



REPUBLIC OF KENYA

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

Criminal Appeal 114 Of 2006

RAHAB WAIRIMU THUO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

RAHAB WAIRIMU THUO was convicted of **CREATING A DISTURBANCE** contrary to **Section 95(1)** of the **Penal Code** and sentenced to two months imprisonment. The Appellant lodged an appeal against the conviction and sentence which appeal was argued on 27th March 2006, one month and 3 days after the sentence was passed against the Appellant. The court allowed the appeal and ordered the immediate release of the Appellant. The reasons of allowing the appeal will be given in this judgment.

MR. KAMERE filed the appeal on behalf of the Appellant in which he raised four grounds as follows: -

1. That the learned trial magistrate erred in law in holding that the defence was a sham and consisted of mere after thoughts and did not in any way challenge that of the prosecution.
2. that the learned trial magistrate erred in law in finding accused guilty as charged, while evidence was adduced that a Police Officer was present and the alleged acts occurred within a police station and did not amount to the offence charged.
3. The learned trial magistrate erred in law in shifting the burden of proof from the prosecution to the Appellant.
4. That the learned trial magistrate erred in law in apply the wrong principles in sentencing the Appellant to an excessive sentence.

The evidence of the prosecution case was that the Complainant met the Appellant and another after alighting from a vehicle in the company of her daughter and one PC Lucy, PW2. That the Appellant started abusing her calling her a dog and a prostitute. That the Complainant left the Appellant but met her again and this time the Appellant spat on her.

PW2 corroborated the Complainant's evidence and said that after the Appellant abused the Complainant, she (PW2) left them and went back to the police station.

The Appellant in an unsworn statement made no reference at all to the alleged insults that she hurled at the Complainant. The Appellant called one witness who said that in fact it was the Complainant who insulted the Appellant after the latter declined to receive her greetings.

I have carefully analyzed and re-evaluated the evidence adduced in this case bearing in mind that I neither saw nor heard the witnesses and giving the due allowance. (See **OKENO vs. REPUBLIC 1972 EA 32**).

MR. KAMERE argued the appeal on the basis that the evidence adduced by the prosecution was insufficient to prove the charge. It was **MR. KAMERE's** submission that even if the alleged abusive words were spoken, they caused merely annoyance or displeasure and were totally unlikely to cause a breach of the peace. He submitted that PW2 a police officer and DW2 were the ones present at the time the words were spoken and that neither they nor members of public were incited to cause violence or a disturbance. He relied on two cases **REPUBLIC vs. KIMANGA 1973 EA 42** and **MULE vs. REPUBLIC 1973 KLR 246** all which I have considered.

MR. MAKURA argued the appeal on behalf of the Respondent. The learned counsel submitted that the offence of creating a disturbance in a manner likely to cause a breach of the peace had two ingredients. The first ingredient was that there was incitement to physical violence and second one, breach of peace contemplating physical violence. The learned counsel submitted that both ingredients were met and that therefore the conviction was safe. The learned State counsel however, submitted that the sentence was harsh since the Appellant was a first offender.

In one of the two cases cited by **MR. KAMERE, MULE vs. REPUBLIC** Supra, the learned Ag. Judge Porter, as he then was, was of the view that to prove such a case, it is not enough to show that the accused merely created a disturbance. That disturbance should have been likely to cause a breach of the peace.

Learned judge described 'peace' as referring to for instance, the right of 'wananchi' to go about their daily activities without interference. In the instance case, the alleged abusive words were uttered in the presence of PC Lucy, a police officer and DW2, the Appellant's friend. Question is whether the words were likely to cause breach of peace.

The breach of peace in my view can only be considered in reference to the place where utterances are made and persons present when the utterances are made. In this case, there was one police officer and a member of public. The incident took place within the police station area. The words uttered were definitely abusive and offensive but I do not believe that they could have incited violence in the hearers. The reaction of the three hearers of those words is also a clear indication that their peace was not interfered with and that they were not incited in any way.

In the second case **MR. KAMERE** relied on **KIMANGA's** case, supra, the judge referred to other decisions in which it was largely held that where the persons before whom obscene or abusive utterances are made are unlikely to resort to physical violence and thereby create a breach of peace, the charge cannot stand.

I am persuaded by these decisions. It is good law to state that even where no breach of the peace has occurred as a result of the reaction of the persons in the presence of whom obscene or abusive words were uttered, as a result of them not having been incited to violence or interfered with in terms of their right to go about their daily activities being interrupted or interfered with; if in fact the words spoken were likely to interfere with people's activities in terms of inciting people to violence, then the offence would have been proved. In the circumstances of facts of this case, the words allegedly spoken by the Appellant were unlikely to create a breach of the peace. The charge was not proved as required.

The learned trial magistrate found as a fact that the abuses were made within the vicinity of the police station which he said was a public area. He decried the impunity with which the Appellant behaved in the circumstances and then found her guilty of the offence. It was precisely for the same reason that the abusive words were uttered within the vicinity of the police station that the learned trial magistrate should have been convinced that no breach of the peace was likely to have been created and therefore ought to have acquitted the Appellant. The learned trial magistrate misdirected himself on a point of both law and fact and therefore arrived at an erroneous judgment.

I find the conviction entered in this case was unsafe and quash the same and set aside the sentence.

Dated at Nairobi this 10th day of April 2006.

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LESIIT, J.

JUDGE

Read, signed and delivered in the presence of;

Appellant present

Mr. Kamere for Appellant - Mr. Mwathi holding brief

Mr. Makura for the State – Miss Nyamosi holding brief

Huka– Court clerk

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LESIIT, J.

JUDGE