REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CRIMINAL APPEAL NO. 45 OF 2015

RASHID NGOLO…….....1ST APPELLANT

HAMISI ALI MUKULUNGU…….....2ND APPELLANT

CHARO KAZUNGU KAMBI…..…….....3RD APPELLANT

VERSUS

REPUBLIC…….....RESPONDENT

(From the Original Conviction and Sentence in Criminal Case No. 549 of 2010 of the Chief Magistrate's Court at Malindi – Y.A. Shikanda, SRM)

JUDGEMENT

1. Rashid Ngolo (the 1st Appellant), Hamisi Ali Mukulungu (the 2nd Appellant) and Charo Kazungu Kambi (the 3rd Appellant) were the 3rd accused, the 2nd accused and the 1st accused respectively in Malindi Chief Magistrate's Court Criminal Case No 549 of 2010. They were, after a full trial, convicted in respect of three counts of the four counts of the offence of intimidation and molestation contrary to Section 238 (1) of the Penal Code. Subsequently each one of them was placed on two years probation. They were acquitted in respect to the 4th and 5th counts.

2. They have appealed against the finding and sentence on grounds that can be summarized as follows: -

a) The trial Court erred in finding that the case had been proven beyond reasonable doubt;

b) The trial Court failed to evaluate the appellants' evidence in particular that the land in dispute belonged to them and further failed to direct its mind to the constitutional right of self–defence and defence of one's property;

c) The trial Court ought not to have convicted the appellants against the finding that there was a land dispute; that there was a court order restraining the alleged owner of the land from dealing with the suit property; and that the criminal charges could have been commenced to settle personal scores as a result of the land dispute; and

(d) The sentence was excessive and unreasonable in the circumstances of the case.

3. The appeal was canvassed by way of written submissions. The appellants' first point was that the

charge sheet was defective. The defectiveness being that it did not reflect the time the offence was committed against each of the five individual complainants making it difficult for the appellants to answer charges about an incident that allegedly took place on the same day against five different persons.

4. They further submitted that there was a court order as at 27th April, 2010, the date of the alleged incident, restraining the alleged owner of the land PW1 A A O, his agents, workmen, legal representatives, or anyone claiming interest through him from dealing with the suit property, Plot No. [particulars withheld], pending the hearing and determination of the suit/application. That the said order was brought to the attention of the court by the appellants and produced in evidence. It is the appellants' proposition that the trial court erred by overlooking the said order.

5. The appellants contend that the action by PW1 of sending workers to work on the plot was in contempt of court orders and an illegality therefore no cause of action ought to have been entertained by the Court as it arose from an illegality.

6. Further, that the trial Court having established the existence of a land dispute and having noted the many court cases between the families of PW1 and the appellants ought to have discerned that their criminal prosecution was an attempt to fix them. The appellants therefore asserted that in light of the prevailing circumstances a conviction ought not to have been entered against them.

7. Lastly, the appellants submitted that they were defending their property and the trial Court appeared not to have appreciated their evidence showing that they were exercising their constitutional rights of self-defence and defence of property.

8. The DPP opposed the appeal and urged this court to uphold the conviction and sentence. The Respondent's position was that the trial Magistrate rightly found that the prosecution evidence was consistent and corroborative; that the appellants were duly identified by the witnesses; that the conditions were favourable for positive identification of the appellants; that the prosecution had discharged its burden having proved the ingredients of the offence beyond reasonable; and that the defence proffered was an afterthought and did not cast doubt on the prosecution's case.

9. It was further submitted for the Respondent that the trial Court had the opportunity of observing the demeanour of the witnesses, believed them and reached a proper conclusion. It was also submitted that the defence raised during submissions that the appellants acted in self-defence and in defence of their property, was rightly rejected.

10. In my view the issues for determination in this appeal are whether the charge was defective; whether the prosecution proved its case to the required standards; whether the defence raised was plausible; and whether the sentence was excessive in the circumstances of the case.

