REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

APPELLATE SIDE

(Coram: Odunga, J)

CRIMINAL APPEAL NUMBER 103 OF 2018

BETWEEN

ALEX NZALU NDAKA........APPELLANT

VERSUS

REPUBLIC...........................RESPONDENT

(From original conviction and sentence in Machakos Chief Magistrate's Court Criminal Case No 236 of 2017, I. M. Kahuya, SRM)

REPUBLIC.......................PROSECUTOR

VERSUS

ALEX NZALU NDAKA..........ACCUSED

JUDGEMENT

1. The appellant, **Alex Nzalu Ndaka**, was charged before the Chief Magistrate's Court at Machakos in Criminal Case No 236 of 2017 with the offence of ***Creating a Disturbance in a Manner Likely to Cause a Breach of the Peace*** Contrary to Section 95(1)9b) of the ***Penal Code***. The particulars were that the appellant, on the 29th day of March, 2017 at Kola Location within Machakos County, created disturbance and caused a breach of the peace by chasing and threatening to cut **Agnes Kavindu** with a *panga*.

2. Upon being found guilty, the appellant was convicted of the said offence and was placed on probation for 6 months.

3. In support of the prosecution's case the prosecution called 6 witnesses. In summary, the prosecution's case was that on 29th March, 2017, the complainant, PW1, **Agnes Kavindu**, was in her farm at 4.00 pm when the appellant, her nephew, went and enquired from her what she was doing there and asked her to leave. When PW1 declined to leave, the appellant left and shortly thereafter returned and once again ordered her to leave and upon refusing to adhere to the said directive, the appellant rushed towards the complainant waving a *panga* and chased her away. When the complainant raised an alarm, the appellant turned and went away as the neighbours alerted by the alarm approached. When the complainant reported the matter at Katumani Police Post, she was advised to reconcile with the appellant but when no effort was made towards that direction by the appellant, the complainant reported the matter at Machakos Police Station. According to the complainant, the subject land belongs to her, having been given to her husband by her father in law and she has been tiling the same since 1985, at the chagrin of the appellant's father and his children. She admitted that there was a family dispute regarding the said land and that they were forbidden from tilling the same.

4. On the same day, PW2, **Anne Kalekye**, the complainant's daughter, was at 4.00pm drawing water from a river when she heard screams and upon rushing to the direction of the screams she met the complainant running with the appellant following behind armed with a *panga* and threatening to cut the complainant as his mother was urging him on. When people appeared, the appellant turned back and returned to his home. PW2, admitted that there was a long standing dispute between her family and the appellant's.

5. PW3, **Bernard Musi**, the complainant's son in law and the appellant's neighbour was on that day at 5.00pm harvesting fish in the river when he heard screams from the complainant's farm. Upon rushing there, he found the complainant screaming as the appellant chased her with a *panga*. Upon spotting PW3 and another neighbour, the appellant turned back and headed towards his home. Later, the appellant

returned and threatened to cut the other neighbour, **Mulwa** in the stomach.

6. The same day at 5.00pm, PW4, **Henry Mutua**, a neighbour was unwell sleeping in his house when he heard screams and upon rushing outside he saw the complainant running towards his direction, screaming with the appellant chasing her armed with a *panga* followed by the appellant's mother. After a while the appellant gave up the chase and turned back towards his home. According to PW4, there is a land dispute between the appellant and the complainant that at one point led to an assault on the complainant by the appellant's brother.

7. PW5, **PC Onyisa**, the investigating officer was on the same day on duty at Konza Police Station when he was instructed to carry out investigations into the matter. After taking statements from the witnesses he charged the accused with the offence after efforts at reconciliation failed to bear fruits.

8. Upon being placed on his defence, the appellant gave sworn testimony and called his mother as DW2. According to the appellant, the subject land of which he is a caretaker, belongs to his uncle, **Dickson**, and the complainant, his aunt married to his other uncle often interfere with the said land despite the existence of a dispute. On the material day, he met the complainant on the farm and upon asking her to leave, the complainant raised an alarm that attracted the attention of onlookers, including his other uncle. He then left for his home but was later confronted by his other uncle over the issue. In his evidence, the entire case was a fabrication resulting from the land dispute. In his evidence he found the complainant picking mangoes without his authority despite the existence of a land dispute.

