



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Criminal Appeal 86A of 2002

JULIUS MWANGI WAITHAKA.....APPELLANT

-AND-

REPUBLIC.....RESPONDENT

(An appeal from the Judgment of Principal Magistrate Mrs. W.A. Juma dated 14th January, 2002 in Criminal Case No. 20684 of 2000 at Makadara Law Courts)

JUDGMENT

The appellant herein had been charged with three others for creating a disturbance in a manner likely to cause a breach of the peace, contrary to s.95(1)(b) of the Penal Code (Cap.63, Laws of Kenya). The particulars were that the three accused, on 22nd October, 2000 at Gikomba Market within the Nairobi Area, jointly created a disturbance by abusing *James Macharia*, threatening to strangle him with a rope, and blocking his customers from accessing his business outfit.

PW1, *James Kamau Macharia* said he had a hawking business at Machakos Bus Station in Nairobi. He was at his place of work on Sunday, 22nd October, 2000 between 10.00 a.m. and 10.30 a.m. As PW1 sold his cabbages and potatoes, the three accused persons entered his sales yard, and started preaching the word of God. The three set up in the yard a large wooden table, and fixed thereon loudspeakers. It was the appellant herein and a co-accused who lodged the two loudspeakers on the large table in the sales yard. When the complainant strenuously objected to such intrusion upon his business space, the three accused beat him up and called him names. The appellant herein slapped PW1 in the back, and all the three threatened to strangle him with two ropes which the appellant supplied. It is the members of the public who stopped the planned orgy of strangling PW1. PW1 went to Kamukunji Police Station, but got no help until the following day, when the three were arrested. The arrest took place at the appellant's timber-sale yard a short distance from the *locus in quo*, and even the other accused, who were his employees, were found at his premises. PW1 had known the three accused for as long as 3 – 4 years and there had been no grudge between them. When the appellant had entered PW1's business space he had brought chairs therein, had mounted speakers and amplifiers, and had attracted six of their followers.

On cross-examination, PW1 said the appellant's Church was based in Shauri Moyo, some distance from the *locus in quo*; he (PW1) had a proper business licence for the space at the *locus in quo*; PW1 had no grudge against followers of the appellant's Church.

PW2, *Clement Nduku Ndichu*, a cabbage-seller along New Pumwani Road in Nairobi, testified that on

22nd October, 2000 at 10.30 a.m. he was at work with PW1 and one *Paul Kariuki*. The appellant herein then came along, with his followers, chairs, loud-speakers, and a microphone. The appellant and his aids then fixed the loud-speakers and amplifiers. When PW1 sought explanation for this intrusion, a commotion ensued; the intruders slapped and kicked PW1, forcing PW1 to dash off to Kamukunji Police Station. Subsequently the appellant herein and his accomplices were arrested. PW2 said he had known the appellant and his aids for about a year, but he has not had any disagreement with them.

On cross-examination, PW2 said that all the three accused had launched physical attacks upon PW1, at the material time, and he (PW2) was one of those who rescued PW1.

PW3, ***Paul Karoki Choro*** testified that he sells vegetables and potatoes at Machakos Bus Stand, and on 22nd October, 2000, at about 10.30 a.m., he had been at PW1's stall, selling green groceries. The appellant then came along with his followers, and fixed his amplifier and loud-speakers at PW1's stall. When PW1 objected, the appellant and his group burst out in insults aimed at PW1. This situation degenerated into attempts by the appellant and his group to strangle PW1" "When ***Mwangi*** [appellant] and ***Mbugua*** were holding [PW1] to strangle him, members of the public intervened....; in the meantime the 3rd accused kept kicking [PW1] behind." PW1 went to Kamukunji Police Station, but did not return with Police officers. On 26th October, 2000 the appellant and his accomplices were arrested. PW3 said he had known the appellant for two years, and there has been no disagreement between the two of them.

On cross-examination, PW3 said the appellant and his accomplices had wheeled in, in a hand-cart, the electronic gadgets they were attempting to install in PW1's stall, on the material morning. PW3 said the appellant had no licence for PW1's space, and the appellants' entry into the said premises was an invasion.

PW4, Police Force No. 6630 ***P.C. Cosmas Mweu***, of Kamukunji Police Station received a complaint from PW1 on 26th October, 2000 at 11.00 am. PW4 confirmed that PW1 had indeed made an earlier report on the matter which gave rise to the charge herein. PW4 went with PW1, who pointed out the suspects, and they were arrested and charged.

The appellant herein, when put to his defence, made an unsworn statement in which he said he is leader of a Church, and on the material date he was preaching, but he did not know why he had been arrested subsequently.

In arriving at a conviction-verdict, the learned Principal Magistrate thus stated:

"Having considered the evidence before me as a whole, I consider PW1, PW2 and PW3 as credible witnesses.

"The defence stories have nothing to be considered. It is a mere denial of the allegations.

"I find the case proved against all the three accused persons to the required standards. I find them guilty and they are convicted accordingly."

The learned Magistrate treated the accused persons as first offenders, and after they had made their mitigation statements, she sentenced them to a fine of Kshs.9000/= each and, in default, to serve four months' imprisonment.

The appellant stated in his grounds of appeal, that the trial Court had erred in holding that PW1, PW2 and PW3 were truthful witnesses; that the trial Court erred in convicting him in the absence of certain exhibits, in the form of ropes said to have been intended for strangling PW1; that the conviction was wrongly entered as there was no independent witness of the happenings of the material date; that the conviction was against the weight of the evidence on record; that the trial Court had not considered his defence adequately.

Learned counsel **Mr. Ocharo** contended that the testimonies of PW2 and PW3 should have been rated low, as they emanated from persons in a special relationship to PW1. Counsel contested the finding of the trial Court that PW1, PW2 and PW3 were truthful witnesses.

Mr. Ocharo submitted that there was no act on the part of the appellant which had threatened breach of the peace.

Learned State Counsel, **Mr. Makura** contested the appeal, and urged that there had been overwhelming evidence adduced against the appellant, as regards the offence charged, under s.95(1) of the Penal Code. Counsel urged that there was reliable evidence that, in broad daylight, the appellant and his accomplices had begun to beat up the complainant at his place of work, slapping him, insulting him, and preparing to strangle him with sisal ropes. Counsel submitted that the evidence of PW1 and that of PW2 and PW3 was mutually corroborative, and had established an overwhelming case. The learned Magistrate had also taken into account evidence of demeanour, and had found the case adequately proved. Counsel urged that the appeal lacked merit and should be dismissed.

I have carefully considered all the evidence, and I have found nothing in the testimony of the complainant which has any artificial character such as would be inconsistent with true account; and his evidence is consistently corroborated by that of both PW2 and PW3. By contrast, I did not find the appellant's evidence to carry any conviction at all, and it was thus not capable of shaking the steadfast case put up by the prosecution, through their witnesses. The conclusion to be drawn is that the prosecution did prove their case beyond reasonable doubt, and provided a secure base for the conviction which was entered by the learned Principal Magistrate.

I dismiss the appellants appeal, uphold the conviction, and confirm sentence as imposed by the trial Court.

Orders accordingly.

DATED and DELIVERED at Nairobi this 3rd day of March, 2008.

J.B. OJWANG

JUDGE

Coram: Ojwang, J.

Court Clerk: Huka

For the Appellant: Mr. Ocharo

For the Respondent: Mr. Makura