



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

CRIMINAL APPEAL NO. 50 OF 2009

WILSON NDURU ESTIKA ----- APPELLANT

-VERSUS-

REPUBLIC ----- RESPONDENT

JUDGMENT

This is an appeal from the judgment of the P.M's Court Maseno in Criminal Case no. 629 of 2006. The appellant **WILSON NDURU ESTIKA** had been charge alongside his son **GIDION ESTIKA**. His son was faced with 1 count (count one) and the appellant with 4 counts (count two to four). They both pleaded not guilty to the counts and were tried. **GIDION ESTIKA** was acquitted for lack of evidence. The appellant was however convicted of all the counts that face him. He was aggrieved by the judgment and hence this appeal on the following grounds:-

1. That he pleaded not guilty to the charges appended.
2. That the learned resident magistrate erred in-law and fact in failing to find that if indeed the complainant was robbed. And if so then the span of time taken rules it out from truth to untruth.
3. That the trial magistrate erred in-law and in fact in failing to take judicial notice of the infringement of the Constitutional rights of the appellant when he was kept in custody for longer than allowed before he was charged, hence they ought to have been acquitted for that reason.
4. That the trial magistrate erred in law and in fact in failing to analyze that the appellant could not be courageous enough to walk into the police station and course obstruction and being that the police later awarded the appellant with bond to keep peace proofs co-operation.
5. That the burden of proof always rests on the prosecution and never shifts to the part (accused).
6. That the sentence imposed on the appellant are so manifestly harsh and excessive as to amount to a misdirection.

The appellant was charged as follows:-

COUNT II: Obstructing a police officer contrary to Section 253(b) of the Penal Code in that on the 11th day of May, 2006 at Maseno Police Station in Kisumu, obstructed P. C. Ezekiel Juma a Police Officer who was at the time of the said obstruction acting in the execution of his duty.

COUNT III: Also obstruction contrary to Section 253(b) of the Penal Code in that on the said date he also obstructed Hesborn Otieno a Police Officer who at the time was acting in execution of his duty.

COUNT IV: Behaving in a disorderly manner in a Police building contrary to Section 60(1) of the Police Act. Particulars of the offence are that on the said date 11th of May, 2006 at Maseno Police Station in Kisumu, he behaved in a disorderly manner within Police building namely the Crime Office by banging on the table and abusing officers Ezekiel Juma and Hesborn Otieno as fools.

At the hearing of this appeal in his submissions the appellant stated that he was nor drunk nor did he create any disturbance. That the police ganged against him. Further that the sentence is harsh.

On its part the prosecution opposed the appeal. **Mr. Kiprop** learned Stated Counsel submitted that the appellant had behaved in an irresponsible manner by obstructing the police. That the appellant on learning of his sons arrest he went to the Police Station and while there he banged tables and attempted to have his son ran away. That the appeal lacks merit. The learned State

Counsel conceded that there was no count 5 and the appellant was wrongly convicted.

This being the first appellate court it has a duty to re-consider the evidence, examine and analyze the same in order to arrive at an independent decision. See **OKENO VS R** (1972) E. A at 32.

The court has considered the evidence on record as follows:-

PW1 JAPHETH MOKAYA reported theft of his sugar. He learnt from PW2 that the appellant's son who was first accused in the lower court had been seen by **PW2** pushing sugar on a handcart.

PW2 KEVIN NYAKUNDI alleged to have witnessed the theft. **PW3 P. C. VALENTINE ORINYO** attached to Maseno Police Station saw her colleagues **P. C. JUMA** and **OTIENO** chasing the persons i. e the appellant and his son. That **P. C. JUMA** raised an alarm and they joined in the case. The 2 were arrested. The appellant resisted arrest and a struggle ensued when the appellant tore the left breast jacket of PW5. When the appellant was taken to the office he continued with the struggle and banged tables and insulted the officers. **PW4 & PW4** gave similar evidence.

At the close of the prosecution evidence the appellant's son was acquitted but the appellant was however put on his defence. The appellant denied that he was drunk. He stated that in the evening sometime in May, 2006 he learnt of his son's arrest. He went to the police and found his son had been released on a free bond and was to return the next day. However on seeing him the police asked them to go back and asked for Kshs 300/=. He did not have the demanded amount and both of them were as a result put in the cells. He alleged to have been beaten and injured. The essence of the defence is a denial of the allegations.

The evidence of **PW3 – 5** is similar. They all testified to the unruly behaviour of the appellant and the insults he hailed at them while exercising their duty as police officers. In his submission the appellant alluded a conspiracy by the police. In his cross – examination of the witnesses he did not pursue this neither did he in his submission explain why the police conspired against him. I see no reason why the police officers could have conspired. Like the trial court I find that the evidence of the prosecution was sufficient and proved to the required standard in support of the 3 counts that faced the appellant. I see no reason therefore to interfere with the lower court's finding.

The appellant did not pursue the claim of infringement of his Constitutional rights and I will therefore make no finding.

However I do agree with the appellant that the sentence meted out is harsh. I find the same to be not only harsh but excessive. He was sentence to a fine of Kshs 50,000/= or 2 years imprisonment in counts II and III, 10,000/= or 1 year for count IV and a 5th count which was none existence where he was to pay Kshs 5,000/= or 6 months. The sentences were to run consecutively which means he would serve 5 years 6 months.

I begin by setting aside the sentence on count 5 as there was no count 5.

I also set aside the other sentences and in place substitute the sentences as follows:- fine of Kshs 20,000/= for count 11 and III in default, 6 months imprisonment. Fine of Kshs 10,000/= for count IV in default 2 months imprisonment. All the sentences to run concurrently.

The appellant was sentenced on the 19th of March, 2009 meaning that he has more than served his sentenced as set out above. I consequently set him free unless he is otherwise lawfully held.

DELIVERED THIS 23th DAY OF September, 2011.

**ALI-ARONI
JUDGE**

In the presence of:

..... **for State**

..... **present for Appellant.**