



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL APPEAL NO.103 OF 2010

SIMON MUREITHI MUTAHI.....1ST APPELLANT

JOSEPH ZACHARIA MAINA.....2ND APPELLANT

ELIJAH MAINA MWAI.....3RD APPELLANT

CHARLES MWANGI MUREITHI.....4TH APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being a consolidation of Criminal Appeals Nos. 103,104,105 and 106 of 2010 against conviction and sentence from Nyeri C.M.CR.C. No. 1268 of 2008 delivered on 06/5/2010 by Hon. L.W.Gitari, Chief Magistrate.)

JUDGMENT

SIMON MUREITHI MUTAHI, JOSEPH ZACHARIA MAINA, ELIJAH MAINA MWAI and CHARLES MWANGI MUREITHI, being the 1st, 2nd, 3rd and 4th Appellants respectively, were tried and convicted for the offence of creating disturbance in a manner likely to cause the breach of the peace contrary to **Section 95(1)** of the **Penal Code**. The appellants were each sentenced to pay a fine of Kshs. 30,000 in default to serve six(6) months imprisonment. Being aggrieved, the appellants each filed an appeal which appeals were ordered consolidated when the same came up for hearing.

Before considering the substance of the appeal let me first set out in brief the case that was before the trial court. The particulars of the offence were that on the 6th day of December, 2008 at Muthua Estate in Nyeri North District within Central Province, jointly with others not before court created disturbance in a manner likely to cause a breach of the peace by shouting and heckling the President of the Republic of Kenya **H.E.Hon. Mwai Kibaki**. The prosecution lined up the evidence of six witnesses in support of the charge. The facts of the case are that on 6th December, 2008, there was a Presidential function to launch the construction of the Kiamariga-Kabiruini road by H.E. Hon. Mwai Kibaki at Muthua. It is said, when the area member of parliament was invited to address the gathering, some people with some banners shouted C.D.F! C.D.F! Those people were quickly dispersed by the security personnel. It is said the appellants were among those people who had banners and heckled the area M.P. It is the evidence of **Nahashon Gachau** (P.W.1) that he was present when people with banners started shouting, heckling in the presence of the President who was seated at the dias before being dispersed. P.W.1 said calm was restored when those people were dispersed. The President is said to have thereafter addressed the function which was peaceful. **John Mwangi Ngatia** (P.W.2) gave evidence which resembled that given by P.W.1. P.W.2 said he saw people with banners which were inscribed with the words '**C.D.F is our right**' and shouting C.D.F! C.D.F! before being dispersed by police. IP **Kennedy Rucho** (P.W.3) restated

what P.W.1 and P.W.2 told the trial court. P.W.3 said he saw people waving placards which was inscribed with the words **“Mathira C.D.F, lying in the bank, help Sir.”** in front of the Presidential dias. P.W.3 said he together with other police officers advanced to where those people were and identified them but could not arrest them immediately. The following day, P.W.3, said they embarked on arresting those people. He said those people were common figures in Karatina Town. P.W.3 identified the appellants as among those people they arrested on 7/12/2008. P.W.3 identified, the 4th appellant to be the person who was carrying the placard. CIP **Benjamin Muhia** (P.W.4) gave a near similar narrative to that of P.W.1, P.W.2 and P.W.3. PW4 said he was able to identify the 4th appellant as the person who was carrying the placard. **CPL Ibrahim Abdi Hassan** (P.W.5), and **CPL Musa Kiptoo** (P.W.6) also restated evidence similar to that of P.W.3 and P.W.4.

When placed on their defence, the appellants each denied having committed the offence. They each raised the defence of alibi.

The learned trial Magistrate considered the evidence from both sides and came to the conclusion that the prosecution had tendered overwhelming evidence placing the appellants at the scene of crime. She also formed the opinion that the act of waving placards was a disturbance likely to cause a breach of peace. She further concluded that the appellants defence was a mere denial.