9. DW2, **Rebecca Ndaka**, the appellant's mother testified that on the material day upon arriving home from work, she spotted the complainant trespassing on the land under the appellant's custody. The appellant then proceeded there and before long she heard the complainant screaming. She then went outside and asked the appellant to leave the scene. According to her the appellant did not have any weapon with him. Prior to this, she however did not witness what transpired.

10. DW3, **Catherine Nzomo**, a neighbour on that day heard noises from the farm and upon checking it out spotted the complainant and the appellant engaged in a conversation after which they parted ways. She could not recall seeing any *panga* at the scene and did not know what could have transpired prior to the screams by the complainant.

11. In her judgement, the learned trial magistrate found the evidence of the complainant untruthful since the complainant could not have raised an alarm unless she was provoked by the appellant's actions or words. The learned trial magistrate found that the witnesses' evidence corroborated what transpired after the alarm was raised. According to her, there was a battle of might with PW1 being disadvantaged since she was a widow. The learned trial magistrate then opined that it is because of such vulnerable persons that the court is looked upon as the public protector; a duty the learned trial magistrate in her own words, wore a badge of honour.

12. In this appeal, the appellant raises the following grounds:

> **1. That the learned trial magistrate erred in fact by convicting and sentencing the appellant on account of PW1's statement which was riddled with material non-disclosure.**
>
> **2. That the learned magistrate erred in fact by convicting and sentencing the appellant on account of evidence adduced without the corroboration of an independent witness.**
>
> **3. That the learned magistrate erred in fact by failing to consider the admitted fact by PW1 that the government through the chief had restrained them from interfering with the disputed land which action by herself may have provoked the appellant if at all.**
>
> **4. That the learned trial magistrate failed to consider that the family feud had earlier on led to a similar allegation of assault against the appellant's brother which case was dismissed for lack of evidence and which fact established a vendetta mission by PW1.**
>
> **5. That the prosecution did not prove its case against the appellant beyond any reasonable doubt.**
>
> **6. That the prosecution's evidence was insufficient, incredible and unreliable as it was based on already existing bad blood between the complainant's family and that of the accused.**
>
> **7. The prosecution's evidence was incapable of sustaining a conviction as the ingredients of this offence were not proved.**
>
> **8. That the defence was good and credible and raised doubts in the prosecution's case.**
>
> **9. That the learned trial magistrate erred in law and fact in not considering the totality of the evidence on record and creating an opinion of her own which occasioned a miscarriage of justice.**
>
> **10. That the learned trial magistrate did not consider the defendant's submissions and precedent in reaching her decision.**
>
> **11. That the learned trial magistrate erred in law and fact by convicting and sentencing the appellant on account of the complainant being a widow which fact was never stated by the complainant in her testimony.**
>
> **12. That the learned trial magistrate erred in law and in fact by imposing a sentence that was manifestly excessive considering the circumstances of the case.**

13. The appellant consequently prayed that this appeal be allowed, his conviction set aside the conviction, his sentence be quashed the sentence and he be acquitted.

14. It was submitted on behalf of the appellant based on **Francis Muriithi Munuhe vs. Republic [2010] eKLR** and **Republic vs. Director of Public Prosecution and 2 Others [2018] eKLR**, that the court should have been cautious in evaluating the prosecution evidence as it was likely that there was malice to ensure that the appellant was convicted based on an already existing family feud.

