**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISII**

**CORAM: A.K NDUNG'U J**

**CRIMINAL APPEAL NO. 64 OF 2019**

**EDMUND MACHONI ONYIEGO ……..…..…. APPELLANT**

**VERSUS**

**REPUBLIC ……..……. RESPONDENT**

***(Appeal from the original conviction and sentence of Hon. P. Wamucii – RM dated 12th July, 2019 at the Chief Magistrate's Court at Kisii in***

***Criminal Case No. 1101 of 2018)***

**JUDGEMENT**

1. The appellant was charged with **threatening breach of peace** contrary to **Section 95(1)(b)** of the **Penal Code.** The particulars of the offence were that on the 25/5/2018 at Igemo Sublocation in Marani Sub County within Kisii County, created a disturbance in a manner likely to cause a breach of peace by threatening Carren Omwenga by chasing her away with a panga.

2. The appellant denied the charge and was tried and in a judgement dated 12.7.2019 he was found guilty and convicted and sentenced to a fine of Sh 10,000 in default to serve one month imprisonment.

3. Aggrieved by the said judgement, the appellant lodged this appeal citing 4 grounds in the petition of appeal viz;

> **1. The learned Resident Magistrate erred in law and fact by convicting the appellant on the offence which has not been proved beyond no reasonable doubt.**
>
> **2. The learned Resident Magistrate erred in law and fact by convicting and sentencing the appellant when there was every doubt if there was commission of the offence at all in view of the strong defence of the accused, the appellant herein.**
>
> **3. The learned Resident Magistrate erred in law and fact by not properly addressing her mind to and considering the strong defence raised by the appellant which if she did she could have dismissed the prosecution's case.**
>
> **4. The findings and conclusions of the learned Resident Magistrate are not supported by the evidence on record.**

4. The appeal was canvassed by way of written submissions by the appellant which were responded to orally by the DPP.

5. A summary of the case at the trial court is as follows;

> PW 1 (the complainant) testified that on 24.5.2018 she approached the appellant who was in the company of Gladys and Hellen and questioned them on why they were cutting her trees. The appellant who had a panga started chasing her. Gladys and Hellen joined him. She ran away and spent the night away from home. On 25/5/2018, she found the appellant fencing her land. He chased her again with a panga. She reported the matter to the police. Upon return she found her compound fenced and her house demolished.

6. PW 2 saw the appellant chase the complainant with a panga. He rescued her.

7. In a sworn defence the appellant stated that on 23.5.2018 there was a meeting called at their home to resolve differences between the appellant and PW 1. The D.O attended in company of the Chief and assistant Chief. The appellant added that on 25.5.2018 he was at home. Nothing happened between him and PW 1. It is PW 1 who demolished her house. PW 2 is her lover and they have 2 children.

8. DW 2 confirmed there was a family meeting on 23.5.2018. The appellant is his brother. The D.O attended. He added that they fenced the land on 24.5.2018. PW 1 never went to the home on 25.5.2018.

9. DW 3 a village elder confirmed the holding of the meeting which was attended by the Chief and D.O. It was decided that the homestead be given to a sister of the appellant. PW 1 had built a house there and they stopped her. The meeting advised the appellant and his brothers to fence off the land. PW 1 was not satisfied.

10. As a first appellate court, I have the onerous duty to re evaluate the evidence on record and make my independent conclusion(s) all the while alive to the fact that I neither saw or heard the witnesses testify and give due allowance in that regard.

**11.** In so doing, I place reliance on the decision in **Okeno –vs- Republic [1972] EA 32** where at Pg 36 the court stated;

> *"An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya –vs- R [1975]E.A 336). 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 courts finding and conclusions; 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 Peters –vs- Sunday Post (1958)E.A 424."*

12. It is submitted for the appellant that PW 2 talks of witnessing the complainant being chased on the 24.5.2018. The complainant does not mention PW 2 as having been around on 24.5.2018 and giving her information. The offence in court relates to the events only of 25.5.2018. The evidence of PW 2 does not thus corroborate the evidence of PW 1.

13. The evidence of the investigating officer is faulted. It is urged that according to her she received the report on 25.5.2018 and that upon return the following morning (read 26.5.2018) she found that the appellant had demolished her house. She is faulted for failing to give evidence on a visit to the scene and if at all she had visited and found the complainant's alleged properties destroyed, she would have preferred more serious charges.

