



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

**Criminal Appeal 61 of 2006**

**DAVID KAKAI ..... APPELLANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

**(From original conviction and sentence of Senior Resident**

**Magistrate's Court at Kilgoris Criminal Case No.757**

**of 2004 by W. N. Kaberia Esq. RM)**

**JUDGMENT**

The appellant was charged with creating disturbance in a manner likely to cause a breach of peace contrary to section 95(1) (b) of the Penal Code. The particulars of the offence were that on the 8<sup>th</sup> day of September 2004 at Osupurko community Health Centre in Trans-mara District of the Rift Valley Province, the appellant created a disturbance in a manner likely to cause a breach of the peace by chasing Everlyne Pereso Siparo and threatening to beat her by a fist.

The appellant was tried, convicted and sentenced to a fine of Kshs.5000/= in default 3 months' imprisonment.

The appellant was aggrieved by the said conviction and sentence and preferred an appeal to this court, having paid the fine. In a nutshell, he stated in his petition that the prosecution evidence had glaring contradictions and was therefore unreliable. He also faulted the learned trial magistrate for considering the prosecution evidence separately and accepting the same as true before purporting to consider the defence case and rejecting the same.

The prosecution case briefly stated was as follows:

On 8<sup>th</sup> September, 2004, **Everlyne Pereso Siparo, PW1**, was at Esupurko Health Centre where she worked as a nurse and also served as a secretary to the management committee of the said institution. The appellant was a committee member. The appellant had called for a meeting, which was not known to PW1. An argument arose as to the manner in which the committee meeting had been called. PW1 told the trial court that the appellant ***"shouted at me, woke up, snatched a rungu from a committee member, somebody held him. He pushed me and I was taken out. Later he was threatening to beat the chairman. He did not hit me but threatened me with a rungu."***

The area chief, **John Olumbe, PW2**, was also in the said meeting. He testified that a quarrel ensued between the chairman and PW1. He further stated that the appellant threatened to hit the secretary (PW1) with a fist but later he snatched a rungu and threatened to beat her with it.

According to **Peter Ole Ngiti, PW3**, the appellant threatened PW1 with a rungu. However, according to **Samson Olekeiu, PW4**, there was a quarrel between the appellant and PW1 but they were separated by other committee members.

In his defence, the appellant admitted that he argued and quarreled with PW1. He added that there had been disagreement between members of the committee since the year 2000. He further stated that PW2 and the complainant's husband did not like him. He denied having committed the offence as charged with. He was arrested two weeks after the said incident, although PW1 had made a report to the police on the material day.

The appellant's advocate, Mr. Bosire, submitted that the conviction was not warranted because of the conflicting evidence given by the prosecution witnesses. Mr. Kemo, Senior Principal State Counsel, submitted that the charge had sufficiently been proved.

I have carefully perused the record of appeal. The purpose of a charge is to inform an accused person the nature and the particulars of the offence with which he is charged so as to enable him prepare for his defence, see **ABDULRASUL G. SABUR VS REPUBLIC** [1958] E.A. 126. The particulars of the offence should correspond with the acts that constitute the offence.

The appellant was said to have created a disturbance likely to cause a breach of the peace by chasing PW1 and threatening to beat her using his fist. PW1 told the court that the appellant shouted at her, pushed her and threatened her with a rungu. There was no indication that the appellant assaulted her with his fist. None of the other prosecution witnesses testified that the appellant chased the complainant.

Only PW2 said that the appellant threatened to hit PW1 with his fist, the other witnesses said that the appellant threatened to hit PW1 with a rungu. The charge was not amended at any stage.

All the evidence that was adduced by the prosecution witnesses did not support the material particulars of the offence. The police must have charged the appellant pursuant to the complaint made by the complainant. The particulars of the offence as contained in the charge sheet are not the same as the particulars that were given by the complainant before the trial court. That, in my view, made the appellant's conviction unsafe.

It should also be noted that there had been a long-standing disagreement between the appellant and some of the committee members, including PW1 and PW2. PW1 had also testified that the appellant was his neighbour and their relationship was not cordial. There was therefore need to weigh the prosecution evidence carefully. The appellant was arrested two weeks from the date of commission of the alleged offence. No reason was given for that delay, since a report was made to the police promptly.

All in all, I find and hold that the appellant's conviction was unsafe.

Consequently, I allow the appeal, quash the conviction and set aside the sentence that was passed by the trial court.

**DATED, SIGNED and DELIVERED at KISII this 6<sup>th</sup> day of June, 2008.**

**D. MUSINGA**

**JUDGE.**

Delivered in open court in the presence of:

Mr. Nyakundi H/B for Mr. Bosire for the appellant

Mr. Kemo, Senior Principal State Counsel for the Republic.

**D. MUSINGA**

**JUDGE.**