REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MARSABIT

CRIMINAL APPEAL NO.14 OF 2018

HASSAN BIDU GUYO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from original conviction and sentence in Criminal case no.241 of 2016

of the Senior Resident Magistrate E.K.TOO at Moyale)

JUDGMENT

The appellant was charged with the offence of incitement to violence Contrary to Section 96 of the Penal Code. The particulars of the offence are that the appellant on the 28th day of May at Dabel trading center in Moyale subcounty within Marsabit county without lawful excuse uttered words "*Watu wote wa clan ya migo ni lazima watoe Watoto wao kutoka shule ya Dabel Junior Academy ama shida itakokea*" an act which was calculated to lead to the forcible removal of school children at Dabel Junior academy the property of Adan Mamo

The trial court convicted the appellant and sentenced him to pay a fine of Ksh.1 million or in default to serve one year imprisonment. The grounds of appeal are That:-

1. The learned magistrate erred in law and in fact in convicting the appellant against the weight of the evidence.

2. The learned trial Magistrate erred in law and in fact in finding that there was evidence of incitement contrary to Section 96 of the Penal Code.

3. The learned trial magistrate shifted the burden of proof onto the appellant.

4. The learned trial magistrate failed to analyse the evidence by the appellant.

5. The learned trial magistrate failed to appreciate and interrogated the ingredients of Section 96 of the Penal Code in arriving at his judgment

6. The learned trial magistrate failed to accord the appellant a fair and just hearing.

7. The learned trial magistrate erred in law and in fact in relying solely on the demeanor of the respondent's witness to arrive at his judgment.

Mr. Halake appeared for the appellant. Counsel submitted that there was no evidence to the effect that the appellant uttered the words complained of. None of the seven witnesses talked of the alleged words. The conviction is against the weight of the evidence. There was no physical injury to the complainant or destruction of property. The pupils and their parents were not called to testify. It was alleged that there were meetings held on 27th and 28th of May 2016. The evidence shows that the appellant did not attend the meeting of 27.5.2016. Counsel further submit that there is discrepancy on the alleged motor bikes used to take away the pupils. The number of students taken away from the school is also contradictory. PW3 testified that it was 51 students. PW4 said it was 41 while the investigating officer stated that only 18 pupils were removed. The discrepancy confirms that no investigations were conducted and if there were any investigations then they were poorly conducted.

Mr. Halake further submitted that the evidence is too weak and is insufficient to warrant the conviction. It was alleged that the chief also

held a meeting but he was not summoned to testify. PW1's statement was recorded on 5.6.2016 yet the matter was reported the following day on 6.6.2016. The trial Court did not consider the appellant's defence. The appellant also had a child in the school. There was a victim impact assessment report that was done by the prosecution and is fabricated. There was evidence that the proprietor of the school had dumped the parents. Parents took away their children to a free public school. The tender to construct the school was issued in 2013 and the appellant could not have raised the issue in 2016. The appellant testified that he had several contracts.

The state opposed the appeal. Mr. Mwangangi submit that the evidence show that there was a meeting called by the appellant. PW2 testified on the words uttered by the appellant. Several meetings were held. The language used in the meeting was the local dialect that was translated into the words on the charge sheet. Under Section 96 of the Penal Code the effect of the words is paramount. Injury or destruction of property may not take place. Although there is confusion on the number of motorbikes used or whether the motor bike had number plates that was immaterial. The important fact is that motor cycles were used to take away children from the school. Similarly, the number of pupils removed is not important. There was genuine fear by the victims. Teachers had to leave the school as children were kept away. PW1, PW2 and PW3 attended the meetings and they all come from the appellant's Migo clan.

This being a first appeal the court is supposed to evaluate the evidence afresh and make its own conclusion. Seven witnesses testified for the prosecution while the appellant called two witness. **PW1 Adan Ali Roba** testified that he is from the a Sakuye tribe from Migo clan. There was a meeting called by the elders on 27.5.2016. The appellant complained that the complainant had done a construction and brought fundis from another place. The appellant was not in that meeting but had earlier complained he had been denied the job. On 28.5.2016 the appellant held a meeting in the presence of about 35 people. He wanted to know what the elders had resolved. The appellant asked those present to remove their children from the complainant's school. It is PW1's evidence that the appellant stated that if anybody refused to remove his children and if he dies he should not be buried. If he disappears nobody should look for him. On the 6.6.2016 the school was attacked. PW1 saw motorbikes removing children from the school. He saw the appellant riding one of the motorbikes. There were three other motorcycles. The matter was reported to the Police. PW1 is the chairman of the affected school. The four motorbike which removed the pupils from the school did not have their number plates.

