CRIMINAL APPEAL

- What is the obligation of the prosecution in regard to the number of witnesses to call.
- What the court should consider in an appeal against sentence.

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL APPEAL CASE NO. 37 OF 2007

VERONICAH KANYIRI ..... APPELLANT

VERSUS

REPUBLIC ..... RESPONDENT

(An appeal from conviction and judgment of G. Oyugi Senior Resident Magistrate delivered in Tigania Law Courts on 21st February 2007 in SRMCR. NO. 1191 OF 2006)

JUDGMENT

The appellant was charged with before the Resident magistrate Court at Tigania 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. She was convicted as charged by the trial court and was sentenced to imprisonment for four months. By this appeal, she has appealed against that conviction and sentence. This is the first appellant court. I should re-consider the evidence adduced before the trial court. In so doing, I should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses. See the case of **Okeno Vrs. R.** (1972) EA 32. PW1 was the complainant. She stated that on 15th July 2006 at 9am she was on her way back to her home from the shops. She saw the appellant who was armed with a panga. She passed the appellant on the path on her way to her house. After passing her, she heard the appellant asking her to stop. When she looked she noticed that the appellant was chasing her with the panga. PW1 run to her house and locked herself in. The appellant who pursued her threw stones at her house. PW1 said that the incident was witnessed by Mutembei and Purity Nkatha. According to PW1, the appellant was swearing that she would assault her. The matter was later reported to the police. On being cross examined by the appellant, PW1 said that Purity Nkatha, Mutembei and Thuranira tried to persuade the appellant not to attack her. PW2 was Purity Nkatha. She stated that she was the daughter of PW1. On 15th July 2006 whilst she was in her house she saw the appellant chase PW1 whilst the appellant was

armed with a panga. When PW1 run into her house she saw the appellant begin to throw stones at her house. Whilst she did so, she was hurling insults towards PW1. The appellant was restrained according to this witness by Mutembei, Thuranira and Andrew Kinyua. At that time, the appellant was 200m from this witness. It is important to note that the appellant did not cross examine this witness on her evidence that she chased PW1. It then follows that the appellant did not contest that evidence. PW4 was a student at an institute of technology. He stated that on that material date whilst he was on his way to a canteen at about 10am, he heard cries for help. These cries were near Tigania Mission Hospital. He rushed there. He saw PW1 running and being chased by the appellant. He saw the appellant throwing stones. PW1 was crying and people responded to her cry. When they responded they attempted to restrain the appellant who was insisting that she would beat PW1 more. He saw PW1 lock herself into her house. When he was cross examined by the appellant, this witness said that the appellant was unrelenting in her attempt to assault PW1 even though the people that were there tried to stop her. The appellant in her defence stated that the material date was a Saturday. On that day, she went looking for cattle feed. She did not say where she had gone to look for the cattle feed. On her return home, and again she did not state what time she returned home, she prepared food for her children. It was later at about 4pm that she saw police officers come to arrest her for assault. It was at the police station that she was shown a panga and stones. She denied assaulting PW1. That was the totality of the evidence adduced before the trial magistrate. The learned trial magistrate did not believe the defence offered by the appellant. He found that PW2 and 4 corroborated the evidence of PW1. In support of the present appeal the learned counsel Mr. Ayub Anampiu stated that the case against the appellant was not proved at the required criminal standard during the trial. He faulted the prosecution for failing to call witnesses such as Mutembei to give evidence at the trial. Counsel further argued that although there were many people at the scene the prosecution had failed to call them too. In the absence of the evidence of those witnesses that were not called, he requested the court to consider the evidence of PW2 with caution. This is because PW2 was a daughter of PW1 and according to him her evidence was likely to be tainted with fraud. It should however be recalled that the appellant did not cross examine PW2 over the allegation of casing PW1. Counsel for the appellant also pointed out that PW2 was not near the scene. Prosecution called the evidence of PW2 and 4 to corroborate the evidence of PW1. Having re-evaluated that evidence, I too find that it indeed corroborated the evidence of PW1. My response to the argument raised by learned counsel for the appellant is that the prosecution is not bound to call more witnesses than necessary to establish a particular fact. See the case **Paratoti Ole Tema Vs. Republic** Criminal Appeal No. 142 of 2005. In that case, the Court of appeal stated thus:-

"The prosecution is not bound to call more witnesses than are necessary to establish a particular fact. The principle of law is that the court may only draw an adverse inference that had the uncalled witnesses testified their testimony would have been adverse to the prosecution case where the evidence adduced is barely sufficient to support the charge [Bukenya Vs. Uganda 1972 E.A. 549]."

