



**M'Igweta v Republic (Criminal Appeal E023 of 2020)
[2022] KEHC 10909 (KLR) (30 May 2022) (Judgment)**

Neutral citation: [2022] KEHC 10909 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CRIMINAL APPEAL E023 OF 2020
EM MURIITHI, J
MAY 30, 2022**

BETWEEN

ZAKAYO MUKUBIO M'IGWETA APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from the original conviction and sentence in Tigania Principal Magistrate's Court Criminal Case No.207 of 2020 on 16/10/2020 by Hon. P.M Wechuli SRM)

JUDGMENT

1. The Appellant, Zakayo Mukubio M'igweta, was charged with 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 were that on the 29th day of February 2020 at around 0800 hours at Kagaene Market, Mbeu Location in Tigania West Sub County within Meru County, he created disturbance in a manner likely to cause breach of the peace by threatening to harm Bernard Kirimi Thirungu. Upon trial before the trial court, he was convicted and sentenced to pay a fine of Ksh.40,000 in default to serve 6 months' imprisonment.

Grounds of Appeal

2. He was dissatisfied with the conviction and sentence, and he lodged this appeal setting out 6 grounds of appeal as follows: -
 - a) The Learned Trial Magistrate erred in law and fact in failing to note that the prosecution did not prove their case beyond reasonable doubt.
 - b) The Learned Trial Magistrate erred in law and fact by convicting and sentencing the Appellant on 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 on the basis of the Complainant and prosecution's evidence full of contradictions.



- c) The Learned Trial Magistrate erred in law and fact by failing to note that the prosecution did not satisfy the ingredients of an 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 as none of the Complainant witnesses listed on his written statements witnessed before the court and instead the complainant went on witness fishing expedition.
- d) The Learned Trial Magistrate erred in law and fact by failing to note that the act of leaving out the key witnesses captured on the complainant statements casts aspersions on the prosecution's case as it only left one conclusion that the complainant had selectively sought witnesses and coached them to frame the allegations against the Appellant.
- e) The Learned Trial Magistrate erred in law and fact by failing to note that the Appellant had already reported that the complainant who had entered his land and destroyed his crops but no action was taken or any OB booked and/or investigation carried out by the Police but the Appellant while he was at the Police Station over the same, the Complainant came from behind and caused the Appellant to be arrested without investigation being carried out proper investigation to establish the charges thereof.
- f) The Learned Trial Magistrate erred in law and fact by failing to establish the lies motive by the Appellant and indeed ignored and disagreed with the Appellant's side of the story and agreed with the complainant who indeed had caused the Appellant to be arrested while he had gone to report the malicious damage by the complainant.

Evidence

3. PW1 Bernard Kirimi, the complainant and a distant relative to the Appellant, left home early at 7 am and called some people to work on his land which had a petrol station. The Appellant came while unarmed but the Appellant's son was armed with a panga. The Appellant was claiming that he was the owner of the land and when the Appellant threatened to harm him, he feared for his life and ran to the police. At the station, he found one Mwenda Ikabia recording his statement. The Appellant came and held Mwenda, slapped him and threw him. The Appellant was arrested for beating Mwenda and he took the mzee who had been injured to hospital. He was informed by his sons that the Appellant had later on gone to the scene with a panga. There were around 10 boys who included Lalu, Mugira and Kagwira but he brought only 2 witnesses. He said he had a land dispute with the Appellant.
4. On cross examination, he confirmed that he was related to the Appellant and stated that the Appellant had constant wrangles with his uncle. He had a case with ELC which was unrelated to this case. The Appellant assaulted Fredrick Mwenda Ikabia. He assisted Mwenda as a good Samaritan and went to the police after the Appellant chased him. He had people working on his plot and out of the 10 people who were at the scene, he only brought 2. He said he could not bring all of them due to costs and others had refused to testify. He had a title deed to his land and he saw the Appellant's son at the scene. He maintained that the Fredrick Mwenda was attacked while at the police station. On re-examination, he stated that the Appellant's son, who he saw at the scene, threatened him as he ran to the police station.
5. PW2 Mwenda Jackson Martin, the complainant's employee testified that on the material day and time he was working with others on the complainant's land. At around 9 am, the Appellant came complaining that the land was his. The Appellant then threatened to beat Kirimi since he was on his land. They advised the complainant to go to the police and the Appellant returned while armed with a panga.



