makadara CMC. CR. Case No.2188 of 2009)

DANIEL IKENYE MUHOHO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant, Daniel Ikenye Muhoho was charged with the offence of **assaulting a police officer** contrary to **Section 253(a)** of the **Penal Code**. The particulars of the offence were that on 25th May 2009 at Roysambu along Thika Road in Nairobi County, the Appellant unlawfully assaulted No.76247 PC Charles Kiprotich thereby occasioning him actual bodily harm. The Appellant was further charged with the offence of **willfully obstructing a police officer in the due execution of his duty** contrary to **Section 253(b)** of the **Penal Code**. The particulars of the offence were that on the same day, and in the same place, the Appellant willfully obstructed No.76247 PC Charles Kiprotich (the complainant), a police officer who at the time of the said obstruction was acting in the due execution of his duty. When the Appellant was arraigned before the trial magistrate's court, he pleaded not guilty to the charge. After full trial, he was convicted as charged on both counts. He was sentenced to serve six (6) months imprisonment. He was aggrieved by his conviction and sentence. He filed an appeal to this court. Pending the hearing and determination of the appeal, the Appellant was released on bail pending appeal.

In his petition of appeal, the Appellant raised several grounds of appeal challenging his conviction and sentence. He was aggrieved that he had been convicted on the basis of insufficient prosecution evidence that did not support or establish the charges to the required standard of proof. The Appellant was of the view that the verdict was reached against the weight of evidence. He took issue with the manner in which the trial court relied on inconsistent medical evidence which did not support the complainant's allegations that he had been hit with a blunt object. The Appellant faulted the trial magistrate for raising the issue of self defence in his judgment when the same had not been raised by any of the parties in the trial. The Appellant was of the view that the trial court was biased against him in the manner in which the entire trial was conducted. The Appellant was aggrieved that the trial court failed to consider the existence of bad blood between the Appellant and Traffic police officers based at Kasarani Police Station who were bent on frustrating his transport business. The Appellant faulted the trial magistrate for failing to consider his defence before reaching the impugned determination. He accused the trial court for ignoring a decision of the High Court in **Judicial Review Application No.473 of 2008** that prohibited the police from harassing the Appellant. In the premises therefore, the Appellant urged the court to allow the appeal, quash the conviction and set aside the sentence that was imposed upon him.

During the hearing of the appeal, this court heard oral rival submission made by Mr. Thuku for the Appellant and by Ms. Nyauncho for the State. Prior to the hearing of the appeal, the parties to this appeal filed written submission in support of their respective opposing positions. Mr. Thuku submitted that the trial court erred in finding the Appellant guilty of the charges that were brought against him in the absence of any cogent evidence. In particular, he accused the trial court of introducing the theory of self-defence to explain away the Appellant's assault by the complainant. This was despite the fact that the complainant himself denied that he had attacked the Appellant. Learned counsel submitted that the trial court ignored medical evidence that was produced by Dr. Barae of MP Shah Hospital which established that the Appellant had indeed been assaulted on the material day. He took issue with the manner in which the trial court interpreted this evidence and gave it a spin that it was caused by the Appellant when he reacted in self-defence. He explained that the trial court did not take into consideration the fact that the evidence adduced by the complainant was that of a single witness. There was no other eye witness. It was the Appellant's story as compared to that of the complainant. No reason was given why the trial court believed the testimony of the complainant and disbelieved that of the Appellant.

Learned counsel urged the court to consider the events that took place on the material day in light of the order that was issued by the High Court in **Judicial Review Miscellaneous Application No.473 of 2008** where the court had restrained the District Traffic Officer, Kasarani from harassing him in the conduct of his transport business. He submitted that the police officers from Kasarani arrested him as a result of the bad blood that existed between him and the said traffic officers. He urged the court to take into consideration the fact that the trial court was biased against the Appellant in the manner in which he conducted the trial. Mr. Thuku submitted that the evidence adduced before the

trial court, taken in totality, showed that the prosecution did not establish its case to the required standard of proof. He urged the court to allow the appeal.

