



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS
CRIMINAL APPEAL NO. 114B OF 2011

(From original conviction and sentence in Criminal Case No. 575 of 2009 of the Senior Resident Magistrate's Court at Mwingi, H. M. Nyaberi, SRM)

MARY MATI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

1. The Appellant, Mary Mati was charged with 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. The particulars of the offence are that on the ***“10th day of June 2009 in Kyuso District within Eastern Province created a disturbance in a manner likely to cause a breach of the peace by telling BNJ that she has Aids in her hotel in presence of customers.”***
2. When the Appellant was arraigned before the trial court, he pleaded not guilty. The case proceeded to a full trial.
3. In support of their case, the prosecution called four witnesses. Their case was that at the material time, the Appellant was in the complainant's hotel and when she started hauling abusive words at the complainant calling her a murderer and prostitute who suffered from AIDS. That the complainant had contracted AIDS from the children of one M and further that the complainant was a woman who bleeds from the rectum. That the said words were uttered in the presence of the complainant's workers and customers who included the Assistant Chief.
4. When the Appellant was placed on her defence, she gave sworn evidence and called two witnesses. Her case was that on the material day at about 9.00 a.m., she was at Gatoloni Trading Centre where she had gone to deliver milk. That the complainant came outside where she was and started abusing her by calling her a dog and a person who suffers from leprosy who is unable to dress because of the disease. The Appellant denied having abused the complainant and termed this case as a frame-up.
5. The trial magistrate found the prosecution case was proved beyond reasonable doubts. The Appellant was convicted and sentenced to pay a fine of Ksh 7,000/= in-default to serve two months

imprisonment.

6. The Appellant was aggrieved by both the conviction and sentence and appealed to this court on grounds that can be summarized as follows:–

- (a) That the prosecution witnesses gave contradictory evidence.
- (b) That the trial court relied on hearsay evidence.
- (c) That the prosecution failed to call crucial witnesses.
- (d) That the charge sheet was defective.
- (e) That the defence case was not given sufficient consideration.
- (f) That the sentence was harsh and excessive.

7. During the hearing of the appeal, the parties opted to rely on written submissions. I have duly considered the said submissions.

8. This being the first appeal, this court is duty bound to re-evaluate the evidence and the record afresh and come to its own conclusions and inferences – See **Okeno –vs- Republic (1972) EA 32**.

9. The complainant, PW1 BN gave evidence that the Appellant stood beside her hotel and uttered the aforesaid abusive words. The complainant's evidence is corroborated by that of PW2, Alice Kathuli, and PW4 John Mulyungi who were in the complainant's hotel as customers at the material time. These two witnesses gave evidence which established that the abusive words complained of were directed by the Appellant to the complainant. The evidence of PW2 and PW4 further corroborated the complainant's evidence that the said incident happened in Gatoloni Trading Centre at the complainant's hotel where there were many members of public.

10. The evidence of PW3 Corporal Yuaai Keitan confirmed that a report was made at Kyuso police station and the matter investigated. This led to the arrest of the Appellant and the subsequent case.

11. On the other hand, the Appellant's evidence was that it was the complainant who abused her. The Appellant's witnesses, DW2 Mercy Kamene and DW3 Peter Muthenji Mwangangi corroborated the complainant's evidence. However, the defence case talks about an incident that happened at about 9.00 a.m. at the same Trading Centre (Gatoloni) at the shop of one Kagendo.

12. It appears the defence evidence refers to a separate incident. Although the Appellant also referred to a previous incident of assault by the complainant, the matter is not the subject of the proceedings herein. The incident described by the defence witnesses also appears not to have been reported to the police and appears not to have featured in the investigations carried out in this case.

13. It was argued by the defence that some crucial prosecution witnesses were not called to testify. However, the prosecution witnesses who testified were able to prove their case. As stated by the Court of Appeal in the case of **Bukenya & Others –vs- Uganda (1972) EA 549, page 550:-**

“It is well established that the Director has a discretion to decide who are the material witnesses and whom to call, but this needs to be qualified in three ways. Firstly, there is a duty on the Director to call or make available all witnesses necessary to establish the truth, even though their evidence may be inconsistent. Secondly, the court itself has not merely the right, but also the duty to call any person whose evidence appears essential to the just decision of the case. Thirdly, while the director is not required to call a superfluity of witnesses; if the calls evidence which is barely adequate and it appears that there were other witnesses available who were not called, the court is entitled under the general law of

evidence, to draw an inference that the evidence of those witnesses, if called, would have been or would have tended to be adverse to the prosecution.”

14. The particulars of the offence as stated in the charge sheet refers the complainant being told that she has AIDS. The other abusive words to wit murderer or witch, prostitute and bleeding were not stated in the charge sheet. According to the Appellant, this made the evidence to be at variance with the particulars of the offence, thereby making the charge sheet defective. However the court’s view is that the charge sheet is not defective as it is clear and discloses and offence known in law. As stated in the case of **Sigilani –vs- Republic (2004) 2 KLR, 480;**

“The principle of the law governing charge sheets is that an accused should be charged with an offence known in law. The offence should be disclosed and stated in a clear and unambiguous manner so that the accused may be able to plead to specific charge that he can understand. It will also enable the accused to prepare his defence”.

15. The sentence meted out is within the law and it is not harsh or excessive.

16. Having re-evaluated the evidence on record in its entirety, I find no merits in the appeal and dismiss the same.

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B. THURANIRA JADEN

Dated and delivered at Machakos this 3rd day of June, 2015

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B. THURANIRA JADEN

JUDGE