



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MERU**  
**CRIMINAL APPEAL NO. 48 OF 2019**  
**(CORAM: F. GIKONYO J.)**

**PURITY KARIMI ..... 1<sup>ST</sup> APPELLANT**

**JUDY GACHERI..... 2<sup>ND</sup> APPELLANT**

**-versus-**

**REPUBLIC ..... RESPONDENT**

**(This being an appeal from the original conviction and sentence in Meru CMCCRC No. 1093 of 2017 delivered on 25/2/2019 by Hon H. N. Ndungu, CM)**

**JUDGMENT**

**The Charge they faced**

1. **PURITY KARIMI** and **JUDY GACHERI** were charged with offensive conduct contrary to Section 94 (1) of the Penal Code. The particulars were that on 28/4/2017 at Kirindine area of Nkomo Location in a public place namely Digital Emmanuel Hotel, jointly and unlawfully insulted Dorris Mulekyo Kieke by calling her 'stupid' and 'Mukenye' with intent to cause a breach of peace to the said Dorris Mulekyo Kieke.
2. They pleaded not guilty and after trial, in a judgement dated 25/2/2019 the trial magistrate convicted them of the offence. The appellants offered nothing during mitigation and were consequently fined Kshs. 100,000 each or to serve six months in prison.
3. They were dissatisfied with the said conviction and filed this appeal which carries the following grounds of appeal;
  - a. **That the learned Chief Magistrate erred in law and in fact by fining the appellants excessively.**
  - b. **That the learned Chief Magistrate erred in law and in fact by not finding that the charge herein was a "woman issue" and acquit the accused.**
  - c. **That the learned Chief Magistrate erred in law and in fact in finding that the prosecution has proved its case beyond reasonable doubt.**
  - d. **That the learned Chief Magistrate erred in law and in fact in being taken by emotions against the accused due to the background of the charge sheet.**
  - e. **That the learned Chief Magistrate erred in law and in fact by disregarding the defence.**
  - f. **That the learned Chief Magistrate erred in law and in fact in prejudicing the accused as feminist criminals.**

**Appellants Submissions**

4. The appellants in their submissions argued that the prosecution did not prove their case beyond reasonable doubt because their utterances did not provoke the breach of peace as people went about their business. They quoted the case of **Caxton Mulinge v. Republic [2017] eKLR** where it was held;

**“.....on hearing the utterances that he made she walked away. PW3 stated that when the Appellant insulted the Complainant she simply laughed.**

**None of the witnesses stated what effect the words uttered had on them. In a matter where it is alleged that the act was intended to provoke a breach of peace, the Prosecution is duty bound to prove beyond reasonable doubt that the act complained of was likely to make people resort to physical violence (See Mule vs. Republic Criminal Appeal No. 873 of 1982).**

**The words uttered by the Appellant were abusive but the two (2) witnesses who were present did not react to them. There is no indication of there having been a likelihood of being provoked.”**

5. They contended further that the trial magistrate never took the time to consider that the alleged offensive words emanated from the first appellant and not the second appellant and therefore the sentence that was imposed was faulty. Furthermore that the sentence imposed was excessive and was; they urged that in the event the court disallows the appeal then the fine payable should be reduced to an amount less than 5,000 which is the fine payable in this instance.

#### **Respondents Submissions**

6. The respondents on the other hand argued that they proved the ingredient of offensive conduct. It was proven that the complainant and the accused were at a public place as according to PW1 the 1<sup>st</sup> appellant was at the gate of Tigania Law Courts and Emmanuel Hotel which are public places. This fact was corroborated by PW2 and PW3. Secondly, that the abusive words were used against the complainant. It was demonstrated by PW1 in her testimony that as she was passing the gate at the court the appellants were mocking her calling her “mukeye” which means uncircumcised lady. The 1<sup>st</sup> appellant continued the abusive language at the Emmanuel Hotel. Finally, that the manner in which the appellants behaved was with the intent to provoke a breach of peace as PW1 was likely to result to violence because of the abusive language that was directed towards her.

