



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MURANG'A**

**CRIMINAL APPEAL NO 456 OF 2013**

**(APPEAL AGAINST CONVICTION AND SENTENCE IN KANGEMA SPM CRIMINAL CASE NO 326 OF 2012 – J O MAGORI, PM)**

**JOHN MUCHORO MWANGI.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**J U D G M E N T**

The Appellant in this appeal, **John Muchoro Mwangi**, was convicted after trial of *resisting arrest* contrary to **section 253(b)** of the *Penal Code*. It was alleged that on 13<sup>th</sup> August 2012 at Kanyenyaini Trading Centre in Kangema District within Murang'a County, he resisted arrest by No 77879 Sgt Julius Odera and No 78873 PC Tom Onyango, both of whom were in due execution of their duties. He was fined KShs 50,000/00 and in default of payment to serve one (1) year imprisonment. He paid the fine. He has appealed against both conviction and sentence.

Learned counsel for the Appellant submitted that the alleged offence should have been charged under **section 41(4)** of the *Copyright Act, Cap 130* and not under section 253(b) of the Penal Code as charged. He further submitted that the two police officers purported to carry out a search of the Appellant's premises yet they were not inspectors duly appointed under **section 39** of the aforesaid Act. The search was thus illegal and, by necessary implication, that the Appellant was therefore entitled to resist the arrest.

Learned counsel further submitted that the Appellant's prosecutor was not a prosecutor duly appointed under **section 43** of the Copyright Act, and that the prosecution was thus illegal, null and void.

Finally, learned counsel for the Appellant submitted that the fine provided for under section 41(4) of the Copyright Act was a maximum of KShs 20,000/00, and that therefore the fine of KShs 50,000/00 imposed upon the Appellant was illegal.

Learned Prosecution Counsel for the Respondent did not support the Appellant's conviction and sentence upon the same reasons given by his learned counsel.

I have considered the learned counsels' submissions. I have also read through the record of the trial court (including the judgment).

There was no dispute that PW1 and PW2 (who were police officers) had been duly allocated the duty of accompanying the musician John Njagi to Kanyenyaini Trading Centre to look for his pirated music. They were thus engaged in due execution of their duties as police officers.

Police officers are, by virtue of being police officers, inspectors under the Copyright Act. Section 39(1) of the Act provides for appointment of inspectors for purposes of enforcing the provisions of the Act, who would then be issued with certificates of authority to act as such inspectors. And then section 39(2) of the Acts states –

**“(2) In addition to inspectors appointed under subsection (1), any member of the Board (the Kenya Copyright Board established and incorporated under section 3 of the Act) or a police officer may perform the functions of an inspector under this Act.”**

The argument that PW1 and PW2 were not inspectors duly appointed under the Act thus rings hollow. They were indeed authorised to perform the functions of an inspector under the Act by virtue of them being police officers.

Indeed the Appellant could have been charged under section 41(4) (a) of the Act. But it was also open to the police to charge him, as they did, under section 253(b) of the Penal Code as the persons resisted in their due duties were police officers. The fact that the Appellant could have been charged under section 41(4) (a) of the Copyright Act does not render the charge under the Penal Code defective in any way, as long as the offence thereunder was disclosed by the particulars given in the charge. In this case the offence was indeed disclosed.

The offence charged under section 253(b) of the Penal Code is as follows –

**“ Any person who –**

- a. ....
- b. **assaults, resists or wilfully obstructs any police officer in the due execution of his duty, or any person acting in aid of that officer; or**
- c. ....

**is guilty of a misdemeanour and is liable to imprisonment for five years.”**

The issues before the trial court therefore were whether the Appellant resisted the two police officers (PW1 and PW2) and whether the police officers were in the due execution of their duties.

I have already held that PW1 and PW2 were police officers engaged in due execution of their duties. There was ample evidence that the Appellant resisted arrest after obstructing them from carrying out their duties. For an offence under section 253 of the Penal Code a police officer may arrest without a warrant. See the **First Schedule** to the *Criminal Procedure Code, Cap 75*.

As for the fine of KShs 50,000/00 and in default one(1) year imprisonment, the same was lawful, except in regard to the default term of imprisonment, which should have been six months, not one year. See **section 24(e)** and **section 28(1) (b) & (2)** of the Penal Code. No harm was done as the Appellant paid the fine and did not serve the default term of imprisonment.

In the result I find no merit in this appeal. The same is dismissed in its entirety. It is so ordered.

**DATED, SIGNED AT MURANG'A THIS 14<sup>TH</sup> DAY OF APRIL 2016**

**H P G WAWERU**

**JUDGE**

**DELIVERED AT MURANG'A THIS 15<sup>TH</sup> DAY OF APRIL 2016**