



THE REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

HCCRA. NO.129 OF 2011

JAMES MUEKU MAUNDU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. In his Notice of Motion dated and filed on the 30th June, 2011 brought under Section 357 of the Criminal Procedure Code, James Mueku Maundu (**the Appellant**) seeks to be released on bond or cash bail pending the hearing and determination of his appeal also filed on the 30th June, 2011. In his supporting affidavit made on the 30th June, 2011, the Appellant says he was convicted on the 28th June, 2011 and sentenced to one (1) year imprisonment for the offence of grievous harm. He complains that his conviction was not supported by the evidence before the learned trial Magistrate especially in the absence of any direct evidence to link the Appellant with the offence. In addition, the Appellant contends that the trial court did not take into account that he was a first offender and further that the imposition of a custodial sentence without the option of a fine was manifestly unreasonable, hard and severe in the circumstances. The grounds and reasons amongst several others form the basis of the appeal and were reiterated in the submissions made by learned counsel for the Appellant at the hearing of the application.

2. The State opposed the application on the basis that the evidence of Joseph Nzamelu Mutungi, the complainant (PW.1), clearly demonstrated that it was the Appellant who pushed the table that hit him, PW.1 and injured his leg. The evidence is supported by the evidence of Jacob Mutuku Makundi (PW.2) and the proprietor of Alice Bar where the complainant and others were enjoying a drink. Learned Senior State Counsel also pointed out that as regards sentence, the Applicant was liable to imprisonment for life but was sentenced to imprisonment for only one (1) year.

3. Mr. Mutungi, the complainant, testified with reference to the Appellant that:

“Afterwards, the accused stood up and pushed the table which hit me on the right leg at the shin. My leg got fractured on both bones.....”

This evidence is supported by the testimony of the bar owner (PW.2) who told the learned trial Magistrate that –

“after a while, Mr. Mueku pushed the table towards Mr. Mutungi who was seated the opposite side. The table hit Mr. Mutungi on the leg and he fell down.”

Mr. Kitingo Paul Nzioka (PW.3) who was also present testified that:

“Mr. Mueku pushed a table towards Mr. Mutungi who attempted to stand without success.”

4. The Appellant, DW. 1, in his sworn testimony stated as follows:-

“He started abusing me and my family that we are poor and can do nothing to him. He alleged that I and my family combined cannot match his mother’s wealth. I kept quiet. He rose from the table carrying a glass and bottle of beer. He changed position to another place but same table. He continued abusing me. He then filled his glass and started playing about with it. He stood up and splashed at my face. I was seated next to the proprietor who pacified me and urged me to take it easy. As I was wiping my face, he moved towards me ready to fight. Leonard Mutuku stood between him. I stood up as was the proprietor. The proprietor Makundi urged me not to retaliate as Leonard urged the complainant. I walked out of the bar. I walked to my car. I remembered having left behind the ignition keys to my car. I returned to the bar and Leonard Mutuku who had then surrendered them and I drove home together with Mutung Syengo. I did not push a table to hit the complainant. At that table was Leonard Mutuku Nzagi. I was with him throughout”

5. DW.2, Leonard Mutuku alias Nzangi, who was also present recalled the incident as follows:

“I restrained him AS DID TO Mr. Mueku using both hands. I was joined by Mr. Makundi who held Mr. Mueku. That was when Mr. Mutungi lost balance and almost fell down. He said that his leg “imeenda”. He was holding my shoulders. I assisted him to stand and there was no contact between Mr. Mueku and Mr. Mutungi. Mr. Mueku did not push a table to him Mr. Mutungi. There was a glass and some bottles on the table but did not fall down. I tried to observe Mutungi’s leg but did not see anything wrong. He could however not stand alone. At that time, Mr. Mueku had left in fury but returned for his ignition key from me which I did and then left. I took his vehicle and drove Mutungi upto his home where I handed him over to his brother.”

6. In the face of this evidence, the learned trial Magistrate in the judgment dated the 28th June, 2011 summarized the same in the following manner:

“from the evidence, it is not in dispute that all the prosecution and defence witness were on 28.12.2007 seated together drinking at Alice Bar, Salama. That the accused person and the complainant started conversing separately but this conversation turned sour. That was when as put by PQW.1, 2 and 3, the accused person pushed a table in rage which hit and injured the complainant. This version was disputed by DW. 1 and 2. According to the accused, he left the bar immediately his conversation with the complainant turned sour. As he was driving home, DW.2 called and asked him to return and take the complainant to hospital for he had stumbled and sprained his leg. So according to the accused person, any injuries that the accused person might have sustained were inflicted after he had left the scene. This was however, contradicted by DW.2 who said that when the conversation between the complainant and the accused turned sour, a commotion ensued. The same was corroborated by PW.2, the proprietor of the bar and a friend to both the accused person and the complainant. Those witnesses appeared to me to be neutral and gave a correct version of what actually transpired . I therefore accept the version that it was actually the accused person in a fit of anger, who pushed the table which injured the complainant. All the witnesses on both sides said that though they were drinking beer, none of them was intoxicated and were therefore in control of their instincts. What this means is that the accused’s act of pushing a table to hit and injure the complainant was a deliberate and intentional”

7. In light of the foregoing, I am unable to form the opinion that the Appellant’s appeal has such overwhelming chances of success as would not justify depriving him of his liberty pending the hearing of his appeal. I have noted the Appellant’s offer of substantial security to secure his release but on assertion that he will not abscond is not sufficient ground for releasing a convicted person on bail pending appeal – see **Dominic Karanja vs. Republic [1986] KLR 612.**

8. In the result, the application for bail/bond in the Notice of Motion dated and filed on the 30th June, 2011 fails and is hereby dismissed.

So ordered.

Dated and delivered at Machakos, this 27th day of **July**, 2011.

P. Kihara Kariuki
Judge