REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT MALINDI

Criminal Appeal 126 of 2008

JOHN JILO SIMON ……………..…………..………….APPELLANT

VERSUS

REPUBLIC ……………………………………………RESPONDENT

J U D G E M E N T

The appellant (John Jilo Simon) was convicted on charge of assault in resisting arrest contrary to section 253(a) of the Penal Code that on 17th day of June 2005 at about 3.30pm within Makaburini area in Zubaki location of Tana River District, he assaulted APC Martin Koome with intent to resist or prevent the lawful arrest or apprehension or detainer of himself for the offence of consuming traditional liquor (makole) contrary to section 34(2) as read with section 50 of the Liquor Licensing Act cap 12 of Laws of Kenya. He was also convicted on a charge of consuming traditional liquor contrary to section 34(2) as read with section 50 of the Liquor Licensing Act that on 17 th day of June 2005 at about 3.30pm, at Makaburini area in Zubaki Location of Tana River District, he was found consuming traditional liquor (makole) appellant denied both charges, on the charge of assault contrary to section 253, he was sentenced to serve 4 years imprisonment and on the charge of consuming traditional liquor, he was sentenced to serve three months imprisonment. The sentences were to run concurrently.

The trial court was informed that Administration Police Officers (APs) being APC Martin Koome Karimi (PW1) and APC Babu Chokera (PW2), were on patrol within Hola area along with the other officers. They went to Makaburini area, looking for bhang smokers and people who brew traditional liquor. At Makaburini area, they came across five people who were seated outside a house drinking traditional brew and who on seeing then begun running away. However two were very drunk and the APs managed to arrest them. PW1 got hold of appellant who bit him on the right hand. Pc Ngonde ran to PW1's assistance but the appellant pushed Pc Ngonde who dislocated his right leg, as a result. Appellant was eventually subdued and arrested.

On cross-examination PW1 denied that it's the APs who beat appellant and that any injuries he had he must have sustained them as a result of falling down while running away.

Dr. John Mwangi (PW3) produced the P3 form on behalf of Dr. Kahindi who had filled it, and had been transferred from Hola to Kilifi. The injuries on PW1 were found to be on his fingers and bruises on the right hand probably caused by a blunt object. On cross-examination he stated that the injuries were to the thumb finger and hand (both right).

In his sworn defence, appellant told the trial court that he was a freelance photographer and was on his normal photography duties around Makaburini area when police officers surrounded him and started beating him.

They held his hands tightly, and the photographs that he had fell down. He explained that he was not able to do anything because his hands were tightly held by the police officers. A crowd formed, he was ordered to carry jerrycans containing traditional brew – he refused.

He got injured during the struggle in an effort by police to arrest him but he was eventually arrested and taken to the police station.

The police officers did not allow him to go to hospital as they argued that he had assaulted one of them.

In his judgment, the trial magistrate found that the police officers were consistent that appellant was found drinking traditional liquor when he was arrested and that no other reason is cited as to why appellant resisted arrest nor was it demonstrated that there existed a grudge between him and the officers.

The trial magistrate held that since appellant did not suggest any other reason for his arrest, then malicious arrest could not be imputed.

The trial magistrate considered the evidence of PW1, PW2 and the doctor and held that appellant had assaulted PW1 while resisting arrest, noting that the police officer was examined on the same day of the assault and the P3 form entries therefore confirmed that the injuries were sustained and it was clear the same were as a result of the assault while arresting appellant.

The trial magistrate held that since appellant said the police tied his hands tightly, so that he was unable to do anything then that meant that the was resisting arrest, which made the police officers to handcuff him tightly. Also that another indication of resistance by appellant was his act of using his teeth to bite PW1. The trial magistrate also considered that the fact that appellant got injured during the arrest as a good indication of resistance and infact termed it as *"an admission of the offence of arrest"*

He concluded that since appellant did confirm being within Makaburini area, and that there was a struggle during his arrest, and appellant's own injuries and defiance to carry the jerrycans, then the offences preferred were proved, saying appellant's defence did not controvert or rebut the evidence offered by prosecution.

