



REPUBLIC OF KENYA

High Court at Machakos

Criminal Appeal 66 of 2010

JOSEPHINE NTHUKAAPPELLANT

VERSUS

REPUBLICRESPONDENT

(Being an appeal from the original conviction and sentence in Kangundo Principal Magistrate's Court Criminal Case No 53/2010 by C. Obulutsa, PM on 16/3/2010)

JUDGMENT

The appellant, **Josephine Nduka** was charged before the Principal Magistrate's Court, Kangundo with creating disturbance in manner likely to cause a breach of peace by calling **Jackline Mwendé** a prostitute on 28th January, 2010 at Tala Township contrary to section 95(1) (b) of the Penal Code. She denied the charge and was soon thereafter tried.

PW1, **Jackline Mwendé's** story was that she was heading home and while waiting to board a motorcycle she met the appellant who was with her worker. The appellant confronted her and while holding her by the collar called her a prostitute, who was useless, slept with street boys and old men and could not even wash her private parts well. She threatened to set thugs upon her. PW2, **Julius Mutua** and PW3, **John Mutiso** who were motor cycle operators were at the stage and witnessed what went on between the two ladies. They decided to intervene. **Mutiso** took **Mwendé** aside and the next day when she reported to the police the two recorded statements with PW5, **Corporal Wangwe** whereupon he arrested the appellant the same day in the company of PW4, **P.C Wamalwa**.

In her defence the appellant stated that she operated her business in the same plot with the complainant and that on that day while with her worker DW2, **Irene Nzisa** met the complainant standing by the road who told her to take away her buttocks. **Irene** told her not to reply and they went home. In the morning she went to her business intending to report later to the police but before she could do so she was arrested. She said she had previously reported **Jackline** to the police and nothing was done.

The learned magistrate having keenly evaluated the evidence on record both for the prosecution and defence found the case against the appellant proved beyond reasonable doubt convicted her and sentenced her to 4 months imprisonment.

Aggrieved by the conviction and sentence, the appellant lodged the instant appeal through **Messrs Wambua Kilonzo & Co. Advocates** on 25th March, 2010. A total of 7 grounds were advanced faulting the magistrate for convicting the appellant to wit that;

- the magistrate erred by holding that the prosecution had proved its case against the appellant

beyond reasonable doubt,

- the charge was defective;
- The appellant's testimony and that of their witness was totally ignored by the magistrate,
- Nor did the magistrate appreciate that the appellant did not understand or appreciate the language used at the trial and even took into account irrelevant considerations,
- He gave no reasons for his findings and above all,
- he erred in sentencing the appellant to 4 months imprisonment without an option of a fine.

When the appeal came before me for hearing on 11th June, 2013, both **Mr. Kamolo**, learned Counsel for the appellant and **Mr. Mukofu**, learned State Counsel agreed to canvass the appeal by way of written submissions. Those submissions were subsequently filed and exchanged. I have carefully read and considered them.

The appeal was conceded to by the State on the grounds that the case was weighed against the appellant on the basis of the number of witnesses who testified against her. However, the testimony of these witnesses was contradictory. Those contradictions made the conviction of the appellant not safe.

The appellant too, in her submissions alluded to the contradictions in the prosecution case as well as the defects in the charge sheet.

Having carefully evaluated the charge sheet, the evidence led in support thereof and the judgment of the learned magistrate, I am satisfied that the State was right in conceding this appeal. It is quite apparent that there is business rivalry between the appellant and the complainant. They all operate hair saloons from the same suit premises. As a result of such rivalry, courts should be wary and ensure that they are not turned into arenas of resolving personal differences under the guise of criminal sanctions. I have no doubt at all in my mind, that the complainant wrongly invoked the criminal justice system so as to settle personal scores with the appellant. That explains the contradiction in her testimony regarding the incident with that of her witnesses. The complainant for instance testified that she met with the appellant who was accompanied by her worker. A madman had been pestering her for money. It was then that the appellant followed her and held her shirt and called her a prostitute, useless and threatened to unleash thugs on her, accused her of sleeping with street boys, old men and she could not even wash her private parts well. At this juncture, it is imperative to note that the complainant does not at all mention the presence of her 2 witnesses at the scene of crime, nor does she mention the role these 2 witnesses (PW2 and 7) played. Further PW2 and PW3 testified that they are the ones who moved in to separate the two ladies. This is stark contradiction with the PW1's testimony who simply stated that following the encounter, she walked home. PW1 did not state where the offence was committed. PW3 testified that the 2 ladies approached him and one lady held the other by the shirt and he intervened. However, he could not tell the court as between the complainant, the appellant and the appellant's employee who held the other. Again whereas PW2 testified that he was the one who intervened in the situation between the complainant and the appellant, PW3 on the other hand testified to being the person who intervened. These clearly cast doubts on the complainant's story. Those doubts should have been resolved in favour of the appellant. In the light of the foregoing and considering other factors already alluded to elsewhere in this judgment, it was unsafe for the court to have made a finding that the prosecution had proved its case beyond any reasonable doubt. The testimony of the complainant was scanty and raised more questions than answers.

The appeal is accordingly allowed, conviction quashed and the sentence imposed set aside. Unless otherwise lawfully held, the appellant should be set at liberty forthwith.

DATED, SIGNED and DELIVERED at MACHAKOS this 28TH day of SEPTEMBER 2012.

ASIKE MAKHANDIA
JUDGE