



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT CHUKA

HCCRA NO. 31'A' OF 2018

LAWRENCE MUGAMBI.....1ST APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Appeal from the Judgment of the Resident Magistrate at Marimanti (HON. S.M. NYAGA - RM)

delivered on 17/4/2018 Marimanti Principal Magistrate's Court Criminal Case No. 337 of 2017).

J U D G E M E N T

1. **LAWRENCE MUGAMBI**, the Appellant herein was charged with the offence of causing grievous harm contrary to **Section 234** of the **Penal Code** with particulars that on the night of 7th June 2017 at Kithino, Tunyai Location within Tharaka Nithi County jointly with one **PETER MUTHINIM'NTAKAMWARA** (co-accused) unlawfully did grievous harm to **COSMAS MURITHI MURIUNGI** (the complainant). After trial, the Appellant was found guilty and convicted. He was sentenced and placed on probation for 3 years with a warning not to take law into his hands.
2. The Appellant felt aggrieved and filed this appeal raising four grounds but before I consider the grounds a brief preview of the evidence tendered at the trial court is necessary for re-evaluation and re-assessment of the same in order to determine this appeal, especially given that this being a 1st appeal, this court is mandated to do that.
3. The complainant (PW2) at the trial was a young man aged 31 years of age. His sister (PW1) testified on 8th June 2017 at around 8.30 am as she was checking poultry in her brother's place, she noticed some blood stains on the ground with a trail leading to her brother's house and when she went into the house, she found her brother lying on a mat with two fingers cut off from his left hand. upon inquiry, the brother told her that the Appellant had cut him. She advised that they go to hospital and pass through Tunyai Police Station to make a report which they did.
4. The witness further testified that they later went back to the scene which was Mugambi's (Appellant) home in the company of police officers and that while at the scene where the brother claimed, he was attacked, they found two human fingers on the ground which were collected by the police and preserved. In the meantime, the complainant had been admitted at St. Orsola Hospital. The two fingers were later tendered as P. Exhibit 1 by P.C Wanami Nyongesa (PW4).
5. Cosmas Murithi; the complainant (PW2) testified that on 7th June 2017 at around 7.45 pm while he was coming from Kithinu Shopping Centre, he met the Appellant and another person. According to him he identified the Appellant because he knew him and that he had a torch. He stated that the Appellant asked where he was going before pushing him into his farm. The witness stated that he tried to struggle to get free and in the ensuing struggle the Appellant who was armed with a panga cut his hand chopping off 2 fingers. He added that he screamed and the Appellant and his companion ran away and was able to walk home and he administered first aid to himself as he says he was a trained first aider.
6. The complainant stated that the following day, she was woken up by her sister (PW1) and later taken to Mater Hospital (St Orsola) where he was admitted for 21 days. He identified treatment note which were tendered by a medical officer Emilio Mwenda Gaichu (PW3) as P. Exhibit 3.
7. Emilio Mwenda Gaichu (PW3) in his evidence told the trial court that he was a clinical officer at Tharaka Nithi Hospital and that he examined the complainant and noted that the middle and ringer of the left hand were severed and that the probable type of weapon used was

sharp. He assessed the degree of injuries as grievous harm and tendered the P3 form which he authored as P. exhibit 4.

8. P.C Wanami Nyongesa (PW4) of Tunyai Police Post the investigating officer confirmed to the trial court he received a report on the assault of the complainant on 8th June 2017 which was made by both the complainant (PW2) and his sister (PW1). He told the trial court that they went to the scene to confirm/investigate the allegations made and that on arrival, the Appellant confronted them with a bow and arrows questioning the police officers in uniform what they were doing in his farm. He added that they managed to calm him down upon which he narrated that he caught someone trying to steal his miraa and attacked him with a panga chopping off his 2 fingers before the 2nd co-accused came to rescue him after he screamed for help

9. The investigating officer added that they searched the scene and managed to recover two pieces of body parts (fingers) and took them to hospital for preservation. He tendered the same as P. Exhibit - 1. He also added that they took photographs at the scene and tendered them as P. Exhibit 2 (a) to (e).