15. It was submitted that since the complainant was neither harmed nor threatened to be harmed, according to her own evidence, the ingredients of the offence were never proved. In this respect, the appellant relied on **R vs. Howell [1982] QB** where it was held that:

> **"There could not be breach of the peace unless an act was done or threatened to be done which either actually harmed a person or, in his presence, his property or was likely to cause such harm or which put someone I fear of such harm being done."**

16. According to the appellant there were numerous contradictions in the prosecution's case with the complainant changing her story. It was submitted that the fact of the complainant holding a *panga* and chasing the complainant was not corroborated hence there was no evidence that the appellant had any weapon. It was therefore submitted that the appellant was convicted on account of uncorroborated evidence. To the appellant his evidence was good and credible and raised doubts in the prosecution's case.

17. The appellant further submitted that the learned trial magistrate based her judgement on an opinion which was unsupported by evidence such as the fact of the complainant's husband being deceased. As a result, the learned trial magistrate allowed herself to be carried away by emotions and mere imaginations rather than on the evidence adduced by the prosecution.

18. On behalf of the Respondent, reliance was placed on **Jacob Nthiga Ngari vs. Republic [2014] eKLR** where it was held that for an offence under section 95(1)(b) to be proved:

> **"the prosecution must prove that there was a brawl caused by the accused in 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."**

19. It was therefore submitted that the prosecution proved the elements of the offence with which the appellant was charged beyond reasonable doubt based on the evidence adduced.

Determination

20. I have considered the submissions made on behalf of the parties herein. As stated hereinabove, the learned trial magistrate, in her judgement expressed herself, inter alia, as follows:

> **"Similarly, efforts for an out of court settlement did not yield fruits as the accused's family frustrated any such attempts. What could be observed from the entire bigger family is that there was a battle of the might with PW1 being disadvantaged since she was a widow. It is because of such vulnerable persons that the court is looked upon as the public protector; which duty I do wear as a badge of honour."**

21. The appellant has taken issue with this statement on the basis that it was informed by emotions devoid of supporting evidence. It is true that there was no evidence adduced by any party to the effect that the complainant was a widow. It is therefore with respect unfortunate that the learned trial magistrate formed an opinion regarding the matter before her based on non-factual matter. **Warsame, J** (as he then was) in **Jon Cardon Wagner vs. Republic & 2 Others [2011] eKLR** expressed himself as follows:

> **"The law is that it is not the duty of the trial court to go beyond the scope of the evidence adduced and adjudicate on a matter which was not raised by the prosecution and answered by the defence. The remarks by the trial court that the three police officers did their best to attack their own case and to highlight the weaknesses in the prosecution case is a matter of grave concern in terms of whether justice was done to the appellants. If a material element in an evidence and one which must have been within the knowledge of the person giving the evidence is demonstrably untrue the value of the evidence as a whole is destroyed and cannot be relied upon. I think therefore the reference was a most unfortunate one and is capable of prejudicing the appellants' case. This was a grossly improper remark. There was no evidence whatsoever that the appellants were in any way responsible for the way the police acted in terms of giving evidence before the trial court. If the three police officers were prompted by the urge to speak the truth, the trial court was duty bound to accept their evidence as against the prosecution and in favour of the appellants."**

22. That said, this being a first appellate court, this court is obliged to analyse and evaluated afresh all the evidence adduced before the lower court and to draw its own conclusions while bearing in mind that it neither saw nor heard any of the witnesses. See **Okeno vs. Republic [1972] EA 32** where the Court of Appeal set out the duties of a first appellate court as follows:

> **"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. Republic (1957) EA. (336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala Vs. R. (1957) EA. 570). 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 Peters vs. Sunday Post [1958] E.A 424."

23. Similarly, in **Kiilu & Another vs. Republic [2005]1 KLR 174,** the Court of Appeal stated thus;

> **1. An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusions.**
>
> **2. 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 findings and 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.**

24. It has been held that in a first appeal the appellant is entitled to expect this Court to subject the evidence on record as a whole to an exhaustive re-examination and the evidence having given allowance to the fact that this court did not see the demeanour of witnesses. Further even where the appeal turns on a question of fact, the Court has to bear in mind that its duty is to rehear the case, and the Court must reconsider the materials before the trial Court with such other materials as it may have decided to admit. The Court must then make up its own mind, not disregarding the judgment appealed from, but carefully weighing and considering it. See **Pandya vs. R [1957] EA. 336** and **Coghlan vs. Cumberland (3) [1898] 1 Ch. 704**.

