REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO.113 OF 2010

(An Appeal arising out of the conviction and sentence of HON. NGUGI - PM delivered on 16th December 2009 in Makadara CM. CR. Case No.4497 of 2006)

SAMUEL MBUGUA THUITA...…...……APPELLANT

VERSUS

REPUBLIC………………………..........RESPONDENT

JUDGMENT

The Appellant, Samuel Mbugua Thuita was charged with several offences under both the **Penal Code** and the **Traffic Act.** He was however convicted of one count under **Section 253(b)** of the **Penal Code** for the offence of **assaulting a police officer while resisting arrest**. The particulars of the offence were that on 15th August 2006 at Githurai 45 within Nairobi County, the Appellant assaulted No.231260 CI Roselyne Mulyomo, a police officer who was at the time of the said assault acting in execution of her duty. The Appellant pleaded not guilty to the charge. After full trial, he was convicted of that count and sentenced to pay a fine of Kshs.100,000/- or in the alternative he was ordered to serve twelve (12) months imprisonment. The Appellant was aggrieved by his conviction and sentence. He has appealed to this court.

In his petition of appeal, the Appellant raised three grounds of appeal challenging his conviction. He was aggrieved that he had been convicted on the basis of contradictory evidence which led to his erroneous conviction. He was of the view that the prosecution had adduced insufficient evidence which could not sustain conviction on the charge brought against him. He was finally aggrieved that the trial court had applied the wrong standard of proof and thereby wrongly convicted 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 on him.

Prior to the hearing of the appeal, Mr. Mathenge, counsel for the Appellant and Ms. Atina for the State filed written submission in support of their respective opposing positions. Whereas Mr. Mathenge submitted in court that the prosecution had failed to establish a case on the charge against the Appellant to the required standard of proof, Ms. Atina for the State urged the court not to interfere with the finding of the trial court because the prosecution had established its case to the required standard of proof. In particular, Mr. Mathenge submitted that the prosecution had failed to produce sufficient medical evidence to establish that indeed the complainant had been assaulted by the Appellant. He questioned the P3 form that was produced by PW3 Dr. Zephania Kamau. Learned counsel was of the view that the P3 form (which was produced into evidence) could not be relied on by itself to establish that indeed the

complainant had sustained the injuries in question as a result of the assault. He explained that in the absence of initial medical treatment notes, the trial court could not rely solely on the P3 form as medical proof of assault.

Although the Appellant did not raise the issue in his petition of appeal, counsel for the Appellant argued that the charge brought against the Appellant was incurably defective in that it did not distinctly set out the charge and its particulars. He further submitted that the complainant's testimony to the effect that she was assaulted by the Appellant was not corroborated since no one who was at the scene at the time was called to testify in the case. In the premises, learned counsel submitted that there was no evidence upon which the trial court could have convicted the Appellant. He urged the court to allow the appeal.

In response, Ms. Atina submitted that the prosecution had adduced sufficient evidence which established that the Appellant had assaulted the complainant while she was in the course of her duty. She narrated the circumstances under which the offence was committed. She submitted that the complainant was on duty at the time along Thika Road. She saw the Appellant, who was driving a matatu, Toyota Hiace Registration No.KAV 029J, picking passengers on the road and obstructing other motor vehicles. When she sought to stop the Appellant, he drove off. She pursued the Appellant and managed to stop his motor vehicle at a petrol station along the said road. It was when she sought to arrest the Appellant that the Appellant resisted arrest. He then assaulted her. She fell to the ground. She lost her police pocket radio. She was injured by the Appellant in the course of the struggle. The P3 form produced by the doctor indeed established that the complainant had sustained injuries during the assault. She submitted that the charge brought against the Appellant was set out in sufficient particularity that there was no question that the Appellant understood the charge and ably defended himself during trial. She urged the court to dismiss the appeal.

This being a first appeal, it is the duty of this court to reconsider and to re-evaluate the evidence adduced during trial 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, Ruwalla v R [1957] EA 570)".***

The issue for determination by this court is whether the prosecution established to the required standard of proof, the charge of assault of a police officer to the required standard of proof beyond reasonable doubt.

The first issue for determination is whether, as claimed by the Appellant, the charge of assault set out with sufficient particularity to enable the Appellant to defend himself. The Appellant argued that he was called upon to take plea on a duplex charge and therefore could not with certainty defend himself. The Appellant was charged under **Section 253(b)** of the **Penal Code** which provides that:

> ***"Any person who assaults, resists or willfully obstructs any police officer in the due execution of his duty, or any person acting in aid of that officer is guilty of a misdemeanour and is liable to imprisonment for five years."***

It was the Appellant's submission that the charge should have set out the particulars of either assault or resistance or willful obstruction and not set out the charge with the three particulars. The Appellant argued that the charge was therefore duplex and embarrassed him in the preparation of his defence. On its part, the State was of the view that the charge was proper. Having re-evaluated the rival submission made by the parties to this appeal, it was clear to this court that the charge brought against the Appellant was neither defective nor did it fail to set out which sufficient particularity the particulars in support of the charge. It is evident to this court that the elements that constitute the charge that was brought against the

Appellant included two aspects: namely that the Appellant assaulted a police officer in the course of executing her duty. The prosecution was therefore required to establish, firstly, that the complainant was a police officer who was on duty at the time of her assault. This, the prosecution was able to establish to the required standard of proof. If this court were to be persuaded by the argument put forward by the Appellant, then, the assault of the complainant would have been similar to any assault under **Section 251** of the **Penal Code**. In any event, this court agrees with the prosecution that the Appellant knew the charge that he was facing and sufficiently and ably defended himself during trial. This court is not persuaded that the charge brought against the Appellant was duplex or was defective. In that regard, this court relies on the decision in **Ng'ang'a –Vs- Republic [1981] KLR 483** at page 487 where the Court of Appeal held that that for an appellant to succeed by putting forward the ground that the charge was defective for lack of specification of particulars, such appellant must establish that he was prejudiced by the failure to set out such particulars. In the present appeal, it is clear that that is not the case. That ground of appeal fails.

The Appellant complained that the trial court erred when it allowed into evidence the P3 form as proof of injuries that the complainant is alleged to have sustained during the assault. The Appellant argued that the prosecution was required to produce medical evidence in form of medical treatment notes to support the complainant's assertion that she had been assaulted. This court has perused the P3 form in question. It was clear to this court that the said P3 form sets out the injuries that the complainant sustained. The complainant was seen by PW3 within 24 hours of the assault. The injuries were fresh. They could be seen and documented. In the considered view of this court, it was not necessary for the prosecution to produce medical treatment notes where it was established that the P3 form was filled within a few hours of the taking place of the assault. The case is different where the P3 form is filled a few weeks or months after the alleged assault. This court holds that the prosecution proved to the required standard of proof that the complainant was assaulted and was injured. The evidence that the complainant adduced in regard to her injuries was corroborated by medical evidence which was produced in form of a P3 form. There was no legal requirement in this particular case for any other corroboration. The injuries that appears in the P3 form is consistent with the narration by the complainant in regard to how she was assaulted and injured.

This court has carefully re-evaluated the evidence adduced before the trial court in light of the submission made before this court during the hearing of the appeal. It is clear to this court that the grounds of appeal put forward by the Appellant lacks merit. He was properly convicted. That conviction is upheld. The sentence that was imposed upon him was legal. This court cannot interfere with the same. The appeal is dismissed. It is so ordered.

DATED AT NAIROBI THIS 31ST JANUARY 2017

L. KIMARU

JUDGE