



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT ELDORET
CRIMINAL APPEAL NO. 95 OF 2013

ABRAHAM KIPYEGO MUTAI APPELLANT

VERSUS

REPUBLIC RESPONDENT

(Being an appeal from the Judgment, conviction and sentence by the Hon. Resident Magistrate D. Limo in Kapsabet Principal Magistrate's Criminal Case No. 187 of 2013 delivered on 21st May, 2013)

JUDGMENT

Abraham Kipyego Mutai, the Appellant herein was charged with incitement to violence contrary to Section 96 of the Penal Code. Particulars of the offence were that on the 18th day of January, 2013 at Ndaptapwa Market Centre in Nandi County uttered to Henry Kiplimo Tendenei Rono had both stolen votes and misappropriated CDF's funds during the recent political parties nominations, an act which was calculated to lead to causing violence to Henry Kiplimo Tendenei Rono.

The Appellant was found guilty and convicted accordingly. He was sentenced to serve two years probation.

He was dissatisfied with both the conviction and sentence, hence this appeal. He raised fourteen (14) grounds of appeal as per the Petition of Appeal dated 5th June, 2013. However, only three issues were raised at the hearing of the appeal, namely;

- (a) That the charge sheet was defective.
- (b) That the Appellant was denied a right to a fair hearing
- (c) That the Appellant was convicted on the weight of insufficient evidence.

Learned State Counsel Mr. Omwega for the Respondent conceded to the appeal. He submitted that the evidence on record did not prove the offence with which the Appellant was charged as defined under Section 96 of the Penal Code.

He also conceded that the trial Magistrate erred in requesting for a probation officer's report before convicting the Appellant and the mitigation was done.

He however urged the court to expunge pages 34 to 42 of the record of appeal as they do not comprise part of the proceedings. Learned counsel for the Appellant, Mr. Kamau concurred with

Mr. Omwega that pages 34 to 42 of the record of appeal do not comprise a part of the proceedings and were included in the record by error.

Although the Respondent conceded to the appeal, this being the first appellate court must re-evaluate the evidence on record and come up with its own conclusion but bear in mind that it has neither heard nor seen the witnesses. See **PANDYA -VS- REPUBLIC (1957) E.A. 336, OKENO -VS- REPUBLIC (1972) E.A. 32** and **KARIUKI KARANJA -VS- REPUBLIC (1986) KLR, 190.**

I now proceed to consider each of the issues raised by the Appellant.

DEFECTIVE CHARGE SHEET

Under this head, Mr. Kamau submitted that the charge sheet did not contain the ingredients of the offence as set out under Section 14 of the Penal Code. He submitted that what comprised the particulars of the offence was reiterated by PW1, 2 and 3. The words they uttered though did not meet the threshold of the offence under Section 96 of the Penal Code. That is to say, that the words allegedly uttered by the Appellant could not be interpreted to mean that they could cause injury, or death or violence against a person. Further, it was submitted that not a single witness testified that the Appellant had incited anybody to be violent against another person.

The Appellant was charged as follows:-

"Incitement to violence contrary to Section 96 of the Penal Code."

The particulars of the charge were spelt out as follows:-

"On the 18th day of January, 2013 at Ndaptapwa Market Centre in Nandi County, uttered word to Henry Kiplimo Tendenei Rono had both stolen votes and misappropriated CDF's funds during the recent political parties nominations, an act which was calculated to lead to cause violence to Henry Kiplimo Tendenei Rono.

Section 96 of the Penal Code under which the Appellant was charged provides as follows:-

"96. Any person who, without lawful excuse, the burden of proof whereof shall lie upon him, utters, prints or publishes any words, or does any act or thing, indicating or implying that it is or might be desirable to do, or omit to do, any act the doing or omission of which is calculated-

(a) to bring death or physical injury to any person or to any

class, community or body of persons; or

(b) to lead to the damage or destruction of any property; or

(c) to prevent or defeat by violence or by other unlawful means the execution or enforcement of any written law or to lead to defiance or disobedience of any such law, or of any lawful authority, is guilty of an offence and is liable to imprisonment for a term not exceeding five years."

Under the particulars of the charge, it was stated that the Appellant caused the incitement to violence by uttering some words which were calculated to lead to violence to the complainant, Henry Kiplimo Tendenei Rono. To ascertain whether the charge sheet was properly drafted it is important that I address what contributes a defective charge sheet.

