



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT BUNGOMA

Criminal Appeal 907 of 2001

NAFTALI NYONGESA BULUMA.....APPELLANT

VS

REPUBLIC.....RESPONDENT

(Appeal from the Kimilili RM CR. No.907 of 2001)

JUDGMENT.

This appeal was heard by Justice Mitey who retired before delivering judgment. I have taken over the file for writing and delivering judgment.

The Appellant Naftali Nyongesa Buluma was charged and convicted by Kimilili Resident Magistrate of the offence of creating disturbance contrary to section 95 (1) of the Penal Code and committed to do community service work for eighteen (18) months at Kamukunji F. Y. M. School. He appealed against conviction in this court.

The grounds of appeal are that the offence was never proved as required. Secondly, that the magistrate erred in convicting the Appellant of the offence of trespass while he was not charged with it. Thirdly, the Appellant states that the magistrate did not analyze the evidence before convicting him and that the Appellant's defence was not considered.

Mr. Wanyama for the Appellant argued the grounds of appeal bringing out discrepancies between the evidence and the charge in line with the petition of appeal.

Mr. Kemo, State Counsel conceded to the appeal. He agreed with the grounds of appeal as presented.

I have perused the record of appeal. The Appellant was charged with creating disturbance contrary to section 95 (1) of the Penal Code. PW1 testified that he was in his house watching television with neighbours on the material day around 9.00 p.m. He saw the appellant cross his shamba and chased him. He entered the forest and when PW1 went near him, the Appellant confronted him with a panga. PW1 ran to the nearest home which happened to be that of the Appellant's parents. The Appellant followed him there and threatened

to cut him with the panga. He was restrained by his parents and his brother. PW1 reported the matter to police and the Appellant was arrested the following morning.

PW2 was attracted by noise from the home of the Appellant. He went there and found the Appellant held by his parents and PW1 at the same place. PW2 did not see the Appellant armed with any weapon. This was the only eye witness of the scuffle and only saw the last part of it.

The Appellant denied the offence and said he had gone to the latrine around 9.00 p.m. when he found PW1 with a panga. PW1 chased the Appellant who ran back home. DW2, the brother of the Appellant supported the story that it is PW1 who chased the Appellant with a panga.

The magistrate convicted the Appellant for the reason that he believed PW1 as opposed to the Appellant. It is evident that in his judgment, the magistrate did not analyze the evidence on record. Had this been done, the magistrate would have noted the discrepancies in the evidence and would have reached a different conclusion. Firstly, the incident took place at night around 9.00 p.m. PW1 did not explain how he saw the Appellant, whether he was aided by some torch light or moonlight. This is crucial in order to establish that there was identification. It is also questionable how PW1 saw someone crossing his shamba while he was sitting inside the house watching television. It sounds incredible unless PW1 walked outside or stood at the entrance of his house, he could not see someone cross the shamba. The light which aided PW1 to see the Appellant was not described or even mentioned.

The version of the Appellant sounds more credible that he found PW1 standing at the latrine and that PW1 chased him to the home of the Appellant's parents. PW1's version that he ran to the home for help when accused attempted to attack him does not strike me as credible. It would be expected that PW1 should have ran to his own house or to the house of another neighbour for help. If it true that the accused was threatening to attack him. PW2 found PW1 and the Appellant outside the home of the Appellant's parents. He said he did not see the Appellant holding any weapon. PW2's version is also credible. He did not witness the first part of the incident as who chased who between the Appellant and PW1.

The magistrate in his judgment said:

“The question for determination is whether the accused crossed the shamba of the complainant at night and later threatened him or complainant attacked the accused at the latrine.”

The magistrate then jumped to a conclusion without analyzing the evidence:

“ I have concluded that accused attacked the complainant.”

It is noted that the question for determination ties the offence with trespass and with creating disturbance on the complainant on the one part and with assault on the Appellant on the other part. The magistrate did not say which offence he convicted the Appellant with. He stated:

“I find the accused guilty and he is convicted of the offence.”

The record of appeal has two charge sheets with two different charges, one of creating disturbance and the other of trespass. The first charge is the one the Appellant was tried for, yet the language in the judgment would lead to an inference that the Appellant was convicted of trespass, that is, entering the land of the complainant without his consent. Further confusion is caused by the statement earlier quoted herein to the effect that the magistrate found that the ***“accused had attacked the complainant.”***

I agree with the State Counsel that the evidence is full of contradictions and that the judgment charges and convicts the Appellant of trespass instead of the offence charged which is a misdirection and an irredeemable error leading to miscarriage of justice. After analyzing

the evidence, I find the complainant an untruthful witness who is likely to have framed the case in order to frame the Appellant for some earlier grudges or differences.

The Appellant was wrongly convicted by the trial court. I allow the appeal by quashing the conviction. The sentence is also set aside.

Dated, Delivered and Signed at Bungoma this 16th day of June, 2010.

F.

N.

MUCHEMI

JUDGE

In the presence of the State Counsel Mrs. Leting.