REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS
APPELLATE SIDE
CRIMINAL APPEAL NO. 63 OF 2001
(From Original Conviction and Sentence in Criminal Case No. 221 of 2001 of the Senior Resident Magistrate's Court at Kangundo: B. Maloba Miss, on 2.4.2001)

GILBERT KINYUA NDUKU :::::::::::::::::::::::::::::: APPELLANT

VERSUS

REPUBLIC ::: RESPONDENT

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

JUDGEMENT

20 The appellant faced 2 charges in the lower court at Kangundo. The first under S.339(1) Penal Code was that on 24.3.2001 at Kakuyuni Township, Kangundo Machakos he willfully and unlawfully damaged chairs and glasses worth Sh.1500/= the property of Michael Masika.

The second charge under S.95 (1) Penal Code alleged that on the said day and place the appellant created a disturbance by abusing Michael Masika and other patrons at Happy Lion Club bar.

The record that the appellant pleaded guilty to both charges. He was convicted and the prosecution said that he be treated as a first offender. The appellant in mitigation said that he was drunk and thereafter the Learned Trial Magistrate handed down a sentence of 12 months imprisonment on count 1 and 6 months for count 2.

A 8 – point appeal Mr. Kioko argued claimed that the plea was not unequivocal and that the facts reproduced did not constitute an offence as charged. 10 And that the sentences were harsh in the circumstances.

The Learned State Counsel did not support a conviction on count 1, and as it turned out on account of the facts reproduced.

Having heard both counsel, and their submissions being incorporated in the following determination, this court is of the view that the plea of guilty cannot be faulted much save as shall eventually appear as regards count 2 – creating a disturbance.

The facts reproduced were to the effect that when the appellant entered the club in issue he found patrons. He started abusing them and pouring their beer. 20 The patrons threw him out; he was arrested and charged accordingly.

These are the facts that were admitted. A conviction followed and then the sentence. These facts did not reveal an offence of malicious damage to property and so conviction on count 1 is quashed and the sentence thereon set aside.

The plea was also not entirely proper in count 2 even if this court may heed to repeat that an answer to a plea of guilty that:

“It is true,”

is sufficient. But the facts spoke of causing a disturbance. The appellants abused patrons. He poured their beer. However the charge which ought to have stated in the particulars that he: “……..created a disturbance in a manner likely to cause a breach of the 10 peace,”

was not so laid in the charge sheet. Creating a disturbance alone is not an offence. The disturbance should be in a manner to cause a breach of the peace. Thus a charge which omits this element in its particulars constitute no offence. Accordingly conviction on count 2 is similarly quashed and the sentence set aside.

In sum this appeal is allowed. The appellant who should be none careful with his drinking in future to be set at liberty, unless otherwise lawfully held. 20 Judgement accordingly.

Delivered on 11th June 2001.

J. W. MWERA

JUDGE