



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

Criminal Appeal 148 of 2004

PAULINE JAMES MBAABU APPELLANT

VERSUS

REPUBLIC RESPONDENT

**(From the conviction and sentence of G. Oyugi R.M. in Tigania Cr. Case No. 1462 of
2003)**

J U D G M E N T

The appellant Pauline James Mbaabu was jointly with another charged with three offences kiosk breaking contrary to section 306 (a) and stealing contrary to section 279(b) of the Penal Code. She was also charged with willfully obstructing a police officer contrary to section 126 of the Penal Code. Alternatively they faced the charge of handling contrary to section 322 (1) of the Penal Code. The appellant was convicted of the 2nd count of obstructing a police officer in the performance of his duties and acquitted of the 1st count of stealing and the alternative charge of handling. She was sentenced to eight months imprisonment. She appealed against both the conviction and the sentence.

The facts of the case as I gather them from the prosecution witnesses are that PW1 who was the complainant had locked his kiosk at Miathane and gone away on 17.8.2003 at 8pm. At 11pm the same night when she returned, she found her kiosk broken into and shop goods stolen therefrom. She had seen one Nicholas Miko at the door of the kiosk as she came back but he ran away. She reported the theft to Mithiane police station the following day. She had seen the said Nicholas on the road the same morning and so she told the police that Nicholas was the thief. The police are said to have tried to arrest the said Nicholas but he resisted and ran away. However, the police ran after him and arrested him. He led them to his home where he refused to show them where the stolen goods were. A thorough search of Nicholas' home and compound yielded the stolen goods in a sack somewhere in a fence. Later the appellant herein threatened PW2 and two other police officers with a panga with intention to prevent them taking the accused to the police station. Had PW2 PC John Mbari, not warded off the panga with which the appellant wanted to cut him, she would have injured the police officer. However, the police overpowered her and arrested her. They later charged her with obstructing the police in the performance of their duties.

When the appellant was put on her defence, she on oath, denied trying to or preventing the police from doing their duties. She stated that on the material day which was 18.8.2003, she was at home when the police brought Nicholas back there. The police had apparently arrested him earlier, taken him to Miathane police station and then had brought him home to make a search for stolen things. A search

yielded nothing in that home although later stolen goods were found in the compound fence of one Mwongera. She denied that she held a panga or used a panga to threaten the police with a view of preventing them from arresting the said Nicholas, who was later charged jointly with her. She denied that she threatened them with a panga with a view of making the police release Nicholas. She however testified that the police arrested her because she told them that Nicholas did not deserve being arrested because he was not the thief of the goods that they recovered in the fence. She also said that on arrest the police beat her seriously and when she later got released on bond she was taken to hospital for medical treatment and had a P3 filled with the help of the officer-in-charge of Miathene police station. She produced the P3 in evidence.

The honourable trial magistrate had no hesitation in convicting the appellant on the charge of obstruction of police officers in the performance of their duty.

I have carefully perused the record and considered the evidence. The evidence is clear that appellant was arrested when she tried to intervene for Nicholas Miko who had been arrested. The only issue to resolve is the manner of her intervention. Did she carry a panga and threaten the police with it with a view to injure them so that they could release him? Or did she threaten them with the said panga to frighten the police to release him? The third version from the evidence is whether the police found her with the panga in her hand and she tried to persuade the police to release Nicholas while still harmlessly and incidentally holding the panga in her hand. And finally whether the appellant did not hold any panga in her hand at all as per defence statement?

I have considered the relevant pieces of evidence from various witnesses. PW1 the complainant testified that the appellant had a panga in her hand when she talked to the police to release Nicolas. She advanced two versions. That appellant who held a panga did not use it to threaten the police. She changed at one stage and averred that the appellant tried to cut a police officer with it. She said she saw appellant prevent the police from arresting Nicholas. PW2, PC John Mbai however testified that appellant threatened to cut them with the panga and had he not warded it off, she would have cut him. There is evidence on the record that the appellant talked with the police after they had first arrested Nicholas, taken him to the station and had now brought him for a search at his home. It is not likely therefore that the appellant, if she ever interfered was trying to prevent them from arresting a person who was already under arrest. As to whether the appellant used the panga to threaten the police or not, I would rather at the worst take PW1's version that was favourable to the appellant, which was that she did not use the panga to threaten the police but that the police found her with it when they arrived at her home.

On the other hand it is my impression that PW1 and PW2 were not reliable witnesses. PW1 gave double impressions on various important aspects of the evidence. She stated that she saw Nicholas walking to the hospital as she went to report at the police station. Yet there is evidence that the police went to Nicholas's home and Nicholas ran away on seeing them but they chased him and arrested him. She first claimed that Nicholas admitted keeping the stolen goods and led the police where the goods were but she again changed and said that he did not show the stolen goods. She claimed that appellant did not use the panga to threaten the police and then she changed her story and said she used the panga to threaten the police. On the part of PW2, a police officer, he categorically denied assaulting the appellant on arrest and yet on cross-examination admitted that their senior officer is the one who supplied the appellant with the P3 with directions that the appellant needed it filled on the grounds that she had been assaulted by the police officers who had arrested her.

I have also considered the appellant's defence in the lower court. It is steady and very likely to be true. I accept the position that when she tried to convince PW2 and his colleague police officers that Nicholas was not responsible for the alleged theft, they were not happy and they decided to arrest her. I accept the evidence that they beat and assaulted her and to cover that up and prevent her from filing charges, they decided to charge her together with Nicholas. How else can they explain charging her with theft and handling stolen property when there was totally no jot of evidence linking her to the theft? Why in addition would they beat her and refuse her a P3 until a senior officer comes to intervene? How could PW2 become an investigating officer in a transaction in which he was involved and could in fact have been charged with the offence of assault?

I in conclusion and of no less weight, find that the honourable trial magistrate failed to consider the appellant's defence until he had expressly concluded that she and Nicholas were guilty of the various offence he convicted them of. Turning to the appellant's defence thereafter was merely to pay lip service to it – to show the appellant that he had the defence in mind all along when infact he had not. The effect of such approach is as if he totally ignored the defence thus breaching the appellant's basic right that a person should not be condemned without being given a fair opportunity to be heard.

For the above reasons this appeal succeeds. It is allowed. The conviction of obstructing police officers in the performance of their duties is quashed. The sentence of 12 months is set aside. The appellant is set at liberty forthwith unless otherwise lawfully held. It is so ordered.

Dated and delivered at Meru this 21st day of September 2005.

D.A. ONYANCHA

JUDGE

21.9.2005