



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAKURU

Criminal Appeal 57 of 2004

(From original conviction and sentence in Criminal Case No.2663 of 2002 of the Principal Magistrate's Court at NYAHURURU – D. K. NGOMO)

SAMUEL MUIGAI MBOGO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The appellant was charged with creating disturbance in a manner likely to cause a breach of the peace contrary to **Section 95(1)(b)** of the **Penal Code**. The particulars of the offence were that on 25th August 2002 at Gituamba village in Nyandarua District within Central Province he created a disturbance in a manner likely to cause a breach of peace by abusing Monica Wambui Mwangi by calling her a devil, witchdoctor, a ghost and “*pepo mbaya*” meaning “**bad spirit**”.

He also faced a second count of giving false information to a person employed in the public service contrary to **Section 129(a)** of the **Penal Code**. The particulars thereof were that on the 26th August 2002 at Criminal Investigations Department office of Nyandarua District he informed No. 51618 P.C. James Kaguai, a person employed in the public service that one Monica Wambui Mwangi chased him while armed with an axe threatening to cut him, which information he knew or believed to be false intending thereby to cause or knowing it to be likely to cause the said police officer to institute investigations which the said officer ought not to have done if the true state of facts respecting which such information was given had been known to him.

The appellant was tried, convicted and sentenced to a fine of Kshs.10,000/- in default six months imprisonment in each of the counts. He was aggrieved by the said conviction and sentence and preferred this appeal. The appellant raised the following grounds of appeal:-

1. The learned trial magistrate erred in law and fact in failing to consider that the words allegedly uttered against the complainant were incapable of establishing the offence created by **Section 95(1)** of the **Penal Code**.
2. The learned trial magistrate erred in law and fact in concluding that the appellant was an untruthful witness despite the corroborative evidence given by the defence witness which was not taken into account.
3. The learned trial magistrate erred in law and fact in finding that an offence of giving false information to a person employed in public service had been established despite the fact that the prosecution failed to call a crucial witness in this regard and the evidence fell short of the required

standard.

4. The learned trial magistrate erred in law and fact in failing to consider that the evidence of PW2, PW3 and PW4 was full of material contradictions and based his judgment on such evidence against established legal principles.
5. The learned trial magistrate entered conviction and sentence against the weight of evidence and therefore misdirected himself on the legal requirements necessary to establish the appellant's case beyond reasonable doubt.

This being the first appellate court, it is duty bound to re-examine and re-evaluate the evidence that was tendered before the trial court and draw its own conclusions but it has to warn itself that it did not have the advantage of seeing the demeanour of the witnesses. See *OKENO VS R [1972] EA 32*. It is therefore important that I set out the evidence that was adduced before the trial court, albeit briefly, then proceed to evaluate the same in order to determine this appeal.

Monica Wambui Mwangi, (PW1) was the complainant. She was also a neighbour of the appellant. She told the court that on 25th August 2002 at about 7 p.m. or thereabouts she decided to go outside her home to look for firewood near the fence to her compound. She took an axe with her so that she could split a piece of wood. Opposite the fence was a road. She was unable to access the piece of wood which she intended to split from inside her compound and so she decided to go to the road side. She saw two people who were coming towards her. They had a torch and they flashed it towards her but did not talk to her. The two people were the appellant and his son Simon Mbogo Muigai (DW2). The two then retreated and loudly uttered the words "*shetani ashindwe katika Jina la Yesu*". These words in English can be translated to mean **(let the devil be defeated in the name of Jesus)**. She said that they repeated those words four times. At that time she was bending down but suddenly she straightened up and started moving. The complainant appeared to have had some serious differences with the appellant because they had not talked since 1998. When the complainant began to walk away, the appellant and his son ran backwards shouting that they had seen a ghost carrying an axe. Some people had heard the appellant shouting the above words and they went to see what was happening. The complainant said that the appellant pointed at her and told those people "*it is that woman who is a witch*" and thereafter went back to his home. The people then went and asked her what had happened and she narrated her story. The complainant decided to go and make a report to the police at Gituamba police base but when she went there she did not find any officer, she alleged.

The appellant reported the matter to Gituamba police post the following day and the complainant was arrested for allegedly threatening to kill the appellant using an axe. She told the police what had happened and recorded her statement and said that the appellant had lied to the police. She complained to the police about the words which the appellant had uttered against her. The complainant was released and instead the police decided to arrest and charge the appellant with the aforesaid charges.

Cross examined by the appellant's counsel, the complainant stated that the said incident occurred at a time when it was fairly dark and one could not see properly without some light. She admitted that the appellant did not mention her name as he uttered the words she complained about. She however, admitted that she was holding an axe at the very time. She also admitted that she was not in talking terms with the appellant and that the appellant had a dispute with a person who had sold parcels of land to both herself and the appellant.

