REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL APPEAL NO. 135 OF 2009

LESIIT J.

M'ITHANA M'ITHAI …….....…….....1ST APPELLENT
MICHAEL KIRAMANA…….....……...2ND APPELLANT
VERSUS
REPUBLIC …….....…….REPONDENT

JUDGMENT

The Appellant M'ITTHANA M'ITHAI the first appellant and MICHAEL KIRAMANA the 2nd Appellant were tried together in the lower court. They were jointly charged with one count of creating disturbance in a manner likely to cause a breach of the peace contrary to section 95(1) (b) of the Penal Code. They were found guilty and convicted for the offence. They were sentenced to four months imprisonment. They have since served sentence.

The Appellants were aggrieved with the conviction and sentence and therefore filed these appeals which I have consolidated having arisen out of the same trial.

The Appellants rely on 10 grounds of appeal cited in the filed Petition of Appeal which was urged by their Counsel Mr. Muriuki.
Mr. Mungai Learned State Counsel opposed the appeal on behalf of the State.

The facts of the case are that both Appellants went to a parcel of land belonging to PW1 albeit still within an Adjudication Section, and chased away PW1, 2 and 3 with a panga.

The 1st Appellant's defence was that he found the Complainant tilling his land. That when he went to make a report against him, he was the one who was arrested and charged.

The 2nd Appellants defence was that the land in question belonged to the 1st Appellant. That he did not do any wrong.

I have carefully considered these appeals, guided by the court of appeal case of **Okeno V. Republic [1972] EA 32** the role of a first appellate Court is given as follows:

"**An Appellant on first Appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination** [Pandya vs. Republic (1957] EA 336] **and to the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusion** (Shantilal M. Ruwala v. Republic [1957] EA 570.) **It is not the function of a**

first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, (SeePeters v. Sunday Post, [1958] EA 424.)"

I have considered submissions by both Mr. Muriuki for the Appellants and Mr. Mungai for the State.

Mr. Muriuki submitted that the ingredients of the offence were not proved as there is no evidence to show the scene of the incident was in a public place and that peace was threatened. Counsel relied on the authorities **Tolley Vs Republic 1983 KLR 315** where court held:

"There is a breach of the peace where never a person who is lawfully carrying out his work is unlawfully prevented by another from doing it. It is a breach of the peace because such persons is entitled to peacefully go on with his work (R v Chief Constable of Devon and Cornwall, Exparte Central Electricity Generating Board [1982] QB 458). In this instance, the appellant's act of wielding a "pistol" and threatening officers on lawful duty was likely to cause a breach of peace."

Counsel also relied on **MULE VS 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."**

The authorities are persuasive and good law therefore I am well guided.

Mr Mungai urged that the Appellants went to PW1's shamba and chased her and others with pangas. The learned State Counsel urged that what was important was the fact Appellants had no right to enter that shamba.

Having evaluated and analysed the evidence adduced before the lower court, I am convinced that the learned trial magistrate despite drawing up the issues of the case very clearly and analyzing the evidence quite well, misdirected himself as to the ingredients of the offence.

The evidence that was presented before the learned trial magistrate clearly indicated that what took place at the scene of the incident was a dispute concerning either land or boundary to land. The learned trial magistrate was even informed of a pending court case involving that shamba. In spite of all that evidence, the learned trial magistrate proceeded to convict.

A conviction to a charge of creating disturbance contrary to section 95(1)(b) of the Penal Code cannot be entered unless it is proved that the appellant went to a public place where he created a disturbance by interfering with, and stopping *Wananchi* from going about their chores peacefully and threatening peace by creating a situation which could lead to an incitement to physical violence. In the instant case the scene was on a private piece of land. Implements such as pangas which the Appellants are said to have had, are the common and implement of choice for most land chores like weeding, planting, slashing, cutting etc. It could not have constituted an incitement to violence or a threat of peace for the Appellants to wield the pangas at the scene. In fact the evidence was PW1 for instance ran away from the scene early before anything happened. I find the evidence by the prosecution did not support the charge.

Before I end I wish to make a note to the learned trial magistrate. Convictions should be based on actual

evidence adduced before the court and not on mere conjecture. To conclude that the Appellants intended to cut or assault the Complainant if they remained at the scene is conjecture, is not evidence and is inadmissible. To rely on such conjecture to reach a conclusion to convict is misleading and could alone lead to the overturning of one's decision.

I have concluded that the conviction entered herein was unsafe. I find merit in both Appellants appeals, allow them, quash the convictions and set aside the sentences.

Those are my orders.

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

J. LESIIT
JUDGE