In the case of **YOSEFU & ANOTHER -VS- UGANDA (1960) EA, 236** the East African Court of Appeal held that;

“the charge was defective in that it did not allege an essential ingredient of the offence; in that the skins came from animals killed etc, in contravention of the Act.”

And in **SIGILANI -VS- REPUBLIC (2004) 2 KLR, 480**, it was held thus;

“The Principle of the law governing charge sheets is that an accused should be charged with an offence known in law. The offence should be disclosed and stated in a clear and unambiguous manner so that the accused may be able to plead to specific charge that he can understand. It will enable the accused to prepare his defence.”

Thus, an accused must be charged with an offence known in law, particulars of which must be clearly and sufficient spelt out in an accurate manner so that he understands the charge(s) facing him. In the instant case therefore, it was imperative that the words allegedly uttered by the Appellant that were calculated to cause violence to the complainant be replicated in the particulars of the charge.

From the evidence on record, it is only PW2 and 3 who heard what the Appellant had uttered. According to PW2, the wife of the complainant (PW1), the Appellant told her that PW1 had stolen votes together with the sons of one David during the parliamentary nominations as well C.D.F funds from the office of Emgwen Constituency.

PW3, Joseph Agui Kosgei on the other hand stated that he was among a crowd of people when he heard the Appellant say that the voting had been cancelled and that votes had been stolen by PW1 who had also misappropriated C.D.F funds.

Although the two witnesses did not state the actual words which the Appellants allegedly uttered, it was mandatory that those words be duplicated in the particulars of the charge. Otherwise the Appellant would not know what he did that was likely to cause violence and therefore be adequately prepared to present his defence. I do therefore concur with the Appellant that the charge was defective and did not meet the threshold of the offence under Section 96 of the Penal Code.

Learned counsel for the Appellant did also submit that the offence did not satisfy its ingredients as provided by Section 14 of the Penal Code. Unfortunately, Section 14 relates to age of accused persons and has no relevance to this case.

RIGHT TO A FAIR TRIAL

Under this head, learned counsel, Mr. Kamau, submitted that the Appellant was denied a fair trial because the trial court ordered for a probation report before the conviction and mitigation.

He also submitted that the statements of the witnesses were recorded by the police before the complainant made his complaint with the police.

The right to a fair hearing is envisaged under Article 50 of the Constitution. Its broad spirit is captured in sub-Article (1) which reads thus;

“Every person has the right to have any dispute that can be resolved by the application of the law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.”

In my view, the process of a fair trial must be deduced from the manner a trial is conducted. No step of a trial ought to be overstepped so as to appear to conclude the trial fast. If any of the requisite steps is skipped, it may be interpreted that the presiding officer (judicial officer) has a pre-determined mind or is only interested in ending but not the quality of the outcome of the process.

In the instant case, the trial was concluded on 17th April, 2013 with the defence case and their

submissions. As soon as the defence submissions were made, the learned trial Magistrate made the following order;

"Mention on 19/4/2013 for a status report from the probation department."

The said probation report was availed on 19th April, 2013.

It is a trite procedure that such a report ought to be called for after Judgment. This is for obvious reasons, that not even the trial court ought to know the outcome of the trial before the Judgment as it is in the Judgment that evidence is evaluated. But in this case, sadly though, it appeared that the trial court knew that the Appellant would be convicted and the ultimate sentence was probation. My interpretation of the premature order is that the trial court already had a pre-determined mind to convict the Appellant notwithstanding the absence of sufficient evidence. As fate had it, after Judgment, the trial court sentenced the Appellant to a two year probation period.

This substantive procedural lapse negated a fair administration of justice to the Appellant and it violated his fundamental right to a fair hearing under Article 50 of the Constitution.

On the issue of the prosecution witness statements, at page 15 of the record of appeal, on cross-examination, PW4, the investigating officer stated as follows;

"The matter was reported on 24.1.13 at Kapsabet Police Station. I am not sure the matter was reported in the occurrence book The name of the complainant is Henry Rono. All witnesses recorded statements on 21.2.2013."

