



REPUBLIC OF KENYA

High Court at Kakamega

Criminal Appeal 231 of 2010

ENOCK MANDILA
APPELLANT

V E R S U S

REPUBLIC
RESPONDENT

(Appeal arising from the judgment of [S.N. ABUYA, SRM])

in the Senior Resident Magistrate's Court at Butali

in Criminal Case No. 731 of 2010

J U D G M E N T

The appellant was charged with the offence of creating disturbance in a manner likely to cause a breach of the peace contrary to **section 95(1)** of the **Penal Code**. The particulars of the offence were that *on the 6th day of December, 2009 at Chesero village, Luanda sub-location, Chesro location in Kakamega North District within Western Province, the appellant created a disturbance in a manner likely to cause a breach of the peace by abusing and threatening to do harm to FESTO MANDILA.*

The appellant was convicted of the charge and sentenced to serve one year probation sentence. The grounds of appeal are that the ingredients of the offence were not proved, there was no evidence of a fracas or breach of peace, the prosecution evidence was contradictory, the burden of proof was shifted, the trial court did not analyze the entire evidence, the arresting and investigating officer did not testify and no reasons were given in the judgment.

Mr. Akwala, counsel for the appellant, submitted that the appellant did not charge the complainant. He was not armed and the three prosecution witnesses were at variance as to what was uttered. The words allegedly uttered could not have caused a breach of peace and on their own cannot constitute the offence of creating disturbance. Further the investigating officer did not testify. Mr. Orinda, state counsel, opposed the appeal. Counsel submitted that there was a meeting convened by the administrators and the appellant started abusing the complainant. The appellant became unruly and uttered words calculated to annoy the complainant.

The prosecution case before the trial was that the Chesero location chief had called a meeting to resolve a land dispute between the complainant and the appellant. The appellant started abusing the complainant and the meeting could not have proceeded. FESTUS TAWAI (PW1) was the complainant. His evidence was that on the 6.12.2009 at 9.00 a.m. he went to the Chesero chief's office. There was a meeting and he found the chief, the sub-chief, the appellant and other people. The

meeting was about a boundary dispute. The chief allowed the appellant to talk about the issue and the appellant stood up and said he was going to kill PW1. The appellant said if he did not manage to kill PW1, then he will die himself. The appellant then left and PW1 reported the matter at the Malava police station. The appellant was arrested and charged with the offence. The appellant was not armed.

PW2, CHARLES KATEMBU, was at the chief's office on the 6.12.2009 at 9.00 a.m. He had gone for purposes of listening to the boundary dispute between the parties. PW2 heard the appellant saying he will die on the shamba or kill PW1. The appellant said that PW1 had not known him to be a man since childhood. The chief stopped the case and PW1 went to report to the police at Malava. PW3, ISAYA SALAMBA, was also at the Chesero location chief's office on 6.12.2009 at 9.00 a.m. He heard the appellant telling PW1 that he had dressed him a dress since he was young and was taking the appellant a woman. The appellant said either himself or PW1 was going to die. The chief tried to cool down the situation but could not manage. According to PW3, the appellant used abusive language and was speaking in Kabras dialect of the Luhya language.

The appellant was put on his defence. He testified in his sworn evidence that on 6.12.2009 he never left his house. On 7.12.2009 he went to the chief's office in relation to a quarrel between himself and his father. He did not talk to the complainant.

The trial court evaluated the evidence and was not convinced by the appellant's alibi defence. From the prosecution evidence, it is established that the chief, Chesero location had convened a meeting on 6.12.2009 with the intention of resolving the boundary dispute between the appellant and PW1. PW1 is the appellant's uncle. PW1's evidence is similar to that of PW2 and PW3. The prosecution's contention is that the appellant informed PW1 that he was going to kill him or the appellant was going to die. Further, the appellant stated that PW1 had been dressing the appellant since childhood and he was not recognizing him as a man. He was going to kill him.

It is established by the prosecution evidence that the appellant was not armed. Due to the appellant's utterances, the meeting could not proceed and the chief had to call it off. The offence was that of creating disturbance in a manner likely to cause a breach of peace. From the prosecution evidence, it is clear that the meeting could not proceed as the appellant stood up and started threatening to kill the complainant. It was the appellant's contention that the complainant had no respect for him as he used to dress him up during childhood. The meeting could not proceed and attempts by the chief to cool down the situation did not materialize. The main issue for determination is whether indeed the conduct of the appellant could have caused a breach of peace. Was there any disturbance?

From the evidence on record, I am satisfied that the conduct of the appellant at the chief's office created disturbance. It is not a requirement that when you create disturbance there must be a fracas or people have to fight. Abusing and threatening to kill others cannot be held to be polite conduct. It is conduct that is likely to cause a breach of peace. Had the complainant responded to the abusive words it is likely that a fight would have occurred. The fact that the appellant was not armed is not a mitigating factor. The appellant's conduct made it impossible for the chief to continue with the meeting. Although the investigating officer did not testify, I am satisfied that there was disturbance at the Chesero location chief's office on 6.12.2009 created by the appellant.

The upshot is that the prosecution did prove its case beyond reasonable doubt. The appeal lacks merit and the same is disallowed.

Delivered, dated and signed at Kakamega this 27th day of February, 2013

SAID J. CHITEMBWE

J U D G E