



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**HIGH COURT CRIMINAL APPEAL 77 OF 2014**  
**JOB WAWERU KARIUKI.....APPLICANT**  
**VERSUS**  
**REPUBLIC.....RESPONDENT**

(Being an appeal arising from the decision of Hon. Olando (Resident Magistrate) on 5<sup>th</sup> May 2014 in the Chief Magistrate's Criminal Case Number 4203 of 2013)

**JUDGMENT**

1. The appellant was arraigned in Court on 4<sup>th</sup> November 2013, charged vide Criminal Case No. 4203 of 2013, with the offence of; creating disturbance in a manner likely to cause a breach of peace, contrary to; section 95(1) (b) of the Penal Code. The particulars of the offence read that, on 14<sup>th</sup> day of October 2013, at Kikuyu District within Kiambu County, he created disturbance in a manner most likely to create a breach of peace by shouting to Winnie Wanjiru Kariuki, that she is a prostitute and spreading "AIDS" within Kanyariri.
2. He pleaded not guilty and the case proceeded to full hearing. The prosecution's case was led by the evidence of; PW1, Winnie Wanjiru Kariuki (herein "the Complainant), who told the Court that, on the material date, she was taking soda at a store at Carbi, in the company of her sister Wambui, when the appellant who is her younger brother, went running towards them, and started hurling abuses at them. That, he told the complainant she is a prostitute, has HIV Aids and has slept with all the uncircumcised boys in the village.
3. The complainant and the sister moved away from the shopping centre to go home, but the appellant followed them, as he continued with the abuses but was cooled down by the shamba boy; Musau (PW2). Thereafter, the complainant reported the matter at Kanyariri Police Post. On 16<sup>th</sup> October 2013, the appellant also went to the Police Post, and reported that, he had been abused by his two sisters. The police officers told each reportee to avail witnesses to support their respective claims. The complainant availed witnesses, but the appellant did not. He was then arrested and charged accordingly.
4. At the close of the prosecution case, the appellant was put on his defence. In an unsworn statement, he told the Court that, the complainant is his elder sister but they are not in good relationship. That, he also has a dispute with his sister Wambui over plot number one (1), which belongs to him but the two sisters transferred to their names. Further, Ann Wambui has been charged over the same in Criminal Case No. 2684 of 2013. That he has also been jointly charged with the wife; Hannah Wambui Kariuki in another case of malicious damage to property being Case No.72 of 2014, where his brother and Winnie the sister are the complainants. He testified that, the bad blood arose out of the distribution of the property of the deceased mother.
5. He further testified that, on the material date herein, the sister Wambui told him that, he is a poor man, that the two sisters were being sarcastic. He denied calling the complainant a prostitute and stated that, the complainant has been trying to get him to reconcile but he has declined and/or refused, the reconciliation.
6. The trial Court considered the evidence adduced and delivered a judgment on 5<sup>th</sup> May 2014, in which the learned trial Magistrate found that, the prosecution had adduced adequate evidence and proved its case beyond reasonable doubt. The appellant was therefore found guilty as charged and convicted accordingly. Upon considering the appellant's mitigation and the fact that the appellant had no previous record of conviction, the learned trial Magistrate ordered for a Probation Officer's Report. After considering the report, which was positive, the appellant was sentenced to serve two (2) years on probation and given 14 days right of appeal.
7. However, the appellant was aggrieved by the decision of the trial Court and on 2<sup>nd</sup> July 2014, lodged an appeal vide a Petition of appeal dated; 25<sup>th</sup> June 2014 filed by the firm of; K. D. Thuo & Company Advocates. The appellant relies on the following grounds verbatim reproduced;

- a. That, the Learned Resident Magistrate erred in failing to appreciate that there was a property dispute between the appellant and the complainant and that the charge of creating disturbance was only actuated by malice;
- b. That, the Learned Resident Magistrate failed to see the glaring contradictions in the complainant's case particularly in the evidence given by witnesses;
- c. The Learned Resident Magistrate erred in totally disregarding the appellant's evidence;
- d. That, the entire conviction is against the weight of evidence.

The appellant consequently seeks that the conviction be quashed and the sentence set aside.

8. However, on 22<sup>nd</sup> September 2021, the Respondent opposed the appeal by filing grounds of opposition which states as here below reproduced.

- a. That, the appeal is misconceived as the trial Court acted within the law;
- b. That, the conviction and sentence was sound in law as the prosecution proved its case beyond reasonable doubt;
- c. That, the appeal lacks merit and should be dismissed in its entirety.

9. The appeal was disposed of vide filing of submissions. The appellant's submissions dated 21<sup>st</sup> October 2021, were filed on 22<sup>nd</sup> October 2021, in which he submits in a nutshell that, the trial Court failed to appreciate that, due to the family dispute, the charges herein were activated by malice. Further, the testimony of the witnesses was contradictory as to whether both sisters were abused or it was just the complainant who was abused and /or in relation to the words alleged uttered by the appellant, hence, there was doubt which should have been given to the appellant.

