



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT CHUKA

HCCRA NO. 6 OF 2019

REPUBLIC.....APPELLANT

VERSUS

JOHN MWANGANGI ICHARIA.....RESPONDENT

(An appeal against the decision of Hon. S.M. NYAGA (SRM) in Marimanti Principal Magistrate's Court Criminal Case No.261 of 2017 dated on 29th March 2018.)

J U D G E M E N T

1. The Respondent in this Appeal **JOHN MWANGANGI ICHARIA**, was charged with the offence of grievous harm contrary to **Section 234** of the **Penal Code** vide ***Marimanti Senior Principal Magistrate's Court Criminal Case No.261 of 2017***. The particulars as per the charge sheet presented to trial are that on 23rd May 2017 at Marimanti Sub-Location In Tharaka South Sub-County within Tharaka Nithi County, unlawfully did grievous harm to one **DAVID KITHAKA GAICHU**, the complainant in the case.

2. The Respondent denied the offence and after trial, he was acquitted. The State through the Director of Public Prosecution felt aggrieved and preferred this appeal.

3. A brief summary of the prosecution's case against the accused indicates that, the complainant, a village administrator and a chairman of a water project in Kithigiri Sub-Location had sent a plumber by the name Josphat Mwathi (PW3) to open a water valve located at the Respondent's farm to let water flow. When the plumber went to do so he met resistance from the Respondent who chased him wielding a panga. When the complainant went to resolve or find out why the Respondent was doing so, he was also attacked by the Respondent who cut him with a panga on the lower right hand. He was thereafter treated at Marimanti Hospital before he was taken to Kirua Mission Hospital where he was admitted for over week. Medical documents (P. Exhibit 1 and P3 -P. Exhibit 2) were tendered to prove the injuries suffered. The evidence of the complainant (PW1) was corroborated by PW2 (Clinical officer) and PW3.

4. When placed on his defence, the Respondent defended himself stating that the complainant first attacked him and that he had to defend himself and that in the process the complainant got himself injured. He stated that the complainant was bigger to him in size and that he grabbed him by the collar before the struggle ensued. He testified that he grabbed the panga from the complainant and went to the police to report but he reportedly was locked in after he reported. Lucy Kawira (DW2) and Ann Njeri (DW3) supported the Respondent in his defence that the complainant first attacked the Respondent before a struggle ensued.

5. The trial court evaluated the evidence and blamed the complainant for being "***the author of his misfortune***" by "***arrogantly***" misusing his authority to oppress the Respondent. It also found that the prosecution's case had contradictions and inconsistencies. It blamed the complainant for not taking fair administrative action and finally acquitted the Respondent.

6. The State felt aggrieved by the said finding and filed this appeal raising the following grounds namely;

- i. That the learned trial magistrate erred in law by finding that the prosecution had failed to prove its case.**
- ii. That the learned trial magistrate erred in law by holding that the injuries suffered by the complainant did not amount to grievous harm.**
- iii. That the trial magistrate erred by considering extraneous and irrelevant factors.**
- iv. That the trial magistrate erred by cross-examining witnesses instead of remaining impartial.**

- v. That the learned trial magistrate erred in law and in fact by finding that the clinical officer failed to prove that the complainant suffered grievous harm.
- vi. That the learned trial magistrate erred by holding that the clinical officer unprocedurally treated the complainant without an Occurrence Book Number.
- vii. That the learned trial magistrate erred in holding that the complainant was attacked by the Respondent who was acting in self defence.
- viii. That the trial magistrate erred by holding that the clinical officer treated the complainant unprocedurally while on strike.
- ix. That the trial magistrate disregarded the testimony of the investigating officer.
- x. That the trial court placed heavy reliance on the defence untruthful and uncorroborated evidence.
- xi. That the learned trial magistrate erred in law and in fact by acquitting the Respondent against the weight of the evidence adduced.

7. In its written submissions, the Appellant contends that the offence of grievous harm as defined under **Section 4** of the **Penal Code** contains numerous ingredients and that the prosecution needs to adduce evidence in support of any one of them to successfully prove the offence of grievous harm. It has relied on the decision in *John Oketch Abongo –vs- Republic [2000] eKLR* where the Court of Appeal held as follows:

“ We are satisfied that the complainant’s injury amounted to grievous harm as defined in the Penal Code. The definition contains several ingredients of what constitutes grievous harm. We are of the opinion that the presence of any one of these ingredients would suffice to disclose grievous harm. Here, we are satisfied that the complainant’s injury did amount to dangerous or serious injury to health both of which are ingredients contained in the definition.”

8. The State asserts that it tendered sufficient evidence to show that the complainant suffered grievous harm pointing out that the clinical officer (PW2) gave details on the nature of injuries sustained and the treatment given. Replying on the findings contained in the P3 form, the State faults the trial in its finding that there was no grievous harm occasioned to the complainant. It asserts that it was erroneous for the trial court to hold that the harm occasioned was not grievous because there was no injury to the bone structure. According to the Appellant, the complainant suffered permanent injuries to his hand and cannot flex his fingers because of permanent injury to his tendons.

9. The Appellant further faults the trial court for considering extraneous and irrelevant factors in the case contending that things like weight, height and strength of the complainant were not relevant yet the trial court put a lot of weight on the same in its judgment. It contends that the fact that the Respondent suffered no injuries is an indication that he is the one who attacked the complainant.

10. The Appellant further faults the trial court for finding that the Respondent attacked the complainant in self defence, contending that the complainant was a victim yet the trial court gave undue weight to irrelevant facts and defence evidence which it terms **“untruthful.”**

11. The Appellant has also faulted the trial court for finding that it was unprocedural for the complainant to be treated without an Occurrence Book number and has asked this court to take judicial notice of the fact that many a lives have been lost in this County because of the mistaken belief from members of the public that injured persons should be rushed to police stations instead of hospitals to save lives before taking legal action.

12. The Respondent on the other hand has opposed this appeal through his written submissions dated 21st February 2020. He has supported the finding of the trial court that it was the complainant who had sought out the Respondent at his home and attacked him using a panga.

13. He has accused the complainant for bringing up the case in order to settle scores owing to personal differences which he says had persisted for long. He insists that the complainant went to his home armed with a panga and that he was unarmed at the time.

14. The Respondent further contends that the complainant should have been the one charged but turned the tables on him because of money and influence. He contends that the complainant framed him and brought false witnesses who allegedly were his relatives to fix him. He accuses him further for abusing his authority by trespassing into his property without authority.

15. The Respondent contends that had the complainant not got injured he would have probably killed him and has blamed him for trying to suppress him.

16. This court has considered this appeal, the grounds upon which it has been brought and the submissions made. I have also considered the response made and the decision of the trial court. The main issue in this matter is whether the evidence tendered by the prosecution during trial prove beyond reasonable doubt that an offence of grievous harm was committed by the Respondent.

17. Grievous harm is defined under **Section 4** of the **Penal Code** as;

“ any harm which amounts to a maim, or dangerous harm, or seriously or permanently injuries health, or which is likely so to injure health, or which extends to permanent disfigurement, or to any permanent or serious injury to any external or

internal organ, membrane or sense.”

18. The big question therefore even before a decision is made as to who caused the injuries is whether the complainant suffered injuries (if at all) that can be classified as grievous harms. The evidence tendered by the complainant (PW1) as per the record of proceedings shows that the Respondent's wife warned the complainant and a plumber (PW3) of an impending danger and as the plumber fled, PW1 was caught as he tried to start his motorbike by the Respondent who attacked him cutting him on the lower right hand as he tried to shield himself. He was rushed to Marimanti and thereafter to Kiirua Mission Hospital where he was admitted for one week.

19. This court has considered the evidence tendered by Andrew Kinyua, (PW2) a clinical officer at Tharaka District Hospital who told the trial court that the complainant was taken to the said Hospital bleeding profusely while **"semi-unconscious"**. He says they carried out first aid to check the bleeding and referred him to Kiirua Mission Hospital for further admission and treatment as they were on strike and were not admitting patients. He further testified that the complainant suffered a cut on the ulna artery and that the patient could not flex his hand and that the right upper limb had a deep cut involving cartilages and tendon. He further concluded that a sharp object was probably used and stated that he classified the injuries as grievous harm as the patient (PW1) could not flex his fingers freely.

20. Looking at the nature of injuries suffered by the complainant as per the evidence tendered at the trial court it is clear that the same fits into the description given under **Section 4** of the **Penal Code**. The injuries described by the Medical Officer amounted to dangerous harm and caused serious injury to the arm that required admission of the complainant for one week. It was therefore erroneous for the trial court to find that the injuries sustained were not grievous because **"the bone was not cut"**. The trial court did capture well the legal definition of **'grievous harm'** in law. That the definition certainly does not state that grievous harm can only be caused when a bone is cut. It says **"any harm"** which amounts to a maim, dangerous or serious harm or harm that causes permanent disfigurement etc. At the trial, the learned trial magistrate instructively observed **"healed scar"** on the arm which clearly showed that the complainant had been cut. The medical officer stated that the complainant could not flex his fingers. The evidence tendered was clear and there were no dots, so to speak, left for the trial court to fill.. There was no doubt that the complainant did suffer serious injuries that amounted to grievous harm as defined under **Section 4** of the **Penal Code**.