Ms. Nyauncho for the State opposed the appeal. She submitted that the evidence adduced by the complainant and other prosecution witnesses was credible, corroborated and was not shaken during cross-examination. She explained that the complainant was assaulted by the Appellant while in the course of his duty. The complainant had stopped a motor vehicle owned by the Appellant for infringing traffic rules. The Appellant arrived at the scene and identified himself as the owner of the motor vehicle. The complainant entered the motor vehicle and instructed the driver to drive the motor vehicle to the police station. The Appellant accompanied them. Instead of driving into the police station, the Appellant instructed the driver to drive past the police station towards the Thika direction. It was then that the complainant was assaulted by the Appellant. He managed to jump off from the vehicle and sought medical assistance.

Ms. Nyauncho submitted that the prosecution proved the two counts to the required standard of proof. She denied the Appellant's assertion that the trial court was biased against him. On the issue of the court order issued by the High Court, she submitted that the order did not prevent the police from taking action when a criminal act had been committed. On sentence, she explained that the same was lenient as the maximum sentence provided by the law is five (5) years imprisonment on each of the counts. She urged the court to dismiss the appeal as it lacked merit.

This being a first appeal, it is the duty of this court to reconsider and to re-evaluate the evidence adduced before the trial court so as to reach its own independent determination whether or not to uphold the conviction of the Appellant. As was held by the Court of Appeal in **Njoroge -Vs- Republic [1987] KLR 19 at P.22:**

“As this court has constantly explained, it is the duty of the first appellate court to remember that the parties to the court are entitled, as well as on the questions of facts as on questions of law, to demand a decision of the court of first appeal, and that court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions though it should always bear in mind that it has neither seen or heard the witnesses and to make due allowance in this respect (see Pandya v R [1957] EA 336, Ruwala v R [1957] EA 570)”.

In the present appeal, the issue for determination by this court is whether the prosecution established the case against the Appellant on the charge of assaulting a police officer contrary to **Section 253(a)** of the **Penal Code** and **willfully obstructing a police officer in the due execution of his duty** contrary to **Section 253(b)** of the **Penal Code** to the required standard of proof beyond any reasonable doubt.

This court has carefully re-evaluated the evidence adduced before the trial court. It has also considered the submission made before this court, both oral and written. The Appellant was charged with two offences. The 1st count is that of assaulting a police officer. The complainant testified that on 25th May 2009 while he was on duty along Thika Road with his colleagues PW2 PC Detrus Mwaniki and PW3 PC Benson Nasogo, he stopped motor vehicle Registration No. KAW 562X Nissan matatu. On inspection, he noted that the said motor vehicle had breached several traffic rules including playing loud music. The driver not having a PSV licence. He entered the motor vehicle and ordered the passengers to alight. He then instructed the driver to drive the motor vehicle to Kasarani Police Station. The Appellant arrived at the scene and identified himself as the owner of the motor vehicle. He accompanied them in the motor vehicle.

The Appellant ordered the driver to drive the motor vehicle past the police station at a high speed. Meanwhile, the Appellant assaulted the police officer by hitting him on his head and neck. He threatened to kill him. Realizing that his life was in danger, the complainant jumped out of the moving vehicle. He called his colleagues for reinforcement. He realized that he had been injured. He went to Trinity Medical Centre Kasarani where he was treated and later discharged. The injury sustained by the complainant on the material day was confirmed by PW5 Dr. Zephania Kamau who noted that the complainant had sustained injuries on his back, neck and right shoulder. The injuries were caused by a blunt object. He assessed the degree of injury as harm. He produced the P3 form as an exhibit in the case.

The Appellant disputes this version of event by the complainant. He testified that when he entered the motor vehicle, he asked the complainant what traffic rules the motor vehicle had broken. The complainant told him that he wanted the motor vehicle taken to the police station. While in the motor vehicle, the complainant demanded a bribe of Kshs.5,000/-. He refused to pay because he had a court order which prohibited the police from harassing him. The Appellant testified that the complainant beat him. He went to MP Shah where he was treated and discharged. The Appellant called DW2 Dr. Samuel Bavae who confirmed that the Appellant was treated at the said hospital on 25th May 2009. The medical treatment notes were produced into evidence. The Appellant explained that he did not have a P3 form because the same was not issued to him by the police. He denied assaulting the complainant.

