REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

CRIMINAL APPEAL NO. 130 OF 2019

REPUBLIC.....APPELLANT

VERSUS

AMBROSE KIMANTHI ITUMO .....RESPONDENT

(From the order of acquittal by Hon. J.N Mwaniki (SPM) in Makueni Senior Principal Magistrate's Court Criminal Case No. 570 of 2018 delivered on 5th September, 2019).

JUDGMENT

1. The Respondent was charged with the offence of grievous harm contrary to section 234 of the Penal Code. The particulars of the offence were that on the 11th day of December 2018 at Muthuoi village, Nzui location in Makueni sub-county within Makueni county, the Appellant did grievous harm to **John Mutunga.**

2. After a full trial, the learned trial Magistrate acquitted the Respondent under section 215 Criminal Procedure Code.

3. Aggrieved by that decision, the State filed this appeal and raised 4 grounds as follows;

*a) **That,** the honorable trial Magistrate erred in law in failing to find that the prosecution had discharged its burden of proof as required by law.*

*b) **That,** the honorable trial Magistrate erred in law in placing more weight on the defence case and totally failed to evaluate and place any weight on the prosecution's overwhelming evidence.*

*c) **That,** the honorable trial Magistrate erred in law in failing to understand that the prosecution ought to prove its case beyond the reasonable doubts and not beyond any shadow of doubt.*

*d) **That,** the honorable trial Magistrate erred in law in failing to find that the defences of provocation and self defence as put forth by the accused were only mitigative in nature.*

4. From the evidence tendered, the Respondent and complainant are distant cousins and the former would hire the latter to do casual jobs at his home. Their respective homes are approximately one kilometer apart. On the night of 11/12/2018 *(material night)*, the Respondent returned home at around 8.00 pm and according to him, found his wife having sex with the complainant in a building under construction within the compound. A confrontation ensued leading to injuries.

5. The prosecution called five witnesses *to wit*; **Dr. Lugogo** (Pw1), the complainant's son (Pw2), the complainant's brother (Pw3), the investigating officer (Pw4) and the complainant (Pw5). It also produced the following exhibits, discharge summary (P.Ex1a), P3 form (P.Ex1b), blood stained shirt (P.Ex2), blood stained trouser (P.Ex 3), grey shirt blood stained shirt (P.Ex 4), six photos (P.Ex 5a-f), certificate of scene and exhibit photographs (P.Ex 6) and exhibit memo form (P.Ex 7).

6. According to the Respondent, he was trying to protect himself from the complainant who attacked him first and in the process, the complainant sustained the injuries. He testified as Dw1, his daughter as Dw2, his wife as Dw3 and **Dr. Makau** as Dw4. He produced a call data as D.Ex1, a treatment card as D.Ex2 and a P3 form as D.Ex3.

7. The appeal was canvassed by way of written submissions.

8. On ground **(a),** the State through the learned counsel, Ms. Gakumu, submits that the prosecution and defence witnesses confirmed that the complainant sustained grievous harm injuries inflicted by the Respondent. She submits that the medical evidence enumerated multiple injuries on the complainant including amputation of the left hand. She submits that the finding by the trial court was that both the

complainant and Respondent occasioned grievous harm on each other but contends that there was no evidence to support the finding of grievous harm on the Respondent.

9. On ground **(b),** she submits that the analysis of the evidence in the judgment does not mention the prosecution's evidence at all. She submits that the trial Magistrate analyzed the evidence of all the defence witnesses despite the fact that Dw1, Dw2 and Dw3 were husband, wife and daughter. It is also her submission that the trial court's opinion, that the prosecution developed a theory about the Respondent going to his home in disguise, is a clear indication of an already biased court and pre-determined outcome.

10. It is her submission that there was an observation by the trial court that the Respondent's defence was contradicted by Dw4 who termed the complainant's injuries as attack injuries. She contends that despite the observation, the trial Magistrate proceeded to give weight to the evidence of Dw4.

