



NO. 458/2014

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 123 OF 2012

KIMEU WAMBUA.....APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

*(Being an appeal from the original conviction and sentence in Tawa Senior Resident Magistrate's Court Criminal Case No.161 of 2012 by*

*Hon. J.W. Gichimu SRM on 11/09/2012)*

J U D G M E N T

1. **Kimeu Wambua**, the appellant was charged with resisting lawful arrest contrary to **Section 253 (b)** of the **Penal Code**.

Particulars of the Offence being that on the **13<sup>th</sup> day of May 2012** at **Kusyethuku village, Uthiuni Sub-Location, Mbooni County**, resisted lawful arrest of **No.226314 APC Michael Maithya** and **No. 232740 APC**

**Urbanus Ndaka** Administration Police Officers who at the time of resistance were acting in the due execution of their duties.

2. He was tried, convicted and sentenced to **three (3)** years imprisonment.
3. Being aggrieved by the conviction and sentence thereof, in his amended grounds of appeal he states that the trial magistrate erred in law and fact by; applying the doctrine of recent possession of the alleged weapons without observing that the same was not proved; shifting the onus of proof to the defence; no report was booked or warrant issued to establish that he was to be arrested; and by rejecting his plausible defence.
4. The facts of the case were that on the **13<sup>th</sup> May 2012** PW1 **No.94006632 Sergeant Simon Lochiyole**, PW2 **No.2007128053 APC Athanus Ndeta** and PW3 **No.226314 APC Michael Maithya**, administration police officers acting on information received moved to arrest the appellant herein for the offence of selling alcohol near a school. On arrival they found the appellant at home. They introduced themselves but the appellant declared that he would not be arrested. He entered the house and returned with a panga, bow and arrows. He threatened to use the weapons. The officers however subdued him and arrested him. He was taken to the police station and charged.
5. In his defence the appellant stated that when the police officers went to his house they assaulted

- him. Two people who were at his house ran away. They ordered him to sit. They fired an ammunition and wounded him. Members of public gathered. The officer fired a gunshot which made them run away. The police officers handcuffed him and ravaged his house and damaged water jerricans. They also arrested his mother. He saw a bow, an arrow and three pangas being loaded in the motor-vehicle. At the police station he complained to the OCS who did not take him to hospital but later on he was taken following a court order.
6. The appellant called witnesses. His wife DWI **Diana Mutia Kimeu** confirmed in material particular what he stated and added that she picked a spent cartridge at the scene of the incident which she produced in evidence. She had to pay Ksh.3000/= to the police to have her mother-in-law released. On cross-examination she stated that the appellant was arrested for being in possession of alcohol.
  7. DW2 **Muindi Musyoka** stated that he witnessed as the police assaulted the appellant while some 20 metres away. On cross examination he admitted that the appellant was known for brewing alcohol at his home. On the material date he was with two (2) men who were drinking alcohol. They ran away.
  8. At the hearing the appellant relied upon the amended grounds of appeal and written submissions.
  9. In response thereto **Mr. Mwangi** learned State Counsel opposed the appeal. He stated that indeed the appellant resisted arrest on being arrested for the offence of being in possession of traditional liquor. He pleaded guilty to the charge and was sentenced.
  10. This being the first appeal, I do remind myself of the duty to re-consider the evidence, evaluate it and draw my own conclusions in deciding whether the judgment of the trial court should be upheld. (*See Okeno versus Republic [1972] E.A. 32*).
  11. I have considered evidence adduced at trial and submissions of the appellant and the learned State Counsel. The appellant was stated to have contravened the provisions of **Section 253 (b)** of the **Penal Code** which provides thus:

*“Any person who ...*

*(b)...resists or wilfully obstructs any police officer in the due execution of his duty, or person acting in aid of that officer...is guilty of a misdemeanour and liable to imprisonment for five (5) years.”*

In the instant case it was stated that he resisted lawful arrest of Administration police officers who were acting in due execution of their duties.

