REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA

Criminal Appeal 265 of 2003
(Appeal against both conviction and sentence of the Butere Senior Resident

Magistrate's court in Criminal Case No.17 of 2001 (A. K. KANIARU ESQ., SRM)

ZABLON OCHIENG SENGE ……...…….. APPELLANT

VERSUS

REPUBLLIC ……... RESPONDENT

J U D G E M E N T

The Appellant in this appeal is Zablon Ochieng Senge. On 5-12-2003, he was convicted by the Senior Resident Magistrate, A. K. Kaniaru, in Butere SRM Criminal Case No. 17 of 2001 of the offence of false swearing contrary to Section 114 of the Penal Code, Cap 63 of the laws of Kenya. He was sentenced to a term of one year in prison.

The particulars of the charge were to the effect that the appellant had, on 15-10- 99, at Mumias Law Courts sworn falsely an affidavit before a Resident Magistrate *"upon a matter of public concern in miscellaneous Civil Application No. 258 of 1999."*

The evidence adduced in the trial court shows that the appellant was a tenant of the complainant in the premises known as Plot No. 3 at Mumias Township. The Appellant was an auctioneer and court process server. The complainant locked up the appellant's premises on 27.8.99.

The Appellant filed a complaint against the complainant in the Business Premises Tribunal at Kakamega in Tribunal Case No. 31 of 1999. The Tribunal ordered restoration of the Appellant in the business premises. He had also filed in the High Court Misc. Civil Application No. 258/99 in Kakamega. The affidavit alleged to have been sworn falsely by the appellant on 15.10.99 was filed in the latter case. It contained averments relating to the terms of the tenancy of the said business premises and the complainant's alleged wrongful acts in closing the same and to items of attached property. There were many averments in the affidavit which related to facts which were not in contention.

The charge did not spell out what in the said affidavit was alleged to be false to enable the appellant to know the particulars of the offence with which he had been charged.

Aggrieved by his conviction and sentence, the appellant filed a Petition of Appeal dated 9.12.2003 and proffered seven grounds of appeal. In brief, the grounds attacked the sentence as harsh, and excessive, and the conviction as erroneous, and as not disclosing the particulars of the offence. It further contended that there was no evidence to prove beyond any reasonable doubt, the guilt of the appellant and finally, that the burden of proof was shifted to the appellant contrary to law.

Mrs. Osodo, Learned Counsel for the Appellant, urged the court to quash the conviction and set aside the sentence.

The Principal State Counsel, Mrs. Kithaka did not support the conviction.

I have carefully perused the lower court record and given due consideration to the Petition of appeal and the submissions of both counsel.

I think Mrs. Kithaka rightly conceded the appeal. The *"matter of Public Concern" referred to in section 114 of the Penal Code required to be spelt out in the particulars of the charge in the same way in which, in a charge of theft, the particulars of the property stolen are given. It was not enough to repeat the phrase "matter of Public Concern" without more as this did not in any way demonstrate in the slightest manner the particulars which were alleged to have constituted the "matter of public concern."* An accused person is entitled to know the particulars of the offence with which he/she is charged and where the particulars are either lacking or are too vague to enable the accused to make a defence, the charge ought be declared bad in law. Where the particulars of the charge do not show any offence, the charge is also bad in law. In such cases, there can be no proper conviction.

The circumstances of this appeal demonstrate abuse of office on the part of the police who delved into a civil dispute and sided with the complainant in an apparent move to help him to remove the Appellant from the leased premises by using a criminal charge under S.114 of the Penal Code as an instrument to achieve that. Such conduct must be deprecated in the strongest terms possible.

The trial magistrate was wrong in his finding that there was before him a proper charge on which he could convict as he did. He also erred when he purported to know and assumed that the omitted particulars in the charge consisted of *"matters to do with rent and items in the accused's office"* without stating what those matters of rent or items were and how he had come to that conclusion. This was not a case where he could do so without inviting an amendment to the charge from the prosecution. He was also wrong in his finding that the offence was proved beyond any reasonable doubt when clearly there was no evidence to sustain that finding.

I am satisfied that the conviction was erroneous. I accordingly quash it and set aside the sentence.

Dated at Kakamega this 11th day of November, 2005.

G. B. M. KARIUKI

J U D G E