



REPUBLIC OF KENYA

High Court at Meru

Criminal Appeal 98 of 2009

LUCY NKATHA MBEERO.....APPELLANT

V E R S U S

REPUBLICRESPONDENT

J U D G M E N T

The Appellant Lucy Nkatha Mbeero was charged with one count of creating a disturbance in a manner likely to cause a breach of the peace contrary to section 95(1) of the Penal Code. She was found guilty, convicted and sentenced to a fine of Ksh.120,000/- in default 1 year's imprisonment. The particulars of the offence are that on the 7th day of February, 2009 at 7.45 hours at Katheri Location in Meru Central District in Eastern Province created a disturbance in a manner likely to cause a breach of peace by sending a short text message service (sms) through your mobile phone . No. 0720xxxxxx to the mobile No. 0722 xxxxxx which belong to J. K., the text which read *{particulars withheld}*.

The Appellant was aggrieved by the conviction and sentence and therefore filed this appeal. The petition of appeal raises the following grounds.

1. The learned trial magistrate erred in law and facts in failing to analyze the evidence of the prosecution which evidence was a contradictory and therefore not enough to convict and sentence the Appellant thus a miscarriage of justice.

2. The learned magistrate erred in law and fact in failing to consider that the charge sheet was defective in as far as the same failed to tarry with the statement and evidence adduced by the complainant.

3. The learned magistrate erred in law and fact in failing to consider the evidence of the accused.

4. The learned magistrate erred in law and fact in failing to explain to the Appellant the right to conduct her defence and the consequences of failure to do so.

5. That the sentence was excessive in the circumstances of the case.

When the Appellant came up for hearing the Appellant who had counsel on record applied to prosecute the appeal in person as the counsel had failed to come to court on several occasions. The request was granted.

The Appellant's submitted that she was convicted of sending a message to her uncle through phone. She stated that her uncle annoyed her because he disconnected his phone every time she tried to talk to him on phone. She pleaded for the reduction of the fine urging that it was excessive and she could not manage to pay the same.

The Appellant was granted bond in the sum of Ksh.10,000/- with one surety of like sum on 11th June, 2009.

The State was represented by Mr. Moses Mungai in the Appeal. The learned state counsel urged that the charge before the court was defective because the offence under section 95 of the Penal Code did not apply where the communication is through a gadget; counsel urged that the section dealt with threatening of the peace. Counsel urged that the defect was not curable and that in the circumstances he was not opposing the appeal.

The Appellant was charged with an offence of creating a disturbance in a manner likely to cause a breach of the peace. The facts disclosed in the prosecution case were that the Appellant sent abusive short text messaging service (SMS) to the complainant.

The offence of creating a disturbance likely to cause a breach of the peace has two components. One incitement by the accused to physical violence and two the breach of the peace contemplating physical violence. See *Mule v. Republic* [1983] KLR 246. The prosecution must prove not only that the accused created a disturbance but also that the disturbance was likely to cause a breach of the peace. By peace it means the acts complained of were likely to interfere with people's activities.

The prosecution's case was that an SMS text was sent to the complainant on his private mobile hand set. The only person who saw the text was him. There is no way the prosecution could have been able to prove that by receiving the text, the complainant had any way of disturbing the peaceful activities of any persons. At the very most the Appellant annoyed the complainant. The offence was in the circumstances not sustainable under the law invoked.

There is a relevant offence under the Kenya information and communications Act Cap 411A. under S.29 of the Act an offence of improper use of system is created as follows:

“Any person who by means of a licensed telecommunications system-

(a) Sends a message or other matter that is grossly offensive or of an indecent, obscene or menacing character; or

(b) Sends a message that he knows to be false for the purpose of causing annoyance, inconvenience or needless anxiety to another person commits an offence and shall be liable on conviction to a fine not exceeding fifty thousand shillings, or to imprisonment for a term not exceeding three months, or to both.”

That provision under which the appropriate offence should have been preferred against the Appellant for what she did is alleged to have been done.

The charges preferred against the Appellant were defective charges. A defective charge was defined by the court of Appeal in **Yongo v. Republic [1983] KLR 319** as follows:

1. “ A charge is defective under section 214(1) of the Criminal Procedure Code (cap 75) where:

a) It does not accord with the evidence in committal proceedings because of inaccuracies or deficiencies in the charge because it charges offences in the charge not disclosed in such evidence or fails to charge an offence which the evidence in the committal proceedings discloses.”

I find that the offence charged in this case was not proved. In fact it was incapable of being proved for reasons I have given herein above.

In the result I quash the conviction and set aside the sentence.

The Appellant was out on a bond pending appeal. Any security deposited or cash paid to secure her release on bond should be returned and or refunded to the depositor.

Those are my orders.

DATED SIGNED AND DELIVERED AT MERU THIS 2ND DAY OF MAY 2013.

J. LESIIT

JUDGE