Mutua v Republic (Criminal Appeal E019 & E020 of 2022 (Consolidated)) [2023] KEHC 706 (KLR) (7 February 2023) (Judgment)

Neutral citation: [2023] KEHC 706 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KITUI

CRIMINAL APPEAL E019 & E020 OF 2022 (CONSOLIDATED)

RK LIMO, J

FEBRUARY 7, 2023

BETWEEN

MICHAEL MUTUNGA MUTUA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Consolidated Appeal both charged vide Kyuso Principal Magistrate Court's Criminal Case No.106 of 2018 with the offence of offensive conduct contrary to Section 94(1) of the Penal Code.)

JUDGMENT

1. Michael Mutunga Mutua and Daniel Musyoka Kimetho the 1st and 2nd Appellants respectively in this Consolidated Appeal were both charged vide Kyuso Principal Magistrate Court's Criminal Case No.106 of 2018 with the offence of offensive conduct contrary to Section 94(1) of the *Penal Code*.

2. The particulars of the offence were that; the Appellants on the 25th day of February, 2018 at around 1700hrs in Katakani village, Gai Sub-location, Kyuso location of Kyuso sub-county within Kitui county, jointly in a public place namely Katakani Township used insulting words namely "wii malaya" in Kamba language meaning "she is a prostitute" to Dorcas Ndoni Mwaniki with intent to provoke a breach of the peace.

3. The Appellants both denied committing the offence but after trial they were found guilty and convicted. They were both fined Kshs. 40,000 or 5 months in jail in default.

4. The Appellants felt aggrieved and filed this Appeal raising a number of grounds but before I consider the same, I will consider the evidence tendered before the trial court.

5. The Complainant at the trial, Dorcas Nduni Mwaniki (PW1) told the trial court that she was here doing her business on 25th February, 2018 at Katakani Trading Centre, when at around 5PM, the 1st Appellant went to her shop and started shouting at her calling her a prostitute in Kamba language

several times. She further testified that as the 1st Appellant continued insulting her, the 2nd Appellant joined the 1st Appellant saying;

"This woman is a prostitute." In reference to her. She testified that the 1st Appellant then wondered aloud saying he could understand how one Muthui Kutuo would fuel his car all the way from Nairobi to come and sleep with the Complainant. She added that 2nd Appellant also stated that she also sleeps with Mbuvi Ivuti and DC Kyuso Sub-County. The Complainant stated that the Appellants were standing at the entrance to her shop as they hurled those insults making lewd gestures towards her. She also stated that she went inside her room to cry as members of public went and pulled the duo away from her shop and that she went and reported at Kyuso Police Station since it was not the first time that the two had insulted her.

6. Nicholas Mbuvi Ivutie, (PW2) testified that he was a Pastor in a Local Church testified that on the material date and hour he was coming out of church which he stated was next to where the Complainant's shop was located and that as he came out, he heard someone shouting and when he went close to the Complainant's shop, he heard the 2nd Appellant shouting and insulting the Complainant telling her that she was a prostitute sleeping around with several men among them were himself (PW2), Muthui Mwangangi alias Katuo and a District Commissioner. The witness stated that as a Pastor he felt offended since he was a respectable old man with a wife and family.

7. The evidence of PW1 and PW2 was corroborated by Joseph Muthui Mwangangi (PW3) who testified that he was near the vicinity at the material date and time and that he also heard the 2nd Appellant insulting the Complainant telling her that she had affairs with men. He told the trial court that he also heard his name being mentioned as one of the men having affairs with the Complainant.

8. PC Sora Sharamo (PW4), the Investigating Officer testified that she was at Kyuso Police Station on 27th February, 2018 when the Complainant went to the said Police Station and reported that one Mutunga Mutua (the 1st Appellant) had insulted her on 25th February, 2018 by calling her a prostitute. According to the Investigating Officer, the report she got was that the 2nd Appellant insulted the Complainant telling her that she used to sleep with Muthui who used to drive all the way from Mombasa to sleep with her.

9. The Investigating Officer further testified in cross examination that the incident happened at Katakani Shopping Centre where the complainant run a shop and that she arrested both appellants and charged them for the offence committed.

10. When placed on their defence both the Appellants denied the offence.

11. DW1 Michael Mutunga Mutua, the 1st appellant herein denied committing the offense or seeing the 2nd appellant on the material day. He attributed his tribulations to a dispute that existed between himself and the Complainant following some witch craft allegations in which the Complainant was implicated. The 1st appellant stated that he was determined to take PW1 to Mutomo to take a traditional oath following the witchcraft allegations and that the fact that she escorted her, made her have ill feelings towards him. He claimed that he was framed as a result.

