



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA
CRIMINAL APPEAL NO. 316 of 2012

BETWEEN

E S L.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from the judgment of the Hon. SRM P.A Achieng delivered on 18th December 2012 vide Kakamega CMC.CR. Case No.577 of 2012)

J U D G M E N T

Introduction

1.The appeal herein emanates from the judgment of P.A. Achieng (Ag. P.M) in Kakamega Criminal Case No. 557 of 2012. Being dissatisfied and/or aggrieved with the said judgment the appellant has appealed against the whole decision on the following principal grounds:

1. **The Honourable Trial Magistrate erred in law in her finding that the charge was not defective in law.**
2. **The Learned Trial Magistrate misdirected her mind as to the burden of proof and failed to take evidence as a whole.**
3. **The Honourable Trial Magistrate erred in law and in fact in convicting the Appellant in the absence of evidence in support of the charges for creating disturbances as a requirement under the law.**
4. **The Honourable Trial Magistrate erred in law and in fact in convicting the appellant on contradicting evidence.**

The Charge Against the Appellant

2. The appellant herein was charged with the offence of creating disturbance in a manner likely to cause a breach of the peace contrary to section 95(1)(b) of the Penal Code. Particulars of the offence were that on the 12th March 2012 at [particulars withheld] in Kakamega Central District within Western Province she created a disturbance in a manner likely to cause a breach of the peace by uttering abusive words to J O K. At the trial the prosecution called a total of six (6) witnesses to prove their case while the defence called two witnesses who gave sworn testimonies. Being a first appeal, this court is duty bound to re-examine and re-evaluate the evidence on record and come to its own independent conclusion and inferences keeping in mind that it was not at the trial to see the demeanor of the witnesses. See **Okeno-**

The Evidence

3. In his evidence PW1 J O K told the court that on the 12/03/2012 at about 12.00 noon while at [particulars withheld] Academy a former teacher (DW1) entered his office and started banging the table saying “leo lazima unilipe wewe ni mjinga na leo lazima unilipe”. He got angry and told the appellant to leave his office but she refused. He opted to go out of the said office, leaving the appellant behind. She then left the office saying “nyinyi ni wajinga na lazima mtanilipa pesa zangu” She told PW1 that he was not the director of the school and that he had not employed her. PW1 further testified that the appellant also went to the classes while shouting insults, specifically where the director was teaching and pushed her out and caused a lot of commotion for about thirty (30) minutes. He added that the father to the appellant also came to the school and claimed that PW1 had sexually harassed the appellant and other staff members. A subsequent meeting convened to resolve the matter failed to do so.

4. On cross-examination by the Mr. Mukele for the appellant PW1 told the trial court that the school was a private academy and maintained that the appellant forced herself into the school compound by defying the orders he gave to the watchman not to allow her in. He added that he left the appellant in his office. He also stated that the appellant had resigned on the 06/03/2012 and not on the 05/03/2012. He explained that the school was not prepared to pay her on the day she resigned. He denied the allegation that on the 13/03/2012 he tried to befriend the appellant. He also denied the accusations of sexual harassment of all the staff members of the school.

5. PW2 L S the Director of [particulars withheld] Academy and a teacher told the trial court that on 12/03/2012 at about 11.00 a.m she was in her class teaching when she heard the appellant’s voice saying “Madam L come out you are the one who resigned me not this man”. She stopped teaching turned and saw the appellant who she says was previously a class 3 teacher. The appellant called her. She told the trial court that the appellant made noise, disrupted lessons and refused to wait for her in the office. She added that the appellant asked for her payment which prompted her to leave the class and go to her office. She further stated that the court that the appellant was very aggressive and abusive. At her office she saw the brother to the appellant who was also asking for the appellant’s payment. She said that they tried to stop the appellant and her brother from continuing with the commotion but they were adamant. The appellant called her father who went to the school and claimed that a man at the school was harassing her daughter sexually.