#### **Analysis and determination**

7. The duty of first appellate court is to evaluate the evidence and come to own conclusions except I am reminded that I neither saw nor heard the witnesses when they testified. See: **SELLE & ANOTHER vs. ASSOCIATED MOTOR BOARD COMPANY LTD. [1968] EA**

8. Although it is not my style to rehash evidence, the nature of this case forces me to reproduce the evidence adduced.

#### **The evidence**

9. The prosecution called 4 witnesses in support of their case. **PW1 DORIS MULEKYO** the complainant recalled that on 28/4/2017 she went to her place of work at 8.00 am. She had instructions from her employer Kitheka and Co. Advocates to go and file documents at the court registry. At the court she found the accused persons, who are also clerks to advocate’s standing at the gate. As she passed they started mocking her because of the way she was dressed. The 2<sup>nd</sup> appellant said “This stupid Mukamba will not be able to work in Tigania. She will close office very soon”. She did not respond and continued to the registry to file her documents. When she was returning she heard the 2<sup>nd</sup> appellant saying that it would be better if Hon. Sogomo, the magistrate would make orders that she should not continue entering court.

10. Later, she went for lunch with a client at a hotel near the court. The two accused persons entered the hotel and as she was talking to her client the 1<sup>st</sup> appellant approached them and picked a piece of meat from her client’s plate. Her client got offended and decided to leave. The 2<sup>nd</sup> appellant started abusing her by calling her “Mukenye” which means uncircumcised and added that she would circumcise her! She also told her that she would teach her a lesson because she had reported them prior after they had abused her but she decided to forgive them.

11. **PW2 PETER MUTETHIA** told the court that on 28/4/2017 he was at a hotel at Kirindine, near Tigania court taking tea when PW1 entered with a man. The accused persons later entered the hotel and the 1<sup>st</sup> appellant picked a piece of meat from the plate of the person PW1 was with. The man left the hotel and the 1<sup>st</sup> appellant started to tell PW1 to dress like a girl because she was a woman. She further added that PW1 dressed badly because she was not circumcised and she would have to get circumcised because they would not stay with ‘Mukenye’ there. The 2<sup>nd</sup> appellant just stood there laughing and cheering behind her. **PW3 CELESO KAITHIKE** corroborated PW 2’s testimony

12. **PW4 AP BENSON WAFULA** told the court that on 28/4/2017 at around 1400hrs he was at the police station when PW1 reported that she had been abused by the accused persons. He recorded her statement and on 15/5/2017 he arrested the appellants.

13. **DW1 PURITY KARIMI** told the court that on the material date they gathered at the court to perform some work. She was together with 2<sup>nd</sup> appellant, a clerk called Ambrose and the security guards at the gate. They happened to have laughed as PW1 passed. At around 10.00 am she left with the 2<sup>nd</sup> appellant and went to a nearby hotel close to the court. PW1 came with 2 people she claimed were her clients and they all sat close to each other. They started sharing food with her clients. As PW1 was eating her food poured and she claimed there were witches in the hotel.

14. They finished eating and together with the 2<sup>nd</sup> appellant they sat outside their offices. PW1 saw them and decided to sit between them. Muthomi gave them Ksh. 300 to buy sodas and when they did PW1 started arguing and she cautioned her not to bring arguments in her office. Three days later they were arrested by the police for abusing PW1.

15. **DW2 JUDY GACHERI** told the court that she recalled that on the said date they met their colleague Ambrose and a security guard and they were laughing and PW1 came and said that they were laughing at her. They went back to the office and when PW1 came to talk to them

they ran away. They were later arrested and charged.

16. **DW3 AMBROSE KAGGIA** testified and told the court that on the material date he was with the accused persons and no one used abusive language.

#### **Elements of offence**

17. According to **Section 94 (1)** of the **Penal Code**;

**“94. (1) Any person who in a public place or at a public gathering uses threatening, abusive or insulting words or behaviour with intent to provoke a breach of the peace or whereby a breach of the peace is to be occasioned is guilty of an offence and is liable to a fine not exceeding five thousand shillings or to imprisonment for a term not exceeding six months or both.**

18. Accordingly, the Prosecution was required to prove that;

- (i) The incident took place at a public place.
- (ii) While at public place, the appellants used abusive words as against the Complainant.
- (iii) The intent was to provoke a breach of the peace.

