



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Criminal Appeal 90 of 2002

AGNES WAIRIMU MBURUAPPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

This is one of those rare cases when the spotlight is turned on a judicial officer in the manner in which he conducts himself and also in the manner in which he presides over proceedings in his Court.

The Appellant herein was the Complainant in Criminal Case Number, 260 of 2004 in the Senior resident Magistrate’s Court at Githunguri. In the said case the accused, one **PATRICK KABUE NJOROGE** was convicted and discharged under Section 35 (1) of the Penal Code for the offence of stealing farm produce contrary to Section 55 (1) of the Stock and Farm Produce Act. The Appellant was not amused by the discharge. She flew into a rage and hauled abuses at the Presiding Magistrate accusing her of corrupt dealings whereupon the Magistrate ordered her immediate arrest. The Appellant was arrested, locked up in the Police cells at Githunguri Police Station and subsequently charged in the same Court on 10th February, 2004. She was charged with the offence of being disrespectful to a Judicial proceeding contrary to Section 121 (a) of the Penal Code. The particulars given were that **“on the 9th day of February, 2004 at Githunguri Law Court in Kiambu District within Central Province AGNES WAIRIMU MBURU was disrespectful to Judicial Proceedings namely RM’s Court Githunguri, CRIMINAL CASE NO. 260 OF 2004 REPUBLIC VS PATRICK KABUE NJOROGE by shouting at Miss Odembo RM that, she has been corrupted to acquit her case.”**

The Appellant entered a plea of not guilty to the charge. However, in a rather unorthodox and unprocedural manner the Learned trial Magistrate proceeded as though the Appellant had entered a plea of guilty, convicted her and sentenced her to one month imprisonment without an option of a fine.

The Appellant was aggrieved by the conviction and sentence. She therefore through Messrs Gachoka & Co. Advocates lodged this Appeal setting out seven (7) grounds. It is not necessary to repeat them here. Suffice to say that in my view the proceedings before the trial Magistrate in this regard was a comedy of errors deliberate or otherwise. When the Appeal came up for hearing before me, Miss Gateru, Learned State Counsel conceded to the Appeal and rightly so in my view. In conceding to the Appeal, the Learned State Counsel pointed out that the plea wasn’t properly taken. That indeed the entire

proceedings were irregular in that the Magistrate who was the Complainant also presided over the case. The sentence too was irregular, Learned State Counsel further pointed out. The Appellant in Counsel's view ought to have been given an option of a fine. I couldn't agree more with these fine submissions by the Learned State Counsel.

Mr. Gachoka, Learned Counsel for the appellant applauded the state's gesture and prayed that the Appeal be allowed, conviction quashed and the sentence imposed set aside.

I have carefully gone through the proceedings in the subordinate Court in the light of the submissions by Counsel's herein. Section 121 (1) (a) of the Penal code under which the Appellant was charged provide that:-

"....Any person who....."

(a). Within the premises in which any Judicial proceedings is being had or taken, or within the precincts of the same shows disrespect, in speech or manner, to or with reference to such proceedings or any person before whom such proceeding is being had or taken;

(b)

(c).

(d).

(e).

(f).

(g).

(h).

(i).

is guilty of an offence and is liable to imprisonment for three years.

(2). When an offence under any of paragraphs (a). (b). (c). (d). and (i). of subsection (1) is committed in view of the court, the Court may cause the offender to be detained in custody, and at any time before the rising of the Court on the same day may take cognizance of the offences and sentence the offender to a fine not exceeding one thousand four hundred shillings or in default of payment to imprisonment for a term not exceeding one month....."