Appellant challenged both conviction and sentence saying the four year sentence was excessive and unfair.

(2) He was not given a second chance to call his defence witness after the first failure to attend court.

(3) The trial magistrate failed to take into consideration that appellant had been in custody for four years.

At the hearing of the appeal, even before the defence counsel stood up to address the court, the learned counsel for the State, Mr. Ogoti informed the court that he was conceding to the appeal because the case was handled by two different magistrates, Mr. ole Tanchu who heard two witnesses until 17-1-07, then Mr. J. M. Anunda (RM) who took over the matter on 6-3-07 and proceeded to hear the defence case. There was no indication that section 200 (3) Criminal Procedure Code was explained to the appellant and thus made the trial fatally defective.

Further that appellant had already served over one year in jail, and that the sentence on count 2 which was a term of three months, had been exhausted.

As regards the charge of assaulting a police officer during arrest, Mr. Ogoti submitted that there was no medical evidence that the officer was ever taken for treatment and that is why the State is not even seeking a retrial.

The appellant's counsel, Mr. Magolo added that there really was no evidence against the appellant because the P3 form relied on was filled by a doctor who did not testify and produced by another doctor without any explanation as to why the maker was not available.

Further that the charge of consuming traditional liquor is not an offence – under section 34 of the Liquor Licensing Act, it is only consuming after hours not authorized which is an offence; and the time indicated in the evidence was 3.30pm and there was no evidence that 3.30pm is not time authorized by the license. Even the sentence served is contested, Mr. Magolo submits that the same is illegal as offences under section 34 and 50 give a sentence of Kshs. 500/= in default one months imprisonment, so appellant is entitled to an acquittal.

I have gone through the record and confirm that part of the proceedings were conducted by Mr. T. K. ole Tanchu, (Resident Magistrate) who took the evidence of PW1 and PW2 whilst Mr. J. M. Anunda (Resident Magistrate) recorded the evidence of PW3 and PW4 and wrote the judgment.

I confirm that the provisions of section 200 (3) of the Criminal Procedure Code were neither complied with nor explained to the appellant to establish whether he wished the matter to proceed afresh; continue from where it had reached, or whether he would have wished for some witnesses to be recalled.

Section 200(3) Criminal Procedure code provides as follows;

> "*where a succeeding magistrate commences the hearing of proceedings, and part of the evidence has been recorded by his predecessor, the accused person may demand that any witness be resummoned and reheard and the succeeding magistrate shall inform the accused person of that right.*"

To that extent then, the trial was prejudicial to the appellant and became fatally defective and therefore a nullity.

Secondly, the P3 form was produced by a doctor who was not its maker and it was not indicated that there was difficulty in easily getting the maker. Dr. Mwangi did not tell the court whether he had ever worked with Dr. Kahindi and for how long and it was not clear the circumstances which made him become versed with Dr. Kahindi's signature. This too was prejudicial to appellant.

Then there is count 2 – for which appellant has already served sentence. Was an offence established? Was the sentence legal? Section 34 of Cap 121 makes it an offence to sell liquor after hours – no evidence was led to show that the premises where appellant was found was selling liquor after hours, or what hour the licence was limited to or what the closing hour on the licence was. As for sentence for a first offender, it does not exceed five hundred shillings in default 3 months imprisonment. I can only say that given the circumstances, the sentence was harsh.

My finding then is that the appellant was greatly prejudiced in the trial due to the trial magistrate's failure to comply with provisions of section 200(3) Criminal Procedure Code and the lacuna and casual production of the P3 form.

Also count 2 was clearly not proved at all coupled with the harsh sentence passed by the trial magistrate.

The period appellant has served in prison and also taking into account that at some stage the trial magistrate cancelled appellant's bond, so that he was remanded in custody from 3-3-08 to 10-4-08, makes the option of a retrial a rather unattractive one.

Consequently, I allow the appeal, quash the conviction and set the sentence aside. Appellant shall be set at liberty forthwith unless otherwise lawfully held.

Delivered and dated this 10th December 2009 at Malindi.

H. A. Omondi
JUDGE