IN THE COURT OF APPEAL

AT KISUMU

(CORAM: ASIKE MAKHANDIA, KIAGE & OTIENO-ODEK JJA)

CRIMINAL APPEAL NO. 102 OF 2016

BETWEEN

ISAAC ANYULA KHATETE.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from conviction and sentence of the High Court of Kenya at Kakamega,

(by Dulu J as read by Sitati J) delivered on 25th November 2015

in

H C Cr. Appeal No. 227 of 2012)

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JUDGMENT OF THE COURT

The appellant was arraigned before the magistrate's court and charged with 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 were that on the 16th day of April 2012 at Malaba Estate in Kakamega Township, Kakamega Municipality in Kakamega Central District within Western Province, he created a disturbance in a manner likely to cause a breach of peace by chasing Chrispinus Odhiambo Oluoch out of his rental house plot while being armed with a panga and stones.

The prosecution case was grounded *inter alia* on the testimony of PW1 Chrispinus Odhiambo; PW2 Saumu Odhiambo and PW3 Robert Onyango Ngeja.

PW1 testified that on 16th April 2012 at around 3.10 pm while at work as a mechanic he received a call from his wife, PW2, who informed him that the appellant (their neighbour) was forcing them to vacate the garden. He went home and found the appellant at the boundary between their houses. The appellant had a panga and was slashing grass. PW1 entered his house and PW2 informed him that the appellant had chased her. He went outside the house and found the appellant. He asked the appellant why he had chased his wife. The appellant replied that PW1 had no authority to ask him any question because he was the owner of the land and had a title deed. PW1 told the appellant to produce the title deed. The appellant got angry and crossed over the fence and pursued PW1 with a panga. His wife, PW2 and Robert as well as other neighbours saw the appellant chase PW1. PW1 called the landlord one Wilson Ojuju (PW4) who advised him to report to the police. He reported the incident to the police.

PW2, Saumu Onyango Odhiambo testified that on 16th April 2012, at around 2.00 pm she called her husband, PW1 informing him that the appellant was chasing her out of the garden. PW1 came back home and she explained to him what had happened. PW1 got out of the house. Shortly, she saw the appellant who was holding a panga chasing her husband, PW1.

PW3 Robert Onyango Njega testified that he was also a neighbour to the complainant. On 16th April 2012 at around 3.00 pm he heard the complainant asking the appellant to produce the title deed to the plot because he was inconveniencing everybody. The appellant was on the other side of the fence. The appellant got annoyed and crossed over the fence and pursued the complainant while armed with a panga.

PW4 Wilson Francis Ojuju testified that he was the landlord to both PW1 and PW3. He owned three plots in Maraba Estate that is

Butsotso/Shikoti/2763, 4712, 4711 and 4713. He owns the three plots personally and not jointly with any other person. The complainant (PW1) was his nephew who stayed on one plot and Robert (PW3) is a tenant on the other plot. That the appellant was his neighbour and as far as he was concerned, there was no dispute on the land. He produced copies of the title deeds for the three plots he owned.

When put on his defence, the appellant testified that there was no single time on 16th April 2012 at 3.00 pm when he trespassed the boundary and entered Maraba Estate and created a disturbance. That he did not chase PW1 and PW2 out of the plot while armed with a panga and stones. That the case between the parties had been resolved by the village Chief Sichirai.

Upon evaluating the evidence tendered, the trial magistrate convicted the appellant for the offence as charged. The magistrate found the prosecution case to be watertight; a finding was made that the appellant indeed chased the complainant while armed with a panga. On the issue whether the appellant's action amounted to creating a disturbance likely to cause a breach of peace, the learned magistrate stated that by chasing the complainant while armed with a panga, it was clear that the appellant was contemplating physical violence. Had the complainant not run away, he could have suffered serious consequences.

The trial magistrate sentenced the appellant to a fine of Ksh. 2,000 in default of which he was to serve one-month imprisonment.

