



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**OF KISII**

**Criminal Appeal 158 of 2009**

**BETWEEN**

**RAPHAEL MARWA MWITA ..... APPELLANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

**JUDGMENT**

The appellant was charged with obstructing a police officer contrary to **section 254 (b)** of the **Penal Code**. The particulars of the offence were that on the 14<sup>th</sup> day of December 2008 at Nyabasi North Location in Kuria East District within Nyanza Province jointly with others not before court, willfully obstructed **Police Constable Javan Loliko, Corporal Benson Maina** and **Police Constable Kennedy Jobando** who were acting in the execution of their duties. The appellant also faced another count of being in possession of offensive weapon in a public place contrary to **section 6 (a)** of the **Public Act**. The particulars of the offence were that on the same day and place as in count one, the appellant was found in possession of 18 poisonous arrows and a bow. In respect of count two I believe the police intended to cite the provisions of **section 6 (1)** of the **Public Order Act, Cap 56** of the **Laws of Kenya**. There is no Act of parliament known as “**the Public Act**.” **Section 6 (1)** of the **Public Order Act** states as follows:

**“Any person who, while present at any public meeting or on the occasion of any public procession, has with him any offensive weapon, otherwise that in pursuance of lawful authority, shall be guilty of an offence.”**

The appellant was tried and convicted of the two counts and sentenced to four years’ imprisonment in respect of the first one and 6 months’ imprisonment on the second count. The sentences were ordered to run concurrently.

Being dissatisfied with the said conviction and sentence the appellant preferred an appeal to this court.

The brief facts of the case were as follows.

On 14<sup>th</sup> February 2008 at about 8.00 a.m., **Inspector Javan Loliko, PW1**, who was the Officer in charge Masurura Anti Stock Theft

Unit Camp, received a report of stolen animals from Lolgorian. He prepared a unit of ten police officers to accompany the complainant in tracking the stolen animals. They reached a place known as Kugitimo at about 11.00 a.m. Members of the public started screaming and shooting arrows at the police. The police managed to arrest one of the members of the public who was shooting arrows at them. He was found in a maize plantation. He had a bow and an arrow in hand. He had seventeen other arrows. He was taken to Kehancha police station. The bow and arrows were produced before the trial court.

The evidence of PW1 was corroborated by **Corporal Benson Maina, PW2, and Police Constable Kennedy Jobando, PW3.**

In his defence, the appellant stated that on the material day at about 2.00 p.m., he was cleaning a church together with his wife. He went home and sat under a tree. While there the police came and arrested him. They entered his house and took a bow and three arrows. Thereafter he was taken to Kehancha police station.

From the evidence on record the appellant was arrested by the police armed with a bow and arrows. The appellant and others were attempting to block the police from pursuing cattle rustlers. I am not persuaded by his defence that he was merely arrested while seated outside his house. In the circumstances, the conviction on count one was well founded. However, the provision of the law that was cited is not correct. The right section of the Penal Code that defines the offence of obstructing a police officer on duty is **section 253 (b)** and not **254 (b)**. The learned trial magistrate correctly convicted the appellant under the correct provision of the law.

As regards the sentence that was passed by the trial court, the appellant was a first offender. The learned trial magistrate rightly exercised his discretion in passing the sentence and cannot be faulted at all. The appellant has been in custody for nearly one year. Considering the nature of the offence and the circumstances under which it was committed and taking into account the congestion in our prisons, I hereby allow the appeal and reduce the sentence to the period already served. The appellant is set at liberty unless otherwise lawfully held.

**DATED, SIGNED AND DELIVERED AT KISII THIS 14<sup>TH</sup> DAY OF MAY, 2010.**

**D. MUSINGA**  
**JUDGE.**  
**14/5/2010**

Before D. Musinga, J.

Mobisa – cc

Mr. Mutuku, Senior Principal Prosecution Counsel

Appellant present

**COURT:** Judgment delivered in open court on 14<sup>th</sup> day of May, 2010.

**D. MUSINGA**  
**JUDGE.**