25. However, it must be stated that there is no set format to which a re-evaluation of evidence by the first appellate court should conform. I adopt what was stated by the Supreme Court of Uganda in the case of **Uganda Breweries Ltd v. Uganda Railways Corporation [2002] 2 EA 634**, thus:

> **"The extent and manner in which evaluation may be done depends on the circumstances of each case and the style used by the first Appellate Court. In this regard, I shall refer to what this court said in two cases. In Sembuya v Alports Services Uganda Limited [1999] LLR 109 (SCU), Tsekooko JSC said at 11:**
>
> **'I would accept Mr. Byenkya's submission if he meant to say that the Court of Appeal did not go into details of the evidence, but that is really a question of style. There is really no set format to which the re-evaluation should conform. A first Appellate court is expected to scrutinise and make an assessment of the evidence but this does not mean that the Court of Appeal should write a judgment similar to that of the (trial).'"**

26. In **Odongo and Another vs. Bonge Supreme Court Uganda Civil Appeal 10 of 1987 (UR), Odoki, JSC** (as he then was) said:

> **"While the length of the analysis may be indicative of a comprehensive evaluation of evidence, nevertheless the test of adequacy remains a question of substance."**

27. The appellant submitted that the prosecution's case was riddled with inconsistencies. I find myself persuaded to borrow the definition rendered by the Court of Appeal of Nigeria in the case of **David Ojeabuo vs. Federal Republic of Nigeria {2014} LPELR-22555(CA),** where the court (**Adamu JA; Ngolika JA; Orji-Abadua JA; & Abiru JA)** stated as follows:-

> **"Now, contradiction means lack of agreement between two related facts. Evidence contradicts another piece of evidence when it says the opposite of what the other piece of evidence has stated and not where there are mere discrepancies in details between them. Two pieces of evidence contradict one another when they are inconsistent on material facts while a discrepancy occurs where a piece of evidence stops short of, or contains a little more than what the other piece of evidence says or contains."**

28. Whereas I appreciate that there were minor discrepancies in the evidence of the prosecution witnesses, it is my respectful view that such minor discrepancies are common. Whether or not discrepancies in the evidence of witnesses have the effect of discrediting that evidence would depend upon the nature of the discrepancies, that is to say, whether or not the discrepancies are trifling. See ***Law of Evidence*** **(10th Ed) Vol. 1 at 46.**

29. As was stated in **John Cancio De SA vs. V N Amin Civil Appeal No. 27 of 1933 [1934] 1 EACA 13:**

> **"Probably every judge has had occasion at some time or other to regard discrepancies as showing veracity, and to regard uniformity as showing fabrication, but it depends upon the nature of the discrepancies and the uniformity. If two people allege that they made a journey together from Kampala to Nairobi and they differ on such details as the time the train stopped at Eldoret, what they had for lunch and dinner, and whether it rained on the journey and where, it would be more reasonable to argue a difference in memory than that the journey was never undertaken. But if one says they made the whole of the journey by rail, and the other says they went to Entebbe by car and thence by air to Nairobi, it would be more reasonable to argue that the journey never took place than that one or both suffered from a defective memory."**

30. This was the position in **Willis Ochieng Odero vs. Republic [2006] eKLR,** where the Court of Appeal held:

> **"As for the contradictions in the prosecution evidence it may be true that such contradictions, particularly with regard to the date indicated on the P3 form as the date of the offence, is different. But that *per se* is not a ground for quashing the**

conviction in view of the provisions of *section 382* of the *Criminal Procedure Code*."

