



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NANYUKI

HCCRA. NO. 33 OF 2015

DANSON MURIITHIAPPELLANT

VERSUS

REPUBLICRESPONDENT

(Being an appeal from the original conviction and sentence by **Hon. V K KIPTOON SENIOR RESIDENT MAGISTRATE** dated 27th JULY, 2013 in Nanyuki Chief Magistrate's **Court Criminal Case No. 1250 of 2011**)

JUDGMENT

1. Appellant **DANSON MURIITHI** was charged before Nanyuki Chief Magistrate's court and convicted of 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 Cap 63**. He has filed this appeal against both conviction and sentence.

2. It is important to begin by considering the particulars of that offence as stated in the charge sheet. The particular were:

“Danson Muriithi Mwai on 15th day of September, 2011 at Nanyuki Township Nyariguni village in Laikipia Country within the Republic of Kenya jointly with others not before court created a disturbance in a manner likely to cause a breach of the peace by chasing and threatening to cut JOHN MATHENGE with a panga.”

3. Bearing the above particulars I will summarise the prosecution's case.

4. The prosecution's first witness, John Mathenge stated he was the registered owner of a farm in Nganyero. The particulars of title to that farm were not given in evidence. On 15th January, 2011 he was in the process of showing that farm to a prospective buyer namely Charles Kinyua (**P W 2**). P W 2 was intending to buy the farm from P W 1. P W 1 and 2 while at the farm saw the appellant standing at a distance. They both noted appellant had a panga (matchete) . P W 1 further stated:

“ ... he (appellant) always has a panga, he is my neighbour.”

5. P W 1 and P W 2 said that when they first saw the appellant he did not say anything. He however

returned, according to P W 2 ten minutes later. He came the second time with two other men who did not speak or do anything.

6. On the appellant returning P W 1 said:

“He (appellant) had a panga and told us to leave the parcel of land... He was talking angrily. We went to the taxi and went to report to police...”

7. P W 2 said:

“ ... He (appellant) came with 2 other men he accused (appellant) came towards me and asked what I was doing in that shamba. I never answered him. I continued with my work, he ordered us out of that piece of land. I was not standing with P W 1. He raised the panga on me and I obliged and left. He followed us to the road he had a panga.”

8. Appellant’s Learned Counsel Mr. J M Mwangi argued grounds 1 and 2 together. Those grounds relate to appellant’s contention that the charge sheet was defective, and that it did not disclose the correct complainant.

9. It was submitted on behalf of the appellant that although the charge sheet, in its particulars, stated that appellant created a breach of the peace by threatening to cut and by chasing JOHN MATHENGE, the prosecution’s evidence however showed that it was Charles Mathenge Kinyua who had a panga raised at him by the appellant.

10. The Learned counsel Mr. Tanui Principal Prosecution Counsel conceded that the charge sheet had an error in stating that it was John Mathenge and not Charles Mathenge Kinyua who was threatened by appellant with a panga. He however submitted that it was an error that was curable under **Section 382 of the Criminal Procedure Code**. In the Counsel’s view the appellant would not suffer any prejudice if that section was invoked because both John Mathenge (P W 1) and Charles Mathenge Kinyua (P W 2) testified and appellant was able to cross examine them both. That to do the converse, that is to dismiss the charge on technicality would be absurd.

COURTS DETERMINATION ON GROUNDS 1 AND 2

11. The charge sheet that was before the lower court stated that it was John Mathenge who was threatened to be cut and was chased by the appellant, which acts resulted in a breach of the peace.

12. The prosecution however by its evidence clearly showed that it was Charles Mathenge Kinyua that saw appellant raise the panga toward him. Incidentally the evidence adduced by prosecution did not show that appellant threatened to cut or chased any one. The evidence is that appellant just raised the panga to Charles Mathenge Kinyua.

13. The Learned trial Magistrate in his judgment also noted that anomaly and stated:

“Firstly his evidence on record should establish an offence of creating disturbance. The accused (appellant) person as per evidence of P W 1 and P W 2 were that accused asked them to get out of his land. The accused directed his panga to P W 2 who is not the complainant herein but P W 2. So in my opinion the complaint of creating disturbance should have been made by the (sic) P W 2 because mere utterance of words does not constitute an offence or creating disturbance. The mere statement the accused made to the (P W 1) complainant to leave his land does not constitute an offence of creating disturbance.”