#### **Public place**

19. According to the complainant’s evidence the incident herein happened twice on the same day: at the gate of the court at Tigania and at Digital Emmanuel hotel. Other witnesses corroborated this fact. The Penal Code defines public place as follows:

**“public place” or “public premises” includes any public way and any building, place or conveyance to which, for the time being, the public are entitled or permitted to have access either without any condition or upon condition of making any payment, and any building or place which is for the time being used for any public or religious meetings or assembly or as an open court”**

20. The evidence show that the incident took place at a public place. I find that the prosecution proved that the incident took place at a public place.

Use of abusive words

21. According to the complainant, the 2<sup>nd</sup> accused person called her “a stupid mukamba” at Tigania court and “mukenye” at Digital Emmanuel Hotel. Although the 1<sup>st</sup> appellant was with the 2<sup>nd</sup> appellant at the courts, she did not utter any abusive terms towards the complainant. But, when they came to the hotel, she picked a piece of meat from the plate of the complainant’s client. It was the testimony of both pw2 and pw3 that she then made comments on the manner the complainant was dressed and said it was because she was uncircumcised. I should sound a caution here; that in describing people, be careful not to confuse details of dress or dressing with aspects of character. The 1<sup>st</sup> appellant clearly used abusive language when she commented that the complainant’s manner of dressing is because she was not circumcised.

22. Their defence that they did not use abusive language and that they were just laughing is hollow. The prosecution witnesses proved that they used abusive language against the complainant.

23. The words “stupid Mukamba” and “Mukenye” are abusive. According to the witnesses “mukenye” in the local dialect means uncircumcised lady. Accordingly, I find that the utterances by the appellants were abusive in the context of the law.

#### **Intention to cause a breach peace**

24. Were the words spoken with the intention to cause a breach of peace? Given the nature and meaning of the words spoken, the intent was to get the complainant to react negatively and caused a public disturbance. Female circumcision is still a big menace in our society and the words spoken towards the complainant is a form of bullying. This type of bullying has made some girls or ladies feel lesser beings in a society which regard the circumcised ones as the “real” ladies. The derogatory reference completely detracts from their core as a person and hurts their esteem to feel as honorable members of society. Some of the victims have been forced to flee their homes or communities; others have been forced to take a cut in order to remove the “stigma” of the kind of derogatory reference I have seen here. Therefore, reference to a lady as a “Mukenye” which means uncircumcised lady in this region of Meru is not only demeaning but quite provocative. The appellants were aware of the choice of abuses they hurled at the complainant and the effect on the recipient. Thus, by taunting the complainant at the courts, her place of work, and at a hotel while she was with a client, and using the words “stupid mukamba” and “mukenye” towards her, the appellants’ intent was to provoke a violent reaction from the complainant and cause a breach of peace. Accordingly, the prosecution did prove all the ingredients of the offence. The appellants appeal on conviction therefore fails.

#### **Of sentence**

25. **Section 94 (1)** of the **Penal Code** provides for a fine not exceeding five thousand shillings or for a prison term not exceeding six months

or both. The Trial magistrate herein imposed a fine of one hundred thousand or in default to serve six months in prison.

26. In light thereof, I find that the fine imposed was excessive. Consequently, I reduce the fine; each to pay five thousand shillings in default to serve a jail term of six months. However, let me state in passing that, these kind of abuses (Mukenye) among ladies are prevalent in this region and cause breach of the peace in many instances. Where it is apt, deterrence should be employed as a noble objective of justice. And, in appropriate cases, courts should be bold enough to impose a fine and a jail term or a jail term without the option of a fine.

27. It is so ordered

**Dated, signed and delivered at Meru this 29<sup>th</sup> day of July 2020**

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**F. GIKONYO**

**JUDGE**