



**REPUBLIC OF KENYA**

**IN THE SENIOR PRINCIPAL MAGISTRATE'S COURT AT MAKINDU**

**CRIMINAL CASE NO E633 OF 2021**

**REPUBLIC.....PROSECUTION**

**VERSUS**

**DAVID MWAU KIVUVA.....ACCUSED**

**JUDGMENT**

**INTRODUCTION**

It is always a matter of deep regret when disputes find their way into court between siblings. What ought to have been resolved within the family bond and guided by mutual respect, understanding, and affection, instead becomes a contest of rights and recriminations. When siblings, bound by blood and shared history, allow discord to supplant dialogue, the very fabric of kinship is strained. The Court is thus called upon, not with satisfaction, but with a sense of sadness, to determine matters that could have been better settled in the spirit of brotherhood and reconciliation. When members of the same family resort to litigation, the consequences often transcend the legal questions before the Court, leaving behind strained relations and lasting emotional scars. There is no judgment, however well-reasoned, that can restore the warmth of family once it is lost. Amicable settlement of such disputes not only preserves relationships but also spares families the emotional and financial burdens that litigation so often brings. The accused person and the complainant are brother and sister but do not see eye to eye.

**THE CHARGE**

David Mwau Kivuva (hereinafter referred to as the accused person) 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 8/5/2021 at Kavuthu village in Nzau Sub-county within Makueni County, the accused person created a disturbance in a manner likely to cause a breach of the peace by chasing Ruth Mwikali Kivuva while armed with a bow and arrow. When the plea was taken, the accused person pleaded not guilty. The matter proceeded to hearing. On 14/11/2024 the court delivered a ruling in which it placed the accused person on his defence in respect of the charge.

**THE EVIDENCE****The Prosecution Case**

The prosecution case was substantially heard by another Magistrate who was subsequently transferred. I only heard the testimony of the last prosecution witness after it was directed that the matter proceeds from where it had reached, pursuant to section 200(3) of the Criminal Procedure Code. The prosecution called a total of four (4) witnesses in a bid to prove their case against the accused person. PW 1 Ruth Mwikali Kivuva (hereinafter referred to as the complainant) testified that on 8/5/2021 she went to her parents' home in the company of her sister and friends. They placed chairs under a tree and as they were preparing for prayers, the accused person started shouting, stating that he would kill somebody.

The complainant further stated that the accused person was armed with a bow and arrow and aimed while advancing to where they were. Villagers gathered at the scene. The complainant and her friends ran for safety. They called the area Assistant chief. The matter was later reported at Emali Police station. The accused person was arrested and charged. PW 2 Josephine Wandii Kivuva testified that she was with the complainant and others at the time of incident. Her testimony was similar to what the complainant stated. PW 3 Makau Willy testified that he was with the complainant and two members of his church. That he

had been invited by the complainant to go for prayers at the latter's parents' home. His testimony was also similar to what the complainant and PW 2 stated.

PW 4 Police Sergeant Kennedy Nkonge testified that he was the investigating officer in the matter. That the report on the incident was made at Emali Police station on 8/5/2021. He narrated what the report indicated. The investigating officer stated that he visited the scene but did not find the accused person. He later summoned the accused person to the police station. The accused person presented himself where after he was arrested and charged.

### **The Defence Case**

When the accused person was placed on his defence, he gave a sworn testimony and called one other witness. The accused person testified that on the material day, he was at his farm when he heard a person screaming. That the screams were from his home. The accused person rushed home to see what was happening and as he approached, he saw people standing at his gate. One of them was PW 2 who pointed at the accused person. At that instance, the people at the gate started running away. The accused person stated that he followed the people and realized that they had entered his mother's house. The accused person saw a motor vehicle that he usually saw with the complainant.

It was the testimony of the accused person that he went to talk to the complainant. He asked the complainant what was wrong but the complainant stated that she had been looking for him for long and that time had reached. That the complainant told the accused person that he would be dead or in prison by the time the money in the succession cause in respect of the estate of their niece was distributed. The complainant stated that the complainant and two others were the administrators of the estate of their deceased nephew. That the family members did not receive any communication concerning the succession cause. The accused person decided to follow up. According to the accused person, this case was instituted because of the objection that he raised in the succession cause.

