REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL APPEAL NO. 9 OF 2009

CHRISTOPHER WANJIHIA KANG'ETHE……..……APPELLANT

VERSUS

REPUBLIC…….....RESPONDENT

(Being an appeal against conviction and sentence in Chief Magistrates Court Criminal Case No. 2648 of 2006 (Hon. E.J. Osoro, Senior Resident Magistrate) on 27th January, 2009)

JUDGMENT

The appellant was charged alongside one Susan Natongo Esikhati 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.

It was alleged that on the 10th day of June, 2006 at Karundas Kids Alive Children Home in Nyeri District of the Central Province, the appellant created disturbance in a manner likely to cause the breach of the peace by chasing away S.O.S children and caretakers from the Kids Alive Children Home Karundas.

The accused persons entered a plea of not guilty and therefore the case against them proceeded to full trial at the end of which they were found guilty as charged and convicted accordingly. Each of them was fined Kshs. 10,000/= or in default to serve three months imprisonment.

The appellants filed separate appeals against the learned magistrate's decision although they always appeared together whenever this particular appeal came up in court. Again, though there does not appear to be any order consolidating the two appeals, their separate files were tied together and from the very beginning the court and the all the parties proceeded on the presumption that the two files were consolidated. It is for this reason, that when directions were taken that the appeal be heard by way of written submissions, the two appellants filed their respective written submissions while the state responded to those submissions as if the appeals were consolidated.

I suppose that since the appellants were charged and tried together and the consolidation of their appeals would not have prejudiced any of the parties to this appeal and since they have always proceeded on the understanding that the appeals were consolidated, it is not too late to make a formal consolidation order even at this stage. Accordingly, I direct that **Criminal Appeal No 9 of 2009** and **Criminal Appeal No. 10 of 2009** (filed by Susan Natongo Esikhati) be and are hereby consolidated and the former is adopted as the lead file. **Christopher Wanjohi Kang'ethe** is deemed the first appellant and **Susan Natongo Esikhati** is the second appellant. With this order, this judgment shall apply to both the appellants with equal measure.

In their respective petitions of appeal dated 6th February, 2009 and filed in court on 10th February, 2009,

the appellants faulted the learned magistrate's decision on similar grounds; these grounds are that:-

1. The learned magistrate erred in law and in fact by convicting the appellants when the facts in the charge disclosed no offence;

2. The learned magistrate erred in law and in fact when the plea of guilty was not unequivocal;

3. The learned magistrate erred in law and in fact in convicting the appellants and fining them as she did which punishment was excessive in the circumstances considering that the appellants were arrested while on their official duties;

4. "The learned prosecutor in the lower court erred in law and in practice in urging the learned magistrate to take stern action against the appellant without giving any grounds for such address."

The appellants urged this court to allow the appeal, quash the conviction and set aside the sentence.

I must say at the outset that the second ground of appeal is misplaced since the appellants did not enter a plea of guilty. That ground is dismissed outright.

As the first appellate court, it is necessary for this court to analyse the evidence at the trial afresh and come to its own conclusions irrespective of the decision of the subordinate court subject of course to the understanding that it is only the latter that had the advantage of seeing and hearing the witnesses first hand. **(**See the case of **Okeno versus Republic (1972) EA 32).**

The appellants, according to **Isaac Mwangi Kiberenge (PW1)** were driven to Karundas Kids Alive Children Home (the children's home) on 10th June, 2006 at around 4 pm in two separate vehicles; behind their vehicles were two other vehicles which the witness described as "security vehicles". The witness was then apparently employed as a guard at the children's home.

The witness testified that the appellants informed him that they had a court order and therefor he opened the gate and allowed all the four vehicles in the institution's compound. He then informed one **Ephraim Mutuku (PW2)** who was also known as "Baba Fred" of the presence of visitors at the children's home.

While he was at the gate, one pastor **Robb(PW6)** came and asked him to guard his brief case. Later, the same pastor Robb came being guarded by two people from a security company.

The manager of the home, who arrived later **Ephraim Kabugi Wangui (PW7)** is said to have questioned the appellants why they entered his home without his permission.

According to this witness, the children at the home were screaming and following the manager. He testified that at some point the Officer in Charge of Kiganjo Police station (OCS) came at the home and everybody followed him to the institution's dining hall.

