



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 235 OF 2013

PATRICK MASILA MUSYIMI APPELLANT

VERSUS

REPUBLIC

(Being an appeal from the conviction and sentence of Hon. B.M. Kimemia Senior Resident Magistrate delivered on 30/7/2010 in Kitui Principal Magistrate Criminal Case No. 1203 of 2009)

(Before Hon. B. Thurania Jaden J)

J U D G M E N T

1. The Appellant, **Patrick Musila Musyimi**, 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.
2. When the Appellant was arraigned before the Trial court, he pleaded not guilty. The case proceeded to a full hearing. The prosecution called four witnesses in support of their case.
3. The Complainant, **Pw1 Muema Kilonzi**, his mother **Pw2 Kavenya Kilonzi** and his wife Pw3 Koki Muema testified herein. Their evidence was that they were working at their farm when the Appellant came with some of his family members. That the Appellant advanced towards the complainant while holding a panga and threatened to kill him. The complainant and his family members ran away. That the appellant and his family members then started removing the maize seeds that the complainant's family had planted and started planting millet. The matter was reported to the police and the appellant was arrested and subsequently charged with the offence herein.
4. In his defence case the Appellant gave sworn evidence and called three witnesses. That is Dw2 **Nzeri Musyimi** who is his mother, Dw3 **Kitonga Mulandi** and the Assistant Chief, Dw4 **Samuel Musyimi**. The defence side blames the complainant for working on the land which had a land dispute and the parties were to maintain the *status quo* and not work on the said land. It was denied that any disturbance was created. The defence termed this case as a frame up due to the land dispute.
5. The trial magistrate convicted the appellant and sentenced him to five (5) months imprisonment. The Appellant was aggrieved by the conviction and sentence and appealed to this court. The Appellant's counsel raised eleven (11) grounds of appeal which can be summarised as follows;
 - a. That the prosecution failed to discharge the burden of proof.
 - b. That the conviction was against the weight of the evidence.
 - c. That the prosecution evidence was uncorroborated, contradictory and unreliable.
 - d. That the case was a frame up due to a land dispute.

- e. That the sentence was harsh and excessive.
- 6. During the hearing of the appeal, the parties agreed to proceed by way of written submissions. I have considered the said submissions.
- 7. This being a first appeal, this court is duty bound to re-evaluate the evidence and the record afresh and come to its own conclusions and inferences – See **Okeno –vs- Republic (1972) EA 32**.
- 8. The Complainants side gave evidence that blamed the Appellant for creating a disturbance. Two witnesses from the scene corroborated the complainant’s evidence. On the other hand the Appellant testified and blamed the complainant for working on the disputed land. The Appellant also called two eye witnesses. It is rather difficult in the face of these allegations and counter allegations to tell which side told the truth. Although the complainant’s side denied the existence of a land dispute, the Assistant-Chief who is an independent witness supported the defence case. The evidence of the Assistant Chief was that the land dispute existed.
- 9. In the premises, the Appellant ought to have been given the benefit of doubt. The appeal has merits and is allowed. The Appellant is at liberty unless otherwise lawfully held.

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B. THURANIRA JADEN

JUDGE

Dated and delivered at Machakos this 21st day of December 2015.

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B. THURANIRA JADEN

JUDGE