When I look at the original record, it is difficult to tell whether the month in the dates as handwritten is (1) or (2). But whatever the number, the hand writing and the manner of writing the numbers in both dates of the month is the same. That is to say that it may be that the matter was reported on 24th January, 2013 or 24th February, 2013. The date when the statements were written may also be read as either 21st January, 2013 or 21st February, 2013. Whatever the date it is clear that statements were written before the complaint was made with the police. Again, the presumption arising therefrom is that the police officers were working in cahoot with the complainant to facilitate a case that never was. This anomaly ought to have raised an eye brow with the trial court and resolved it as a huge discrepancy that vitiated fair investigations and trial of the Appellant.

WEIGHT OF EVIDENCE

Under this head, learned counsel Mr. Kamau submitted that the court failed to take into account the evidence adduced that there already existed a grudge between the Appellant and the complainant.

He further submitted that the trial court dismissed the defence evidence that cast doubts towards the prosecution's case. It was also his submission that the Appellant was convicted on the consideration of evidence of only one witness, PW3.

In total, the prosecution called four (4) witnesses. The complainant testified as PW1. His testimony was that on 18th January, 2011 at about 11.00 a.m. at Ndaptapwa Trading Centre he passed a big crowd of people that was being addressed by the Appellant. He was later informed by the youth that the voting on nominations had been stopped.

He further testified that on the following day he received a call from the Appellant. His wife also told him that the appellant had called her to tell her that he (PW1) was not picking his calls and that he was looking for him and had threatened to do harm to him.

He stated that he thereafter went to the police station together with his witnesses who had heard the Appellant stating that he had stolen votes and misappropriated C.D.F. funds.

He also testified that the Appellant had been having bad blood (grudge) against him since the year 2001.

PW2, Lenah Cheptoo Rono, PW1's wife testified that on 19th January, 2013, the Appellant called him and told him that PW1 had stolen votes and C.D.F. funds from the office of Emgwen Constituency. She said that the Appellant also asked him where PW1 was and he (Appellant) indicated to her that he (PW1) must go. She then feared that PW1's life was in danger.

PW2 further testified that she knew that PW1 and the Appellant did not relate well.

PW3, Joseph Kosgei testified that on 18th January, 2013 he went to where there was a crowd being addressed by the Appellant. That is where he heard the Appellant telling the people that PW1 had stolen votes and "eaten" C.D.F funds. He thereafter left.

PW1, 2 and 3 were the key prosecution witnesses. To start with, PW1 himself did not hear the words uttered by the Appellant. PW2 and 3 only heard the Appellant say that PW1 had stolen votes and misappropriated C.D.F (Constituency Development Fund) money. None indicated that the Appellant, after stating this, asked the people he was addressing to beat PW1 or become unruly (cause violence) or destroy any property. According to PW2, the Appellant only spoke to her on phone. And even if he told her that the Appellant "must go", she did not state where he meant him (PW1) to go. Her statement was then bear and could be interpreted in very many ways. Moreover, the clarification of what the Appellant meant by the words that PW1 'must go' were not clarified on cross-examination. Even then, they could not at all be interpreted to mean they were intended to cause any violence.

More importantly, even after the Appellant stated that PW1 had stolen both votes and C.D.F money, no member of public is said to have confronted him (PW1) with the intention of causing injury to him. There was also no violence of public nature that was reported. As such, it begs how the trial court arrived at a finding that the mere statement by the Appellant that PW1 had stolen votes and money amounted to incitement to violence. In my view, it misdirected itself in making such a finding. The evidence of the prosecution witnesses was too weak, too insufficient as to found a concrete case against the Appellant.

I also concur with the Appellant that, had the trial court critically analysed the defence evidence, it would have cast doubts on the strength of the prosecution's case.

In all, it is factual and trite that the prosecution did not prove its case to the required standards. The case was riddled with insufficient evidence that did not meet the threshold set out under Section 96 of the Penal Code. It was also marred by procedural lapses and poor investigations that violated the accused's right to a fair trial. It is clear that the case was trumped up against the Appellant with the aim of settling a score with PW1 with whom he had a long standing grudge.

In the result, this appeal must succeed in its entirety. I quash the conviction, set aside the two years probation sentence and order that the Appellant is forthwith set free, unless he is otherwise lawfully held.

DATED and DELIVERED at ELDORET this 28th day of October, 2014.

G. W. NGENYE – MACHARIA

JUDGE

In the presence of:-

Mr. Maritim holding brief for Kamau for the Appellant

Miss Oduor for the Respondent