



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

CRIMINAL APPEAL NO. 94 OF 2008

JOSEPH KAGIRI KIHARAAPPELLANT

Versus

REPUBLIC.....RESPONDENT

JUDGMENT

JOSEPH KAGIRI KIHARA, the appellant herein, was tried on a charge of ***creating disturbance in a manner likely to cause a breach of peace contrary to section 95(1)(b) of the Penal Code***. At the end of the trial the appellant was convicted and ordered to pay a fine of Kshs. 5000 in default to serve 3 months imprisonment. He was aggrieved hence this appeal.

On appeal the appellant put forward the following ground in his petition:-

- 1. That the trial magistrate erred in law and facts in failing to find the prosecution evidence did not support the necessary ingredients of the offence of creating disturbance in a manner likely to cause breach of peace contrary to section 95(1)(b) of the Penal Code.***
- 2. That the learned trial magistrate erred in law and fact in failing to visit the locus in quo terms of order made by a magistrate previously hearing the case.***
- 3. That the learned trial magistrate erred in law and fact in failing to consider the defence advanced by the appellant.***
- 4. That the learned trial magistrate erred in law and fact in convicting the appellant in absence of evidence from a crucial prosecution witness who was never called to give evidence.***
- 5. That the learned trial magistrate erred in law and fact in arriving at a decision not backed by the evidence on record by based on a person surmise and conjecture.***
- 6. That the learned trial magistrate erred in law in failing to appreciate the provisions of Section 47A of Evidence Act (Cap 80 Laws of Kenya).***

7. That the learned trial magistrate judgment, conviction and sentence are bad in law.

Before delving deeper into the merits of the Appeal, let me set out the case that was before the trial court. The prosecution's case was supported by the evidence of three witnesses. Isaac Waithaka (PW 1) told the trial court that on 22nd August 2005 he found the appellant grazing his cows on his neighbour's land which had been left under the appellant's care. PW 1 said he took a stick to drive away the appellant's cows. The appellant is said to have started pushing PW 1 using his shoulders. When PW 1's wife saw this, she screamed. PW 1 requested his wife to join him to drive away those animals. The appellant is said to have began to drive away those cows. PW 1 sent for the police when he realized the appellant was not moving out. PW 1 said the appellant started to haul abuses at him referring PW 1 and wife as witches. Leah Wacheke (P.W. 3) repeated the evidence of her husband (PW 1). She said the appellant referred her as a prostitute.

P.C. Stephen Kinyua (PW 3) told the trial court that PW 1 reported to the police about the offence. The appellant denied the complainant's complaint. He claimed that on that date he went to graze his animals in a shamba next to that owned by the complainant. The complainant is said to have told the appellant to drive away the animals. He denied having abused the complainant.

Having given the brief history of the case, let me now look at the salient points argued on appeal. It is the submission of Mr. Mugambi learned advocate for the appellant that the particulars of the charge were not established. It is said that the offence was allegedly committed in a private farm and not in a public place in the presence of the complainant and his wife. It is alleged that the trial court ignored the appellant's submissions.

Secondly, it was alleged that the appellant had asked the court to visit the *Locus quo* but that request was never made. Mr. Makura, Learned Senior State Counsel agreed with the submissions of the appellant that the offence took place in a private farm.

After a careful consideration of this appeal, I am convinced that the offence was committed in private which cannot be said to be a public place within the meaning of section 4 of the Penal code. It was also erroneous for the trial magistrate to fail to visit the locus. The benefit of doubt should be given in favour of the appellant.

The appeal is allowed. The conviction is quashed and the sentence is set aside. The appellant be set free forthwith.

Dated and delivered this 17th day of June 2011

J. K. SERGON

JUDGE

In open court in the presence of Miss Wambui holding brief Mugambi for the Appellant and Mr. Makura for the State.