



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KITUI**

**CRIMINAL APPEAL NO. 158 OF 2011**

**C V..... APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

***(Being an appeal from the original conviction and sentence in Kitui Senior Principal Magistrate's Court Criminal Case No. 1284 of 2009 by***

***Hon. B. M. Kimemia – S.R.M. on 24/8/2011)***

**J U D G M E N T**

1. C V, the Appellant was charged with two (2) counts of **sending offensive messages by means of Licenced Telecommunication System** contrary to **Section 29(a)** of the **Kenya Communication Act, 1998**.
2. The particulars of the first count were that on the **23<sup>rd</sup>** day of **August, 2009** at **7.48 p.m.** within the Republic of Kenya by means of Mobile Phone Number **[particulars withheld]** sent an Offensive Message to wit **“UNASIMA SIMU MAANA UKO NA ADAM HUNA BAHATI”** to Mobile Phone Number **[particulars withheld]** belonging to **M M N**.
3. The particulars of the second count were that on the **29<sup>th</sup>** day of **August, 2009** at about **6.00 a.m.** at unknown place within the Republic of Kenya by means of Licenced Telecommunication System namely Safaricom through Mobile Phone Number **[particulars withheld]** sent an Offensive Message to wit **“MZEE ULINIULIZA NI NANI ANAITWA F A O PRIVATE SURVEYOR NA PLEASE HAWAACHANI NA BIBI YAKO NA HATA SAFARI NYINGI HUWA WANAENDA PAMOJA”** to mobile phone number **[particulars withheld]** belonging to **A N N**.
4. Facts of the case were that on the **23<sup>rd</sup>** August 2009, a text message was sent on cell phone No. **[particulars withheld]** which was read by PW 1 M M N that she considered offensive. The message was from cell phone No. **[particulars withheld]**
5. On the **27<sup>th</sup>** August 2009 another text message was received by PW 2 A N N the husband of PW 1. Both messages having implied that PW 1 was engaged in an extra-marital affair with the husband of the author, they reported to the police. Investigations were carried out that culminated into the arrest of the appellant who was subsequently charged.
6. When put on her defence the appellant stated PW 1 was previously her friend while PW 2 was well known to her. On the **13<sup>th</sup>** July 2009 she received a text message that was offensive from cellphone No. **[particulars withheld]**. She reported the matter to the DCIO. They retained her cellphone with simcard No. **[particulars withheld]**. She stated that on the **23<sup>rd</sup>** August 2009 the

- cellphone was in possession of P.O. Murungu who was investigating her complaint. She was summoned to the police station on the 5<sup>th</sup> December 2009 and charged.
7. The trial magistrate evaluated evidence adduced and found the appellant guilty on both counts. She convicted her and sentenced her accordingly. A fine of Kshs.7000 was imposed on each count. In default she was required to serve three (3) months imprisonment.
  8. Being aggrieved with the conviction and sentence thereof she appealed on grounds that:
    - **The ingredients of the offence under the law were not proved.**
    - **Section 169(1) of the CPC was not complied with. No points for determination, decision thereon and reasons for determination were set out by the trial magistrate.**
    - **Points of law raised in the appellant's submissions were not considered.**
    - **Evidence adduced by the prosecution was insufficient.**
    - **Material evidence tendered in defence was ignored.**
  9. The appeal was canvassed by way of written submissions which were duly considered.
  10. This being the first appellate court it has the duty to review the evidence of the case and reconsider the materials before the trial court, make up its mind not disregarding the judgment appealed from but carefully weighing and considering it. This court must remember that it neither saw nor heard witnesses who testified. (**see Pandya vs R (1957) EA 336 and Okeno vs Republic (1972) EA 32**).
  11. At the outset it is important to point out that the Kenya Communication (Amendment) Act, 2008 amended the Kenya communication Act, 1998 (the Principal Act) whereby it is now referred to as the **Kenya Information and Communication Act, Cap 411A**. That ought to have been reflected in the statement of the offence in August 2009 when the offence was alleged to have been committed.
  12. Points for determination that the trial court should have come up with in the instant case are whether:-
    - **A message was sent.**
    - **The message was sent by a licensed telecommunication system.**
    - **It was grossly offensive.**
    - **It was sent by the accused ( appellant).**
  13. Evidence was adduced by PW1 that a text message was sent from a cellphone with a sim card number [particulars withheld] to her cell phone No. [particulars withheld]. In her testimony she stated the purported content of the text message. A "Nokia Handset" was identified by PW 1 and eventually produced in court.

