REPUBLIC OF KENNYA

IN THE HIGH COURT OF KENYA AT KISII

CRIMINAL APPEAL NO.20 OF 2016

(An appeal from original conviction and sentence of KILGORIS PM'S C Criminal Case No. 738 of 2016 by Hon. M.N. MUNYENDO - SITATI dated 6TH JUNE, 2016)

ZACHARIAH MATOKE BOKEA .....APPELLANTS

VERSUS

REPUBLIC ..... RESPONDENT

JUDGMENT

1. ZACHARIA MATOKE BOKEA, the appellant herein, was charged before the Principal Magistrates' Court at Kilgoris with 4 counts as follows:

> **(i) Willfully assaulting police officer in due exercise of the police officers duties contrary to Section 103 (a) of the National Police Service Act No. 11 (A) of 2011. The particulars of the offence were that on 4th June, 2016 at around 8.30 Hours at Bonyiasiaga village, Gesabakwa Location within Kisii County, while armed with a spear and a panga, willfully and unlawfully assaulted No. 66833 CPL. JAMES MONGERA while in due exercise of his duties.**
>
> **(ii) Willfully obstructing a police officer in due execution of the police officers duties contrary to Section 103 (a) of the National Police Service Act No. 11 (A) of 2011. The particulars of the 2nd count were that on 4th June, 2016 at around 8.30 Hours at Bonyiasiaga village, Gesabakwa Location within Kisii County while armed with a spear and a panga willfully and unlawfully obstructed No. 66833 CPL JAMES MONGERA, NO. 59565 CPL SOLOMON KAIKAI and No. 68115 CPL ELFAS HYUGA while in due execution of their duties.**
>
> **(iii) Willfully resisting arrest from police officers in due execution of the police officer's duties contrary to Section 103 (a) of the National Police Service Act No. 11 (A) of 2011. The particulars were that on 4th June 2016 at about 8.30 Hours at Bonyiasiaga village, Gesabakwa Location within Kisii County while armed with a panga and a spear willfully and unlawfully resisted arrest from No. 66833 CPL JAMES MONGERA, NO. 59565 CPL SOLOMON KAIKAI and NO. 68115 CPL ELFAS HYUGA while in due execution of police duties.**
>
> **(iv) Creating a disturbance in a manner likely to cause a breach of peace contrary to Section 95 (1) (b) of the Penal Code. The particulars being that on 4th June 2016 at Bonyiasiaga village, within Kisii County willfully and unlawfully breached the peace while armed with a spear and panga.**

2. The appellant pleaded guilty to the 1st, 2nd and 4th counts and was consequently convicted on his own

plea of guilty and sentenced to 3 years imprisonment each for count 1 and 2, and 4 months imprisonment for count 4 which sentences were to run concurrently.

3. The appellant has now appealed against both the conviction and sentence and has, in his petition of appeal set forth the following grounds of appeal:

> **1. That learned Trial Magistrate erred in law and in fact in convicting the Appellant to three years imprisonment without an option of a fine.**
>
> **2. That the learned Trial magistrate erred in law and in fact in convicting the Appellant when the appeal was an unequivocal admission of guilt.**
>
> **3. That the learned Trial Magistrate erred in law and in fact in convicting the Appellant when the Trial Magistrate failed to warn the Appellant of the gravity of the offence and the consequences appurtenant thereto.**
>
> **4. That the Learned Trial Magistrate erred in law and in fact in convicting the appellant when the charges facing the Appellant were defective.**
>
> **5. That the learned Trial Magistrate erred in law and in fact in convicting the Appellant when the alleged exhibits to wit the spear and panga were not exhibited in court.**
>
> **6. That the Learned Trial Magistrate erred in law and fact in convicting the Appellant by relying on conjectures, suppositions and on extraneous matters.**

4. During the hearing of the appeal, Mr. Abobo advocate for the appellant submitted that the guilty plea was not unequivocal since it was not clear if the appellant understood language used by the trial court when recording and taking the plea. Mr. Abobo added that it was also not clear if the accused understood the language used at the time the plea was taken.

5. Mr. Otieno for the state conceded to the appeal while submitting that the charge was a duplex because the appellant faced 4 different counts which were based on the same facts thereby prejudicing the appellant. Mr. Otieno added that the same facts that supported the counts of obstruction, resisting arrest and assault are the same facts that would support the count of creating a disturbance and therefore presenting creating a disturbance as a separate charge created a duplex that prejudiced the appellant's case.

