



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU
CRIMINAL APPEAL NO. 242 OF 2009

LESIIT J.

GERVASIO KIRIMI.....APPELLANT

VERSUS

REPUBLIC.....REPOUDENT

JUDGMENT

The Appellant **GERVASIO KIRIMI** was convicted of one count of creating a disturbance in a manner likely to cause a breach of the peace contrary to section 95(1) (b) of the Penal Code. He was sentenced to serve CSO for a period of 3 months.

The Appellant was aggrieved by the conviction and sentence and therefore filed this appeal.

Mr. Nyenyire for the Appellant urged four grounds in line with the grounds on the Petition of Appeal filed herein, which I have considered.

The facts of the prosecution case were that the Appellant went to the home of the Complainant and hurled unprintable insults at him and challenged him to go out where the Appellant was so that he could kill him. The prosecution case was that neighbours of the Complainant, PW2 and 3 went to the scene attracted by the noise, and were able to persuade the Appellant to go home.

The Appellant put forward an alibi as his defence denying even going to the complaint's home as alleged. The Counsel for the Appellant, Mr. Nyeinyire urged four grounds together in line with the filed petition of appeal. Counsel urged that the circumstances at the scene were not conducive for a positive identification as the incident occurred at 10 pm. He relied on the **M'Mwongo & Another Vs Republic Case No. 357 and 359 of 2009** for proposition courts must carefully examine the evidence adduced in order to determine the ability of the witness(es) to identify the offender. I agree fully with that proposition.

Mr. Mungai learned State Counsel opposed the appeal and submitted that all the witnesses knew the Appellant before. That there was moonlight and that the Appellant took a considerable time at the scene. That in the circumstances the identification was correct.

The circumstances of identification being 10 pm under moonlight was truly late at night.

I did however, consider the fact all the prosecution witnesses and the Appellant were fellow villagers that they knew each other very well and also the fact that two other witnesses, PW2 and 3 took time to calm down the Appellant and persuade him to leave any doubt in their ability to positively identify the Appellant was removed. The identification of the Appellant was correct and safe.

Mr. Nyenyire urged that some witnesses were not called as witnesses. That argument was also advanced before the learned trial magistrate who found correctly that the prosecution's duty was not to call all those who witnessed but to call sufficient evidence to sustain its case.

There is however, a more important matter which neither the learned trial magistrate nor both Counsels to the Appellant and State considered. The prosecution need to prove either that the Appellant was involved in a brawl or conducted himself in a manner that could lead to a breach of the peace. The evidence of the prosecution negates these ingredients of the offence. First, it is shown that the Appellant stood at the Complainant's fence and started abusing him. Secondly, the Complainant never let the Appellant into his compound neither did he go out to where the Appellant was. Thirdly, incident was in the village. Fourthly, it was at 10 pm and people were in their houses.

At the scene only the Appellant and his company and PW2 and 3 were present. The conduct of PW2 and 3 clearly shows that the Appellant could not have succeeded in provoking them to conduct themselves in a manner that was a threat to peace. They not only maintained peace but managed to calm down the appellant. Likewise the complainant was annoyed due to the insults hurled at him. He never however, went out to where the appellant was. The complainant was not incited to act violently either. **MULE VS REPUBLIC 1983 KLR 246** where the court held:-

2. The offence of creating a disturbance and likely to cause a breach of peace constitutes incitement to physical violence and the breach of the peace contemplating physical violence. The act of the appellant had those two elements.

3. 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 Appellants interfered with people's activities and therefore caused a breach of peace."

Clearly the evidence adduced by the prosecution did not support the charge.

On these grounds I will allow the appeal, quash the conviction and set aside the sentence.

Those are my orders.

DATED, SIGNED AND DELIVERED THIS 1ST DAY OF DECEMBER, 2011

J. LESIIT

JUDGE