



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KERUGOYA

CRIMINAL APPEAL NO.41 OF 2017

**(From original conviction and sentence in Criminal Case No. 310 of 2015 of the
Chief Magistrate's Court at Kerugoya)**

JOHN NYAGA WARURI.....APPELLANT

V E R S U S

REPUBLIC.....PROSECUTOR

JUDGMENT

1. The appellant was charged with the offence of Assault in resisting arrest Contrary to Section 253 (a) of the Penal Code before the Chief Magistrate's Court Kerugoya. After a full trial he was convicted and sentenced to pay a fine of Kshs 30,000/- or i/d serve six months imprisonment.
2. He was dissatisfied with both the conviction and sentence and lodged this appeal raising the following grounds:-
 - a) **That the learned trial Magistrate erred in law and fact in holding that the appellant resisted arrest as charged in the absence of any evidence to support the same.**
 - b) **The learned Magistrate erred in law and fact in holding that the appellant assaulted one Nemwel Osiemo as charged in the absence of evidence to support the same.**
3. The appellant prays that the conviction and sentence be quashed.
4. The appeal proceeded by way of written submissions.
5. For the appellant, it is submitted that the trial Magistrate erred by convicting the appellant on very conflicting testimonies from prosecution witnesses as to what actually occurred on the said material date and misapprehending the appellant's own testimony as to the said occurrence.
6. That the appellant never admitted that he resisted arrest and assaulted the police officers.
7. That there was discrepancies in the testimony of PW-5- the Medical Officer who examined PW-6- and produced the P.3 form. That the discrepancies should have been resolved in favour of the appellant as they showed that they were not telling the truth.
8. For the State it was submitted that there was sufficient evidence to prove that the appellant resisted arrest and assaulted Sgt. Namwel Osiemo.
9. I have considered the submissions and the evidence tendered before the trial Magistrate. This being the first appellate court, this court has a duty to consider the evidence that was tendered before the trial Magistrate and analyse and evaluate it then make its own independent finding. The appellant has a legitimate expectation that the appellate court will analyse the evidence and make its own finding. This in line with the holding in **Okeno -v- R 1972 E.A 32.**

The Summary of the evidence adduced before the trial Magistrate

10. **PW 1** - He had gone to the police station to record statement that his house and land boundaries had been destroyed. The appellant came with Nicholas Githuku Waruri who was the suspect arrested for destroying his land. After the appellant threatened him he left and PW 1 left the suspect having his fingerprints being taken.

11. **PW 2 and PW 3** – they were in the crime branch office where PW 1 was recording a statement when the appellant came and threatened PW 1.

12. **PW 4** – he is the DCIO and there was a matter involving the appellant and they were instructed to effect his arrest. Together with PW 6 and P.C Kimotho, they proceeded to Katedoso area and intercepted the appellant. After introduction, they requested him to accompany them to record statement for offence of creating disturbance in police building. The appellant declined a scuffle ensued where PW 6 was bitten on the finger and hit on the mouth by the appellant. They managed to put the appellant in the police vehicle and went to the police station.

13. **PW 5** – upon examining PW 6, he had small laceration on inner lip which was oozing blood and small human bite wounds on the right small finger. During cross-examination he explained that there was an error as it is indicated date as 26th instead of 25th but he corrected the same.

14. **PW 6** - he was with PW 4 and 2 others when they came across the appellant's vehicle. He signaled him to stop and they informed him the reasons and that they wanted to arrest him. The appellant attempted to ignite his vehicle to leave and PW 4 held the key to stop him. As he tried to handcuff him, the appellant hit him on the mouth with his fist and also bit him on the finger. They placed him on the police land cruiser and escorted him to the station. Thereafter he went to hospital for treatment.

15. **DW 1** – on 03/10/2014 after being informed his brother Nicholas Githuku Warui had been arrested he went to the police station and was informed he had chased away PW 1's workers. Later, he was stopped at Katedoso area by Charles Otiti who ordered his colleagues to arrest him. They removed him from his vehicle forcefully, put him on the ground, sat on him and handcuffed him. they threw him into heir pick up and took him to the police station.

