REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CRIMINAL APPEAL CASE NO.47 OF 2014

(From original conviction and sentence in Criminal Case No.858 of 2012 of the

CM'S Court at Kisii delivered on 10th June, 2014 by Hon. S. Makila – RM)

BENARD AMENYA MOGOTI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

1. The Appellant herein **BENARD AMENYA MOSOTI** was convicted of the offence of creating disturbance in a manner likely to cause a breach of peace contrary to **Section 95 (1) (b)** of the **Penal Code**. He was sentenced to serve 6 months imprisonment.

2. In his supplementary record of appeal filed by the firm of Anyona Mbunde & Co. Advocates on 30th September 2015 the Appellant set forth the following grounds of appeal:

1) The Learned trial Magistrate erred in law and fact in convicting the appellant when there was no sufficient evidence on record.

2) The Learned trial Magistrate erred in law and fact when she convicted and sentenced the appellant on evidence which is contradicting and not consistent.

3) The Learned trial Magistrate erred in law and fact in sentencing the Appellant maximum sentence when the evidence on record was doubtful.

3. At the hearing of the appeal, the Appellant's counsel Mr. Anyona argued that the particulars of the charge did not conform with the evidence tendered before the court as the particulars stated that the Appellant chased the complainant and his companions with a panga yet the element of chasing was not proved since the complainant and his witnesses did not say that the Appellant ran after them.

4. Mr. Anyona advocate for the Appellant submitted that the prosecution did not prove its case against the Appellant beyond reasonable doubt since nobody was harmed by the Appellant and the Act of chasing was not proved.

Mr. Anyona added that the charge sheet and the evidence on record was contradictory/inconsistent. He prayed that the appeal be allowed.

5. The appeal was opposed by Mr. Otieno counsel for the state who argued that the prosecution had proved its case beyond reasonable doubt as the testimony of the complainant that the Appellant jumped over the fence while armed with a panga, thereby causing them to scamper for safety was corroborated by the testimonies of PW2 and PW4.

6. According to Mr. Orieno, all the ingredients of the offence of creating a disturbance in a manner likely to cause of breach of peace had been proved beyond reasonable doubt and therefore the Appellant's conviction and sentence were proper and merited.

7. It is this court's duty, as the first appellate court, to analyze and evaluate the evidence tendered before the trial court afresh in order to reach its own finding.

In the case of **David Njuguna Wairimu –vs- Republic [2010] eKLR Court of Appeal Criminal Appeal No.5 of 2008 at Nairobi** held:

"that the duty of the 1st appellate court is to analyze and re-evaluate evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the circumstances of the case come to the same conclusions as those of the lower court. It may rehash those conclusions as those of the lower court. We do not think that there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decision."

8. The prosecution called a total of 5 witnesses in support of its case as follows:

PW1 James Oyaro Ambrose testified that on 24th April 2012 at about 3.00 p.m., he was at his home digging a pit latrine in the company of PW2 and PW4 when his step brother, the Appellant herein, trespassed into his compound by jumping over the fence while armed with a panga with the aim of harming him. PW1, PW2 and PW4 ran away into the house where they locked themselves up. The Appellant then took the roofing materials of an old demolished toilet and covered the pit that PW1 was digging before going away.

9. Upon being cross-examined by the Appellant the complainant stated:

"You chased all of us. It is Mageto who was inside the pit but he came out when you came quarrelling. You had a panga when you came. You wanted to cut us and I did not recover it because I had no strength to wrestle it from you."

On further cross-examination the complainant said:

"You chased me with a panga. I was digging a pit latrine when you chased me with a panga. This disturbed me while doing my work in my compound."

10. **PW2, Moses Mokrison Kwanga** testified that on the material day he was assisting PW1 dig a pit latrine when at about 3.00 p.m., the Appellant came quarrelling and asking why they were digging the pit

latrine next to his compound. He stated that the Appellant jumped over the fence while armed with a panga and chased them whereupon they all ran and locked themselves up in the complainant's house.

11. **PW3, PC Eddy Kahindi** was the investigating officer who took over the case from the investigating office one PC. Kiprono who was on transfer.

12. **PW4, Wilfred Mageta Akenga** testified that he was on 24th April 2012 assisting the complainant dig a pit latrine when the complainant came quarrelling while armed with a panga and they all ran away for safety in a nearby house belonging to the complainant.

13. **PW5, APC Samson Ongeri Ratemo** was the arresting officer in this case.

14. The Appellant opted not to give any testimony in court in his defence but called one witness **DW1 Edward Siocha** a Public Health Officer from Kitutu Chache Sub-county.

