IN THE COURT OF APPEAL

AT NAKURU

(Coram: Platt, Gachuhi & Apaloo JJ A)

CRIMINAL APPEAL NO 140 OF 1988

Between

JOSEPH RUSWETI..... APPELLANT

AND

REPUBLIC.....RESPONDENT

JUDGMENT

(Appeal from a judgment of the High Court at Nakuru, Tunoi J, dated 23rd September 1988

in

High Court Criminal Appeal No 441 of 1987)

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1989, the following Judgment of the Court was delivered.

The appellant was, on the 16th November, 1987, convicted of an offence under section 95(1) of the Penal Code and was sentenced to a fine of Ksh. 2,000 or in default 6 months imprisonment. He appealed against his conviction and sentence to the High Court. On the 23rd September, 1988, that Court affirmed the conviction and dismissed the appeal. The appellant brought a second appeal to this Court. The right to prefer a second appeal to this Court was conferred by section 361(1) of the Criminal Procedure Code and is limited to "a matter of law". This Court is expressly enjoined by that subsection not to entertain an appeal on "a matter of fact".

The appellant seeks to contest his conviction in this Court on five grounds set out in the memorandum of appeal. Four of these grounds purport to be grounds of law, the 5th is not and indeed no argument was addressed to us on that ground. But in order to determine if any error of law was disclosed or that it was serious enough to justify this Court's interference with the conviction, it is necessary to examine the facts. But it is well to bear in mind that even if the question of law can be determined in favour of the appellant, this could not result, *ipso facto* in the interference with the verdict. Such error, must, in the words of subsection 5, occasion a substantial miscarriage of justice. Perhaps it would help if we reproduce the actual words of the section. It says:-

> "On any appeal brought under this section, the Court of Appeal, may notwithstanding that it may be of opinion that the point raised in the appeal might be decided in favour of the

> appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has in fact occurred."

There was some conflict of evidence between the prosecution and defence on the facts. The learned trial Magistrate found the prosecution's version to be the truth. That finding was concurred in by the High Court on first appeal and we have no jurisdiction to review it. What then are those facts?

The complainant was, in October 1987, the Co-operative Officer attached to the Narok District. The appellant was a driver employed by his department. It appears, the appellant sought the complainant's permission to travel but this was denied. But nevertheless, the appellant seems to have gone on his journey notwithstanding his failure to obtain permission. The evidence suggests that the complainant contemplated the taking of disciplinary action against him. So he called for his personal file. The appellant seems to have got wind of this.

According to the evidence which both Courts accepted, the appellant entered into the complainant's Office uninvited and locked it from inside. He then held the complainant by the neck and threatened to kill him. As is to be expected, this resulted in a scuffle. The complainant said, he began to struggle with him. This gave rise to "a lot of commotion" and this attracted persons in adjacent office. Some of these telephoned the Police who arrived shortly afterwards. But before this the departmental messenger who had the keys, opened the office and narrated what he saw in these words: -

> "I found the complainant and the accused holding each other and fighting. I separated them."

After investigation, the police must have felt that as the "commotion" was provoked by the appellant, he alone must be charged with the offence created by section 95 1(b). In view of the argument addressed to us, it is necessary to reproduce the charge. It states: -

> "Charge: Creating a disturbance in a manner likely to cause a breach of the peace contrary to section 95 1(b) of the Penal Code."

It is to be noted that the charge, as framed, conforms with the section which enacts that: -

> "Any person who ... in any other manner creates a disturbance in such a manner as is likely to cause a breach of the peace is guilty of a misdemeanour..."

However, the particulars of the charge were, in part, at variance with the charge. It reads: -

> "Particulars: Joseph Rusweti on the 13th day of October 1987 at about 4.30 p.m. at Narok Township ... created disturbance by fighting his boss Justine Kabacha and threatening to kill him. (Emphasis ours)"

The main question to be determined on this appeal, is whether this variance was fatal to the conviction or is curable under subsection 361? Before considering this matter, it is necessary to dispose off the other less weighty grounds on which argument was addressed to us.

The first ground of appeal was:

> "The learned Judge and the lower Court erred in law in finding corroboration as there was no corroboration of the evidence of the complainant."