31. In the case of **Njuki vs. Rep 2002 1 KLR 77**, the court said the following in respect of discrepancies in the evidence of witnesses:

> **"In certain criminal cases, particularly those which involve many witnesses, discrepancies are in many instances inevitable. About what is important is whether the discrepancies are of such a nature as would create a doubt as to the guilt of the accused… however, where discrepancies in the evidence do not affect an otherwise proved case against the accused, a court is entitled to overlook those discrepancies and proceed to convict the accused."**

32. In **Philip Nzaka Watu vs. Republic [2016] eKLR,** the Court of Appeal held that:

> **"The first question in this appeal is whether the prosecution case was riddled with contradictions and inconsistencies of the magnitude that would make the conviction of the appellant unsafe. It cannot be gainsaid that to found a conviction in a criminal case, where the trial court has to be satisfied of the accused person's guilt beyond reasonable doubt, the prosecution evidence must be cogent, credible and trustworthy. Evidence that is obviously self contradictory in material particulars or which is a mere amalgam of inconsistent versions of the same event, differing fundamentally from one purported eyewitness to another, cannot give the assurance that a court needs to be satisfied beyond reasonable doubt. However, it must be remembered that when it comes to human recollection, no two witnesses recall exactly the same thing to the minutest detail. Some discrepancies must be expected because human recollection is not infallible and no two people perceive the same phenomena exactly the same way. Indeed, as has been recognised in many decisions of this Court, some inconsistency in evidence may signify veracity and honesty, just as unusual uniformity may signal fabrication and coaching of witnesses. Ultimately, whether discrepancies in evidence render it believable or otherwise must turn on the circumstances of each case and the nature and extent of the discrepancies and inconsistencies in question."**

33. In **Dickson Elia Nsamba Shapwata & Another vs. The Republic, Cr. App. No. 92 of 2007** the Court of Appeal of Tanzania addressed the issue of discrepancies in evidence and concluded as follows:

> **"In evaluating discrepancies, contradictions and omissions, it is undesirable for a court to pick out sentences and consider them in isolation from the rest of the statements. The Court has to decide whether inconsistencies and contradictions are minor, or whether they go to the root of the matter."**

34. In **Erick Onyango Ondeng' vs. Republic [2014] eKLR**, the Court of Appeal held that:

> **"The hearing before the trial court invariably entails consideration of often contradictory, inconsistent and hotly contested facts. The primary duty of the trial court is to carefully analyse that contradictory evidence and determine which version of the evidence, on the basis of judicial reason, it prefers. It is the trial court, when it comes to questions of fact, which has the singular advantage of seeing and hearing the live witness testify and being subjected to cross-examination, that time-honoured devise for testing the truth or correctness of evidence. Next is the first appellate court which by law, it is its bounden duty to re-consider, re-evaluate and analyse the evidence that was before the trial court, to determine whether, on the basis of those facts, the decision of the trial court is justified. *(See OKENO VS REPUBLIC (1972) EA 32*). It is in the above context that this Court has said time and again that it will defer to and respect findings of fact by the trial court as affirmed by the first appellate court after due re-evaluation and analysis, because the second appellate court operates from the distinct advantage of not having seen or heard the witnesses. This Court will therefore not interfere with findings of fact by the two courts below unless it is demonstrated that the trial court and the first appellate court considered matters they ought not to have considered or that they failed to consider matters they should have considered or that looking at the evidence as a whole, the courts below were plainly wrong in their decision, in which case such omission or commission would be treated as matters of law."**

35. As was noted in **Twehangane Alfred vs. Uganda, Crim App. No. 139 of 2001, [2003] UGCA, 6:**

> **"With regard to contradictions in the prosecution's case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution's case."**

36. In **Joseph Maina Mwangi vs. Republic CA No. 73 of 1992** (Nairobi) **Tunoi, Lakha & Bosire JJA** held: -

> **"In any trial there are bound to be discrepancies. An appellate court in considering those discrepancies must be guided by the working of Section 382 of the Criminal Procedure Code, viz whether such discrepancies are so fundamental as to cause prejudice to the Appellant or they are inconsequential to the conviction and sentence."**

37. Each case must be considered on its own particular circumstances. There are cases where the inconsistency is so minor that clearly it will be of little effect and certainly does not necessarily mean that the witness is lying or that his testimony cannot be relied on. The judge must take all the evidence and all the circumstances of the case into account in deciding whether to accept a witness's evidence or any part of his testimony. (**Nyakisia v. R**. E. A. C. A. Crim. App. 35-D-71; -/5/71; **Duffus P**., **Spry VP**. & **Lutta JA**., in the East African Court of Appeal).