11. She submits that, the part of the judgment insinuating that the summary of the prosecution case was that the Appellant planned to attack the Respondent and executed his evil plan, was utterly untrue and biased towards the prosecution case. She further submits that despite the trial Magistrate relying on a High court case that frowns on taking the law into one's hands, he proceeded to give a lot of weight to the defence evidence and to acquit the Respondent on account of '*self defence and grave provocation'*.

12. Counsel submits that it was untenable for the trial court to give weight to the evidence of Dw3 after finding that she was not an independent witness for being the substantial reason that the incident occurred. She contends that Dw3's evidence, to the effect that she saw the complainant reaching out for the panga, cannot be equated to commission of an offence.

13. She further submits that the prosecution fulfilled all the ingredients of the offence and contends that the trial Magistrate contradicted himself by returning a verdict of '*not guilty'* after finding that the Appellant had actually caused grievous harm to the complainant.

14. It is her contention that the defence of provocation and self defence is only available to an accused person charged with murder where after the court reduces it to manslaughter after conviction. She contends that the court should not rely on this defence to acquit. She relies on **Siaya HCCRA 83 of 2017: Joannes Otieno –vs- Republic [2020] eKLR** where the Court expressed itself as follows;

> *"61. It is trite law that every homicide is unlawful unless authorized by law or excusable under the law. That proposition was expounded in Sharm Pal Singh [1962] EA 13, see also Guzambizi Wesonga v Republic [1948] 15 EACA 63 where the court held:*
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> *"Every homicide is presumed to be unlawful except where circumstances make it excusable or where it has been authorized by law. For a homicide to be excusable, it must have been under justifiable circumstances, for example in self-defence or in defence of property."*
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> *62. The real point of this case turns up whether or not legal provocation as defined under section 208 (1) of the Penal Code was disclosed to trigger the actions taken by the accused. In order to answer this question, it is appropriate at this stage to set out the law relating to provocation. Section 207 of the Penal Code provides:*
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> *"When a person who unlawfully kills another under circumstances which but for the provisions of this section would constitute murder, does the act which causes death in the heat of passion caused by sudden provocation as hereinafter defined, and before there is time for his passion to cool he is guilty of manslaughter."*
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> *63. Section 208 (1) of the Penal Code defines the term provocation as follows:*
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> *"The term provocation means and includes, except as hereinafter stated any wrongful act or insult of such a nature as to be likely when done to an ordinary person or in the presence of an ordinary person to another person who is under his immediate care, or to whom he stands in conjugal, parental filial or fraternal relation or in the relation of master or servant, to deprive him of the power of self-control and to induce him to commit an assault of the kind which the person charged committed upon the person by whom the act or insult is done or offered."*

15. It is also her submission that the trial Magistrate erred by relying on authorities involving murder hence misapprehending the application of the defence of provocation. She submits that the holding of the Court of Appeal, in **Tarsisio Weino Letwamba –vs- Republic (1994) eKLR**, is that the defence of provocation is only available in murder cases.

16. She has also cited **Republic –vs- Hussein S/O Mohamed [1942] EACA** where the Court of Appeal of Eastern Africa held;

> *"When once legal provocation as defined in our court has been established and death is caused in the heat of passion whilst the accused is deprived of self-control by that provocation the offence is manslaughter and not murder, and that irrespective of whether a lethal weapon is used or whether it is used several times or whether the retaliation is disproportionate to the provocation. The presence of one or more of these factors is of course a matter to be taken most carefully into account when considering the question of sentence but will not of itself necessarily rule out the defence of provocation."*

17. She submits that, from the evidence, it is clear that it was the Respondent who attacked the complainant and inflicted injuries which clearly show that he had the intention and a pre-determined mind of attacking and grievously harming the complainant. She contends that the injuries on the Respondent do not confirm any iota of self defence.

