IN THE COURT OF APPEAL FOR EAST AFRICA

AT NAIROBI

(Coram: Wambuzi P, Law V-P & Mustafa JA)

CRIMINAL APPEAL NO. 109 OF 1976

BETWEEN

CHELAGAT MUTAI.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from the Judgment of the High Court (Sir James Wicks CJ and Hancox J) Dated 27th October, 1976

in

Criminal Appeal No. 307 of 1976)

JUDGMENT

Wambuzi - **P** The appellant was charged in the court of the Resident Magistrate at Nakuru with the following offence, to which she pleaded not guilty:

Incitement to violence and disobedience of law contrary to section 96(b) of the Penal Code.

Particulars of Offence

Chelagat Mutai on 12th September 1975 at Ziwa Sisal Plantation Farm in the Uasin-Gishu district within the Rift Valley province, without lawful excuse uttered words indicating that it was desirable to do an act the doing of which was calculated to lead to the destruction of sisal, factory, machinery and fence belonging to the said Ziwa Sisal Plantation Farm.

The appellant was convicted of this offence and sentenced to two and a half years' imprisonment. She appealed to the High Court, but her appeal was dismissed. She now appeals to this Court.

The case for the prosecution was that the appellant addressed a fundraising meeting on Ziwa Farm, at which from one to two thousand people were present, and that in the course of her speech she incited

the local population to take violent action to obtain possession of the farm. The Resident Magistrate found that the words uttered by the appellant, so far as they related to the offence charged, were to the following effect:

> I now stand here and tell you to uproot all the sisal, destroy all the fences belonging to the Indian, and destroy all the machinery on the farm and chase him and finally he will go away even without shoes and leave you in the farm.

and that she was accordingly guilty of incitement to violence and disobedience of law. The High Court judges (Sir James Wicks CJ and Hancox J) exhaustively reviewed the evidence given at the trial, made their own evaluation of it, and came to the same conclusion. They were satisfied that the appellant uttered the words which the Resident Magistrate found that she had uttered: that she intended to utter those words; and that they were calculated to lead to the destruction of property. There was evidence to support these concurrent findings by the two courts below, and it is not open to us on a second appeal to examine the sufficiency of that evidence.

Mr Muthoga for the appellant argued three grounds of appeal before us. The first was that the charge was defective, in that the actual words allegedly uttered by the appellant were not particularised. Mr Muthoga submitted that the failure to state the actual words meant that the appellant did not know what was alleged against her, and that this had led to a failure of justice. The High Court, in dealing with this submission, held that the charge as framed was legally valid, as it satisfied the requirements of section 134 of the Criminal Procedure Code, in that it supplied the appellant with such particulars as were necessary for giving reasonable information as to the nature of the offence charged. We are of the same opinion. Mr Muthoga sought to draw an analogy between the charge in this case and a charge of sedition in which, according to him, “the actual words used must be set out”. No forms of stating offences contrary to section 96 of the Penal Code, or section 57 which deals with seditious offences, are prescribed in the Second Schedule to the Criminal Procedure Code, but reference to A*rchbold: Criminal Pleading, Evidence and Practice* (38th Edn), paragraph 3150 gives the following precedent for particulars in a sedition charge, “A B ... uttered a seditious speech the purport of which was (state in ordinary language)”. This does not support Mr Muthoga’s submission that in cases of the nature of the one now under consideration, the actual words allegedly uttered must be particularised. This ground of appeal fails.

The second ground of appeal argued by Mr Muthoga related to the wrongful admission of evidence of bad character which, in his submission, led to a failure of justice. The appellant had made no attack on the character of the prosecution witnesses, but the resident magistrate allowed the prosecutor, in the face of objections by defence counsel, to cross-examine her as to whether she had misbehaved at school and had been expelled from Nairobi University for publishing a banned magazine, and as to whether she was “anti-authority” or “radical”. Having admitted this evidence, the Resident Magistrate had second thoughts about the matter, and expressly stated in his judgment that he had

> ... ignored and excluded and ... not taken into account at all, the [appellant’s] past background and her behaviour at the school, the college or at the University of Nairobi.

The High Court judges held that this evidence had been improperly admitted; they noted that no question of any previous conviction was involved, but “only the relatively trivial matter at school and the appellant’s alleged university activities” and they were satisfied that the admission of this evidence “did not in fact prejudice or cloud the mind of the magistrate, since he was at pains to correct the matter in his judgment” and they were satisfied that the admission of this evidence did not occasion any failure of justice. We have come to the same conclusion. The Resident Magistrate did not rely on this inadmissible

evidence in convicting the appellant; on the contrary, he carefully excluded it from his consideration; and we are satisfied that no prejudice or failure of justice resulted from its admission. This ground of appeal also fails.

The third ground of appeal relates to the form of the judgment delivered by the Resident Magistrate. Having examined in some detail the evidence of the principal prosecution witness, and that of the appellant and her witnesses, the Resident Magistrate said that he had not the slightest hesitation in rejecting the entire defence denial as being “false and untrue”. Having done so, he again examined the evidence on both sides in even greater detail, before concluding that the prosecution had proved the appellant’s guilt beyond all reasonable doubt and convicting her. Mr Muthoga submitted that the Resident Magistrate appeared to have placed the onus of proof on the appellant, and approached the case against her on the basis that her evidence, and that of her witnesses, was false and untrue. The same submission was made on first appeal, and received careful consideration from the High Court judges. They came to the conclusion that, in saying that the “defence denial” was “false and untrue”, the Resident Magistrate was concerned, at that stage, with an essential matter on which he had to make a finding, that is to say, whether words to the effect of those referred to in the charge had been uttered by the appellant, as contended by the prosecution, or had not been uttered, as contended by the appellant and her witnesses. It was in connection with this matter that the Resident Magistrate found the defence case to be false and untrue. He found as a fact that the words had been uttered, and his subsequent reexamination of the whole of the evidence was undertaken to decide the other matters in issue, that is to say, whether the appellant, in speaking these words, had the intention or *mens rea* necessary for the commission of a criminal offence, and whether those words were calculated to lead to the destruction of property as alleged in the charge. In finding against the appellant on these issues, the Resident Magistrate made it clear that he had in mind where the burden of proof lay. He said:

> ... I further find that the Republic has discharged the heavy burden of proof which lies on its shoulders, namely that it has established the [appellant’s] guilt, on the whole case, beyond a reasonable doubt.

After careful consideration of this aspect of the case, we are of the opinion that, although the form of the judgment at the trial was open to criticism, the judges of the High Court were right in holding that this did not result in the Resident Magistrate:

> considering the evidence as if the burden of proof was on the appellant, nor was it to base the conviction on the weakness of the defence case.

We think that, on the basis of the concurrent findings in the courts below, the prosecution discharged the onus of proving that the appellant uttered the words complained of; that she did so with the intention that persons to whom she uttered these words should destroy, thus involving the use of violence, and that the words were calculated to lead to such destruction, the words “calculated to” meaning in our view “of a nature or character proper or likely to”, as held by the High Court judges. In short, we are satisfied that any Court, on a proper direction, would no doubt have come to the same conclusion in this case as did the two courts below.

This appeal is accordingly dismissed.

Appeal dismissed.

Dated and Delivered at Nairobi this 6th day of May 1977.

S.W.W.WAMBUZI

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PRESIDENT

E.J.E.LAW

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VICE PRESIDENT

A.MUSTAFA

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JUDGE OF APPEAL

I certify that this is a true copy of the

original.

DEPUTY REGISTRAR

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