REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL APPEAL NO. 47 OF 2003

DOMISIANO MICHUBU MAUTA ….…….. APPELLANT

VERSUS

REPUBLIC ……..RESPONDENT

JUDGMENT OF THE COURT

The appellant herein, Domisiano Michubu Mauta was charged in the Principal magistrate's Court at Maua in Criminal Case No. 1963 of 2002 with the offence of creating a disturbance in a manner likely to cause a breach of the peace contrary to section 95(1) of the Penal Code. The particulars of the charge were that on the 10.9.2002 at Kanuni Location in Meru North District within the Eastern Province created disturbance in a manner likely to cause a breach of the peace by using abusive language to SARAH KARAMBU by calling her a prostitute. The appellant was found guilty as charged and convicted. The appellant was fined Kshs. 5000 in default 6 months imprisonment.

In summary, the evidence is as follows:-

The complainant in this case operates a bar and shop at Kanuni Athiriba. On 10.7.2002 at about 8.00pm, she was at her bar taking stock when the appellant who had been preceeded by one Mwithalie entered the complainant's bar and asked to be sold some beer by the complainant but the complainant informed him that since it was past time, she could not sell beer to him. On hearing that, the appellant took Muthalie's beer and drank it and then went out but returned after about two (2) minutes and again demanded to be sold beer by the complainant, but once again the complainant refused to comply. The appellant made repeated demands which the complainant ignored. That is when the appellant started calling the complainant a prostitute and telling her she had AIDS. The appellant went on to tell the complainant that she would sleep with him because he had on him Kshs. 5,000/= as he had sold miraa. That inspite of the complainant telling the appellant that she was married, he went on abusing her and at one time the appellant picked up an empty bottle and dropped it on the floor and it broke, apparently in an attempt to annoy the complainant. The appellant then got hold of the complainant and held her against the counter telling her he would have sex with her. That was when one bar maid by the name Jane who gave evidence as PW2, screamed and attracted some people from outside who came into the bar and pushed the appellant outside. Even at that time the appellant continued abusing the complainant. The matter was reported to Maua Police Station later on and the appellant was subsequently arrested and charged. Both the complainant, PWI and Jane, PW2, told the court that the appellant had been to the complainant's bar on other occasions in the past and that he had on a few of those occasions behaved badly to their bar patrons.

PWI told the court in cross-examination that she did not report the incident until about 13.9.2002

because the appellant's wife was seeking to reconcile with the complainant and she denied that she assaulted the appellant at any time during the incident. The complainant called two other witnesses, PW3, one FESTUS MUTURA whose wife also runs a bar on the same market as the complainant but he denied a suggestion by defence counsel that he together with the complainant assaulted the appellant.

The appellant gave sworn testimony and told the court that on the material day, PWI and PW3 called him as he was passing by PWI's bar and asked him about keys that had got lost on 4.8.2002 and when he told them that he did not know about the keys, PWI hit him on the right hand with a stick. He gave the time as being between 7 and 8pm. Somebody separated them and on the following day, he reported the matter to Maua Police Station. The appellant produced some exhibits – one being a hospital card from Maua Methodist Hospital – defence exhibit 9 and copy of a P3 form – defence exhibit 2 – to show that he had been assaulted by the complainant, PWI. The appellant denied that he entered PWI's bar on the evening of the material day and he also denied that he was drunk.

After considering the above evidence, the trial court found that the appellant went to the complainants bar on the material day and time where he called the complainant a prostitute and told her she had AIDS, and further that he could have sex with her because he had Kshs. 5000/= on him from the sale of miraa. The trial court found that the words uttered by the appellant were strong abusive words directed at a married woman who was carrying on business at the place where the incident took place. The trial court also found that the documentary evidence produced by the appellant was at variance with the alleged assault of the appellant by the complainant on the appellant's right hand and the trial magistrate reached the conclusion that the injuries indicated on the P3 form produced by the appellant were consistent with injuries sustained by the appellant when he was being pushed out of the bar by those who came to the complainant's rescue. The trial court thus proceeded to find the accused guilty of the offence as charged and to convict him accordingly.

It is against that conviction and the sentence of a fine of Kshs. 5,000/= in default imprisonment of six (6) months that the appellant has appealed. The appellant was found to be a first offender and expressed his remorse. The appellant was also said to be aged 32 years, married and with two children.

