



REPUBLIC OF KENYA



**KENYA LAW**  
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**Lekortum v Republic (Criminal Appeal E16 of 2020)  
[2023] KEHC 1113 (KLR) (23 February 2023) (Judgment)**

Neutral citation: [2023] KEHC 1113 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KABARNET  
CRIMINAL APPEAL E16 OF 2020  
HK CHEMITEI, J  
FEBRUARY 23, 2023**

**BETWEEN**

**GRACE LEKORTUM ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an Appeal From The Judgement of Hon. Biwott (CM)  
Dated 3.2.2020 in Kabarnet Criminal Case No 862 of 2020)*

**JUDGMENT**

1. The appellant was charged with the offence of Creating disturbance in a manner likely to cause a breach of the peace contrary to Section 95(1), (b) of the *Penal code*. The particulars of the charge were that on the December 13, 2019 at Marigat location in Baringo south sub county within Baringo county created a disturbance in a manner likely to cause a breach of peace by shouting and insulting Wilson Ngugi.
2. The matter proceeded to full trial where the appellant was convicted and sentence to serve six months' probation period. Being dissatisfied she has file this appeal citing several grounds as per the petition herein.
3. Principally the appellant grounds are that the respondent did not prove its case beyond reasonable doubt, the trial court failed to consider the appellants defence, the court shifted the burden to the appellant and that the court relied on contradictory evidence.
4. When the matter came up for directions the court directed that the parties file written submissions to dispose it and they have complied. The court has perused the same with the attendant authorities.
5. The facts before the trial court were not difficult to discern. The appellant and the complainant were lovers or husband and wife and they had separated. Both of them were business persons. On the material day, pw1 the complainant, told the court that he was buying ndengu at some store when



- the appellant approached and abused him by calling him a thief and that he would deport him from Marigat. The complainant went on to state that he did not respond but instead he reported the matter at the police station.
6. The appellant was thereafter arrested and charged. The complainant on cross examination admitted that the appellant was his ex-wife and denied owing her kshs 47000. He also denied frustrating the appellant in her business.
  7. PW2 and 3 were casual employees of the complainant who heard the appellant abusing the complainant. PW2 said that she called him a thief and Satan, while PW3 said that she called him a fool and threatened to ensure that he leaves Marigat town.
  8. PW4 the investigating officer took over from her colleague one PC Kisenbe. She said that the appellant called the accused mjinga. She recorded statements and preferred charges against the appellant.
  9. The appellant when placed on her defence denied the charge and gave chronology of how the complainant had stolen from her kshs 47000. She denied that she abused him and that on the material day they were buying ndengu from the National Irrigation Board and he saw the complainant queuing as well for the same products.
  10. After leaving the scene the complainant came back with the police and wanted to arrest her. She further narrated other 7 incidences where he had made some complains and had been arrested and incarcerated with her son in the same cell.
  11. Her witness DW2 a block leader at Perkerra irrigation scheme testified that he sold to the two ndengu on that particular day and he did not witness any altercation between them. He only recalls that after the complainant left he came back with police officers who wanted to arrest the appellant. He further said that he told the OCS that the allegations were not true.
  12. As indicated above the parties did file their submissions and the appellant in support of her grounds of appeal stated that the complainant brought the matter in bad faith as there was no evidence at least from the caretaker of the store that she insulted the complainant.
  13. That the witnesses called by the respondent were employees of the complainant whom he paid at the end of the business and it was imperative that at least he should have gotten other independent witnesses.
  14. The appellant in summary prayed that the respondents appeal be allowed as the threshold of conviction was not met.
  15. The respondent supported the findings of the trial court. According to the learned state counsel the ingredients of the charge were met as evidence by the witness's testimony. That the witnesses called were credible and there was no contradiction and the appeal be dismissed.

### **Analysis and determination**

16. The court has perused the proceedings herein as well as the submissions by the parties. The duty of the court was well spelt out among others in the case of *Okeno v Rep* 1972 EA 32. The appellate court ought to evaluate afresh the evidence so presented at the trial court and arrive at an independent decision noting that the court did not have the benefit of seeing the witnesses or their demeanour.
17. Having stated so, it is not disputed that the appellant and the respondent were lovers and that their relationship broke down. At the same time both are business persons plying their trade at Marigat township.



18. On the material day they were each buying ndengu from the National Irrigation Board stores. It was the evidence of the complainant that he was abused by the appellant who called him a thief and that she was going to ensure that he leaves Marigat town. From his evidence it is also clear that they have had a long dispute which involved the complainant's wife and the appellant.
19. The two witnesses present were the casual employees of the complainant. He admitted that he had hired them and were paid at the end of the day.
20. What then was the veracity of their evidence? Is it possible that they were biased against the appellant? Going by the sore relationship between the two it would have been reasonable to call the watchman who was likely to be an independent witness in this case.
21. The need of independent witness was in my view necessary to allay any fear of the complainant compromising the two casual workers he had hired for the day.
22. More importantly is the defence offered by the appellant. She explained the extent of her relationship she had had with the complainant ever since they parted. The records of the Occurrence Book (OB) from the police were not controverted by the respondent. It appears that over time their differences have spilled over and the police have been involved.
23. The evidence of DW2, the manager from Parkera irrigation scheme who sold them ndengu seemed in my view credible and from an independent source. At least it was not denied that he sold the two of them ndengu at that particular time. he said that he did not witness any altercation between them. He only got to know that there was a problem when the police came with the intention of arresting the appellant.
24. Taking the totality of the whole matter, the sore relationship between the two, I find that the trial court ought to have granted the appellant the benefit of doubt. This is a matter where an alternative justice system ought to have been encouraged as the differences are deeper than what was brought before the court.
25. The evidence of both sides contradicted each other and it is not clear whether the appellant abused the complainant. Had it not been of the bad past relationship between them to the extent that the police had severally dealt with the matter, the court would have easily believed the complainant.
26. In the premises, the appeal is allowed, the trial courts conviction and sentencing are set aside for all intent and purposes.

**DATED SIGNED AND DELIVERED VIA VIDEO LINK AT KABARNET THIS 23<sup>RD</sup> DAY OF FEBRUARY 2023.**

**H. K. CHEMITEI.**

**JUDGE**

