REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI

Criminal Appeal 61 of 2006

FRANCIS MURIITHI MUNUHE…….APPELLANT

Versus

REPUBLIC…..….……RESPONDENT
(Appeal from the original conviction and sentence of the Chief Magistrate's Court at Nyeri in CMCR.3575 of 2004 by E.J. OSORO - SRM)

J U D G M E N T

The appellant faced two counts in the Chief Magistrate's Court at Nyeri, to wit;
COUNT 1 – Creating disturbance in a manner likely to cause a breach of the peace contrary to *section 95 (1) (b)* of the Penal code. The particulars being that the appellant on the 25th day of September, 2004 at Gitegi village in Nyeri District of the Central Province, created a disturbance in a manner likely to cause a breach of the peace by threatening to cut Esther Wanjiku Ndungu with a panga.
COUNT 2 – Injuring animal contrary to *section 338* of the Penal code. The particulars thereof were that the appellant on the 26th day of September, 2004 at Gitegi village in Nyeri District Central Province, willfully and unlawfully maimed an animal capable of being stolen namely a sheep, the property of Esther Wanjiku Ndungu.

The prosecution case according to the complainant was that on 15th September, 2004 at about 4 p.m, PW1 was going to fetch water when she met the appellant sitting on a path. The appellant refused to give way and threatened to cut her with a panga. PW1 ran and met PW2 who took her back to the scene and found the appellant having sat on the path whilst armed with a stick and panga. Again the appellant refused to give them way to pass. PW1 further testified that on 26th September, 2004 the appellant injured her sheep which was in the custody of PW3. PW3 on his part told the court that on the material day whilst looking after 12 sheep in the bush he came across the appellant who drove the sheep away. PW3 ran home to look for help but he did not find anyone. He came back only to find one sheep injured. He took the injured sheep home and informed his father and the matter was reported to Mweiga police station. The appellant was subsequently arrested and charged. PW3 confirmed to the court that there was pre-existing grudge between him and the appellant. The sheep was attended to by Dr. Karugu, a veterinary doctor.

PW4 Joseph Muriuki, a veterinary doctor, told the court that he took over the case from his predecessor Dr. Karugu. He tendered in evidence the medical report prepared by Dr. Karugu on the injured sheep. The findings were that the sheep had a deep and wide wound to the left tarsal that was infected and severely purulent, the metatarsal bone was broken traversely at the area of the wound the fracture was simple and complete. Recommendation in the medical report was that chances of recovery of the fracture and wound sepsis was poor, and mercy killing of the sheep was advised to prevent further unnecessary suffering.

PW5 the investigating officer testified he escorted the Veterinary doctor to the complainant's house, who identified the injured sheep which was examined by the veterinary doctor. He further testified that on 1st October. 2004 with his colleague they arrested the appellant at Mweiga police station and then preffered the charges against him.

The appellant was put on his defence. In sworn evidence, he told the court that he has had grudges with the complainant's husband Mugo Kingori, his mother Monica Muthoni (PW1's mother in law) the 2 brothers Mathenge and Kingori (brothers to the PW1's husband) over a case of illegal grazing. This case was therefore framed against him by PW1 to prevent him from pursuing his complaint against her (PW1) husband. Further he testified that PW1 had colluded with the police. He denied committing the offences. He called a witness, his wife, who told the court that she was with the appellant throughout on the material day and did not see him chase PW1 at all.

The learned magistrate having carefully considered and evaluated the evidence tendered by both the prosecution and defence found favour with prosecution case. Accordingly she convicted the appellant on both counts. Upon conviction, she sentenced the appellant to fines of Kshs.5,000/= and Ksh.10,000/= respectively in respect of count 1 and 11 aforesaid and in default to serve 3 and 6 months imprisonment respectively.

Aggrieved by the conviction and sentence the appellant preferred the instant appeal. He faulted his conviction and sentence on 4 grounds to wit,

"1. THAT the learned magistrate erred and misdirected herself in law in failing to take into consideration that no evidence of an eye witness was adduced that the complainant's sheep was assaulted by the accused person and the trial magistrate relied on hearsay evidence.

2. THAT the learned magistrate erred herself in law by failing to take into consideration that none of the prosecution witness witnessed PW1 being chased or threatened by the accused person.

3. THAT the learned magistrate failed to take into consideration that there was no corroboration of the evidence adduced by the complainant and her witnesses.

4. THAT the learned magistrate failed to take into consideration that the ingredients of the offence were properly proved."

When the appeal came up for hearing, the appellant submitted that he did not commit the offence and that the case was a frame up as a result of a land dispute between himself and the complainant.

