REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMININAL DIVISION

CRIMINAL APPEAL NO. 82 OF 2011

BETWEEN

THOMAS SENGENGE SHIRABU……...…….APPELLANT

AND

REPUBLIC ……RESPONDENT

(Being an appeal arising from original conviction and sentence by Hon. S. N. Obuya SRM 24.09.2010 in Butali SRM Criminal Case No. 122 of 2008)

J U D G M E N T

Introduction

1. The appellant Thomas Sengenge Shirabu was charged with the offence of creating disturbance in a manner likely to cause a breach of the peace contrary to Section 95(1)(b) of the Penal Code. Particulars of this offence were that on the 18th March, 2008 at Mundoli Village, Cheboso Sub-Location, South Kabras Location in Kakamega North District within Western Province created a disturbance in a manner likely to cause a breach of the peace thereby chasing ALFRED EBOSO while armed with a panga. The alternative charge was forcible entry contrary to Section 90 of the Penal Code. The particulars in this charge were that on the 28th of January, 2009 at Mundoli Village, Cheboso Sub_location South Kabras Location in Kakamega North District within Western Province, forcibly entered into the piece of land with intent to plough and did plough the property of Solomon Muliga. The appellant pleaded not guilty to the charges and the case was heard to its conclusion.

The Trial Court's Judgment

2. After carefully considering the evidence on record, the law and the submissions, the learned trial court came to the conclusion that the prosecution had proved its case against the appellant beyond any reasonable doubt. Consequently the appellant was found guilty as charged, convicted and sentenced to 1 year on probation.

The Appeal

3. The appellant was aggrieved and dissatisfied with the trial court's judgment and through his advocates M/S Shitsama & Company Advocates filed the appeal herein on the following main grounds;-

1. That the learned trial Magistrate erred in law and fact in convicting the Appellant on count 1 which the prosecution had failed to prove its case against him in respect of the said count beyond reasonable doubt.(sic)

2. That the learned trial Magistrate erred in law and fact in convicting the appellant of the said count I in face of serious contradictions with regard to the evidence of all the prosecution witnesses namely PW1 – PW4 respectively.

3.That the learned trial Magistrate erred in law and fact in convicting the appellant in respect of count I when the evidence of the prosecution witnesses Pw1 – PW4 was not properly corroborated or at all.

4. That the learned trial Magistrate erred in Law and fact in dismissing the Appellant's defence when the prosecution had failed to call any or evidence to rebut his, Appellant's evidence.

5. That the learned trial Magistrate erred in law and fact in not considering the totality of the evidence on record which occasioned a miscarriage of justice.

6. That the learned trial Magistrate erred in law and in fact in imposing a sentence that was manifesty excessive considering the circumstances of the case.

4. The appellant prays that the appeal be allowed; his conviction quashed and sentence set aside and/or varied.

5. This being a first appeal, this court is under a duty to reconsider and evaluate the whole of the evidence afresh as if it was hearing the case a new, the only difference being that it has no advantage of seeing and hearing the witnesses and has therefore to make provision for that fact. This means that if any of the grounds of appeal turn on the demeanour of any of the witnesses, then it would be prudent for this court to rely on the observations made by the trial court, with little or no variation in the trial court's findings and conclusions. Further, until the fresh analysis of the evidence is done by this court and its own conclusions drawn, it would be impossible for this court to say whether or not the findings of the learned trial court should stand. For these propositions, see the case of **Mark Oiruri Mose – vs – Republic [2013] eKLR and also Mwangi – vs – Republic [2006] KLR 28.**

6. An appellate Court will also not ordinarily interfere with the sentence imposed by the trial court since sentencing is a matter of discretion for the trial court. In the case of **Omuse – vs – Republic [200] KLR 214**, the Court of Appeal held that an appellate court will not interfere with the "discretion exercised by a trial judge unless it was evident that the judge acted upon some wrong principles or overlooked some material facts."

The Prosecution Case

7. The prosecution called four (4) witnesses. It was the prosecution case that on the 18th March, 2008 PW1 Fred Imbusi (Fred) a shamba boy while working on Solomon Malinga's (Solomon) shamba was chased by the appellant who at the time was carrying a panga. Fred ran away and reported to Solomon who testified as PW2, that the appellant wanted to cut him with a panga.

8. Solomon rushed to his shamba where he found the appellant and the two had an exchange. According to Fred, he was in the shamba with Zablon Namutuli (Zablon) who testified as PW3. Solomon confirmed that he had employed Fred to work in his shamba, and that on the 18th March, 2008 while in his home Fred reported to him that the appellant had attacked him and chased him with a panga. He went to his shamba and found the appellant who was in the company of others where they were blocking a furrow Fred had dug. He reported the matter to the police who summoned the appellant but the appellant did not respond to the summons.

9. Solomon further testified that on 28th January, 2009, the appellant went to his shamba again and

ploughed 1/8 of an acre. After making the report to the police, the police arrested the appellant and charged him. He produced his title deed to confirm that the said shamba was his.

10. Solomon also stated that he had a boundary dispute with the appellant over their adjoining parcels of land. Zablon confirmed that on the 18th March, 2008 as he was grazing cows the appellant entered Solomon's shamba and threatened to attack Fred. The appellant had a panga and was in the company of other people, and that the appellant chased away Fred who was working on the said shamba. Fred ran away and reported to the owner of the shamba who came to enquire what was happening.

