**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KABARNET**

**CRIMINAL APPEAL NO. 17 OF 2017**

**(FORMERLY ELDORET CRIMINAL APPEAL NO. 240 OF 2011)**

**FRANSISCA KIBORUS....................................................APPELLANT**

**VERSUS**

**REPUBLIC....................................................................RESPONDENT**

***[Being an appeal from original conviction and sentence on 25th November 2011***

***in Criminal Case No. 763 of 2011 in the Senior Resident Magistrate's Court***

***at Kabarnet (Hon. E. Bett, RM)]***

**JUDGMENT**

***Introduction***

[1] The appellant appeals from original conviction and sentence for the charge of creating a disturbance in a manner likely to cause a breach of the peace contrary to section 95 (1) (b) of the Penal Code. The particulars of the Offence were that he appellant had "on the 20th day of August 2011 at Seretunin sub-location in Baringo district within Baringo County created disturbances in a manner likely to cause a breach of the peace by calling Joshua Kibowen a witch."

[2] In addition to the and the offence of creating a disturbance as a second charge, the appellant had been charged with a first count of the offence of theft contrary to section 275 of the Penal Code with an alternative of handling stolen goods contrary to section 322(2) of the Penal Code, the subject of the alleged theft or handling being tree seedlings belonging to the complainant. She was acquitted of the offence of theft and alternative of handling but convicted for the second count of creating a disturbance.

[3] In absolving the appellant from involvement on the issue of alleged theft of seedlings, the trial court found that –

> *"From the evidence and testimony of the accused, the seedlings were bought by the accused husband from a third party. This ia [corroborated] by DW2 who says that eh seedlings were left behind by her father with instructions to plant them once it rained. It is also alleged that the accused son was the one who was planting them. So what then is the legal repercussion of this?*

*I am not aware of a law that imputes criminal responsibility to a person for [acts] or omissions of a child, wife or a husband. In this case, it is alleged that the seedlings were brought by the accused's husband. The planting was then done by the accused's son. Then it is thus the two that ought to have been charged with the first count. As for handling I am also in doubt if the parcel was registered in the accused name or that of her husband. She was not shown to have been directly involved in their acquisition, storing or subsequent planting. It is out of these considerations that I hereby dismiss Count I."*

There was no appeal from this finding, and this Court does not deal with that aspect of the trial.

[4] As regards the 2nd Count of creating a disturbance, the Court ruled as follows:

*"Turning now to the third issue it is on record from the evidence of PW1, PW2, and PW3 that the accused called the complainant a witch. Further that he had at one time travelled to Mombasa to service for witchcraft which he subsequently used to bewitch the accused daughter. Calling a person a witch does undoubtedly bring the complainant to contempt from the immediate society, lower the complainant moral standing in the society and having in mind the resentment that the society has towards a witch may ultimately make the complainant to be shunned by the rest of the society. Such words are painful and emotive and may result in physical harm if the person referred to does not exercise restraint.*

***I am thus inclined to believe and accept that the accused acted in manner likely to cause a breach of peace when she called the complainant a witch and do hereby convict her under section 215 of the CPC."***

***The Appeal***

[5] Being aggrieved by the decision of the trial court, the accused appealed to the High Court against conviction and sentence. There was no cross-appeal by the Director of Public Prosecution (DPP) on the acquittal of the appellant for the charges of theft and handling stolen property. See section 348A of the Criminal Procedure Code (2009 ed. which is applicable to the matter).

[6] The principal grounds of the Appeal were set out in paragraphs 7 and 8 of the Amended Petition of Appeal dated 13th November 2012 as follows:

*7. The trial magistrate erred in fact and in law by convicting and sentencing the appellant on Count II of the Charge Sheet yet the alleged offence happened on a different day and different time hence offending provisions of the law.*

*8. The trial Magistrate erred in fact and in law by proceeding to hear and convicting the appellant where it is clear that there is duplicity of the charges against the appellant hence occasioning miscarriage of justice.*

[7] In written and oral submissions before the court, counsel for the Appellant substantially urged the court to find that as all the offences facing the appellant were alleged to have occurred on diverse dates the same could be charged in one charge sheetand to do so would amount to duplicity of charges which was prejudicial to the appellant. It was further contended that there was no evidence of commission of the offence of creating a disturbance in a manner likely to cause a breach of the peace and that the trial magistrate had convicted the appellant "out of his own imagination and imported extraneous evidence which was not part of the evidence on record and are merely allegations which were not proved."