16. I have analysed the evidence tendered before the trial Magistrate.

17. The appellant was charged under **Section 253(a) of the Penal Code**. It provides:-

“Any person who assaults any person with intent to commit a felony or to resist or to prevent the lawful apprehension or detainer of himself or of any other person for any offence; is guilty of a misdemeanor and is liable to imprisonment for five years.”

18. The ingredients are assault with intent to commit a felony, to resist or prevent **Lawful** arrest, detention of himself or any other person. I have emphasized on the word **Lawful**.

19. The question is whether the PW4 & PW6 were effecting a lawful arrest. For the police to effect lawful arrest the police must have reasonable grounds to suspect that the person has committed an offence. **Section 29(a) of the Criminal Procedure Code** provides:- that:-

“A Police Officer may without an order from a Magistrate and without a warrant, arrest –

Any person whom he suspects upon reasonable grounds of having committed a cognizable offence.”

20. The Section gives the situations where the police may effect lawful arrest without a warrant. PW -4- & PW-6- did not have a warrant of arrest. The offence which the appellant was alleged to have committed was committed at the police station on 3/10/2014. The appellant was not arrested when the offence was committed. Six months later the appellant was intercepted on the road so that he could be arrested for that offence. The PW-4- & 6 were not executing a lawful arrest because at that time the appellant had not committed a cognizable offence. The police ought to have applied for warrant of arrest.

21. The PW-5- testified that they were instructed to arrest the appellant for offence of threatening. This is the threat which was committed six months before.

22. The appellant availed a court order which he had obtained from the High Court on 27/10/2014. The order was issued after the offence of threatening was committed. The order had stated that the appellant should report to the OCS for any further investigations or action by the State which shall be at liberty to prefer any charges without necessarily locking up the applicant in custody. The order was produced as **Exhibit D-1-**.

23. The arrest which PW-4- and PW-6- were effecting was unlawful for the reasons that:-

a) They did not have a warrant of arrest.

b) The arrest was in violation of a valid court order.

24. The section under which the appellant was charged required that the police be executing a lawful arrest.

25. The trial Magistrate at Page 60 of the record appreciated that police officers were required to ask the appellant to present himself in court

as he had obtained anticipatory bail. That there was no indication that it was done. The trial Magistrate went on to state:-

“But even though the manner the officers went about to arrest the accused person cannot be described as civil under the Police Service Act---“

26. This shows that the trial Magistrate faulted the manner in which the appellant was arrested.

27. The trial Magistrate erred by stating that the appellant had testified that he had put up resistance to his arrest and the course thereof assaulted the police officer. This is not borne out by the record. The appellant never stated that he resisted arrest. It was a gross miscarriage of justice for the trial magistrate to base conviction of the appellant on evidence which is clearly imaginary as it is not on record. **Article 50(1)** provides that the accused has a right to a fair hearing. The right to a fair trial cannot be limited.

“Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.”

28. The law does not protect officers who violate the law when effecting arrest. The appellant’s defence was that he was arrested as he had written a letter complaining about the Deputy County Commander. At the time of arrest he was asked whether he is the one who knows how to write. An indication that he was arrested for writing letters but not because he had committed a crime.

29. This defence was plausible as the Police Officers did not convince the court as to why they had not arrested the appellant for a period of six months for an offence which was committed at the police station.

30. The testimony of PW-4- & PW-6- was contradictory. Where witnesses give contradictory evidence on material particulars which they say they witnessed, an inference will be drawn that they were not telling the truth. The testimony is not credible and raises doubts which in a criminal case must be given to the accused.

31. On the medical report there were inconsistencies. Though PW-5- corrected the date which maybe excusable as an error, there was however unexplained contradiction as PW-5- said PW-6- was still in the same uniform which he was while on duty. PW-6- said he had already changed his clothes at time of medical examination. The evidence is riddled with inconsistencies.

In conclusion-

The prosecution failed to prove a key ingredient of the charge that the police were effecting a lawful arrest or detainer of himself or of any other person for any offence. The prosecution failed to prove the charge beyond any reasonable doubts. I find that the appeal has merits. I allow it and order that the conviction is quashed and the sentence is set aside. If the fine was paid, it should be re-imbursed to the appellant.

Dated at Kerugoya this 13th Day of November 2019.

L. W. GITARI

JUDGE