



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CRIMINAL APPEAL NO. 97 OF 2018

ESTHER KEMUNTO MAKORI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the judgment of Hon. N. S Lutta delivered on the 19/10/2018 in CMCC no. 2036 of 2013)

JUDGMENT

1. The appellant was charged with the offence of, Creating disturbance in a manner likely to breach the peace contrary to section 95 (1) (b) of the Penal Code. The particulars of the offence were that, on the 14<sup>th</sup> day of November 2013 at around 4pm at Mwangichana location at Marani District within Kisii County the appellant created disturbance in a manner likely to cause a breach of peace by using abusive words to one Elizabeth Nyaboke Ogamba. She was convicted of the said offence and fined Kshs. 30,000/- in default 4 month's imprisonment.

2. She filed this appeal on the 25/10/2018. Her grounds of appeal are that; the prosecution failed to prove their case beyond reasonable doubt as there were glaring flaws, contradictions discrepancies and inconsistencies, the trial court erred in law and fact in evaluation and analysis of the evidence tendered and that the sentence imposed against the appellant was harsh.

3. As the first appellate court, I am required to re-evaluate the evidence independently and reach my own conclusion as to whether to uphold the conviction and sentence. I must bear in mind that I neither heard nor saw the witnesses testify (*see Okeno v Republic [1972] EA 32*).

4. The prosecution called 3 witnesses. Pw1 Elizabeth Nyaboke Ogamba testified that on the 14/11/2013 at 4pm she was at her home. Nancy Bosibori and Japheth Asiako were visiting her. She heard a person abusing her outside her fence. She went to check and found it was Esther, the appellant. She asked what was happening and the appellant continued to abuse her. She called her a prostitute and that she had been infected with AIDS by policemen that she should go and spread it in the market. She also told her that she would kill her and bury her and that she will follow her children who she had taken to boarding school. She went and reported the incident to the police. The appellant is her brother in law's wife and a neighbor. Pw2 Nancy Bosibori testified that on the 14/11/2013 she was at the home of Pw1 at 4pm. She heard the appellant who was outside the compound saying that they did not want beer and that she should go and check on the policeman who had infected her with AIDS. The appellant was addressing Pw1 as she was facing Pw1 home. The appellant stated further that she will see whether the children of Elizabeth will proceed with school and that her money will get finished on the road. Pw3 Japheth Asiako testified that on the 14/11/2013 at 4pm he was at the home of Pw1. Pw1 sent her child to add fire to the food. He heard the appellant who was in her shamba tell Pw1 that nobody was to report her to the police except that she would die of AIDS that had been infected on her by policemen. That the children of Pw1 would not finish school as she would die of AIDS. Elizabeth did not reply.

5. The appellant in her defense testified that she did not abuse the complainant as alleged. The complainant is her daughter in law. They have not been living in harmony with the complainant. She brews illicit liquor and alleges that he is the one who reports to the police. Her husband is the chairman of the community policing. That on the material day she was involved in a vaccination exercise. There are prosecution witnesses who did not attend court. The evidence of the prosecution witnesses is contradictory. The complainant has a pending case against her husband CMCC No. 167 of 2013. She did not utter the alleged words against the complainant. The charges against her are not true.

6. Mr. Obure for the appellant submitted as follows; that the investigating officer was not called, thus if a party fails to call a witness it is because their evidence will be adverse to them. That failure to call the witness was fatal to the prosecution case. That Pw1, Pw2 and Pw3 gave contradictory evidence, that Pw2 testified that she heard '*Charia tell Elizabeth to stop abusing the accused*'. That Pw1 should have been the one to be charged with abusing the appellant. That Pw1, Pw2 and Pw3 produced their statements in cross-examination, they claimed they did not tell the police what was in their statements. That all three witnesses said that Pw1 was a brewer of alcohol. That the judgment of the lower court is unsafe. The appeal should be allowed.

7. Mr. Otieno for the Respondent conceded to the appeal. He submitted that the issue of the investigating officer not testifying is not fatal to the case. That they concede to the appeal because it was not enough to say that the appellant caused disturbance, it has to be shown how the disturbance was likely to cause a breach of the peace. That though the appellant abused the complainant the trial court failed to consider how it would cause a breach of the peace. That the offence was not proved.

8. The issue for determining in this appeal is whether the prosecution proved their case beyond reasonable doubt. **Section 95 (1) (b)** of the **Penal Code** provides:

*“(1) Any person who –*

*(b) 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 misdemeanor and is liable to imprisonment for six months.”*

9. For the offence to be proved, the prosecution must establish that there was a brawl caused by the accused or that the accused created a disturbance in a manner that is likely to cause a breach of peace. In **Mule vs. Republic (1983) KLR 246 Porter Ag.J** was of the view that to prove a case of creating disturbance it is not enough to show that the accused merely created a disturbance, that the disturbance should have been likely to cause a breach of the peace. The learned judge described ‘peace’ as referring to the right of ‘wananchi to go about their daily activities without interference. In the case the evidence of Pw1, Pw2 and Pw3 was that the appellant used abusive words towards the complainant. Were the words likely to cause a breach of the peace? In considering this I have to consider the place the words were uttered and the persons who were present when the utterances were made. The incident took place at the complainant’s home. Pw2 and Pw3 were present. The words uttered were abusive and offensive however they could not have incited violence or caused a breach of the peace. The reaction of Pw2 and Pw3 was a clear indication that there was no breach of the peace, their peace was not interfered with nor were they incited in any way. In my view the charges were not proved as charged. The conviction was unsafe.

10. On the issue that the investigating officer was not called I agree with the submission that failure to call this particular witness was not fatal to the prosecution case.

11. Having found that the conviction was unsafe I quash the conviction and set aside the sentence. The fine paid by the Appellant, Kshs.30,000/= shall be refunded forthwith.

**Dated signed and delivered this 24<sup>th</sup> day of January 2019**

**R.E.OUGO**

**JUDGE**

**In the presence of;**

**Appellant Present**

**Mr. Obure For the Appellant**

**Mr. Otieno For the State/Respondent**

**Rael Court Clerk**