PW2 Isaack Wario Boa testified that on the 4.6.2016 at about 3.00pm he attended a meeting that had been called by the appellant. The appellant uttered the following words, "**my brothers, my parents I asked the person, the owner of Dabel Junior by the name Adan Mamo for a job to build the school and he denied me to build the school and denied me livelihood."** PW2 also testified that the appellant wanted parents to remove their children from school so that the teachers could go back to Nairobi and the school become a resting place for donkeys. The appellant said he would use force to remove the children. On 6.6.2016 the appellant used force and removed children from school. PW2's grand children were in that school.

PW3 Adan Ali Boru is a village elder. In January 2013 the appellant complained that the owner of Dabel Junior school had denied him the contract to build the school. PW3 is an uncle to the appellant. The appellant wanted him to talk to the owner of the school so that he could be given the contract. PW3 talked to the owner who told him that he had given the contract to another person. On 27.5.2016 there was a meeting. The appellant informed people that they should agree with him and remove their children from the school so that the school can be empty and become a resting place for donkeys. On 4.6.2016 another meeting was held and the appellant was present. The chief was also present and asked for the meeting to be ended. It is the evidence of PW3 that on the 6.6.2016 the appellant and three other people namely Abdi Dikacha, Hassan Amani and Hassan Adan removed children from school using motorbikes which had no number plates. Once again on the 7.6.2016 the same people went to the school and removed children. The chief called a meeting and ordered the removal process to stop. The matter was reported to the Police. It is his evidence that he attended three meetings. The appellant complained that he had been denied the job to build the school. The appellant had married his daughter but later divorced her. They had one child who was attending the affected school. It is PW3 who was paying the fees for the child.

PW4 Mohamed Bonaya Raja testified that he was the supervisor for the construction of the school. The construction started in 2013 and was completed in 2015. Enrollment started in April 2015. students were enrolled and the school was opened. There was a community meeting held on 27.5.2016. On 6.6.2016 children were taken from the school. The appellant was involved in the process of taking away the children. There were motorbikes being used to take away the children. The other riders of the motorbikes were Urera, Adan Adi Dikacha and Hassan Amani. It is his evidence that the students were removed because the appellant said he had asked for a contract but his request was declined. The motor cycles had no number plates. He was at the school with the headteacher when the students were being removed. The action scared the teachers. The school is still going on.

PW5 Kolo Godana informed the court that on the 8.6.2016 at 2.00pm he attended a meeting that had been called by the chief. The chief told them that he had called the meeting because the appellant had removed children from the school. The appellant had earlier asked members of the Migo clan to remove their children from the school. The meeting was disrupted. The Migo clan members refused to take away the children and the meeting ended. The owner of the school reported the matter to the police.

PW6 Adan Mamo Elema is the complainant. In 2013 he started the construction of a private primary school by the name Dabel Junior school. The appellant asked to be the contractor. He told him that he had already given the contract and he could join in as a mason. The appellant later sent Adan Ali Boru (PW3) who is his uncle and Adan Ali to request him to give the appellant the contract. He told them that he had already given out the contract. The construction was completed in early 2015 and he handed over the school to the Board of Governors. He took teachers from Nairobi and classes began on 6.5.2015. The appellant started inciting people not to join the school. On 4.6.2016 he was in Dabel and the appellant called his Migo clansmen and incited them. A resolution was passed that on the 6th June the children should be evicted from school. On the 6th which was on a Monday the appellant and his people stormed the school compound, harassed the students and forcefully took away the children. There was tension. He reported the matter to the Sakuye clan members as well as to the chief. The chief organized for a meeting on 8.6.2016. He informed the chief that the teachers were scared and the students were traumatized. The elders tried to intervene during the meeting but clansmen from the appellant clan said they would not stop the withdrawal of the children from the school because the appellant had told them so. The appellant had also said he will not stop the withdrawal of the children. PW6 told the meeting that he was going to report the matter to the police because there was no solution. It is his evidence that the children were removed from school on the 6th and 7th June 2016. He was in Dabel when the incident occurred. It was the appellant, Hassan, Adan Abdi Gurera and Abdi Dadacha who were removing the students from school. Those removed from school were not the appellant's children. During the meeting on 8.6.2016, two chiefs were in attendance.

PW7 PC Titus was based at Moyale Police station. The case was reported by PW6 on 10.6.2016. He investigated the case and had the appellant charge with the offence.

