REPUBLIC OF KENYA

HIGH COURT, AT NAIROBI

CRIMINAL APPEAL NO 873 OF 1982

MULE…..…….…… APPELLANT

VERSUS

REPUBLIC…… RESPONDENT

JUDGMENT

The appellant was charged before the district magistrate II at Uaani with two counts. The first count was an offence of creating a disturbance in a manner likely to cause a breach of peace contrary to section 95(1)(b) of the Penal Code and the second challenging another person to fight a duel contrary to section 93 of the Penal Code.

The appellant was convicted on both counts and has appealed against that conviction. On the first count he was sentenced to five months' imprisonment and on the second count he was sentenced to four months' imprisonment and the sentences were ordered to run consecutively.

Dealing first with the second count there is absolutely no doubt in my mind that the brief encounter between the appellant and the complainant in this case whilst it can be described as the beginning of a bar room brawl can in no sense be described as a duel which according to the definition which I prefer and which Mr Kakonzi has pointed out to me is a private fight between two persons pre-arranged and fought with deadly weapons usually in the presence of at least two witnesses called seconds having for its object to decide a personal quarrel or to settle a point of honour. The Penal Code is perfectly satisfactorily drafted to cope with the sort of problem which has arisen in this case without it being necessary to widen the meaning of the word duel which bears a particular meaning and refers to a particular public ill with which the legislature clearly wished to deal in section 93 of the Penal Code. That conviction cannot be supported and indeed senior state counsel quite rightly does not support it.

With regard to the other offence of creating a disturbance in a manner likely to cause a breach of peace Mr Kakonzi has submitted that the district magistrate has gone wrong in a number of ways related to the law which applies to this offence. The first way in which he says that the district magistrate has gone wrong is that the district magistrate at the beginning of his judgment has said that there is no authority which would assist him in deciding the case before him. He in fact quotes two authorities one of which clearly has no relevance and has not been quoted by the advocate for the appellant in this appeal. The other is the case of *Fosta s/o Kipija Mwakalinga v R* [1961] EA 1. Mr Kakonzi has referred me to that case and points out that the magistrate could have extracted from it the fact that not every threat even if loudly uttered constitutes a breach of the peace. In the case Sir Ralph Windham who was then Chief Justice quoted a passage from Glanville Williams *Criminal Law* (1953), at page in which the position was set out. After reciting what the district magistrate in this case has said, that there is a lack of authority on

this subject, it is pointed out that an assault in the sense of a threatened battery can amount to a breach of the peace. I will be turning in due course to the question of whether the district magistrate decided this case rightly on the facts before him. However there is no doubt that what he did find was that the appellant called the complainant (Emperor Bokassa) and then challenged him to a fight by starting to remove his coat. It seems to me that although I agree with the advocate for the appellant that the learned district magistrate could have extracted a principle from the quoted case, it does him little good since the principle which can be extracted clearly shows that if the learned district magistrate's decision was right in fact then the principle is against the appellant. Secondly counsel for the appellant draws my attention to the case of the *Rep v John Agostino* in which an attempt to interpret the import of this section was made. Counsel for the appellant extracts the principle that the section is aimed at incitement to physical violence. He says that a breach of the peace contemplates involvement by the listeners. He points out that this element is absent in this case.

Once again it is going to be necessary to consider whether the district magistrate came to the correct conclusion on fact but once again it is clear that the district magistrate has held that the appellant called the complainant Emperor Bokassa and explained what he meant by saying that he was a dictator and a killer of children several times. He then told the complainant to take off his coat so that they could fight. According to the district magistrate's finding it would seem to me that is the clearest involvement of listeners (that is the complainant) and indeed the district magistrate has also found that it was necessary for those around in the bar to get between the appellant and the complainant to stop a fight breaking out.

The third point which Mr Kakozi raises on behalf of the appellant is the clear admission of the complainant that he did not know who Emperor Bokasa was. Whilst the appellant was charged in the lower court with the specified act of calling the complainant Emperor Bokasa the evidence clearly indicates, as found by the learned district magistrate, that even if the complainant did not know who Emperor Bokasa was and why that should be considered to be an insult the appellant lost no time in explaining the general purport of the insult. Witnesses have referred to the appellant calling the complainant a child killer and various other matters which can have left no doubt in the mind of the complainant as to what the appellant meant by the term Emperor Bokasa.

