REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT MERU
CRIMINAL APPEAL NO. 145 OF 2003

REPUBLIC…….. ……..…….. APPELLANT

VERSUS

JOSPHINE MUTHONI BAARIU ……..…….. RESPONDENT

JUDGMENT

The respondent in this case, Josephine Muthoni Baariu was charged with the offence of creating a disturbance in a manner likely to cause a breach of the peace contrary to section 95(1) (b) of the penal code as follows:-

> **"On the 5th day of December 2002 at Kabachi location in Meru North District within the Eastern Province, jointly with others not before this court created a disturbance in a manner likely to cause a breach of the peace by chasing MARY NKOYAI MUTUMA with a panga threatening to cut her."**

The respondent pleaded not guilty to the charge, was tried and acquitted of the offence. The appellant, being dissatisfied with the judgment of the Learned Magistrate Mr. N. Kimani Principal Magistrate, in criminal case No. 1112/2003 at Maua has appealed against that judgment. The petition of appeal sets out three grounds of appeal:-

1. That the learned magistrate erred in law by finding that the charge before him was not proved and proceeded to acquit the respondent contrary to the evidence.

2. That the learned honourable magistrate misdirected himself in law in acquitting the respondent on the basis that the police were not called as witnesses whereas the honourable court had by its orders of 28th April 2002 granted the prosecution the last adjournment whereas it was the first day of hearing thus prevented the prosecution from securing the attendance of all its witnesses.

3. That the learned honourable magistrate erred in law by considering extraneous matters which were not relevant to the matter before him thus improperly proceeded to acquit the respondent thereby causing a miscarriage of justice.

Mr. Muteti for the appellant submitted that the trial court actively frustrated the prosecution from calling the police officer as a witness when the court, after hearing two witnesses on the first day that the case came up for hearing on 23.4.2003 ordered that the prosecution was being given last chance to call its remaining witnesses. He submitted further that the learned magistrate did not record any reason for refusing the prosecution an adjournment on that day. Mr. Muteti also submitted that it was a misdirection on the part of the learned magistrate in finding that there was no evidence of the panga as stated in the

charge sheet. That infact the learned magistrate considered extraneous matters in reaching his conclusion to acquit the respondent. That the learned magistrate did not comply with the provisions of section 169 of the Criminal Procedure Code, namely that he did not in his brief judgment give the point or points for determination thereby occasioning a miscarriage of justice to the appellant. The appellant is praying for an order of retrial.

The respondent has opposed the appeal arguing that the learned magistrate's judgment is sound, especially in view of the fact that the prosecution did not prove its case beyond any reasonable doubt. That there was no evidence connecting the appellant with the offence – that even PWI, the complainant did not allege that the accused chased her with a panga. Mr. Ayub Anampiu for the respondent submitted further that the prosecution voluntarily chose to close its case when on the 19.5.2003, the prosecutor said:-

"One witness to go. I was granted last chance. I close our case."

Mr. Anampiu relied on the judgment in criminal appeal no. 56 of 1983 between *Mohamme d Rafic and Republic* where at page 194 thereof, Kneller and Hancox, JJA & Chesoni Ag J.A. set out the rules regarding retrial and that a retrial may be ordered where:-

(a) The trial is illegal or defective as was the case in Zebiyo Ndyoka V. R (1956) 23 EACA 505 Fatehali Maju V. R (1966) E.A. 343 Merali & others V. R (1971) E.A. 221 and Horace Kiti Makupe V. R. cr. Appeal no. 98 of 1983 (unreported); OR

(b) The accused has not had a satisfactory trial as in the cases of R. V. Vashanjee Liladhar Dossani (1946) 13 EACA 150, Pyralal Merlam Bassan & Ano. V. R (1960) E.A. 854 and George Karanja Mwangi & others V. R. Cr. Appeal No. 132 of 1983 (unreported) OR

(c) It is in the interest of justice and no injustice is likely to be caused to the appellant Ahmed Ali Dharamshi Sumar V. R (1964) E.A. 481, Merali and others V. R. (1971) E.A. 221 and Horace Kiti Makupe V. R (see above).

It was however noted that the above are general rules and that each case should be treated on its own merit.

Does the present case fall within the ambit of any of the three rules? Definitely it does not fall under rule (a) for the trial was neither illegal nor defective. From the record, it is clear that on 19.5.2003, the prosecutor informed the court that though there was one witness to go and that since he had been given the last chance, he was closing his case. It may be true that the learned magistrate made a harsh ruling when on the first application for adjournment, he gave the prosecution the last chance to call its witnesses. However, it is to be noted from the record that the prosecution had almost four weeks within which to call the remaining prosecution witness, and when the due date came, he had no witnesses.

The appellant has submitted that if the prosecution had had a chance of calling the remaining witnesses, the outcome might have been different. I have carefully perused the record of the trial court and found that the evidence that was adduced by the prosecution up to 19.5.2003 was so scanty, and so contradictory that I am satisfied that the trial magistrate was justified in reaching the conclusion that he did. The evidence that is on record does not support the charge against the accused person. It is my considered view that even if the police officer who was locked out had testified his evidence would not have made a difference to the prosecution case. Since he was not at the scene of crime, he would not have testified to the fact of the respondent chasing the complainant wit a *panga.*The trial was satisfactory in the circumstances.

Would it be in the interest of justice to order a retrial in this case? The appellant has submitted that the learned magistrate did not comply with the provisions of section 169 of the Criminal Procedure Code. The learned magistrate at paragraph 2 of the judgment sets out the issue for determination and proceeds to set out and/or evaluate the prosecution's case after which he makes a finding that there is no evidence to

show that the respondent was seen chasing the complainant with a panga. It emerges therefore that the learned magistrate did comply with the provisions of section 169 of the C.PC. Secondly, the investigating officer whose evidence would have laid a basis for the charge against the respondent was not called as a witness, thereby complicating the prosecution's case further. Taking the totality of the evidence on record, I am satisfied that the learned magistrate could have reached no other conclusion. It would not be in the interests of justice to order a retrial as such an order would only cause injustice to the respondent to whom the benefit of doubt was given in the lower court. I find nothing from the record to suggest that the learned magistrate considered extraneous matters which were not relevant to the matter before him and which matters led or could have led to a miscarriage of justice.

After considering all the above facts, the submissions by learned counsels for both the appellant and the respondent and the authorities submitted by the respondent I am satisfied that justice has been done in this case. I will not order a retrial for the simple reason that it will not serve any useful purpose in view of the evidence on record. In the result, the judgment of the learned magistrate is upheld. The appeal is dismissed.

Dated and delivered at Meru this 5th day of August 2004.

RUTH N. SITATI

Ag JUDGE

5.8.2004