14. In my considered view appellant will be prejudiced by the invocation of Section 382 of the Criminal Procedure Code Cap 75. why do I say so? Because appellant conducted his case and more particularly cross examined on the basis that the charge he was facing was one threatening to cut and chasing Charles

Mathenge Kinyua P W 2 and not P W 1. If the court, at this late stage was to invoke Section 382 of Cap 75 appellant would not be afforded an opportunity to cross examine, perhaps more keenly, P W 2. Indeed I am of the view to invoke that section there would be failure of justice occasioned against appellant. It follows therefore that on grounds 1 and 2, the appellant's appeal shall succeed. It succeeds because prosecution, going by the charge sheet, did not prove its case beyond reasonable doubt that P W 1 was threatened and chased with a panga by appellant resulting in a breach of the peace.

15. In my view there is also doubt, that even if the charge sheet had reflected the name of P W 2, that there was a breach of peace. I am guided By the English case **R- V- HOWELL (1982)** QB where it was held thus:

“There could not be breach of the peace unless an act was done or threatened to be done which either actually harmed a person or, in his presence, his property or was likely to cause such harm or which put someone in fear of such harm being done.”

16. The evidence of the prosecution did not show the threat articulated in the above case. According to P W 1 appellant was talking angrily and because of this, it seems, he and P W 2 went to the taxi and went to report it to the police. P W 1 did not state appellant either threatened him or P W 2. Indeed P W 1 stated that appellant *“always had a panga.”* In other words P W 1, who was the complainant according to the charge sheet was used to seeing appellant with a panga. On the other hand P W 2 by his evidence does show that he did feel threatened at all. In fact he is on record as stating that as at the time when appellants appeared, he tried to talk to him and that was when appellant told him that the soil of the land belonged to him (I the appellant) but that P W 1 was holding its title deed.

17. In this regard I am well persuaded by the decision of Justice J Lesiit in the case **GERVASIO KIRIMI – V- REPUBLIC [2011]eKLR** where the Learned Judge held:

“It is not enough to constitute the offence of creating a disturbance likely to cause a breach of the peace to show that the accused merely created a disturbance. The disturbance would have been likely to cause a breach of peace. Peace would, for instance, refer to the right of wananchi to go about their daily activities without interference. The actions of Appellants interfered with people's activities and therefore caused a breach of peace.”

18. In my view looking at the prosecution's evidence the appellant merely disturbed the P W 1 and P W 2 in that he spoke angrily but that disturbance did not create a breach of peace. if it did P W 2 would not have engaged appellant in conversation as stated before.

19. Since I have found in favour of the appellant on grounds 1 and 2, that determination also covers grounds 6 and 8.

GROUND 4, 5 AND 7

20. It is obvious as submitted by appellant's Learned counsel that there was in existence a Land dispute between P w 1 and appellant. There was at the material time, a Civil case proceeding before High court at Nyeri. That fact was also conceded by Learned Counsel for the state, but the Learned Counsel for the state proceeded to submit that appellant before the trial court was facing a charge under section 95 of the Penal Code.

21. If indeed there was a civil land dispute, as admitted by all parties, it is not clear why P W 1 did not seek in that Civil court restraining orders against appellant, since it does seem that they had disagreement on the extent of the boundary for a longer period than when the incident of this case occurred. The only reason, perhaps, P W 1 did not get a restraining order, as submitted by appellant's counsel, may have been that the criminal conviction was intended to bolster P W 1's Civil case.

22. In the case **KURIA & 3 OTHERS – Vs- ATTORNEY GENERAL[2002] 2 KLR69** the High court

had to contend with such a scenario. It stated:

“The court has power and indeed the duty to prohibit the continuation of the criminal prosecution if extraneous matters divorced from the goal of justice guide their instigation. It is a duty of the court to ensure that the process does not degenerate into a tool for personal score – settling or verification on issues not pertaining to that which the system was formed to perform ...”

23. In my view this is not a case that ought to have been prosecuted in the criminal court. It was a matter that should have been restricted to the civil court.

24. It is because of the above that I find the appellant’s conviction was unsafe and according the appeal shall succeed. **The conviction of the appellant is hereby quashed and the sentence is hereby set aside. I order the appellant to be refunded the fine he paid.**

25. **It is so ordered**

Dated and Delivered at Nanyuki this 25thFebruary, 2016

MARY KASANGO

JUDGE

Coram

Before Justice Mary Kasango

Court Assistant – Kiruja

Appellant: Danson Muriithi

For state

For Appellant

Appellant

COURT

Judgment delivered in open court

MARY KASANGO

JUDGE