The appellant was charged with creating a disturbance. There is no doubt that he did that on the facts found by the learned district magistrate. The question is whether that disturbance was likely to cause a breach of the peace and the facts found by the learned district magistrate were that in the course of the argument, annoyance on both sides was raised so far as to cause the appellant to start removing his jacket and indicating that he wanted to fight the complainant. If the peace is defined as the right of *wananchi* to go about their normal daily business without interference and in the particular circumstances of this case for the public in the bar to have a peaceful drink without being required to intervene between a senior chief and a councillor to avoid what they and the learned district magistrate were clearly satisfied was going to be a fight then the original conduct of the appellant can be said to have been likely to cause a breach of the peace.

In principle I am satisfied that the learned district magistrate was able to convict in this case and now turn to a consideration of the facts which he found upon which to convict. There is I think no need to set out the facts yet again as they are clear from the record and the district magistrate has considered the facts as fully as possible in his judgment. On behalf of the appellant two points have been raised. One of them is that the case was one which should have been tried in a civil court on the basis of a defamation. Whilst this is clearly a possibility senior state counsel quite rightly points out that civil and criminal cases can run concurrently and it cannot be said that just because the appellant may be liable to the complainant in damages he cannot be prosecuted for a criminal offence revealed. There is an additional element to the criminal case which relates to the disturbance to the public involved in the conduct of the relationship between the complainant and the appellant, and I do not think this could be sufficient ground to interfere with this conviction. The other matter which is raised on behalf of the appellant amounts to an allegation that the district magistrate was biased and indicated in his record that he did not want to listen to the defence.

I have listened to the submission on behalf of the appellant on this point. I would agree with the advocate

for the appellant that on occasions during his judgment the district magistrate by his language does indicate what might be called a sense of outrage that a councillor should call a senior chief such an unpleasant thing in public. I shall be dealing with this matter when I consider the ground of appeal which relates to sentence. However it is an entirely different thing to say that the district magistrate indicated by his language that he was completely unprepared to listen to anything the defence said. There are passages of the judgment which clearly indicate that he was considering the credibility of the prosecution witnesses (particularly on page 4 of the judgment) and that he had in mind the standard of proof cast on the prosecution. The learned district magistrate has considered at length the facts and evidence recorded. He saw all the witnesses and was in a much better position to consider the question of credibility than I am. I have no doubt that upon that basis he came to the correct conclusion in convicting the appellant on the first count.

Where however I cannot agree with the learned district magistrate is over the question of sentence. I have already indicated that the appellant should not have been convicted of count II. It is obvious that I shall be setting aside the sentence which relates to that count. It is interesting to notice that the learned district magistrate felt that it was necessary to make the sentence for count II consecutive to the sentence for count I. These are two charges which arose out of the same behaviour. Then assuming that the learned district magistrate did not realize what a duel really meant it must have been clear to him that the proper way to have sentenced in these two counts would have been to make the two sentences run concurrently (*R v Sawedi Mukasa s/o Abdulla Ali Ngwesa* (1946) 13 EACA 97).

I have already pointed out that the language of the learned district magistrate seems to show a sense of outrage arising from the relative position in the community of the complainant and the appellant. I think in sentencing the learned district magistrate has allowed that outrage to blunt his sense of proportion. That is clearly shown I think by his order that the sentence for count II should be consecutive. His reason for imprisoning the appellant, I think, are absolutely right but the notes which he has made of these reasons do not take into account the very relevant and undisputed fact that the appellant did offer to make amends and did so publicly. What was needed in this case was a short sharp lesson and the learned district magistrate was quite right in saying that the proper way in view of the last conviction was to administer that short and sharp lesson in prison. It is clear from what I have said before that the sentence with which I shall be dealing is the sentence of five months' imprisonment on the first count. The maximum sentence on that count is the period of 6 months and the learned district magistrate has sentenced nearly to the maximum. I consider this to be manifestly excessive in the particular circumstances of this case. The appellant was sentenced to prison on July, 1982. He has served three weeks imprisonment in respect of the first count and although I would have thought that an appropriate sentence would have been perhaps for one month, nevertheless in the particular circumstances of this case I am satisfied that the appellant has served a sufficient period of imprisonment.

Accordingly the conviction on the second count will be quashed and the sentence set aside. The appeal against the conviction on the first count will be dismissed but the appeal against sentence on the first count will be allowed to the extent that the appellant be released from that sentence on July 30, 1982.

Dated and Delivered at Nairobi this 24th Day of January, 1983

D.C. PORTER

…….....…….

Ag JUDGE