Mr. Orinda, learned senior principal state counsel opposed the appeal. He submitted that the evidence of PW3 and PW4 spoke for itself. PW1 knew the appellant. They had issues to square. Defence was considered and rightly rejected. Finally counsel submitted that the sentence imposed was proper.

As a first appellate court, I am required to subject all the evidence tendered before the trial court to fresh and exhaustive evaluation so as to reach my own decision as to whether the judgment of the learned magistrate should stand. See Okeno V Republic (1972) EA 32.

I have no doubt at all in my mind that the relationship between the appellant and the complainant and her family was anything but cordial. The complainant did not dispute the fact that she had a land dispute with the appellant. She did not dispute the fact that they had grudges with the appellant. Indeed even PW3, the herdsman confirmed the existence of such grudges. This being the case it behoved the learned magistrate to approach the prosecution case with abundant caution knowing that very often parties resort to criminal sanctions to settle scores. In my view this is one case where our criminal justice was invoked unfairly so as to punish the appellant. This was purely a civil matter that was unnecessarily criminalized. Had the learned magistrate approached the case with this background in mind, I am certain that the result may well have been different.

The appellant advanced a plausible defence. The defence in my view was not properly treated and or evaluated by the learned magistrate. The appellant went into the details as to the genesis of the dispute between him and the complainant's family. That defence was not dislodged and or discounted at all much as the appellant was cross-examined. Indeed that defence seems to tie in very well with the circumstances of the appellant's arrest. He was arrested at the police station as he pursued his complaint against the complainant's family. The appellant gave several criminal cases that he was involved in with the complainant's family. The complainant did not deny the existence of those cases which therefore tends to lend credence to the appellant's assertion that this case was conjured up against him by the complainant in a bid to pressurize him not pursue those cases against her and her family.

This fact is born out further by numerous contradictions in the prosecution case. According to the charge sheet, the animal alleged to have been injured was a sheep. However, PW1 in her evidence stated that infact the animal so injured was a goat. There is a whole world of difference between a goat and a

sheep. Secondly, the 1st count talks of the appellant having created a disturbance in a manner likely to cause a breach of the peace by threatening to cut PW1 with a panga. However the evidence of PW1 and PW2 is to the contrary. According to PW1 as she was going to fetch water, she found the appellant sitting on a path. When she asked the appellant why she was sitting on the way, he rose and started chasing her. This being the only evidence on the issue, where is the threat to cut PW1 with a panga by the appellant as she claimed. As for PW2 he testified that on 15th September, 2004 he was from home going to the farm when he met PW1 running. He stopped and she told him that someone was chasing her. They went back and saw the appellant sitting on the path and when they asked him why he was sitting on the path and how he expected them to pass, he told them to pass through the farm. Again with this evidence, where is the threat to cut PW1 with a panga. Indeed it would even appear that the alleged evidence of PW1 of being chased by the appellant was a figment of her imagination. Surely, if indeed the appellant was chasing PW1 as claimed, couldn't PW2 have been able to witness the same. It does appear that the appellant was nowhere in sight when PW2 encountered PW1 who claimed to being chased by the appellant. It took PW2 and PW1 to walk back to the scene only to find the appellant sitted. So where is the chase? In a nutshell therefore there is no evidence that PW1 was threatened with a panga and or was chased by the appellant. The same goes with regard to count II! There was no eye witness to the maiming of the PW1's sheep and or goat. In other words, the learned magistrate failed to take into consideration that no evidence of an eye witness was adduced that the complainant's sheep and or goat was maimed by the appellant. Much as the evidence on this aspect of the matter was purely circumstantial, the possibility that the sheep/goat could have been maimed by another person or cause was not completely eliminated.

Finally I wish to comment on the application of *section 77* of the evidence Act. In the circumstances of this case, the prosecution without laying the firm basis for the invocation of the said section simply said; "….I am applying that I be allowed to produce the statements under section 77 of the Evidence Act…" without as much as saying why the author of the document could not produce the same. Nonetheless the learned magistrate proceeded to allow the application. She did not even seek the reaction of the appellant. For *section 77* of the Evidence Act to be properly invoked it is necessary for the prosecution to state why the maker of the document cannot testify and tender in evidence the document. The appellant then should be asked whether he opposes the application or not and whether he wishes the maker of the document to be availed in court to produce the same. It is only after the appellant indicates that he has no objection to the application that the same can be allowed. In the circumstances of this case however, the record shows that the appellant was not asked whether or not he opposed the prosecution application. That being the case, it cannot be said that the appellant did not suffer prejudice as a result.

For all the foregoing reasons, I am satisfied that the appeal is merited. Accordingly it is allowed, the conviction quashed and sentence imposed set aside. The fines imposed if paid should forthwith be refunded to the appellant.

Dated and delivered at Nyeri this 25th day of January, 2010.

M.S.A. MAKHANDIA
JUDGE