10. Further, the trial Court did not adequately consider the defence case, and merely treated it as a mere denial of the offence. That, the evidence adduced in support of the case was not adequate to sustain a conviction. Finally, the offence herein is a misdemeanor and anyone found guilty is liable to six (6) months' imprisonment.

11. The appellant relied on the case of *Mule vs R (1983) eKLR*, (where Parter J), stated that, to prove the offence of creating disturbance; there must be proof of likelihood to cause a breach of peace. That, the prosecution failed to prove how the alleged abusive words could invite violence or cause breach of peace.

12. In response, the Respondent filed submissions dated 21<sup>st</sup> October 2021, and submitted that, the prosecution proved its case beyond reasonable doubt. The Court was referred to the case of; *Jacob Nthiga Ngari vs Republic (2014) eKLR*, where the ingredients of the offences of creating disturbance were considered. That, the evidence of the complainant was corroborated by the evidence of PW2, PW3, and PW4; and was consistent. Further, the actions of the appellant interfered with the peace of the customers at the shop. Finally, the trial Court considered the appellant's defence and concluded it was a mere denial.

13. I have considered the appeal in the light of all the arguments advanced by the respective parties, and I note that, the role of the 1<sup>st</sup> appellate Court as held in the case of; *Okeno vs Republic (1972) EA 32* is to evaluate the evidence afresh and reach its own decision: of course, considering that, the Court did not have the benefit of the demeanor of the witnesses. In that regard, I have considered the evidence adduced by the prosecution in support of its case and I find that, the complainant's evidence that the appellant hurled abusive words against her was corroborated by the evidence of; PW2 Musau, that, the appellant told the complainant that; she was "a prostitute and the she(sic) was having sex with young men.

14. Similarly, PW3 – Lydiah Wambui, testified that, the appellant told the complainant that, she had come to teach Wambui "prostitution since Winnie was a prostitute and she has HIV Aids". In the same vein, PW4, Mwangi Kamae, told the Court that, the appellant told the complainant that she was "a prostitute" and that Winnie was "having sex with young boys- "Kihii". It is clear from the aforesaid testimonies of all these witnesses, that, the appellant abused the complainant that, "she was a prostitute, having HIV Aids, and sleeping around with uncircumcised young boys. These are abusive words. Any denial of the utterance is thus untruthful and dishonest.

15. Be that as it were, one of the ingredients of the offence of creating disturbance is proof of breach of peace. The evidence herein reveals that; the appellant was hurling these abusive words in public, at a shopping centre. All the witnesses who testified stated that, the appellant confronted the complainant and the sister at a shop where they were taking sodas. The two sisters moved off to their mother's grave and the appellant jumped the fence and followed them, and continued hurling the abuses up to their home compound. These facts are undisputed or rebutted.

16. It is in evidence that; the abuses were agitating the other members of the public. In that regard, PW2 testified that, he "cooled" the appellant down and opened for him the gate to leave. PW3 - the shopkeeper testified that the two sisters went away and did not pay for the sodas, and only returned to pay later. That, the appellant created disturbance as the two customers at the shop went away due to the noise the accused was making. Finally, PW4 stated that, "I asked the accused why he was doing that but he told me he did not want to hear anything from me".

17. It is therefore clear from this evidence that, the appellant's actions did not just agitate the complainant but other members of the public, thus, causing a breach of peace. In the given circumstances, indeed, anyone who might have felt morally obligated to intervene to protect the

victim, would most likely have been involved in physical confrontation with the appellant.

18. I find that, the prosecution adduced sufficient and/or adequate evidence to prove its case and therefore the conviction herein was and is safe and sound. I further find that, Indeed, the offence of creating disturbance has two main ingredients; that, there was incitement to physical violence and breach of peace contemplating physical violence, therefore based on the same and the evidence herein, I decline to quash it.

19. As regards the sentence meted, I find that, in all the grounds of appeal, none thereof relates to the sentence, neither has the appellant dealt with it in his submissions. Therefore, the Court holds the view that, the same is not challenged. I therefore uphold the sentence and decline to set it aside.

20. The upshot is that, I find the appeal devoid of merit and I consequently dismiss it in its entirety.

It is so ordered.

**DATED, DELIVERED VIRTUALLY AND SIGNED ON THIS 1<sup>ST</sup> DAY OF DECEMBER, 2021**

**GRACE L NZIOKA**

**JUDGE**

In the presence of:

Ms Nganya for Kanyi for the appellant

Appellant present in person

Ms Ndombi for the Respondent

Edwin Ombuna – Court Assistant