12. David Musyoka Kimetho, (DW2) the 2nd appellant herein also denied committing the offence and stated that he was in Endau at a place called Ndamsa at the material time was there between 21st February 2018 and 28th February 2018. He said that he was not at Katakani Market where the offense allegedly took place. He also claimed that the Complainant framed him because the 1st appellant took her to take a Kamba traditional oath to allay fears of witchcraft. He told the court that he did not have a cordial relationship with the Complainant.

13. Reuben Kimethu (DW3) told the court that he was DW2's brother and that DW2 was not at the scene at the material time because he was at Endau where he had been sent on the very same day at around 8.00am. The witness stated that DW2 had been sent to Endau to ask for dowry for one of their sister. He also stated that his family did not relate well with the complainant because of allegations that she was possessed by evil spirits and that DW2 had accompanied her to Mutomo for a traditional Kamba oath taking ceremony to cleanse her.

14. Ronald Muthami Kiembeni (DW4) told the court this case was as a result of allegations against the complainant dating back to 2013 when parents of Katakani Primary School had complained that the complainant had bewitched their children. He stated that he was the area Assistant Chief at the time and that parents of the aforementioned school had reported the witchcraft incident to him. He stated that he wrote a letter authorizing the complainant's husband and his elder brother to take the complainant for a Kamba traditional oath. He however stated that he did not know about the incident that happened on 25th February 2018 in respect to the charge facing the Appellants.

15. The trial court evaluated the evidence tendered and found that the defence allegations of being framed were far-fetched and mere denials. It found that the words uttered were derogatory in nature, offensive and with potential to hurt someone self-esteem. The trial court further found that the offending words were uttered in a public place with intention of provoking violent reaction from the Complainant. The Appellants were both found guilty and sentenced a fine of Kshs. 40,000 each or 5 months in jail.

16. The Appellants as observed above, felt aggrieved and filed this appeal raising the following grounds: -

    i. That the learned magistrate erred in law and in fact by fining the appellants excessively and passing unlawful sentence

    ii. That the learned trial magistrate erred in law and fact by failing to consider that the appellant and the complainant were related with personal differences which led to the charges leading to the conviction of the appellant

    iii. That the learned magistrate erred in law and in fact in finding that the prosecution had proved its case beyond reasonable doubt

    iv. That the learned magistrate erred in law and in fact by disregarding the appellant evidence and forcing them to proceed with matter violating their constitutional rights to fair hearing.

    v. That the learned trial magistrate demonstrated open bias by forcing the appellant to proceed with the hearing of the matter without their advocate when she was aware that they were represented from the beginning

    vi. That the learned magistrate failed in law and fact by disregarding the appellant submission authorities cited and attached therein

    vii. That the trial learned magistrate erred in law and fact by shifting the burden of proof to the appellant.

    viii. That the trial magistrate failed in law and fact by not finding the prosecution case was full of contradictions

    ix. That the trial magistrate erred in law and fact when he failed to consider that the appellant had been charged on similar offence and acquitted of the same criminal case 26/2018 in the same court.

x. The learned trial magistrate erred in law and fact when she considered extraneous matters not in evidence to sentence the appellant.

17. In their written submissions through their learned Counsel M/s Mulinga Mbaluka & Co. Advocate, the Appellants fault the trial court in the manner it conducted proceedings stating that it failed to grant an adjournment to the defence and proceeded to have the defence heard in the absence of Counsel. The Appellant also contend that a date for submissions and Judgement was given without considering that they were represented thus violating their right to fail trial.

18. They submit that the charge sheet was defective because, while the charge sheet indicated that the offensive words were uttered in public, the witnesses could not pinpoint what words were uttered, and by which appellant.

19. The Appellant have also faulted the trial court in the sentence meted out terming it excessive and illegal.

20. They submit that the case before the trial court was due to personal differences in the family pointing out past instances where case of such nature had been preferred but later dismissed in court. They fault the trial court for not considering the significance of a previous case yet they tendered the evidence in their defence to that effect.

21. It is their submission that the Prosecution's Case against them was flimsy and failed to reach the threshold required in Criminal cases pointing out that the ingredients of the offence are missing. They contend that there was no evidence of breach of peace or any disturbances of any kind that would make people resort to violence.