DW 2 Benson Mulinge Munyalo testified that on the material day he was at the trading centre when he heard screams. He rushed to where the screams were coming from. That

the screams were from the home of Kivuva. DW 2 stated that he saw the accused person asking his sister whether she had passed by the Assistant chief's office. That the sister stated that she was not interested and did not know anything concerning the Assistant chief. Later, a village elder appeared and asked who had called claiming that they had been locked inside a house. DW 2 stated that there were a lot of people at the scene. That the village elder asked the people to leave and requested the family of Kivuva to go to the Assistant chief. DW 2 left.

### **FACTS NOT IN DISPUTE**

Having considered the evidence on record, I find that the following facts are not in dispute:

- a) That there was a long standing dispute between the accused person and the complainant herein;
- b) That on 8/5/2021, there was an encounter between the accused person and the complainant.

### **MAIN ISSUES FOR DETERMINATION**

In my view, the main issues for determination are as follows:

- i. Whether the accused person created a disturbance in a manner likely to cause a breach of the peace on the material day;
- ii. Whether the prosecution has proven its case against the accused person to the required standard.

### **ANALYSIS AND DETERMINATION**

I have carefully considered the evidence on record as well as the law applicable. In my considered view, for the case to be proved against the accused person, the prosecution must have proven the following beyond reasonable doubt:

- a) That the offence complained of was indeed committed; and
- b) That the evidence links the accused person to the offence complained of.

It is my further opinion that in order to show that the offences complained of were indeed committed, the prosecution must establish the key ingredients of the offences. In order to

prove their case, the prosecution must offer credible and irrefutable evidence in support of each element of a crime.

The particulars of the charge indicate that the accused person created a disturbance in a manner likely to cause a breach of the peace by chasing the complainant while armed with a bow and arrow. Section 95(1) of the Penal code provides as follows:

***“(1) Any person who—***

***(a) uses obscene, abusive or insulting language, to his employer or to any person placed in authority over him by his employer, in such a manner as is likely to cause a breach of the peace; or***

***(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.”***

The above provision creates two offences that would threaten breach of the peace or violence. The Penal code does not define the term brawl. However, in ordinary parlance, the word brawl as a verb means to fight or to quarrel, or scold. From the provisions of section 95(1) (b) of the Penal Code, it is my view that the offence is committed when the accused person:

- i. Brawls in such a manner as is likely to cause a breach of the peace; or
- ii. Creates any other disturbance in such a manner as is likely to cause a breach of the peace.

From the particulars of the charge and the evidence of the prosecution witnesses, the accused person was armed with a bow and arrow. That the accused person then stated that he would kill somebody and advanced towards the place where the complainant and others were. There is case law touching on the offence with which the accused person has been charged. I will consider a few authorities.

In the case of ***Mule v. Republic [1983] KLR 246***, Porter, Ag. J held as follows concerning the offence:

*"The offence of creating disturbance likely to cause a breach of the peace constitutes incitement to physical violence and the breach of the peace contemplating physical violence. The act of the appellant had those two elements. It is not enough to constitute the offence of creating a disturbance likely to cause a breach of the peace to show that the accused merely created a disturbance. That disturbance should have been likely to cause a breach of peace. Peace would, for instance, refer to the right of wananchi to go about their daily activities without interference. The actions of the appellant interfered with people's activities and therefore caused a breach of peace".*

In the English case *R v Howell [1982] QB*, it was held that there could not be breach of the peace unless an act was done or threatened to be done which either actually harmed a person or, in his presence, his property or was likely to cause such harm or which put someone in fear of such harm being done.

Wendo J in the case of *Mumbe Musau v Republic [2004] eKLR*, had this to say:

*"For a charge of creating disturbance to be proved, the prosecution had to prove that the threats were accompanied by some act by the appellant that caused the complainant to apprehend some harm being done by the appellant to the complainant. I find that the ingredients of the offence of creating a disturbance were not satisfied. Mere words do not amount to creating a disturbance that is likely to create a breach of the peace."*

In the authority of *Fransisca Kiborus v Republic [2017] eKLR*, while quashing the conviction on a charge of creating a disturbance in a manner likely to cause a breach of the peace, Muriithi J held as follows:

*"There was no evidence of any violence that accompanied or ensued the alleged abuse of the complainant by the appellant. The words used also do not of themselves incite or provoke violence, and there cannot be held to have been created a disturbance by the use of word 'witch'. Calling the complainant a witch, even if it were held to be a disturbance, was not shown to have threatened the peace. There was no evidence as to the reaction of the complainant, such as anger or annoyance and provocation to a brawl or other violence, on his being called a witch such as would support a finding of threat to the*

