REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

HCCR. NO. 250 OF 2008

LESIIT

GLADYS KANANU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGEMENT

The appellant was convicted of the offence of **offensive conduct** contrary to section 94(1) of the Penal Code. She was sentenced to a fine of 50,000/- and in default six months imprisonment. She was aggrieved by the conviction and the sentence and therefore filed this appeal. The appellant relies on the grounds in the filed petition. Which I summarize as follows:

1. That the offence charged was defective and the particulars did not disclose any offence.

2.That the learned trial magistrate disregarded the appellants defence that she was admitted in hospital on the date of the alleged offence.

3.That the learned trial magistrate shifted the burden of proof and

4.That the sentence was excessive.

The facts of the case were that the appellant went to the complainants saloon and knocked at the back door when the complainant opened the door the appellant started abusing her and insulting her calling her a prostitute, a witch who was bringing customers through *"Majini"* the appellant also challenged the appellant to a duel. There were five customers in that saloon who included PW3 corroborated the complainants evidence as to the words spoken to the appellant to the complainant.

In her defence the appellant denied the charge and told the court that she was admitted at Maua District Hospital on the 22nd up to 24th July 2008 the appellant called one witness who told the court that he knew nothing about the case. The defence witness No. 2 told the court that between 15th and 18th of July 2008, the complainant sent him to the appellant to warn her to stop moving with her husband otherwise she would take action which was not disclosed.

As a first appellate court I have subjected the evidence adduced before the court to a fresh evaluation and

analysis. In the case of **OKENO V. REPUBLIC [1972] EA 32**. the role of a first appellate Court is given as follows:

"**An appellant on first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination [**Pandya vs. Republic (1957) EA 336] **and to the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusion** (Shantilal M. Ruwala v. Republic [1957] EA 570.) **It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, (See** Peters v. Sunday Post, [1958] EA 424.)"

I am guided by the above cited case.

The appellants appeal was argued by Mr. Lekoona advocate. The state was represented by Mr. Solomon Kimathi who opposed this appeal.

The first issue raised by Mr. Lekoona was that there was contradiction in the evidence of the prosecution. Mr. Lekoona urged that the complainant's testimony was that she called the landlord who did not speak to her. PW3 on the other hand contradicted that evidence when she said that the landlord told the complainant to keep quite and not to fight. Mr. Lekoona urged that PW4 contradicted the complainant further by testifying that the landlord told the complainant to report the matter to the police. The other contradiction was in the evidence of PW1 and 2 where Mr. Lekoona said that the two of them went to Maua Police Station and reported to PW1 whereas it was not possible that PW2 to have reported the matter to herself.

Mr. Kimathi urged that there were no contradictions in the evidence of the prosecution witnesses.

I have considered the evidence of PW1,3 and 4. I find that their evidence was consistent, that when the appellant confronted the complainant and uttered the abusive words, the complainant went to call the landlord, and that when the landlord went to the scene he advised the complainant not to fight with the appellant, but instead to report the matter to the police.

Mr. Lekoona urged that the appellant a report was disregarded. Counsel urged that on the date the offence was alleged to have been committed the appellant was admitted in hospital.

Mr. Kimathi urged that the learned trial magistrate was right in his disbelieving the defence. Mr. Kimathi submitted that from the medical record which the appellant produced as an exhibit it clearly indicated that the appellant was not admitted between 22nd and 24th of July, as she had alleged in her defence.

I have looked at the medical document marked defence exhibit 1 and I have noted that the record shows that the appellant was treated and discharged on the 22nd July 2008. The card shows that the appellant was admitted for observation on 23rd July 2008 and released the following day. The appellant was giving a false impression to the court that she had been admitted for 3 days i.e between 22nd and 24th July 2008. She was therefore deliberately misleading the court.

On my part I have considered the offence charged. Section 54 (1) of the Penal Code makes it an offence for any person who goes to a public place or public gathering and uses threatening, abusive or insulting words or behavior with intent to provoke a breach of the peace. The evidence adduced by the complainant, P3 and 4 clearly supports the particulars of the offence charged. The words used by the appellant as per the evidence of the three eye witnesses is consistent with the particulars of the charge.

The prosecution has established that the appellant went to the complainants salon which is a public place, where there were five customers including PW3, and an employee PW4. The words used by the appellant

were abusive and insultive and therefore constituted the offence charged. The prosecution has shown that the appellant also threatened the complainant and challenged her to a duel thereby threatening a breach of peace. I am satisfied that the learned trial magistrate came to the correct conclusion that the prosecution had proved the charge against the accused person beyond any reasonable doubt.

In regard to the sentence the last ground of appeal challenges the sentence for being excessive and or wrong in law. A person convicted of an offence under section 94 (1) of the Penal Code is liable to a fine not exceeding 5,000/- or to imprisonment for a term not exceeding 6 months or to both. The sentence imposed by the learned trial magistrate was not merely excessive but illegal. I set aside the fine of 50,000/ - in default six months imprisonment and in substitution thereof impose a fine of 5,000/- in default 2 months imprisonment.

If the appellant paid any part of the fine imposed by the lower court the same should be refunded to her less 5,000/- which is the fine substituted by this court.

The appellants appeal succeeds to the extent shown hereinabove.

DATED, SIGNED AND DELIVERED THIS 22ND DAY OF SEPTEMBER 2011.

J LESIIT

JUDGE