REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT EMBU

CRIMINAL APPEAL NO. 48 OF 2014

JACOB NTHIGA NGARI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Appeal from the Sentence and Conviction of G.M. Mutiso - RM

Siakago in Criminal Case No. 709 of 2012 on 8th August 2014)

J U D G E M E N T

This is an appeal from the judgment of Ag. Senior Resident Magistrate Siakago court delivered on 8th August 2014. The appellant was convicted of the offence of creating disturbance in a manner likely to cause a breach of the peace contrary to section 95(1) of the Penal Code and sentenced to serve six (6) months imprisonment. In his petition of appeal filed by Duncan Muyondi and Co. advocates for the appellant, the appellant relied on the following grounds;

a. That the prosecution did not prove its case against the appellant beyond any reasonable doubt;

b. That the ingredients of this offence were not proved;

c. That the incident took place in a home and not in a public place and in the circumstances, the magistrate would have found that no breach of peace was caused;

d. That the prosecution's evidence was insufficient, incredible and unreliable which was incapable of sustaining a conviction;

e. That the defence was good and credible and raised doubts in the prosecution's case;

f. That the magistrate erred in imposing the maximum sentence.

The appeal was opposed by the State on grounds that the prosecution proved the case beyond any reasonable doubt. Ms Ingahizu argued that the appellant was armed with a panga when he went to the complainants home and hurled insults at him in presence of other people. He threatened to cut him with the panga and called him an old uncircumcised man. This conduct caused a breach peace. It interpreted the normal conduct of business. If the complainant would have reacted to the situation, it would have resulted into violence.

It is the duty of the first appellant court to analyse all the evidence afresh and reach its own finding as was held in the case of ***DAVID NJUGUNA WAIRIMU –VS- REPUBLIC [2010]eKLR COURT OF APPEAL CRIMINAL APPEAL NO.5 OF 2008 AT NAIROBI;***

> *"that the duty of the 1st appellate court is to analyse and reevaluate evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the circumstances of the case come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decision".*

The evidence of PW1 was that on the 16th October 2012 around 8.00pm he was at his home with his son (PW3) and brother (PW2) when the accused went there armed with a panga. He insulted the complainant calling him an old and uncircumcised man. He challenged him to a fight if he was man enough but PW1 remained calm. He reported the incident to Police following day which led to the arrest and subsequent arraignment in court of the appellant. PW2 the brother of the complainant testified that he was present during the incident.

He saw the appellant come to PW1's home armed with a panga. He called PW1 an uncircumcised man and threatened to cut him and his family members with the panga. PW3 the son of the complainant testified that he witnessed the incident. He said the appellant armed himself with a panga and went to their home. He insulted his father PW1 calling him uncircumcised and stupid. He threatened to kill him together with other members of the family.

In his defence the appellant said he was at Muembe area of Siakago on 02/11/2013 when a Police officer called him on phone to go to CID office Siakago. He proceeded to the said office where he was arrested. He denied that on the material day he went to the complainant's home and that he did not insult PW1 at all. He told the court that there is a land case in Kerugoya court between him and the complainant. He produced pleadings and a copy of a ruling in respect of the case.

The appellant relied on the case of ***GERVASIO KIRIMI –VS- REPUBLIC (2011)eKLR*** where the High Court Meru held that the mere demonstration that the appellant caused disturbance is not enough to constitute the offence of creating disturbance. Mr. Okwaro argued that there must be a breach of peace caused by the disturbance for the court to convict for the offence of creating disturbance contrary to section 95(1) of the Penal Code.

The evidence of PW1 was corroborated by that of PW2 and PW3 who were present at the scene. Insults were hurled at the complainant by the appellant who was armed with a panga. PW1 did not respond to the challenge to a fight made by the appellant but instead he kept his cool. The evidence is to the effect that the scene was at the home of the complainant. The appellant argue that the scene must be in a public place and not a home in order to constitute the offence charged.

Section 95(1) (b) of the Penal Code provides;

> *"Any person who brawls or in any other manner creates a disturbance in such a manner as is likely to cause a breach of the peace, is guilty of a misdemeanor and is liable to imprisonment for six months".*

For the offence to be provided, the prosecution must prove that there was a brawl caused by the accused on that the accused creates disturbance in such a manner as is likely to cause a breach of the peace. A brawl is defined as a rough or noisy quarrel or fight. Would the conduct of the appellant in the circumstances amount to a brawl or creating disturbance? The learned trial Magistrate after analyzing the evidence reached a conclusion that insulting a man by calling him uncircumcised in the presence of his son in a community that practices compulsory male circumcision as a rite of passage to adulthood was a conduct likely to breach the peace as it was a provocative insult. From the language used by the accused

in court, it shows he was from the Mbeere Community. The Magistrate worked in the heart of Mbeere sub-county and appears to have familiar with the traditional and cultural practices of the community.