***peace. I do not find that there was by such abuse created a disturbance and that such act threatened to cause a breach of the peace in any way."***

The above authorities suggest that mere words do not constitute the offence of creating a disturbance in a manner likely to cause a breach of the peace. The words must be accompanied by an overt act that tends to incite to violence or threaten breach of the peace. No wonder the offence is titled "***Threatening breach of the peace or violence***" under section 95 of the Penal Code. The prosecution evidence does not show that the accused person chased the complainant and others. It shows that when the complainant and others saw the accused person advancing towards them, they ran for their lives. The prosecution evidence further indicates that the accused person was armed with a bow and arrow. That even after the complainant and others had run for their lives, the accused person banged the door to his mother's house, asking her to let out witches/wizards from the house. Both the prosecution and defence agree that a crowd gathered at the scene. This implies that the commotion attracted members of public to the scene.

There is obviously bad blood between the complainant and the accused person. Where there is an existing grudge or bad blood between parties, the court ought to consider the evidence and in particular the prosecution evidence with great caution as parties are known to resort to criminal sanctions in a bid to settle old scores. It is also to be remembered that existing grudges or disputes between parties are a recipe for chaos. In the authority of ***Ayub Muchele v Republic [1980] KLR 44***, Trevelyan and Sachdeva, JJ held that:

***"Just as animosity is a factor which is properly to be taken into account where required, so is lack of animosity. We see nothing wrong in an appropriate case for the court to ask "What reason had the witness to lie" ...The fact that people have no grudge against someone does not mean that they cannot, at the same time, be mistaken or, for that matter, deliberately untruthful...There are spiteful people about."***

The prosecution must prove its case beyond reasonable doubt. This standard of proof "*beyond reasonable doubt*" is grounded on a fundamental societal value determination that it is far worse to convict an innocent man than to let a guilty man go free. A reasonable doubt exists when the court cannot say with moral certainty that a person is guilty or that a

particular fact exists. It must be more than an imaginary doubt, and it is often defined judicially as "such a doubt as would cause a reasonable and prudent person, in one of the graver and more important transactions of life, to pause or hesitate before or taking the represented facts as true and relying and acting thereon" (*see Clarence Victor, Petitioner 92-8894 v. Nebraska, 511 U.S. 1 (1994); Rex v. Summers, (1952) 36 Cr App R 14; Rex v. Kritz, (1949) 33 Cr App R 169, [1950] 1 KB 82 and R. v. Hepworth, R. v. Feamley, [1955] 2 All E.R. 918*).

Beyond reasonable doubt is proof that leaves the court firmly convinced that the accused is guilty. Reasonable doubt is a real and substantial uncertainty about guilt which arises from the available evidence or lack of evidence, with respect to some element of the offence charged. It is the belief that one or more of the essential facts did not occur as alleged by the prosecution and consequently there is a real possibility that the accused person is not guilty of the crime. This determination is arrived at when after considering all the evidence, the court cannot state with clear conviction that the charge against the accused is true since an accused may not be found guilty based upon a mere suspicion of guilt.

While this matter was pending judgment, the Constitutional and Human Rights Division of the High court at Nairobi (Mwamuye J) in the authority of *Law Society of Kenya v Director of Public Prosecutions & 2 others; Kebaso (Interested Party) [2026] KEHC 1486 (KLR)*, while dealing with the question of the constitutionality of section 95(1) (b) of the Penal Code held as follows:

*"A rigorous examination of the text of Section 95(1) (b) reveals a provision riddled with fatal indeterminacy. The offence is committed when a person 'brawls or in any other manner creates a disturbance in such a manner as is likely to cause a breach of the peace.' Each of the operative phrases is a vessel of ambiguity. What constitutes a 'disturbance' in a legal sense? Does it require noise? Commotion? Emotional upset? Could a silent, powerful political slogan on a placard create a 'disturbance?' The phrase 'in any other manner' offers no limiting principle, expanding the offence to an open-ended array of behaviours. Most critically, what does 'likely to cause a breach of the peace' mean? 'Likely' implies a probability, but of what degree? Is it a mere possibility, a more probable*

