



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAMIRA

CRIMINAL APPEAL NO. 9 OF 2016

CHARLES HAMISI NYARANGI.....1ST APPELLANT

NEMWEL OMBUI NYARANGI.....2ND APPELLANT

DOUGLAS AGETA NYARANGI.....3RD APPELLANT

=VRS=

REPUBLIC.....RESPONDENT

{Being an appeal against the conviction and the sentence of Hon. N. Okumu – RM dated and delivered on the 17th day of December 2013 in the Original Nyamira Chief Magistrate’s Court Criminal Case No. 280 of 2011}

JUDGEMENT

The three appellants in this consolidated appeal were accused persons 3, 4 and 1 in the court below. They were charged with creating a disturbance in a manner likely to cause a breach of the peace contrary to Section 95(1) (b) of the Penal Code with an alternative charge of trespass upon private land contrary to Section 3 (1) of the Trespass Act.

In the principal charge the particulars were that on 4th April 2011 at Itibo Sub-location in Nyamira County they jointly created a disturbance in a manner likely to cause a breach of peace by chasing Richard Sigira Sanganyi and his workers out of his shamba while armed with pangas with intent to injure them.

In the alternative charge, it was alleged that on 4th April 2011 at the same place they trespassed upon a Land Parcel No. North Mugirango/Ikongwe/21 the property of Richard Sigira Sanganyi by claiming the said land to be theirs.

They all pleaded not guilty to the charge. After considering and evaluating the evidence from both sides, the trial magistrate found the accused persons guilty on the principal charge, convicted them and sentenced them to a fine of Kshs. 8,000/= in default two months’ imprisonment each.

The appellants were aggrieved by the conviction and sentence and they preferred appeals which were later consolidated. Their grounds of appeal are that: -

- “1. The learned trial 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 convicting the appellant on the basis of contradictory evidence.**
- 3. The learned trial magistrate erred in law in shifting the burden of proof to the Appellant.**
- 4. The learned trial magistrate erred in law and in fact in rejecting the evidence adduced by the Appellant without giving reasons.**
- 5. The evidence adduced did not support the charge against the appellant.**
- 6. The sentence meted out against the Appellant was manifestly excessive, harsh and oppressive in the circumstances of the case.”**

The appeal was canvassed by way of written submissions which I need not to reproduce here. Suffice it to say that as is my duty as the first

appellate court, I have considered and evaluated the evidence in the court below so as to arrive at my own conclusion. I have done so while appreciating that unlike the trial magistrate I did not have the benefit of observing the demeanour of the witnesses.

The particulars of the charge against the appellants were that on the material day they created a disturbance in a manner likely to cause a breach of peace by chasing Richard Sigira Sanganyi and his workers out of his shamba while armed with pangas with intent to injure them. I agree with their advocate's submission that the ingredients of the offence established under **Section 95 (1) (b)** are that: -

“(a) The accused person brawled or in any other manner created a disturbance.

(b) That it was done in a manner that was likely to occasion a breach of peace.”

In this case it was alleged that firstly the accused persons chased Richard and his workers from his land with pangas with intent to injure them. Chasing someone and his workers from his shamba with pangas would most definitely create a disturbance in a manner as is likely to cause a breach of the peace. However, it is my finding that in this case those particulars were not proved. It would appear that there were two incidents on that day one involving the two wives of the complainant and the other involving the complainant himself. The appellants were arrested concerning the incident that pertains to the complainant. Nowhere in his evidence did the complainant state that he was chased from his shamba with pangas by the appellants. To the contrary his testimony was that as soon as they alleged he had forged his documents, he and his workers left peacefully. There was no disturbance as he left without an argument. If there was an earlier incident where the appellants chased away his wives and workers, then it was not this one and the police should have charged them separately for that.

It is my finding that the offence they charged the appellants for was not proved beyond reasonable doubt and indeed a prima facie case had not even been established against them to warrant them being put on their defence. It is never the duty of an accused person to prove their innocence or even disprove the case for the prosecution and whatever they (appellants) said in their defence could not in the circumstances of this case be evidence that they did not offer any rebuttal to the prosecution's case. I find merit in their appeal and accordingly allow it. Their convictions are quashed and the sentences are set aside. If any fines were paid the same should be refunded to them.

Dated, signed and delivered at Nyamira this 24th day of January 2019.

E. N. MAINA

JUDGE