Having set out the case that was before the trial court, let me now revisit the substance of the appeal. The appellants put forward the following grounds of appeal which were similar in content.

- 1. The learned Chief Magistrate erred in law and fact in not holding that the prosecution had not discharged the very heavy burden of proof beyond all reasonable doubt that the Appellant had shouted and heckled the President of the Republic of Kenya and a miscarriage of justice was thereby occasioned.**
- 2. All the ingredients of the offence charged, to wit, shouting and heckling the President of Kenya as listed in the charge sheet were not proved or established. A miscarriage of justice was thereby occasioned.**
- 3. In so far as there were grave contradictions in the evidence of the prosecution, the learned Chief Magistrate erred in not considering the same and attaching to the same due weight in such a serious charge and a miscarriage of justice was thereby occasioned.**
- 4. The Chief Magistrate erred in law in not finding and holding that there were doubt in the prosecution case which doubt ought to have been resolved in favour of the Appellant. A miscarriage of justice was thereby occasioned.**
- 5. Considering all the evidence on record and the circumstance of the case the sentence meted out is manifestly harsh, excessive and against the weight of the evidence adduced.**

Mr. Wahome, learned advocate for the appellants argued together the aforesaid grounds of appeal. Basically, it is his submission that the prosecution did not establish its case beyond reasonable doubt in all respect. The learned advocate pointed out that the appellants were not properly identified and that the particulars of the offence were never established. Miss. Kitoto conceded that the particulars of the charge were never established. I have carefully re-evaluated the evidence that was before the trial court. It is alleged that the appellants jointly with others not before court created a disturbance in a manner likely to cause a breach of peace by shouting and heckling the President of the Republic of Kenya H.E. Hon. Mwai Kibaki. To begin with, the prosecution was enjoined to prove that the appellants attended the presidential function and that they shouted and heckled the President. All the prosecution witnesses admitted while testifying before the trial court that they did not personally know the appellants. P.W.1 and P.W.2 merely stated that the appellants were common figures at Karatina Town. None of the witnesses gave the physical description nor the names of the appellants. In fact, they only said that they marked their faces at that function. P.W.3, P.W.4,P.W.5 and P.W.6 stated that they managed to arrest the appellants the next day after launching a massive manhunt. None of the above witnesses gave the names nor the physical

descriptions of the persons they were looking for. There was no explanation as to where or how the appellants were arrested. The standard of proof in criminal cases is that of beyond reasonable doubt. Even if I was allowed by law, which is not the case, to apply a lower standard of proof, I cannot for sure say that the appellants were properly identified and were placed at the scene of crime. The prosecution failed to discharge the burden of proof. The other ingredient which must be established is that the appellants must have shouted and heckled the President. All the prosecution witnesses agree in their testimonies that the people they alleged to have created a disturbance shouted and heckled when the Member of Parliament of Mathira Constituency Hon. Ephraim Maina was called upon to address the gathering. There is no clear evidence whether those people actually shouted or they simply displayed placards expressing their displeasure in the manner the C.D.F was being run. All the witnesses stated that those people were quickly dispersed by police and calm was restored almost immediately. It is said the President addressed the gathering and throughout his speech there was no shouting and heckling witnessed. It is therefore obvious that the President was never shouted down neither was he heckled. It is also admitted that the president's speech was never interrupted. I cannot comprehend how a conviction can be sustained by the evidence on record.

I must commend Miss. Kitoto for conceding this appeal. In the end, the appeal is allowed. The conviction is quashed and the sentence is set aside. The fines imposed, if paid, should forthwith be refunded.

Dated, Signed and delivered in open court this 20th day of February, 2014.

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J.K.SERGON

JUDGE

In the presence of

Mr. Cheboi for Director of Public Prosecution

N/A Mr. Wahome for Appellant

N/A Mr. Elijah Maina for 3rd Appellant

1st, 2nd, and 3rd Appellants present in person