18. She argues that the nature of injuries and evidence tendered by the prosecution are clear indicators that there was malice aforethought on the part of the Respondent. She relies on the case of **Lucy Mueni Mutava –vs- Republic (2019) eKLR** where the Court of Appeal stated that;

> *"All in all, we, like the trial Court are satisfied that the Appellant's actions and more specifically the vicious nature she attacked the deceased and the resulting injuries are indicative of malice aforethought on her part as defined under section 206 of the Penal Code."*

19. It is also her submission that section 234 of the Penal Code has no provision for the application of self defence and provocation by a person charged which inflicting grievous harm. She relies on the case of **Veronica Gitahi & Another –vs- Republic (2017) eKLR** where the Court of Appeal held that;

> *"The application of the principles of common law regarding the defence in Kenya is subject to any express provision in the Penal Code or any other law in operation in Kenya. Where there are express provisions in the Penal Code or any other law in operation in Kenya, those provisions will apply in lieu of the common law."*

20. Counsel submits that the trial court expressly found that the Respondent caused grievous harm to the complainant and as such, the trial court went outside its jurisdiction by apportioning blame to the Respondent because the case before it was not affray. It is also her submission that the medics from the facility that allegedly treated the Respondent were not called to testify.

21. The Respondent through learned counsel Mr. Masaku, has summarized the grounds of appeal as follows;

> a) The honorable trial Magistrate erred in law in failing to find that the prosecution had discharged its burden of proof as required by law.
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> b) The honorable trial Magistrate erred in law in placing more weight on the defence case and totally failed to evaluate and place any weight on the prosecution's overwhelming evidence.

22. On ground (a), he submits that the position in the *locus classicus*, **DPP –vs- Woolmington (1935) UKHL 1**, has been upheld in numerous Kenyan cases. He submits that the standard of proof required is 'beyond reasonable doubt' and cites the case of **Miller –vs- Minister of Pensions (1947)2 ALL ER, 372** where Lord Denning stated;

> *"That degree is well settled. It need not reach certainty but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man a to leave only a remote possibility in his favour which can be dismissed with the sentence of course it is possible, but not in the least probable, the case is proved beyond reasonable doubt but nothing short of that will suffice."*

23. He submits that for criminal liability to lie, the prosecution must prove the cardinal elements of *mens rea* and *actus reus*. He submits that the fact of the complainant and Respondent getting injured in the commotion is not disputed and contends that P3 forms were issued to both of them at the same time and day. Further, he submits that the degree of injury assessed for both was grievous harm. He supports the trial court's finding that it was impossible to tell who attacked who first or whose *panga* was used.

24. He submits that the prosecution failed to prove malice aforethought by tendering evidence to show that he had the positive intention of causing such harm. He argues that the Respondent raised a very plausible defence of self defence and provocation. That the complainant (Pw5) confirmed that he normally walks with a panga owing to his nature of casual work.

25. Relying on section 17 of the Penal Code, Cap 63 Laws of Kenya, he submits that the common law position has evolved from an objective approach to a subjective one and relies on the case of **Ahmed Mohammed Omar & 5 Others –vs- Republic (2014) eKLR** where the Court of Appeal expressed itself as follows;

> *"The common law position regarding the defence of self defence has changed over time. Prior to the decision of the House of Lords in DPP –vs- Morgan (1975) 2 ALL ER 347, the view was that it was an essential element of self defence not only that the accused believed that he was being attacked or in imminent danger of being attacked but also that such belief was based on reasonable grounds. But in DPP –vs- Morgan (supra), it was held that;*
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> *"……if the Appellant might have been labouring under mistake as to the facts, he was to be judged according to his mistaken view of facts, whether the mistake was, on an objective view, reasonable or not. The reasonableness or unreasonableness of the Appellant's belief was material to the question whether the belief was held, its unreasonableness, so far as guilt or innocence was concerned, was irrelevant."*