11. This being a first appeal, this court's task is to re-evaluate the evidence afresh in order to reach its independent decision bearing in mind that, unlike the trial Court, it did not have advantage of observing the demeanour of the witnesses as they testified.

12. A perusal of the record reveals that nine witnesses testified in support of the prosecution's case. The appellants also gave evidence in their defence. The summary of the prosecution's case was that on 27th April, 2010 at [particulars withheld] area in Malindi, the appellants intimidated and molested PW3 J C Y, PW4 M K, PW5 A K K and H R N, the complainants in counts 1 to 4 respectively, by threating to cause unlawful injury to them so as to prevent them from working on Plot No. [particulars withheld] belonging to PW1 A A.

13. In count 5 the appellants were charged with trespass with intent to annoy contrary to Section 5 (1) of the Trespass Act. The particulars being that on 27th April, 2010, with intent to annoy, they entered the land of PW1 without his permission.

14. As already stated, the appellants were convicted on counts 1 to 3. They were acquitted in respect to

count 4 as the complainant named therein did not turn up in court to give evidence. On count 5 the trial Court found that the charge of trespass could only have been on alternative charge to counts 1 to 4.

15. I will start with the allegation that the sentence was excessive. The principles applicable are that sentencing is in the discretion of the trial Court and that a sentence can only be upset on appeal were the same is unlawful, manifestly excessive or where irrelevant matters were considered and or relevant matters were not taken into account – see **Bernard Kimani Gacheru v Republic [2002] eKLR**.

16. The offence of intimidation or molestation for which the appellants were charged attracts a maximum of three years imprisonment. The Court considered the circumstances under which the offence was committed, the nature of the offence, the fact that nobody was injured and the ages of the appellants before placing the appellants on probation. In view of the fact that the Court clearly indicated what it considered before arriving at the sentence, the appellants' claim that the sentence was excessive is without merit. In fact one is tempted to conclude that the sentence was lenient. This particular ground of appeal fails.

17. The trial was focused on ownership of Plot No. 5467 which PW1 claimed was his. There was the allegation, denied by PW1, that the plot in question belonged to the appellants. Tied to question of the ownership of the land was the appellants' assertion that they acted in self-defence and in defence of property.

18. The appellants' claim that they acted in self-defence and in defence of property amounts to nothing. I say so because none of the appellants in their testimony told the trial Court that they were repulsing the appellants who had invaded their land.

19. The 1st Appellant testified as DW3 stating that on the date of the alleged offence he was away in Nairobi. When he returned he was informed that some people had been stopped from working on their land. The information was given to him by his employee C K.

20. The 2nd Appellant who testified as DW2 told the Court that on the material day he was at Watamu assisting a colleague. He left Watamu at 7.00 p.m. reaching Malindi at 8.00 p.m. He stated that he never went to the scene of crime at Kivulini on that day and neither did he assign anyone to carry out duties at Kivulini. He testified that he was only arrested when he went to court to attend a land case.

21. The 3rd Appellant who testified as DW1 also denied being at the scene of crime at the material time. His evidence was that his wife informed him that some people had sent her away when she had gone to work on their land. She went to the farm with his wife and they did not see anybody. His wife told him that she did not identify the people who turned her away from the farm.

22. The appellants did not call any witness.

23. In light of the fact that the appellants had clearly indicated that they were not at the scene of crime on the material day, how then could they claim they were acting in self-defence and in defence of property? Only if they were at the scene could these defences have been available to them.

24. Indeed, the trial Court correctly identified the defence raised by each appellant as that of *alibi.* After considering the appellants' defence the trial Magistrate concluded that PW2 H L N, PW4 M K C and PW5 K K knew the appellants very well prior to the incident. He concluded that the appellants were at the scene of crime on the material day and rejected their *alibi* defences. I do not find any fault with this conclusion. The evidence of the three complainants who testified for the prosecution was consistent and the trial Magistrate reached the correct decision.