22. The State/Respondent through Mr. Okemwa for the Director of Public Prosecution opposed the appeal on conviction but conceded that the sentence was harsh given that the law provides for a fine of Kshs. 5,000.

23. The Appellants have appealed on both conviction and the sentence. As the first appellate court, this court has the duty to re-evaluate the trial while at the same time appreciating that the Trial Court is the one that had the opportunity of actually hearing the testimonies and observing the demeanor of witnesses as they testified. This was succinctly stated by the Court of Appeal in *Okeno v Republic* [1972] EA 32 as follows: -

> " An appellant is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellant's court own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. It is not the function of the first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and conclusions. Only then can it decide whether the magistrate's findings can be supported. In doing so, it should make an allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses"

24. The Appellants were charged and convicted of the offence of offensive conduct contrary to Section 94(1) of the *Penal Code*. Section 94 (1) of *Penal Code* provides as follows: -

> "Any person who in a public place or at a public gathering uses threatening, abusive or insulting words or behaviour with intent to provoke a breach of the peace or whereby a breach of the peace is likely to be occasioned is guilty of an offence and is liable to a fine not

exceeding five thousand shillings or to imprisonment for a term not exceeding six months or to both."

25. The crucial elements that must be established and proved by the Prosecution in order to sustain a charge of this nature namely;

    i. That the incident took place at a public place.

    ii. While at public place, the accused persons used abusive or insulting words as against the Complainant.

    iii. That the intention was to provoke a breach of the peace

26. The trial court was obligated to evaluate the evidence and determine if all the above ingredients were proved to the required standard in Criminal Law.

Whether the incident took place at a Public Place.

27. The *Penal Code* at Section 4 defines Public Place as follows;

> 'Public Place" or "public premises" includes any public way and any building, place or conveyance to which, for the time being, the public are entitled or permitted to have access either without any condition or upon condition of making any payment, and any building or place which is for the time being used for any public or religious meetings or assembly or as an open court;"

28. The evidence tendered indicated that the incident took place at Katakani Market at the Complainant's Shop. Granted, it is Public knowledge that a shop is a place where members of the public are permitted to have access without conditions and anyone can pop in to buy items needed. A business premise therefore, qualifies to be a "Public Place" within the meaning of Section 4 of the Penal Code unless it can be shown that the place was a restricted place for whatever reason/purpose. This court finds that the trial court was right to find that the first element of the incident happening in a public place was proved. However, whether or not there was sufficient evidence that the offensive words were uttered in the first place is the next issue for determination in this appeal.

Whether the Appellants uttered the abusive or insulting words against the Complainant.

29. The Complainant at the trial was adamant that the 1st Appellant found her at her shop at Katakani Market on the material day and began shouting saying;

> "This woman is a prostitute", several times before the 2nd Appellant joined in the chorus saying it was true she was a prostitute alleging that she was sleeping with PW2, PW3 and DC Kyuso Sub-County.

30. There are a number of questions that arose which appear to cast some doubts about the veracity of the allegations.

    (i) In the first place, the incident is said to have happened in a market place with a number of people present. However, was it a coincidence that the only witnesses who heard the offensive words were the "interested parties"? I pose the question because PW2 stated that he is a Pastor in a church next to the Complainant's shop and that he heard his name being mentioned and that is why he went to where the commotion was. On the other hand, PW3 states that he had travelled from Nairobi and that he had gone to the said Centre because he owns a plot which

is fine, but it is too much a coincidence that persons who were being mentioned in relation to the insults directed at the Complainant were the only people at the scene at the material time, given that one had travelled from Nairobi. If it is true that members of the Public indeed removed the Appellants from the shop as they insulted the Complainant, why is it that none was called as a witness?

31. Secondly, the evidence given by the Investigating Officer (PW4) appears inconsistent with evidence tendered by the Complainant in respect to when the report about the incident was made at Kyuso Police Station. According to the Complainant, she reported the incident immediately but the Investigating Officer informed the trial court that the report was made on 27th February, 2018 which is about 2 days after the incident. If the report was made 2 days later as the Investigating officer stated, then questions emerge as to what were the reasons for the delay particularly in light of the defence raised. The Appellant raised issues regarding personal differences and the fact that the Complainant had previously made similar allegations which were dismissed the same in another case. This court has perused the evidence regarding Criminal Case No. 26 of 2018 in the same Court and finds that the Appellant had a legitimate issue which could not be disregarded. In her judgement the trial court simply mentioned the previous case but in her analysis in the judgement, she did not address it altogether which I find erroneous. Any issue raised in defence should be interrogated particularly when it touches on matters to do with extraneous family matters/feuds that could have led to disagreements and settlements of scores. The alleged differences between the complainants and appellants were confirmed by the Area Chief (DW4) and that fact was not considered by the trial court.