6. On cross examination, he stated that he was Martin Jackson and not Lunguli. He affirmed that he was given work at around 8 am and the Appellant came back shortly thereafter with a panga. He did not know all the people who were on the farm and that the complainant was also known as Kamanga.
7. PW3 Amos Gikundi Benard, a driver of the complainant testified that while working at the complainant's land on the material day and time, the Appellant came to enquire what they were doing on the land telling Kamanga to wait. The Appellant then left and the complainant ran. When the Appellant later came back, he found that the complainant had left. He identified the Appellant in the dock.
8. On cross examination, he stated that when the Appellant came, they had already started working and he did not know why the Appellant left. When the Appellant came back, he did not talk to them and he was unsure whether the appellant was armed.
9. In his sworn defence, DW1 Zakayo Mukubio, a mechanic at Kagaene testified that at 8 am, he was assaulted by someone who was on his plot. The person came, cut crops and grass on his land and when he reported 30 minutes later at Kagaene, no action was taken. He then met one Bariuki coming from the office and when he gave way for Bariuki to pass, they quarreled and Bariuki stabbed him with a bakora. The police held him and the complainant, who came from behind the office, said he should be jailed. He insisted that the land was his and he had no land dispute with Bariuki and the complainant. He also denied either doing anything to them, going near them or being armed. He produced a search and title deed as exhibits in court to support his case.
10. On cross examination, he denied seeing the complainant on that day. He was arrested when he went to the police station to report but he did not have any OB. He stated that it was the old man Mwenda who had attacked him. He denied taking the law into his hands and stated that he had reported earlier. He stated that he did not write any statements or report the OCS. It was Kirimi who had instructed the police to put him in the cells. On re-examination, he stated that he was attacked at the police post.
11. DW2 Boniface Gitonga, a boda boda rider, was on the material day on his way to pick mzee Karinguri to take him to Mikinduni. On reaching Kagaene, he found Kirimi slashing on the Appellant's plot. He went to inform the Appellant and he did not know what happened after that. On cross examination, he stated that the Appellant was his father and he saw Bernard on the farm.
12. DW3 Michael Mwingirwa, was on the material day at the garage when a young boy namely Gitonga came and told him that some people were clearing his plot. The old man peeped and saw people on his plot. The old man said he was going to report but he later learnt that he had been arrested. On cross examination, he stated that the plot was not far from the garage and he saw people on the plot. He did not know the relationship between Boniface and Zakayo.

Submissions

13. The appeal was heard by way of written Submissions. The Appellant submitted that the prosecution's evidence was contradictory, inconsistent and did not meet the threshold of proof beyond reasonable doubt, and relied on *Mule v Republic* (1983) eKLR, where the ingredients of the offence of creating disturbance were laid down. He submitted that none of the prosecution witnesses gave evidence as to the nature of threat or breach of peace and there was no suggestion whatsoever of people likely to result to violence. He submitted that although he may have uttered annoying words, his actions of retreating as testified by PW1 negated the possibility of him having the mens rea of making the complainant result into violence, and supported that argument with the case of *Mutuku Solo v Republic* (2017) eKLR.



He urged the court to hold that the prosecution had failed to prove its case against him to the required standards and proceed to acquit him.

14. The respondent submitted that it had proved through consistent and corroborated evidence of its witnesses all the ingredients of the offence of creating disturbance in a manner likely to cause a breach of peace, and prayed for the dismissal of the appeal.

Analysis and Determination

15. The duty of this court as the first appellate court is to re-appraise, review and re-evaluate the evidence afresh with a view of drawing its own independent conclusions and findings, bearing in mind that it did not have the advantage of seeing the witnesses testify. See *Okeno v R* (1972) EA 32.

