REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA
Criminal Appeal 59 of 2003
(Appeal against both conviction and sentence by the Chief Magistrate's Court at Kakamega in Criminal Case No.945 of 2000. (Mrs. R. A. Oganyo, RM)

SIMON WAMACHABA……..……APPELLANT

V E R S U S

REPUBLIC …… RESPONDENT

JUDGEMENT

The Appellant, Simon Wamachaba, preferred an appeal to this court against his conviction and sentence on 6.10.2001 by Mrs. R. A. Oganyo, Resident Magistrate, in Kakamega CM. Criminal Case No.945 of 2000. The conviction and sentence was on two counts both relating to the offence of *"giving false information to a person employed in the public service contrary to Section 129(a) of the Penal Code."* The particulars of count I were that:-

> ***"On the 28th day of June 1999, at Kakamega police station within Kakamega District of Western Province, informed No.45680 P.C. Boniface Mailu, a person employed in the public service that the Managing Director (Njoroge) of Reuco group Companies took away his properties by force, intending thereby to cause the said No.45680 P.C. Boniface Mailu to arrest the suspect which the said No.45680 P.C. Boniface Mailu ought not to have done if the true state of facts respecting which such information was given had been known to him."***

Particulars of count II were that:-

> ***"On the 4th day of August 1999, at Kakamega police station, within Kakamega District of Western Province, informed I.P. Godfrey Anaya a person employed in the public Service that Managing Director of Reuco Group Companies went in to his house and robbed some properties from there, which information he knew or believed to be false intending thereby to cause the said I.P. Godfrey Anaya to arrest the said Managing Director which the said I.P. Godfrey Anaya ought not to have done if the true state of facts, respecting which such information was given had been known to him."***

After a full fledged hearing in which the prosecution called a total of seven witnesses and the appellant gave unsworn statement and called two witnesses, the trial magistrate on 11.12.2002 delivered her judgement in which she found the Appellant guilty on both counts and convicted him. After mitigation the Appellant was sentenced and an order of discharge under section 35(1) of the Penal Code was made and the court ordered the Appellant to pay Shs.30,000/= under Section 31of the Penal Code Cap 63 as

compensation to PW1, the Complainant, as a condition for the discharge.

In his Petition of appeal, the Appellant put forward 11 grounds of appeal. He was represented by counsel, Mr. Onsongo. The learned counsel submitted:

(i) that the charge was duplex as the second count was a duplication of the first count;

(ii) that the trial court failed to consider the defence along side the prosecution evidence;

(iii) that the trial court imported extraneous matters in the judgement to buttress the prosecution case;

(iv) that the sentence was irregular and unprocedural as the charge of giving false information could not be said to have injured a state witness.

Mr. Onsongo, learned counsel for the Appellant urged the court to quash the conviction and set aside the sentence as the prosecution did not prove the case beyond any reasonable doubt.

Mr. Karuri, the learned State Counsel, conceded the appeal on the ground that count II was defective as there was no report made to PW7. The particulars of both counts, he said, were also not proved and therefore the case was not proved beyond any reasonable doubt. It was Mr. Karuri's submission that the trial magistrate shifted the burden of proof to the appellant.

I have perused the entire record in the lower court and the appeal and have carefully considered the evidence adduced by both the prosecution and the defence. I have also given due consideration to the submissions of both Mr. Onsongo and Mr. Karuri.

P.C. Boniface Mailu, PW8 gave evidence in support of Count I of the Charge. He testified that he got a report on 28/6/99 from the Appellant while at Kakamega Police Station. The report was to the effect that the Appellant's property had been taken from his residence by his employer, one Njoroge. The report was booked by PW8 in the OB which was produced as exhibit No.12. PW8 referred the appellant to the Crime Branch in the station. The contents of Exhibit 12 show that the Appellant merely reported that Njoroge, the Managing Director of the Company which had employed the Appellant had taken his goods which were tabulated, and no more. The Particulars of Count II showed that the goods had been taken by force. PW7, Inspector Godfrey Anaya gave evidence in support of Count II. His testimony was that on 28.6.99 P.C. Mailu, PW8, told him that the Appellant had made a complaint in the OB which he read. On 4.8.99, the Appellant recorded a statement with PW7 and promised to bring witnesses to buttress his allegations.

