REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT

MACHAKOS

APPELLATE SIDE

HIGH COURT CRIMINAL APPEAL 149 OF 2004

(From Original Conviction(s) and Sentence(s) in Criminal Case No.614 of 2004 of the Resident Magistrate's Court at Yatta M.Maundu Esq. on 7/9/04)

MUMBE MUSAU.....APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

J U D G M E N T

This is an appeal against the judgement of the Resident Magistrate Yatta in Criminal Case No. 614/04 where the appellant was charged with the offence of 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 charge are that on 17/5/04 at Matuu town, created a disturbance in a manner likely to cause a breach of the peace by threatening to bewitch Rose Wayua Muthusi. The appellant was convicted and sentenced to serve 9 months at Matuu Sub District Hospital on Community Service. The appellant is aggrieved by the said conviction and sentence.

Briefly stated the facts of the prosecution case were that the complainant and accused were summoned to the village headman for arbitration of a case where the accused wanted her charms to be cleansed by the complainant because one Mutua, a son in law to appellant and her bag carrier, had gone with the appellant's bag containing her charms to the complainant's house. The prosecution called a total of four witnesses. PW 1 and 2 who claimed to have been present at the arbitration said the appellant threatened to bewitch the complainant if she did not cleanse appellant's charms. PW 3 denied that such words were uttered. On the other hand appellant denies threatening to bewitch the complainant. She called two elders who were allegedly present at the scene who denied that the appellant uttered such words. Counsel for the appellant argued grounds 1 and 2 of the memorandum of appeal together and grounds 3 and 4 together.

Mr Makau who had conduct of the appeal on behalf of the appellant argued that the charge was defective and misplaced firstly because, the allegation is one of threats to bewitch which falls under the Witchcraft Act and that the said section 95(1) (b) under which the appellant was charged deals with brawls or creating disturbance of any other matter. He further submitted that ingredients of the offence were not satisfied because the threats to bewitch were not accompanied by any act towards the breach of peace. In opposing the appeal, the learned state counsel submitted that it is not necessary that the words uttered be accompanied by an action and that ingredients of Section 95 (1) (b) were proved.

According to PW 1, the appellant said that if she was not given a goat and 1,000/= then she would bewitch complainant. PW 2 went on to say that the appellant merely said she was capable of bewitching the complainant if cleansing of the charms was not done i.e. conditional. I do agree with Mr Makau that this did not amount to threats. They were dependent upon some happening as per PW1's evidence whereas PW 2 said it as a possibility but not that appellant would do it.

For a charge of creating disturbance to be proved, the prosecution had to prove that the threats were

accompanied by some act by the appellant that caused the complainant to apprehend some harm being done by appellant to the complainant. I find that the ingredients of the offence of creating a disturbance were not satisfied. Mere words do not amount to creating a disturbance that is likely to create a breach of the peace.

In grounds 3 and 4, Mr Makau submitted that the evidence of the prosecution did not support the charge as the prosecution evidence was contradictory; the words uttered were conditioned on a future event and that the appellant's defence was not considered which was a breach of the rules of natural justice.

The state counsel submitted that the evidence of PW 3 who was declared a hostile witness is worthless and cannot be relied upon as counsel for appellant purported to and that the rest of the prosecution evidence was consistent; that the court had nothing to consider in the defence because nothing new was introduced. From the judgement of the court, it is apparent that the court never made any attempt to consider the defendant's defence and yet the defence witnesses were people present at the scene where the words were allegedly uttered. The court should have weighed the evidence of the two defence witnesses as against that of PW 1 and 2 as that of PW 3 was worthless as far the prosecution case was concerned. Failure to consider that evidence of the defence witnesses is indeed a breach of rules of natural justice. ***See the case NJARAMBA versus REPUBLIC Criminal Appeal 170/84***. What was the use of the appellant defending himself if it was not taken into account?

This is a criminal charge that has to be proved beyond any reasonable doubt. The court heard the evidence of three witnesses for the prosecution, of which one was declared hostile whereas the defence also called three. Having failed to consider the defence case, the lower court cannot have considered this case beyond any reasonable doubt.

In addition to the above, as earlier submitted the evidence of PW 1 and 2 was that the threats were based on a future event or conditional. There was no action towards the creating of the disturbance. That evidence did not support the charge.

As to the submission that the charge was defective, I find no defect in the charge sheet. After all there was evidence that there was some quarrel and in any event if the appellant had done some act towards executing the threats the offence would have been proved, notwithstanding that the threats were to bewitch.

The upshot of all the above is that the conviction of the appellant was unsafe. It is hereby quashed and sentence set aside. The appeal is allowed.

Dated at Machakos this 8th day of December 2004

Read and delivered in the presence of

R.V. WENDOH

JUDGE