Issues for determination

16. From the grounds of appeal the following 3 issues for determination; 1) Whether the evidence by the prosecution witnesses and defence proved the charge of creating a breach of the peace; 2) Whether any key witnesses were left out, and the impact thereof; and 3) Whether the appellant's defence was considered by the trial court.

Whether there was proof of beyond reasonable doubt of the charge.

17. At the core of this case is a land dispute between the complainant and the Appellant. Both the complainant and the Appellant assert that the land in question belonged to them. The Appellant was charged and convicted with creating disturbance in a manner likely to breach peace under section 95(1)(b) of the Penal Code. The section provides as follows:- "Any person who 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 misdemeanour and is liable to imprisonment for six months."
18. For the offence of creating disturbance in a manner likely to breach peace to be proved, the prosecution needed to establish that there was a brawl caused by the Appellant or that the Appellant created a disturbance in a manner that was likely to cause a breach of peace. A brawl is defined in the Oxford dictionary as "a rough or noisy fight or quarrel."

Breach of the peace

19. In *Mule v. R* the headnote sets out the holding Porter, Ag. J. as follows:

"3. It is not enough to constitute the offence of creating a disturbance likely to cause a breach of the 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 wananchi 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."

20. In *Tolley v. R* 1983) KLR 315, Sachdeva, J. held that:

"2. There is a breach of the peace whenever a person who is lawfully carrying out his work is unlawfully prevented by another from doing it. It is a breach of the peace because such person is entitled to peacefully go on with his work (*R v Chief Constable of Devon and Cornwall, Ex parte Central Electricity Generating Board* [1982] QB 458). In this instance, the appellant's act of wielding a "pistol" and threatening officers on lawful duty was likely to cause a breach of peace."



21. In the passage relied in Tolley, Lord Denning MR in *R v. Chief Constable of Devon and Cornwall, Ex parte Central Electricity Generating Board* [1982] QB 458, 471:

“There is a breach of the peace whenever a person who is lawfully carrying out his work is unlawfully and physically prevented by another from doing it. He is entitled by law peacefully to go on with his work on his lawful occasions.”

22. Similarly, Watkins, LJ. in the English Court of Appeal (criminal) in *R v Howell* [1982] QB 416; [1981] 3 All ER 383 in considering the power of arrest for breach of the peace as follows:

“A comprehensive definition of the term ‘breach of the peace’ has very rarely been formulated. So far as we have been able, with considerable help from counsel, to discover from cases which go as far back as the eighteenth century.... [W]e cannot accept that there can be a breach of the peace unless there has been an act done or threatened to be done which either actually harms a person, or in his presence his property, or is likely to cause such harm, or which puts someone in fear of such harm being done. There is nothing more likely to arouse resentment and anger in him, and a desire to take instant revenge, than attacks or threatened attacks on a person’s body or property.”

On the evidence

23. PW1 testified that, “the accused came claiming that he was the owner of the land. His son was armed with a panga. The accused threatened me saying he shall harm me. The accused retreated fast. I got afraid. I ran to police....later on after I had run away my sons said he went to the scene with a panga....I had a land dispute with the accused.” PW1’s evidence was corroborated by both PW2 and PW3, who were at the scene when the threats were made.
24. PW2 testified that, “the accused then came at around 9 am complaining that the land is his. He threatened to beat Kirimi since he was on his land. He told Kirimi to wait a bit. We told the complainant to go to police. The accused later returned armed with a panga.”
25. According to PW3, “the accused came to ask what we were doing on the land. He told Kamanga Alias the complainant to wait. The accused then left and the complainant ran. When the accused came back he found that the complainant had left....The accused is in the dock.” The evidence by PW1, PW2 and PW3 was not unshaken even during cross examination. The appellant intended to make good his threats when he returned in a moment armed with a panga. The complainant heeded to the advice of his workers and decided to rush to the police station to report. If the complainant had waited to see whether or not the Appellant could bring his threats to fruition, nobody can tell what could have transpired.
26. The Court, consequently, finds that, by first threatening to harm the complainant and then shortly returning while armed with a panga, and later following the complainant to the police station, the Appellant indeed created a disturbance by interfering with the peace of the complainant and his workers and rejects the Appellant’s contention that the evidence led by the prosecution witnesses was marred with inconsistencies and contradictions. The witnesses agreed on the material facts that the appellant had gone to the Shamba and demanded to know what the complainant was doing on his land and threatened to harm him upon his return, and that when he came back he was armed with a panga.
27. Peace was disturbed when the appellant threatened to harm the complainant and his workers at the shamba prompting the complainant to stop his lawful activity and go to report the matter at the police



station fearing for his life upon the appellant's return. The ingredients of the offence of creating a disturbance were proved.