That notwithstanding, the appellant was armed with a panga when he went to the complainant's home. He did not only insult the complainant but threatened to cut him and his family with the panga. A man brandishing a panga and threatening to use it on the person to whom the insults are directed creates disturbance by interfering with the peace of that person and his family in their own homestead. The complainant would not go on with his normal business when a man armed with a panga, hurling insults at him and threatening to harm him is standing in his way. The appellant challenged the complainant to a fight if he was man enough which amounted to incitement to physical violence. The case by the High Court of Kenya at Nairobi in the case of ***MULE –VS- REPUBLIC CRIMINAL APPEAL NO.873 OF 1982*** described the offence as follows;

> *1. "The offence of creating disturbance likely to cause a breach of the peace constitutes incitement to physical violence and the breach of the peace contemplating physical violence. The act of the appellant had those two elements.*
>
> *2. 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. That disturbance should 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 the appellant interfered with people's activities and therefore caused a breach of peace".*

The facts of the ***MULE*** case are similar to those in this case. The appellant had abused the complainant and then challenged him to a fight resulting in the court finding that both elements existed and that they constituted the offence.

The facts in the case of ***GERVASIO KIRIMI*** relied on by the appellant is not directly relevant to this case in that the two elements in the ***MULE*** case and in this case are missing. The appellant in that case stood at the fence and never came into the complainant's compound as he abused him. The court observed in that case that the appellant could not have succeeded in provoking the complainant.

There is no requirement under section 95(1) (b) that for the offence to be proved, the incident must take place in a public place. Furthermore, it was held in the case of ***FELIX MUTHONI NGUNGA –VS- REPUBLIC HCCRA NO.131 OF 2010 AT MACHAKOS;***

> *"Clearly the offence can be committed in a private place for the simple reason that a breach of the peace can occur in such a place, there is absolutely no necessity to impute a restriction that is absent from the wording of the statute".*

I associate myself with the dicta of Waweru, Judge in the ***MUTHIANI CASE*** that the offence under section 95(1) (b) can be committed in either a public or a private place.

The defence of the appellant was an *alibi.* He denied having been at the scene at the material time. He is a brother to the complainant and well known to the eye-witnesses PW2 and PW3. There was no possibility of mistaken identity. The trial magistrate found the witnesses credible and the existence of the land dispute between the appellant and the complainant not a justification to commit the offence. I would accordingly agree with this reasoning of the learned magistrate. For the accused to arm himself and go to the home of the complainant demonstrates a motive behind committing the offence. His defence is untenable.

I reach the conclusion that the offence of creating disturbance in a manner likely to cause the breach of the peace was proved against the appellant beyond any reasonable doubt. The conviction was based on cogent evidence.

The magistrate imposed the maximum sentence of six months imprisonment under section 95(1) of the

Penal Code. The accused had a previous conviction where he was placed on probation. The magistrate observed that the accused was not remorseful. I believe that this observation was as a result of his demeanor in court and the fact that he had nothing to say in mitigation. It is important to examine the laid down principles upon which an appellate court may interfere with sentence.

In the case of ***BERNARD KIMANI GACHERU –VS- REPUBLIC [2002]e KLR CRIMINAL APPEAL NO.188 OF 2000*** the court of appeal at Nakuru cited the case of ***OGOLA s/o OWOURA –VS- REGINUM [1954]21 270*** as follows;

> *"The principles upon which an appellate court will act in exercising its jurisdiction to review sentences are firmly established. The court does not alter a sentence on the mere ground that if the members of the court had been trying the appellant they might have passed a somewhat different sentence and it will not ordinarily interfere with the discretion exercised by a trial Judge unless, as was said in* ***JAMES –V- REPUBLIC [1950] 18 E.A.C.A. 147.***

It is now settled law that sentence is a matter of discretion of the trial court and must be based on the facts and circumstances of each case. An appellate court will not normally interfere with sentence unless the sentence is manifestly excessive or is based on wrong principles. In this case, the sentence cannot be said to be manifestly excessive or based on wrong principles. The sentence was lawful and based on the facts and circumstances of the case and the antecedents presented to the trial court. I find no legal basis to interfere with the sentence imposed by the trial court.

I come to the conclusion that this appeal has no merit and it is hereby dismissed. The conviction and sentence are hereby upheld. It is hereby so ordered.

DELIVERED, SIGNED AND DATED AT EMBU THIS 17TH DAY OF DECEMBER 2014.

F. MUCHEMI

JUDGE

In the presence of;

Mr. Momanyi for Okwaro for Appellant

Mr. Onyoro for Respondent