



**REPUBLIC OF KENYA**

**Saidi v Republic**

**High Court, at Mombasa**

**June 3, 1992**

**Omolo J**

**Criminal Appeal No. 45 of 1992**

June 3, 1992, **Omolo J** delivered the following Judgment.

The learned Ag. Resident Magistrate purported to convict the Appellant under section 131 of the Penal code. The provisions of that section are as follows:-

“Everyone who disobeys an order, warrant or command, duly made, issued or given by an court, officer or person acting in any public capacity, and duly authorized in that behalf, is guilty of a misdemeanour and liable, unless any other penalty or mode of proceedings is expressly prescribed in respect of the disobedience, to imprisonment for two years.”

That is a Penal Code offence, and to convict a person of that offence a charge must be framed in those terms, and the person to be convicted asked to plead to it. The Magistrate did not frame any charge and did not ask the appellant to plead to any such charge. Indeed she could not have done so because the proceedings in which she purported to convict the Appellant were civil and the Appellant was brought before her on a warrant of arrest issued by her on an earlier date. When she issued the warrant of arrest the order was and I quote:-

“Warrant of arrest to issue to the defendant to shw cause why he should not be committed to civil Jail.”

Committing a person to civil jail for disobeying a civil order is totally different from convicting a person of an offence under section 131 of the Penal Code. I do not have the terms of the civil order which the Appellant is supposed to have disobeyed, but if the Magistrate was proceeding with the matter under section 5(1) of the Judicature Act (assuming for the moment that she had jurisdiction under that section), then the order being disobeyed would itself be required to specifically warn the Appellant on the face thereof that disobedience of the same would result in punishment. That is now well established law as the High court or the Court of Appeal in punishing for contempt applied the law applicable in the High of Justice in England. It has been held by the Kenya Court of Appeal that to punish for a civil contempt the order disobeyed must contain on its face a warning of punishment in the event of its being disobeyed. But the Magistrate did not purports to be proceeding under the provisions of section 5(1) of the Judicature Act. Indeed she would have no jurisdiction to proceed under that section. That left her only with section 131 of the Penal Code and as I have said, she did not in any way take appropriate steps to have a charge framed against the Appellant. The conviction and the subsequent punishment of the Appellant was accordingly without jurisdiction and I accordingly quash that conviction and set aside the sentence imposed on the appellant. The fine of Shs.5,000/- is to be refunded to him if it was paid.