



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS
APPELLATE SIDE
CRIMINAL APPEAL NO. 13 OF 2001

(From Original Conviction and Sentence in Criminal Case No. 621 of 1999 of the Senior Resident Magistrate’s Court at Kangundo: C. D. Nyamweya Esq. on 24.1.2000)

BERNARD MBITHI KISIVE ::::::::::::::::::::::::::::::::::: APPELLANT

VERSUS

REPUBLIC ::::::::::::::::::::::::::::::::::: RESPONDENT

Coram: J. W. Mwera J.
Wanyonyi Advocate for Appellant
Orinda State Counsel for Respondent
C.C. Muli

J U D G E M E N T

The appellant and another faced 2 charges in the lower court at Kangundo. The first count under S.234 Penal Code stated that on 19.10.99 at Kangundo Township they jointly did grievous harm to one Marklound Ndolo. The second count was that on the same date and place the duo jointly unlawfully assaulted Mutuku Munyao occasioning him actual bodily harm.

On 24.1.2000 the appellant was found guilty of the two counts and ordered to served four (4) years for count 1 and two (2) years for count 2. The sentences were to run concurrently. On either charge the Learned Trial Magistrate opted not to impose corporal punishment.

On 7.2.2000 a petition with a whopping twelve (12) grounds was filed here. But as it is bound to be with such a kind of petition some grounds (Nos. 1, 2, 4 and 12) were abandoned at the trial while others were argued together (Nos. 5, 6, 7 and 8, 9 and 11). Grounds 3 and 10 were argued separately. 10

Mr. Wanyonyi argued that the Learned Trial Magistrate fell in error when he failed or refused to have the appellant adduce evidence on a certain occurrence book entry (of a local police station) wherein it could have been demonstrated that the two complainants in the lower court had earlier been booked and charged with breaking into a motor vehicle (of the 2nd accused Charles Mutua –); that the Learned Trial Magistrate found guilt against the weight of evidence and that the conviction was based on extraneous matters. There was a further point that did not come out clearly at the trial that the lower court did not accord the appellant a fair trial. Probably this was based on the submission that the lower court did not specifically state that S. 211 20 Criminal Procedure Code had been complied with by giving the appellant

whatever options that provision of law accords an accused person against whom a prima facie case is found. The other point of appeal but one that similarly not quite well brought out was that the sentence was malicious and excessive. It was not shown on whose part malice was alleged. And that the Learned Trial Magistrate failed or refused to keep a full and proper record-not-too-easy a ground to prove in this case.

The Learned State Counsel had a contrary view to the effect that the entry in the occurrence book about an earlier offence against the complainants was brought up by the prosecution witness (P.W.4) and non-availing of this O.B. is no way impacted prejudicially against the appellant. That indeed such state of things existed but that was peripheral to the charges of assault that were laid.

He added that eye witnesses did testify on the assaulting of the complainants all the way from the bar counter – the appellant ran and owned Treeshade Bar, to 10 some spot in the verandah outside. That the dates of the offences were slips that stood to be cured under S. 214 Criminal Procedure Code in the light of the direct evidence adduced and that for sure the dates put variously at 16th, 19th or 27th October 1999 did not prejudice the appellant. It may be added that although the issue of those dates did not feature clearly in the petition of appeal, Mr. Wanyonyi put that aspect forth as a strong ground. The Learned State Counsel supported both conviction and sentence inviting this court as the first appeal court to review all the lower court record and to conclude the way the Learned Trial Magistrate did.

The prosecution called five (5) witnesses to testify in the lower court. Upto 20 the close thereof the appellant was not represented. Then the lower court ruled

“Ruling

Going by the evidence adduced before this court, I find that each accused has a case to answer.”