26. He further submits that section 17 of the Penal Code subjects criminal responsibility, for use of force in defence of person or property, to the principles of English Common Law except where there are express provisions to the contrary in the code or any other law in operation in Kenya. He submits that the classic pronouncement on the said principles was made by the privy council in **Palmer –vs- Republic (1971) A.C,814** which decision was approved and followed by the Court of Appeal in **Republic –vs- Mc Innes, 55 Cr. App. R. 551** when it expressed itself as follows;

> *"It is both good law and good sense that a man who is attacked may defend himself. It is both good law and common sense that he may do, but may only do, what is reasonably necessary. But everything will depend on the particular facts and circumstances…some attacks may be serious and dangerous. Others may not be. If there is some relatively minor attack, it would not be common sense to permit some act of retaliation which was wholly out of proportion to the necessities of the situation. If an attack is serious so that it puts someone on immediate peril, then immediate defensive action may be necessary. If the moment is one of crisis for someone in immediate danger, he may have to avert the danger by some instant reaction."*

27. He submits that the Respondent's evidence before the trial Court was that he arrived home at 8:00 pm and realized that all the security lights were off except some flicker of light at a house under construction. He heard some mourns in the room and headed there only to find the complainant red handed having sex with his wife. His wife ran away and he was left to struggle with the complainant who was reaching for his panga. He contends that sexual infidelity of a wife is an integral and essential trigger for loss of self-control due to grave provocation. He relies on the case of **Elphas Fwambatok –vs- Republic (2009) eKLR** where the Court of Appeal held;

> *"In our view, once a person is provoked and starts to act in anger, he will do so until he cools down and starts seeing reason. This is because he will be suffering under diminished responsibility and the duration of that state may very well depend on individuals. In any case, several injuries can be inflicted within a very short time particularly if one has a panga-we cannot agree that whether a person is acting on provocation or not would depend on the number of injuries inflicted on the victims…"*

28. He has also cited **Nanyuki HCCRA 24 of 2018; Michael Kimondo –vs- Republic [2019] eKLR** where the Court observed that;

> *"It is only a very foolish man who would enter another man's house and bed with that other man's wife, and such man would ordinarily be deserving of whatever might come to him, including grievous harm or even death, because such foolish action would amount to a very grave provocation to the man cuckolded!"*

29. He concludes by inviting this court to find that this appeal is devoid of merit and urges it to affirm the order of acquittal.

Analysis and determination

30. It is now settled that the duty of a first appellate court is to scrutinize the evidence on record, make it's own findings and draw it's own conclusions giving due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses. See **Okeno –vs- Republic 1972 E.A 32; David Njuguna Wairimu –vs- Republic (2010) eKLR**.

31. Having looked at the grounds of appeal, the entire record and the rival submissions and law, it is my considered view that the only issue arising for determination is whether the acquittal is justified;

32. Section **234** of the **Penal Code** *(the Act)* provides that *'Any person who unlawfully does grievous harm to another is guilty of a felony and is liable to imprisonment for life'*

33. Section **4** of the Act defines **grievous harm** as; *'any harm which amounts to a maim or dangerous harm, or seriously or permanently injures 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'.* Further, the same section defines **maim** as *'the destruction or permanent disabling of any external or internal organ, member or sense'.*

34. From the evidence, there is really no contestation as to the nature of injuries sustained by the complainant. The P3 form (EXB1'B)shows that he sustained several deep cuts all over his body, his nose was separated into two, his left ear lobe was cut off but rejoined in theatre, lost sensation and hearing on the right ear as well as functional loss of the knee. The injuries were categorized as grievous harm and Dr. Lugogo testified that they were permanent and disabling.