15. DW1 stated that he had written a letter concerning the pit latrine dispute that the complainant had with the accused which he noted was 2 meters from a kitchen. According to DW1 it was not advisable to build a pit latrine where the complainant wanted to build it because it was on the windward side and in close proximity to the Appellant's kitchen.

16. **Section 95 (1) (b)** of the **Penal Code** provides:

"(1) Any person who –

(b) brawls or 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 misdemeanor and is liable to imprisonment for six months."

17. For the offence to be proved, the prosecution must establish that there was a brawl caused by the accused or that the accused created a disturbance in a manner that is likely to cause a breach of peace.

A brawl is defined as a rough or a noisy quarrel or fight.

18. From the circumstances of this instant case, the trial magistrate in her judgment observed as follows:-

"I find that the prosecution has proved beyond reasonable doubt that the accused person created disturbance and caused breach of peace on 24th April 2012 by chasing James Oyoro Ambrose with a panga."

19. I similarly find that the conduct of the Appellant, by arming himself with a panga, trespassing into the complainant's home by jumping over the fence, threatening to cut the complainant and his workers created a disturbance by interfering with the peace of the complainant whose latrine construction work as abruptly disrupted when he and his assistants had to run into the house and lock themselves up for safety.

20. It is clear in mind that the complainant, PW2 and PW4 sensed that the appellant meant his words and that their lives were in danger when they saw the Appellant brandish the panga and threaten to cut them. They did not have to wait to see whether or not the Appellant could make good his threat because if that was the case nobody can tell what could have transpired.

21. The complainant could not go on with his latrine project because the Appellant threatened to harm him and his workers. To my mind, this amounts to creating a disturbance. The Appellants contention that the act of chasing the complainant was not proved and thus the offence was not proved is not tenable in the face of the evidence of PW2 who was categorical that the Appellant chased them while armed with a panga.

22. In the case of **Muler –vs- Republic Criminal Appeal No.873 of 1982** the offence of creating a disturbance was described as follows:

"1. The offence of creating disturbance likely to cause a breach of the peace constitutes incitement to physical violence and the breach of the peace contemplating physical violence. The act of the Appellant had those two elements.

2. It is not enough to constitute the offence of creating a disturbance likely to cause a breach of peace to show that the accused merely created a disturbance, that disturbance should have been likely to cause a breach of peace. Peace would for instance refer to the right of wanainchi to go about their daily activities without interference. The actions of the Appellant interfered with people's activities and therefore caused a breach of peace."

23. The facts in the Muler case (supra) are identical to those in this instant case. The Appellant charged into the complainant's home while armed with a panga. He (Appellant) was quarreling and spoiling for a fight. His actions had the ultimate effect of interfering with the complainant's work in his pit latrine. I find that the ingredients constituting the offence were proved.

24. There is no requirement that the incident must take place in a public place for the offence under **Section 95(1) (b)** of the **Penal Code** to be proved. In the case of **Felix Muthoni Nganga –vs- Republic HCCRA No.131 of 2010** at Machakos, it was held that:

"Clearly the offence can be committed in a private place for the simple reason that a breach of the peace can occur in such a place, there is absolutely no necessity to impute restriction that is absent from the wording of the statue."

25. The defence of the Appellant was that of justification. By calling the Public Health Officer DW1 to state that the complainant was constructing a toilet contrary to their advise, was to me, an attempt to justify the Appellant's disruption of such a construction.

26. I find that the complainant's testimony was consistent and was corroborated by the evidence of PW2 and PW4. I find that the offence of creating a disturbance in a manner likely to cause the breach of peace was proved against the Appellant beyond any reasonable doubt. The conviction was founded on watertight evidence.

27. The magistrate imposed the maximum sentence of 6 months imprisonment. The magistrate observed that the Probation officer's report filed in respect of the accused was not favourable.

I therefore believe that the trial magistrate's decision to impose the maximum sentence was well informed not only by the Probation Officer's report, but by the demeanour of the Appellant.

28. Sentence is matter of discretion of the trial court based on the facts and the appellate court will not ordinarily interfere with the same unless it is manifestly excessive or based on a wrong principle. (See **Ogola s/o Owuora –vs- Reginum [1954] 21 270**).

29. In the instant case, the sentence cannot be said to have been excessive or based on the wrong principles. I find no reason to interfere with the sentence passed by the trial court.

30. In conclusion, I find that this appeal has no merit and it is hereby dismissed. The conviction and sentence are consequently upheld.

Dated, signed and delivered in open court this 9th day of March, 2016

HON. W. OKWANY

JUDGE

In the presence of:

- N/A Anyona for the Appellant
- Mochama for the State
- Omwoyo court clerk