The appellant paid the fine but nonetheless lodged an appeal against conviction and sentence to the High Court. In dismissing the appeal, the learned judge expressed as follows:

> ….. *The incident is alleged to have occurred in broad daylight around 2.00 or 3.00 pm. PW1 clearly explained how the incident occurred. His wife, PW2 also explained the events. PW3 an independent witness also witnessed the incident and explained what happened. Though the appellant denied committing the offence, in my view, the learned magistrate was correct in finding that indeed the appellant chased the complainant with a panga. That conduct in my view was likely to cause a breach of the peace if PW1, 2 and 3 or even other people in the estate reacted by confronting him. I thus agree with the trial court that the prosecution proved its case against the appellant beyond any reasonable doubt. I will thus uphold conviction.*
>
> *With regard to sentence, the maximum sentence for the offence under Section 95 of the Penal Code is six (6) months' imprisonment. The appellant was fined Ksh. 2,000/= and in default was ordered to serve imprisonment for one (1) month. In sentencing the appellant, the magistrate took into account the mitigation of the appellant. I find that the sentence was neither harsh nor excessive. …. I find no merit in the appeal. I dismiss the appeal and uphold both the conviction and sentence of the trial court*.

Aggrieved by the judgment of the learned judge, the appellant has lodged the instant second appeal citing the following grounds:

(a) That the evidence on record was not enough to warrant the sentence of Ksh. 2,000/= fine or one-month imprisonment.

(b) That there was no evidence on record to show that the appellant had a panga and no independent witness saw the appellant chasing the complainant.

(c) That the judge erred in failing to find material contradictions in the lower court evidence as the charge sheet was defective.

(d) That Land Parcels Nos. Botshotso/Shikoti 2763, 4711, 4712 and 4713 which were not part of the case produced in evidence by PW5 were quashed by the High Court in Kakamega on 25th September 1996 in Criminal Appeal No. 127 of 1996 and Criminal Case No. 86 of 1995.

(e) That how PW4 has been issued with two title deeds to the same Land Parcel No. Butsotso/Shikoti/2763 remain in doubt.

Based on the forgoing grounds, the appellant has urged us to set aside the judgment of the High Court, quash his conviction and sentence and substitute the same with an order acquitting him for the offence as charged and an order of refund of the Ksh. 2,000/= paid as fine.

At the hearing of the instant appeal, the appellant appeared in person. The State was represented by learned counsel S. G. Thuo. Both parties filed written submissions in the appeal.

The appellant in his written submissions reiterated the grounds of appeal.

He emphasized that there was no evidence that he chased the complainant with a panga. That there were discrepancies in the testimony of prosecution witnesses. That the issue of two title deeds issued to PW4 need to be resolved. That the offence of creating a disturbance was not proved beyond reasonable doubt.

The respondent in opposing the appeal urged that the only question for determination is whether the essential ingredients for the offence of creating a disturbance were proved. Counsel submitted that PW1 to PW5 were all eye witnesses who saw the appellant chase the complainant while armed with a panga; that the testimony of PW1, PW2 and PW3 was unshakable; that the appellant's argument and submissions on Land Parcels Nos. Botshotso/Shikoti 2763, 4711, 4712 and 4713 are neither here nor there; and that the essential ingredients of the offence of creating a disturbance in a manner likely to cause a breach of peace were proved beyond reasonable doubt.

The appellant was charged with the offence of creating a disturbance in a manner likely to cause a breach of peace contrary to **Section 95 (1) (b) of the Penal Code. Section 95 (1) (b) of the Penal Code** provides:

> ***"(1) Any person who –***
>
> ***(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 misdemeanor and is liable to imprisonment for six months."***

For the offence to be proved, the prosecution must establish that there was a brawl caused by the accused or that the accused created a disturbance in a manner that is likely to cause a breach of peace. A brawl is defined as a rough or a noisy quarrel or fight. In the case of **Muler –vs- Republic Criminal Appeal No.873 of 1982** the offence of creating a disturbance was described as follows:

> *"1. 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….*
>
> *2. It is not enough to constitute the offence of creating a disturbance likely to cause a breach of 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 wanainchi to go about their daily activities without interference…."*