10. When placed on his defence the Appellant in sworn statement of defence testified that he has a Miraa farm measuring around two acres and that on the material date at 9 pm he saw a tall person picking the Miraa while standing on the ground and that he called out to find out who he was but the thief did not respond and so he went near where a struggle ensued where the attacker hit him on the hand and grabbed the panga he had. He told the trial court that he screamed and attracted the co-accused who had a spot light and that it was then that unknown person fled away from the scene.

11. The Appellant further stated that he reported to Sub-Area Manager known as Kaithi and the following day he recovered the Miraa at the scene which the "**unknown**" thief had left behind after picking it. He stated that the police later came to the scene and informed him that someone's fingers had been severed. He insisted that the person was a thief out to steal his Miraa and that he was the one who accosted him.

12. The trial court found that the prosecution had proved its case beyond doubt and that the injuries inflicted on the complainant were grievous in nature and that the Appellant had no justification to cut the complainant because the act was unlawful. The Appellant was convicted and sentenced to serve 3 years probation.

13. He felt aggrieved and filed this appeal raising the following four grounds namely;

i. That the trial magistrate erred by failing to note that the prosecution's witnesses were inconsistency, contradictory and conflicting.

ii. That the prosecution's case was not proved beyond reasonable doubt.

iii. That the trial magistrate erred by convicting the Appellant and acquitting the co accused when both of them had been charged with committing the crime jointly

iv. That the trial court erred by rejecting the defence without giving cogent reasons.

14. In his written submission through counsel, the Appellant contended that the complainant lied to the trial court when he stated that he was pinned down by two persons before being cut. He submits that DW2 testified that he was attracted by screams on the Appellant's farm and when he lit his torch towards the farm he saw two men struggling before one stood and ran away. The Appellant contends that the evidence of DW2 was crucial but the trial court failed to take his evidence into consideration. He faults the trial court for failing to analyse the evidence objectively and thus arrived at the wrong conclusion.

15. The Appellant further submits that though there was a scuffle at his Miraa farm, the question of how and who cut the complainant was not in his view conclusively determined. He contends that the answer to that question should have led to an acquittal of the Appellant.

16. In response, the Respondent has opposed this appeal contending that the witnesses presented to the trial were candid, clear and consistent. It has pointed out that the Appellant admitted in his defence that on the material day he saw a person allegedly stealing Miraa from his farm and that he was armed with a panga when he confronted the alleged thief and a struggle ensued. It has urged this court to take judicial notice of the fact that suspected thieves of Miraa in this region are ruthlessly dealt with through illegal mob justice and usually have their hands chopped off.

17. The State contends that the human parts found at the scene (Miraa shamba) which showed that the Appellant beyond doubt committed the offence. In its view there was no direct evidence linking the 2nd accused to the offence and hence his acquittal.

18. The State/Respondent submits that the evidence adduced showed that the Appellant caused grievous harm on suspicion that he had stolen his Miraa. In its view the case was proved beyond reasonable doubt as the Appellant was squarely placed at the scene of the crime.

19. **Analysis and Determination:**

For the record and from the onset this court wishes to observe that it has dealt with this matter vide **Criminal Review No.101 of 2018** when the Director of Public Prosecution applied for review of the sentence. This court dealt with the issue of sentence imposed and pursuant to **Section 362** and **364** this court reviewed the sentence and enhanced it to 7 years in custody.

20. This appeal however touches conviction because this court only dealt with the sentence it is properly seized of the matter pursuant to its

appellate jurisdiction under **Section 347** of the **Criminal Procedure Code** and being the first appellate court its mandate is to re evaluate and re assess the evidence tendered at the trial and come up with own conclusions. It is important to note that unlike the trial court this court does not have the advantage of observing the demeanor of witnesses as they testified.

