REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KISUMU
Criminal Appeal 141 of 2009

REPUBIC……..APPELLANT

VERSUS

JERRY ODHIAMBO ONYANGO ……RESPONDENT

[From previous conviction and sentence at Maseno SRM'S Court Criminal case No. 1264 of 2007].

J U D G M E N T

This is an appeal by the state against the decision of the learned Resident Magistrate at Maseno in criminal case No. 1267 of 2007 in which the respondent, **Jerry Odhiambo Onyango**, was acquitted after the court found him not guilty of the offence of creating disturbance in a manner likely to cause breach of peace contrary to section 95 (1) of the penal code.

The particulars of the charge were that on the 18th November 2007 at Newa sub-location, Kisumu West district, the appellant created disturbance in a manner likely to cause a breach of peace by chasing **Bold Ainea Otieno** shouting that he will cut him with a panga.

Being dissatisfied with the decision, the appellant preferred two grounds of appeal as follows:-

(1) That the learned trial magistrate erred in law in acquitting the respondent under section 215 of the Criminal Procedure Code.

(2) That the learned trial magistrate erred in law in acquitting the respondent on a wrong decision of the law.

The learned Senior State Counsel, **Miss Oundo**, argued the appeal on behalf of the state appellant by submitting that the law as found in section 89 (5) of the Criminal Procedure Code is clear and if the learned trial magistrate noted that the charge did not disclose an offence then it ought to have been rejected instead of the matter proceeding to trial and ending in the acquittal of the respondent on ground that there was no offence disclosed under the charge.

To fortify the argument, the learned State Counsel referred to section 90 (2) of the Criminal Procedure Code and section 214 (2) of the same Criminal Procedure Code and contended that the charge was not invalid and that if there was a defect then it is curable under section 382 of the Criminal Procedure Code.

The learned State Counsel urged this court to exercise its powers under section 354 of the Criminal Procedure Code and reverse the findings of the trial court.

M/S Asunah, learned counsel for the respondent submitted that under section 89 (5) of the Criminal Procedure Code an offence ought to be disclosed and that under section 95 (1) of the penal code, there are two limbs of the offence divided into part (a) and (b) but herein there was no evidence that the complainant was a person in authority over the respondent or that the respondent was involved in a brawl. Therefore, the charge did not disclose whether the offence fell under part (a) or (b) of section 95 (1) of the penal code. The appellant did not know the charge facing him.

The respondent's learned counsel went on to submit that the charge did not disclose an offence but it was not rejected by the trial court as required. Instead the trial court proceeded with the trial and finally acquitted the appellant.

Learned counsel further submitted that the burden of proof rested on the prosecution and if the charge was proper it was not proved as there was no evidence of chasing or shouting or even the mention of a panga. The evidence was thus at complete variance with the charge.

Learned counsel contended that there was no support accorded by PW2 and PW3 to the evidence of the complainant (PW1). If anything, the evidence of PW2 and PW3 contradicted that of the complainant and failed to establish the charge.

It was further contended by the learned counsel that the learned trial magistrate properly consider the evidence and rightly concluded that the charge was not proved. Further, this was a matter that ought not have gone to trial and therefore, the appeal should be dismissed.

The duty of a first appellate court as was set out in the case of **Okeno –VS- Republic [1972] EA 32,** is to reconsider the evidence, evaluate it itself and draw its own conclusions in deciding whether the judgment

of the trial court should be upheld, as well as deal with any questions of law on the appeal.

Herein, the prosecution case was that on the 18th November 2007 at about 5.00 p.m., a peasant farmer at Kakamega village by name **Bold Ainea (PW1)** was seated alone in his house when the respondent while passing along a nearby road remarked **"Ogolla Otieno atapigwa bunduki".** Bold (PW1) took it that the respondent was referring to him. He did not take any action at the time.

