



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KITUI**  
**CRIMINAL APPEAL NO. 55 OF 2015**

**CAXTON MULINGE KYUVU.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(Being an appeal from the original conviction and sentence in **Kitui Chief Magistrate's Court Criminal Case No. 702 of 2012** by **Hon. A. S. Lesootia Ag. S R M** on 19/09/14)*

**J U D G M E N T**

1. **Caxton Mulinge Kyuvu**, the Appellant, was charged with the offence of **Offensive Conduct** contrary to **Section 94(1)** of the **Penal Code**. Particulars of the charge were that on the **4<sup>th</sup> day of November, 2012** at about **6.30 a.m.** at **Mutune/Wanzua Road, Mutune Location** in **Kitui County**, used abusive words to **M K N**, namely **“K\*\*a and Prostitute”** with intent to provoke a breach of the peace.
2. Facts of the case were that on the **4<sup>th</sup> November, 2012**, **PW1 Margaret Kivala**, the Complainant was at home inside the house when she heard a person hurling unprintable insults at her. She went outside to find the Appellant who was armed with a machete, spade and a hoe. Neighbours gathered. The Appellant abused her further. She reported the matter to the area Chief and later to **Kitui Police Station**. The Appellant, whose family is entangled in a land dispute with the Complainant's husband was arrested and charged.
3. When put on his defence the Appellant denied having met the Complainant on the material date. He stated that his shop was broken into. He travelled from **Nairobi** to **Kitui** having purchased stock to replace what was stolen. He encountered the Chief within the shopping centre. On the **8<sup>th</sup> November, 2012** he received a demand letter from **Kalili and Company Advocates** to which he responded. Subsequently, he was arrested on the **23<sup>rd</sup> December, 2012**. He denied having insulted the Complainant.
4. The trial Magistrate considered evidence adduced, dismissed the defence put up by the Appellant and reached a finding that the utterances were made in public, on a road outside the Complainant's gate. Further, that the Appellant had every intention to provoke a breach of peace. He convicted the Appellant and sentenced him. He placed him under probation supervision for a duration of eight (8) months.
5. Being dissatisfied with the decision of the Court the Appellant appealed on the following grounds:
  - Convicting him was against the weight of evidence.
  - He was not identified by prosecution witnesses as the person who used abusive words against the Complainant with intent to breach peace.
  - The burden of proof was shifted to him as the Accused.

- The Prosecution evidence was full of contradictions.
- The alleged crime was not reported to the police.
- The Court failed to warn itself of the possibility of a false complaint following the enmity between the Appellant and Complainant.

6. The Appellant filed written submissions where it was stated that evidence adduced by the Prosecution was insufficient to prove the charge as required by **Section 94(2)** of the **Penal Code** and witnesses were not incited to cause violence. Further that even if the alleged abusive words were uttered they caused merely annoyance and displeasure and were unlikely to cause a breach of peace. Prosecution witnesses did not identify the Appellant as the person who used abusive words. Prosecution's witnesses gave contradictory evidence and could not agree on the words uttered. The Appellant's witnesses were competent and shifting the burden of proof to the defence and dismissing the case was erroneous.

7. The State through learned State Counsel, **Mr. Wanjala** opposed the Appeal. He submitted that the State called four (4) witnesses who testified that they heard insults being hurled and on going out they found the Appellant. Identification of the Appellant was proper. The road in question was a public place and the Appellant's alibi was wanting.

8. This being the first Appellate Court, I am duty bound to re-evaluate, re-assess and re-analyze evidence adduced before the trial Court bearing in mind I had no opportunity of seeing and hearing witnesses who testified at trial then come up with my own conclusions. **(See Okeno vs. Republic (1972) EA 32).**

9. To prove the offence the Appellant faced the Prosecution was required to prove that:

- (i) The Appellant was at a public place.
- (ii) He used abusive words as against the Complainant.
- (iii) He acted with an intent to provoke a breach of the peace.

