



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
APPELLATE SIDE
CRIMINAL APPEAL NO.130 OF 2002

(From Conviction and Sentence of by Mrs. J. Oseko, Senior Resident Magistrate in Magistrate’s Court Criminal Case No.1746 of 2000 delivered on 16th January 2002)

WILLIAM NDUBI IKIAO alias

BENSON MAKORI APPELLANT

VERSUS

REPUBLIC RESPONDENT

J U D G M E N T

JUSTIN JOSEPH OGWAPIT (PW.1) joined a company known as CONSOLIDATED WAREHOUSING LTD Mombasa in the year 1975 and worked up to the month of August 1997 when his services were terminated. At all times material to his case PW.1 was employed as the Managing Director of a company known as United East Africa Warehousing Ltd. Situated in Shimanzi area of Mombasa. Mr. Evans Asimo (PW.2) is this company’s Chairman. As the Managing Director, PW.1 runs the day to day affairs of this company.

On the 6th April 2000 at about 2 p.m. PW.1 was supervising off loading of a consignment of tea in the Godown. He received a call from his secretary that a police officer was waiting to see him in the office. The godown is in the same building as his office. He decided to go back to his office and there, sitting in his secretary’s office, was a gentleman whom he pointed out in court as WILLIAM NDUBI IKIAO (the appellant). PW.1 invited the appellant into his office and both took their respective chairs. PW.1 asked the appellant what the purpose of his visit was. It is the evidence of PW.1 that the appellant told him that he did not want anyone to know the purpose of his visit because it concerned police investigations and was therefore a secret matter. The appellant advised him to close the door leading to the Secretary’s office, and this was done. He said the appellant asked him to ensure that they were not disturbed, and he told the secretary that nobody was to disturb them.

PW.1 went on to say that, after those preliminaries the appellant removed a card and showed it to him. He noticed it had a Coat of Arms of the Police Force. The appellant then returned the said card into his pocket and told him that he was a Senior Superintendent of police known as BENSON MAKORI from Police Headquarters Nairobi. PW.1 continued to say as follows:

“He asked me if I knew ERIC NCABITT. I said I did. That he was the Managing Director of Consolidated Warehouses Mombasa when I was Managing Director before. He asked me how well I knew ERIC MCABITT. He also asked me if I knew

George, Eric's brother who also works at Consolidated as Operations Director though I am not sure. I told him I have known them since I was a little child as their mother is an elder sister of my wife. He then said that these boys are very bad i.e. Eric and George. I asked why. He said they have made very serious allegations about me to the office of the President. I asked him what the accusations are. He said they have used a very senior Politician to gain access to the Chief Secretary and have made very serious allegations towards me. He was referring to Dr. Richard Leaky. He produced photocopies of two letters. One was written from the Office of the President to the Commissioner of Police, and one written by the Commissioner of Police instructing him to investigate me. This was one of the letters dated 3.3.2000 (MFI.1). It is from Office of the President addressed to the Commissioner of Police. It is signed by Senior LAIBOI, Permanent Secretary Internal Security. The letter is bearing my name. That my personal conduct should be investigated. The letter dated 3.4.2000 MFI -2 is written purportedly from the Commissioner of Police addressed to officer -in-charge of operations. It was signed by senior Superintendent SANG for the Commissioner of Police. The Ref. Is SSP/Ben Makori Police Headquarters Nairobi. SNC/AG/T19/2000. The letter gives the accused full powers to investigate me. I told him I had only stated the company one month ago. So I asked whether this was about me personally or my company. I noted that the name S.M. Clerk also other buyer and Mr. Koinia Weche mentioned in the letter. I asked him what they had said about me. He said these ones had said good things about me. He reiterated that they are very serious allegations but I should not worry that since he was full powers if I would look after him. That he would ensure the report was in my favour. I told him I had not committed any offence and why I should ask for help. I asked him why this matter was not investigated by Mombasa Police. He said it was a security issue. He asked me if I had seen him the day before. I said no. He said it is ERIC who pointed me out to him and he was in Eric's hands – That he was interviewing me further. We talked for one hour. ”

PW.1 then asked for copies of the two letters and the appellant gave them to him. Then the appellant started to narrate to him how he had left Nairobi for Mombasa in a rush, had no money, no extra clothes and how he had come by road. PW.1 offered him lunch and gave him Sh.2000/-. Appellant took the money but demanded for Sh.80,000/-. PW.1 told him he did not have that kind of money. They agreed to meet another day, and the appellant left the officer, never to return again.

PW.1 said he quickly made a report to his boss, the chairman of the Company PW.2 and they agreed that the matter should be reported to the police, which he did one week later at the Provincial Police Headquarters Mombasa. He made a statement and surrendered the two letters (MFI.-1 and MFI-2) to the police for investigation. He was summoned to the Provincial CID office on 23rd May 2000 where he attended an identification parade and he positively identified the appellant as the man whom he was complaining about. The record shows that the appellant was charged and convicted of the offence of personating a person employed in the Public Service contrary to Section 105(b) of the Penal Code, namely, a police officer based at Police Headquarters Nairobi. He was sentenced to serve two years imprisonment. His appeal is now against both conviction and sentence but the Principal State Counsel, Mr. Patrick Gumo, supports both conviction and sentence.