Mr. Arimba for the appellant argued that the trial magistrate erred in law and infact by convicting the appellant on the basis of contradictory evidence of the prosecution witnesses and further that the learned trial magistrate erred in law and infact by disregarding the evidence of the appellant and that of his witnesses. Finally, Mr. Arimba argued that the learned trial magistrate erred in law and infact by failing to adhere to the mandatory provisions of the law regarding the taking of plea(s) from the accused person(s) and urged the court to quash the conviction and set aside the sentence. In his submissions, Mr. Arimba pointed out that there is contradiction between the evidence of PWI and Pw3 regarding the time when the appellant was in PWI's bar and further that there is contradiction as to whether or not appellant took PW3's beer and drank it. He also submitted that there is contradiction between the evidence of PWI and PW2 as to whether PW3 was in PW1's bar on the material day and that even the evidence of PW3 was contradictory in itself – when he stated in his evidence in chief that he was not at PWI's bar and admitting in cross examination that he was at PWI's bar with DWI (appellant) at about 7.00pm. That PWI testified that many people came to her rescue when PW2 screamed, but that PW2 stated that one person came to PWI's rescue and that because of these contradictions, the appellant should not have been convicted.

Mr. Arimba also submitted in support of the second ground of appeal that the trial magistrate completely failed to consider the evidence of DWI and that he did not give any reasons as to why he thought or found the evidence of DWI untruthful. Finally, Mr. Arimba submitted that the learned magistrate did not comply with the mandatory provisions of sections 207(1) and 211 of the Criminal Procedure Code, namely that the substance of the charge against the appellant was not stated to the appellant and asked whether he admitted or denied the truth of the charge; and that failure to comply with those sections of the law is sufficient to make this court quash the conviction and set aside the sentence.

Mr. Oluoch for the state opposed the appeal and submitted that ground 3 of the appeal cannot and does not stand since the record shows at page 7 thereof that the charge was read and explained to the appellant and that the appellant participated in the proceedings all along. He submitted further that page 7

of the proceedings shows that the learned magistrate complied with section 211 of the C.P.C. Mr. Oluoch further submitted that the contradictions in the evidence, if any, were not material and accordingly did not effect the outcome of the trial. Learned counsel for the state submitted further that the evidence is clear that the appellant went to the complainant's (PWI's) bar and called her a prostitute within the hearing of PW2 and that before finding the appellant guilty as charged, the learned magistrate complied with section 169 of the CPC when he said that he believed the prosecution evidence. That since there is no allegation that the trial magistrate considered extraneous evidence, the court should find that the appeal is not merited and proceed to dismiss the same.

What is the duty of this court in considering the appeal before it? In the case of Okemo v. R (1972) 32 at page 36, the court of appeal for East Africa stated the duty of an appellate court on first appeal as follows:-

> **"An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya V. R. (1957) EA 336) and to the appellate's court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (Shantilal M. Ruwala V. R (1957) E.A. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, if should make allowance for the fact that the trial court has had theadvantage of hearing and seeing the witnesses, see Peters V. Sunday Post (1958) E.A. 424."**

So that is my duty before I can reach the conclusion as to whether the conclusions and findings of the trial court can be supported. PWI told the court in her evidence in chief that the appellant entered her bar at about 8.00pm and demanded to be served with beer which complainant refused to serve because it was past time. That when PWI refused to serve him with the beer, the appellant took the beer for PW3, and after drinking it went out of the bar only to return 2 minutes later to continue demanding to be served beer by PWI. When PWI refused, the appellant called her a prostitute and told her she had AIDS. When he pinned her to the counter telling her he would have to sleep with her, PW2 screamed and others came from outside to rescue her, and pushed the appellant outside. PWI stated that she knew the appellant before and that she had no grudge with him. When cross-examined by Mr. Arimba for the appellant, PWI told the court that both herself and PW2 were in the bar when the appellant arrived there and that Mwithalie, also known as M'Atheru was also in the bar. PWI also stated that the appellant had been to her bar before, especially on 4.8.2002 when he behaved badly to other bar patrons. PW2 corroborated the evidence of PWI regarding the time the appellant went to the bar and regarding the words uttered by the appellant to PWI including pinning PWI to the counter and threatening to have sex with her. There is also corroboration of PWI's evidence that when PW2 screamed some others came and ejected the appellant from the bar. While PWI talked of a bottle falling and breaking, PW2 talked of hearing bottles fall on the floor. PW2 also stated in her cross-examination that at the time of the incident, there was one other person in the bar and that the appellant drank that person's beer (one M'Atheru).

