



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Criminal Appeal 86 of 2003

**(From original conviction(s) and Sentence(s) in Criminal Case No. 3002 of 2002 of the
Resident Magistrate's Court at Nairobi (H.N. Oundo – RM)**

ARMSTRONG KASUKU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

ARMSTRONG KASUKU had been charged with two offences as follows: -

Count 1: Interfering willfully with city Council Officers while on duty contrary to Section 266(1) of the Local Government Act.

Count 2: Resisting Lawful arrest contrary to Section 258 of the same Act.

Both offences were allegedly committed on 27th May 2002 along Langata Road Nairobi. The Appellant was acquitted of count 1 and convicted in count 2 after a full trial. The court then discharged the Appellant on condition that he did not commit a similar offence for a period of 12 months. Being aggrieved with the conviction the Appellant lodged this appeal filed by Namisi & Co. Advocates on his behalf.

In the petition of appeal, two grounds were raised

- 1. That the learned trial magistrate founded a conviction on the wrong premise in view of the evidence adduced in court.**
- 2. That the trial magistrate failed to evaluate the prosecution evidence against the defence evidence thereby arriving at a wrong conclusion.**

Mr. Namisi argued the appeal on behalf of the Appellant. The State was unrepresented. When the appeal came up for hearing, **Mr. Namisi** abandoned all grounds cited on the petition of appeal and argued a fresh ground on a point of law. Counsel submitted that the court misdirected itself when it convicted the Appellant on a non-existent offence. Counsel submitted that **Section 258** of the **Local Government Act** under which the Appellant was charged in court had nothing to do with the statement of the offence

charged. Counsel further submitted that indeed there was no provision in the **Local Government Act** that covers resisting lawful arrest. The learned counsel for the Appellant urged the court to find that on that basis alone the appeal should be allowed.

I have considered this appeal. **Section 258** of the **Local Government Act** provides as follows: -

“258 (1) Subject to subsection (2), all fines imposed and recovered by a competent court other than by such a magistrate as is referred to in subsection (2), in respect of contraventions of any of the provisions of this Act or of any by-laws made under this Act or any other written law, other than the fines referred to in subsection (2), shall be paid-.”

Clearly the statement of the charge in court 2 does not have anything to do with the section of the law involved. **Mr. Namisi** has argued that not only does **Section 258** not relate to the offence charged but that the offence does not exist under the **Local Government Act**. I agree with the learned Counsel. The offence is non-existent not only to **Section 258** but the entire **Local Government Act**.

Where an accused person is charged for a non-existent offence the trial court had an option to reject the charge and discharge the accused person under **Section 89(5)** of the **Criminal Procedure Code**. In this case, the court, overlooking the error on the charge, proceeded to admit evidence in support of the charge and to convict. That was a fatal error on the part of the court.

The issue is whether the defect is curable under **section 382** of the **Criminal Procedure Code**. The Appellant ought to have raised this issue during the trial in the lower court as the proviso under **Section 382** of the **Criminal Procedure Code** provides. It does appear that the issue was not raised before the lower court. Even then, the defect is incurable as it is substantive in nature and goes to the very root of the prosecution case and a point of law. The defect has occasioned a failure of justice. Clearly the irregularity occasioned in this case is irreversible by this court and **Section 382** of the **Criminal Procedure Code** cannot cure it.

I will allow the appeal and quash the conviction accordingly.

Dated at Nairobi this 18th day of October 2006.

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LESIIT, J.

JUDGE

Read, signed and delivered in the presence of;

Appellant

Mr. Namisi for the Appellant

Cc: Tabitha

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LESIIT, J.

JUDGE