REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

CRIMINAL APPEAL NO 175 OF 1980

JAMES NJOROGE KINYANJUI ....APPELLANT

VERSUS

REPUBLIC...RESPONDENT

(Appeal against his conviction by Second Class District Magistrates' Court, Kiambu, in Criminal Case No 2738 of 1979.)

JUDGMENT OF THE COURT

The appellant was convicted on a charge thus set against him:

> Omitting to take precautions against any probable danger from any animal in his possession contrary to section 243 (d) of the Penal Code and section 36 of the Penal Code,

the offence being particularised that, on the day and at the place concerned, he:-

> omitted to take precautions against any probable danger from any animal in your possession in that his dog bite Njeri Kiragu thereby occasioning her grievous harm.

It was not well drawn for the omission was not specified, it only being said that the dog bit someone. A dog may very well bite someone, even if all reasonable precautions are taken. But that apart, section 243(d), under which the charge was laid, reads:

> Any person who, in a manner so rash or negligent as to endanger human life or to be likely to cause harm to any other person ... (d) omits to take precautions against any probable danger from any animal in his possession ... is guilty of a misdemeanor.

There is not a word in the charge alleging that the appellant was "so rash or negligent" as to endanger human life or to be likely to cause harm to anyone, nor is there anything to that effect in the particulars. The charge and particulars were patently deficient.

This Court recently had occasion, in *Njenga v The Republic* (1980) page 89, *ante*, to consider the meaning of culpable rashness and negligence when dealing with a charge under section 243(c) of the Penal Code; and if that case is read, it will be seen that before there can be a conviction under section 243 one or other of these ingredients must be proved. The charge against the appellant is derived from section 289 of the Indian Penal Code which lays down:

> Whoever knowingly or negligently omits to take such order with any animal in his possession as is

> sufficient to guard against any probable danger to human life or any probable danger of grievous hurt from any such animal shall be punished ...

but although that section is not the same as ours, the commentary on it in Ranchhoddas and Thakore's *The Law of Crimes* (1956) is of some use to us. Quoting, then, from pages 654 and 655 we have:

> In the case of animals which are tame and mild in their general temper no mischievous disposition is presumed. It must be shown that the accused knew that the animal was accustomed to do mischief. Some evidence must be given of the existence of an abnormally vicious disposition ... Before the owner or keeper of the animal can be convicted under this section, it must be made out that the animal was known to be ferocious and that it was negligently kept ... the High Court quashed [a] conviction holding it must be established in the affirmative that the accused knowingly or negligently omitted to take such order with the animal as was sufficient to guard against probable danger to human life or probable danger of grievous hurt from such animal.

Of course, our section does not use the words "knowingly or negligently" and the Indian section does not have the words "so rash or negligent," and there are other differences; but, as we say, the commentary has its value. Now let us turn to the evidence.

The appellant denied that the dog was his; but the magistrate, as he was entitled to do upon the evidence, did not believe him. But that was not an end to it. The complainant told the Court:

> … when I was bitten by the dog I was near the home of the appellant ... His house is just next to the road …The wife [of the appellant] told me that their dog had developed a habit of biting women … I knew the dog belongs to the [appellant] because I am a neighbour of the [appellant] and I had been knowing the dog. My house is about 100 yards from home of [the appellant] ... I said that I know your dog very well because your children used to walk around with the dog. I had been passing there for many years but it never bit me …

Let us consider that. So far as the witness (a close neighbour for years of the appellant) was concerned, she knew the dog, had seen it with children and it had never bitten her. When, where and why did the appellant's wife tell her of the newly-developed habit? But it does not matter; for it was not evidence helping to bring home the charge to the appellant. Another witness, Mr Kimani, told the Court, "I used to see the dog at the home of the [appellant] since it was a young dog ... Yes your home is fenced around", without suggesting any knowledge that the dog was naturally fierce or vicious; and the appellant said that his fence was put up to stop stray dogs coming in foraging for refuse.

According to the trial magistrate's judgment:

> It is reasonable to suppose that [appellant] kept the dog for the protection of his home ... If it were rural Narok district, for example, the situation would be different.

and he relied on what the appellant's wife is supposed to have said. We can support none of this. It was not reasonable to hold that the dog was kept for any purpose because there was no evidence about it; the comment about Narok was too wide for it might or might not be so, depending on the evidence; and if what was allegedly said by the appellant's wife was for acting on (but it was not), it did not show that the appellant was aware of it. What then do we have?

The magistrate found that the dog was in the appellant's possession and it bit someone. The appellant's house was fenced and there was no evidence on which to hold that the dog was naturally fierce or vicious. Accordingly, it was not shown that the appellant was in any way negligent (let alone rash) and it was not shown that he omitted to take appropriate precautions against any probable danger from his possession of the dog. It follows that not only was the charge bad, but that (even were it good) the guilt of the appellant was far from proved. That a man's dog bites someone, without something more, does not fix him with criminal liability.

One can sympathise with the trial magistrate, who is of the second class. The charge set before him was an unusual one involving particulars difficult to frame. The charge would the better, and should, have been taken to the most senior available magistrate. The appeal is allowed. The conviction entered is quashed and the appellant is acquitted. The fine will be repaid.

Once again we must point out that an accused is entitled, when he appears as required, to have his cash bail back. In this case the magistrate awarded the appellant a fine of Shs 700 or to serve imprisonment for six months. No doubt the probability is that the fine would have been paid, but the appellant had the option of incarceration. The magistrate did not have the right to order the fine to be taken out of the cash bail; *R v Kinumbi s/o Thuo* (unreported) and *Chebuye v The Republic* (unreported). The Republic did not support the conviction.

Appeal allowed.

Dated and delivered at Nairobi this 18th day of June 1980.

TREVELYAN

JUDGE

Z.R CHESONI

JUDGE