6. On the language used by the court, Mr. Otieno submitted that was a typographical error in the recording of the proceedings.

7. On the sentence, Mr. Otieno submitted that the same was manifestly harsh because the Act provides for the option of a fine and that no reasons were given for the stiff penalty of prison sentence.

8. This being a first appeal, the primary duty of this court is to re-analyze and re-consider the evidence tendered before the trial court with a view to arriving at its own independent conclusions. **See Pandya vs Republic [1957] EA 336 and Okeno vs Republic [1972] EA 32.**

9. In this appeal however, the appellant was convicted on his own plea of guilty and this means that a full trial was not conducted. I have therefore scrutinized the record to establish if the plea was unequivocal.

10. Section 281 of the Criminal Procedure Code provides that an accused person may plead not guilty, guilty subject to a plea agreement. The said section does not however provide for the steps to be taken by the court when taking plea.

11. Section 207 (2) of the Criminal procedure Code stipulates as follows:

"207 (2) If the accused person admits the truth of the charge otherwise than by a plea agreement his admission shall be recorded as nearly as possible in the words used by him, and the court shall convict him and pass sentence upon or make an order against him, unless there appears to it sufficient cause to the contrary:

Provided that after conviction and before passing sentence or making any order the court may permit or require the complainant to outline to the court the facts upon which the charge is founded."

12. In Adan vs Republic [1973] EA 445, the Court of Appeal J set out the steps to be taken in recording pleas as follows:

"When a person is charged, the charge and the particulars should be read out to him so far as possible in a language which he can speak and understand. The magistrate should explain to the accused person all the essential elements, the magistrate should record what the accused has said, as nearly as possible in his own words and then formally enter a plea of guilty. The magistrate should next ask the prosecutor to state the facts of the alleged offence and, when the statement is complete, should give the accused an opportunity to dispute or explain the facts or to add any relevant facts. If the accused does not agree with the statement of facts or asserts additional facts which, if true, might raise a question as to his guilt, the magistrate should record a change of plea to "not guilty" and proceed to hold a trial. If the accused does not deny the alleged facts in any material respect, the magistrate should record a conviction and proceed to hear any further facts, relevant to sentence. The statement of facts and the accused's reply must of course, be recorded."

13. In the instant case, the lower court proceedings show that the appellant was arraigned in court on 16th June 2016 and the proceedings were taken as follows:

"The substance of charge (s) and every element thereof has been stated by the court to the Accused person in Kiswahili language that he/she understands, who being asked whether he/she admits or denies the truth of the charges replies in Kipsigis:

Accused

I understand Kiswahili

Count 1

It is true

Count II

It is true

Count III

It is not true

Count IV

It is true

Court

A plea of guilty for Count 1, 2, and 4. A plea of not guilty for count 3.

5/12/13.

PROSECUTOR & FACTS

On 4/6/16 at 07.30hrs. Police Officer from Nyangusu Police Station, CPL. James Mwongela, CPL. Solomon Kaikai, CPL Elphas Hyuga had gone for inquiries within Nyangusu police station where an incident had been reported via OB No. 29/3/2016 where one Elijah Change had made a report on a charge of threatening to kill. The person who had threatened to kill as Zacharia Matoke, the accused. They found accused hiding in his house while armed with a spear and panga. He charged at officers and threw a spear at CPL. Mowngera. It pieced through the police uniform and inflicted an injury at his lower abdomen. The other officers wrestled him and snatched the panga. He was handcuffed and taken to Nyangusu police station. The injured officer was taken to Akemo Hospital. The spear is in court marked as MFI-1 and produced as exhibit 1, the panga marked as JFI-2 and produced as exhibit no. 2. I have a p3 form with respect to PC JAMES MWONGELA together with treatment notes, X-rays, which are collectively as exhibit no. 3a b and c respectively. That is all.

Accused

Facts are true.

Court

Accused convicted on own plea of guilt.

Prosecutor

1st offender.

Accused in mitigation

I pray for leniency. I threw the spear. I had a quarrel that evening. I will not repeat.

COURT

I have considered the offence, mitigation and fact that accused is a 1st offender. The nature of the offence and circumstances under which the offence was committed is very serious. Noting that accused attacked a uniformed police officer and inflected injury on his abdomen. As such a deterrent sentence will be metted out on accused for him to act as an example to other members of community with similar disposition.

Count II accused is sentenced to three (3) years imprisonment. Count (2) to three years imprisonment. Count 4 to six months imprisonment. Sentences to run concurrently. Right of Appeal 14 days."

14. From the above extract of the proceedings, it is clear that the charges were read to the accused in Kiswahili language which he confirmed that he understood. I have perused the original lower court record and noted that the words "In Kipsigis" recorded at before the appellant responded to the plea are missing and this makes me agree that the said words "In Kipsigis" could have been a typographical error as observed by Mr. Otieno for the state.

15. I am therefore satisfied that the plea was properly taken in the language that the appellant understood, which is Kiswahili, and I find that the plea was unequivocal.

16. Turning to the issue of duplex, Mr. Otieno submitted that the presentation of the charge creating a disturbance as a separate charge on the same facts as the first three counts created a duplex that

prejudiced the appellant's case.

17. In P. Kiage now (Judge of Appeal) Essentials of Criminal Procedure by Law Africa Publishing Limited at page 78 duplicity of a charge has been described as follows:

> **"Any count that charges within it more than one specific offence is said to be bad for *duplicity.* It is also said to be *duplex*. It is a fundamental mistake and not normally curable. See Kasyoka v Republic [2003]KLR 406.The reason for this is that when a charge is duplex and an accused person goes through a trial, the fairness of the process is fundamentally compromised as it is not clear to him what the exact charges that confront him are. As a result, he may not be able to prepare a proper defence and this is clearly prejudicial and may amount to a failure of justice."**

18. In my humble view, from the above description of what a duplex charge is, the charges framed against the accused cannot be said to be duplex as each count carried one offence. In my opinion the charge sheet against the appellant was not duplex but overloaded in the sense that it had multifarious counts against the appellant involving different aspects of the Criminal Law. As was stated in the case of John **Kamau Kinyanjui v Republic [2004]2KLR 364.** The test to be applied to determine whether a charge is overloaded is whether or not the counts preferred against the accused person prejudice or embarrass him in the presentation of his defence by their sheer numerosity.

19. In as much as the appellant pleaded guilty to some charges brought against him, it is this courts observation that he was prejudiced by the multiple charges since, as correctly submitted by Mr. Otieno, the particulars, of offence of all the 4 charges he was facing were the same. One wonders how one person can assault a police officer, obstruct his arrest, resist his arrest and create disturbance all at the same time with the particulars of offence remaining the same. It is in the same vein that I observe that it would have been inconceivable that the appellant could plead guilty to counts 1,2 and 4 and not guilty to count 3 yet the same facts supported all the counts. The appellant was unrepresented before the trial court, and therefore, the fact that he pleaded not guilty to count 3 reinforces my observation that the sheer multiplicity of the charges prejudiced his presentation of his plea and defence. Looking at all the counts preferred against the appellant, one gets the feeling that the police were, for reasons only known to them, out to charge the appellant with every offence in the book white the ideal scenario would have been that only one or two counts would have sufficed. The zeal with which the police presented the charges can be attributed to the fact that one of their own was the complainant. This zeal has however had the boomerang and undesirable effect of watering down the entire case.

20. In the case of **Peter Ochieng vs Republic (1985) KLR 562**, it was held:

> **"It is undesirable to charge an accused person with so many counts in one charge sheet as this may occasion prejudice. It is proper for a court to put the prosecution to its election at the inception of the trial as to the counts upon which it wishes to proceed."**

21. This court further notes in the case of **Mule v Republic 1973KLR 246** Ag Judge Porter (as he then was) held that to prove a case of creating disturbance, it was not sufficient to show that the accused created disturbance but that the said disturbance was likely to cause a breach of peace. In the present case, the particulars of offence do not disclose which actions the appellant engaged in or which words he uttered which led to threatened breach of peace.

22. For the above reasons, I hereby allow the above appeal by the appellant and quash the conviction and the sentence of the trial court. Having found that the appellant was prejudiced by the multiple counts/charges arising out of the same facts, it follows that the 3rd count to which the appellant pleaded not guilty is similarly affected by the findings in this judgment consequently, this court will exercise its supervisory powers to review the lower court file with a view to terminating the charges in count 3 that is pending hearing with the net effect that the appellant is hereby set free unless he is otherwise lawfully held.

23. Orders Accordingly.

Dated, signed and delivered in open court this 17th day of November, 2016

HON. W. A. OKWANY

JUDGE

In the presence of:

- Mr. Otieno for the State

- Mr. Abobo for the Appellant

- Omwoyo court clerk