The appellant tendered sworn defence and stated that he is a sub contractor and a mason. He comes from Dabel in Moyale. On 28.5.2016 he was in Moyale town and was not at Dabel trading centre. He got information that members of the public who had students at Dabel were removing their children. The parents were complaining about the promise made by the owner of the school that the school will be sponsored. Since there was no sponsor the parents decided to remove the children. The school is owned by PW6. He also had a child at the school. It is his evidence that PW6 took him to court because he tried to seduce his wife. His wife rejected his approaches and thats why the complainant decided to take him to court. He had done other works. In 2014 he built a maternity ward as a sub contractor. He also built Dabel social hall. It is true that he had asked for the job to build the school in 2013 but he was not offered the job. However, the construction of the school is not the source of the conflict. The meeting which occurred on 27.5.2016 was in relation to a deceased person. He denied that he participated in the removal of the children from the school. The appellant and all the witnesses for the prosecution are his relatives. The appellant also told the court that he had differences with PW6 over a plot which the appellant bought. He bought the plot from one Mohamed Halake. The appellant told the seller that he could pay him more and refund the appellant's money but the seller refused.

DW2 Diba Doyo comes from Dabel. His children were attending Dabel Junior Academy but he decided to remove them. PW6 had promised them that they will pay fees for only one term and thereafter they would get scholarships. He had four students in the school. Since he was not getting Scholarships he removed his children and took them to a government school. Due to the school fees he realized that he had to sell his goats to pay the fees. He did not see the appellant removing children from school. He is a Sakuye elder. No property dispute or problem involving appellant's wife had been taken to the elders.

DW3 Ibrahime Ware comes from Dabel. He testified that the alledged offence never took place. The appellant has a son who is a student at the school. The child lives with his mother. He did not see the appellant removing students from school.

The appeal raises the following issues.

1. Were students removed from Dabel Junior Primary school on 6th and 7th June, 2016.

2. Did the appellant incite the removal of the students from Dabel Junior primary school.

3. Did the prosecution prove its case against the appellant beyond reasonable doubt?

The prosecution evidence is that students were removed from the school on 6th and 7th June 2016. PW5 who supervised the construction of the school was present with the headmaster when children were being removed. The complainant was also in Dabel on 6th and 7th June, 2016 when students were being removed from the school. PW1, PW2 and PW3 also testified that children were removed from the school on those two days. DW2 and DW3 testified that there was no such incident involving the removal of the students from the school.

From the prosecution evidence, it is established that students were removed from the school on the 6th and 7th, 2016. PW1, PW2, PW3, PW4, PW5 and PW6 witnessed the removal of the students from the school. The incident was reported to the area chief who called a meeting on 8th June, 2016. The complainant later reported the matter to the Police. The incident actually took place. The evidence of PW1 to PW5 objectively proves that the students were removed from the school. The five witnesses have no grudge against the appellant. The defence evidence does not disprove the fact that students were removed from the school. DW2 testified that he removed his children from the school because he had been promised sponsorship. The witness did not state how and when he removed his children. All what he could do was to transfer his children to another school and that is not the same as Physical removal of pupils who had attended school and are physically taken away. I am satisfied that indeed the incident took place.

The second issue is whether it was the appellant who incited the removal of the pupils from the school. The appellant contends that the refusal of the contract was in 2013. In between he had other contracts. He was not in Dabel when the incident occurred. Further, the appellant did not attend the meeting of 27th May, 2016. From the prosecution evidence, it is clear that there were several meetings held relating to the issue of removal of the students from the school. The first meeting was held on 27th May, 2016. The evidence shows that the appellant did not attend that meeting. A second meeting was held on 28th May, 2016. Another meeting was held on 4th June, 2016. After the incidents of 6th and 7th June, 2016, a meeting that was attended by two chiefs was held on 8th June, 2017. The matter was reported to the Police on 10th June, 2016.

Counsel for the appellant contends that there is no evidence that the appellant uttered the words indicated on the charge sheet. According to PW2, the appellant attended the meeting of 4th June, 2016 and complained that he had been denied livelihood by PW6. The appellant asked members of his clan to remove their children from the school. PW1 testified that the appellant called for the meeting of 28th May, 2016. According to PW1 the appellant complained that he had been denied the job of constructing the school. It appears that soon after the meeting of 4th June, 2016, the removal took place the following Monday 6th June, 2016.

