



REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA AT KISII  
CRIMINAL APPEAL NO 104 OF 2018

GEOFFREY BOB ONDIEKI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

*(An appeal from the conviction and sentence of the Senior Resident Magistrate's Court (C. R. T. Ateya) at Ogembo, Criminal Case No. 1720 of 2018 delivered on 30<sup>th</sup> November 2018)*

JUDGMENT

1. The appellant, **Geoffrey Bob Ondieki**, was charged with the offence of grievous harm contrary to **section 234** of the **Penal Code**. The particulars of the offence were that on 2<sup>nd</sup> December 2017 at Omoraa village Nyachonge sub-location, Masige West location in Nyamochi sub-county within Kisii County unlawfully caused grievous harm to Thomas Machugu Nyabuto.

2. The court found that the prosecution had established its case against the appellant to the required standard and convicted the appellant. The Appellant appealed on the following grounds:

*1. The trial magistrate erred in fact and in law in holding that the prosecution had proved their case beyond reasonable doubt when indeed the evidence available on record shows the contrary.*

*2. The trial magistrate erred in law and in fact in completely failing to critically analyze the evidence tendered by the appellant and his witnesses, thereby casually dismissing it as contradictory without setting out the contradictions in it, hence arriving at a very unreasonable and unconscionable conclusion.*

*3. The learned trial magistrate adopted a presumptive approach to the application of the defence of self defence to the circumstances of the case herein, instead of critically analyzing that defence alongside the facts herein, instead of critically analyzing that defence alongside the facts presented, thereby making an erroneous conclusion that the accused was vicious in defence when indeed the contrary shows that the complainant was an aggressive attacker who viciously wanted to exterminate the accused, the later who is only surviving as a result of a reciprocal attempt at disarming the complainant.*

*4. The trial magistrate's finding elevates the serious crimes committed by the complainant against the life and limbs of the accused to a position of praise and worship by dancing on alter of the victim's loss; thereby commissioning a serious injustice to an innocent Kenyan.*

*5. The sentence passed by the trial magistrate is very harsh in the totality of the circumstance.*

3. The facts at the trial were that on 2<sup>nd</sup> December 2017, the complainant, **Charles Machogu Nyabuto** PW1 testified that he went to the appellant's home to collect Kshs 400/- which was owing to Mosobeti self-help group. They were 8 people. On arrival he asked the appellant for the money which the appellant did not have and the appellant's mother advised that they utilize the appellant's chicken to settle the debt. That immediately they were given the chicken the appellant slapped the treasurer who was carrying the chicken and the appellant ran to the house and got a panga and ran after them. The appellant attempted to cut PW1's neck but PW1 put up his hand and his two fingers were cut. PW1's little finger on his left hand was completely cut off. He testified that the appellant also threatened the other members of the group who were present and they raised an alarm. He reported the incident to the police and was issued with a P3 form.

4. **James Kennedy Molono** (PW2) told court that he heard screams in the appellant's home, and found the appellant holding a panga and surrounded by people. He found PW1 was bleeding. The appellant was taken to the police station and PW1 to the hospital.

5. **Tom Osoro** (PW3) told court that the appellant owed the chama money and they had proceeded to his home to collect the debt. The appellant's mother gave them chicken as security. He testified that the appellant thereafter came with a panga ready to cut PW1's head, Pw1

blocked the panga with his hand and his little finger on the left hand got cut.

6. **Auna Nyanganisa Nyabuto** (PW4) testified that she is the treasurer of the group and recalled that on 2<sup>nd</sup> December 2017 they went to collect Kshs 400/- which was owing to the group and a fight ensued between the appellant and the PW1. She saw the appellant cut PW1's finger. The appellant began running away but was caught by a village elder.

7. **Ann Nyabuga** (PW5) a clinical officer at Nyamache testified that PW1 was taken to the hospital on 2<sup>nd</sup> December 2017. PW1 had a history of assault. Her examination revealed that PW1 had a blunt injury on the cheeks, the left little finger was chopped off and he had also suffered a deep cut wound of the second finger.

8. **Nicholas Kiptoo** (PW6) told court that he took over the investigation and that the matter had been reported by PW1. He testified that the appellant chopped off the finger of Pw1, and Pw1 was issued with a P3 form.

9. At the close of the prosecution case the court found that the appellant had a case to answer and he was put on his defense. The appellant called 5 witnesses. The appellant testified as DW1 and told court that on the material day he was at home when a group of more than 15 people found him outside his house and asked for Kshs 400/- and Kshs 2,000/- as extra charges. That on that day he paid Hanna Nyabuto Kshs 347/-, sent Kshs 327 to 0700xxxxx8. He had also paid Kshs 500 and Kshs 127. By the time the group was in his home he did not owe them anything. The group started chasing the chicken and untying a cow. He testified that PW1 had a panga and tried to cut him with it and the appellant blocked it and the panga fell down. That they took more than 4 chickens and returned the cow at night. The other beat him and he was tied with a rope and was taken to Nyangusu police station. He was left at the police station on allegation that he had cut someone.

10. **Alice Nyaboke Maticha** (DW2) testified that she is married to the appellant and recalled on 2<sup>nd</sup> December 2017 there was an incident involving a loan of Kshs 300/-. She produced an M-pesa statement claiming that she had paid the money to PW1's wife. **Stephene Asingo Ombino** (DW3) testified that a group of about 15-20 people entered the home of the appellant claiming that they wanted Kshs 200/- from the appellant and took more than 5 chickens and a cow. He testified that while they argued one had a panga while the others had rungu. That the said people hit the appellant with a rungu, tried to hit him with a panga which fell and the appellant stepped on it. When the panga fell on the ground PW1 tried to pull it the panga cut him on the fingers. She did not see who picked up a panga and cut someone.