12. It is argued that the arresting officers did not have a warrant when they arrested the appellant. As a result the conviction should be quashed. According to **Section 29** of the **Criminal Procedure Code**, a police officer may arrest a suspect without a warrant upon reasonable grounds of having committed a cognizable offence. In this case the complainants, administration police officer received information that the appellant was selling some illicit brew. This was a cognizable offence. The police officers were not required to obtain a warrant from a court to enable them to effect arrest. The law does not envisage that in such offence permission has to be obtained from the court to investigate it. A warrant of arrest was not necessary.
13. It is a requirement of the law that the person being arrested must be notified of the reason of his arrest. The persons effecting arrest are required to introduce themselves. Where the suspect does not submit to custody by word of mouth or action, the arresting officer must touch him or confine his body. (*See Section 21 (1) of the Criminal Procedure Code*).
14. PW1, PW2 and PW3 **No. 226314 APC Michael Maithya** were categorical that they introduced themselves when they found the appellant at his home. On being cross-examined the appellant stated that indeed he knew the complainants as police officers.
15. It is in evidence that the officers found two (2) people with the appellant taking the illicit brew who upon seeing the complainants ran away. The appellant was arraigned before court for the offence of manufacturing/processing of alcoholic drinks without a licence. He admitted having committed the offence. He was to be arrested for an offence that exists in law. The arrest was hence lawful.
16. Evidence adduced by PW1 and corroborated by PW2 and PW3 was that the appellant refused to

be arrested and told them as much. He hit PW2 and ran into the house. He came out armed with a panga, bow and arrow and threatened to kill the officers. He threatened to cut PW3. The police officers struggled with him. They managed to subdue him and effected arrest. The weapons he had were produced in evidence.

17. The appellant on the other hand argues that he was assaulted by the police. Denying having had the weapons he argued that he saw them being loaded in the motor-vehicle. He denied having seen them previously. However, in court he made an application claiming them. DWI the appellant's wife also stated that the police collected a basin, utensils, a bow, an arrow and two (2) pangas from them. That was evidence that the weapons belonged to them.
18. According to the law, if a person forcibly resists the endeavour to arrest him, the police officer may use all means necessary to effect arrest. (***See Section 21 (2) of the Criminal Procedure Code***).
19. The prosecution witnesses stated that the appellant having resisted arrest they managed to subdue him. They did not specifically state how they did it. The defence, however, stated that they assaulted the appellant. He claimed he was wounded following a gunshot.
20. When the appellant appeared in court on the **14<sup>th</sup> May 2012** he notified the court that he was assaulted by the police. The court directed that he be taken to hospital. He never alleged that he had been wounded or that he suffered a gunshot wound. The plea was taken the following day, the **15<sup>th</sup> May 2012** after he informed the court that he had been taken to hospital. The treatment notes from **Mbooni District Hospital** form the court record. It is noted he had;

- i. Headache
- ii. General malaise
- iii. Back pains

It is recorded that he alleged that he was beaten by a police officer at the cells. This was evidence that he was not wounded by any gunshot. In the premises the learned trial magistrate made no error in reaching a finding that the injuries the appellant sustained were as a result of the struggle that ensued between him and the complainants.

21. The alleged doctrine of recent possession was misplaced as the learned trial magistrate did not allude to it. This is a case where the trial court evaluated evidence adduced and reached a correct conclusion.
22. The appellant was sentenced to three **(3) years imprisonment**.
23. A person who commits such an offence can be imprisoned for upto **five (5) years** in jail. The appellant herein was sentenced to **three (3) years**. The learned trial magistrate considered what the appellant had to state in mitigation. He stated thus:

***"I ask the court to determine the matter"***

24. The trial court had an opportunity of observing the appellant's demeanour. It was noted that he was not remorseful. The sentence was imposed after the court considered circumstances under which the offence was committed. Unleashing weapons like arrows, a bow and panga to confront arresting officers necessitated use of reasonable force. In the circumstances the sentence meted out which is legal was reasonable.
25. Consequently, the appeal lacks merit. It is dismissed in its entirety.

**DATED, SIGNED and DELIVERED at MACHAKOS this 16<sup>TH</sup> day of DECEMBER, 2014.**

**L.N. MUTENDE**

**JUDGE**