35. The Respondent testified as follows;

> *"I grabbed the panga and swung it around for protection. I could tell it hit the man severally but wouldn't know on what part of the body I hit him or what side of the panga. I screamed and asked him why he wanted to kill me. I could hit the man, the walls and windows with the panga. My intention was to protect myself. I would move backwards towards the door to protect myself. I would move backwards towards the door to run away. The man tried to pass in between my legs. I lifted the panga and*
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> *I believe that is how he sustained injuries to the back. I then grabbed the man and we struggled….I would say I cut him while waving it around. The panga before Court is sharp. I would say it can cut off a hand in one blow."*

36. In the case of **John Oketch Abongo –vs- Republic (2000) eKLR**, the Court of Appeal expressed itself with regard to the ingredients of the offence;

> *"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."*

37. Similarly, I have no doubt that the injuries sustained by the complainant in this case are within the definition of **section 4** of the Penal

Code. It is also clear that he sustained the injuries at the instance of the Respondent.

38. On the other hand, the Respondent testified that he also sustained injuries amounting to grievous harm but the prosecution thinks otherwise. He produced medical documents which Pw1 agreed were from their medical facility. He saw the Respondent five days after the incident for purposes of filling the P3 form (EXB2'B') and testified that at that time, the Respondent had a plaster of paris on the right hand.

39. He testified that according to the treatment notes, the Respondent's hand was not swollen on the material night but he had mild pain and was referred for x-ray and orthopedic. On 13/12/2018, the complainant went for orthopedic examination and a fracture was noted. Further, he testified that a fracture is a grievous harm as it can heal with some deformity. The Respondent's daughter testified that she saw her dad with a plastered hand.

40. I am unable to agree with the Appellant that there was no evidence to support the finding that the Respondent sustained grievous harm since the authenticity of his medical documents was not questioned. I am therefore inclined to agree with the expert opinion of Dw4 that a fracture is a grievous harm. What is obvious however is that the injuries sustained by the complainant were more serious than those of the Respondent. Accordingly, I am of the view that there was no error on the trial court's finding that both the complainant and Respondent sustained grievous harm.

41. The question at this juncture is whether the Respondent intended to inflict the injuries on the complainant. The Respondent's evidence was that on the material night, he arrived home at around 8:00 pm, found the security lights off and thought there was a black out. He went round the compound as per his tradition and saw some flicker of light in a house under construction. He also heard some people conversing in low tones. Upon gaining entry into the house, he saw his wife having sex with a man.

42. The fact of the security lights being off was corroborated by the Respondent's daughter and his wife. The complainant confirmed that the house under construction had no lights but he had a torch. The two prosecution witnesses (Pw2 & Pw3) arrived at the scene after the fact and as such, they could not testify as to what exactly happened. The investigating officer was categorical that his investigations did not establish who the owner of the panga was.

43. Accordingly, his conclusion that the panga belonged to the Respondent is neither here nor there. It is noteworthy that the complainant's evidence was that he used to carry a panga always due to the nature of his work. It was therefore his tool of trade. The prosecution submitted as follows before the trial court;

> *"The only question left in the mind of the prosecution and Honorable court would therefore be, what was the accused's intention going home unannounced, in disguise and armed with a newly sharpened panga?"*

44. In my considered view, this must be the theory that the trial Magistrate was referring to because the submission was clearly based on no evidence. One wonders why the home owner would be expected to announce his/her arrival so that even if it was proved, it would not be the yardstick against which intention can be measured. It can as well be argued that an owner arriving home unannounced would have the intention of surprising his family. Furthermore, the evidence on record is that the Respondent was not aware of the affair between his wife and the complainant. His evidence, which I found sensible, was that if he had been aware, he would not have hired the complainant as his casual labourer.