*than not chance, or a virtual certainty? And what is the constitutional definition of a 'breach of the peace?' Does it require actual violence, or merely a threat thereof, or could it encompass any disruption of public tranquillity? The Penal Code is silent. The Respondents' defence, relying on cases like Mule v Republic (supra) and Ikise Ole Neusiet v Republic (Supra), is unpersuasive. Those cases do not define the terms. They merely assume their meaning and proceed to apply them to specific facts. They illustrate the application of vagueness, they do not cure it. Asserting that courts have interpreted the provision for decades confuses the existence of precedent with the existence of clarity. A string of cases applying a vague law does not make the law any less vague, it merely demonstrates a history of judicial officers filling the legislative void with their own subjective judgments. This is precisely what the principle of legality seeks to avoid."*

The court further held:

*"Therefore, Section 95(1)(b) fails to qualify as a law "provided by law" as required by Article 24(1), as it lacks the essential quality of precision, and it directly infringes the principle of legality under Article 50(2)(n)."*

In conclusion, the court made the following orders, among others:

- a) A declaration be and is hereby issued that Section 95(1)(b) of the Penal Code, Cap 63 of the Laws of Kenya is inconsistent with and in contravention of Articles 33, 50(2)(n) and 24 of the Constitution of Kenya, 2010, and is therefore unconstitutional, **null and void ab initio**;
- b) A declaration be and is hereby issued that the continued enforcement, application, or reliance upon Section 95(1)(b) of the Penal Code by the Respondents, their agents, servants, or any person acting under their authority, against the Interested Party, Morara David Kebaso, or any other person, is unconstitutional, unlawful, and invalid.

The question that I wish to pose is whether this court can proceed to decide on the guilt or otherwise of the accused person based on section 95(1) (b) of the Penal court in view of the above stated authority. By virtue of the doctrine of stare decisis, I am bound by the decisions of the High Court. In the case of *Union of India v Raghubir Singh, [1989] 2 SCC*

754, The Supreme Court of India held that the benefit of the doctrine of precedent is to provide certainty, stability, predictability and uniformity. That it increases the probability of judges arriving a correct decision, on the assumption that collective wisdom is always better than that of an individual. It also preserves the institutional legitimacy and “adjudicative integrity. It provides equality in treatment and thus prevents bias, prejudice and arbitrariness and avoids inconsistent or divergent decisions. It prevents uncertainty and ambiguity in law.

In *State of U.P v Ajay Kumar Sharma, (2016) 15 SCC 289*, the Supreme Court of India observed that the courts have to nurture, strengthen, perpetuate and proliferate certainty of law and not deracinate its clarity. With respect, I agree. The use of precedent is an indispensable foundation upon which to decide what is the law and its application in individual cases. It provides a basis for orderly development of legal rules. In *Dwarikesh Sugar Industries Ltd v Prem Heavy Engineering Works (P) Ltd, AIR 1997 SC 2477*, the Supreme Court of India held that:

***“When a position, in law, is well settled as a result of judicial pronouncement of the Court, it would amount to judicial impropriety to say the least, for the subordinate Courts including the High Courts to ignore the settled decisions and then to pass a judicial order which is clearly contrary to the settled legal position. Such judicial adventurism cannot be permitted and we strongly deprecate the tendency of the subordinate Courts in not applying the settled principles and in passing whimsical orders which necessarily has the effect of granting wrongful and unwarranted relief to one of the parties. It is time that this tendency stops.”***

The above authority emphasizes the importance of the doctrine of precedent. The decisions of the High court bind the courts below it, unless overturned by a more superior court. The holding of Mwamuye J was that section 95(1) (b) of the Penal Code was null and void *ab initio*. My view is that where an accused person is charged under a statutory provision that is later declared unconstitutional, null and void *ab initio* by a superior court, the effect on a pending criminal case (even one awaiting judgment) is generally fatal to the prosecution. The provision is treated as having never existed in law. It is not merely invalid from the date of judgment but void from inception. This principle flows from constitutional

supremacy under Article 2 of the Constitution of Kenya. The court cannot convict under a provision that is deemed never to have existed. Proceeding to judgment would amount to enforcing a non-existent offence. A criminal court derives its jurisdiction from valid law. Once the provision is void, the court effectively loses jurisdiction to determine the offence. Any conviction would be a nullity.

**DISPOSITION**

In view of the foregoing, I proceed to terminate these proceedings and make the following orders:

- a) The accused person is found **NOT GUILTY** of 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;
- b) The accused person is hereby **ACQUITTED** in respect of the charge.

**DATED, SIGNED AND DELIVERED IN OPEN COURT AT MAKINDU THIS 9<sup>TH</sup> DAY OF APRIL,  
2026.**

**Y.A SHIKANDA**

**SENIOR PRINCIPAL MAGISTRATE.**