32. Thirdly, the Investigating Officer stated that the information received indicated that the 2nd Appellant insulted the Complainant on 26th February, 2018 and not 25th February 2018 as reflected in the particulars in the charge sheet or the evidence of PW1, PW2 and PW3 which indicated that the 2nd Appellant insulted the Complainant on 25th February, 2018.

That inconsistency in my view when taken in light of the evidence tendered by defence should have at least created some doubts in the mind of the trial court as to whether the alleged offensive/derogatory words were ever uttered and by whom? This Court finds that the evidence of PW2 and PW3 were insufficient to

corroborate the evidence of the Complainant because both of the witnesses were said to have been mentioned adversely which casted doubts about their objectivity and credibility. The prosecution should have availed an independent witness who had no interest in the matter in order to strengthen its case against the Appellants.

In view of the foregoing, I am persuaded by the Appellants that the Prosecution failed to prove that they uttered the abusive/insulting words against the Complainant.

Whether there was intention to provoke breach of peace.

33. The 3rd ingredient of the offence upon which the Appellants were charged and convicted is that the offender creates a disturbance in a manner likely to cause breach of the peace. The evidence presented at the trial does not show that there was a breach of peace in any way. If there's any disturbances in the Centre, then the Police could have been notified promptly, but in this instance, the Investigating Officer says that the police were notified 2 days after the event. That shows that the issue was not that serious and did not cause any disturbances even if it occurred.

In the case of *Jacob Nthiga Ngari v Republic* [2014] eKLR the court address it mind as to what constitutes creation of disturbance by holding as follows: -

> i. The offence of creating disturbance likely to cause a breach of the peace constitutes incitement to physical violence and the breach of the peace contemplating physical violence.....
>
> ii. It is not enough to constitute the offence of creating a disturbance likely to cause a breach of the peace to show that the accused merely created a disturbance. That disturbance should have been likely to cause a breach of peace. Peace would, for instance, refer to the right of wananchi to go about their daily activities without interference. The actions of the appellant interfered with people's activities and therefore caused a breach of peace.

34. This Court finds that the Prosecution's case fell short of establishing and proving the element of breach of peace to the required standard.

35. The Appellants have raised an issue regarding their right to a fair trial which I find far fetch.

36. The record shows that the hearing of the defence case took place in three days being 25th November 2021, 15th December 2021 and 31st January 2022. On the first two occasions, the record shows that the appellants were represented by their counsel Mr Mbaluka. The only date in issue can only be on 31st January 2022 when the matter proceeded in his absence. The record however shows that the trial court initially recorded the quorum probably for time allocation and mentioned the matter later in the day at 12.35 PM when DW4 testified.

37. The matter was mentioned later probably in the afternoon when the court was informed by the Appellants that their advocate was in Mwingi. This had not been brought to the attention of the court before when DW4 was on the stand. The court therefore directed for the matter to proceed for interest of expediency. Failure by the appellants and their counsel to communicate to the court in court in good time that he was going to Mwingi was their fault and the trial court cannot be faulted for bias when it decided to proceed with the trial and have the matter concluded without unnecessary delays.

38. There is no evidence that the trial court was biased or was against the Appellant in any way, other than to ensure that the matter proceeded and concluded speedily as required by the *Constitution*.

39. On sentence, it is quite clear from Section 94(1) of the *Penal Code* that the Sentence prescribed by the statute is a fine not exceeding five thousand or imprisonment not exceeding 6 months. A fine imposed of Kshs. 40,000 was certainly excessive and this court could have set it aside even if I had found that conviction was safe. But as I have demonstrated above, the conviction of the Appellants based on the evidence tendered and issues raised was not safe.

In the premises, this court allows this appeal. Both the conviction and sentence are set aside. The fine paid, shall be refunded to the Appellants.

DATED, SIGNED AND DELIVERED AT KITUI THIS 7TH DAY OF FEBRUARY, 2023.

HON. JUSTICE R. K. LIMO

JUDGE