Poipoi v Republic (Criminal Appeal E038 of 2021)
[2023] KEHC 21158 (KLR) (5 July 2023) (Judgment)

Neutral citation: [2023] KEHC 21158 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KAJIADO

CRIMINAL APPEAL E038 OF 2021

SN MUTUKU, J

JULY 5, 2023

BETWEEN

JOHNSTONE WANJALA POIPOI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from judgement of Hon. Kahuya I.M principal magistrate Kajiado in Kajiado Criminal Case No.1191 of 2019 R-vs- Johnstone Wanjala Poipoi delivered on 22/7/2021)

JUDGMENT

Background

1. Johnstone Wanjala Poipoi, the Appellant, was charged with the offence of abuse of office contrary to section 101(1) of the *Penal Code*. The particulars of the offence are that on August 25, 2019 at Kajiado township within Kajiado County, being an employee in the public service as the Kajiado Count Statistics Officer, sabotaged the 2019 National Population and Housing Census exercise by calling off the exercise before the stipulated time.

2. He was also charged with the second count of failing to comply with the terms and conditions of oath contrary to section 26(f) of *Statistics Act* No. 4 of 2006. The particulars of the offence are that on August 25, 2019 at Kajiado township within Kajiado County, being the Kajiado Count Statistics Officer failed to comply with terms and conditions of oath by instructing the county statistics representatives and enumerators to stop the 2019 census exercise before the stipulated time.

3. The Appellant was tried and found guilty in count 1 for creating disturbance under section 95 (1) (b) of the *Penal Code* after the trial court invoked the provisions of section 179 (2) of the *Criminal Procedure Code*. He was also found guilty in respect of count 2. He was fined Kshs 20,000 in default 3 months imprisonment on the first count and Kshs 30,000/- and in default 3 months imprisonment on the second count.

4. The Appellant was dissatisfied with the conviction. He came to this court on appeal through a Petition of Appeal dated August 11, 2021. He has raised the following grounds of appeal:

    i. That the Honourable magistrate erred in law and fact by convicting the appellant on the offence of creating disturbance when the ingredients of the offence had not been proved.

    ii. That the Honourable Magistrate erred in law and fact by convicting the appellant without sufficient evidence.

    iii. That the Honourable Magistrate erred in law and fact by holding that the prosecution had proved its case beyond reasonable doubt on both counts.

    iv. That the Honourable Magistrate erred in law and fact by shifting the burden of proof to the appellant.

    v. That the Honourable Magistrate erred in law and fact by failing to consider evidence by the defence.

Submissions

5. The appeal was canvassed by way of written submissions. The Appellant filed his submissions dated February 14, 2022. In his submissions, he has argued that the Magistrate erred when he convicted him on the offence of causing disturbance because this offence is not a lesser offence to that of abuse of office; that the trial court did not give reasons for the said conviction neither was the appellant given a chance to defend himself on that count and that the ingredients of the offence of creating disturbance were not proved as he was arrested while resting in his room. On that point, he relied on the case of *Mutuku Solo v Republic* [2017] eKLR.

6. On the second count he argued that the prosecution did not prove the ingredients of that offence to enable the court convict him.

7. The Respondent filed submissions dated June 9, 2022 in which it is argued that the role of the Respondent was to establish all the ingredients as required for the charge to be sustained; that the Appellant is a State Officer, employed in the public service, a fact that has not been disputed; that the evidence adduced did not clearly demonstrate how the acts or omissions of the Appellant prejudiced others; that in his defence, the Appellant stated that he never received official communication on extension of time and that his supervisors were indecisive on the issue and that no exhibit of the letter was produced as proof that the Appellant was informed of the new developments nor were the minutes of the committee meeting produced as exhibits. It is the Respondents case that in the interest of justice, this matter ought to go for re-trial.

Analysis and Determination

8. I have taken time to read the entire record of the lower court. I have understood the evidence of the prosecution witnesses. Joshua Muindi, PW1, who testified that he was the County Commissioner. Kajiado County and Chairperson of the County Census Committee, stated that census did not take place on 24th August 2019 as scheduled because "the committee" had withdrawn all the enumerators. He testified that on 25th August, 2019, he received information the census activity will commence on 26th August 2019 to run the entire night but "once again the accused person withdrew all the enumerators and census officials at 8.00pm." He testified that he confronted the appellant who told him that he does not take instructions from anyone else other than the National Census Department.

9. Beatrice Gachengwa, PW2, had the role of providing security during the census exercise. She deployed security personnel for this purpose but learned that the enumerators had been withdrawn. PW2, in company of other police officers including Kombo Sebe, PW3, went to fetch the Appellant from his hotel room at Hamadi Guest House on 25th August 2019 following the withdrawal of enumerators. The Appellant, however, failed to open his door prompting the intervention of IP Job Wafula, PW4.

10. In his defence, the Appellant testified that the census exercise started well and ended well on 24th and August 25, 2019 and that on August 25, 2019, census was to begin from 6am and end at 6pm; that at 5pm on the same day, he received an email from their sub-office that the census hours had been reviewed from 8pm to an approximate time as per the area of service and he relayed this information to PW1 through a WhatsApp group. He testified that at 7pm he received a call from PW1 that he had received a directive that census was to proceed from 6pm to 6am, which information PW1 also communicated through the WhatsApp group; that he contacted his superiors who had no knowledge of such communication.

11. The Appellant testified further that he told census officials to stay put on the ground until further communication but his phone went off for some time and when he was able to communicate he consulted his superiors on the issue but they were indecisive.

