



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT BUNGOMA**

Criminal Appeal 62, 63 & 64 of 2005

VINCENT MUNITI JUMA 1ST APPELLANT
JOHNSTONE EGESA OTUNGA 2ND APPELLANT
IGNACIOUS OLINGA OTUNGA 3RD APPELLANT

~VRS~

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant Vincent Muniti Juma was convicted jointly with two others of the offence of creating disturbance contrary to section 95 (1) of the Penal Code by Bungoma Resident Magistrate. Each was fined Ksh.10,000/= in default six (6) months imprisonment. Being dissatisfied with the judgment, the Appellant appeals against both conviction and sentence. The five grounds of appeal challenge the conviction on grounds that the prosecution's evidence was at gross variance with the charge. The court engaged in extraneous matters which were not included in the evidence and that the defence of the Appellant was not sufficiently considered. Mr. Ocharo took the court through the grounds of appeal.

Mr. Onderi, the Senior Principal State Counsel opposed the appeal on behalf of the state. PW2 saw one of the accused namely Olinga armed with a club as he came out of his house. The others broke twigs and threatened the complainant. If the complainants did not escape, there would have been total breach of peace. The judgment was well reasoned because all the evidence was evaluated.

The facts are that PW1 accompanied by PW2 and PW3 went to clear land he had bought from one James Kuchio. On arrival, one George Olinga accosted them and demanded to know what they were doing there. Olinga was restrained by his brother Ferdinand Ouma. The Appellants came to the scene and started breaking twigs while threatening the complainant. The complainant reported the matter to the assistant chief and the area police. The four suspects including the Appellant were arrested. Ferdinand was released later. The land originally belonged to a relative of the Appellant before it was sold out.

In the particulars of the charge, it was stated that the accused persons were armed with sticks and runkus. PW1 said the accused persons came to the scene and found George Olinga and his brother Ferdinand fighting. At that juncture the accused persons broke twigs and moved towards the complainant, PW2 and PW3. They threatened the witnesses. In cross examination, PW1 confirmed that the accused persons armed themselves with the twigs which they had broken. None of the three was armed with a rungu save George Olinga who had a club. PW2 and PW3 supported this evidence. It was correct to say that the accused persons were armed with sticks. The sticks were the

broken twigs. The charge was framed by the police who had also arrested Olinga who had a club. This could have been the reason why the charge was so framed. Olinga was released later without being charged. The explanation from the witnesses is that the accused were only armed with sticks and not a club or rungu. The inclusion in the charge sheet of the word rungu is a minor defect which does not affect the validity of the charge. Being armed or not is not an ingredient of the offence of creating disturbance. It is therefore not a conflict between the charge and the evidence. It is a negligible error on the charge which does not cause any prejudice to the accused. The witnesses said the accused armed themselves with sticks and moved towards the complainant threatening him. PW1 did not describe the nature of the threats. With the sticks in their hands and moving towards PW1 would be interpreted to mean threats to beat PW1.

PW1 said the accused persons chased him. The ingredients of the charge of creating disturbance was proved by the following:

- a) Accused persons arming themselves;**
- b) Moving towards complainant; and**
- c) Chasing him away from his land.**

The accused created disturbance in such a manner as is likely to cause a breach of the peace. I agree with the state counsel that if the complainant did not leave the scene, there would have been more serious consequences. The Appellants were identified by the witnesses. It was broad daylight at 1.30 p.m. The village elder PW2, knew the Appellant and his accomplices by name.

The magistrate rejected the defence of the Appellants which he described as orchestrated. He found that in cross-examination, the Appellant dwelt more on the issue of the land belonging to his relative and not to complainant. The Appellant admitted being at the scene where they saw complainant and other people passing by. He had the opportunity to commit the offence.

Contrary to what the Appellant's counsel argued, I find that the magistrate complied with section 169 of the Criminal Procedure Code. The judgment is well reasoned and contains sound evaluation of the evidence.

The sentence imposed was a fine of Ksh.10,000/= in default six (6) months imprisonment. The sentence imposed herein is reasonable and not excessive.

It is my finding that the appeal has no merit and I dismiss it accordingly. I uphold the conviction and sentence imposed.

F. N. MUCHEMI
JUDGE

Dated, Delivered and Signed at Bungoma

This 26th day of November, 2009 in the presence of Mr. Murunga for Ocharo for the appellants, the appellants and Mr. Onderi state counsel.