11. **Joseph Ondiek Monyancha** (DW4) testified that on the material day at around 1:00 p.m. he was at his home in his posho mill and saw many people pass near the posho mill and shortly thereafter he heard screams and closed the mill. He met the people one carrying a chicken while another had a cow. **Ezna Jane Nyambeki Ondieki** (DW5) testified that on the material day at around 2:00 p.m. she was sleeping when she was awoken from noise from outside the house. She saw more than 15 people carrying sticks and PW1 had a panga. The appellant stepped on the panga and PW1 cut his left hand as he tried to pick it up. They left with the chicken and went with the appellant. She testified that he went back to sleep.

12. At the hearing of the appeal Mr. Nyamweya, counsel for the appellant submitted that there were contradictions on whether Pw1's finger was completely severed from his hand or whether he merely suffered a cut and that the evidence presented has three versions of facts. It was further submitted that there was no evidence tying the appellant to Pw1's injuries. It was submitted by the appellant's counsel that the prosecution case was not proved beyond reasonable doubt. He argued that the appellant's defence of self defence was not considered.

13. The appeal was opposed by the prosecution. Mr. Otieno submitted that the appellant was rightfully convicted and the submissions that his defence was not considered incorrect. He explained that the defence did not shift the burden of proof and submitted that there was evidence the appellant caused the complainant grievous harm.

14. This is a first appellate court, I have to analyze and evaluated afresh all the evidence adduced before the lower court and drawn my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses. I am guided by the case of **Okeno vs. Republic 1972 EA 32**.

15. The issue for determination by this court is whether the prosecution proved to the required standard of proof, beyond any reasonable doubt, the offence of grievous harm contrary to **Section 234** of the **Penal Code**. **Section 234** of the **Penal Code** provides that any person who commits grievous harm to another is guilty of a felony and is liable to imprisonment for life. "Grievous harm" is defined under **Section 2** of the **Penal Code** to mean:

*"Any harm which amounts to 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."*

16. The Court of Appeal in **John Oketch Abongo v Republic [2000] eKLR** 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."*

17. PW1, PW3 and PW4 all testified that the appellant cut the complainant's finger with a panga. PW1 testified that his little finger on the left hand was completely cut off. PW5 corroborated the evidence of Pw1, Pw3 and Pw4 when she testified that the left little finger of the complainant was chopped off and the complainant also suffered a deep cut wound on the second finger of the left hand. I find that the kind of injuries described by Pw5 amounts to grievous harm. According to the P3 form the weapon that caused the injury leading PW5 to arrive at the conclusion of grievous harm was a panga. It is therefore clear that though the complainant had suffered blunt injuries on the cheeks, the

injuries could not be considered as harm that maimed the complainant neither were they seriously injuries.

18. The appellant relied on the defense of self-defense claiming that a group of about 15-20 people came to his home took his chicken and cow. He testified that it was PW1 who was armed with the panga. The trial court considered the appellant's defence of self defence and found as follows; *"Even if the court is to take up the proposal that accused was acting in self defence, the act of chopping off the finger of complainant is clearly a vicious act and therefore falls outside the preview of self defence."* The defense of self-defense is provided for under **section 17** of the **Penal Code** which states as follows:

*"17. Subject to any express provision of this code or any other law in operation in Kenya, criminal responsibility for the use of force in the defence of person or property shall be determined according to the principles of English common law."*

19. The Court of Appeal in **Ahmed Mohammed Omar & 5 others v Republic NRB CA CRIMINAL APPEAL NO. 414 OF 2012 [2014]eKLR** stated as follows;

*"The common law position regarding the defence of self-defense has changed over time. Prior to the decision of the House of Lords in DPP v Morgan [1975] 2 ALL ER 347, the view was that it was an essential element of self-defense 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 v Morgan (Supra) it was held that:*

*.....if the appellant might have been labouring under a mistake as to the facts, he was to be judged according to his mistaken view of facts, whether or not that mistake was, on an objective view, reasonable or not. The reasonableness or unreasonableness of the appellants' belief was material to the question whether the belief was held, its unreasonableness, so far as guilt or innocence was concerned, was irrelevant."*

20. I find that the appellant's defense of self-defense to be an afterthought. There was no evidence that the appellant sustained any injury from the large group that came to his home armed with a panga and runigus, on the contrary the evidence reveal that it was PW1 who lost his little finger and had cut on his second finger. His wife did not witness the incident nor his father. The evidence of the defense witnesses is that PW1 held the panga and it cut off his finger. I find this unlikely under the circumstances as explained by the witnesses. I agree with the trial court's sentiments that defence raised by the appellant did not raise any doubt as to who assaulted PW1. The appellant knew that striking PW1 with a panga was likely to maim or cause PW1 who was unarmed serious injuries. He aimed for PW1's head. The evidence reveal that the members of the group who came to collect money from the appellant were therefore not armed as alleged by the appellant, and the belief that he was in imminent danger cannot suffice and the appellant is not entitled to the defense of self-defense. I find that the prosecution case was proved beyond reasonable doubt. I affirm the conviction.

21. The last issue for consideration is the aspect of the sentence. **Section 234** of the **Penal Code** provides that anyone convicted of the offence of grievous harm is liable to life imprisonment. The appellant was sentenced to 4 years imprisonment which I find to be lenient and warrants no interference. The appeal is devoid of merit on both conviction and sentence and is hereby dismissed.

**Dated, signed and delivered at Kisii this 9<sup>th</sup> day of August, 2019.**

**R. E. OUGO**

**JUDGE**

**In the presence of:**

**Appellant Present**

**Mr. Otieno Senior State Counsel Office of the DPP**

**Rael Court clerk**