

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL APPEAL NUMBER 92 OF 2016

HENRY MURIUNGIAPPELLANT

VERSUS

REPUBLICRESPONDENT

(Being an appeal against the Judgment of Hon. B. Mararo – PM, delivered on 22nd July 2015 in Tigania Cr Case No.470 at Tigania Principal Magistrate's Court)

J U D G M E N T

The appellant was charged with the offence of creating disturbance in a manner likely to cause a breach of peace contrary to **section 95(1)(b)** of the Penal Code. The particulars of the offence were that the appellant on the 29th September 2014 at Kulamawe area in Isiolo County within Eastern region created disturbance in a manner likely to cause a breach of the peace by throwing stones to the house of **Jane Karimi**. There was a second count of obstructing a police officer in the due execution of his duties contrary to **section 103(a)** of the National Police Act NO.3 of 2011. The particulars of the offence are that on the same day the appellant willfully obstructed **No.43079 P.C. Dominic Mutua** and **No.75455 PC Richard Musiori** while in due execution of their duties.

The trial court convicted the appellant on both counts. He was fined kshs.6,000/= in default to serve six (6) months imprisonment in respect of the first count. He was fined kshs.50,000/= and in default to serve three (3) years imprisonment in respect of the second count. The grounds of appeal are that the appellant was not placed on his defence and therefore **section 211** of the Criminal Procedure Code was violated, that vital witnesses were not called to testify and that the prosecution did not prove its case beyond reasonable doubts. During the hearing of the appeal the appellant informed the court that the case proceeded while he was in prison. A probation officer went to his home and asked for money but he told his family not to give any money. He had another case involving the same complainant.

Mr. Odhiambo partly conceded to the appeal. Counsel submitted that the appellant was in court throughout the proceedings. The charge of obstruction was not proved and the evidence is insufficient to support the charge.

This is a first appeal and this court has to evaluate the evidence afresh and make its own decision. **Jane Karimi** was the complainant and testified as PW1. She informed the court that on the 29th September 2014 at about 6.00am, she heard a knock on her door. She opened and found the appellant who used to be her husband in the company of three other people. The appellant was holding a stone. She screamed and members went there. The other three people ran away. The appellant threatened to kill her. She was advised by the neighbours to call the police. She called **P.C. Wanjiku** of Kulamawe Police Post. Police went to the scene and found the appellant there holding the stone. The appellant was arrested.

PW2 **P.C Richard Musiori** was attached to the Kulamawe Police Post. He was on duty on the material day when the report was made that someone was throwing stones at the complainant's house. He went to the scene with **P.C. Dominic Mutua**. They found members of public standing outside the plot. They were shown the appellant who had a stone in his hand. They tried to arrest him but he tried to resist. They managed to arrest him and recovered the stone. The appellant was later taken to Isiolo Police station. PW3, **P.C. Micah Korir** was attached to the Isiolo Police Station. On 29th September 2014 at about 9.00am, the appellant was taken to the station by PW2 and **P.C. Mutua**. He investigated the case and had the appellant charged of the offence.

In his unsworn defence, the appellant testified that on the 27th September 2015, PW1 went to the market with her mother, one **Atwiri** and another lady. They started throwing stones towards the appellant. It was about 1.00pm and his customers chased them away. On the 29th September 2014 at about 8.00am, he met the same three people with police officers from Kulamawe. They started beating him and took him to Kulamawe Police Post. He told them to take him to Isiolo Police Station. He was taken to Isiolo and was charged with the offence.

The appeal raises the issue whether the prosecution proved his case beyond reasonable doubt. It is the evidence of PW1 that the appellant went to her house in the morning. She knew the appellant. Members responded to her screams. The evidence of PW2 is that they went to the scene and found the appellant holding a stone. There were members of the public at the scene. The defence evidence does not refer to that particular scene but alleges that it is PW1 and her mother who threw stones upon the appellant. The appellant did not report that alleged incident. None of the appellant's customers who are alleged to have chased the complainant and her mother were called by the appellant to fortify his defence. The evidence of the police officer PW2 shows that the appellant was arrested at the scene while holding a stone. It is clear that the appellant's action created disturbance. The charge on count one relating to creating disturbance was proved beyond reasonable doubt.

There is the second charge of obstructing police officers while in the cause of their duties. PW2 testified that they tried to arrest the appellant but he resisted. It is not clear whether there was a scuffle during the arrest. According to PW2, they managed to arrest the appellant and handcuffed him. There is no strong evidence that the appellant resisted arrest. The members of public were present at the scene and the appellant was alone. He knew that he was cornered and could not escape the arrest. I do agree with **Mr. Odhiambo** that count two of the charge was not proved beyond reasonable doubt. The appeal on count two is hereby allowed.

The appellant was sentenced to serve six (6) months imprisonment in respect to count one if he failed to pay the fine of kshs.6,000/=. He was convicted on 26th June 2015. He has by now served the sentence. The appeal is hereby allowed on count two which condemns the appellant to three years imprisonment. The appellant shall be set at liberty unless otherwise lawfully held.

Dated signed and delivered at Meru this 22nd day of August 2017.

SAID CHITEMBWE

JUDGE