Charles Kinuthia Muiruri (PW2) was a son of the person who had sold parcels of land to both the complainant and the appellant. He said that on 25th August 2002 at about 7.30 p.m. he was coming from a shopping centre near their home and he heard somebody screaming saying "*ishindwe pepo, ibilisi, jini*" meaning **(be defeated evil spirit, devil, ghost)**. He then saw the appellant and his son when they flashed their torch and he identified himself and they asked him to help them as there was a ghost which wanted to attack them using an axe. He said that he accompanied the two to the home of the complainant and on arrival he asked the appellant to show him where the ghost was and he pointed to the complainant and said "*ishindwe jini, ishindwe pepo, mchawi*" meaning **(be defeated ghost, be defeated evil spirit,**

witch).

The evidence of **Samson Kibunja Mwangi (PW3)** was not quite relevant for the purposes of this appeal and therefore I will not summarise the same.

Charles Kamau Ngayu (PW4) was also a neighbour of the complainant and the appellant. On 25th August 2002 at about 7.30 p.m. he was on his way home when he heard a person screaming ahead of him but did not know who it was. When he arrived near the complainant's home he saw her splitting firewood using an axe. He asked her about the screams which he had heard and she said that it was her neighbour the appellant who was screaming. He then went to the appellant's home and asked him what he was screaming about. The appellant told him that he was coming from church with his son when they saw a ghost. He said that the appellant was referring to the complainant. In cross examination, the witness said that he did not hear the name of any person being mentioned at the time when he heard the screams.

P.C. James Kaguai (PW5) was stationed at C.I.D. offices Nyandarua. He said that on the 26th August 2002 at about 10.30 a.m. the appellant reported that on the previous day as he was going home with his son at about 7.30 p.m. they found a certain lady hiding herself near the road holding an axe and was waiting for them. He added that the appellant further stated that as they were approaching her, the lady jumped towards them intending to cut them with the axe and they ran backward screaming. He took the appellant to the District Criminal Investigation Officer (D.C.I.O.) and PW5 explained what the appellant had told him. PW5 said that the appellant told him that he had not reported the matter to the nearby police post. The D.C.I.O. gave to the appellant a note to take to the nearby police post so that the complainant could be arrested. When she was arrested the complainant gave her explanation as earlier stated. She was however released and instead the appellant was arrested and charged.

In his sworn statement of defence the appellant stated that on 25th of August 2002 at about 7.30 p.m. he was walking home with his son. His son told him that he heard as though there was somebody ahead of them and he flashed a torch which he had. The appellant saw a woman moving very swiftly wearing a white head cloth but he did not identify her, he said. Thereafter the torch was put off and the appellant and his son kept on walking. When the appellant flashed the torch again he saw the woman squatting by the fence on the road side as if she wanted to squeeze herself through the fence. The appellant further stated that the woman suddenly removed an axe from a paper bag and advanced towards them raising the axe as though she was going to strike them. The appellant was shocked and he screamed and both himself and his son retreated. The appellant said that as they went back they met PW2 and another person known as Paul Njuguna. He told PW2 that his neighbour the complainant wanted to slash him with an axe. The appellant said that he did not tell PW2 that a ghost wanted to attack them and added that PW2 had not told the whole truth when he testified before the trial court. PW2 and the appellant and his son walked past the complainant's house and they saw her still holding an axe but said they did not talk to her, he only said "**there is the woman**". The appellant further stated that PW4 called him and asked him why he had screamed and he explained that it was because the complainant wanted to attack them using an axe. The appellant denied having referred to the complainant as a ghost.

The following day the appellant went to Gituamba police post to make a report but no police officer was available and he decided to go to Nyahururu police station where he was directed to the C.I.D.'s office. He was then given a note to take to Gituamba police post. The appellant denied having met P.C. Kaguai on that day. The police arrested the complainant and they asked the appellant to provide them with bus fare to enable them take her to Nyahururu police station. The appellant was asked to go to Nyahururu police station the following day. When he went there at about 9 a.m. he wanted to see Inspector Kendagor whom he had seen earlier but he was told that he was busy but he insisted and he opened the door only to find him talking to the complainant. The appellant went back at about noon and he met P.C. Kaguai who told him to take some witnesses to the station on the 28th August 2002. On that day the appellant took his son with him and P.C. Kaguai recorded a statement from the appellant's son.

On 3rd September, 2002 both the appellant and the complainant met Inspector Kendagor in his office and

the police inspector said that he wanted to carry out further investigations and told the appellant to return on 13th September, 2002. When he went to the police station on that day he was arrested and subsequently charged.

The appellant denied both counts and said that there had been a deep grudge between the complainant and himself and added that it was the complainant who should have been charged for threatening to attack him and his son. He further alleged that PW2 had given evidence which was not in his favour because of the land dispute which existed between his father and himself.

Simon Mbogo Muigai (DW2) was the son of the appellant. He said that on the 25th August 2002 at about 7.30 p.m. he was walking home with his father. He was holding a torch in his hands. As they neared home he heard some noise ahead of them. He flashed the torch and saw a woman ahead of them with a white head scarf. His father snatched the torch and put it off. As they got nearer to where they had seen that person, his father flashed the torch and they saw a woman squatting near a fence. She had an axe in her hands and she started to advance towards them. DW2 and his father retreated and began to scream. As they got to a road junction they met PW2 with another person and they walked towards the home of the complainant. They saw her in her home compound still holding the axe. The witness and his father proceeded to their home and after a while some people arrived in their home to enquire what had happened. He denied that his father had uttered the words complained about to the complainant.

