



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT MERU

Criminal Appeal 271 of 2003

AUGUSTINE KIRIMI APPELLANT

VERSUS

REPUBLIC RESPONDENT

(An appeal from a judgment of A.N. Kimani P.M. Chuka

dated on 4th December 2003

JUDGMENT

The appellants herein filed three separate appeals which were subsequently consolidated and heard in HC Cr. Appeal No. 271 of 2003. Initially the appellants had filed, in person, separate petitions. When they engaged counsel, they filed supplementary grounds of appeal. The appellants were charged with two counts under the Penal Code, namely, resisting arrest contrary to section 253 (b) in respect of all the three appellants and destroying evidence contrary to section 116 in respect of the 1st appellant alone. After their trial the learned trial magistrate found them guilty and convicted them on both counts. He sentenced each to serve four (4) years in count one (1) and 1st appellant two (2) years in count 1. Being aggrieved the appellants filed this appeal.

There is no significant departure in the grounds initially filed by the appellants and the supplementary grounds. Learned counsel for the appellants argued the grounds together, the main one being that there was no or no sufficient evidence to warrant a conviction. That ground was based on the fact that:-

- (i) the charges were irregular and defective
- (ii) essential witnesses were not called
- (iii) the judgment was contrary to section 169(1) of the Criminal Procedure Code:
- (iv) the evidence was not corroborated
- (v) the evidence was contradictory
- (vi) the appellant's defence was not considered
- (vii) the sentence was manifestly harsh

Learned counsel for the respondent conceded the appeal on further grounds; namely;

- (i) the language used at the trial is not indicated
- (ii) the provisions of section 211 of the Criminal Procedure Code was not complied with

Counsel further submitted that in view of the time that had elapsed, (5 years) he would not seek a retrial. He cited the case of **Swahibu Simbauni Simiyu V. R.** on the issue of the language at the trial. On my part I note that the rank of the prosecutor when plea was taken is recorded as Sgt. Musila. I have taken into account the grounds advanced in this appeal, the submissions by both counsel and the above authority. Before I venture to consider these grounds, it is necessary as I am bound to do, to re-evaluate the evidence on record afresh in order to come to my own independent conclusion bearing in mind that this court has not had the benefit of seeing the witnesses.

PW1 P.C. Martin Njue and PW2 P.C. Moses Nyaga were at Mitheru Market on 21st August 2003 when they received information that a person had bhang at a certain kiosk at the market. When they got to the kiosk they found the 1st appellant. After conducting a search in the kiosk they recovered six stones of bhang in a carton. When they told the 1st appellant that he was under arrest he became rowdy and declared that he would not go with the officers. The officers had to resort to the use of force to handcuff him. His screams attracted members of the public. The 2nd and 3rd appellant joined in the argument insisting that the 1st appellant was going nowhere. The 1st appellant passed the carton containing bhang to the 2nd appellant who in turn ran off. Because the crowd was growing the officers called for reinforcement which arrived shortly and the crowd was contained.

The 1st appellant had also run off with the handcuffs but was later traced and arrested along with the 2nd and 3rd appellants. The carton and its contents were never recovered. The 1st appellant in his defence stated that while in his kiosk a customer came to buy cigarettes. When the 1st appellant was refunding the charge to that customer a tall man grabbed him. He screamed as the man wanted to take the money. The man took a panga and chased him. Neighbours and the general public were attracted and concluded that the 1st appellant was being robbed. It is at this stage that he realized that the two (the customer and tall man) were infact police officers.

2nd appellant briefly defended himself that he responded to the screams and went to the scene. But was arrested as he was preparing to leave the scene. According to the 3rd appellant he saw two people armed with pangas chasing away children. They identified themselves as police officers and arrested both the 1st appellant and the 3rd appellant.

I have considered the foregoing evidence as well as the submissions. I find as a fact that all the three appellants were at the scene at the time material in this matter. It is also not in dispute that the first two prosecution witnesses went to the kiosk belonging to the 1st appellant. The offences created under section 253 are in respect of other forms of assault. The only assault in respect of a police officer is provided for under section 253(b) as follows:-

“253. Any person who –

- (a)
- (b) **Assaults, resists or willfully obstructs any police officer in the due execution of his duty, or any person acting in aid of that officer;**
- (c)
- (d)

(e)

Is guilty of a misdemeanour and is liable to imprisonment for five years.”

The provision gives three instances when the offence is committed on a police officer, namely, assaulting him, resisting or willfully obstructing him in the execution of his duty.

First and foremost I must determine whether the persons who went to the kiosk to arrest the 1st appellant were police officers. That question may appear mandane but it is the basis of the charge under section 253(b) of the Penal Code. Yes, of course PW1 and PW2 were police officers when they went to arrest the 1st appellant. But was this fact known to the appellants or indeed to the rest of the members of the general public present.

The Constitution guarantees the citizens of the protection of right to personal liberty which can be taken away, only if, among other reasons, he is reasonably suspected of having committed or about to commit a criminal offence under the law. The Constitution further provides that once a person is arrested he must be informed as soon as reasonably practicable, in a language that he understands, of the reasons for his arrest.

The manner of effecting arrest by the police or any other person is provided for in part III of the Criminal Procedure Code. Specifically section 21(1) thereof provides that in making an arrest the officer or other person doing so must actually touch or confine the body of the person to be arrested unless the latter submits. The appellants in this appeal maintained that they did not know that PW1 and PW2 were police officers. PW1 confirmed that they did not introduce themselves. He said:-

“I have my work ID. You could have asked for ID if in doubt.”

PW2 on the other hand stated:-

“We identified ourselves.”

Both confronted the 1st appellant at the same time. One confirmed that they did not identify themselves while the other maintained that they did. That apparent contradiction is resolved in favour of the appellants. The appellants and members of the public infact suspect that PW1 & PW2 were thieves. It would appear they were not in uniform. Handcuffs alone could not be a basis of concluding that the two were police officers. The peoples’ doubt about the officers’ identity was buttressed by their insistence that the chief be called. The two must count themselves lucky for missing mob justice by a whisker.

I come to the conclusion that there was no evidence to support the charge in count one. The offence under section 116 of the Penal Code is proved where it is shown that the suspect knowing that an item may be required in evidence willfully removes or destroys it or renders it incapable of identification with the intention of preventing it from being used in evidence.

The crowd that was attracted to the scene was estimated to be ten young men, armed with all manner of weapons. PW1 & PW2 acting on some information seized what they said was bang. This is how PW1 described what happened:-

“1st accused pushed the bang to 2nd accused. 2nd accused ran off with the carton.”

In cross-examination by the 3rd appellant PW1 continued:-

“The accused pushed the bhang to 2nd accused. 2nd accused took it away.”

PW2 on his part testified as follows in this regard:-

“Bhang was passed to one in the group. It was taken away,”

In cross examination by the 1st appellant he went on:-

“You called one person to carry the carton which had bhang. The carton was at the door. Bhang was taken in the direction of your home.”

Once again the two eye witnesses could not agree on what happened to the carton and its contents. For all these reasons coupled with the fact that part of prosecution was undertaken by an incompetent officer and bearing in mind also that the language of the trial has not been indicated and that Section 211 CPC was not complied with, this appeal is allowed. The conviction is quashed and sentence set aside.

The appellants shall be set at liberty forthwith unless they are held for any lawful reason.

Dated and delivered at Meru this 29th day of January 2009.

W. OUKO

JUDGE