



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Criminal Appeal 120 of 2006

(CORAM: OJWANG, J.)
CRIMINAL APPEAL NO. 120 OF 2006

BETWEEN

RICHMOND MWANGI.....APPELLANT

-AND-

REPUBLIC.....RESPONDENT

(An appeal from the Judgement of Senior Resident Magistrate Mrs. F. Nyakundi dated 7th October,

2005 in Criminal Case No. M.4598/03 in the Subordinate Court of the

First Class Magistrate at City Hall, Nairobi)

JUDGEMENT

The appellant was charged with the offence of being engaged in/carrying out trade/occupation/business at premises within the jurisdiction of the City Council of Nairobi while such premises are not licensed for the purpose of carrying on such trade/occupation/business, contrary to By-Law 3(1) and punishable under By-law 12 of the City of Nairobi (Licensing of Premises and Trades) By-Laws, 1991.

The particulars of the charge were that the appellant, on 22nd March, 2005 at about 12.30 p.m., in the Pangani Area within the City of Nairobi, did engage in/carry out the trade/occupation/business of an Eating House at a premises not licensed by the said Council for the purpose of carrying out such trade occupation/business.

Two witnesses, PW1 (**Francis Omenge Ogane**) and PW2 (**Dan Amos Rabilo**), both City Council officers attached to the City Inspectorate at the Central Business District, testified that they were on duty in the company of other City Council officers, at Pangani, on 22nd March, 2005 at about 12.30 p.m., when they came up to a kiosk within that area which was operating as a hotel. These witnesses demanded of the appellant, who presented himself as the owner of the said kiosk, the licence of the City Council which permitted his kiosk-trade to be conducted. They arrested the kiosk owner, the appellant herein, when he

did not produce the City Council licence demanded.

The appellant gave sworn evidence in his defence, but did not call any witnesses. He denied carrying on the kind of business which was the subject of the charge. The appellant testified that the City Council officers had only met him by chance as he was engaged in an activity wholly unrelated to the said kiosk, and that he had told them he operated no kiosk.

The learned Magistrate thus stated the question pending before her: “The issue for determination is whether the charge facing the accused person has been proved beyond any reasonable doubt.” She held that the evidence of PW1, corroborated by that of PW2 showed that the appellant had been found inside a kiosk operating a hotel and, when the owner was sought to be known, the appellant presented himself, and on this account the appellant was the person arrested when he could not produce a licence authorising him to run a hotel business. The trial Court did not accept the testimony of the appellant, that he does not carry on the hotel trade and that, when he had been arrested, he was quite innocently walking along the road. The learned Magistrate observed: “It is not possible that these officers would have arrested a person who was innocently walking on the road, minding his own business – otherwise they could then have arrested hundreds of such people.” The trial Court then found as follows:

“I am satisfied from their testimonies that the accused person was arrested in the circumstances described, and his defence cannot be true at all. This Court, therefore, finds that the charge facing the accused person has been proved beyond any reasonable doubt. I dismiss the defence by the accused person, find him guilty as charged, and convict him under s.215 of the Criminal Procedure Code [Cap.75].”

The learned Magistrate took the appellant’s mitigation plea, treated him as a first offender, and imposed a fine of Kshs.2000/= or, in default, a one-month term of imprisonment.

In the memorandum of appeal filed on 16th March, 2006 the appellant contends as follows:

- (1) the learned trial Magistrate erred both in law and fact, by convicting the appellant of operating a hotel without a licence when it was clear from the proceedings that there was no evidence on record to link the appellant to the operation of any business in the City;
- (2) the trial Magistrate erred in law and/or misdirected herself in finding the charge to be proved beyond reasonable doubt, in the absence of concrete proof or corroboration of the allegations made against him and there were no exhibits produced in Court to validate the case against him.

In the submissions before this Court, the appellant contended that he had been punished in respect of business that was being conducted by his children and not himself. This, however, was a new point of fact which ought to have been part of the defence before the trial Court. While exercising its appellate jurisdiction, this Court is not a Court of *testimonies*, and cannot adopt the appellant’s new “testimony” which is not only, intrinsically and as a matter of procedural law misplaced, but a “testimony” which, besides, is unsworn and is thus not attended with the forensic safety-measures for ensuring veracity. I hold, therefore, that the appellant’s new contention is inadmissible as a matter of *law*.

Learned State Counsel **Mr. Makura** contested the appeal, and urged that the conviction be upheld, and the sentence affirmed.

Mr. Makura submitted that the charge against the appellant had been proved beyond reasonable doubt, through the testimonies of the two prosecution witnesses. The two witnesses had made a physical check on the premises the subject of the charge, and had established that the owner of the same, the appellant herein, had no City Council licence authorising him to conduct his hotel business.

Mr. Makura submitted that the appellant’s averment that his children were operating the hotel business the subject of the charge, should be treated as further corroboration to the testimonies of PW1 and PW2: he was well and truly operating the subject hotel business, through his children.

Learned counsel submitted that the sentence imposed against the appellant, of fine in the sum of Kshs.2000/= or in the alternative, one month's imprisonment, was a lenient one; and hence the instant appeal should be treated as being devoid of merits, and accordingly, be dismissed.

After considering the charge as laid against the appellant; the testimonies of the two prosecution witnesses; the submissions on both sides; and the judgement of the trial Court, I have come to the conclusion that nothing was left out of the evidence which would have further enhanced the case against the appellant; that the proof placed before the Court was complete in every respect, and pointed to the guilt of the appellant; that the defence evidence was mainly evasive and did not even begin to shake the cogent inculpatory prosecution evidence; that the learned trial Magistrate carefully and competently assessed the evidence; and that the learned Magistrate exercised her judicial discretion properly in dispensing sentence.

I hereby dismiss the appellant's appeal, uphold his conviction by the trial Court, and affirm the sentence meted out by the learned trial Magistrate.

Orders accordingly.

DATED and DELIVERED at Nairobi this 23rd day of July, 2007.

J.B. OJWANG

JUDGE

Coram: Ojwang, J

Court Clerk: Nd'ungung

For the Respondent: Mr. Makura

Appellant in person