My careful reading of the above provision, envisages two scenarios. One where the Court can summarily deal with the offence and secondly where the offence committed is tried in the normal manner. It appears to me that the trial magistrate mixed the two procedures in handling this case. This was wrong. In the summary procedure, the requirement is that the accused is detained in Court and dealt with before the Court rises on the same day. There is no requirement that a charge be formally drawn and read to the accused person who is then called upon to plead. This procedure is analogous to the Procedure normally adopted in cases of contempt in the face of Court. Once the Court takes cognizance of the offence, the Court is required to sentence the accused to a fine not exceeding one thousand four hundred shillings or in default of payment to imprisonment for a term not exceeding one month. What did the Magistrate do in the instant case? Apart from mixing the two procedures, she also got it all wrong when it came to sentencing. Upon irregularly convicting the Appellant, she also sentenced her to a term of imprisonment of one month without an option of a fine. This was in gross violation of the specific provisions of Section 121 (2) of the Penal code. The Provision requires that the accused be sentenced to a fine first and in default of which the accused may be sentenced to imprisonment. In my view this gross violation of the law by the Learned trial Magistrate is inexcusable. I am tempted to think that this obvious violation of the law could be attributed to the fact that since the insults were heaped at her by the appellant she became the victim and her vision, independence and impartiality were thus clouded. She descended in the arena of conflict. In those circumstances she should never have accepted to preside over the case in the first place.

The alternative procedure was to deal with the case as a normal criminal case where the Magistrate would have been the Complainant. From my reading of the proceedings, I think the trial Magistrate had initially settled for this option. However I do not know what caused her to change her mind the following day. Having withstood the Appellant's abuses, she caused the Appellant to be arrested and locked up at Githunguri Police Station. She thereafter caused the charge to be drawn. She also had initially ordered that the appellant's plea be taken in another Court.

So far so good. However come the following day, and the trial Magistrate reversed her earlier order and decided to hear the case herself. This was wrong. It is clear from the record that when the plea was read to the Appellant she pleaded not guilty. For it is recorded thus:- “...**Accused denies the charge.....**” However in a strange twist of events, the trial Magistrate purported to invoke Section 121 (2) of the Penal Code and deal with the case summarily. This ought not have happened. Once the Appellant entered a plea of not guilty, the case ought to have proceeded just like any other Criminal Case, and the Learned trial Magistrate would have been a witness, as the, Complainant.

That she decided to conduct the proceedings in the manner that she did oblivious of the laid down procedure can only mean one thing, she was hurt by the utterances of the Appellant and was determined to nail her at all costs. This smacks of bias which ought not to be exhibited by a judicial officer. This is a case in which the presiding Magistrate ought to have secluded herself and left it to another Magistrate to preside.

To my mind and in both instances, the trial magistrate acted as a Complainant, Prosecutor and a Judge in her own cause. Any student of Law will tell you that such conduct has no place in our Criminal Law and or jurisprudence and indeed any other system of law that I am aware of. It is small wonder that in a bid to convict the Appellant, the Learned trial magistrate even forgot the elementary and rudimentary principles of taking a plea. Assuming that the Appellant had admitted the charge, the next step would have been for the Prosecutor to state the facts and thereafter the Appellant be called upon to indicate whether admits with the facts as outlined by the prosecutor. If he admits, then the Court will convict the Appellant and thereafter ask him to mitigate. The sentence will then follow. What happened in the instance case? Once the Magistrate entered a plea of not guilty, she purported to wrongly invoke Section 121 (2) of the Penal Code. However nowhere is it indicated that the facts were read or that the Appellant was called upon to mitigate before sentence was imposed. In my view this is a classic abuse of the criminal process by a judicial officer who ought to have known better.

Having taken into account all the circumstances of this case, I am of the considered view that the proceedings before the subordinate Court were a nullity as the due process was not adhered to. Justice

was thus only not done but was also seen not to have been done. The conviction is clearly unlawful. The sentence too is not only manifestly excessive but illegal as well. I would therefore allow the Appeal, quash the conviction and set aside the sentence. Since the Appellant was admitted to bail pending Appeal, I would direct that the sum of Kshs.3,000/= deposited in Court as cash bail be released to her forthwith.

Dated at Nairobi this 5th day of April, 2006.

MAKHANDIA

JUDGE