The witness learned the following day that the appellants had been arrested but that he was not certain whether the appellants had been in any of the four vehicles when they were driven out of the compound.

Upon cross-examination he testified that the appellants did not create any commotion at the institution; indeed, so the witness testified, they showed him a court order before they entered the home.

The nursing officer at the children's home, **Fredrick Kyalo Mutuku (PW2), apparently he is the same person that PW1 referred to as Ephraim Mutuku or "Baba Fred"** recalled that on the 10th June, 2006 he was at his house when he was informed by **Isaac Mwangi Kiberenge (PW1)** that there were people who had come to the institution; he found about ten of these strangers at the car park. He testified that could identify some of them as people he had worked with in other institutions similar to the one he was working in at that time. The witness testified that he was given fifteen minutes to vacate the institution; it was the first appellant who ordered him to leave. He also served him with two copies of a court order,

directed at him and his wife.

This witness also testified that they had been in court with the first appellant the previous day. He was escorted to his house by three officers from the Securicor firm to collect his belongings; however, since he could not collect them within the short time he had been given, he decided to hand over the keys to his house to the officers. Meanwhile, the appellants were at the car park. Apart from the keys to his house, the officers also collected car keys from **Robb (PW6)** in respect of an ambulance registration number KAU 896P and his personal car registration number **KAR 111W**.

It was this witness' evidence that the children started shouting because they did not understand what was going on.

When the police OCS arrived, he asked the witness to stay because, according to him, the people who were evicting them did not have an eviction order.

The witness testified that earlier, on 19th May, 2006, he had received a letter terminating his services from one **John D. Bovard** who was one of the trustees of children's home. He conceded in cross-examination that he had been served with a court order on 10th June, 2006 and that there was no commotion at the institution. The witness also testified that none of the appellants ever chased any children from the dormitory.

One of the children being accommodated at the children's home also testified on behalf of the prosecution; she was **Sabina Agure Lokidongoi (PW3)** who testified that she was aged 15 and a pupil at Nyeri Junior High School. She testified that on 10th June, 2006 at 2pm she saw three vehicles two of which belonged to Securicor company. A vehicle whose registration number she could not remember blocked another vehicle in which she was travelling. The witness could also not remember the full registration number of this particular vehicle. The driver of the vehicle is said to have been Fredrick Mutiso (PW2). The occupants of one of the strange cars are said to have given the driver of the vehicle in which this witness was travelling a piece of paper and taken the car from him. She identified these people as the appellants and in particular it is the first appellant who took control of their vehicle and parked it behind the staff house.

The witness testified that, as children, they decided to go outside the institution's compound as they could not stay with strangers. At 6 pm some children had to take drugs but the Securicor officers restrained them. She testified that other than the first appellant parking the vehicle in which she had been a passenger behind the staff room, he did not do anything else.

Dorothy Kathum (PW4) was also one of the children being accommodated at the children's home. She was aged 12 and according to her testimony, she saw three vehicles arrive at the institution on the material day. The white car among them obstructed their vehicle. She testified that she saw the appellant holding the doctor's (PW2's) shoulder as the two ran towards the latter's house.

According to this witness, the officers from Securicor company divided themselves into three groups; the appellants were with the group that was at the gate. She testified that when they went outside the compound they were locked out until 9 pm when the OCS came and ordered that all the children to go back to the compound.

The witness also said that the second appellant denied them drugs though she admitted they received their doses on time, at 6 pm. She testified that the children got out of the dormitory when they saw the first appellant pushing the doctor (PW2) roughly. According to her the officers from the Securicor company were nine.

Mr Reuben Mungai Mwita (PW5) testified that he was the branch manager of G4S group which was previously called Securicor Company Limited. According to his evidence, on 10th June, 2006 the company's city branch called and asked him to deploy ten security guards at the children's home. He was

given the name of the contact person as Stephen Masera whom he met at Chaka junction. The appellants drove in two vehicles to the institution ahead of this witness' convoy.

When they entered the compound, this witness was instructed that he was to ensure that every person who was served got out of the compound; the first appellant's task was to ensure that the people had been served while the 2nd accused appellant was to ensure that the doors were locked. This witness said that a white man and at least two other people were served although one resisted to move until her husband who was away came back. This particular person happened to be the manager. At some point an argument ensued on the removal of his items from his house but it was not clear from his testimony who exactly were arguing.