21. I also find that the basis of some doubts created in the mind of the trial court was erroneous in itself. He for example found fault in the fact that the medical officer at Tharaka Hospital treated the complainant without an OB number. That is a misnomer because a patient requiring urgent medical attention should be rushed to hospital for treatment first before questioning the cause of the injury. It is true that in this region there is that mistaken belief that victims who have been assaulted should first be taken to the police station before being taken for treatment. The Appellant has invited me to take judicial notice of that fact and based on my experience during the trials in murder cases, I readily accept that invite because at times lives are lost because of the time taken to rush victims to police stations which could be far instead of the nearest medical facility for the requisite urgent attention to save lives. There is no legal requirement that the police should give a note before a victim of assault or attack is treated. It was therefore erroneous for the trial court to doubt the complainant for having been **"treated without being referred by police."**

22. It was equally erroneous and extraneous for the trial court to find a fault on the fact that the clinical officer attended the complainant when there was a strike or go-slow at Marimanti Hospital. While it could be true that some medics could have been on go-slow or strike, the clinical officer cannot be faulted for attending to an emergency and saving a life. The officer certainly should be commended for the action he took. Blaming him for bias in my considered view was unfounded.

23. I have gone through the evidence tendered during the trial and contrary to the finding of the trial court, it is obvious that the Respondent attacked the complainant. He was the aggressor and reading from his submissions it is clear that the Respondent was not pleased with the complainant **"trespassing into his property"**. He says that the complainant was using his authority as the chairman of the water project to **"supress him"** and that statement in my view is loaded and perhaps explains why the Respondent wrongly chose violence to address that concern. The trial court fell into error when it found that the complainant was the **"author of his misfortune"**. This is because the trial court did recognize that the complainant suffered some misfortune in the hands of the Respondent but erroneously blamed him for bringing it upon himself. The trial furthermore found that the complainant **"looked physically stronger compared to the Respondent"** which in my view is a misdirection because in an assault particularly where one is armed with a panga size rarely matters. The complainant was attacked as he tried to flee from the scene and for the trial court to find that **"power had gotten into his head"** and **"had little understanding of the principles of fair administrative actions"** was a bit extraneous and irrelevant to the matters at hand. The trial court's direction in its judgment appears to have been misdirected by what the complainant ought to have done in solving water issues and this is evident in its finding that **"power had gotten into his head."** A further finding that **"the accused had a right to object the water project laying pipes through his farm....."** is a further demonstration of a misdirection by the learned trial court. Those findings with due respect were extraneous and not relevant to the issue at hand which was whether the Respondent had caused grievous harm to the complainant.

24. I also find the finding that the Respondent assaulted the complainant in self defence to an error in law and fact. In law self defence is not a defence to an offence of grievous harm. A person cannot assault another person and claim that he was doing so in self defence. Such defence is only available in murder cases but certainly not in assault cases.

25. Secondly the facts/evidence tendered at the trial showed that the Respondent suffered no injuries in the encounter. It is true he is the one who first reported the incident to the police but even murder suspects often do that for one reason or the other. The mere fact of reporting does and cannot absolve a culprit from blame.

26. In the end for the reasons aforesaid this court finds merit in this appeal. The judgment of the trial court delivered on 29th March 2018 is hereby reversed and set aside. In its place this court finds that the evidence tendered by the prosecution at the trial proved beyond doubt that the Respondent was guilty as charged. He is hereby convicted accordingly. This court hereby gives him a chance to mitigate before passing an appropriate sentence.

Dated, signed and delivered via zoom this 30th day of April 2020.

R.K. LIMO

JUDGE

30/4/2020

Momanyi:

We do not have previous record he can be treated as a first offender.

Mitigation:

I have a child who is sick the child requires treatment at Kenyatta Hospital. I have no money. I pray for forgiveness. The child has a swelling at the stomach. I pray for non custodial sentence.

Sentence:

This court has considered mitigation raised but owing to the serious nature of the injuries and the penalty prescribed by **Section 234 of Penal Code** which is life imprisonment, this court hereby imposes a sentence of a fine of Kshs.100,000/- or in default 5 years imprisonment. 14 days Right of Appeal.

Judgement, delivered and signed in the presence of Momanyi for -ODPP and Accused person via zoom.

R.K. LIMO

JUDGE

30/4/2020