



THE REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

HCCRA. NO.13 OF 2011

**ROBERT MUMO KILONZI.....APPELLANT/
APPLICANT**

VERSUS

**REPUBLIC.....RESPONDE
NT**

RULING

(1) On the 14th February, 2011 Robert Mumo Kolonzi (“**the Appellant**”) was convicted on the charge of creating disturbance contrary to section 95(1) of the Penal Code and sentenced to six months imprisonment and being dissatisfied with that conviction and sentence of the Resident Magistrate’s Court (Hon. S. K. Mutai) in Mutomo Criminal Case No.157 of 2010 filed his Petition of Appeal on the 28th January, 2011. He contends that the Learned trial Magistrate misdirected himself in law and fact by failing to take into account that the evidence of the complainant before the trial court did not support the charge nor was it corroborated; that the evidence led by the prosecution was contradictory; that the appellant’s evidence was corroborated by evidence of his witnesses and that the complainant failed in his evidence to mention P.W.2, 3 ad 4 as having been present at the meeting when the alleged offence was purported to have been committed.

(2) In a Notice of Motion dated and filed on the 28th January, 2011, the Appellant seeks to be admitted to bail pending the hearing and determination of his appeal on the main ground that the appeal has overwhelming chances of success in that there are clear misdirection by the final court (sic.) The application is supported by the affidavit of Alphonse Mbindyo, Esq., Advocate for the Appellant, made on the 28th January, 2011 in which he reiterates the grounds in the Appellant’s petition.

(3) In submissions, Mr. Mbindyo contended that the evidence upon which the Appellant was convicted was conflicting and that as no violence was shown to have occurred, the offence with which the Appellant was charged was not proved. Learned counsel also drew the court’s attention to the provisions of Article

49 (1) (h) of the Constitution read in conjunction with Article 51 (1) thereof on the basis of which he urged that the application be allowed.

(4) Mrs. Gakobo, learned State Counsel for the Respondent, in opposing the application stated that the Appellant had failed to establish that his appeal has overwhelming chances of success. Learned counsel pointed out that the evidence of P.W.1, 2 and 3 clearly pointed to the manner in which the Appellant had threatened to cause a breach of peace at the meeting and that actual physical violence was not envisaged as an ingredient to the offence under section 95(1) (a) of the Penal Code under which the appellant was charged. It was also argued for the Respondent that Article 49 of the Constitution is irrelevant to the application as it relates to the rights of an arrested person, which rights the Appellant had enjoyed fully while undergoing trial. Having been convicted and sentenced to a custodial sentence, the Appellant could not seek to benefit under those provisions.

(5) Looking at the evidence, the complainant, Chief Jackson Munyalo Muthoka (P.W.1), testified that the Appellant told him that he (the Appellant) knew how to deal with chiefs and threatened to kill him. P.W.2 said the Appellant became angry and said he would even beat the chief and was violent; while P.W.3 stated that the Appellant became angry and violent and said the former chief died because of ordering him (“**the Appellant**”) and that he abused the chief. Similar sentiments also were expressed by P.W.4. While being cross-examined by the Prosecution, the Appellant admitted that he had a disagreement with the chief while D.W.3 testified that the Appellant did not threaten the chief but that he had a grudge with him since July, 2010.

(6) It was on that evidence that the learned trial Magistrate made a finding that the Appellant threatened to beat the complainant while he was conducting a meeting and a further finding that the defence advanced by the Appellant was unconvincing and proceeded to convict the Appellant. On the basis of all the relevant material before me which I have considered, I am unable to reach the conclusion that there is an overwhelming chance of the appeal being successful and that being the case, the application must be disallowed. The other minor relevant considerations would be whether there are exceptional and unusual circumstances. None have been advanced in the grounds of appeal nor in submissions.

(7) Accordingly, and for the reasons I have stated, the application dated the 28th January, 2011 fails and is hereby dismissed.

Orders accordingly.

Dated and delivered at Machakos this 14th day of **March**, 2011.

P. Kihara Kariuki

Judge