There could be an issue of law on this ground if this is one of the cases in which corroboration is required by either a rule of law or practice and the Courts below had found corroboration where there was none. The learned Magistrate said the complaint's evidence "is consistently tendered by PW1 & PW2 & PW3". The Judge said the complainant's evidence "gets corroboration from that of PW2 and PW3". No corroboration is required of this type of evidence as a matter of law. And the fact that only the

complainant and the appellant were in the locked room, does not mean that the evidence of these other witnesses taken broadly, did not tend to confirm the fact that the appellant entered the complainant's office without his invitation and there engaged in conduct by which a breach of the peace could result.

In ground 4, it was complained that: -

> "The learned Judge erred in law in failing to hold that the burden of proof was expressly or impliedly shifted on to the appellant."

There is nothing in the judgement of the Courts below to suggest that either Court misconceived the elementary principle that the burden in a criminal trial rests on the prosecution and never shifts. There is nothing in this ground.

Counsel expressly abandoned grounds 2 and 5 and nothing need be said on those grounds which, on the facts of this case, contain very little substance.

Although it was not an express ground of appeal, it was also urged for the appellant, that on the facts, no offence was shown to have been committed as the disturbance did not take place in a public place as defined by section 4 of the Penal Code. Counsel cited and relied on the decision of Gray Ag. J in *R v Ndarama & Others* [1958] EA 294. That case involved the interpretation of section 173 (d) of the Penal Decree of Zanzibar and that decision may well have turned on the express provision of the Decree which is unavailable to us. But it is worthy of note that while section 94 of our Penal Code makes conduct a punishable offence only if it is committed in a public place, section 95 is silent on this. It is a reasonable inference that the requirement of a public place was deliberately omitted to make the act punishable whenever it was committed. It is not legitimate to import this in the construction of a penal statute. We do not feel that the *Ndarama* holding compels us to import public place in section 95 of the Penal code. We think therefore that this ground fails.

In Count 3, it was claimed that : -

> The charge as framed was bad in law, omnibus and duplex and did not disclose any offence known in law and a miscarriage of justice was occasioned.

The argument presented on this ground was rather terse. A charge is said to be duplicitous if it charges the accused with the commission of two or more separate offences in one count. Here the only offence charged was:

> "Creating a disturbance likely to cause a breach of the peace."

The fighting and threatening to kill mentioned in the particulars, were only intended to show what the offensive conduct was and why it was thought likely to cause a breach of the peace. The appellant was not charged with either fighting or threatening to kill. He was not punished for either offence. True, the particulars were inelegantly drafted but the charge was not bad for duplicity. In *R v Thompson* 9 Cr. Appl. 252 and *Robertson v R* it was held that even if the charge was bad for duplicity, the appeal should be dismissed if no injustice was done to the appellants. It is manifest that no injustice was occasioned to the appellant. In this case although Counsel submitted that a miscarriage of justice occurred, he failed to show how this happened. This ground of appeal must also fail.

That brings us to the only serious point of this case. While the charge was correctly laid, the particulars did not state that the disturbance created by the appellant was likely to cause a breach of the peace but said it consisted in his fighting and threatening to kill the complainant. There can be no suggestion that this variance between the charge as laid and the particulars in any way misled the appellant. He knew the charge he faced and his evidence was directed at meeting it. Had his evidence been accepted he would, in all probability, have been acquitted as the victim of assault committed on him by the complainant. He was not punished either for assault or for threat to kill. So it would not be accurate to say that the charge disclosed no offence. It clearly did.

The only fault is the statement in the particulars which suggests that the breach of the peace has already been committed. If a man who committed a breach of the peace is merely charged with conduct likely to cause it and is punished for that lesser offence, by what stretch of imagination can it be said that a miscarriage of justice was occasioned to him or to use the words of subsection 5 of section 361, a substantial miscarriage of justice had occurred?" While we acknowledge the discrepancy in the charge and in part of the particulars, we are entirely satisfied that nothing remotely resembling a miscarriage of justice occurred. That being so, we think no good grounds exist for disturbing the conviction. In our judgement this appeal fails and should be dismissed. We accordingly so order.

Dated and delivered at Nakuru 1989

H.G PLATT

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JUDGE OF APPEAL

J.M GACHUHI

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JUDGE OF APPEAL

F.K APALOO

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR