



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MALINDI
HCCR APP NO. 52 OF 2008

(FROM ORIGINAL CONVICTION AND IN CRIMINAL CASE NO. 444 OF 2006 SENTENCE OF THE SENIOR RESIDENT MAGISTRATE’S COURT AT MALINDI BEFORE J. KITUKU – RM)

WILSON KAZUNGUAPPELLANT

VERSUS

REPUBLICRESPONDENT

J U D G E M E N T

Wilson Kazungu Katana was charged along with three others of incitement to violence contrary to section 96 Penal Code.

The particulars were that on 19th day of November 2005 at Gader in Malindi District within Coast Province, jointly with others not before court without lawful excuse uttered words “do not do work if you continue you will see fire or you will shed blood” an act which led to the damage of motor vehicle registration KAG 899U Land cruiser, the property of Said Abdalla Backshwein.

Appellant was sentenced to serve one (1) year imprisonment and he has appealed against this sentence and conviction.

PW1 (Said Abdallah Bakshwein) has a farm in Gada, Malindi. On 18th March 2004, the area sub-chief wrote a letter summoning him to his office. When he got there he found the appellant and his father and his brother Immanuel. The Assistant Chief informed him that there were allegations he was making arrangements to burn appellant’s house and kill him. He denied and appellant could not prove the allegations that, – the matter was referred to police and an enquiry file was opened.

On 19-11-05, the appellant went to PW1’s land, plot no. 120 Malindi and found approximately fifteen workers there. Among them being Furaha Gungi – this was about 11.30am and appellant said:

“I have come to tell you that you should stop working here because there will be fighting here and you will see”

Appellant said there was going to be violence and as a fellow Giriama he was cautioning them to stop working.

PW2 recognized appellant who was alone and whom he says is a neighbour. Appellant stood by the roadside while talking, so the workers moved out of the shamba and went to wait for Said (PW1) who came the next day and was informed about what had transpired.

PW1 advised the workers to go back to work and while still working, PW2 saw PW1 being attacked and burned inside his car.

PW1 further stated:

“Only one of those who attacked him is here but not amongst the accused. When the threat of violence was issued by accused 1, the accused in the dock was not present”

PW3, Eric Kazungu, another of PW1’s workers testified that appellant went to them and informed them that there would be blood shed in the place where they worked. According to PW3, appellant said he would not be involved, but there would be violence and bloodshed. The workers became fearful and stopped working.

On cross-examination PW2 stated that appellant and complainant have a dispute and that appellant spoke in a threatening voice and that appellant spoke in the Giriama language. He stated that only appellant was involved in issuing the threats. According to PW3 on cross examination, appellant spoke to them moderately Charo Kazungu (PW4) testimony was that appellant approached them and told them:

“We may keep on working in that shamba, but he knew there will be bloodshed in that shamba and we decided to leave.”

He explained that:

“after some time, the violence he threatened broke out and there was bloodshed.”

Now on 20-11-05, PW1 received the report about the incident from his workers and he instructed some of the workers to go to the police and report that – they obliged.

On 27-2-06 – PW1 had gone to the shamba in his motor vehicle registration no. KAG 899U, a land cruiser. He parked his motor vehicle and begun assigning his workers duties for the day. Shortly some people emerged and attacked him, they were armed with dangerous weapons. He got a chance and ran off to his motor vehicle and started it so as to flee. However the people came and locked him inside the motor vehicle then asked for petrol, and a woman brought petrol in a bottle. They splashed the petrol on the motor vehicle and set it alight with PW1 inside. One of the people speared him through, the nose, however he was rescued by a tractor driver who came along and pulled him out. He sustained injuries on left leg, right side of the abdomen and the whole right arm. The motor vehicle burned.

“I was still conscious. I saw those who attacked me and recognized them. If I saw them, I would recognize them. None of the accused is them. They were arrested and charged in Criminal case 441/06”

According to him appellant was the mastermind of the whole incident because he even threatened PW1 in the presence of his two brothers and the administrators, after the incident. On cross-examination PW1 further stated he had a two fold dispute with the appellant

(a) he was a squatter on their farm

(b) appellant and his family had a case in High Court Mombasa No. 71 of 1989 against PW1’s family (being a civil case).

He further stated that appellant had several times threatened his life. PW1 stated appellant incited his workers and subsequently, he was injured by others.

PW5 Retired IP Juma Mwadime who worked at Malindi Police Station when he received a report of attempted murder at Ganda farm involving PW1. He proceeded to the scene and found a Toyota motor vehicle which had been burnt. He begun investigations and arrested the inciters one was the ring leader

whom he named as the appellant.

He recorded statements from various witnesses who purported appellant as the one who used to go to the area frequently and make threats to the owner of the shamba and that he incited them on 19-11-06 and that appellant was inciting others over a land dispute and now according to his investigations appellant said to the workers that:

“If they continued to work, they will see fire and blood shed”

The appellant in his sworn defence explained that on 19-11-05, at about 8.30am, he left his home in Magogo Gada, Malindi, for a meeting at Barani Secondary School. He passed by the home of Michael Menza Kalicho and together they went for the fund raising in Malindi Central Teachers Project arriving there at 9.45am.

He was an official at the fund raising issuing cards to sell before the meeting and he surrendered the cash sales at 10.00am. The fund raising started at 1.00pm. He never left the meeting venue because at 11.00am he was arranging the seats for the meeting. The meeting ended at 5.00pm and he went home. He denies uttering the alleged words and that the words were fraud.

On cross-examination he stated that the evidence of the witnesses was as a result of a conspiracy to remove him from the land.

Appellant’s witness Michael Menza, a fellow teacher informed the court that on 19-11-05, he was with the appellant they were officials in a fund raising function – they got to the venue at 7.45am and did not leave until 5.00pm.

Another defence witness Agnes Kadzo Unde who was at the fund-raising meeting with appellant testified that she arrived at the venue at 11.00am and found appellant had arrived before her. She further stated that appellant did not leave the venue between 10.00am – 5.00pm.

In his judgment, the learned trial magistrate noted that it was not disputed that PW1 was attacked and burned in the farm and his motor vehicle damaged. He said further that appellant had warned the workers in Giriama saying there would be bloodshed and violence that was to come and indeed it came.

He considered the evidence of the defence witnesses and said none of them were with the appellants as he passed the complainant’s farm so none of them could say what he had done before they met him.

Then he concluded:

“Having looked at the evidence carefully, I find it proved as a fact that accused 1 did incite violence....convict him of the offence charged”

It is against these findings that the appellant has filed his appeal on grounds that:

- The Honourable Court erred in law and in fact in convicting the appellant against the weight of the evidence on record.
- The learned trial magistrate erred in law and fact in finding that there was evidence of incitement contrary to section 96 Penal Code.
- The learned trial magistrate shifted the burden of proof onto the appellant
- The learned trial magistrate failed to analyse the defence by the appellant
- The learned trial magistrate failed to read the judgment but only chose to tell appellant that he had been found guilty and proceeded to sentence him.

- The learned trial magistrate failed to accord the appellant a fair and just hearing
- The learned trial magistrate failed to analyse the evidence of the investigating officer who testified that the charge sheet was defective.

At the hearing of the appeal, Mr. Otara submitted on behalf of the appellant that there was no evidence of incitement on the part of the appellant and the ingredients of section 96 Penal Code were never proved beyond reasonable doubt. He argued that paragraph one of the elements enshrined in that section must be proved:-

- (a) The words uttered, written or printed should be calculated to bring death or physical injury to any person, class, community or body of person.
- (b) He drew the court's attention to the fact that although PW1 claimed to have suffered injury, no doctor ever testified to confirm the injury and no P3 form was ever produced to ascertain that PW1 got injured so injury was never proved.

Mr. Otara further pointed out that a motor vehicle Toyota Land Cruiser registration KAQ 899U was reported to have been damaged yet there was no inspection report produced to support that allegation and not even a single picture of the damaged motor vehicle was produced at the trial. Mr. Otara's contention is that it was bad for the learned trial magistrate to conclude that it was not disputed that complainant was attacked and burnt in the farm yet there was no evidence to support such a conclusion.

He further argued that none of the prosecution witnesses testified that there was enforcement of the law and that appellant participated in defeating such execution.

Further that according to the charge sheet the words alleged to have been uttered by the appellant were uttered on 19-11-05 and the said motor vehicle was damaged on 27-2-06 and that on that day the appellant was not present.

Mr. Otara submits that for incitement to stand, the inciter must be present and must actually move the crowd to the act.

He pointed out that appellant adduced evidence of alibi, yet this was not considered, yet the defence case had remained unshaken even on cross-examination.