6. PW2 further testified that they subsequently held a meeting with the appellant during which meeting it was noted that the appellant owed the school some books which she was to pay for. She maintained that the appellant was paid on the 13/03/2012 and that they reported the incident to the police on the 15/03/2012 at Kakamega Police Station.

7. On cross-examination PW2 said that they opted to go to the Police and report the incident because of the allegations of sexual harassment brought by the appellant and her father. She also confirmed that the incident happened outside the classrooms and that the appellant did not physically push her out of the classroom. She also confirmed that she was married to the complainant for three (3) years though they had not formalized the marriage and that she did not know if the complainant was harassing the appellant.

8. PW3 L N the watchman at [particulars withheld] Academy testified that on the 12/03/2012 at about 12.50 p.m she was at the school gate when the appellant, a former teacher at the school went there. She denied her access to the school compound as per instructions by the bursar PW1 but the appellant managed to sneak into the compound when she opened the gate for the bursar. She testified further that the appellant then went to the complainant’s office which was five (5) meters from the gate. She told the court that she heard the conversation and arguments between the complainant and the appellant when the appellant demanded to be paid her money. She also told the court that she heard the appellant banging the table saying that she wanted to be paid on that very day. PW3 also averred that she saw the bursar leave his office with the appellant following him. She further testified that the appellant went to the class where the Director was teaching and she decided to follow her. That the appellant was shouting while

accusing the director that she had made her resign and that she did not want her stupidity.

9. PW3 further testified that she went and held the appellant and wanted to take her outside the school compound but she did not manage as the appellant was shouting while going towards the offices. She added that the appellant's brother went to the school and later called their father and they demanded payments. They then went to the office to discuss the matter for about one hour and later the matter was reported to the police.

10. On cross-examination PW3 confirmed that she was under instructions not to allow the appellant into the school compound and that she knew that the appellant had gone to the school to claim her money and that at that point the appellant started banging the table while at the bursar's office. She also confirmed that the appellant's brother and father went to the school and that the appellant's father had claimed that the complainant herein had wanted to defile her daughter and that he had also refused to pay her her money. PW3 stated that she later confirmed that the appellant was paid the money the next day.

11. PW4 K I a carpenter at Lurambi told the Court that he too witnessed the incident that occurred on the 12/03/2012 at [particulars withheld] Academy. He told the court that at 12.00 p.m on the material day, he was in his workshop near Cereals Board Area close to the [particulars withheld] Academy when he heard noise from the school. He stated that he saw the appellant insulting a teacher called O saying "utanipatia pesa zangu sitaki ujinga yenu" and uttering other words in English which PW4 did not understand. He also testified that the appellant was with a young man and that the commotion took about 2 hours. After the commotion he said he saw the appellant leave together with the father and the young man . He said that he did not follow the matter further but went to the complainant and told him that he had done well by not reacting to the insults badly.

12. On cross-examination PW4 explained that from the school gate to his workshop was 15feet with no road in between. He said that he heard the appellant saying she wanted to be paid her money and that the appellant's father also went to the school.

13. PW5 J J O a teacher at the [particulars withheld] Academy testified that she also witnessed the events of the 12/03/2012. She told the court that as she was signing class 1 books at 12.30 p.m she heard a person shouting outside the school. She went to find out what was happening and found the appellant demanding to see the school director who was teaching in the next class. She told the trial court that she approached the watchman and asked her why she had allowed the appellant to make the noise in the school compound and asked her to remove the appellant. She also testified that when the watchman tried to remove her, the appellant resisted. She further explained that students had already started peeping through the windows and that the appellant told them that she would call her father who would come there with the Police. The father arrived and asked "where is that thing who demands sex from his workers". They were surprised by the said utterances and they all went into the office to discuss the issue.

14. PW5 explained that there were some books which were in the custody of the appellant which she lost and it was resolved that the father pays for the books. She told the court that the appellant had just reported to the school that same year.

15. On cross-examination PW5 stated that she heads the guiding and counseling department. She further explained that the school owed the appellant some money as she had resigned because of pressure. She could not comment on whether the appellant was being sexually harassed by PW1.

16. PW6 No. 64192 SGT LUCY WAITHERA stationed at Kakamega Police Station at the crime branch section testified that on 15/03/2012 she was in her office when she met the complainant. She told the court that their statements had been recorded in a case of creating disturbance which file had been allocated to her for investigation. She told the court that she visited the scene of crime at [particulars withheld] Academy and found that the office of the complainant was close to the gate where the watchman sits. She also testified that she established that the class where the Director of the School was allegedly teaching was a few meters from the gate while the carpenter's workshop was separated from the school by a barbed wire.

17. As part of her investigations she interrogated the owner of the carpentry workshop and recorded his statement. Further that the appellant was arrested on the 15/03/2012 after which she preferred the charges against the appellant because she banged the table and repeatedly abused the complainant that “wewe ni mjinga sana” which interrupted the normal school activities. On cross-examination she explained that the statements did not have the offensive words against the accused and they did not state what happened.

The Defence Case

18. At the close of the prosecution case the court found that the prosecution had established a prima facie case against the appellant who was then placed on her defence. She chose to give evidence on oath and she called one(1) witness who was her father.

19. E S L DW1 told the court that the words she allegedly uttered were not in the charge sheet. She admitted that she was an employee of the school in question having been employed by the director PW2 and that she was employed on the 4th January 2012. She had worked for the school for two (2) months and one (1) week before the present incident took place. She further testified that PW1 J was sexually harassing her during that time and first did that in mid January 2012. She explained the events of the sexual harassment incidents which she told her father about and that the father advised her to resign. She went back to the school on the 05/03/2012 and PW1 asked her why she was resigning. She told him that she could not work with him. She stated that she was earning Kshs.4000/= per month and was promised to be paid the following day but she said that this stretched to the 9/03/2012 then to 12/03/2012.

20. DW1 explained that on the 12/03/2012 she went to the school and was denied entry by the watchman PW3 who had been instructed by the complainant PW1 not to allow her into the school compound. She however managed to enter the compound when PW1 appeared and the gate was opened for him. She then went and stood outside the office of PW1 who asked her what she wanted. She stated that she told PW1 she wanted to be paid the balance of her salary which was for Kshs.2000/= which was to be carried forward to February. She testified that when she demanded her money, she was told that she had lost some books of which she knew nothing about. Her brother then walked into the bursar’s office as he wanted the key to the house. She gave him the key to the house and told him what was happening. The brother then called his father who went to the bursar’s office where a meeting of all the five of them was held. She told the trial court that the matter was resolved and she was advised to pay for the books first before she could be paid the balance of her salary. She also testified that she was paid Kshs.1000/- the following day and was yet to receive the balance. She denied banging any table or insulting anybody.

21. On cross-examination by the Prosecutor she maintained that she was sexually harassed by the complainant three times but she did not want to cause a scandal by talking about it. She also maintained that the watchman had been given instructions not to allow into the school and that she only managed to enter the school compound when the complainant was entering. She also claimed that she did not talk to the director over the issue of sexual harassment but to a teacher who was close to her. She added that she was compelled to have her salary deducted to pay for the allegedly lost books and that she did not give specific dates on when the sexual harassment took place. She also said that she did not complain to the director as she found it difficult to do so.

22. DW2 E L V the father to the appellant told the trial court the appellant started teaching in the school in January 2012, and that soon thereafter the appellant complained to him about the sexual harassment by the bursar. That as a father he advised the appellant to be cautious with the complainant and if the situation persisted she should consider leaving the school. He told the court that around 02/03/2012, the appellant told him that the situation had persisted and that is when he advised her to leave the school which she did on the 5/03/2012 but was not paid her salary and was told to return on a Friday. He explained that on the 12/03/2012 his son called him and told him that he had gone to the school to collect the keys from the appellant and that the appellant needed his assistance. He went to the school where he found the appellant and her brother standing outside the complainant’s office. They then entered the complainant’s office where they held a discussion and it was concluded that the appellant be paid her salary when the money was ready and that the school would get in touch with him. Later the appellant told him that she was paid Kshs.1,300/- instead of Kshs.4,000/- and that the balance had not been paid.

He maintained that while he was at the school he did not abuse anybody but had mentioned to the bursar about the complaint he had received from the appellant concerning the sexual harassment claims.

23. On cross-examination DW2 told the court that it was his son who called him and told him that the appellant was about to be harassed at the school. He added that the appellant felt embarrassed to discuss the issue of the sexual harassment with the director as the director was the wife to the complainant.

Trial Court Judgment

In its judgment the trial court found, after carefully considering the submissions by the learned counsel for the defense, that the charge sheet as drafted was not defective. The Court considered Sections 134 and 137 of the Penal Code as well as section 95 (1) and came to the conclusion that there was nothing to suggest that the words allegedly uttered must be stated in the charge sheet for the charge sheet to be acceptable in law. She further found that failure to state the words uttered was not prejudicial to the defence as the details could be found in the prosecution witness statements.

24. The trial court also found that all the prosecution witnesses could not have lied that the appellant created a disturbance at the school. The Court also found that the appellant was not very open with regard to what happened on the 12/03/2012. The trial court also found that if the appellant was indeed sexually harassed by the complainant she should have used the proper channel to have the issue addressed, and should have also used other channels to resolve the issue of her salary. The trial court was satisfied that the prosecution had proved its case against the appellant beyond reasonable doubt and found her guilty as charged and convicted her under section 215 of the CPC.

Issues for Determination

25. From the evidence on record this court finds the following to be the issues for determination in the appeal:

1. Whether the charge sheet was defective in law.
2. Whether the trial Magistrate misdirected her mind as to the burden of proof and failed to consider the evidence as a whole.
3. Whether the trial Magistrate erred in law and in fact in convicting the appellant on the basis of the evidence on record.
4. Whether the evidence on record was so contradictory, that it could not support the charge against the appellant.

Analysis and Findings

26. Regarding the first issue as to whether or not the charge against the appellant was defective it was submitted on behalf of the appellant that failure to specify the words allegedly uttered by the appellant clearly made the charge defective. The law allows a charge to be quashed, if as argued in this case, it is insufficiently, or inaccurately particularized. The law requires that every charge shall contain and shall be sufficient, if it contains a statement of the specific offence or offences with which the accused person is charged together with such particulars as may be necessary for giving reasonable information as to the nature of the charge, provided that a charge shall not be open to objection in respect of its form or contents if it is framed in accordance with the relevant rules. See ARCHIBOLD, Criminal Pleading, Evidence & Practice 2002, Paragraph 1 – 114b and also Sections 134 and 137 of the Criminal Procedure Code. Cap 75 Laws of Kenya (The CPC).

27. Section 137 (a) (ii) of the CPC provides as follows:- “The statement of offence, shall describe the offence shortly, in ordinary language, avoiding as far as possible the use of technical terms, and without necessarily stating all the essential elements of the offence, and if the offence charged is one created by enactment shall contain a reference to the section of the enactment creating the offence.” [emphasis is mine]

28. What the above provision means is that essential elements of any offence need not be given in the particulars of the offence, and in my considered view, giving particulars of the words uttered for the offence of creating a disturbance would not be in line with Section 137 (a) (ii) – above. In any event, it is also my considered view that any objection to an information or charge by reason of a formal defect on the face thereof shall be taken immediately after the information or charge has been read over and explained to the accused person and not later. See Section 275 (1) of the CPC. Further, even where objections are raised at the appropriate time, Section 90(2) of the CPC provides that “the validity, of proceedings taken in pursuance of a complaint or charge shall not be affected either by a defect in the complaint or by the fact that a summons or warrant was issued without a complaint or charge.” In effect therefore, a defect in a charge does not necessarily lead to quashing of a conviction or order unless the defect has caused a miscarriage of justice or has prejudiced the accused person.

29. Even in a broader sense, an objection to a charge is more likely to fail unless the objection is based on the ground that the formal charge or information as framed does not disclose an offence known in law, so that a trial Court having conduct of such a case is invited not to admit the same under the provisions of Section 89(5) of the CPC which provides that “where the magistrate is of the opinion that a complaint or formal charge made or prosecuted under this Section does not disclose an offence, the magistrate shall make an order refusing to admit the complaint or formal charge and shall record his reasons for the order.

30. In **WILLIAM DUBI IKIWO –VS- REPUBLOIC (2001) e KLR Criminal Appeal No.547 of 2001** the court noted that the offence the accused was charged with did not exist. There was no amendment to the charge, hence the court held that the appellant had been tried and convicted for a non-existent offence and proceeded to quash the conviction. Much as the position taken in **Ikiwo** appears drastic, it is none the less correct since as it was stated in **SIGILAI and ANOTHER –VS- REPUBLIC (2004) 2KLR 480**, a court may not on its own motion decide that the omissions made in a charge sheet are remediable by taking judicial notice of the omitted matter.

31. It is not every defect or omission however, that defeats a charge. It was held in the case of **ALWI –VS- REPUBLIC (1990) KLR 187** that a mere technical defect in the charge sheet which is not fundamental and does not cause a failure of justice is curable. The paramount consideration in determining whether or not a defect in the charge is incurable or not is whether there is prejudice occasioned to the accused in putting up his defence because of the words used in the charge. This was the holding in **KILOME –VS- REPUBLIC KLR [1990] 193**. There is no demonstration in the instant case that the appellant was prejudiced in putting up her defence.

32. On the issue on whether the Trial magistrate misdirected her mind to the burden of proof and failed to consider the evidence as a whole, I find that the Trial Magistrate carefully considered the evidence as a whole before coming up with her findings. The evidence as tendered pointed to the appellant as having gone to [particulars withheld] Academy and having created a disturbance thereat. She was seen by the complainant PW1 and other witnesses who testified on what they saw and heard and what transpired on the 12/03/2012. The trial court observed that all the prosecution witnesses could not have lied that the appellant created a disturbance at the school. I do find that all the prosecution witnesses were candid in giving their evidence and that the appellant was not very open regarding the events of the 12/03/2012. The trial Court had the additional benefit of seeing and hearing all the witnesses, including the appellant and her witnesses.

33. On the third issue I find that the evidence was overwhelming. I find as the trial Court did that the appellant committed the offence. She was owed money by the school and this must have annoyed her to the point of banging the tables as she was being sent back and forth by the complainant PW1 yet she had worked and was entitled to her salary. She was also accused of having lost books that belonged to the school, an allegation she denied. This must have raised her temperature higher. To vent her anger/frustration and allegations of sexual harassment she reacted in the way she did and this made her brother who was not called as a witness to call her father DW2 who also came feeling agitated for reasons his daughter was being frustrated by PW1. I do not have any doubt in my mind with regard to the evidence given by the prosecution witnesses in this regard.

34. Lastly I do find that there was no contradicting/conflicting evidence by the prosecution witnesses. The evidence was straightforward and direct and clearly linked DW1 the appellant to the offence as per the charge sheet. The events happened during broad day light and were seen by PW1 to PW4 who were called to testify on the same. For the above reasons, I do find that the appeal herein lacks merit and the same is dismissed in its entirety. Right of Appeal within 14 days.

Orders accordingly.

Judgment delivered, dated and signed in open Court at Kakamega this 22nd day of July, 2015.

RUTH N SITATI

J U D G E

In the presence of:-

Mr. Mukele (present) Appellant

Mr. Omwenga (Present)for Respondent

Mr. LagatCourt Assistant