38. I have myself subjected the evidence adduced to fresh scrutiny and though it is true that there were inconsistencies in the evidence of the said witnesses, I am unable to find that the same were material enough to warrant interference with the decision.

39. The appellant submitted that the prosecution failed to prove the ingredients of the offence of creating disturbances in a manner likely to cause a breach of the peace contrary to section 95(1)(b) of the ***Penal Code***. The said provision provides as hereunder:

> **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.**

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

> **"For the offence to be provided (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… The case by the High Court of Kenya at Nairobi in the case of *MULE –VS- REPUBLIC CRIMINAL APPEAL NO.873 OF 1982* described the offence as follows;**
>
> > **1. '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. The act of the appellant had those two elements.**
> >
> > **2. 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'.**
>
> **There is no requirement under section 95(1) (b) that for the offence to be proved, the incident must take place in a public place. Furthermore, it was held in the case of *FELIX MUTHONI NGUNGA –VS- REPUBLIC HCCRA NO.131 OF 2010 AT MACHAKOS;***
>
> > **'Clearly the offence can be committed in a private place for the simple reason that a breach of the peace can occur in such a place, there is absolutely no necessity to impute a restriction that is absent from the wording of the statute'.**
>
> **I associate myself with the dicta of Waweru, Judge in the *MUTHIANI CASE* that the offence under section 95(1) (b) can be committed in either a public or a private place. The defence of the appellant was an *alibi.* He denied having been at the scene at the material time. He is a brother to the complainant and well known to the eye-witnesses PW2 and PW3. There was no possibility of mistaken identity. The trial magistrate found the witnesses credible and the existence of the land dispute between the appellant and the complainant not a justification to commit the offence. I would accordingly agree with this reasoning of the learned magistrate. For the accused to arm himself and go to the home of the complainant demonstrates a motive behind committing the offence. His defence is untenable. I reach the conclusion that the offence of creating disturbance in a manner likely to cause the breach of the peace was proved against the appellant beyond any reasonable doubt. The conviction was based on cogent evidence."**

41. Going by the definition of the word brawl as being a rough or noisy quarrel or fight, it is clear even from the evidence of DW3, who was alerted by what he termed "conversation" that the same must have been loud enough to make her go out in order to find out what was happening. In cross-examination, she stated that she did not know what could have happened prior to PW1's screaming, a concession that there were screams. The prosecution's evidence was that the appellant was seen running after the complainant. Whether he was armed or not is not the issue since from the evidence he threatened the complainant that he would harm her. While the other prosecution witnesses might have been related to the complainant, there was no evidence that PW4 was similarly related to the complainant. According to his evidence, he was in his house sleeping due to illness when he was perturbed by the screams. When he went out he saw the appellant chasing the complainant. DW1 and DW2 admitted that they did not know what might have transpired before they arrived at the scene. Accordingly, their evidence did not controvert the complainant's evidence that she was threatened by the appellant.

42. Based on the evidence produced before the learned trial magistrate, it is my view, that she was entitled to find that the ingredients of the offence were proven notwithstanding her said unfortunate remarks. Just like **Muchemi, J** in **Jacob Nthiga Ngari vs. Republic** (supra) I find that the existence of the land dispute between the appellant and the complainant not a justification to commit the offence.

43. Accordingly, I find no merit in this appeal which I hereby dismiss.

44. Judgement accordingly.

Judgement read, signed and delivered in open Court at Machakos this 1st day of October, 2019.

G. V. ODUNGA

JUDGE

In the presence of:

Appellant in person

Miss Mogoi for the Respondent

CA Geoffrey