



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MARSABIT
CRIMINAL APPEAL NO. 6 OF 2015

HALKANO ROBAAPPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the original conviction and sentence in Criminal Case No. 483 of 2013 of the Principal Magistrate's Court at Marsabit by T.M WAFULA– Resident Magistrate)

JUDGMENT

HALKANO ROBA ,the appellant , was charge with an offence of resisting lawful arrest contrary to section 253 (b) of the Penal Code. He was convicted of the offence and sentenced to five years imprisonment.

The particulars of the offence were that on 26th September 2013 at Marsabit township, Marsabit County, resisted lawful arrest from police constable Jacob Kofa and police constable Hillary Rutto who were acting in due execution of their duties of enforcing a warrant of arrest issued against him in criminal case 115 of 2013.

At the hearing the Appellant was represented by **Mr. Halake** the learned counsel, from the firm of **HALAKE RAMBO MUTHOGA & MUIRURI ADVOCATES**, who relied on two supplementary grounds the firm filed. The grounds are as follows:

- 1.That the learned trial magistrate erred in law and in fact by disregarding the evidence of the appellant that he was intoxicated at the time of his arrest.
- 2.That the learned trial magistrate erred in law and in fact by handling (sic) the appellant a harsh sentence in the circumstances and ignoring the mitigation tendered by the appellant.

The state opposed the appeal through **Mr. Motende**, the learned counsel.

The facts at the trial court were briefly as follows:

Some two police officers were on their regular beat when they were attracted by some noise of people who were moving towards them. The appellant was in the group and was identified as a wanted person against whom a warrant of arrest had earlier been issued after he had failed to attend court. When he was questioned as to why he had failed to attend court, he did not answer. He became violent when he was being arrested. Members of public had to intervene to subdue him.

In his defence the appellant said at the time of his arrest he was drunk.

The trial magistrate after considering the evidence on record, believed the prosecution and convicted the appellant. He now appeals against both the conviction and the sentence.

This is a first appellate court. As expected, I have analyzed and evaluated afresh all the evidence adduced before the lower court and I have drawn my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses. I will be guided by the celebrated Case of **OKENO VRS. REPUBLIC [1972] EA 32.**

On the issue of intoxication section 13 of the penal code provide as follows:

13 (1) Save as provided in this section, intoxication shall not constitute a defence to any criminal charge.

(2) Intoxication shall be a defence to any criminal charge if by reason thereof the person charged at the time of the act or omission complained of did not know that such act or omission was wrong or did not know what he was doing and—

(a) the state of intoxication was caused without his consent by the malicious or negligent act of another person; or

(b) the person charged was by reason of intoxication insane, temporarily or otherwise, at the time of such act or omission.

(3) Where the defence under subsection (2) is established, then in a case falling under paragraph (a) thereof the accused shall be discharged, and in a case falling under paragraph (b) the provisions of this Code and of the Criminal Procedure Code (Cap. 75) relating to insanity shall apply.

(4) Intoxication shall be taken into account for the purpose of determining whether the person charged had formed any intention, specific or otherwise, in the absence of which he would not be guilty of the offence.

(5) For the purpose of this section, “intoxication” includes a state produced by narcotics or drugs.”

The import of this section is that the defence of intoxication is not open to an accused person unless he can peg the same under the exceptions under subsection 2 of section 13. This defence was discussed at length by the Court of Appeal in **CRIMINAL APPEAL NO. 6 OF 2011 JOHN WAIGWA MUMBI Vs REPUBLIC** where the Court rendered itself as follows:

“ It has been stated by this Court that “... the defence of intoxication is very narrow in its application. [section] 13(4) of the Penal Code should not be read in isolation. It should be read within the confines of Sections 13 (1), (2)(a) & (b).” See Roba Galma Wario v Republic [2015] eKLR.

. When presented with a defence of intoxication, the court must consider if “... the drunkenness or intoxication deprived the [accused person] of the ability to form the specific intention required for the commission of a particular crime.” See Charles Heho Ndirangu vs. Republic [2009] eKLR (Criminal Appeal 346 of 2008) and Kyalo Kalani vs. Republic [2013] eKLR (Criminal Appeal 586 of 2010).

In order to prove insanity by reason of intoxication, the appellant was required to demonstrate on a balance of probabilities that he was too drunk to appreciate what he had done. See Maina vs. Republic [2007] 2 EA 279 (CAK) where it was held that:

“If an accused person seeks to set up a defence of insanity by reason of intoxication, the burden of establishing that defence rests upon him in that he must at least demonstrate the probability of what he seeks to prove.”

In the instant case the appellant just said he was drunk. He never discharged his onus on a balance of

probabilities nor bring his defence under the envisaged exceptions. The ground of being drunk must fail.

After his conviction, the appellant was sentenced to serve five years imprisonment. Section 253 (b) of the Penal code provide as follows:

Any person who—

(b) assaults, resists or willfully obstructs any police officer in the due execution of his duty, or any person acting in aid of that officer; or is guilty of a misdemeanour and is liable to imprisonment for five years.

The Hon. trial magistrate must have been influenced to mete out the maximum sentence by the previous record of the appellant that was given to him. Unfortunately he did not ask the appellant to either confirm or deny the same. For this reason I am going to interfere with the sentence. After weighing all the circumstances of the case, I will reduce the sentence to two years imprisonment to run from when the sentence was meted out by the trial court. His appeal succeed only to that extent.

Orders accordingly.

DATED at Marsabit this 23rd day of March 2016

KIARIE WAWERU KIARIE

JUDGE