On that day the appellant who was accused 1 was on bond and did not appear in court. So after several adjournments as a warrant of arrest stood to be executed, he was arrested brought to court and remanded by Mrs. Maloba Senior Resident Magistrate who was at the station, to await the trial magistrate Mr. Nyamweya Senior Resident Magistrate to come and decide either to accept the appellant’s explanation that he had been unwell or otherwise. However later (on 13.12.2000) Mrs. Maloba lifted the warrant of arrest and on that day it is shown that Mr. Wanyonyi (did he come late after the lifting order?) appeared for the appellant:

The defence case was set for hearing on 24.1.2001. That day Mr. Wanyonyi wrote a note to Mr. Ndolo (for the second) to say that he would come by noon. When 10 the court sat at 2 p.m. Mr. Wanyonyi was nowhere and Mr. Ndolo desired to proceed with his case. The appellant said:

“I have no objection to proceed.”

Mr. Ndolo told the Learned Trial Magistrate that he had no evidence to call in defence; he left it all to court. Similarly the appellant said

“I will also leave it to court.”

20 The Learned Trial Magistrate being on transfer to another station wrote and delivered his judgement on the same day, convicting and sentencing the appellant as earlier on indicated.

After reviewing the whole lower court record up to the judgement and having heard both counsel on this appeal, this court is inclined to allow this appeal but only on a technicality otherwise it remains that the appellant assaulted the 2 complainants herein and they were injured as set out in the charges. As for the dates of the offence given variously by the witnesses S. 214 (2) may as well do here otherwise there was little else by way of merit on the other points argued here.

The technical point on which this appeal is allowed is under S. 211 Criminal Procedure Code. All

judicial officers know the importance of this section and that it mandatory in its application even much more so where an accused person is not represented as the appellant was here. It reads in the relevant parts:

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“211 (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 that court that a case s 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 not 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).

(2)

This is a mandatory provision of law. It also sets out what the court must acquaint the accused with and what rights belong to him. In paraphrase, which is probably unnecessary, where the trial court has come to a stage that a prima facie case, as it were, has been made out against an accused person that court:

- 1) shall against explain the substance of the charge to the accused person. It is a reminder, so to speak.
- 2) shall inform the accused that he has a right to give sworn testimony whereby he shall be cross examined by the prosecutor and other co-accused if any.
- 3) that he has a right to testify (unsworn) from the dock (where he will not be subject to cross examination)
- 4) by practice, inform the accused that he may opt to keep quiet and say nothing in his defence but leave it all to court to consider all the 10 evidence and deliver a judgement.
- 5) shall ask him if he has witnesses to examine or other evidence to adduce in his defence.

These are important aspects of a criminal trial in the lower courts and so no court should ever overlook or forget to comply with S.211 Criminal Procedure Code. If it is not complied with an accused could as well be prejudiced one way or another e.g. if he does not know that he can call witnesses. The compliance is even more crucial where an accused person is not represented by counsel. Before the Learned 20 Trial Magistrate the appellant was unrepresented as at 22.11.2000 when the prosecution had closed its case and the Learned Trial Magistrate ruled (see above) that he found that each accused had a case to answer. That was not all. The Learned Trail Magistrate ought to have gone on to explain again the substance of the charge, the mode of testifying and if the accused had witnesses to call. The law is mandatory on this and the Learned Trail Magistrate was in error, and a fatal error, not to comply with it (S.211 Criminal Procedure Code). This is found to be so because when on 24.1.2001 the appellant and his mate were due to be heard in defence, Mr. Ndolo for the mate said that they were calling no evidence and all was left to the Learned Trial Magistrate to decide on evidence on record.

Then the appellant followed suit and said he also left it to court. Mr. Ndolo is a lawyer, the appellant (quite probably or indeed) is not. So did he know what he left to court? Had he been told that under S.211 Criminal Procedure Code (which was not recorded anywhere) he could call witnesses and even require the O.B. from the local police station in his defence, would he not have done so for whatever that OB was worth? This court is inclined to find that had S.211 Criminal Procedure Code been complied with the appellant could not have simply repeated what the lawyer Mr. Ndolo told the Learned Trial Magistrate that his client did not wish to call evidence. He could have considered what the law provided under S. 211 Criminal Procedure Code and quite probably taken another course seeming favourable to him in the trial.

10 That that was not the case this appeal is allowed. S. 211 Criminal Procedure Code should always be complied with and the record should reflect that.

The appellant to be set at liberty forthwith unless otherwise lawfully held.

Judgement accordingly.

Delivered on 2nd April 2001.

J. W. MWERA

JUDGE