The appellant filed seven grounds of Appeal but argued them as one, essentially that his conviction was against weight of evidence.

The appellant started off, by conceding that he knew PW.1 before this incident of 6th April 2000. He conceded to have gone to PW.1's office on the material day and met both PW.1's secretary and PW.1 in his office. He said he had gone to demand payment of Shs.300,000/- which PW.1 owed him. This is what the appellant stated in his sworn evidence:

“On the material date I visited the complainant (PW.1) in his office which is situated at Shimanzi Mombasa. The complainant is someone I knew before. We were working with

him at Consolidated Kenya Ltd. He was the Director and also I was Operations Manager. I was answerable to him. The complainant got sick, and was admitted at Mombasa Hospital. He was sacked by the Chairman and his two sons. I was given a letter to deliver to him. I just waited after a week when he came back and I gave him the letter. After reading it he was so annoyed. He was to hand over to me. He did. He was not happy with me. He left the company after one year and opened another company near our offices. I also left consolidated and started my own business. He is a tea broker. He approached me and requested me to do business together with Ongora Were. I accepted. This was 1999. I got tea which I took to him. He paid half the money and left a balance of KSh.300,000/-. He said he would sell it and pay later. He did not want others to know. It took a lot of time for him to pay and my friends were not happy. He did not pay so I used to visit him. ”

It is the appellant's submission that on the material day PW.1 said he had no money with him but he, the appellant, told him he must pay up. PW.1 threatened him and told him that he, PW.1, was an influential man. Indeed two days later he learnt that police from Urban Police Division were looking for him. He was eventually arrested, locked up for ten days in police cells and a further ten days at Port Police and then charged with personating a police officer. He denied, both in his trial and now on appeal in his court, to have committed this offence.

The appellant observed that evidence which had been adduced before the trial magistrate essentially amounted to be the word of PW.1 against his, that the only person who would have given neutral evidence of the events of the material day was PW.1's secretary. For according to the Prosecution he had initially presented himself to PW.1's secretary as a police officer, that it was the same secretary who summoned PW.1 to the office to meet a policeman who was waiting to see him and that PW.1 instructed the same secretary that they should not be disturbed as they discussed. He submitted therefore that PW.1's Secretary was an important witness in this case. Yet this secretary was not called to testify by the prosecution, and no explanation was given for this omission. Appellant invited the court to hold this omission to call PW.1's secretary adversely against the prosecution i.e. to hold that if she had been called to testify her evidence would have been adverse to the prosecution. In my considered view the appellant is absolutely right in this submission.

It is trite law that when the prosecution fail to call a material witness they do so at their own risk, so held in **NG'ANG'A V. REPUBLIC (1981) KLR 483** AND AN ADVERSE INFERENCE WILL BE DRAWN THAT THE EVIDENCE OF THAT MATERIAL WITNESS, IF CALLED, WOULD BE ADVERSE TO THE PROSECUTION. I DO MAKE THIS ADVERSE INFERENCE BECAUSE PW.1'S SECRETARY WAS A MATERIAL WITNESS IN THIS CASE. The adverse inference to be drawn is that the appellant did not introduce himself to her that he was a policeman, that PW.1 did not instruct her to ensure that nobody disturbed them and that the appellant used to visit PW.1 in the office frequently.

The logical inference to be drawn from that is that the appellant was previously known to PW.1 and therefore he could not have introduced himself to PW.1 as a Superintendent of Police of a Police Officer. The offence of personating a person employed in the public service contrary to Section 105(a) Penal Code was not proved against the appellant.

There are two aspects of this case which I want to deal with briefly. The first relates to the identification parade which was conducted by IP. Samson Thoya PW.4. It is on record that the appellant and PW.1 held a one hour meeting on the 6th April 2000 in PW.1's office, during which time PW.1 must have had ample opportunity to observe the appellant to the extent that when the identification parade was conducted on 23rd May 2000 appellant and PW.1 were not strangers at all. Indeed the trial magistrate held so in her judgment. The conduct of the parade and the identification of the appellant by PW.1 in the process was of no evidential value. In any case I have held that the appellant knew PW.1 well before this incident.

The second issue relates to the two letters which PW.1 claims to have been given to him by the appellant and which PW.1 subsequently handed over to the Police Constable Baya Kibwana (PW.5) on the 14th April 2000. In his evidence PW.5 testified that, during his investigations he found these letters

not to be genuine. But he conceded under cross examination that he neither investigated these letters nor their origin. Indeed one S.L. Laibon who is shown to have signed for the Permanent Secretary – Internal Security on Exhibit 2 being a letter dated 3/3/2000 and a Mr. Sang who purported to have signed for the Commissioner of Police on Exhibit 3 being a letter dated 3/4/2000, were not called. No attempt was made to prove the falsity of both letters.

All in all the investigation and prosecution of this simple case were poorly carried out and the charge laid before court against the appellant was not proved beyond reasonable doubt.

For the above reasons I find the conviction of the appellant unsafe and do hereby quash it. The sentence of two years imprisonment is hereby set aside.

The appellant shall be released forthwith from prison custody unless he is otherwise lawfully held.

It is so ordered.

Dated and Delivered at Mombasa this 9th of May 2003.

A.G.A. ETYANG

JUDGE