The witness learned that there was a change of management that had to be effected and his team's brief was to ensure that no property was lost.

When the OCS (PW9) came later, a meeting was held in the dining hall; according to the OCS the order which the appellant's held did not authorise an eviction and therefore he arrested the appellants.

The witness testified that they were never at any time in control of the gate's institution but it was being manned by the institution's own guard. Neither did any of the appellants enter the children's dormitory. The witness saw one Kabugi leading the children out of the dormitory towards the gate; according to him Kabugi said he could not leave without the children. He told the court that the appellants never pushed anyone.

One of the residents at the children's home was **Robert Davies Michael (PW6)**. He testified that he was a pastor from Canada but for the past three years preceding the incident, he had been at Karundas children's home.

On 10th June, 2006, at around 4pm he was leaving to pick his wife from one of the sister institutions, Mt Kenya Children's Home; he was using the institution's vehicle registration number **KAR 118W (Toyota).** He saw two white vehicles just as he set out. He got out of the vehicle and he was then approached by a process server who told him that he was to be evicted and that he had ten minutes to leave. The witness said that he was escorted to his house to gather his personal belongings. He said that he handed over the keys to his house and the car to the guard and to "the people" respectively.

Apart from those keys, he also handed over the keys to the bungalow guest house and the manager's office. The witness said that the second accused had a court order evicting them. According to him some other people were to take over the running of the school and in the process the children were disturbed when they realised that the manager, Ephraim Kabugi was to leave the school. The witness testified that Mr Kabugi resisted the eviction but eventually he was kept outside the home together with the witness, his three guests from Canada and the caregiver.

The OCS and Chief Inspector of Police, Rungera arrived at 7 pm and after a meeting with them, they realised that the document that had been served did not have a court seal and was only a hearing notice. The appellant's were then arrested.

But during examination, the witness stated that he was served with an order which had been issued by the Chief Magistrate's court at Nyeri the previous day. He even confirmed that the order had the name of the magistrate who issued it and that he complied with it except that it was Rungera who took them back to the institution. The order, according to him had asked them to leave.

The manager of Karundas Kids Alive centre **Mr Ephraim Kabugi Wangui (PW7)** testified that he had been the manager since the year 2002 and that his duties involved the daily running of the home. He said that he was an employee of the Kids Alive Kenya which is an affiliate of Kids Alive International.

The witness testified that on 10th June, 2006 he was in class at Nyeri, when the programme director called him to inform him that there were people at the children's home harassing the children and the workers.

He called the OCS Kiganjo and on his way back to the home, he went to Kiganjo to pick the programme director. At the home, the gate was being manned by Securicor guards. He was served with an order by the 2nd appellant. He produced the order for identification; it is indicated in the proceedings as summons to enter appearance. Apparently another order was issued on 7th July, 2006 when the parties appeared in court.

Previously, the witness testified that there was a problem with the institution's trustee one Bovard. In May, 2006, the manager got a letter terminating his services. He said that there was an order in force even at the time they were served with the order on 10th June, 2006. There was also an order in **Nairobi HCCC No. 549 of 2006**.

The manager told the court that in the process of trying to forcefully get the drugs for the children he was jostled by the Securicor guards.

One of the police officers from Kiganjo police station who arrived at the scene together with the OCS was Corporal Charles Gitende; he testified that on 10th June, 2006, the OCS called and asked him to accompany him to the place the appellants had gone to effect service. When they arrived at the institution, they found the Securicor guards manning the compound while the children were outside. He testified that he was given a copy of the order that was being served by the appellants. He produced the order together with another one issued in **High Court Civil Case No. 549 of 2006**.

The officer testified that the appellants had earlier been at the police station where they had requested the assistance of the officers to enable them serve the court orders. He said that the process servers used what he called "excessive force" to serve the members of staff of the children home. He was instructed by the OCS to arrest the appellants. The officer said that he learnt that there were several civil cases in respect of the home. When the appellants sought the assistance of the police, he said that he could not give such assistance because the order was not addressed to the OCS. According to him the appellants exceeded their mandate when they evicted members of staff and the children from the institution.