Whether any key witnesses were left out, who ought to have been called to testify.

28. According to the Appellant, everyone who was at the scene during the alleged altercation ought to have been called as a witness to testify. The Appellant even put the complainant to task with regard to this issue. In response, the complainant stated that, "I have brought two witnesses of the ten who were on my plot. I could not bring all of them due to costs. Some witnesses don't accept to testify."
29. Section 143 of the *Evidence Act* provides that, no particular number of witnesses shall, in the absence of any provisions of the law to the contrary, be required for proof of any fact.
30. As a general principle of law, whether a witness should be called by the prosecution is a matter within their discretion and an appellate court will not interfere with the exercise of that discretion unless, for example, it is shown that the prosecution was influenced by some oblique motive (see *Oloro s/o Daitayi & others v R.* (1950) 23 EACA 493.
31. Moreover, it would be a superfluity and an academic exercise for the prosecution to call every witness just because they have been mentioned by prosecution witnesses called to testify.
32. Failure to call certain witnesses is only fatal in the circumstances where the Rule in *Bukenya and Others v. Uganda* (1972) EA 549 applies, that is to say:

"[W]here the evidence called is barely adequate, the court may infer that the evidence of the uncalled witnesses would have tended to be adverse to the prosecution."

Whether the appellant's defence was considered.

33. In his defence, the Appellant stated that at 8 am, he was assaulted by someone on his plot. He testified that, I then met one Bariuki coming from the office. When I let him to pass he stabbed me with a Bakora. We quarreled. The police held me.....the complainant came from behind the office. He said I should be jailed. We have no land dispute."
34. The trial court cannot validly be accused of failing to consider the appellant's defence along with the Prosecution evidence. In the oft-cited case on manner of analysis of evidence in a criminal case, *Okethi Okale & Others v. R* (1965) EA 555, the Court of Appeal for Eastern Africa guided that:

“(repeating the principles set out in *Ndege Maragwa v. R* (1965) EACA Criminal Appeal No. 156 of 1964 unreported) the burden of proof in criminal proceedings is throughout on the Prosecution, and it is the duty of the trial judge to look at the evidence as a whole.”
35. In its re-evaluation of the Appellant's defence, the trial court observed thus, “the accused's defence, on the other hand, did not challenge the complainant's evidence, rather it seemed to confirm the state's case. To begin with, though the accused claimed that the complainant had destroyed his crops on the material day, he had no proof of this allegations. He also had no OB number by which he made any such reports. He only had title documents to his land, which brought out the motive of this offence which is a land dispute.....therein lies the motive for the accused threat to the complainant. That he believed that the complainant had invaded his land. he therefore went to threaten him over this fact. His other allegations of the complainant giving orders of arrest to the police, however, show that the rest of the accused defence was not credible.....Taking the law in ones hands, the way the accused did is not the way to go.”



Verdict

36. This court finds 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. It follows that the Appellant's conviction was safe and sentence of a fine of Ksh.40,000 in default to serve imprisonment for 6 months, being within the sentencing discretion of the trial court under section 95(1) (b), as read with section 26(3) of the Penal Code, was proper.

Orders

37. Consequently, for the reasons set out above, the court finds that the appellant's appeal herein lacks merit and it is dismissed.

Order Accordingly.

DATED AND DELIVERED ON 30TH DAY OF MAY, 2022

EDWARD M. MURIITHI

JUDGE

Appearances

M/S Mbaabu M'Inoti & Co Advocates for the Appellant.

Ms. Nandwa, Prosecution Counsel for the DPP.

