



No.418 /2014

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL 22 OF 2010

SUSAN NZILANI MUTUKU.....APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

(Being an appeal from the original conviction and sentence in Tawa Resident Magistrate's Court Criminal Case No. 119 of 2009 by Hon B.M. Mararo R.M on 25/6/09)

JUDGMENT

1. **Susan Nzilani Mutuku**, the appellant herein is charge with three (3) counts.
  - i. Stealing contrary to **Section 275** of the **Penal Code**. Particulars thereof being that on the **12<sup>th</sup> March, 2009** at **Kangengi** butchery **Mbumbuni Market** in **Mbooni East District** within **Eastern Province** stole a weighing machine valued at Kshs. 2000/= the property of **Augustine Musango Kaleve**.
  - ii. Creating disturbance in a manner likely to cause a breach of the peace contrary to **Section 95(1) (b)** of the **Penal Code**. Particulars thereof being that on the **12<sup>th</sup> March, 2009** at **Mbumbuni Market, Kisali Location** in **Mbooni East District** within **Eastern Province** created a disturbance in a manner likely to cause a breach of the peace by threatening to hit **Joseph Muli** with a weighing machine.
  - iii. Resisting lawful arrest contrary to **Section 253(b)** of the **Penal Code**. Particulars thereof being that on the **13<sup>th</sup> March, 2009** at **Mbumbuni Market** in **Mbooni East District** within **Eastern Province** resisted lawful arrest of **No. 95048475 APC Munene, No. 2007123540 AP Onyango** and **No. 2006055558 APC Joel** all Police Officers while at the time of the said resistance when acting in due execution of their duties.
2. She was tried, convicted and sentenced to pay a fine of Kshs. 10,000/= or serve three (3) months imprisonment in default one each count.
3. Being aggrieved by the said conviction and sentence thereof the she appealed on the following grounds:-
  - i. That the learned magistrate erred and misdirected himself in failing to find that the burden of proof in criminal case is beyond reasonable doubt.
  - ii. That the learned magistrate erred in failing to ensure that the burden of proof which is beyond reasonable doubt on the part of prosecution had been discharged.

- iii. That the learned magistrate erred in shifting the burden of proof to the appellant and finding that she had a duty to discharge in a the three counts.
  - iv. That the learned trial magistrate erred in finding that the failure on the accused to oppose the evidence of the prosecution was to her detriment as she had no burden or duty to discharge.
  - v. **That** the learned magistrate erred in finding that the unsworn statement of the accused did not cast any doubt in the evidence of the prosecution.
  - vi. **That** in reaching the finding on the issue of un-controverted evidence of the prosecution this Honourable Court failed to recognize that the burden is on the prosecution to prove beyond reasonable the offence charged.
  - vii. **That** the learned magistrate erred in finding that the appellant had a duty to discharge to show that he was guilty.
  - viii. **That** the learned judge made a wrong misinterpretation of burden of proof in criminal cases and occasioned a miscarriage of justice.
  - ix. **That** the learned magistrate erred in funding the appellant guilty of resisting lawful arrest contrary to **Section 253(b)** of the **Penal Code**.
  - x. **That** the arrest of the Appellant who is woman was carried out by three men who has not identified themselves to the applicant hence improper and such arrest ought to be done by police woman
  - xi. **That** the learned magistrate erred in issuing a very high fine of Kshs. 10,000/= for each count while the alleged stolen metal plate costs Kshs. 2000/= only.
4. Briefly the facts of the case were that on the **12<sup>th</sup> March, 2009** PW2, **Joseph Mutuku Kaleve** was at his place of employment, a butchery owned by PW1, **Augustine Musanga Kaleve**. He sold mutton to a child who returned it but he declined to accept. Moments later the appellant went to the butchery, insulted him and threatened to hit him with a weighing tray/plate. A report was made to the Administration Police, PW4, **No. APC 95048475 David Musila Munene Kathulumbi** who went and arrested her in company of his colleagues. She insulted them. They however managed to arrest her. PW7 No. 67008 **P.C. Christopher Chege** investigated the case and charged her.
  5. In her defence the appellant denied having left her place of business. It was her testimony that on the **13<sup>th</sup> March, 2009** some three (3) people went to her place of business looking for a brown lady. They did not tell her why they wanted her. One of them crossed over the counter and dragged her out. They injured her hand. They took her to the district officer's office where they found a person who alleged that she had sent for meat at their butchery. They were asked to settle the matter. They failed to agree therefore were taken to **Mbumbuni Police Station**. Denying having bought any meat from the butchery she stated that there was a case pending before **Makueni Court**.
  6. The learned trial magistrate evaluated evidence adduced and reached a finding of guilty in respect of the appellant
  7. Both the appellant and State agreed to canvass the appeal by way of written submissions.
  8. This being the first appellate court, its duty is to reconsider and re-evaluate evidence adduced at trial in order to come up with its own conclusions bearing in mind the fact that it neither saw nor heard witnesses testifying ( *(See Okeno versus Republic [1972] E.A. 32)*).
  9. With regard to the count of stealing PW1 identified the appellant as the person who went to the butchery and after an altercation following sale of mutton took away a weighing tray/plate that was not recovered. The appellant denied having gone to the butchery as alleged. PW1 stated that the report he got at the outset from his employees was that a lady had gone to the butchery and taken the weighing plate after an altercation. He went on to state that the employees stated it was the appellant and he identified her in court. Evidence adduced by PW2 that it was the appellant who took the weighing plate is corroborated by that of PW3. The issue to be determined is whether the appellant took it with intent to deprive the owner of it. In her findings the trial magistrate observed that the appellant failed to cast a doubt to the prosecution's case.
  10. The law requires the prosecution to prove all ingredients of a charge. An accused person does not bear the burden of proving his/her innocence. As a rule the person accused can only be convicted

