REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL APPEAL NO 69 OF 2013

Appeal from original conviction and sentence by Acting Senior Resident Magistrate at Mwingi (V. A. Otieno) in Criminal Case No. 14 of 2013

MATI MUTUNGA……APPELLANT

VERSUS

REPUBLIC……RESPONDENT

JUDGEMENT

Background

Mati Mutunga, the Appellant, was charged before the lower court with personating a public officer contrary to section 105 (b) of the Penal Code. It is alleged that on 7th January 2013 at Migwani Market in Migwani District within Kitui County he falsely presented himself to be a person employed in the public service namely a police officer and attempted to borrow money from one Florence Kaingi posing to be a police officer from Migwani District Office.

After taking evidence from three prosecution witnesses and from the Appellant, the trial court was convinced that the Appellant had committed this offence. He was convicted and sentenced to serve three years in jail. He is dissatisfied with the conviction and sentence and has appealed to this court.

Petition of Appeal

Eight grounds of appeal have been presented to this court. I have summarized them as follows:

i. The charges were not explained to the Appellant the language that he understands.
ii. The identification of the Appellant was not positive.
iii. The mode of arrest was poor.
iv. The prosecution evidence was uncorroborated, inconsistent and contradictory.
v. The prosecution left out crucial witnesses.
vi. The prosecution case was not proved beyond reasonable doubt.
vii. The trial magistrate relied on extraneous matters to convict the Appellant.
viii. The sentence is harsh and excessive.

The Appellant's Submissions

The Appellant has submitted that there was no interpretation of the court proceedings to him and the language used by him and the witnesses is not indicated and therefore he was prejudiced; that the Appellant was not positively identified since the evidence of PW1 and PW2 is inconsistent as to the time

the Appellant was arrested; that crucial witnesses, namely one Mwende and one Moraa were left out as witnesses; that the manner in which the Appellant was arrested was not established whether it was at 1.00pm or 10.30am; that there are contradictions in the prosecution case in respect of the time of the alleged offence and that the trial magistrate did not explain section 211 Criminal Procedure Code to the Appellant.

Respondent's Submissions

Learned counsel for the prosecution submitted that the Appellant participated in the trial an indication that he understood the language used; that it is trite law that no particular number of witnesses is required to prove a particular fact; that the evidence of the prosecution was well corroborated; that the trial magistrate was not influenced by the previous records of the Appellant and that the mode of arrest was within the law. Counsel urged the court to dismiss the appeal.

Determination

I have examined and evaluated the evidence tendered in the lower court afresh. Starting with the excessive sentence, I note that the maximum sentence under section 105 (b) of the Penal Code is three years. This is what the Appellant was sentenced to. My view is that the sentence is excessive in the circumstances.

I find that the trial magistrate did not rely on extraneous matters. He considered the previous records of the Appellant and that is within the law.

There is nothing wrong in the manner in which the Appellant was arrested. APC Nyakundi, PW2, acted on the report of Florence Kaingi, PW1, and visited the scene. He arrested the Appellant and booked him. He later handed him over to PC Sospeter Leting who preferred charges against the Appellant. The same goes for the identification. I find nothing wrong with the identification of the Appellant. He was clearly seen by PW1 and upon report to PW2 who rushed to the scene, the Appellant was arrested. In my view the Appellant was positively identified.

Further, I find that the prosecution evidence is not contradictory. PW1 testified that she told the Appellant to wait until 1.00pm because she did not have the money at the time and because she was suspicious of him she called PW2 and reported to him. There is no evidence that PW1 waited until 1.00pm. The Appellant must have misunderstood the evidence. The evidence by the prosecution in my considered view and after my own evaluation proves beyond doubt that the Appellant committed this offence. I am alive to the fact that Mwende and Moraa mentioned in evidence did not testify but that does not affect the prosecution case as the available evidence proves the case as required by the law.

However, I find the manner in which the proceedings were taken rather casual. I note the same magistrate took the plea and proceeded with the hearing although other magistrates mentioned the case in certain dates. The language of the court is not captured on the date the plea was taken. It is not stated in which language the witnesses or the Appellant testified. I agree with the Appellant on this issue. Where the record does not indicate the language used, doubts are created whether the accused person followed the proceedings and for this I refer the trial magistrate to read **Francis Macharia Gichangi & 3 others v. Republic Criminal Appeal No. 11 of 2004; Frederick Kizito v. Republic in Criminal Appeal No. 170 of 2006** and **Albanus Mwasia Mutua v. Republic, Criminal Appeal No. 120 of 2004.**

The Appellant was sentenced on 22nd May 2013. In view of the errors of the trial magistrate in recording the proceedings, I will and do hereby quash the conviction and set the sentence aside. The Appellant shall be set at liberty forthwith unless for any other reason he is held in custody. It is so ordered.

Dated, signed and delivered on 7th April 2014.

S.N.MUTUKU

JUDGE