On considering that evidence as a whole, I have reached the conclusion that the contradictions that have been pointed out by learned counsel for the appellant are so trivial that they do not go to the root of the evidence against the appellant, namely that the appellant entered PWI's bar, called PWI a prostitute, told her she had AIDS and that he would have sex with her because he had money. For that reason, the first ground of the appeal must fail.

Regarding the second ground of the appeal, the appellant contends that the learned trial magistrate erred in law and fact by disregarding the evidence of the appellant and that of his witnesses. The appellant in his sworn testimony told the court that between 7 and 8pm he was at Kanuni. That both the complainant and Mutura (PW3) called him and asked him about the keys that had got lost on 4.8.2002 and then PWI hit him with a stick on the right hand. He produced a P3 form and a hospital treatment card from Maua Methodist Hospital. DWI, one Patrick Ithale M'Athiru told the court that on 10.9.2002, between 6 and 7pm he was at Karambu's (PWI's) bar but denies that he was with the appellant. He states that there were no other customers thereat and that the appellant did not take his beer and drink it because

he was not with the appellant. During cross-examination, he admitted that he was in Karambu's bar by 8.00pm and that it was only him, and Karambu (PWI) in the bar at the time, and that later Festus (PW3) came to the bar and left him there. In reading this evidence, I find that there is a common thread running through DWI's evidence and that of PWI and PW2, namely that DWI was at PWI's bar on the material day and at the material time. At page 2 of the judgment, paragraphs 4 and 5 thereof, the learned trial magistrate put the appellant's evidence under scrutiny and at page 3 he concludes that that defence is a sham, a pack of lies and unmeritorious. It cannot therefore be said that that evidence was not considered by the learned trial magistrate. I have also carefully considered the defence case, and I am satisfied that putting the evidence in chief together with the evidence under cross-examination, the appellant was indeed at PWI's bar on the material day and time and I have reached the conclusion that he committed the offence with which he was charged and in the manner as described by both PWI and PW2. For these reasons therefore, the second ground of the appeal must fail.

The third ground of appeal is that the learned trial magistrate erred in law and infact in failing to adhere to the mandatory provisions of the law regarding the taking of plea from the accused person. During his submissions Mr. Arimba for the appellant argued that the trial magistrate did not comply with sections 207(1) and 211(1) of the CPC. The relevant portion of section 207(1) of the C.P.C. states as follows:-

> **"1. The substance of the charge shall be stated to the accused person by the court and he shall be asked whether he admits or denies the truth of the charge."**

Mr. Arimba submitted that though the charge was read and explained to the appellant when he appeared in court on 1.10.2002, the same thing was not done for him on 16.10.2002. From the record, it is clear to me that the appellant pleaded to the charge on 2.10.2002 because on 1.10.2002, he was absent. On 2.10.2002, the following transpired and I quote from the record:-

> **"Charge read to the accused person who states in Kimeru:- Accused:- I deny."**

On 16.10.2002, the issue that was before the court was one of dealing with the appellant's application for bond and Mr. Arimba for the appellant said and I quote from the record:-

> **"I am for accused person. I pray for bail for accused person. Accused had a police bond and was late at the date of taking the plea. He will abide by the terms of the bond."**

The application by Mr. Arimba on 16.10.2002 was a consequence of the orders made by the court on 2.10.2002. On that date the court fixed the case for hearing on 25.10.2002. Mention was on 16.10.2002 accused (appellant) was remanded in custody but could review his application for bail on 16.10.2002. As it were, the issue of taking plea on 16.10.2002 did not arise and this being the case, there was no obligation on the part of the trial court to once again comply with the provision of section 207(1) of the CPC that had been done on 20.10.2002 and a hearing date given for the appellant's case. It is my respectful view that if Mr. Arimba had taken the trouble to read the record, he would have found that there was no merit in this ground of appeal.