The evidence in support of the particulars of Count II shows that the Appellant did not give false information to I.P. Godfrey Anaya. The only information given by the Appellant was that to PW8, PC Boniface Mailu. There was no basis therefore for the conviction on Count II. It is quite clear that PW7 conducted investigations on the basis of the report made by the Appellant to PW8, PC Boniface Mailu. Moreover, the appellant had not alleged in his report to PC Boniface Mailu ((PW8) that the Managing Director of Reuco Group of Companies had robbed him of the goods. The report alleged that the latter had taken the things.

With regard to Count I, the Appellant did make a report to PC Boniface Mailu, PW8. The report was not that he had been robbed. After the police conducted their investigations following the report, it transpired that the things belonging to the Appellant had been taken by the Appellant himself to the said Mr. Njoroge on account of or as security for a debt he owed him or his company. The allegation by him therefore that Njoroge had taken his things was false and it made P.C. Boniface Mailu (PW8) refer the matter to the Crime Branch whose Inspector Godfrey Anaya (PW7) conducted investigations that, according to him disclosed commission also of the offence in Count I.

Although he did not allege that Njoroge had taken the goods by force as alleged in the particulars of Count II, the appellant intended that his information be acted upon. That is why he went to the Crime

Branch when he was referred there by PW8. He himself went to the P.C.I.O., according to the evidence of PW7, to complain about the length of time it was taking for his report to be acted upon. He knew the report to be false. He wanted the police to help him retrieve his things which he had given Njoroge to secure his indebtedness. The prosecution however added the words ***"by force"*** in the particulars of Count I which the appellant had not made to PW8. The inclusion of these words gave rise to a different statement and meaning the effect of which was that the appellant was not being charged for the information he had made which was also false, but with distorted and different information. I am in agreement with the learned counsel for the Appellant that the evidence adduced did not support the particulars of the charge. It was therefore a misdirection on the part of the trial magistrate to state in her judgement that ***"by making (meaning the appellant) a report to PW8 and PW7 that the accused's items were forcefully (sic) taken from him by PW1 I find (sic) was a false state of affairs and would (sic) imply a criminal act on the part of PW1……"***

In view of what I have stated above, I quash the conviction.

With regard to sentence, it was a misdirection on the part of the learned trial magistrate while considering sentence to opine that the character of the complainant was brought into disrepute and to order the appellant to pay Shs.30,000/= under Section 31 of the Penal Code. In the circumstances of this case the compensation envisaged by section 31 of the Penal Code ***"to any person injured by the offence"*** on which the appellant was convicted, did not cover the situation obtaining in this case for the simple reason that ***"injury"*** under this section does not, in my view, encompass the alleged injury to the character of the complainant. I think the injury envisaged by the section 31 (supra) relates to bodily injury or to damage to the complaint's property. In the context of this case, it cannot be said that the information by the Appellant to PW7 injured the character of the complainant when in fact all that it did was to state that the latter was holding the goods of the appellant to secure the repayment of the debt allegedly due by the latter to him. I do not find it necessary to go into the interpretation of the words ***"compensation to any person injured by his offence"*** in Section 31 of the Penal Code but I can well visualize a situation where character assassination might well fall within the section. Not so here.

The discharge of the Appellant under Section 35(1) of the Penal Code ought to have been either absolutely, or subject to the condition that the Appellant committed no offence during such period as the court might have deemed appropriate providing it did not exceed twelve months. The learned trial magistrate ought to have expressly stated that the discharge was absolute. The issue of compensation under subsection (3) of Section 35 of the Penal Code was independent of this. It was therefore not necessary for the trial magistrate to order that the discharge would be appurtenant to payment of the compensation. In the result, and having quashed the conviction, the sentence meted out is also set aside including the compensation of Shs.30,000/=.

Dated at Kakamega this 22nd day of April, 2005.

G. B. M. KARIUKI

J U D G E