**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KERUGOYA**

**CRIMINAL APPEAL NO. 97 OF 2013**

**LUCY MUTHONI MACHARIA……..…….APPELLANT**

**-VERSUS-**

**REPUBLIC…….....…….…….....RESPONDENT**

*(An appeal from the conviction and sentence of the Principal Magistrate's Court (B. M. Ochoi) at Wanguru, Criminal Case*

*No. 323 of 2012 dated 7h November, 2012)*

**JUDGMENT**

1. **LUCY MUTHONI MACHARIA,** the appellant herein was charged with the offence of creating disturbances in a manner likely to cause a breach of peace contrary to ***Section 95 (1) (b)*** of the **Penal Code** vide **Wanguru Principal Magistrate's Court Criminal Case No. 323 of 2012**. The particulars of the charge indicated that on the 18th April, 2012 at Sagana Trading Centre within Kirinyaga County the Appellant created disturbances in a manner likely to cause a breach of the peace by threatening to cut Susan Wambui Murimi with a knife. After trial she was found guilty, convicted and fined Kshs.10,000/- or 3 months imprisonment in default by the trial court. She was aggrieved by the conviction and sentence and filed this appeal raising 4 grounds namely:-
2. ***(i) That the conviction and sentence were against the weight of evidence and not supportable in law.***

   ***(ii) That the learned trial magistrate erred in law and in fact by failing to note that the initial report made by the complainant made no mention of threat to cut with a knife and the charges herein were fictitious.***

   ***(iii) That the learned trial magistrate erred in law and fact in attaching little importance to the initial report while the complainant and the accused had a long term personal grudges.***

   ***(iv) That the learned trial magistrate erred in law and in fact in relying on unsafe contradictions and worthless evidence by prosecution.***

3. At the hearing of this appeal, the Appellant's counsel summarized the 4 grounds into 2 and stated that the Appellant's appeal was lodged out of time with the leave from this court granted on 2nd May, 2013 and that this appeal was filed on 6th May, 2013.
4. On the weight of evidence adduced by the prosecution, the Appellant submitted that the offence occurred in a public place where witnesses from both the prosecution and defence were present but pointed out that the two sets of witnesses gave a contradictory account of events of what took

place on 18th April, 2012. She further pointed out through her counsel Mr. Karweru that there were other witnesses to the incident who allegedly refused to write statements and that one of the witnesses who refused to write statements and referred by the complainant in her evidence as a Mr. Wachira actually testified on behalf of the Appellant at the trial court and told the trial court that the altercations that occurred on 18th April, 2012 was between employees of the complainant and the Appellant.

5. The Appellant further submitted that the learned trial magistrate misdirected himself when he observed in his judgment that the complainant had been pushed down when there was no such evidence and that the evidence adduced indicated that the complainant was pushed "backwards" and not "down" as observed by the trial court. She also faulted the finding of the trial court that she held the complainant by the collar when no evidence was adduced by the prosecution. She submitted that the learned trial magistrate imported his own evidence to the case and thereby misapprehended the ingredients of the offence.
6. The Appellant also faulted the trial court for not giving due weight to the initial report made by the complainant to the Police at Sagana Police Station. According to the Appellant the initial report as proved by D. Exhibit 1 which was an extract from the Occurrence Book at Sagana was about abuse and bewitching and that there was no mention of a knife. She submitted that initial reports are important as they reflect exactly what was in the mindset of a reportee and this coupled with the fact that the investigation of the prosecution case was conducted by D.C.I.O. Wanguru rather than Sagana Police Station where the incident was reported should have raised eyebrows to the trial court but that the same was ignored. She also pointed out that the complainant at the trial court demonstrated that she was peddling influence since in the past she was said to have made reports against the Appellant at Kerugoya Police Station rather than Sagana where she resides together with the Appellant.
7. According to the Appellant the version of events changed when the report was made at Wanguru C.I.D. from the report that was initially made at Sagana Police Station and that this factor raised in her defence was not considered by the trial court in addition to the history of bad blood between the Appellant and the complainant.
8. The State through Mr. Omayo opposed this appeal. He faulted the appeal for having been filed out of time without reference that it was filed pursuant to leave granted and therefore opined that the appeal was irregularly before court.
9. On the question of the weight of the prosecution case, the State submitted that the offence of creating disturbances was proved as evidence adduced established that the offence took place in a public place.

Mr. Omayo for State went further to defend the trial court against accusation by the Appellant that he imported or introduced new evidence noting that the complainant was pushed and that amounted to physical confrontation which the State argued was rightly captured by the trial court.

10. On the issue of initial report being different from the particulars of the offence, the Respondent submitted that initial reports normally forms a summary report of what took place and that the same leads to investigations that could lead to prosecutions. He maintained that the evidence tendered from P.W.1 and P.W.2 indicated that the Appellant had a knife.
11. In response to the Appellant's allegations that a report was made to D.C.I.O. with ulterior motives in view of an earlier report at Sagana Police Station, the Respondent submitted that there was nothing unusual as Wanguru was in charge of Sagana Police Station which had no C.I.D. office. Mr. Omayo further submitted that there was no problem or problems with the C.I.D. taking over the investigations and taking appropriate actions where necessary.

The State opined that the prosecution case had been proved to the required standard at the trial noting that the issue of existence of a grudge between the Appellant and the complainant did not show that the charge against the Appellant had been framed up. He pointed out that the prosecution witnesses had no grudge to speak of against the complainant.