on the strength of the prosecution's evidence and not on the weakness exposed by the defence ( *also see Oketh Okale versus Republic*[1965] E.A. 555).

11. In the instant case the duty was upon the prosecution to prove beyond any reasonable doubt that the appellant took away the weighing plate fraudulently. No doubt the appellant was a purchaser who was aggrieved by the action of PW2 of declining to refund the money paid and take back the mutton. Having been agitated she took away the weighing plate. After her arrest the matter was handed over to PW7 to investigate. PW7 simply narrated the tale as stated by witnesses. He said :-

***“She tried to assault PW2 and disappeared with the plate”***

12. The appellant who was unrepresented had no question to put to him in cross-examination

13. As an Investigation Officer, PW7 had a duty of interrogating what was reported to him. He did not even state if he sought any explanation from the appellant as to why the plate was taken. He did not make any attempt to recover plate. Looking at the circumstances under which the plate was taken, it cannot be stated with certainty that the appellant did it fraudulently. The intention to permanently deprive the owner of the weighing plate was not established. It was therefore erroneous on the part of the learned magistrate to reach a finding that the appellant stole.

14. With regard to count 2 the appellant is stated to have threatened to hit PW2 with the weighing machine plate. In his evidence PW2 stated:-

***“She tried to hit me with the weighing tray which she carried and dared me to follow her.”***

15. PW3 confirmed that the appellant tried to hit PW2 with a weighing plate. The question to be posed is whether the action taken by the appellant who was agitated for non-refund of her money amounted to reasonable apprehension that would result into breach of peace. In order for such an apprehension to exist evidence must be led of the presence of persons being present who are likely to resort to causation of some breach of peace. PW3 said there was an attempt to hit PW2. He did not state what effect the action had on him. In the case of *Kimanga versus Republic* [197] E.A. 42 – the court stated that the statute is aimed at preventing incitement to physical violence, mere annoyance or displeasure by the complainants was not sufficient.

16. With regard to the third count of resisting arrest, it was stated that the appellant resisted lawful arrest of three police officers. In his evidence PW4, **APC Munene** stated:-

***“We went to her place in uniform. We escorted her to our office. She told us she did not have time and can only be arrested by D.O. , D.C. and the President. She insulted us telling us that she did not make the money from being fucked. We called CID Kioko. He tried to soothe her. She turned wild and CID told us to arrest her...”***

17. **APC, Onyango** stated :-

***“We went to the shop... she said she cannot go to the DC's Office. She said she could only listen to the D.C, PC or President. As she had resisted arrest we called the CID. We used necessary force and put her in the motor-vehicle”***

18. **No. 20065558 APC Joel** is mentioned in the charge sheet.

PW6 **No. 2006055558** who introduced herself as **APC Evans Toit** stated thus:-

***“Munene was in uniform. We went to accused's house. We introduced ourselves and the purposes of our visit. She refused and said that she did not have them. We called the CID Kioko who came with Kharora. She said that she could not be arrested by AP Constable but by the D.O., DC and President. We arrested her and took her to Mbumbuni Police Patrol Base.”***

19. Should the court take what PW4 stated to be true then having escorted the appellant to their office, she had already submitted to custody. According to **Section 21(1)** of the **Criminal Procedure Code**, where a person resists arrest the person arresting ought to use all necessary means to effect arrest. It is alleged that by word of mouth/ action the appellant resisted the endeavour to arrest her. An alleged **CID, Kioko** had to be called. The stated person was not called as a witness to confirm if indeed the appellant resisted arrest. Having subjected herself to custody of PW4 and moved to the Administration Police Officers, that was already arrest. The alleged resistance or arrest could not arise.
20. From the foregoing the appeal must succeed. I quash the conviction and set aside the sentence imposed. If the fine was paid, it shall be refunded to the appellant forthwith.
21. It is so ordered.

**DATED, SIGNED and DELIVERED at MACHAKOS this 28<sup>TH</sup> day of OCTOBER, 2014.**

**L.N. MUTENDE**

**JUDGE**