The appeal is opposed both on sentence and conviction, and Mr. Ogoti for the State submits that the submissions are misplaced because under section 96, the burden of proof was on the accused – the cardinal words being “publishes any words....indicating an injury that it might be deserved to do...”

He points out that, in this case, the words were uttered and appellant urged the workers to stop working as there would be fighting – that violence was going to take place after that day and appellant was placed at the scene and actually spoke to some of the witnesses who testified.

It is also his contention that the appellant had a long standing land dispute with the complainant and that is what gave the appellant the excuse to utter those words which eventually led to the violence on 27-2-06.

As to evidence of the motor vehicle being damaged Mr. Ogoti draws the court's attention to Crc 441 of 2006 which was filed and dealt with the attack and destruction it is his contention that even as the appellant uttered those words, the offence was complete and what happened thereafter was just to demonstrate that he intended for violence to be caused. He clarifies that section 96 does not require that the inciter himself be present or take part in the violence, he simply incites others to do or not do something. He also says the learned trial magistrate held that the injury and damage to the motor vehicle was not disputed because pW1's evidence on that was not challenged on cross-examination.

As for the investigating officer, Mr. Ogoti submits that his evidence was not challenged and he was very focused.

Did the evidence adduced prove that appellant uttered words which led to the complainant being attacked, injured and his motor vehicle damaged?

The words he was alleged to have uttered on 19-11-05 were to this effect:

“DO NOT DO THAT WORK. IF YOU CONTINUE, YOU WILL SEE FIRE OR YOU WILL SHED BLOOD”

Section 96 Penal Code provides as follows:

“Any person who, without lawful excuse, the burden of proof whereof shall lie upon him, utters, prints or publishes any words or documents any act or thing, indicating or implying that it is or might be desirable to do or omit to do any act the doing or omission of which is calculated”

- a) *to bring death or physical injury to any person or to any class, community or body of persons; or*
- b) *to lead to the damage or destruction of any property”*

Is there evidence that appellant uttered the words stated in the charge sheet and that these led to violence?

PW2's evidence is that appellant said:-

“I have come to tell you you should stop working here because there will be fighting here and you will see”

PW2 then further explained that appellant told them he was cautioning them as a fellow Giriama to stop working because there was going to be violence.

- (a) The words as repeated by PW2 certainly are not the same as those stated in the charge sheet.
- (b) They appear to have been a caution, a warning of things to come.

Now to incite according to the Concise Oxford Dictionary Tenth Edition edited by Judy Pearsall (Oxford University Press) means to stir or to encourage or persuade.

PW3 and 4's evidence is in the same tenor, that appellant simply went and told them there would be bloodshed and violence at the place where they worked and to keep away – would this be termed as an incitement or a threat.

It is instructive that PW2, PW3, PW4 to whom the words were uttered did not take part in attacking the complainant – and it is not clear why PW1 was being attacked on 27-2-06. Were the attackers part of the workers to whom appellant is alleged to have uttered the words?

That was not established by the evidence before the court.

The words in their natural meaning as stated by the witnesses do not suggest or even imply that the people should rally up any action – in fact was PW1 attacked because people were working on his farm or because he went to assign work or what – just what is the nexus – even if the charge sheet, the people being threatened would appear to be the workers and not PW1.

What emerges is that the words as given by the witnesses in their testimony, is totally different from the words as stated in the charge sheet and whereas the charge sheet couches the same as a threat intended to stir up negative action, the evidence by PW2, PW3 and PW4 shows that it was more of a caution by a

fellow kinsman who was aware of an impending event and was warning them to keep off.

In fact it would have been different if the attack had been on the workers – then the charge would have had a leg upon which to stand, but as it is, the appellant was convicted simply for cautioning persons known to him of coming events. Indeed PW3 on cross-examination stated this:

“he spoke to us moderately. ..He did not induce us to assist him.”

It is not so much that the learned trial magistrate shifted the burden of proof onto the appellant – because under section 96 Penal Code that burden already is placed on an accused person – but there is nothing in the words (as repeated by those who claim to have heard them being uttered) to qualify as incitement, and that is my finding.

Consequently the conviction was unsafe and is quashed forthwith. The sentence herein is set aside.

The appellant shall be set at liberty, forthwith unless otherwise lawfully held.

Delivered and dated this 12th day of March at Malindi.

H. A. Omondi

JUDGE