



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CRIMINAL APPEAL NO. 326 OF 2010

(From Original Conviction and Sentence in Criminal Case No. 849 of 2009 of the Chief Magistrate's Court at Mombasa: M.K. Mwangi – S.R.M.)

SALIM VERJEE APPELLANT

VERSUS

REPUBLIC RESPONDENT

JUDGEMENT

The Appellant **SALIM VERJEE** has filed this appeal to challenge his conviction and sentence on a 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:

“On the 10th day of March 2009 at about 8.30 A.M. at Bamburi area in Mombasa district within Coast Province created a disturbance in a manner likely to cause a breach of the peace by pushing one RONALD DEMELLO, threatening to beat him”

The prosecution called a total of four (4) witnesses in support of their case. The complainant **RONALD SILVERSE DEMELLO**, testified as **PW3**. He told the court that on 10th March 2009 he was in his house at Bamburi. He heard a commotion from downstairs and went to investigate. He found the Appellant who was his neighbour shouting at the top of his voice and threatening the complainant's cook one **HAMISI PW1**. **PW3** told the Appellant to leave the house whereupon he became violent throwing furniture around and held **PW3** by the collar. One **NZIOKA PW2** also intervened and together they managed to get the Appellant out of the house. **PW1** later went and reported the matter to the police. Appellant was thereafter arrested and charged.

On 17th July 2010 the learned Senior Resident Magistrate delivered his judgement in which he convicted the Appellant of the charge of Creating a Disturbance. After hearing the Appellant's mitigation the trial magistrate fined him Kshs.7,000/- in default three (3) months imprisonment. Being dissatisfied with both this conviction and sentence the Appellant filed this appeal.

MR. OGUK learned counsel represented the Appellant, whilst **MR. ONSERIO**, who appeared for the Respondent State opposed the appeal.

I have carefully considered the submissions made by Mr. Oguk in support of this appeal. He argues

that the learned trial magistrate misdirected himself in considering the prosecution case in isolation from the defence raised by the Appellant. Counsel relies on the findings of the trial magistrate at page 16 line 6 of his judgement to support this contention. In that passage referred to the learned magistrate observed thus –

“PW1 was forthright in his testimony. His evidence is corroborated in all material particulars by the evidence of PW2 and PW3. PW1, PW2, and PW3 are eye witnesses who witnessed the events as they unfolded. PW4 visited the scene the same day and observed the furniture strewn all over the house. I have also considered the defence adduced by the accused person, and the same does not poke any holes in the prosecution case”

Mr. Oguk argues that this passage implies that the learned trial magistrate **first** considered the prosecution case and came to a conclusion **before** he took into account the defence. With respect I do not agree with this submission. The fact of the matter is that the learned magistrate did consider the weight of the prosecution evidence as he was required by law to do **but** he stated that he has **also** considered the defence. This means that the trial court in assessing the prosecution evidence **also** took into account the defence raised by the Appellant. My reading of this is that the two (prosecution and defence) were considered simultaneously and not necessarily one after the other. It is not necessary that the magistrate indicate that he has considered both **‘together’**. I therefore find no merit in this ground of the appeal and I find no evidence that the learned trial magistrate misdirected himself as alleged.

Secondly counsel for the Appellant submits that the learned trial magistrate shifted the burden of proof from the prosecution to the defence. It is without doubt a jealously guarded principle of our law that the burden lies **at all times** upon the prosecution to prove its case beyond a reasonable doubt. I find no evidence to show that the trial magistrate may have deviated from this standard. In observing that the defence raised did not **‘poke any holes’** in the prosecution case the court was not placing upon the accused the onus of discounting the prosecution case. Quite evidently if the defence raised did in any way cast doubt on the prosecution case then the benefit of such doubt would have been awarded to the Appellant. The trial court did not convict the Appellant because he had failed to discount the prosecution case but rather the conviction of the Appellant was based on the finding of the court at page 16 line 10:

“From the evidence I am satisfied that the prosecution has proved its case to the required standards”

It is clear that the basis for the Appellant’s conviction was the assessment of the evidence **taken as a whole** and the finding that the required standards of proof had been met. I therefore find no merit on this ground of appeal and hereby dismiss the same.

My own evaluation of the evidence adduced in the lower court is that the same was clear, reliable and cogent. I do agree with the trial court that the legally required standard of proof was indeed met. In my view this conviction was sound and I see no reason to interfere with the same. I do uphold the same.

The Appellant was allowed an opportunity to mitigate. Thereafter the trial magistrate fined him Kshs.7,000/- in default to serve 3 months in prison. In my view this sentence was both lawful and was appropriate given the circumstances of the case. Finally, I do dismiss this appeal in its entirety. The conviction and sentence of the trial court are hereby confirmed and upheld.

Dated and Delivered at Mombasa this 7th day of March 2011.

M. ODERO
JUDGE

In the presence of:
Mr. Oguk for Appellant
Mr. Onserio for State