45. The upshot is that the Appellant did not prove malice aforethought on the part of the Respondent.

46. As for self defence and provocation, the Appellant's position is that the same are only available to accused persons charged with murder. **Section 17** of the Penal Code provides as follows;

> *"Subject to any express provisions in this code or any other law in operation in Kenya, criminal responsibility for the use of force in the defense of person or property shall be determined according to the principles of English Common Law."*

47. In the **Ahmed Mohammed case *(supra)***, the Court of Appeal further expressed itself as follows;

> *"It is acknowledged that the case of DPP –vs- Morgan …was a landmark decision in the development of common law regarding offences against the person in that it fundamentally varied the test of culpability where the defence of self defence is raised from an objective test to a subjective one…section 17 of the Penal Code subjects criminal responsibility for use of force in the defence of person or property to the principles of English Common law where there are express provisions to the contrary in the code or any other law in operation in Kenya. In the appeal before us, the trial court rejected the Appellants defence because it applied an objective test. The learned judge's attention was not drawn to the current position of the English Common law as regards the defence of self defence. We believe that had the judge's attention been drawn to the case of **DPP –vs- Morgan**…his decision would have been different."*

48. The question of whether or not a person has criminal responsibility arises once such person is charged with a criminal offence. Accordingly, my understanding of the above decision and section 17 of the Penal Code is that whenever a person so charged raises the defence of self defence, the same shall be determined according to the principles of English Common Law except where the Penal Code or any other law in operation in Kenya has express provisions to the contrary. It does not mean that the section under which the person is charged must expressly make the defence available as posited by the Appellant. Accordingly, it is not the law that this defence is only available to accused persons charged with murder.

49. To further illustrate this, the Appellants in the **Veronica Gitahi case *(supra)*** were police officers serving under the National Police Service. The National Police Service Act has express provisions regarding self defence by police officers and the use of force, particularly

the use of firearms. Accordingly, the Court of Appeal held that there was no room for invoking section 17 of the Penal Code and applying the principles of Common Law on self defence.

50. As for provocation, section **208 (1)** of the Penal Code provides as follows;

> *"The term "provocation" means and includes, except as hereinafter stated, any wrongful act or insult of such a nature as to be likely, when done to an ordinary person or in the presence of an ordinary person to another person who is under his immediate care, or to whom he stands in a conjugal, parental, filial or fraternal relation, or in the relation of master or servant, to deprive him of the power of self-control and to induce him to commit an assault of the kind which the person charged committed upon the person by whom the act or insult is done or offered."*

51. From the overwhelming evidence on record, I am convinced, just like the trial Magistrate was that indeed the complainant and Respondent's wife had an affair and that the Respondent found them on the material night having sex. That is by all means an act within the meaning of section 208(1) of the Penal Code and I am in agreement with the Respondent that sexual infidelity of a spouse is a potential trigger for loss of self-control. It is therefore evident that the defences of provocation and self defence were available to the Respondent.

52. As correctly submitted by the Respondent, the Common Law position on self defence has evolved from an objective approach to a subjective one. In the instant case, the Respondent's evidence was that he saw the complainant reaching for a panga that was in the room and he attacked him first. His wife corroborated his evidence on this aspect. I have found nothing to indicate that the wife (Dw3) was not a truthful witness.

53. However, concerns have been raised about her independence primarily for being the reason for the incident. In my view, whether her evidence is given weight or not does not change anything because it still remains the complainant's word against that of the Respondent. As opined herein above, the prosecution did not establish that the *panga* belonged to the Respondent or that he arrived with it at the scene. It is also noteworthy that the altercation happened in the dark as the house under construction had no lights.

54. Further, Dr. Makau testified that the Respondent sustained defensive injuries. It was also his evidence that people tend to use their dominant hands to defend themselves. The Respondent testified that he held the *panga* in his left hand but he makes use of both hands. He also testified that he uses his right hand predominantly. The medical evidence shows that his injuries were on the right hand.

55. The totality of all this evidence makes the Respondent's defence very plausible and like the trial Magistrate observed, just because the complainant emerged with more serious injuries does not necessarily make him the victim and the accused the villain.

56. The upshot is that the appeal lacks merit and is dismissed.

Orders accordingly.

Delivered, signed & dated this 12th day of November, 2020, in open court at Makueni.

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H. I. Ong'udi

Judge