21. This court has considered this appeal and the response made by the State. The main issue in my view is whether the evidence presented by the prosecution were sufficient to sustain a conviction after taking the defence raised into consideration. It is not in dispute that the complainant (PW2 lost his 2 fingers in an attack that occurred on the night of 7th June 2017. That incident occurred on the farm of the Appellant where he has grown Miraa. The two fingers severed from the left hand were collected at the scene and later tendered in court as P. Exhibit 1. The complainant was admitted for 3 weeks and there is no doubt that the injury suffered will remain a permanent disfigurement in his body.

22. When placed in his defence the Appellant admitted that he was involved in the fracas with a person he suspected to be a thief. He told the trial court that he was armed with a panga and a stick and that the "**suspected Miraa thief**" was not armed. How an unarmed person could attack an armed man in something the Appellant was shy to explain and the trial court for good measure captured his demeanor on record when he tried in vain to avoid answering questions in cross-examination on what really happened. He further told the trial court that on the following day he found Miraa which had been picked on the ground and that the pack was worth almost 500/-.

23. The evidence by DW2 the co-accused to the Appellant in my view did not in any way displace any weight of the prosecution's case. He told the court that he heard screams emanating from the Miraa farm belonging to the Appellant as he headed home that night. According to him when he lit his touch towards where the screams emanated from he saw two men struggling, and on approaching the other one broke free and ran away. He said he did not recognize him but recognized the Appellant who had reportedly fallen down.

24. I have considered the evidence by the prosecution witnesses and one can clearly draw a clear picture of events of the incident that took place. It is likely that the complainant may have been found at the Appellant's farm and the Appellant may have been irked with that but as found by the trial court, there was absolutely no justification for him to take the law in his hand and mete out the sort of justice that I also take the invite by the Respondent to take judicial notice of the same. Many people in this region and the larger Meru have lost their arms on suspicion of stealing Miraa. That practice must come to a stop because there is a rule of law in this Country and I believe that sanctions provided by the law are deterrent enough. If the community feels that it requires more deterrent sentences specifically for Miraa thieves, then the way to go is mobilize Mps from this region to amend the law accordingly. There is no other way because this idea of chopping off hands or fingers from suspected thieves is barbaric and horrendous.

25. The Appellant claims that he was defending himself but the facts obtaining reveal otherwise. In the case of **Republic - vs - Julius Terere Parsokoy [2018] eKLR** the court had this to say on the issue of self defence.

" From the neighbouring court in Uganda -vs- Mbumbuli 1975. HCB 225 the court observed as follows on the elements of self defence:

" First there must be an attack on the accused. Secondly that the accused must as a result of the attack believe on reasonable ground that there was eminent danger of death or serious bodily harm. Thirdly accused must have believed it necessary to use force to repel the attack meted upon him. Fourth that the force used by the accused must be such force as accused believed on reasonable grounds to have been necessary to prevent or resist the attack. Fifth the nature of the force used by the accused must be proportionate to the attack. "

The Appellant stated that the complainant was not armed. He himself was armed with a machete and a stick. There was no evidence tendered to prove or establish any injury he claims he suffered from the attack by the complainant. He also says he reported to the Sub-Area Manager but he did not call him as a witness. This court in the premises finds that he absolutely had no reasonable grounds to attack the complainant or use the machete against him in order to resist further attacks. The evidence tendered at the trial shows that it is the complainant who was attacked by the Appellant who unlawfully inflicted grievous harm on him. The clinical officer (PW3) classified the injuries as grievous and tendered proof (P3 form as Exhibit 4.) In my view the prosecution's case was watertight. I am not persuaded by the Appellant's contention that the prosecution's witnesses were inconsistent or contradictory because they were not. Their evidence was consistent with the offence committed and find that the trial's court conclusion on the evidence tendered was proper. The conviction was well supported by the evidence.

In the premises this court finds no merit in this appeal. The same is disallowed. The conviction is upheld and since I had already rendered myself on the sentence, the same shall remain.

Dated, signed and delivered at Chuka this 29th day of October, 2019.

R. K. LIMO

JUDGE

29/10/2019

Judgment signed, delivered in the open court in presence of Momanyi for Respondent.

R.K. LIMO

JUDGE

29/10/2019