REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CRIMINAL APPEAL NO. 6 OF 2020

ALBERT NGONDI MATE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGEMENT

1. The appellant herein instituted the instant appeal vide the petition of appeal dated 16.06.2020 and wherein he challenges the conviction of the trial court and subsequent sentencing in Siakago PM's Criminal Case No. 68 of 2019. In the said petition of appeal, he raises seven (7) grounds of appeal. However, from the face of the said petition and the grounds thereon, the appellant's main contention was that the prosecution did not tender sufficient evidence to prove the elements of the offence the appellant was facing (creating disturbance in a manner likely to cause a breach of peace contrary to Section 95(1)(b) of the Penal Code.

2. The appeal was canvassed by way of written submissions. On behalf of the appellant, it was submitted that the evidence tendered before the trial court did not prove the elements of the offence the appellant was facing and that the alleged actions of the appellant as was described by PW1 and PW2 did not amount to creating disturbance in a manner likely to cause a breach of peace. Further that, the evidence on record did not prove the elements of the said offence as provided for under section 95(1)(b) of the Penal Code *to wit* that there was disturbance and further that the disturbance was likely to cause a breach of peace. In support of these assertions, reliance was made on the case of **Franciscca Kiborus –vs- Republic (2017) eKLR, Mule –vs- Republic Criminal Appeal No. 873 of 1982** and **Gervasio Kimani –vs- Republic (2011) eKLR** amongst other authorities.

3. Ms. Mati filed submissions on behalf of the respondent and wherein she submitted that the evidence before the trial court was sufficient to sustain a conviction as against the appellant and that the prosecution was able to prove the elements of the offence facing the appellant provided for under section 95(1) of the Penal Code. Reliance was placed on the case of **Mumbe –vs- republic (200) eKLR.** Further that the said evidence was never contradictory as alleged by the appellant. In response to ground 7 of appeal, it was submitted that the trial court considered the defence by the appellant but the same amounted to mere denials and which did not dislodge the strong evidence by the prosecution.

4. The duty of this court as first appellate court is now settled thanks to a myriad of judicial pronouncements by the superior courts in Kenya. As a rule, this court has a duty (in exercise of its powers as the first appellate court) to re-analyse the evidence tendered before the trial court and weigh conflicting evidence and draw its own conclusion. It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses. **(**See **Okeno–vs- Republic [1972] EA 32, Pandya -vs- Republic [1957] EA 336** and **Kiilu & Another –vs- Republic [2005]1 KLR 174).**

5. I have considered the evidence which was tendered before the trial court and indeed re-evaluated the same and I don't see the need of reproducing the same herein. However, I will touch on it in the course of this judgment. I have also considered the petition of appeal herein and the rival submissions. From the said analysis, it is my considered view that the main issue for determination is whether the prosecution tendered sufficient evidence to prove the elements of the offence of creating disturbance in a manner likely to cause a breach of peace.

6. Section 95(1)(b) of the *Penal Code* which provides for the said offence provides that;-

> **Any person who -**
>
> **(b) brawls or in any other manner creates a disturbance in such a manner as is likely to cause a breach of the peace, is guilty of a misdemeanour and is liable to imprisonment for six months.**

7. Therefore, the ingredients of the said offence are that the offender either brawls or creates a disturbance in a manner likely to cause a breach of the peace.

8. As to what constitutes a brawl, **Muchemi, J** in **Jacob Nthiga Ngari-vs- Republic [2014] eKLR**, held that:

> **"For the offence to be proved (sic), the prosecution must prove that there was a brawl caused by the accused on (sic) that the accused creates disturbance in such a manner as is likely to cause a breach of the peace. A brawl is defined as a rough or noisy quarrel or fight……"**

9. The evidence by PW1 was that on 25.12.2018 she was in her house when he heard a knock at her gate and which was violent and a person was shouting. That she asked her niece Caroline Ngithi to go and check after which she came and told her that the appellant herein was armed with bows and arrow. That she went out and found the accused standing about ten metres away and he told her that he wanted to kill a person. That the appellant aimed at PW1 with the bow and arrow intending to attack her but PW1 was able to get to the house and after raising alarm, the appellant left. In cross examination, she denied any personal grudge between her and the appellant.

10. PW2 (Caroline Ngithi) testified that on the material day, she was in the house with PW1 when she heard a person knocking the gate violently while shouting and the person was the appellant herein who was armed with a bow and arrows and he was threatening to kill someone. That the accused left after PW1 and PW2 raised alarm.

11. When the appellant was put to his defence, he testified that on the material day, he arrived home after attending a party at his father's place and that her daughter told him that the complainant (PW1) had cut his fence. That he proceeded to the place and found that the said fence had indeed been cut and he saw PW1 near her gate. That when he sought to know the reasons, PW1 used vulgar language and threatened to destroy his (appellant's) reputation. Further that he was not carrying anything on the material date and further that he did not commit the offence. He testified that the charges were inspired by falsehood and malice.

12. From the evidence on record, and going by the definition of the word brawl as being a rough or noisy quarrel or fight, it is clear that the acts of the appellant did not amount to a brawl. PW1 did not testify as having quarrelled with the appellant and neither did PW2 testify as having witnessed such a quarrel. As such, the first part of the element of the offence was not proved.

13. However, the offence can also be committed where an accused, in a***ny other manner, creates a disturbance in such a manner as is likely to cause a breach of the peace*****. Under this limb, there must be disturbance and also** evidence of likelihood to breach the peace. In the case of **Mule –vs- Republic Criminal Appeal No. 873 of 1982** it was stated thus:

> ***"1) The offence of creating a disturbance likely to cause a breach of the peace constitutes incitement to physical violence and the breach of the peace contemplating physical violence…..***
>
> ***2) It is not enough to constitute the offence of creating 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."***

14. The evidence by PW1 was that the appellant went on 25.12.2018 in the evening between 7.00 -7.30 pm when she heard a knock at her gate and a person shouting and who turned out to be the appellant. He further aimed an arrow at PW1 and told her that he wanted to kill someone and intended to attack her. This evidence was corroborated by PW2 who testified that she heard a person knocking at the gate violently and when she went to check, she saw the appellant armed with bows and arrows and threatening to kill someone.

15. E.M Muriithi J in Fransisca Kiborus v Republic [2017] eKLR held that the term "disturbance" must be construed *ejusdem generis* with the word *brawls* to mean creation of violence, **chaos** or fighting. From the evidence on record, PW1 testified as to having entered the house together with PW2 and started screaming for help before the appellant left. It is clear that the appellant herein caused chaos due to his actions as thus created disturbance.

16. Further as the court held in **Mule –vs- Republic (1983) KLR 246**, 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. The disturbance should have been likely to cause a breach of the peace. The court went on to hold that peace would, for instance refer to the right of *wananchi* to go about their daily activities without interference.

17. In the instant case, it is clear that PW1 and PW2 indeed left whatever they were doing to go and check out as to who was making noise. They further entered back the house and started screaming. Being at night (a fact which was not disputed), it was not a time when people should be busy screaming. The appellant as such interfered with PW1 and PW2 and their activities.

18. Taking into account all the above, it is my view that the prosecution tendered sufficient evidence to prove the elements of the offence the appellant was facing. The evidence was not contradictory and the appellant did not submit as to the alleged contradictions.

19. In the premises, I find that the appeal has no merits and I dismiss the same.

20. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 13TH DAY OF OCTOBER, 2021.

L. NJUGUNA

JUDGE

. . . . . . *for the State*

. . . . . . *for the Respondent*