In her judgment the trial magistrate stated thus in respect of the messages:-

***"It is therefore clear that the accused knew who  
was sending the messages"***

14. The learned magistrate was however silent on the content of the message alleged to have been sent.

Having failed to comment on the messages both in the proceedings or her judgement this court is left to guess whether indeed the text messages were sent.

To prove such allegation the prosecution had a duty of causing the alleged messages to be printed and endorsed by the Safaricom Limited as having emanated from the line number owned by the appellant. A letter from Safaricom limited authored by Weldon Siongok was produced in evidence without any objection being raised. It referred to call data. This was a printout of an electronic record which was produced in evidence contrary to the provisions of the law. There was no certificate identifying the electronic record with the data and describing the manner in

which it was obtained and showing that the data was indeed produced by the computer and above all purporting to be signed by a person who occupied a responsible position at the company (vide section 106 B of the Evidence Act).

15. That notwithstanding the call data produced was in respect of data going back to 90 days from the 23<sup>rd</sup> August 2010 which was irrelevant to the instant case where the complaint was in respect of the period 23<sup>rd</sup> August 2009 to 29<sup>th</sup> August 2009, the dates mentioned in the charge sheet.

16. With regard to the 2<sup>nd</sup> count, it is indicated the message was sent on the 29<sup>th</sup> August 2009. PW 2 stated that he got a text message on his cell phone from the number [particulars withheld].

Although cellphone no. [particulars withheld] is mentioned in the charge sheet, PW 2 was silent on the specific number in his evidence.

The prosecution had a duty of proving ownership of the cellphone number which it failed to do.

At the close of the prosecution's case no evidence was adduced to show that indeed the messages mentioned in the charge sheet and verbally by the complainants were sent.

17. Secondly, it was a requirement for the prosecution to prove

that the message alleged was sent by a licensed telecommunication system.

Section 2 of the Act as amended defines "telecommunication

System as – **"A system that conveys signals."**

It must be licensed by CCK in order for a person to be found guilty of the offence. The onus was upon the prosecution to prove that the telecommunication system that was used was licenced at the time. No iota of evidence was adduced in an endeavor to establish that ingredient of the offence. This was fatal to the prosecution's case.

18. With regard to the 3<sup>rd</sup> issue what was alleged to have been sent in a form of a text message was indeed menacing in character and indecent therefore it was grossly offensive.

19. Whether or not an alleged message could have been sent by the accused was also not proved. The prosecution had a duty of proving ownership of the cellphone number [particulars withheld]. The appellate admitted being the owner of the number. This was therefore not in dispute.

However evidence was adduced by the defence that she made a complaint to the police against PW 1 for an alleged threat of death through the cellphone.

On 13<sup>th</sup> July 2009, the police officer took possession of the cellphone to investigate the case. It is argued that as at the time alleged by the prosecution the cellphone was in possession of the police. The allegation is denied, but nothing was produced in evidence to prove when PW 4 took possession of the cellphone and when it was returned, if indeed it happened.

Consequently there was no proof that the appellant sent the alleged messages.

20. Having re-evaluated evidence adduced in the lower court I find that the learned Magistrate misdirected herself in consideration of the evidence tendered and reached a wrong decision.

21. In the premises I quash the conviction and set aside the sentence imposed. The fine, if paid shall be released to the appellant forthwith.

22. It is so ordered.

**DATED, SIGNED and DELIVERED at KITUI this 7<sup>TH</sup> day of MAY, 2015.**

**L.N. MUTENDE**

**JUDGE**