



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT MOMBASA**

**Criminal Appeal 50 & 51 of 2006**

**George Thomas Pesa**

**James Otieno.....APPLICANT**

**Versus**

**Republic.....RESPONDENT**

**JUDGMENT**

James Otieno and Thomas George Pesa, the appellants herein, were tried for the offence of wilfully obstruction police officers contrary to Section 253(b) of the Penal Code.

The particulars of the offence are that on the 14<sup>th</sup> day of February 2004 at about 1.45 P M in Bangladesh slums in Mombasa District within Coast Province jointly wilfully obstructed P C Yakub, P C Ndambi, P C Hamdi and P C Koech, police officers who were at the time of obstruction acting in due execution of their duty. After undergoing a full trial the appellants were convicted and each sentenced to serve 1 year in prison. They each filed an appeal which appeals were later consolidated at the instance of Miss Mwaniki, the Learned State Counsel.

The background of this appeal is that on the 14<sup>th</sup> day of February 2004 at about 2.00 PM, one Titus Malende booked a report at Changwame Railway Police Station to the effect that one Bakari Omende and another James Opondo had demolished his kiosk on land owned by Kenya Railways situate at Banglesh slums. Upon booking the report police officers namely P C Livingstone Koech (PW 1), P C Ibrahim Yakub (P W2), P C Hamadi, and P C Ndambi in company of the reported visited the site of demolition. The Police officers arrested the two suspects and headed for the police station. At this juncture members of the public protested the arrest of the duo by throwing stones at the police officers. The rowdy crowd also prevented the police officers. P W 1 and P W 2 said their colleague, one P C Hamdi cocked his gun and his action prompted members of the public to disperse.

They fled in different directions. P W 1 said that the 1<sup>st</sup> appellant had accused the police officers of having gone to make arrests in a place which was outside their administrative jurisdiction. PW 1 said that the 1<sup>st</sup> appellant wanted to the two suspected to be released. P W 1 said the 1<sup>st</sup> appellant was arrested near the police station. PW 2 said he saw the 2<sup>nd</sup> appellant was advancing to the police station.

According to PW2, it would appear the police took Bakari Omende and James Opondo placed them in the cells and came back to arrest the appellants. P W 2 said that the 1<sup>st</sup> appellant had demanded to see the OCPD to intercede over the arrests of the two suspects and that he arrested while on his way to the police

station.

Each of the appellants gave an unsown statement in their defence. The 1<sup>st</sup> appellant said when the police came to arrest two people in their estate he in company of the 2<sup>nd</sup> appellant visited the police station to make inquiries as to why they were being held and that is when they were arrested and accused of obstructing the police from arresting suspects.

The 1<sup>st</sup> appellant also claimed that he had a dispute with the PW 2 over a plot within Changamwe slums. On his part, the 2<sup>nd</sup> appellant claimed he had gone to check on why one of his tenants was arrested. The 2<sup>nd</sup> appellant also claimed he had a dispute over a plot with PW 2. He said when he visited the police station P W2 told the other police officer to arrest him because he was hotheaded.

On appeal, the appellants raised a total of 7 grounds of appeal which grounds may be summarised to three:

The first being that the offence the appellants were convicted for was not proved. Secondly that the trial court shifted the burden of proof to the accused. Thirdly that the sentence was harsh and excessive.

It is the submission of Mr Magolo advocate for the appellants that the offence under Section 253(b) of the Penal Code was not established. Miss Mwaniki who appeared for the state was of the contrary view that the prosecution had established its case to the required standards.

An offence under Section 253(b) is proved when the following ingredients are established.

- (i) Assault or
- (ii) Resistance or
- (iii) Wilful obstruction of any police officer from performing his duty or any person acting in aid of that officer.

In this case the evidence tendered by the prosecution witnesses do not show that the appellants committed any of those acts. There is no evidence that any of them assaulted or resisted and or prevented in anyway the police officers from performing their duties. The evidence tendered showed that the appellants were part of the crowd who pelted and blocked the road the police officers were using while taking away the suspects they had arrested. It was not shown that they participated in throwing stones at the police officers. The evidence of PW 1 and PW 2 lends credence to the defence raised by the appellants which is to the effect that the appellants had gone to make inquiries as to why James Opondo and Bakari Omende were arrested. I am convinced that the appellant had gone to appeal for the release of the two people as opposed to the view that they had intention to obstruct the police from arresting or performing the other duties. Of course it is evident that amongst that crowd there were hooligans and goons who wanted to cause mayhem and chaos with the sole aim of scaring the police from taking away the suspects who had demolished the house of Titus Malende. I agree with the appellants that the trial magistrate misapprehended the point when he came to the conclusion that the offence under Section 253(b) had been proved.

It has also been argued that the trial court shifted the burden of proof to the appellants when it stated that the appellants should have tendered evidence proving that there was a dispute over land by producing a title deed, letter of allotment or Deed Plan and so on. With respect to Mr Magolo, I think the learned District Magistrate did not shift the burden of proof. What the learned District Magistrate did was to show that there was insufficient evidence to cast doubt on the prosecution's case.

Finally, it has been argued that the Sentence is harsh and excessive. I do not need to belabour so much about this point. The law provides for a Maximum Sentence of 5 years. The appellants were sentenced to 1 year's imprisonment. I think the sentence if it were to stand is not harsh nor excessive.

The upshot of my decision is that the appeal is allowed with the result that the conviction is quashed and the Sentences are set aside.

The appellants are hereby set free forthwith unless lawfully held.

August 18, 2006

Sergon, J