In creating a disturbance likely to cause a breach of peace, there is no requirement that the incident must take place in a public place for the offence under **Section 95(1) (b)** of the **Penal Code** to be proved. In the persuasive case of **Felix Muthoni Nganga –vs- Republic HCCRA No.131 of 2010** at Machakos, it was held that:

> *"Clearly the offence can be committed in a private place for the simple reason that a breach of the peace can occur in such a place, there is absolutely no necessity to impute restriction that is absent from the wording of the statue."*

With the foregoing in mind, we remind ourselves that this is a second appeal and our jurisdiction is confined to matters of law. This was well explained in **Karani vs. R [2010] 1 KLR 73** where it was stated:

> *"This is a second appeal. By dint of the provisions of section 361 of the Criminal Procedure Code, we are enjoined to consider only matters of law. We cannot interfere with the decision of the superior court on facts unless it is demonstrated that the trial court and the first appellate court considered matters they ought not to have considered or that they failed to consider matters they should have considered or that looking at the evidence as a whole they were plainly wrong in their decision, in which case such omission or commission would be treated as matters of law." See also* ***Karingo -vs- R (1982) KLR 213***

In this matter, there are concurrent findings by the two courts below that the appellant committed the offence of creating a disturbance in a manner likely to cause a breach of peace. In **Adan Muraguri Mungara - v - Republic, Cr. No. 347 of 2007 (Nyeri*),*** this Court set out the circumstances under which it will disturb the concurrent findings of fact by the two courts below in the following terms:

> *"As this court has stated many times before, it has a duty to pay homage to concurrent findings of fact made by the two courts below unless such findings are based on no evidence at all or on a perversion of the evidence, or unless on the totality of the evidence, no reasonable tribunal properly directing itself would arrive at such findings. That would mean that the decision is bad in law, thus entitling this Court to interfere." See* ***Aggrey Mbai Injaga v Republic [2014] eKLR***.

The first issue for our consideration is whether the appellant was properly identified or recognized as the person who committed the offence. In ***Anjononi & others – v- Republic [1980] KLR 57*** it was held:

> ***"…****; recognition of an assailant is more satisfactory, more assuring and more reliable than identification of a stranger because it depends on the personal knowledge of the assailant in some form or the other."*

In the instant matter, the appellant was a person well known to the complainant, PW1. The appellant was also well known to PW 2 and to PW3.

They were all neighbours. We are satisfied that there was no possibility of mistaken identity of the appellant. The testimonies of PW1, PW2 and PW3 place the appellant at the scene of crime.

As to whether the appellant indeed chased the complainant while armed with a panga, the testimony of PW1, PW2 and PW3 are to the effect that the appellant chased the complainant while armed with a panga. The incident occurred in broad day light. There can be no mistake in PW1, PW2 and PW3 all saying that they saw the appellant armed with a panga and chasing the complainant. We note that PW2 is the wife to the complainant. Nevertheless, PW3 is an independent eye witness who saw the appellant chase the complainant while armed with a panga. The testimonies of PW1, PW2 and PW3 are all direct evidence of an eye witness account. There is nothing on record to make us doubt the veracity of the testimony of these witnesses. The appellant's act of chasing the complainant while armed with a panga disturbed the peace as it prevented other people namely PW2 and PW3 from peacefully going on with their ordinary chores. We find no reason to interfere with the concurrent findings of the two courts below that the appellant's conduct of chasing PW1 while armed with a panga was likely to create a breach of peace.

The appellant has raised the issue of Land Parcels Nos. Botshotso/Shikoti 2763, 4711, 4712 and 4713. The existence or non-existence of title deeds for the foregoing land parcels is not an ingredient for the offence of creating a disturbance in manner likely to cause a breach of peace.

For the foregoing reasons, we are satisfied that the learned judge properly re-evaluated the evidence on record and correctly upheld and

affirmed the conviction and sentence meted upon the appellant. The upshot is that we find this appeal has no merit and is hereby dismissed.

This Judgment is delivered pursuant to rule 32(2) of the Court of Appeal Rules since Odek, JA passed on before the delivery of the judgment.

Dated and delivered at Nairobi this 19th day of June, 2020.

ASIKE MAKHANDIA

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR