



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL APPEAL NO. 12 OF 2012

(An appeal arising from Senior Resident Magistrate's

Court at Hamisi in Criminal Case No. 53 of 2011

[J. N. NTHUKU, DMII]

ELIJAH MUTAI CHENGA APPELLANT

VERSUS

REPUBLIC RESPONDENT

JUDGMENT

The appellant was charged with two counts. The first count was wilfully obstructing police officers contrary to Section 253 (v) of the Penal Code. The particulars of charge were that on the 2nd February 2011 at Serem market, Serem sub-location, Shamakhokho Location in Vihiga District within Western province wilfully obstructed PC Titus Nzokah, PC Samson Kiprono and Zachary Cherigat, police officers who at the time of the said obstruction were acting in the execution of their duties. The second count was for misconduct in a police building contrary to Section 60 (1) of the Police Act. The particulars of this charge were that on the same day at Serem Police Station, Serem sub-location, Shamakhokho Location having been arrested for obstructing police officers while in line of their duties, created disturbance in a police building by banging hard several times on the report office desk. He denied both charges.

After a full trial, he was convicted on both counts. He was sentenced to serve imprisonment for a period of four (4) years without indicating the offence for which he was sentenced.

Being dissatisfied with the decision of the trial court, he has filed this appeal against both conviction and sentence. He also tendered written submissions, which I have perused.

At the hearing of the appeal, the appellant complained that he was assaulted in prison. With regard to his appeal, he stated that he was arrested while escorting his cows. He stated that in the process of being arrested by the police, he ended up not knowing where his cows are upto date.

The learned Prosecuting Counsel, Ms Opiyo opposed the appeal and supported the conviction and sentence. Counsel submitted that the appellant obstructed police officers from executing their duties. Counsel relied on the evidence of PW1 and PW2 who were police officers. Counsel stated that the Probation report, which was represented in the court, justified the sentence of four (4) years imprisonment as that report was not favourable to the appellant.

In response to the Prosecuting Counsel's submissions, the appellant submitted that he disagreed with

the police because he was in possession of cows. He stated that the police told him that he was obstructing motor-vehicles.

In brief, the case for the prosecution was that PW1, PC Titus Nzokah and PC Samson Kiprono and PC Zachary Kerigat were on official duties at Serem market on 2nd February 2011 at 9.00 a.m. They were patrolling the road to prevent crimes. According to PC Nzokah, he had stopped a motor-cycle when the appellant appeared, threatened him and the motor-cycle driver drove off. PW1 was in uniform and armed. PC Zachary (PW2) and PC Samson Kiprono (PW3) who were on the other side of the road, witnessed the incident. According to PW1, the appellant roughed him up by holding his collar and claimed to be an ex-police officer and that he said he would teach him some manners. He demanded the force Number of PW1. He even put his hand in the left pocket of PW1 in an attempt to get the force number. The appellant then ran to the bus terminus shouting that the police who were on duty were thieves.

When people came to the scene, however, they found that they were genuine police officers who were maintaining law and order. PW1, 2 and 3 then looked for the appellant and found him in a saloon car. They arrested him and took him to the Police Station. At the Police Station, he banged the report office desk. He was booked and put in the cells. He was later charged with the two offences.

In his defence, the appellant gave unsworn testimony. He stated that he was a cattle trader. He was taking three cows to the market on the 22/2/2011, when near the police roadblock, the cows got out of control. The police arrested him. Thereafter, he did not know where his three cows were. He stated that he was surprised to have been brought to court and charged with the offences.

After considering the above evidence, the learned trial magistrate found that the prosecution had proved its case against the appellant beyond reasonable doubt. The appellant was thus convicted and sentenced. Therefrom arose this appeal.

This being a first appeal, the court is duty bound to re-evaluate all the evidence on record afresh and come to its own conclusions and inferences – see **Okeno –vs- Republic [1972] EA 32**.

I have re-evaluated the evidence on record afresh. The evidence of PW1, PW2 and PW3 with regard to count I, in my view did not disclose the offence of obstructing police officers in the execution of their duties. The evidence was that the appellant was demanding for the identification of PW1. He wanted to know the police service number of PW1. That was his right. Such a demand is not an offence. It does not amount to obstructing a police officer from the execution of his duties. The appellant is said to have stated that he was a former police officer. There was no evidence tendered by the prosecution to disprove this allegation. The fact that the appellant stated that he was a former police officer and that he would teach PW1 some manners, appears to have angered the police. However, there is no evidence to establish the commission of the offence of obstructing police officers in execution of their duties.

The second count is that the appellant misconducted himself at a police building by banging the report office desk several times. Only PW2 specifically testified to the banging of the report office table. Curiously enough, PW1 and PW3 are completely silent on this aspect. In addition, it is expected that at the report office, there will usually be police officers on duty 24 hours. Those on duty would surely have witnessed the banging of the report office table, and the circumstances under which such banging occurred. They would also have been independent witnesses. In my view, there is no sufficient evidence to establish that indeed the appellant misconducted himself in a police building. The evidence of the prosecution witnesses was not believable. Both offences were not proved. The conviction cannot be sustained.

The learned trial magistrate sentenced the appellant to serve four (4) years imprisonment, without indicating the offence for which he was sentenced. Having convicted on two offences, the learned trial magistrate should have addressed the sentence on each offence separately, even if the two sentences were to run concurrently. It was wrong for the trial magistrate to hand down a single sentence on account of the two offences.

In conclusion, I find merits in the appeal. I allow the appeal, quash the conviction and set aside the sentence. I order that the appellant is set at liberty forthwith unless otherwise lawfully held.

Dated at Kakamega this 29th day of January, 2014

George Dulu

JUDGE