



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MAKUENI

HCCRA NO. 124 OF 2019

SAMSON MUOKI JOEL.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the original conviction and sentence of Hon. E. M. Muiru (SRM) in Kilungu

Senior Resident Magistrate's Court SRMCRC No. 736 of 2018

delivered on 9th August, 2019).

JUDGMENT

1. The Appellant was charged in the subordinate court with two counts. Count one was 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 which were that on 22nd August 2018 at Nthozweni Village, Kee Sub-location, Kilungu Sub-county within Makueni County, created a disturbance in a manner likely to create a breach of the peace by obstructing villagers of Nthonzweni from constructing a road reserve.

2. In count 2, he was charged with giving false information to a person employed in the public service contrary to Section 129(a) of the Penal Code, the particulars of which were that on 22nd August 2018 at Kilome police station, Mukaa Sub-county in Makueni County informed No. 118199 PC EUTICUS MURIMI a person employed in the public service as a police officer that he was assaulted by the area chief, Kee Location namely Lawrence Mulili Mwau information he knew to be false intending thereby to cause the said officer to take action against the area chief.

3. After a full trial, he was convicted of both counts and sentenced to probation for one year.

4. Dissatisfied by both the conviction and sentence, the Appellant has come to this court on appeal through counsel D.M. Mutinda advocates on the following grounds of appeal, that:-

- 1. The trial magistrate erred and misdirected herself in law and facts in convicting the Appellant without proper analysis of the evidence.*
- 2. The learned magistrate erred in law and facts by convicting the Appellant against the weight of the prosecution evidence and when there was no evidence to convict the Appellant with the commission of offence.*
- 3. The magistrate erred in law by converting criminal proceedings of causing disturbance and giving false information to a civil case over land.*
- 4. The learned magistrate erred in law by shifting the burden of proof from the prosecution to the accused person contrary to the principle of the prosecution proving beyond reasonable doubt.*
- 5. The learned trial magistrate erred in law by convicting the appellant relying on documents produced by the Appellant and which related to land dispute and had no connection to the offences charged.*
- 6. The trial magistrate erred in law by totally disregarding the defence evidence of the Appellant and his witnesses.*

7. *The trial magistrate erred in law by failing to consider the evidence of some crucial documents the Appellant produced such as the P3 form to prove that he had been assaulted and hence did not give false information to a police officer.*

8. *The learned trial magistrate erred in law in relying on a letter written by the Appellant's family instead and relying on a copy of a title deed which had been adduced as evidence to come to a conclusion that there existed a public (road) on the point where the offence of causing disturbance was allegedly committed.*

9. *The trial magistrate erred in law by failing to summon the crucial witnesses such as the medical officer who authored the P3 form which the Appellant relied to show that he had been assaulted.*

10. *The learned magistrate erred in law by purely relying on witnesses who contradicted themselves and despite the fact that the prosecution did not produce any single document.*

11. *The trial magistrate erred in law and in fact by disregarding the fact that the alleged offence of causing a disturbance occurred at the Appellant's home and that the prosecution never adduced any evidence to prove otherwise.*

12. *The trial magistrate erred by converting a prosecution witness to be the complainant in a matter that had no complainant.*

13. *The learned magistrate erred in law and in fact by generally holding that it is not possible for a police officer to collude with the area chief and frame the accused person who had complainant and reported assault case against the area chief.*

14. *The trial magistrate contradicted herself on what constitutes the offence ingredients of the offence of causing disturbance and at the same time convicted the Appellant when the ingredients had not been satisfied.*

5. The appeal was proceeded by filing written submissions. Both the Appellant's counsel and the Director of Public Prosecution filed written submissions relying on a number of authorities.

6. I have to start by reminding myself that this being a first appeal, I am required to re-evaluate the evidence on record and come to my own independent conclusions and inferences. See **Okeno –Vs- Republic [1972] EA 32**.

7. I have re-examined the evidence on record and considered the submissions both for the Appellant and the State. The burden is always on the prosecution in a criminal case to prove the case against the accused beyond any reasonable doubt. The accused has no burden to prove his innocence.

The prosecution is required to prove every element of the offence beyond reasonable doubt.

8. In the present case the Appellant was charged firstly with creating a disturbance in a manner likely to cause a breach of the peace. In **Gervasio Kimani –Vs- Republic (2011) eKLR** the court stated that it is not enough for the State to demonstrate merely that the Appellant caused a disturbance, the prosecution must prove that there was a brawl caused by the accused.

9. With the evidence on record in my view, the prosecution did not prove the ingredients of the offence. The evidence of PW1 Lawrence Mwau (the location chief, Kee Location) was that at 10.00 a.m. he mobilized people to build a road damaged by heavy rains. They repaired the road with cement and sand. After 1.00 p.m., the Appellant, his brother Mbatha Joel and a young boy came and pulled a donkey on the wet part of the repaired road. Then the mother of the Appellant came with her daughter and took the rope of the donkey and damaged the wet part of the repaired road. It was his evidence that he phoned the OCS Kola police station but did not get him and left the matter there, but was later called by the OCS Kilome police station and told that the accused had reported that PW1 had assaulted the Appellant.

10. In my view, there was no evidence to support the charge of causing a disturbance by the Appellant to the people who repaired the road, in that there was no verbal exchange or threat to violence. The evidence on record was merely that there was a known existing dispute that the land was not a road but land belonging to the mother of the Appellant which the chief and others had attempted to repair without involving the Appellant's family. In those circumstances the act of the chief might even have been unlawful and mere stopping or questioning what he was doing could not amount to any crime, let alone creating a disturbance. Even if the place was a public road, the act of the Appellant did not amount to creating a disturbance, but perhaps obstructing the performance of a lawful duty, or destruction of the road works which the Appellant was not charged with.

11. I thus find that the prosecution did not prove the offence of creating disturbance beyond any reasonable doubt.

12. With regard to count two of giving false information to a person employed in the public service, the charge was also not proved by the prosecution beyond doubt. The Appellant did report to the police that he was assaulted. He was issued with a P3 form and it was filled and the injuries noted by the medical personnel were classified as harm. The fact that the alleged culprit PW1 denied assaulting the Appellant did not mean that the Appellant gave false information as the alleged culprit had a right to deny the allegation under the law and Constitution.

13. In any case, the alleged victim or those with him had not made any contra report to the police thus what the Appellant informed the police might as well be true.

14. More importantly, on the same issue, the allegation was that the Appellant gave false information to No. 118199 PC Euticus Murimi a police officer who was not called as a witness to testify. Thus the evidence on record about the false information is hearsay evidence and should not have been relied upon by the trial court to convict the Appellant.

15. Thus in my view, both convictions cannot be sustained. Consequently the probation sentence cannot also stand.

16. Consequently, I allow the appeal quash the convictions and set aside the sentence of probation imposed by the trial court.

Delivered, signed & dated this 23rd day of February, 2021, in open court at Makueni.

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GEORGE DULU

JUDGE