



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NYERI**  
**CRIMINAL APPEAL NO.35 OF 2011**

**BETWEEN**

**MAITIMA SEVERINO M'MKINDIA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal from the original conviction and sentence in criminal case No.2686 of 2008 in Nanyuki SRM's Court dated 19th November, 2010, Hon. E.N. Gichangi, RM)*

**JUDGMENT**

1. The appellant was charged with the offence of wrongful confinement contrary to Section 263 of the Penal code, the particulars of which were that on the 1st day of December 2008 at Water Resources Office Nanyuki in Laikipia District within Rift Valley Province unlawfully confined SAMUEL STEPHEN OTELA by locking him in the office.

2. He pleaded not guilty, was tried, convicted and fined Kshs.8000/= in default to serve three (3) months imprisonment. Being aggrieved by the said conviction and sentence he filed this appeal and raised the following grounds of appeal:-

1. *The learned trial magistrate erred in law and in fact in convicting the appellant whereas the ingredients of the offence of unlawful confinement had not been proved.*
2. *The learned trial magistrate erred in law and in fact in convicting the appellant even when the investigating officer had categorically testified before the trial court that the door to the office where the complainant alleged to have been confined was not locked.*
3. *The learned trial magistrate erred in law and in fact in failing to find that the prosecution's case was full of gaping holes and contradictions and failing to give the appellant the benefit of doubt.*
4. *The learned magistrate erred in law and in fact in rejecting the cogent and very comprehensive defence tendered by the appellant.*
5. *The learned magistrate erred in law and in fact in failing to warn himself that the complainant had motive and malice to frame up the appellant with the charges after the complainant's spirited attempts to extort and demand money by menaces from the appellant became a cropper.*

3. At the hearing of the appeal, Mr. Muthui appeared for the appellant while Miss Maundu appeared for the State and conceded to the appeal on the ground that there was material contradiction between PW2 and PW3 since PW3 stated that he did not find the door locked.

4. Mr. Muthui submitted that the evidence of PW1, PW2 and PW3 were contradictory and that the trial magistrate did not look at the evidence of DW2 carefully.

5. It must be pointed out that the court is not under any obligation to allow the appeal since it is conceded to by the State but must re-evaluate the evidence tendered before the trial court and come to its own conclusion.

6. It was the prosecution's case that PW1 Samuel Stephen Otela was a mechanic and the appellant was his customer. He stated that he had repaired the appellant's motor vehicle and was owed Kshs.65,000/=. On 11th December 2008 he went to the appellant and asked for payment he was locked in the office from outside. After 30 minutes he phoned his son who came with the police after one hour.

7. PW2 Richard Ogola Otela stated that PW1 phoned him around noon and stated that the appellant had locked him in the office. He reported to the police and in the company of a police officer went to the appellant's office on arrival confirmed that PW1 had been locked, they went to the appellant who told them to go and check and found the door open. Under cross examination, he stated that PW1 told him that he had been locked in the office of the appellant and that they found PW1 in the office.

8. PW3 David M. Gitahi the investigating officer stated that when he went to the appellant's office on arrival at the gate he talked with the watchman who showed him where PW1 was. He went and opened the door and found PW1. He stated that he did not find the door locked. Under cross examination, he stated that the door was just shut and not locked.

9. The appellant stated that he left PW1 in his office and took his visitors to his deputy's office and did not lock the door and as he was in the meeting a police officer came and said he had come to check on a person who had been locked in the office. This was confirmed by DW2 Doreen Kathure.

10. In convicting the appellant, the trial court had this to say:-

**“Having keenly looked at the statement of PW1 and DW1 the only possibility is that this door must have been opened when it was learnt that the matter was being followed up by the police. DW1 closed the door but it was opened later on.”**

11. It is clear that this finding was not supported by the evidence on record. It is clear that having failed to secure his money from the appellant, PW1 made the report so as to put pressure on the appellant to pay. It is also clear that the independent witness PW3 confirmed that he did not find PW1 locked and since the appellant was in a meeting throughout there is no way he would have known that the matter was being followed by the police.

12. Miss Maundu was therefore right in conceding to the appeal since the conviction of the appellant was not safe, I allow the appeal herein and set aside the conviction of the appellant and quash the sentence herein. The appellant should be set free forthwith and any sum of money paid by the same in fine be refunded to him.

**Signed and dated this    day of    2014**

**J. WAKIAGA**

**JUDGE.**

**Delivered by Justice J. Ngaah on behalf of Justice Wakiaga this 25th day of November 2014**

**J. NGAAH**

**JUDGE**

In the presence of:

----- for Appellant

----- for State