Case Number:	Criminal Appeal 234 of 2008
Date Delivered:	13 Apr 2011
Case Class:	Criminal
Court:	High Court at Meru
Case Action:	Judgment
Judge:	Jessie Wanjiku Lesiit
Citation:	CHARLES MEEME v REPUBLIC [2011]eKLR
Advocates:	-
Case Summary:	-
Court Division:	-
History Magistrates:	-
County:	-
Docket Number:	-
History Docket Number:	-
Case Outcome:	-
History County:	-
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL APPEAL NO. 234 OF 2008

LESIIT J.

CHARLES MEEME……APPELLANT

VERSUS

REPUBLIC……..RESPONDENT

(From Original SPM'S Criminal Case No.2412 of 2008 at Maua; S. Mwendwa – R. M.)

JUDGEMENT

The appellant was arraigned before the SPM's court at Maua on 7th August 2008 with one count of creating a disturbance in a manner likely to cause a breach of the peace contrary to section 95 (1) (b) of the Penal Code. He was found guilty of the charge, convicted and sentenced to six months imprisonment.

The appellant was unhappy with the conviction and sentence thus this appeal. In his Petition of

appeal filed by Mr. Omayo advocate on his behalf, he raises five grounds as follows:

"1. The learned Resident Magistrate erred in law and in fact in convicting the Appellant on a charge of creating disturbance in a manner likely to cause a breach of peace contrary to section 95(1) (b) of the penal code.

2. The learned resident Magistrate erred in law and in fact in not finding that a lease Agreement between the complainant PW2 and DW2 the owner of the Miraa in question.

3. The learned Resident Magistrate erred in law and in fact on not finding that the offence was a fabrication.

4. the learned Resident Magistrate erred in law and in fact in not taking into consideration the evidence of the accused in the lower court and that of DW2 who denied having leased the miraa to the complainant PW2.

5. the conviction and sentence was uncalled for in the circumstance"

The appeal is opposed. Mr. Kimathi, learned counsel for the state vehemently opposed the appeal.

The facts of the case were as follows; the prosecution case was that the complainant, PW2 rented DW2's farm in order to harvest miraa once or twice. It is PW2's evidence, supported by PW3 her employee's evidence that when she went with 20 labourers to cut the miraa that day; the accused chased her out of DW2's farm armed with bow, arrows and stones. PW2 reported the matter to PC (w) Miriti who arrested the appellant.

The defence case was as follows. The accused in his unsworn statement denied committing any

offence as charged. He said that one Harun had rented the farm of DW2 to pluck miraa. DW2 was his employer and his work was to guard the farm. The accused stated that he did not harm the complainant and her witness PW3 until she brought police to arrest him.

DW2, the owner of the farm denied renting out his land to the complainant and denied knowing her.

DW3 a neighbor testified that one the material day he did not see the appellant chasing anyone at DW2's shamba where he guards miraa. DW3 stated that he was called as a witness because one Harun, who had rented the miraa, caused the appellant to be arrested.

I have carefully considered this appeal and have subjected the entire evidence adduced before the trial court to a fresh analysis and evaluation**. In OKENO V REPUBLIC 1972 EA 32** where the role of a first appellate Court is given as follows:

"**An appellant on first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination [**Pandya vs. Republic (1957) EA 336] **and to the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusion** (Shantilal M. Ruwala v. Republic [1957] EA 570.) **It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, (See** Peters v. Sunday Post, [1958] EA 424.)"

The appellant faces a charge of creating a disturbance in a manner likely to cause a breach of the peace contrary to section 95 91) (b) of the penal Code. The prosecution had to adduce evidence to show that either the appellant was involved in a brawl or in any other manner created a disturbance.

Evidence before the court was that the complainant went with PW3 and others to harvest 'Khat' or "miraa" in the shamba of DW2 On the grounds she had rented the place in order to harvest the miraa. The appellant was the watchman over the shamba and DW2 was the owner.

Contrary to what Mr. Kimathi for the state urged, it was material for the learned trial magistrate to consider the capacity in which the complainant visited the said shamba. I agree with Mr. Omayo that the evidence of DW2 as owner of the shamba was very material.

The prosecution case was contested on all particulars necessary to prove the case against the appellant. The complainant's evidence that she rented the miraa from the owner was denied by the land owner himself. DW2 denying leasing the land or the plant to the complainant. The complaint and PW3's evidence that the appellant chased them while armed with bow and arrows and that he threw stones at them was denied by the appellant and DW3.

The prosecution case was hotly contested. At the end of the day the prosecution did not prove to the required standard that the complainant visited the land in question as a leaser or tenant. The evidence points rather to the fact the complainant, if she ever visited the piece, was trespassing into the land of DW2. In that case the appellant, who was the watchman to guard and protect the land and everything in it from thieves and trespasses acted within his mandate to keep them off the land. Even if he was armed with bow and arrows, the manner in which he kept them away from the land, if at all, was reasonable and within the law.

In regard to the ingredients of the charge facing the appellant, the case of MULE VS REPUBLIC 1983 KLR 246 sets out the facts which should be proved in over to establish the charge as follows:

i) The encounter between the appellant and the complainant could not be described as a duel. The definition of a duel 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.

ii) The offence of creating a 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.

The prosecution did not adduce any evidence to show that the appellant was involved in a brawl or challenged anyone to a fight. The prosecution did not adduce any evidence to show that there were any other persons at the scene who were in a manner likely lead disturbed to a breach of the peace, apart from those in the complainants' company.

The evidence of PW2 and 3 was to the effect the appellant chased them away. He did not challenge to any fight.

The learned trial magistrate came to the wrong conclusion of fact that the appellant was guilty of he offence charged.

The ingredients of the offence were not proved from the evidence adduced by the prosecution as explained above. The conviction entered was therefore bad in law and showed not be allowed to stand.

Before I conclude the judgment I wish to comment on one more disturbing matter. In the learned trial magistrate's judgment, he refers to the appellant in the following terms:

"The conduct by the accused was barbaric and uncivilized…but then the accused was stupid to be misused by DW2..."

Let me remind the learned trial magistrate the need to use civil language in court proceedings, especially in the judgments drafted by him. It gives a bad impression when the court uses what can be interpreted to be abusive and therefore uncivil language.

In conclusion the appellant appeal succeeds. The conviction is quashed and sentence set aside. Those are the orders**.**

Dated, Signed and Delivered this 13th April 2011.

LESIIT,

JUDGE.