[8] The DPP responded that from the evidence before the Court, it was obvious that the events part of the transaction for which the appellant was charge with the offences before the Court took place in October 2011 and the reference in the charge sheet to 20th August 2011 was an error on the face of the record but which did not prejudice the appellant in any way. It was further submitted that there was no case of duplicity on the charge sheet as the separate offences were charged under separate counts.

**Issue for Determination**

[9] **The following issues arise for determination:**

a. **The meaning of creating a disturbance in a manner likely to cause a breach of the peace;**

b. **Whether the calling of the complainant a witch was a disturbance within the meaning of section 95 (1) (b) of the Criminal Procedure Code;**

c. **Whether the charge of creating a disturbance likely to cause a breach of the peace was defective.**

**Determination**

***Whether the charge was defective***

*Date of the Offence in the particulars of the Charge*

[10] Section 137 (f) of the Criminal Procedure Code on rules for the framing of charges and informationsprovides as follows:

> *"f. General rule as to description.—subject to any other provisions of thissection, it shall be sufficient to describe a place, time, thing, matter, actor omission to which it is necessary to refer in a charge or informationin ordinary language so as to indicate with reasonable clearness the place, time, thing, matter, act or omission referred to;"*

[11] From the evidence before the Court, the reference to the date of 20th August 2011 as the date of the offence of creating a disturbance is obviously wrong as the transaction upon which it is based is as having occurred in October 2011 and therefore the charge is to that extent defective. However, section 382 of the Criminal Procedure Code provides as follows:

> ***"382. Finding or sentence when reversible by reason of error or omission incharge or other proceedings***
>
> *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."*

[12] Section 382 of the CPC is, therefore, a complete cure of the apparent conflict between the dates of the alleged disturbance given in the charge and in the evidence of complainant. The series of the acts alleged to have been committed by the appellant as part of the transaction that gives rise to the various offences charged as the main charge and its alternative and the second count of creating a disturbance are alleged to have taken place in October 2011 and the dating of 20th August 2011 was clearly and error.

[3] No prejudice was shown to have been occasioned the appellant by reason of the dating error. She was able to respond to the charge of creating a disturbance without any embarrassment as to when it was alleged to have been committed as the evidence of the complainant clearly shown that the alleged disturbance was done at the same transaction as the alleged theft in the month of October 2011 on the 20th day thereof when the complainant allegedly went to complaint about theft of his seedlings and the appellant is alleged to have insulted him and called him a witch, which was the fact presented as a basis

for the charge of creating a disturbance.

*Whether charge sheet had duplicity of charges*

[14] Duplicity is a term of art. A duplex charge is one which charges more than one offence in the same count. In ***Pope v. R*** (1960) EA 132, 138 Sir Alastair Forbes V-P observed that *"It is well established that a count which charges two offences is bad for duplicity and that a conviction under it cannot stand -* ***Cherere v. R*** *(1955) 22 EACA 478."* See,for example,***Joseph NjugunaMwaura& 2 others v Republic*** [2013] eKLR, where a five-judge bench of the Court of Appeal ruled as follows:

> "The offence of robbery with violence is totally different from the offence defined under section 295 of the Penal Code, which provides ***that any person who steals anything, and at, or immediately before or immediately after the time of stealing it, uses or threatens to use actual violence to any person or to property in order to steal***. It would not be correct to frame a charge for the offence of robbery with violence under section 295 and 296 (2) as this would amount to a ***duplex charge***."

[15] It would appear that the objection taken counsel for the appellant as to duplicity of charges that *"she was charged with different counts alleged happened in different days and different dates and putting them together in one charge sheet amounts to duplicity of charges"* was the common parlance meaning of ***multiple*** charges rather than ***duplicity*** in the technical sense.See ***Ochieng v. R*** (1985) KLR 252,

***The offence of causing a disturbance***

[16] What is the ***actus reus*** for the offence of the offence of creating a disturbance in a manner likely to cause a breach of the peace?

> Section 95(1) (a) of the Penal Code is the following terms:
>
> > *"**95.** (1) Any person who -*
> >
> > *(a) uses obscene, abusive or insulting language, to his employer or to any person placed in authority over him by his employer, in such a manner as is likely to cause a breach of the peace; or*
> >
> > *(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."*

[17] The ***actus reus*** of the offence must be in (1) ***the creation of a disturbance in any manner*** that is (2) ***likely to cause a breach of the peace.*** There must be a disturbance. What is a disturbance? I consider that the disturbance must be construed *ejusdem generis* with the word *brawls* to mean creation of violence, chaos or fighting. There must also be evidence of likelihood to breach the peace.