The **OCS** himself, **Stephen Rugera (PW9)** testified that on 10th August, 2006, **Ephraim Kabugi (PW7)** called him over his phone and informed him that some people were creating disturbance at the school. He went to the station and found Ernest Masila and a Mr Imaara a pastor who told him that process servers had gone to effect service at the children's home. Accompanied by corporal Gitende and the two pastors, they went to the home and found the children outside the compound together with the caretakers. The place was under the guard of Securicor officers.

The OCS admitted that the appellants gave him a copy of the court order from Nyeri law courts. It was his evidence that he was also shown an order restraining those who were being served from the management of the centre. According to the OCS the appellants could only serve the orders but not to evict the addressees. The OCS testified that he ordered the arrest of the appellants and also ordered the Securicor officers to leave.

In cross-examination, the OCS told the court that pastor Masila and pastor Imaara whom he found at the station reported that they had gone to evict some people at the home but had encountered resistance; they therefore wanted assistance from the police. He testified that pastor Masila was a trustee of the home and that both him and pastor Imaara had accompanied the process servers to effect service.

The OCS said that he was aware about the tussles in the management of the children's home and curiously, he testified that he was not concerned about the court order despite the fact that he did not doubt its authenticity. He also admitted that the defendants in **Nyeri Chief Magistrate's Civil Case No. 379 of 2006** are the same partes who testified for prosecution in the case against the appellants. He testified that some of the defendants were served in his presence. He said that since the appellants evicted the defendants, they exceeded their mandate. This witness also testified that his investigations revealed that the appellants chased away the children.

The appellants gave a sworn testimony. The first appellant testified that he is a court clerk as well a court process server engaged at the firm of **J.W. Madahana & Company Advocates** at Nairobi.

On 10th June, 2006 he received instructions to serve an application for hearing on 26th June, 2006; together with this application was an order issued in **Nyeri Chief Magistrates Court Civil Case No. 379 of 2006.** The application and the order were to be served upon the respondents or defendants in that application who apparently were based at the children's home. He was accompanied with his workmate, the second appellant herein.

Before proceeding to the children's home, he went to Kiganjo police station seeking security because there was a likelihood of resistance from the respondents since their services had been terminated. At the station the appellants met corporal Getende who told them that he could not accompany them since the OCS was away; he however advised the appellants that they could still serve the documents in the absence of the police but in the event they encountered any problems, they could call back for assistance. With this assurance, the appellants proceeded to the children's home accompanied by the two pastors, the driver of the vehicle in which they were travelling and some other person. They also went with G4S officers who had been engaged by Mr John W.Bovard, their client.

At the children's home, they encountered **Robert David (PW6)** at the institution's car park after they had been freely given access into the compound. Pastor Orindi pointed out Robert David to the appellant and the appellant duly effected service upon him. He also accepted service on behalf of his wife, Sharon Coleen.

The witness then proceeded and served **Mutuku (PW2)** after he introduced himself to him; he accepted service on his own behalf and on behalf of his wife.

The next person to be served was **Ephraim Kabugi(PW7)**; pastor Orinda pointed out his house to the appellant. When the appellant went there, he only found Kabugi's wife who told the appellant that her husband was away; she accepted service on her behalf and on behalf of her husband. Twenty five minutes later when Kabugi himself arrived, the appellant introduced himself to him and showed him copies of the application and the order.

Ephraim Kabugi (PW7) walked away towards the children's hostels and after a short while he came back with the children following him. Although the gate was shut by the Securicor guards, Ephraim Kabugi found his way out of the compound together with the children through the fence. The children literally followed him. The rest of the workers remained in the compound. The witness testified that his only mission was to effect service as instructed.

On her part the second appellant testified that she too worked with firm of **J.W. Madahana & Company Advocates** and that on 10th June, 2006, she accompanied her colleague to effect service. She confirmed that they passed through the G4S offices and Kiganjo police station. At the station an officer manning it told them that he could not give them any officer but offered his telephone number and asked the appellants to contact him in the event they ran into any problems. They then proceeded to the children's home where they were given access to the institution's compound after they introduced themselves and the purpose of their visit.

