



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

CRIMINAL APPEAL NO. 58 OF 2017

JAMES KIRUGI MAINA.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(Appeal against conviction and sentence in Mukurweini Principal Magistrates Court

Criminal Case No. 389 of 2016 (Hon. Chianda V.O. Senior Resident Magistrate) on 31st August, 2017)

JUDGMENT

The appellant was charged and convicted of the offence of grievous harm contrary to section 234 of the Penal Code, cap.63. According to the particulars of offence, on the 26th day of December, 2016 at Kaheti village in Mukurweini sub County within Nyeri County, the appellant wilfully and unlawfully did grievous harm to Simon Kimondo Maina. He was sentenced to life imprisonment.

Being aggrieved by the decision of the lower court, the appellant appealed to this honourable court against both the conviction and the sentence. He raised only four grounds of appeal which are that, first, the trial magistrate erred both in law and in fact in convicting him based on the evidence of the complainant alone and without the evidence of any other identification witness; secondly, that the trial magistrate erred both in law and in fact in believing the prosecution witnesses without considering that they were all from one family; thirdly, that the trial magistrate erred in convicting him without considering that the appellant was defending himself at the time of the alleged offence; and, finally, the learned trial magistrate misdirected himself in convicting the appellant without considering his defence.

Six witnesses testified on behalf of the state the first of whom was the complainant's mother, **Purity Wamuyu (PW1)**. It was her testimony that on the 28th day of December 2016 at around 3:30 PM, the appellant who is her son assaulted her while she was in the kitchen. On the material day the complainant, her elder son, had visited her together with his wife, his children and his in-laws. As the complainant walked around the home, the appellant attacked him and cut him on the head. The complainant was then rushed to the hospital and thereafter the police came to the scene. They found the accused having locked himself in his house from where he was throwing rocks at people and threatening to harm them. The police had to lob teargas into the house and break its door in order to smoke the appellant out. The witness testified further that the appellant had assaulted her before; she characterised him as 'notorious'.

Dr Paul Kimathi (PW2) examined the complainant approximately three months after the date of the offence. It was his evidence that the complainant had a V-shaped cut on the head and another wound on the left side of the eye. As at the time of examination, the approximate age of the injuries was three months. The weapon used to inflict the injuries was described as 'a sharp object'. The complainant was in a coma after the attack and admitted in intensive care and high dependency units during his hospitalization. He suffered heavy haemorrhage. The degree of his injuries was described as 'grievous harm'.

The complainant (PW3) himself testified that on 26th December, 2016 he had visited his mother (PW1); she reported to him that the appellant had attacked her. He therefore decided to enquire from the appellant why he had attacked their mother. He knocked at his door but the appellant did not open. Suddenly, he emerged from the house and attacked the complainant, hacking him with a panga on the head and on the face. He lost consciousness and only regained it at Aga Khan Hospital in Nairobi. He was in a coma for a whole month and he had to spend Kshs 2.3 million for his treatment.

Anthony Mutahi Maina (PW4), another of the appellant's brothers testified that on 26th day of December 2016 their mother called him to inform him that the appellant had hacked the complainant. When he rushed to his mother's home, he found when the complainant had been taken to the hospital but the appellant had locked himself in his house. It took about three hours to flush him out.

Corporal John Mutuma (PW5) testified that he was called to the scene by Mutahi Maina (PW4); he responded and went to the scene with

his colleagues. He found the appellant at the scene where he also recovered weapon by which the appellant had used to attack the complainant. He arrested the appellant and took him to Mukurweini police station where he was received by corporal **Benard Kimutai (PW6)**; the latter booked in for the offence for which he was charged and subsequently convicted.

When the appellant was called upon to defend himself, he opted to give a sworn statement and all he said was that on the material day, the 26th day of December, 2016, the complainant attacked him and knocked out one of his teeth; it is then that he picked up a panga and cut him on the head in self-defence.

In essence therefore, there was no dispute that the appellant injured his brother the complainant. Except for the discrepancy in the complainant's mother's testimony regarding the date when the offence occurred (she spoke of the offence having been committed on 28th December, 2016 rather than 26th December, 2016) I find the testimony of the complainant himself, the evidence of his mother (PW1) and brother (PW3) were consistent with the fact of the appellant's assault of his brother.

I would consider the variation in dates in the complainant's mother's testimony to be minor and which did not, in any event, prejudice the appellant's trial. The appellant himself was under no illusion of when the offence occurred; he admitted that he attacked his brother on 26th December, 2016.

Dr. Kimathi (PW2) corroborated these witnesses' evidence when he testified and produced in evidence medical documents showing the nature and extent of the injuries sustained by the complainant as a result of the appellant's attack; in his opinion the degree of the injuries was that of grievous harm. The appellant himself admitted attacking and injuring his brother with a panga but added that he was defending himself against the complainant.

The offence of grievous harm is prescribed in section 234 of the Penal Code; it reads as follows:

234. Grievous harm

Any person who unlawfully does grievous harm to another is guilty of a felony and is liable to imprisonment for life.

'Grievous harm' is defined in section 4 of the Penal Code in the following terms:

“grievous harm” means 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;

In the doctor's opinion, which I note was not controverted or challenged in any way, the injuries sustained by the complainant as a result of the attack by the appellant amounted to this type of harm. Thus, the prosecution proved beyond doubt that the complainant suffered grievous harm.

As earlier noted, it was also proved beyond doubt that the appellant was the perpetrator of the injuries and therefore the only other question that the trial was concerned with was whether, in the light of section 234 of the Penal Code, the appellant's acts were unlawful.

The appellant intimidated that he was acting in self defence since he was under attack by his brother. However, although he testified that he had been attacked to the extent that he lost his teeth, there was no evidence of any such injury. In the absence of any evidence that the complainant either attacked or threatened to attack the appellant, the defence of self defence was not available to him. It is true that if the act alleged to constitute a crime is done in self-defence or defence of another, it is justified and the defendant's conduct is thereby lawful; however, it is only justified and lawful if no more force is used than is necessary (**see R v Wheeler [1967] 3 All ER 829**).

Even if it was to be assumed that the appellant had been attacked, it is apparent from the injuries that the complainant sustained, that the force used was disproportionate in the circumstances and it was logical to conclude, as the learned magistrate did, that the appellant intended to cause serious harm or to be precise, grievous harm to the complainant.

It has been held that where self-defence is raised as a defence to what would otherwise amount to a criminal offence, that defence fails if the prosecution is able to show beyond reasonable doubt that what the accused did was not by way of self-defence. **See Palmer versus Regiam (1971) 1 ALL ER 1077**. This to me is what happened in the case against the appellant. In the absence of any evidence that the appellant had been attacked, proof by the prosecution that the complainant was harmed to the degree that the medical expert classified as grievous harm and that the appellant occasioned such injury with intent was sufficient to convict the appellant for an offence under section 234 of the Penal Code.

For these reasons, I am satisfied that the appellant was properly convicted.

As far as the sentence is concerned, the appellant did not raise any ground against it and therefore there would be no reason for me to disturb it or even make any comment on it.

In the ultimate, I do not find any merit in any of the grounds of appeal; I am thus left with no other alternative except to dismiss the appeal. It is so dismissed.

Dated, signed and delivered in open court this 25th day of January, 2019

Ngaah Jairus

JUDGE