10. The **Penal Code** defines public place as:

***““public place” or “public premises” includes any public way and any building, place or conveyance to which, for the time being, the public are entitled or permitted to have access either without any condition or upon condition of making any payment, and any building or place which is for the time being used for any public or religious meetings or assembly or as an open court;”***

11. The **Interpretation and General Provisions Act** defines a public place as:

***“public place” includes every place to which the public are entitled or permitted to have access whether on payment or otherwise;”***

12. The Appellant, per the evidence of the Complainant went to her home. She was inside the house when she heard insults being hurled. When she went out he called her a prostitute. PW2 heard noise and went to the Complainant's house. She found the Complainant inside her compound while the Appellant was at her gate. She heard the Appellant call the Complainant a prostitute. PW3 **Elizabeth Kanuna** also saw the Appellant at the Complainant's house but on the path. She heard him call the Complainant a prostitute.

13. The fact that the Appellant went to the Complainant's home suggest that the incident occurred at a residential place as opposed to a public place.

14. It is submitted that Prosecution witnesses gave contradictory evidence and could not agree on which words were uttered. PW1 stated that the Appellant told her that she was a prostitute and that he would insert his finger into her vagina. PW2 stated that he accused her of being a prostitute from **Kabati** and

also called her “**k\*\*a hii**”. PW3 said the Appellant told the Complainant she was a prostitute from **Kabati** and referred to her as “**k\*\*a**”. **K\*\*a** is a Swahili word, when translated into English it means “**v\*\*\*\*a**”.

In **Phillip Nzaka Watu vs. Republic (2016) eKLR** the Court of Appeal stated that:

*“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 (2) people perceive the same phenomena exactly the same way. Indeed as has been recognized 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 rendered it believable or otherwise must turn on the circumstances of each case and the nature and extent of the discrepancies and consistencies in question.”*

15. From evidence adduced by the three witnesses who were present there is no remarkable contradiction in their testimonies. The incident is stated to have taken place on **4<sup>th</sup> November, 2012**. The Appellant adduced in evidence a receipt purported to have been issued by **Nakimu Classic Travelers**. It was his evidence that he traveled to **Kitui** from **Nairobi** on the material date and arrived at **2.30 p.m.** In his alibi defence he stated that he could not have committed the offence because he was not at the premises of the Complainant. He called his wife DW2 **Ndimu Mulinge** as a witness who stated that on the fateful date her husband arrived at **Kitui town** at **1.00 p.m.** and they went together to their **Wanzua home**. DW3 **Mary Munyanya** on the other hand said that she picked up the Appellant at **2.00 p.m.** from **Kiluva area**.
16. Although the defence came up with an alibi defence, on record we have evidence of PW2 and PW3 who knew the Appellant very well who saw him on the fateful morning. They heard the Appellant calling the Complainant a prostitute and “**v\*\*\*\*a**”. Calling her a prostitute implied that she was offering herself for sexual activities in exchange for payment. This was an insult, therefore he used abusive words against the Complainant.
17. Per the evidence adduced by PW1 the Appellant went to her home armed with a machete, spade and hoe. On re-examination she stated that the Appellant did not intend to use the weapons on her. It was established that the Appellant had a land dispute with the Complainant’s husband/family. Further, it was established that the husband to the Complainant, **F K N** instructed **Kalili and Company Advocates** who sent the Appellant a demand letter where it was alleged that on the **4<sup>th</sup> November, 2012** the Appellant uttered and published defamatory words against the said **K N** accusing him of organizing robbers to rob several shop goods from his shop.
18. When the utterances in respect of the Complainant were made, it was alleged that members of public were present including **Syombua Syunda, Kanina Kuta, Mary Wanza, Ndeni Francis, Lenah Kaiti** and **Kinuthu Nzomo**. PW2 was the Complainant’s house help who found the Accused at the gate and on hearing the utterances that he made she walked away. PW3 stated that when the Appellant insulted the Complainant she simply laughed.
19. None of the witnesses stated what effect the words uttered had on them. In a matter where it is alleged that the act was intended to provoke a breach of peace, the Prosecution is duty bound to prove beyond reasonable doubt that the act complained of was likely to make people resort to physical violence (**See Mule vs. Republic Criminal Appeal No. 873 of 1982**).
20. The words uttered by the Appellant were abusive but the two (2) witnesses who were present did not react to them. There is no indication of there having been a likelihood of being provoked.
21. In the premises it was unsafe to return a verdict of guilty. I therefore allow the appeal, quash the conviction and set aside the sentence imposed.
22. It is so ordered.

**Dated, Signed and Delivered at Kitui this 13<sup>th</sup> day of July, 2017.**

**L. N. MUTENDE**

**JUDGE**