There is ample evidence to the effect that the appellant was not happy since he had been denied an opportunity to construct the school. The appellant confirmed in his defence that indeed he had asked PW6 to give him the contract. He sent PW3, his uncle, to plead his case of being given the contract. The school began its operations in May, 2015 and seemed to have progressed well by May, 2016. The evidence proves that it is the appellant who was inciting parents to remove their children from the school. Although some parents were not called to testify PW2 testified that he had his grandchildren in the school. The evidence does prove that parents were being asked to remove their children from the school. I am satisfied that it is the appellant who hatched the plan to have pupils removed from the school.

Did the prosecution prove its case against the appellant beyond reasonable doubt? Section 96 of the Penal Code states as follows:-

Any person who, without lawful excuse, the burden of proof whereof shall lie upon him , utters, prints or publishes any words, or does any act, or thing, indicating, or implying that it is or might be desirable to do, or omit to do, any act the doing or omission of which is calculated -

(a) To bring death or physical injury to any person or to any class, community or body of persons; or

(b) To lead to the damage or destruction of any property; or

(c) To prevent or defeat by violence or by other unlawful means the execution or disobedience of any such law, or of any lawful authority.

Is guilty of an offence and is liable to imprisonment for a term not exceeding five years.

Counsel for the appellant contends that there was no physical destruction of property as envisaged under Section 96 of the Penal Code. Even if no physical damage was experienced, it is clear to me that the actions of the appellant damaged the reputation of the school. It is clear that had PW6 and the teachers confronted the appellant and his people, physical injury or damage to property could have occurred. Under Section 96, apart from uttering or printing the inciting words, the actions of the accused can also constitute the offence of incitement. Witnesses saw the appellant physically removing the children from the school using a motorbike. Whether the motorbikes used had their number plates or not is immaterial. Whether 51 students or 41 or 18 students were removed does not matter. What is crucial is that it is the appellant who urged his Migo clan members to remove their children from the school. The appellant followed up those words with actual actions. On 6th and 7th June, 2016, together with other named persons, went to the school and removed students using motor bikes. The prosecution evidence was not far fetched and is not meant to frame the appellant.

The appellant maintain that he had a dispute over a plot with PW6. PW6 testified and was never asked about the alledged plot. Similarly, PW6 was never questioned about the alleged approaches to the appellant's wife. There was no shift of burden of proof. Infact Section 96 of the Penal Code places the burden of proof on the person alleged to have invited violence. Once it is established that there was incitement to violence and disobedience, the burden of proof shifts to the accused. The defence evidence does not raise any doubt on the prosecution case. It is established that it was only the appellant who was complaining that he had been denied livelihood for having not been given the construction agreement. He incited other people and followed up his words with physical action. Why would PW6 report the matter to the chief and subsequently to the Police if there was no incidents of removal of the students from the school. Even if the area chief did not testify, that does not mean that there was no meeting held on 8th June, 2016 called by the chief. This was an attempt to resolve the matter amicably and when the appellant insisted that the pupils would continue to be removed from the school, the matter was reported at the Police station.

Since the incident started from 27th May, 2016, the fact that PW1's statement could have been recorded on 5th June, 2016 is immaterial. The alleged statement was not produced as an exhibit. It is possible that PW1 went to report to the Police on 5th June, 2016 as he was the chairman of the school. It is submitted that the appellant had a son at the school. The evidence shows that he was not the one paying the school fees.

In the end, I do find that the trial was fair. At times the appellant was represented by his counsel. Even after the appellant and his witnesses testified on 27.8.2017, it took a long time before the trial Court fixed a date for judgement. The appellant requested for the proceedings to be typed before making his submissions and his request was granted. Judgement was delivered on 26.4.2018. It took another long time before the sentence was passed on 1.11.2018. The Probation officer's report is dated 26th June, 2017. There is a victim impact assessment report dated 6.9.2018. The appellant kept on requesting for adjournment and was accorded the same. The conviction is based on the evidence. The trial Court did not convict only on the basis of the demeanor of the defence evidence. The court did analyses the entire evidence. I am totally in agreement with the trial court that the prosecution proved its case beyond reasonable doubt.

The appellant was sentenced to pay a fine of Kenya shillings one million or in default serve one year imprisonment. The maximum sentence under Section 96 of the Penal Code is five years imprisonment. I do find the sentence imposed by the trial Court especially the amount of fine payable to be excessive. The appellant is a first offender. He has six children. He is 36 years old and takes care of his family. Taking the circumstances of the case, I do find that the sentence imposed by the trial Court is excessive. I do set aside the sentence imposed by the trial Court and replace it with a fine of Ksh.50,000 in default the appellant to serve six (6) months imprisonment.

Dated, Signed and Delivered at Marsabit this 29th day of January, 2019

CHITEMBWE

JUDGE