It was clear from the evidence adduced by both the Appellant and the complainant that the Appellant entered the motor vehicle when he was informed that it was being driven to the police station. The Appellant was under the mistaken belief that since he had obtained a court order that prohibited the police officers based at Kasarani Police Station from harassing him, then it meant that his motor vehicle could not be detained under any circumstances even if the police noted that traffic rules had been infringed. This led the Appellant to resist the complainant's instructions to have the motor vehicle driven to Kasarani Police Station. This court's re-evaluation of the evidence adduced clearly points to the fact that there was a struggle in the motor vehicle between the Appellant and the complainant that resulted in both the Appellant and the complainant sustaining injuries. The complainant was overpowered and managed to jump out of the vehicle. He sought treatment for the injuries that he had sustained.

The issue for determination by this court is, *who as between the Appellant and the complainant was the aggressor?* From the evidence adduced, it was clear that it was the Appellant who was the aggressor. Instead of complying with a lawful order that he had been given to have the motor vehicle driven to the police station, he instructed his driver to drive past the police station with the complainant inside the vehicle. This court believed the version of events as narrated by the complainant. If the motor vehicle had been driven to the police station, a struggle would not have occurred between the Appellant and the complainant.

The Appellant was determined not to have the motor vehicle driven to the police station because he was under the illusion that the traffic police had no authority to impound his motor vehicle by virtue of the court order that he had earlier obtained. It was therefore not beyond the

Appellant to assault the complainant in the manner that was described by the complainant. This court therefore holds that the prosecution did establish to the required standard of proof that the Appellant assaulted the complainant. His appeal against that verdict therefore lacks merit and is hereby dismissed.

As regard the 2nd count of obstructing a police officer in the due execution of his duty, PW1, PW2 and PW3 adduced evidence which confirmed that they were lawfully on duty on the material day. They were in their official police uniform. They were discharging their duties as traffic officers. They stopped the Appellant's motor vehicle in the course of their duty. The complainant ordered the Appellant's driver to drive the motor vehicle to Kasarani Police Station in the course of executing his duties. The Appellant gave counter instructions to the driver. It was clear to this court that the Appellant did this under the mistaken belief that the court order that was issued by the Judicial Review Division of the High Court barred the traffic police from executing their duties even where they have seen traffic rules being infringed. This court holds that the Appellant had no legal basis or justification to obstruct the complainant from performing his duties as a police officer. In the premises therefore, it is the finding of this court that the prosecution established to the required standard of proof beyond any reasonable doubt that the Appellant indeed obstructed the complainant in the due execution of his duties as a police officer. The appeal against conviction in this regard lacks merit and is hereby dismissed.

On sentence, the Appellant is on firmer ground. This court agrees with the Appellant that the sentence that was meted out by the trial court was harsh and excessive. There was no justification for the Appellant to be sentenced to serve a custodial sentence without an option of a fine. It was clear to this court that they were mitigating circumstances that informed the Appellant's actions on the material day. He was under the mistaken but honest belief that the traffic police could not impound his motor vehicle on account of breach of traffic rules because he had obtained an order from the High Court that barred the traffic police at Kasarani Police Station from harassing him in the course of undertaking his transport business. The injuries sustained by the complainant were not serious. This court is of the view that the sentence that fits the offences that were committed is a fine.

The custodial sentence imposed on the Appellant is therefore set aside and substituted by an appropriate sentence of this court. The Appellant is sentenced to pay a fine of Kshs.20,000/- on each count or in default he shall serve three (3) months imprisonment on each count. If the Appellant shall not pay the fine, the default sentences shall run concurrent with effect from the date of this judgment. It is so ordered.

DATED AT NAIROBI THIS 21ST DAY OF JUNE 2018

L. KIMARU

JUDGE