The appellants and those people they were accompanied with walked together as service was effected upon the respondents. When Kabugi was served, he walked away with his wife, his child and maid; he asked his wife not to lock the house and said that the appellants would be responsible for any loss. It is then that the appellant asked the Securicor guards to guard the house to avoid any loss. The appellant was categorical that they did not chase any one and in any event, so the witness testified, they did not have the mandate to evict. However, they thought if people served reacted by leaving the institution then the Securicor officers would be at hand to guard the place.

One of the defence witnesses was **Pastor Stephen Karte Masila (DW3)** who accompanied the appellants to the children's home; he said that he was one of the trustees of Karundas Kids Alive but that he

accompanied the process server to witness service of the documents. He confirmed that the officer at Kiganjo police station asked them to proceed and serve and that in the event they encountered any difficulties they were free to contact him. The witness said that all the appellants did was to effect service and that they did not chase any one. According to him, Ephraim and Mutuku brought the children to the gate to give an impression that the appellants were chasing the children away. This witness then went to the police, the same officer whom they had talked to come; he indeed came accompanied with the OCS and in the process they arrested the appellants.

Another of the appellants' witnesses who saw **Ephraim Kabugi** (PW7) leave with the children was **David Thuita Mugo (DW4).** He said that the children went out of the compound through the fence and not through the gate which was at the time being manned by the G4S guards. He confirmed that indeed the OCS came in the same vehicle as pastor Masila.

This was the evidence from which the learned trial magistrate concluded that the prosecution had proved its case against the appellants beyond reasonable doubt. In particular, she held that:-

> ***"The issue for my consideration is whether the prosecution has proved the case against the two accused persons herein to the required standard.***
>
> ***In so doing I have mainly relied on the evidence of PW5 who was an eye witness who I also consider to be an independent witness. It is clear from the evidence of PW5 that accused 1 and 2 went to Karundas Kids Alive to effect serve (sic) and also to evict the people who they were to effect service upon."***

The learned magistrate continued:-

> ***"This also can be explained by the huge contingent of security guards who accompanied them as well as their passing through the police station to seek police reinforcement and security. To this end the two accused who are court process servers exceeded their mandate which was to prove (sic) effect service. The issue of reinforcement of the order was outside their authority."***

As noted thirteen witnesses, nine of whom were prosecution witnesses testified. Besides the prosecution witnesses, the appellants and their two witnesses testified under oath. The evidence of each one of these witnesses was as important as that of the other and if there was any reason as why the learned magistrate would choose to disbelief any of them, then such a reason should have been given. It was incumbent upon the learned magistrate to consider and evaluate all the evidence in its entirety before coming to the conclusion that the appellants were guilty as charged. By singling out one prosecution witness as "an independent witness" without any reason as to why the rest of the witnesses' testimony was apparently disregarded, the learned magistrate fell into error and as will be demonstrated below arrived at the wrong conclusion.

Section 95(1) (b) under which the appellant was charged provides as follows:-

> ***95. Threatening breach of the peace or violence***
>
> ***(1) Any person who—***
>
> ***(a) …***
>
> ***(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.***

From the foregoing provision, the question is whether, looking at the evidence, it was proved beyond reasonable doubt that the accused persons "brawled" or "in any other manner created a disturbance" in a way that was likely to cause a breach of the peace. To answer this question, one has to go back as to why the appellants were found at the children's in the first place.

It is apparent from the evidence and it was not in dispute that there existed a civil dispute in court concerning the management or running of Kids Alive Karundas Children's Home. In particular there was Nyeri Chief magistrates Court Civil Case No. 379 of 2006 from which the order in issue was extracted. The appellants were instructed by the firm of **J.W. Madahana & Company Advocates** to serve this order on the respondents.

The second appellant was categorical in her evidence that their mission all along was to effect service and not to evict. In effecting service they were to take the necessary precautions including being cautious of their own security and that of the institution and the institution's property. She testified that they were not sure of how the respondents would react to the order. Her explanation made sense if one considers the tenor of the order that was served; in its pertinent part, the order provided as follows:-