12. I have considered the appeal and the submissions made by the Appellant's counsel. I have also considered the opposition made by the Respondent through learned State Counsel.

To begin with, the Respondent took issue with this appeal arguing that it was filed out of time and though Mr. Omayo did not contest that leave was granted to the Appellant to appeal out of time, he opined that the Appellant should have indicated that she was filing appeal out of time pursuant to leave granted. I have checked at the proceedings from the file and the record of appeal and I did not find the order granting leave. It is true that where an appeal is filed out of time it is desirable that the Appellant launches the appeal with the order granting leave and indicate so in the petition of appeal. The only savior in this appeal is the fact that the same was admitted to hearing on 25th July, 2013 by this court. The law provides under ***Section 349*** of the **Criminal Procedure Code** that this Court has a discretion to admit an appeal outside the 14 days period given if there are sufficient reasons so to do. In view of the fact that the Respondent did challenge the admission of the appeal, this Court shall notwithstanding the sentiments above determine this appeal on merit rather than striking it out for want of form.

13. This appeal is hinged on the weight of evidence adduced at the trial. The Appellant felt that the trial court never considered defence and submissions made especially the history of bad blood that existed between her and the complainant.

This being an appellate court my role is to re-evaluate the evidence tendered and come to a conclusion aware that unlike the trial court I did not get the benefit to hear and see the witnesses first hand as they testified in court. A trial court is normally best placed to observe the demeanor of witnesses that appear before it especially where the prosecution witnesses and defence witnesses like in this case give different versions of the same event.

14. The Appellant was charged with the offence of creating disturbance in a manner likely to cause breach of peace. ***Section 95(1) (b)*** of the **Penal Code** reads as follows:

***"Any person who brawls or in any manner creates disturbances in such a manner as is likely to cause a breach of peace is guilty……"***

To brawl is defined by **Oxford English Dictionary** as to be *"rough, noisy, quarrel or fight."* The **Black's Law Dictionary** defines the act as to *"engage in a noisy quarrel or fight"*. The Appellant's contention is that she did not engage in the quarrel or fight herself but that it was her employee and the Appellant's employee who had an altercation. She told the trial court that she reported the incident at Sagana Police Station. However, no evidence on the said report was produced to establish or prove the allegations. The evidence adduced by the prosecution on the other hand indicated that the Appellant held the complainant and pushed her hurling abuses in the process.

15. The contention by the Appellant's counsel that the trial magistrate made a finding based on extraneous evidence is unsupported and at best is a question of semantics. The evidence adduced by P.W.1 **Susan Wambui Murimi** indicated that she was held by the neck and "pushed backwards" by the Appellant who then threatened her with a knife. The trial magistrate in his judgment observed that the complainant had been "pushed downwards" and threatened with a knife by the Appellant. In my view though the descriptions of the Appellant's action is slightly different, the difference could not have altered the finding of the necessary ingredient of the offence which I have explained above. The question that the trial court needed to ask and determine is whether the Appellant's action amounted to creating disturbances in a manner likely to cause breach of the peace.
16. This Court has considered the evidence adduced by the prosecution and the evaluation made by the learned trial magistrate and finds no error of judgment or conclusion. It is true that the Appellant and the complainant had a history of bad blood but I find that the learned trial magistrate cautioned himself about this fact while evaluating the evidence. As a matter of fact and law past altercations, bad some relationships, or past disputes should never be an excuse or a defence to crime. I do find that the past disputes and differences well submitted by Appellant's counsel did not negate the weight of evidence adduced by the prosecution. The Appellant's witnesses of course gave evidence contrary to what the prosecution witnesses said about the

incident but the trial court was best placed to make a finding on this fact and make a conclusion based on the credibility of the witnesses. I do not find any basis to fault the finding of the learned trial magistrate on this score.

17. The Appellant pointed out the disparity on the initial report made at Sagana and duly captured by the Occurrence Book extract which was exhibited as D. Ex 1. Again I find that the offence facing the Appellant was that of creating disturbances. If it was a more serious offence of threatening to kill in view of the presence of knife, then this Court could have found the Appellant's arguments valid. This Court agrees with the Respondent that a report made at a police station forms a basis for investigation and the police would normally charge a suspect based on the results of investigation and the evidence catered. The police know the onus they have once they prefer charges. They must prove that the offence under which a suspect is charged was committed by the suspect. I find that the initial report made was not materially different from the evidence adduced and the charge that the Appellant faced. I also do not find anything untoward concerning the action taken by D.C.I.O. Wanguru. When a crime has been committed, it has been committed and it really matters not which police officer from which station takes action, after all that is the work of police officers to take action when they witness a crime or when a report is made to them. They can be faulted for not taking action but they cannot surely be faulted for taking action. I do not find basis for the Appellant to allege that there was interference with the investigations of the case by the C.I.D. at Wanguru. There was no evidence to back the allegations and the Appellant does not have reason to allege that the trial magistrate misdirected himself or that he was biased against her. I have gone through the proceedings and I find no evidence to back such sentiments.

In the end I find no merit in this appeal. Same is dismissed. Both the conviction and the sentence is upheld. It is so ordered.

***Dated and delivered at Kerugoya this 28th day of September, 2015.***

**R. K. LIMO**

**JUDGE**

28.9.2015

Before Hon. Justice R. Limo

Court Assistant Willy Mwangi

Mwangi for appellant present

Omayo for State present

**COURT**: Judgment dated, signed and delivered in the presence of Mwangi for the appellant and Omayo for State.

R. K. LIMO

JUDGE