On 20th November 2007 between 12.00 noon and 1.00 p.m., the respondent stormed into the complainant's house uninvited and asked the complainant (PW1) to accompany him to a fence where he (respondent) was pruning. After receiving the complainant's approval, the respondent continued cutting branches but not as instructed. He then threatened to cut the complainant with a sharp panga which he did not have.

The complainant feared for his life moved some steps behind and dared the respondent to repeat what he had said. The respondent repeated his statement but at that juncture a son of the complainant intervened.

The complainant's wife **Sarah Ambira (PW2)** confirmed that the respondent went to their house on 20th November 2007 and left with the complainant who returned later and told her that the respondent had threatened to cut him with a sharp panga.

The complainant's son **Daniel Ouma Ogolla (PW3),** also confirmed that the respondent went to their house and left with the complainant. Later, he (PW3) heard his father telling the respondent to repeat what he had said and the respondent said that he would cut the complainant with a sharp panga.

The respondent was arrested on the 29th November 2007 by the assistant chief Newa sub-location **Jane Achieng (PW4)** after the matter was reported to the police Maseno Police Station.

P.C John Ngemweya (PW5) of Maseno Police Station indicated that the report was made on 20th November 2007 and on 29th November the respondent was arrested and charged with the material offence.

In his defence, the respondent denied the charge and said that he was pruning a cypress fence on 18th November 2007 when some leaves fell on the complainant's farm. The complainant then came from his house alleging that he (respondent) had been sent to dump the leaves on his farm. He (respondent) did not respond and instead stopped the work and went to his home amid threats by the complainant to report to the police.

From all the foregoing evidence it was clear that the alleged offence occurred on 20th November 2007 rather than 18th November 2007 as stipulated in the charge-sheet. It was also very clear that the evidence did not establish the particulars of the charge which indicated that the respondent created disturbance in a manner likely to cause a breach of the peace by chasing the complainant, while shouting that he will cut him with a panga. There was no such panga nor any other person to witness the chase and threats.

The complainant's wife (PW2) witnessed nothing and merely stated what she was told by the complainant.

The complainant's son (PW3) indicated that he heard the respondent repeat what he had said to his father. He did not see any panga nor the respondent chasing the complainant as alleged in the particulars.

In essence, the evidence was devoid of substance to prove beyond reasonable doubt that the respondent committed the alleged offence.

The defence raised by the respondent suggested that the complainant and respondent disagreed over the pruning of a fence but the disagreement did not manifest itself into a criminal offence.

In the circumstances, this court would find that the evidence was insufficient and contradictory with the particulars of the charge such that the respondent could not possibly have been found guilty as charged. It was not his obligation to prove his innocence. It was for the prosecution to prove his guilt beyond reasonable doubt.

The learned trial magistrate in acquitting the respondent merely resolved the contradiction between the particulars of the charge and the evidence in favour of the respondent. He was entitled to do so. This court would do the same.

The learned trial magistrate did no strictly dismiss the prosecution case on account of a defect in the charge. He merely noted that whereas section 95 (1) of the penal code is in two parts, the prosecution failed to specify which part was relied upon.

The error however did not invalidate the charge as the particulars left no doubt that the prosecution intended to rely on part (b) of the offence. The defect in the drafting of the charge-sheet was a mere irregularity which did not occasion a failure of justice and may be cured under section 382 of the Criminal Procedure Code.

The variance between the charge and the evidence regarding the date was immaterial by virtue of section 214 (2) of the Criminal Procedure Code. That aside, the contradictory nature of the evidence ***vis-a-vis*** the substantial particulars of the charge made it impossible for the learned trial magistrate to decide the case in favour of the prosecution. There was clear failure by the prosecution to discharge its burden of proof.

For all the foregoing reasons, the grounds of appeal and submissions made in respect thereof are unsustainable. This court finds no good reason to interfere with the decision of the learned trial magistrate.

The appeal must and is hereby dismissed.

Delivered dated and signed this 13th day of May, 2010.

J.R. KARANJA

JUDGE