> ***2. " THAT, a temporary injunction do issue restraining the defendants by themselves, their servants, agents and employees or whomsoever be restrained from entering and or interfering with the operation and management of the plaintiff offices at 2nd floor no. 2 vision Plaza Mombasa Road Nairobi and its institutions namely Karundas children's centre, Naro Moru Children's homes, St Stephen's children's home Timau. Machiuka Home and Youth training Centre Isiolo, Gesonso village Nyamarambe, Nyando Children's Centre Pap Onditi, Nzoweni Children's home Mitaboni, Mt Kenya Children's Home Naro Moru, Korogocho Baptist Children's Home and together with all facilities, motor vehicles and other moveable assets until the hearing and determination of this suit of(or) further orders of this court.***
>
> ***3. THAT the defendants be restrained from transacting, operating, holding out in any other manner representing themselves as employees and or trustees of the plaintiff.***
>
> ***4. THAT the plaintiff Bank Account Numbers 1082851, 1082959,115223, 1150091, 1118430, 1149948 at Nyeri Barclays Bank frozen by the defendants be opened forthwith and the plaintiff do operate the same.***
>
> ***5. THAT this matter be heard inter parties on the 23rd June, 2006.***
>
> ***The order was issued on 9th June, 2006 and was duly sealed and signed. At its foot there was a penal notice in these terms:***
>
> ***TAKE NOTICE that you ROBERT DAVIS, SHARON COLLEEN, EDWARD TEI OPUK, EPHRAIM KABUGE, DUNCAN GATERE, ANTHONY MAINA, FRED MUTUKU AND RUTH MUTUKU, when served with the court order and fail to comply, you will be in contempt of the court and liable to be charged for such and be committed to civil jail for a period of six months or sequestrations or otherwise as this Honourable Court directs for the purpose of compelling you to obey this (sic) ORDERS of the Court.***

It is apparent on the face of the order and more particularly paragraph 2 thereof that the order restrained the respondents who included **Fredrick Kyalo Mutuku (PW2), Robert Davis (PW6)** and **Ephraim Kabugi (PW7)** together with their agents, servants or employees from entering Karundas Kids Alive Children's home or interfering with its operations or dealing with the institution's property in any manner whatsoever. They were also restrained from transacting or representing themselves as employees or trustees of the institution (see paragraph 2 of the order).

If this order did not make sense to the learned magistrate with respect to the proceedings before her, it should have at least created a reasonable doubt as to whether the respondent's reaction to it was informed by the order's tenor or its implication on their positions or status in the children's home rather than by the appellant's conduct.

Isaac Mwangi Kiberenge (PW1) testified that Robert Davies **(PW6)** brought his suitcase and left it at the gate, apparently after he had been served with the order. He also testified that he heard children screaming and saw them following **Ephraim Kabugi (PW7)** whose wife had earlier been served the

order a copy of which was shown to him when he appeared twenty -five minutes later (she the evidence of **Christopher Wanjiku Kang'ethe (DW1)**).

Fredrick Kyalo Mutuku (PW2) acknowledged having been served with the order. He testified that he was told to leave but he never testified that any of the appellants evicted him from the home. He said that after he had been served with the order:-

> ***The Securicor officers escorted me to my house, my wife was away my kids, were there with my house boy, I realised that I could not be able to remove all the items in the house where I decided to lock the house and I gave Securicor officers the key to my house. By that time the accused persons were at the car park."***

He added in cross-examination:-

> ***There was no commotion at the institution. The 1st and the 2nd accused did not chase the children from the dormitory.***

Robert Davis (PW6) who was served with the order testified that:-

> ***"The 2 accused had a court order evicting us. There were a number of staff members who were expected to take over Kaunda's children centre.***
>
> ***In the process the children were disturbed when they realised that the manager Ephraim Kabugi was to leave the school."***

The witness said that there were four security guards who escorted him to his house. He was told to gather his personal belongings and he gave the house key to the guard. He also handed over the key to the vehicle and that of the guest house.

He also said that the children came to the gate because they were concerned about Mr Kabugi.

According to him, the order only ordered them and the caregivers to leave the compound. The children were not required to leave.

He did not doubt the authenticity of the order; in fact he said that he obeyed the order and it is only "*CID Rungera who took us back"*.

Ephraim Kabugi (PW7) said he was locked out of the compound but he still found his way in. He went to his wife who showed him a bundle of documents which, according to him, only constituted a summons to enter appearance; he conceded however, that he did not read the entire bundle. After service he went to where the children were. He said that the children followed him outside the compound.

According to the second appellant's evidence which was not challenged, Kabugi's wife's reaction after the order was served was "disturbing". According to the appellant, the wife "was hysterical, crying and screaming."