Turning to ground one of the petition of appeal, there is a dispute as to whether the appellant uttered the words that were complained about and that issue must be resolved before it can be determined whether those words, if at all they were uttered, are capable of establishing the offence created by **Section 95(1)** of the **Penal code**. The charge sheet shows that the appellant abused the complainant by calling her a devil, witchdoctor, a ghost and “*pepo mbaya*” (a bad spirit). In her examination in chief the complainant said that the appellant shouted “*shetani ashindwe katika Jina la Yesu*” (meaning “**devil be defeated in the name of Jesus**”). Those are not the same words as indicated in the charge sheet. Even if the appellant uttered the words which the complainant talked about, there was no evidence that they were directed at her. They could have been words of a person craving for divine intervention while in a state of fear since it is alleged that the words were uttered as the appellant and his son were running away after seeing what they believed was a ghost. In any event, it was not demonstrated that the words were specifically uttered against the complainant. The appellant and his son had seen a woman holding an axe in her hands squatting next to a fence at night and the woman was advancing towards them and they were therefore reasonably filled with fear and began to retreat.

According to PW2 the words he heard being uttered by somebody who was screaming were “*ishindwe pepo, ibilisi, jini*”. These words in English can be translated to mean (**be defeated you bad spirit, devil, ghost**). PW2 also said that he went to the house of the complainant with the appellant and he heard the appellant utter the words “*ishindwe jini ishindwe pepo mchawi*” (meaning “**be defeated you ghost, be defeated you evil spirit, witch**”) as he pointed to the complainant. It is doubtful whether the appellant actually went to the home of the complainant together with PW2 and therefore those words which PW2 allegedly heard being uttered by the appellant at the complainant’s home may not have been said at all. The evidence of PW4 contradicts that of PW2. It must also be borne in mind that there was a serious land dispute between the appellant and the father of PW2 and that may explain why the evidence of PW2 was conflicting with that of PW4.

The words which the complainant complained about, whether they were those stated in the charge sheet or those which she stated in her examination in chief cannot, in my view, be construed to constitute the offence of creating disturbance in a manner likely to cause a breach of the peace. The appellant was in a state of shock and he was not in any way attempting to disturb any peace that may have been prevailing at the time, if at all it can be said that there was any peace in the circumstances as aforesaid.

In ***MULE VS REPUBLIC [1983]KLR 246*** it was held that the

offence of creating a disturbance likely to cause a breach of the peace constitutes incitement to physical violence and breach of the peace contemplating physical violence. Whether the appellant uttered the

words which the complainant stated or not, the offence prescribed by Section 95(1)(b) of the Penal Code was not committed and the learned trial magistrate erred in law in holding that the appellant was guilty of committing the said offence.

With regard to the second count, the appellant did not give any false information to P.C. Kaguai. It is true that the appellant saw the complainant holding an axe on the material night and given the prevailing circumstances as hereinabove stated and the enmity that existed between the two, the appellant could have believed that the complainant wanted to attack him and his son. Any reasonable person, faced by such a situation as was explained by both the complainant and the appellant, would be acting properly and reasonably if he reported the matter to a police officer. It was for the police to carry out their own independent investigations and establish whether the appellant's fears were well founded or not.

In my view, there was no basis of preferring the second count at all. If the police established that the axe that the complainant was armed with on the material night was purely for splitting fire wood and not as a weapon intended for use against the appellant, all they need to do was to close their investigation file without taking any action against the complainant, just as they did, without proceeding to hold the appellant for the reason that he had given them false information. Ordinarily, ladies do not go to split firewood outside their homes at night and the appellant upon seeing his neighbour whom they were not in talking terms, advancing towards him in the circumstances as explained, must have believed that she was upto no good. To constitute an offence of giving false information as defined in Section 129 of the Penal Code, the giver of that information must personally be knowing or having reason to believe that what he is reporting is false. If he is convinced that the information is true and after investigations it is found that the information is factually incorrect, then the charge of giving false information cannot be sustained.

In this particular case, the complainant may not have intended to do any harm to the appellant and his son but it was true that the appellant saw her holding an axe at about 7.30p.m. or thereabout and walking towards them and in his mind, she intended to attack them. That is what he reported to the police. The fact that she denied before the police that she had any bad intentions against the appellant and his son could not change the factual report and make it false. I find that the prosecution failed to prove the second count. In the circumstances the conviction and the sentence as pronounced by the trial court cannot stand. The appeal is therefore allowed, conviction quashed and sentence set aside. The appellant should be refunded any fine which he may have paid to the state.

DATED, SIGNED AND DELIVERED at Nakuru this 19th day of May, 2006.

D. MUSINGA

JUDGE

19/5/2006

Judgment delivered in open court in the presence of Mr. Oumo for the appellant and Mr. Koech for the state.

D. MUSINGA

JUDGE

19/5/2006