[18] In ***Mule v. Republic*** (1983) KLR 246, Porter, Ag. J., with whom I respectfully agree, held that the offence of creating a disturbance of the peace constitutes incitement to physical violence and breach of the peace contemplating physical violence and further that it was 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 the peace. At p. 249, the learned Judge said:

> *"The appellant was charged with creating a disturbance. There is no doubt that he did that on the facts found by the learned district magistrate. The question is whether that disturbance was likely to cause a breach of the peace and the facts found by the learned district magistrate were that in the cause of the argument, annoyance on both sides was raised so far as to cause the appellant to*

*<u>start removing his jacket and indicating that he wanted to fight the complainant."</u>*

***On the facts of this case***

[19] The Complainant's testimony which was the basis of the prosecution case was recorded in the record of the proceedings in material part as follows:

> ***"I am Joshua KibowenKiborus. I comer form Seretunin. I am an AP officer at Kisii. The accused is my in-law. I know her well. I remember 17/10/2011 at 4.00pm. I was at home planting some trees. On the 18/10/2011, I found my trees had been stolen so much. So I marked the trees with a red colour. I also announced my trees had been stolen. On the 20/10/2011 I went to plant more trees.***
>
> ***I went and planted the trees and at 3.00 am I started going round inspecting trees. I went to my brother's shamba and saw some planted trees. They had the red colour. I called my father and informed him. We went with him and he saw the trees. Then a child to the accused came and said the trees were theirs. <u>The accused came and asserted that the trees re hers. The accused then screamed and called me a witch and that I had bewitched her daughter. I then went away and reported on the 22nd.</u>***
>
> *On the 23rd I brought my witnesses and we recorded statements. We then went with the officers to my nursery and they saw my trees and the colour. The accused said that she also has a nursery and we went to her nursery which had coffee trees. She did not have a tree nursery. In fact the trees had the colour as the ones in my nursery. She was summoned at the station. She continued hurling insults at me. We were summoned on 7/10/2011 at the station but the accused never came to the station. The accused was then arrested on that date."*

[20] On cross-examination, the complainant is recorded as responding to the appellant's questioning as follows:

> *"**<u>You hurled insults at me calling me a witch.</u>** I was alone when I called your child. You have never come to my place."*

It is clear that the conduct for which the prosecution relied as amounting to behaviour in a manner likely to cause breach of the peace was the insults and calling the complainant a witch but how does that threaten the peace?

[21] With respect, it would appear that the prosecution in preferring the charge in Count II of the Charge sheet was labouring under a mistaken view that abusive or insulting language amounted to conduct creating a disturbance within the meaning of section 95(1) (b) under which the complainant had been charged. Had there existed an employee-employer relationship between the appellant and the complainant or one of subordinate-superior in an employment situation, abusive or insulting language may have sufficed for an offence under paragraph (a) of subsection (1) of section 95 of the Penal Code. The relationship between these two, however, was one of ***in-law*** the appellant being the complaint's brother's wife.

***<u>Conclusion</u>***

[22] There was no evidence of any violence that accompanied or ensued the alleged abuse of the complainant by the appellant. The words used also do not of themselves incite or provoke violence, and there cannot be held to have been created a disturbance by the use of word 'witch'. Calling the complainant a witch, even if it were held to be a disturbance, was not shown to have threatened the peace. There was no evidence as to the reaction of the complainant, such as anger or annoyance and provocation to a *brawl* or other violence, on his being called a witch such as would support a finding of threat to the peace. I do not find that there was by such abuse created *a disturbance* and that such act threatened to cause a breach of the peace in any way.

[23] In holding that –

> "*Calling a person a witch does undoubtedly bring the complainant to contempt from the immediate society, lower the complainant moral standing in the society and having in mind the resentment that the society has towards a witch may ultimately make the complainant to be shunned by the rest of the society. Such words are painful and emotive and* ***may result in physical harm*** *if the person referred to does not exercise restraint.*"

the learned trial magistrate, with respect, descended into the arena of conjecture against the criminal law principle of proof beyond reasonable doubt. There was simply no evidence of a disturbance likely to create a breach of the peace.

***Orders***

[24] Accordingly, for the reasons set out above, the appellant's conviction for the offence of creating a disturbance in a manner likely to cause a breach of the peace contrary to section 95 (1) (b) of the Penal Code is quashed and the sentence of a fine of Ksh.15,000/- or imprisonment for four months in default, set aside.

[25] Consequently, there shall be an order for the refund of the fine of Ksh.15,000/- already paid to the trial court on 25thNovember 2011.

**DATED AND DELIVERED THIS 15th DAY OF JUNE 2017.**

**EDWARD M. MURIITHI**

**JUDGE**

**Appearances:**

M/S Tarus& Co. Advocates for the Appellant

Ms. Macharia for the DPP.