REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

Criminal Appeal 111B of 2005

ABDULAHI IBRAHIM …… APPELLANT

AND

THE REPUBLIC …….....…….. RESPONDENT

(Being an appeal from the conviction and sentence in Marsabit SRM's case No. 363 of 2004 dated 15.6.2005)

JUDGMENT OF THE COURT

The appellant herein was charged before the Marsabit Senior Resident Magistrate's court with one count of incitement to violence and disobedience contrary to section 96(C) of the Penal Code. The particulars of the offence were that:-

"***On the night of 15th November 2004 at about 8.30pm at Marsabit Township in Marsabit District within Eastern Province in order to prevent the lawful arrest of a suspect, shouted and whistled to members of the public to restrain the officers from the arrest where stones were hurled to the officers."***

The appellant was tried, found guilty and accordingly convicted. He was sentenced to serve 18 months imprisonment.

In his supplementary Petition of Appeal, filed on his behalf by his advocates on record, the appellant sets out five (5) brief grounds of appeal as follows: -

1. The senior resident magistrate erred in law by finding that the prosecution had proved their case on (sic) the required standard.

2. The senior resident magistrate erred in law by convicting the appellant when the evidence before court could not sustain a conviction.

3. The senior resident magistrate erred in law and in general parlance by not reaching at a finding that the charge was materially defective.

4. The senior resident magistrate erred in law by meeting (sic) out excessive sentence to the appellant without option or community service order.

5. The conviction in a whole (sic) was entirely unsafe and unprocedural.

Briefly the facts of the case are that on the night of 15.11.2004 at about 8.30pm, police officers were on duty in Marsabit town during which one police constable SIMON TITUS YANDI (PWI) arrested a suspect and handcuffed him. As the suspect was being handcuffed, he shouted for help. A group of about 20 people, among them the appellant, responded to the screams. The mob threw stones at the police. The appellant shouted at PC YANDI to leave the suspect alone. With the help of other police officers who came to his rescue among them PC CHEPTARUS (PW2) PC YANDI managed to arrest the appellant who was subsequently charged with the offence for which he was tried, found guilty and convicted. He was sentenced to serve 18 months in prison.

The evidence by PW2, PC DAVID CHEPTARUS was that he rushed to Kaisat hotel at about 8.00pm after PC YANDI (PWI) called him to go to his rescue. On arrival, he found the appellant among a group of about 50 other people throwing stones at PC YANDI as they demanded the release of a person who had been arrested by PC YANDI. The mob was also throwing stones.

In his further evidence during cross-examination, PW2 stated that it was only the appellant who was throwing stones while the rest of the mob were onlookers and mere bystanders. PW3 PC FESTUS MUGWIKA was the investigating officer in the matter.

The appellant gave a brief unsworn statement in which he testified that as he went out on the night in question, to take a soda, he found many people at the shop. The police officers who were at the shop arrested him and said he was one of the people.

The task before this court is to reconsider and re-evaluate the evidence on record with a view to reaching its own conclusions in the matter. Before doing so, it is necessary to consider the submissions made before me during the hearing of the appeal. Mr. Ondari who appeared for the appellant argued the five grounds of appeal set out herein above by combining grounds 1 and 2 and then grounds 3, 4 and 5 combined Mr. Ondari contended on behalf of the appellant that the evidence adduced by the prosecution through PWI and PW2 was not sufficient to sustain a conviction. He also contended that no proper investigations were carried out in this case. He also contended that the prosecution evidence was not only scanty but that the same was contradictory especially as concerns the number of people allegedly present when the appellant is said to have committed the offence.

As regards grounds 3, 4 and 5 of the appeal, Mr. Ondari contended that the charge was materially defective in that it purported to charge the appellant with two distinct offences in the same charge, namely the offences of incitement and disobedience all rolled up into one.

On his part, Mr. Muteti learned state counsel contended that the interpretation given to the wording of section 96(1) of the Penal Code by counsel for the appellant was defective. He contended further that the evidence on record proves that the appellant tried to prevent the arrest of a suspect and that he did so by shouting and calling upon other people around the scene to join him.

On the issue of the burden of proof, Mr. Muteti contended on behalf of the respondent that the burden of proof falls squarely upon the appellant. In his view, the appellant's defence did not dislodge the prosecution's claims against him.

After carefully considering the law and the evidence on record, I find that the appellant's complaints as per grounds 1 and 2 of the appeal have merit. The prosecution evidence is not only scanty but also contradictory. It odes not come out clearly from that evidence how PWI was able to pick out the appellant from a crowd of 50 people at 8.30pm. There is no evidence as to whether the scene was well lit or not. PWI stated that: -

"***People came shouting that I leave the suspect. They started to throw stones but I was able to call my colleagues on mobile and they came to my rescue."***

He states further that the appellant was among those who had been throwing stones at him. This scenario does not clearly pick out the appellant as being among those who were throwing stones.

Further, PW2 stated that it was only the appellant who was throwing stones while the other members of the public were just listening and looking at the appellant. That contradiction in the testimonies of PWI and PW2 is material to the prosecution's case and the benefit of doubt arising therefrom goes to the appellant.

Considering grounds 3, 4 and 5 as argued, I do not think that Mr. Ondari's interpretation of section 96 of the Penal Code is correct. If the charge comprised elements taken from subsections (a), (b) and (c), I would agree that the charge would be bad for duplicity. In this particular case, the offence committed falls under section 96(c). There is no defect in the charge.

In the result, and for the foregoing reasons, the appellant's appeal is allowed. The conviction is quashed and the sentence of eighteen (18) months' imprisonment imposed upon the appellant is set aside.

Unless otherwise lawfully held, the appellant, if held in custody over this case, should be released for prison custody forthwith.

Orders accordingly.

Dated and delivered at Meru this 27th day of July 2006.

RUTH N. SITATI

J U D G E