It is clear from the evidence that some of the respondents were infuriated with the order and their reaction upon service was a demonstration of anger. As the evidence shows, their reaction affected the children who were not targets of the order at all. It is obvious therefore that service of the order and the reactions thereto may have perhaps disturbed what was otherwise a peaceful atmosphere at the children's home.

For purposes of this appeal I would say that once the learned magistrate established that the appellants were process servers and that they were undertaking a legal or lawful process it was not their obligation to manage the aftermath of such a service. They were not responsible for the children's riot or departure from school; they were not responsible for management of the respondents' reaction or anger. They were effecting a legal process and merely by doing that they cannot be said to have been creating ***"a***

disturbance in such a manner as is likely to cause a breach of the peace" as understood under ***section 95(1) (b)*** of the ***Penal Code.***

The investigations officer Chief Inspector of Police (PW9) who was also the **OCS** of Kiganjo police station testified that he was aware of the court order in issue. According to him, the appellants were only to serve the order and not to evict the respondents; since, in his view, they were evicting the respondents, they were creating disturbance and therefore he charged them accordingly.

The learned magistrate seems to have bought the investigations officer's argument because, she held that the appellants exceeded their authority in evicting the appellants.

The finding by the learned magistrate was not supported by evidence; as noted she established that the appellants were process servers and therefore by effecting service they could not be said to have been evicting the respondents. If the respondents behaved in a manner to suggest that they had been evicted, the appellants could not be held responsible for their actions. In any event they were not parties to the suit and therefore had no interest in it.

If there was any question as to the tenor or import of the order, or whether either of the parties had acted outside it, the proper forum for its determination was the court which issued it. Any of the respondents was free to lodge a proper application before the same court under the Civil Procedure Act and the rules made thereunder either to challenge it or challenge its enforcement.

With due respect to the OCS, he was not competent to purport to interpret the order and proceed to charge the appellants on the basis what, in my view, was a skewed interpretation of the order.

If the appellants intended to cause a breach of the peace, they would not have sought police escort or security guards whose job is to maintain peace and order and protect property, amongst their other duties. None of them could evict; they were not court bailiffs.

It is quite ironical that the police whom they had earlier notified of their mission and from whom they sought protection and had indeed been assured of such police protection should it be necessary, could turn around and charge them with the offence for which they were convicted.

More importantly, much as the OCS alleged that the appellants had exceeded their mandate and evicted the respondents and the court agreed with him, the charge sheet showed that disturbance was created when the appellants allegedly "*chased away S.O.S children from Kids Alive Children's Home.*"

There was, however, no single proof that the appellants or any of them approached the children let alone chasing them away. To the contrary, the available evidence showed that the children went out on their own or they were incited to do so by **Ephraim Kabugi (PW7)**. For instance, **Isaac Kiberenge (PW1)** said that he heard the children screaming and following Ephraim **Kabugi (PW7)** outside the compound. **Fredrick Mutuku (PW2)** testified that the children did not understand what was happening and so they started shouting. One of children **Sabina Agure Lokidongoi (PW3)** testified that they decided to go out of the compound on their own because they could not stay in the compound with strangers. **PW5** Reuben Mungai, whom the learned magistrate described as "an independent witness" and whose evidence, for that reason, the learned magistrate heavily relied upon, testified that **Ephraim Kabugi (PW7)** led the children out of the compound and he in fact said that he could not go away without children. **Ephraim Kabugi (PW7)** himself testified that the children demanded to leave school and therefore he went outside the compound together with them.

The prosecution evidence was consistent all through that the children were either led away from the dormitory outside the compound by the **Ephraim Kabugi (PW7)** or they went on their own. There was no proof that any of the appellants chased or forced the children out of the institution as alleged in the particulars of the charge against them.

The implication of this evidence is that the charge against the appellant was not supported by any

evidence; it follows that the learned magistrate's decision to convict the appellants was against the weight of evidence.

I am therefore satisfied that the appellants appeal is merited and it should be allowed. I hereby quash their conviction and set aside their sentence. I order that the fines which they paid in lieu of serving a prison term be refunded to them forthwith otherwise they are set at liberty unless they are lawfully held.

Dated, signed and delivered in open court this 8th day of July, 2016

Ngaah Jairus

JUDGE