11. The matter having been reported to the police was investigated by PW4 number 7470 Police Constable Moses Mwangi. PC Mwangi recorded statements from witnesses and also proceeded to the scene. The appellant was later arrested and charged with the charges for which he was tried. Later on the 28th January, 2009 there was another complaint by Solomon. That complaint gave rise to the alternative charge. PC. Mwangi produced Solomon's title deed as exhibit. It was marked "PEX1".

Defence Case

12. At the close of the prosecution case, the appellant was found to have a case to answer and was placed on his defence. He called one witness in addition to his own sworn statement. The appellant testified that it was Solomon who was digging a trench on appellant's shamba just at the boundary. The appellant claimed that when he found Solomon's children on his (appellant's) shamba, he reported the matter to the Assistant Chief. The Assistant Chief gave him two elders who accompanied him to the shamba but when the elders tried to talk to Solomon, a quarrel ensued. They left the shamba while Solomon and his children continued ploughing. The elders gave the Assistant Chief a report which he took to the District Officer's office, and thereafter the appellant was arrested. He denied committing the offences.

13. DW2 Hezbon Ouko a village elder confirmed that appellant made a complaint to the Assistant Chief in respect of his shamba claiming that Solomon was digging a trench therein. The Assistant Chief sent him (DW2) together with another village elder to the appellant's shamba where he claimed to have found Solomon digging a ditch in the appellant's shamba. Efforts to persuade Solomon to abandon the digging fell on deaf ears. He reported back to the Assistant Chief who wrote a letter which was to be taken to the D.O's Office.

Submissions

14. The appeal was canvassed by way of written submissions, which I have carefully considered. The details of the submission shall become apparent during the analysis of the grounds set out in the petition of appeal.

Analysis and Determination

15. As stated earlier, the appellant's main contention is that the prosecution did not prove the case against him to the required standard, namely proof beyond reasonable doubt. The appellant also contends that his defence was dismissed without any proper justification thereby occasioning a miscarriage of justice. The appellant also says that even if there was evidence in support of the charge against him, the same was so contradictory that it should not have been relied upon.

16. In their submissions, counsel for the appellant placed reliance on the case of **Mule – vs – Republic [1983] KLR 246** in which it was held that "the offence of creating disturbance likely to cause a breach of the peace constitutes incitement to physical violence, whether the appellant uttered the words which the complainant stated or not, the offence prescribed by Section 95(1)(b) of the Penal Code was not committed and the learned Magistrate erred in law in holding that ……."

17. In the instant case, it is clear that the appellant and Solomon who shared a boundary had a dispute over the same. On the material day, the appellant went to Solomon's land where Fred was working. The appellant who was armed with a panga shouted at Fred as he (appellant) ran towards Fred, telling Fred to

get out of the shamba. Zablon who was grazing cattle nearby also stated that he saw the appellant chasing Fred while he (appellant) was armed with a panga. Zablon stated that Fred had to run away. Clearly, the appellants' conduct constituted incitement to physical violence and breach of the peace contemplating physical violence. There is no doubt in my mind that if Fred had reacted to the appellant's threats instead of running away to where Solomon was, there would have been physical violence. It is immaterial that the other people who were with the appellant were not armed. The charge was against the appellant and I accept the testimonies of both Fred and Zablon that the appellant was armed with a panga and that he threatened to cut Fred as he chased him away from the shamba. The contradictions in the prosecution evidence complained of by the appellant, if any, are so minor, that they do not affect the totality of the evidence against him.

18. The appellant has also complained that the learned trial Court improperly excluded the defence case. A close look at the judgment reveals that the learned trial court considered the defence when the learned Magistrate stated: "On the other hand, I find the accused defence that PW2 and 4 other people are the ones who dug a trench on his shamba on that day is not believable defence and is an afterthought as the investigating officer (PW4) visited the scene confirmed the trench (mutaro) was dug on PW2's shamba and the accused had not reported to the police since 18.3.2008 to 25.3.2008 when he was arrested that the complainant (PW2) is the one who had dug a trench on the shamba." I have myself carefully reconsidered the appellant's defence and note that the same did not controvert the very overwhelming prosecution evidence against him. In light of the above, I find that the appellant's complaint that the trial court disregarded his defence has no basis and is accordingly dismissed.

19. As for sentence, I find no reason to interfere with the discretion of the learned trial magistrate who placed the appellant on probation for 1 year. The law provides for imprisonment for 6 months. My considered view is that, since the probation period has since been served, it would not change that fact even if the same was altered to 6 months. The trial court should however have cross checked the statute book to confirm the proper sentence prescribed by the law.

Conclusion

20. From all the above analysis, and from the fact that the prosecution evidence was not only overwhelming but also remained uncontroverted, I have reached the conclusion that the findings of the learned trial Magistrate were sound and need not be disturbed. Accordingly appeal on both conviction and sentence is lacking in merit and is thus dismissed. The appellant still has a right to appeal to the Court of Appeal within 14 days from the date of this judgment.

It is so ordered

Judgment delivered, dated and signed in open court at Kakamega this 31st day of July 2017

RUTH N. SITATI

JUDGE

In the presence of;

Mr. Elungata for Shitsama (present)……For appellant

Mr. Juma(present)……for respondent

Polycap……..Court Assistant