12. The trial court considered this evidence, found count 1 not proved but the offence of creating disturbance contrary to section 95 (1) (b) of the *Penal Code* proved. The trial court invoked section 179 (2) of the *Criminal Procedure Code* and found the Appellant guilty of creating disturbance. She convicted him on this offence. She also found count 2 proved.

13. It is clear to me that the Appellant did not cross-examine prosecution witnesses on the issues he has raised in his defence and his evidence in defence appears as an afterthought. This court is alive that the Appellant does not bear the burden of proof and that the burden remains with the prosecution to prove a criminal charge against an accused person beyond reasonable doubt. However, a good defence operates in favour of an accused because it raised doubts in court's mind. It also rebuts the evidence of the prosecution.

14. Turning to the grounds of appeal, I note that the offence of creating disturbance in a manner likely to cause a breach of peace is created by section 95(1)(b) of the *Penal Code* which states that:

> (1) Any person who - brawls or in any other manner creates a disturbance in such a manner as is likely to cause a breach of the peace, is guilty of a misdemeanor and is liable to imprisonment for six months.

15. The trial court found that the offence of abuse of office under section 101 (1) of the *Penal Code* was not proved. This offence is committed when

> "any person who, being employed in the public service, does or directs to be done, in abuse of the authority of his office, any arbitrary act prejudicial to the rights of another".

The trial court found that while the Appellant was rude to the police officers, his actions were not prejudicial to them and therefore the offence had not been proved. The trial court however found the offence under section 95 (1) (b) of the *Penal Code* had been committed.

16. I have considered the offence under section 95 (1) (b) of the *Penal Code*. The offence is committed when any person brawls or in any other manner creates a disturbance in such a manner as is likely to cause a breach of the peace. I have considered the evidence tendered. The accused was rude to the police officers. He was found in his room and there is no evidence to show that he shouted or did any act

that may be termed as a brawl or arguments with the police other than being rude. My view is that the offence under the above section was not proved beyond reasonable doubt.

17. The Appellant was convicted on the second count of failing to comply with terms and conditions of Oath Contrary to the Section 26(f) of the *Statistics Act*. The lower court in its judgement found that the appellants duties were stipulated in the letter dated 17/5/2019 part of which were to act as a link between the County Committee and the Census Secretariat and that from the evidence of PW1, the Appellant failed in his responsibilities. In his defence, the Appellant stated that there was communication between him and his committee members that he tried to get communication on the issue of extension of time for the census exercise but his bosses were indecisive. It was his case that the exercise was a success and that he was even congratulated for good work as per DEXH3(a) (b).

18. Section 26(f) of *Statistics Act* provides as follows:

> Any person who— in the execution of any duty under this Act, fails to comply with or contravenes any terms or conditions of his oath or affirmation taken under this Act, commits an offence and shall be liable on conviction to a fine not exceeding five hundred thousand shillings or to imprisonment for a term not exceeding twelve months or to both.

19. In my reading and analysis of the evidence adduced by the prosecution, I noted that the prosecution did not provide evidence to show what the terms and conditions of the oath or affirmation the Appellant may have taken in execution of his duties. The prosecution has not demonstrated how the Appellant contravened this provision of the law. I have noted that what the trial magistrate was addressing in her judgment are the Appellant's duties and not terms or conditions of his oath or affirmation. I find no evidence demonstrating that the duties are the same as or refer to the terms or conditions of the Oath or affirmation.

20. On my own analysis, I agree with the Appellant in his grounds of appeal leading me to conclude that the evidence adduced does not support the conviction in either of the counts the Appellant was facing in the lower court.

21. I have considered the Respondent's submissions that in the interest of justice the matter be placed before the lower court for retrial. The Court of Appeal in *Bernard Lolimo Ekimat v. Republic* [2005] eKLR, while citing with approval, A*hmed Sumar v Republic* [1964] EA 481 had this to say on the issue of re-trial:

> 'In the case of *Ahmed Sumar v Republic* [1964] EA 481, at page 483, the predecessor to this Court stated as follows:
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> > " It is true that where a conviction is vitiated by a gap in the evidence or other defect for which the prosecution is to blame, the court will not order a retrial. But where a conviction is vitiated by a mis take of the trial court for which the prosecution is not to blame it does not in our view follow that a retrial should be ordered".
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> The court continued at the same page paragraph H and stated:
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> > " We are also referred to the judgment in Pascal Clement Bragan za v R [1957] EA 152. In this judgment the Court accepted the principle that a retrial should not be ordered unless Court was of the opinion that on a consideration of the admissible or potentially admissible evidence a conviction might result. Each case must depend on the particular facts and circumstances of that case but an order for the retrial should only be made where the

interests of justice require it and should not be ordered where it is likely to cause an injustice to an accused person".

22. As stated by the court in the above case, I do not think it is in the best interest of justice to order a retrial in this matter. It is obvious that the prosecution failed in proving any of the offences facing the Appellant in the lower court. To order a retrial would be prejudicial to the Appellant because it will amount to allowing the prosecution a second bite of the cherry to the detriment of the Appellant when it is apparent that the prosecution was at fault.

23. I allow this appeal, quash the conviction and set aside the sentence. The Appellant is at liberty to take any action open to him given that this appeal may have been overtaken by events.

24. Orders shall issue accordingly.

DATED, SIGNED AND DELIVERED THIS 5TH JULY 2023.

S. N. MUTUKU

JUDGE