REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUNGOMA

CRIMINAL APPEAL NO. 82 & 83 OF 2019

TIMOTHY KIPTANUI ALIAS CHEPARAKACH.....1ST APPELLANT

CLEOPHAS NGEIYWA KITAI.....2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(*Being an appeal against the judgement (conviction and sentence) delivered by Hon. C.L. Adisa, RM,*

on 12/6/2019 in Criminal Case No. 750 of 2018 in the Chief Magistrate's Court at Bungoma,

Republic v *Cleophas Ngeiywa Kitai & Timothy Kiptanui Alias Cheparakach)*

JUDGEMENT

1. The first appellant has appealed against his conviction and sentence of five (5) years imprisonment in count 1 in respect of the offence of resisting arrest contrary to section 253 (b) (3) of the Penal Code (Cap 63) Laws of Kenya.

2. In count 2 the first appellant has appealed against his conviction and sentence of five (5) years' imprisonment in respect of assaulting a police officer contrary to section 253 (a) Penal Code (Cap 63) Laws of Kenya.

3. The second appellant has appealed against his conviction and sentence of three (3) years imprisonment in count 1 in respect of the offence of resisting arrest contrary to section 253 (b) (3) of the Penal Code (Cap 63) Laws of Kenya.

4. Both appellants were acquitted of creating a disturbance contrary to section 95 (1) (b) of the Penal Code by creating a disturbance outside and in entering the court room. In acquitting the appellants, the trial court was guided by the decision of the High Court (Porter, J) in *Mule v Republic [1983] KLR 246*, in which that court held that the offence of creating disturbance of the peace consists of incitement to physical violence and that the breach of peace contemplated is physical violence. In the instant appeal the appellants shouted but they did not incite violence, or provoke violence and that it was not shown that they threatened peace; hence the acquittal.

5. The state has supported both convictions and sentences.

6. I will for convenience, deal with the appeal of each appellant separately.

The appeal of the 1st appellant- Timothy Kiptanui Alias Cheparakach.

7. The appellant has in his petition of appeal raised six (6) grounds in this court.

8. In ground 1 the appellant has stated the unchallenged fact that he did not plead guilty to the charges.

9. In ground 2, the appellant has faulted the trial court for convicting him on charges that were substantially defective and invalid. I have perused the charge sheet in respect of count that jointly charged both appellants with resisting arrest contrary to section 253 (b) of the Penal Code. The particulars in support of the charge (offence) do not specify the manner in which the two appellants resisted their arrest. However, the statement of the charge read together with the particulars leave no doubt that the charge is one of resisting arrest.

10. Furthermore, the evidence of No. 45706 PC Benedict Kioko (Pw 1) was that they had information that both appellants were to attend Kimilili law courts and they went there with a view to arrest them for other offences. The case of both appellants was adjourned and as they were leaving the court compound they were asked them to stop. In response thereto, both appellants started to run away and shouted. The second appellant was arrested by CI Ojwang (Pw 5). The first appellant started to fight Pw 5 and assaulted him and ran to court 1. They were ordered by the magistrate to surrender and they were then arrested.

11. The evidence of Pw 1 is supported by that of No. 74837 Cpl Alfred Kimuthi (Pw 2) and that of CI Ojwang (Pw 5).

12. It is clear from the foregoing evidence that the appellants were resisting lawful arrest by the police (PW 1, PW 2 and PW 5). I therefore find that the defects in the charge sheet were cured by the evidence as well as reading the statement of the charge together with the particulars in support of the charge.

13. In the premises, I find that the appellants were aware of the charges they were facing and were not prejudiced in any way. The defects are curable in terms of section 382 of the Criminal Procedure Code (Cap. 75) Laws of Kenya. Ground 2 fails and hereby dismissed.

14. In a coalesced form, in grounds 3 and 5 the appellant has faulted the trial court in finding that the prosecution proved their case beyond reasonable doubt for their evidence was unreliable and discredited. In this regard, the appellant submitted that the evidence of CI Ojwang (Pw 5) contradicted that of the clinician Quinto Maloba (P W 4) as to whether Pw 5 was injured by the appellant in one ear or in both ears. Pw 4 testified that Pw 5 was injured in both ears while Pw 5 testified that the appellant injured him in one ear. I have re-assessed the evidence in this regard as a first appeal court. As a result, I find that Pw 5 was injured in both ears as testified to by Pw 4 (the clinician), in his evidence in re-examination.

15. In the premises, I find that the prosecution proved their case beyond reasonable doubt.

16. In the circumstances, I find no merit in grounds 3 and 5, which I hereby dismiss.

17. In ground 4 the first appellant has faulted the trial court for shifting the burden of proof to the defence. The sworn evidence of defence was that he had gone to Kimilili law courts on 23/11/2015 to attend to a case he had in that court. His case was given another date. He then saw people running and he did not know what was happening. As a result, he ran into the court room from where he was arrested and charged with the offence that ended up in this instant conviction.

18. The trial court assessed the evidence of the appellant. It found that:

> "*the second accused in his defence did not rebut the evidence by the prosecution*."

19. I find that the above terminology used by the trial court gave an erroneous impression that the defence was required to rebut the prosecution case. It was not supposed to rebut that evidence. I have re-assessed the evidence as a whole as a first court of appeal. As a result, I find that the sworn defence evidence has no ring of truth. I further find that there was overwhelming evidence in support of the offences of resisting arrest in count 1 and assault in count 2.

20. In the premises, I dismiss ground 4 for lacking in merit.

21. I make no finding in respect of sentence, since it has not been appealed against.

22. The upshot of the foregoing is that the first appellant's appeal on conviction fails and is hereby dismissed.

The appeal of the second appellant- Cleophas Ngeiywa Kitai.

23. The appellant has raised the same grounds of appeal as the first appellant; except ground 4, in which he has raised the defence of alibi.

24. The sworn evidence of the appellant was similar to that of the first appellant. He admitted being at the scene of crime in his sworn evidence. The raising of the defence of alibi is not available to him. I therefore dismiss it for lacking in merit.

On sentence

25. The first appellant was sentenced to five years' imprisonment in both 1 and 2 which were ordered to run concurrently, because he was not a first offender.

26. The second appellant was sentenced to three years' imprisonment in count 1, since he was a first offender.

27. I find there was a basis for discriminating between the two appellants as regards sentence, which is justified.

28. In the premises, each of the appellants' appeal on sentence fails and is hereby dismissed.

J**udgement dated, signed and delivered through video link conference at Narok this 6th day of October, 2020** in the presence of both appellants and Mr. Robert Oyiembo for the Respondent.

J. M. BWONWONG'A

JUDGE

6/10/2020