I find that there was sufficient and overwhelming evidence adduced by PW1, 2 and 4 which proved the charge against the appellant. The case against the appellant was in my view proved beyond reasonable doubt. PW1's failure to mention PW4 does not weaken the prosecution's case. It should be considered that PW1 was in haste trying to secure her life from the imminent danger posed by the appellant. She was running and did eventually lock herself in her house. It is obvious that outside her house there was a commotion. That may explain why she did not see PW4 at the scene. The appellant in her defence stated that she was not at the scene and she denied having attempted to assault PW1. The defence offered by the appellant was first raised when the appellant gave her unsworn statement in her defence. That defence can only be termed as an afterthought. This is because whilst cross examining the prosecution witnesses the appellant did not raise the issue that she was not at the scene. I do therefore agree with the finding of the learned trial magistrate when he stated in his judgment that he did not believe the defence. The offence was committed at mid morning. The prosecution witnesses therefore had clear opportunity to see the appellant and identify her. The evidence of PW4 stated that he amongst others tried to restrain the appellant to no avail. It is for that reason that I find that the leaned magistrate rightly convicted the appellant. The appellant also argued in her appeal that the sentence of four months was excessive. The Court of Appeal in the case **Peter Wandabwa Walubengo Vs. Republic** Criminal appeal No. 284 of 2007 on an appeal on sentence had this to say:-

"In law, the trial court when sentencing an offender, is exercising a discretionary power but within certain parameters as directed by the Penal Code or the relevant law. That being the position in law, an appellate court will not review or alter a sentence imposed by the trial court on the mere ground that it (the appellate court) would have arrived at a different sentence had it been trying the case. Further an appellate court will not ordinarily interfere with such exercise of discretion by the trial court unless the trial court is shown to have acted on some wrong principle(s) or overlooked some material factors or issued a sentence that was manifestly excessive. In the case of ***Macharia Vs. Republic*** *[2003] 2 E.A. 559 this court stated:-*

"The principle upon which this court will act in exercising its jurisdiction to revive or alter a sentence imposed by the trial court have been firmly settled as far back as 1954, in the case of Ogola s/o Owuor (1954) E.A.C.A. 270 wherein the predecessor of this court stated:-

"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 Vs. R, [1950] 18 E.A.C.A. 147 it is evident that the judge has acted upon some wrong principle or overlooked some material factors. To this we would also add a third criterion namely, that the sentence is manifestly excessive in view of the circumstances of the case R. Vs. Shershawsky [1912] C.C.A. 28 TLR 263."

"Further, the law is that sentence imposed on an accused person must be commensurate to the moral blameworthiness of the offender and that is thus not proper exercise of discretion in sentencing, for the court to fail to look at the facts and circumstances of the case in their entirety before settling for any given sentence – see ***Ambani Vs. Republic*** *[1990] KLR 161."*

The appellant was charged with the offence contrary to section 95 (1) (b) of the Penal Code. That section provides that on conviction one is liable to imprisonment of six months. With that in mind, can one say that the sentence of four months was excessive? Bearing the offence and circumstances of it, I would say that it was not excessive. The appellant was said to have chased PW1 with a panga and she made her intentions clear that she wanted to assault PW1. If PW1 had not managed to outrun her and lock herself in her house the appellant would most likely have carried out her threat. It is because of that that I find that the sentence was not excessive. In the end, the appellant's appeal against conviction and sentence is dismissed. I order the appellant to be detained in custody and to proceed to serve the sentence of the

lower court.

Dated, signed and delivered at Meru this 17th day of February 2011.

MARY KASANGO
JUDGE