14. In rejoinder Mr. Otieno for the State submitted that the evidence of PW 1 was corroborated by that of PW 2. The variance of dates as submitted between the 24th and 25th May 2018 is not an issue. The complainant confirms the date is 24th. Reliance is placed on the decision in **Obedi Kionzo Kevevo –vs- R [2015] eKLR.**

15. I have painstakingly re evaluated the evidence. PW 1 and PW 2 base their evidence on the events of 24.5.2018. The charge sheet refers to the events of 25.5.2018. This alone is not sufficient to water down the conviction.

**Section 214 (2)** of the **Criminal Procedure Code** addresses this scenario. The section provides;

> **"S 214 (2)** *Variance between the charge and the evidence adduced in support of it with respect to the time at which the alleged offence was committed is not material and the charge need not be amended for the variance if it is proved that the proceedings were in fact instituted within the time (if any) limited by law for the institution thereof.*

16. In **Obedi Kilonzo –vs- R [2015] eKLR** the Court of Appeal stated;

> *"We have perused the record and have seen that the charge sheet indicates that the date of the offence was on 10/2/2013 while the facts of the case as read out by the prosecutor refer to 9/2/2013 as the date of the offense. The test applicable by an appellate court when determining firstly the existence of a defective charge, and secondly its effect on an appellants' conviction is whether the conviction based on the alleged defective charge occasioned a miscarriage of justice resulting in great prejudice to the appellant. In the case of **JMA v. Republic(2009)** KLR 671, it was held inter alia that:*
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> > ***"It was not in all cases in which a defect detected in thecharge on appeal would render a conviction invalid. Section 382 of the CPC was meant to cure such an irregularity where prejudice to the appellant is not discernible."***
> >
> > *Applying this principle to the rival arguments of the parties, we are satisfied in the instant case that this was an omission and discrepancy which did not prejudice the appellant and that no miscarriage of justice has been occasioned as a result of the difference in dates. The errors on the dates cannot make the charge sheet defective or the conviction a nullity. This defect is therefore curable under*

***Section 382** of the **Criminal Procedure Code** which provides;*

> ***"Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice. Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings."***

17. It follows that the discrepancy in the charge sheet and the evidence of PW 1 and PW 2 did not prejudice the appellant.

18. Be thus as it may, my evaluation of the evidence shows that this case was casually and shoddily investigated and prosecuted. The evidence of PW 1, the complainant was key to these proceedings. She was the one to lay a strong foundation for her case. Her evidence leaves out the crucial fact of the identity of the person who called her to inform her of people cutting trees. One is left to hazard a guess that that person is PW 2. Whereas PW 2 states he rescued PW 1, there is no mention of such rescue by PW 1 herself. This is a material contradiction.

19. The evidence of PW 1 reveals evidence of what were more serious cognizable offence(s) which included demolition of her house.

20. Despite this matter having been reported to the police, PW 3 the investigating officer only found it fit to institute the current misdemenour charge before the court.

21. If the report by the complainant was properly investigated and found to be true, why then, was the appellant only charged with a charge of threatening breach of peace when the report to the police disclosed more serious offences? Why were Hellen and Gladys not arrested?

22. This gives credence to the view that the investigation herein was shoddy and that the investigating officer failed to go to the root bottom of the matter and unearth the true and factual happenings of the material day.

23. The trial herein is a classical example of dereliction of duty by the agency mandated to investigate crimes in the county. Investigations are the foundation of a case with chances of success. They are an integral part of a prosecution. When such investigations reveal obvious flaws, omissions and misadventure, this goes to the root of the integrity and sustainability of the subsequent prosecution.

24. As rightly pointed out by the trial court, the parties herein have a land dispute and each and every every one of them is bound to follow the law in seeking a resolution to that dispute.

25. As things stand, had the trial magistrate considered the contradictions in the evidence of PW 1 and PW 2 and the glaring omissions and sloppiness on the part of the investigating officer, she would certainly have reached a different finding.

26. With the result that I find the conviction herein unsafe and unsustainable. I set aside the same and quash the sentence imposed. The appellant is to receive a refund of the fine paid.

**Dated and delivered at Kisii this 13th day of May, 2020.**

**A.K NDUNG'U**

**JUDGE**