Section 211(1) of the CPC provides as follows:-

> **"1. At the close of the evidence in support of the charge, and after hearing such summing up, submission or argument as may be put forward, if it appears to the court that a case is made out against the accused person sufficiently to require him to make a defence, the court shall again explain the substance of the charge to the accused and shall inform him that he has a right to give evidence on oath from the witness box, and that, if he does so, he will be liable to cross-examination, or to make a statement on oath from the dock, and shall ask him whether he has any witnesses to examine or other evidence to adduce in his defence, and the court shall then hear the accused and his witnesses and other evidence, (if any)."**

Mr. Arimba has argued that the trial magistrate did not comply with this requirement because the

charge was not explained to the accused (appellant). He admits however that the record shows that the section was complied with. Mr. Oluoch has submitted that indeed the court complied with the section ofwhich the appellant now complains. Unfortunately neither Mr. Arimba for the appellant nor Mr. Oluoch for the state cited any authorities in support of their respective positions on this very important point of law.

The record shows that on 28.2.2003, the court stated, and I quote:-

"**Court:- Accused has a case to answer. Section 211 CPC complied with."**

Consequent upon what the court had stated, Mr. Arimba for the accused (appellant) stated as follows, and I quote from the record:-

"Arimba, sworn statement. One witness to call."

On an examination of what transpired on 28.2.2003 before the accused (appellant) gave his evidence I have come to the conclusion that indeed the trial court complied with section 211(1) of the CPC and Mr. Arimba for the appellant took it up from there and duly informed the court that the appellant would give sworn statement and would also call one witness. That indeed happened. Even assuming that the charge was not again read and explained to the appellant before he was put on his defence, I would find that that omission is not fatal to the conviction as the same has not and did not occasion a miscarriage of justice. In R. V. John S/O NJIWA SAMWELI (1962) E.A. 552 at page 554 to 555, BIRON J. said:-

> **"The only irregularity was that the charge was not again explained to the accused and he was not informed of his rights. But, as specifically noted in that case, the accused was represented by counsel who I think, one may presume, would know the procedure. Therefore the omission to address the accused in the terms of the section could not haveoccasioned any miscarriage of justice, and was really an irregularity in form, but not in substance."**

So that even if I had found as a fact that the trial court did not comply with section 211(1) of the CPC to the letter, the fact that Mr. Arimba appeared for the appellant would have mitigated the omission and would not have gone to the substance of the conviction. Quoting from MEGHJI NATHO V. R (1946) E.A.C.A. 137 at page 138.

> **"The object of section 209(1) – the equivalent of current 211(1) – is to ensure that the accused shall fully understand the nature of the charge which he has to answer, and that it is open to him to give evidence, etc. The appellant was represented by an experienced advocate who opened his final address by standing that it was a question of fact whether an invoice was given or not. That shows that the nature of the charge was fully appreciated. Since also the appellant gave evidence, it is clear that the omission of the magistrate to explain to him his right to give evidence, did not occasion any prejudice or embarrassment to the appellant in his defence."**

In the present case, Mr. Arimba did inform the trial court that the appellant would give sworn statement and that he would call one witness. I am satisfied that the appellant fully understood his rights under section 211(1) of the C.P.C. Further, when he gave evidence, the appellant stated, "I know the charge against me," which clearly shows that the appellant fully understood the nature of the charge against him. It is also my considered view and as rightly pointed out by Mr. Oluoch for the state that if indeed it is true that the charge was not again read out and explained to the appellant before he was put on his defence, he should have brought up this issue before the defence case commenced. It is also my view that if Mr. Arimba who appeared for the appellant on 28.2.2003 when the court ruled that the accused (appellant) had a case to answer was so aggrieved by what the appellant now complains of he should have brought the matter to the attention of the court requiring the court to comply with section 211(1) of the C.P.C. That is not what happened. Mr. Arimba being satisfied that the court had complied with the section proceeded to inform the court on how the appellant was going to give his evidence. My finding therefore is that even if the trial court had not complied with section 211(1) of the CPC the omission by

the court would not and has not occasioned a failure of justice and accordingly the case falls within section 382 of the C.P.C. The decision of the learned trial magistrate cannot therefore be reversed by this court on account of that omission.

In the result therefore, the whole appeal fails and is accordingly

dismissed.

Dated and delivered at Meru this 28th day of September 2004

RUTH N. SITATI

Ag JUDGE