25. The prosecution achieved its objective of establishing the facts it had set out to prove. However, the question still lingers as to whether the prosecution established that the appellants committed an offence known to the law.

26. This takes me to the appellants' claim that the charge was defective. I should have started with this issue but in view of the fact that it will determine this appeal, I decided to deal with it last.

27. I must state, with respect to the appellants' counsel that his submission as to what makes the charges defective does not amount to much. He claims that each count ought to have indicated the time at which the offence was allegedly committed against each of the complainants. It is observed that the drafting of counts in respect of each complainant does not amount to a defect in the charge sheet. It is also clear from the charges and the evidence adduced that the offences were committed at the same time against different complainants. The appellants' complaint that the charges were defective on this score has no foundation and their complaint along those lines fail.

28. There is however a different reason as to why the charges were defective. Unfortunately the trial Magistrate did not consider this fact and neither was it taken up by the appellants even in this appeal.

29. The charge in counts 1 to 4 each states: -

> **"INTIMIDATION AND MOLESTATON CONTRARY TO SECTION 238 (1) OF THE PENAL CODE."**

30. Section 238 (1) of the Penal Code provides as follows: -

> **"Any person who intimidates or molests any other person is guilty of an offence and is liable to imprisonment for a term not exceeding three years."**

31. Sub-section (2) defines what intimidation is and Sub-section (3) defines molestation.

32. In my view, there is no offence known as intimidation and molestation as Section 238(1) creates two offences; one known as intimidation and the other one known as molestation. That Section 238 (1) creates two distinct offences was noted by D.K. Maraga, J (as he then was) in **Ali v Republic [2007] eKLR**.

33. *G. W. Ngenye-Macharia, J in Timothy* ***John Victor v Republic [2016] eKLR*** *dealt with a similar provision being* Section 27 (1) of the Firearms Act which states in part that: -

> **"No person shall import or export any firearm or ammunition…."**

34. *She held that: -*

> ***"From the above provisions it is correct to state that duplicity of charges would occur in instances where more than one offence is charged in one count. In such a case, an accused would be presented with difficulty as he would not be in a position to know exactly what charge to plead to or defend."***

35. The learned Judge proceeded to analyse the provision under which the appellant before her had been charged and concluded that: -

> **"It is then clear that when drafting a charge under Sub-Section (1) the accused can only in any one count be charged with either importing or exporting a firearm. The two words, *'import and export'* cannot be used in one count. The rationale is simple, that an accused cannot at any given time be importing and export a firearm. He could only at any given time either be exporting or importing in which case he would be charged with two separate counts each constituting the particulars of importation or exportation of the firearm. It follows then that the instant charge having combined the two elements of importation and exportation is bad for duplicity. In that case, the appellant having pleaded to the charge was prejudicial to him as he was faced with a difficulty of knowing exactly whether he was convicted for the offence of importing or exporting a firearm."**

36. In the pre-independence case of **Cherere s/o Gukuli v Reginam [1955] 22 E. A. C. A. 478**, the Court of Appeal for Eastern Africa observed that: -

> **"We think it is impossible to say, and certainly no court has so far as we are aware ever yet said, that an accused person is not prejudiced when offences are charged in one count in the alternative: he does not know precisely with what he is charged, nor of what offence he has been convicted."**

37. In other words a charge that is bad for duplicity should not be left to stand. In the case at hand it is not known whether the appellants were convicted for intimidation or molestation. A charge that is duplex is prejudicial to an accused person and the same is not curable under Section 382 of the Criminal Procedure Code as the error by its nature will most likely occasion failure of justice.

38. For the reason stated above, I allow the appeal. The conviction is quashed and the order of probation is set aside.

Dated, signed and delivered at Malindi this 27th day of July, 2017.

W. KORIR,

JUDGE OF THE HIGH COURT