REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT EMBU

CRIMINAL APPEAL NO. 43 OF 2017

PATRICK MUTUGI NJUE.....APPELANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

1. The appellant was convicted by Runyenjes Senior Principal Magistrate of the offence of being drunk and disorderly in a public place contrary to Section 33(1) and (2) of the Alcoholic Drinks Act. He was convicted and sentenced to serve 3 months imprisonment.

2. Being dissatisfied with the judgment, the appellant lodged this appeal. He relied on the following grounds:-

(a) That the ingredients of the offence were not proved.

(b) That his alibi defence was not considered.

(c) That the trial was null and void after lapse of the si months trial period allowed by the law.

(d) *That the conviction was such that a manifest travesty of justice occurred.*

3. Directions were given that the appeal be argued by way of written submissions on 4/12/2017. There was a delay on the side of the appellant to file his submissions which were received on 16/05/2018. The respondent did not file its submissions even after being served by the appellant.

4. It was argued that the respondent did not adduce any evidence to demonstrate that the appellant was drunk and disorderly at the time of arrest. The blood sample of the appellant was not taken for alcoholic content test. For this reason conviction was not based on cogent evidence.

5. The appellant stated that he raised an alibi defence whose truth was not verified by the prosecution in accordance with the provisions of Section 309 of the Penal Code. He relied on two cases:-

(i) Victor Mwendwa Mulinge Vs Republic [2014] eKLR *where it was held that it is trite law that the burden of proving the falsity, if at all, of an accused defence of alibi lies on the prosecution.*

(ii) ***Elias Kiamati Njeru Vs Director of Public Prosecution [2015] eKLR*** *where it was held that the failure of the prosecution to adduce evidence to rebut the alibi of the appellant put the prosecution's case in doubt considering that the evidence tendered was not overwhelming.*

6. It was the appellant's contention that the conviction and sentence were rendered null and void for they went beyond six months as provided for by the law.

7. The appellant challenged the sentence as excessively harsh.

8. The duty of the first appellate court was explained by the Court of Appeal in the case of ***KARIUKI KARANJA VS REPUBLIC [1986] KLR 190*** that:-

On first appeal from a conviction by a judge or magistrate, the appellant is entitled to have the appellate court's own consideration and view of the evidence as a whole and its own decision thereon. The court has a duty to rehear the case and reconsider the material before the judge or magistrate with such materials as it may have decided to admit.

9. The facts leading to this appeal are that PW2 and PW2 police officers based at Runyenjes police station were on patrol at Ena market. On entering some premises where the owner was suspected to be dealing with illicit brew they found the appellant consuming liquor and arrested him. There were other customers who ran away on seeing the police. 51 sachets of brew were recovered from the premises. As the police arrested the owner of the premises one Mr. Nyaga, the appellant started shouting and preventing the arrest. The appellant was drunk, disorderly and was shouting loudly. He was arrested and taken to Runyenjes police station where he was charged with the offence.

10. In his unsworn defence the appellant denied the offence. He said that on the material day he was at his home watering miraa where the police found him. They arrested him and later charged him with the offence of drunk and disorderly which he denied.

11. Section 33(1) describes the offence of disorderly conduct as *being drunk and incapable or drunk and disorderly in or near a street, road, licenced premises, shop, hotel or other public place.*

12. The evidence of the prosecution witnesses was that they went to the business premises of one Nyaga at Ena market where they found the appellant drunk and disorderly. As the officers arrested the owner of the premises who was selling alcoholic drinks without a licence, the appellant obstructed them. He was shouting loudly and was staggering.

13. Although the evidence of the 2 witnesses on disorderly conduct was corroborated, there was no evidence adduce on the state of sobriety or otherwise of the appellant. The description given in Section 33(1) is that the person must be *drunk and incapable or drunk and disorderly*. It is not enough for the prosecution to adduce evidence of disorderly conduct but must prove that the person was drunk. The arresting officers were under an obligation to cause to be taken a blood sample of the appellant and take it for testing of alcohol content. In the absence of such a test, the prosecution did not establish the aspect of drunkenness on the part of the appellant.

14. The trial magistrate in convicting the appellant stated that the witnesses *could tell that the accused was drunk because they had had previous encounters with this and during the previous times they arrested the accused he was not behaving in the same manner as that particular day*. It was a misdirection on the part of the trial magistrate to convict the appellant of the offence without any medical evidence. In a case of this nature the prosecution have a duty to establish the content of alcohol in the blood of the accused.

15. On the ground that the offence ought to be tried within three months in default of which the trial becomes a nullity, the defence counsel did not cite the relevant law. Section 33 of the Alcoholic Drinks Act gives no limit of time for the trial. As such, this court had no material before it to determine the said issue.

16. The trial magistrate said that the appellant raised the alibi defence a bit late in the day for there was no indication during cross-examination of the witnesses. I have perused the record and noted that the magistrate was correct. The issue of being arrested at his farm watering miraa was introduced during the unsworn defence. The location or particulars of his farm were not given. It was not possible for the prosecution to verify the truth of such an ambiguous alibi.

17. In the case of ***KIARIE VS REPUBLIC [1984] KLR*** the Court of Appeal held:-

> *"An alibi raises a specific defence and an accused person who puts forward an alibi as an answer to a charge does not in law thereby assume any burden of proving that answer and it sufficient if an alibi introduces into the mind of a court a doubt that is not unreasonable. The judge had erred in accepting the trial magistrate's finding on the alibi because the finding was not supported by any reasons.*

18. It is my finding that the conviction was not based on cogent evidence and it is therefore unsafe. The conviction is accordingly quashed and sentence set aside.

19. It is my finding that this appeal is merited and it is hereby allowed.

20**.** It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 12TH OF JUNE, 2018.

F. MUCHEMI

JUDGE

In the presence of:-

Mr. Gachuba for Appellant

Ms. Mate for Respondent

Appellant present