



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KABARNET**

**HCCRA NO. 11 OF 2018**

**MKK.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**[An appeal from the original conviction and sentence of the Principal Magistrate's Court at Eldama Criminal Case no. 393 of 2013 delivered on the 14<sup>th</sup> day of December, 2017 by Hon. J. Nthuku, SRM]**

**JUDGMENT**

1. The appellant was 14/12/2017 convicted and sentenced to imprisonment for five years and fines of various counts for the offences of causing grievous harm and offences of resisting arrest, entering into a forest and cutting forest produce contrary to stated provisions of the Penal Code and the Forest Act.

2. The particulars of the charges were as follows:

**“CHARGE SHEET**

**CHARGE: GRIEVIUS HARM CONTRARY TO SECTION 234 OF THE PENAL CODE**

**PARTICULARS: MKK: On the 17<sup>th</sup> day of May 2013 at Chemususu forest in Koibatek District within Baringo County, jointly with another one not before Court, unlawfully did grievous harm to TIMOTHY KIPCHUMBA KOSGEL.**

**COUNT II**

**CHARGE: RESISTING ARREST CONTRARY TO SECTION 253 (a) OF THE PENAL CODE.**

**PARTICULARS: MKK: On the 17<sup>th</sup> day of May 2013 at Chemasusu forst in Koibatek district within Baringo County, jointly with another not before Court resist the lawful apprehension of himself for the offence of entering into a forest and cutting forest produce.**

**COUNT III**

**CHARGE: ENTERING INTO A FOREST CONTRARY TO SECTION 52 (1) (g) AS READ WITH SECITON 52 (2) OF THE FOREST ACT 2005.**

**PARTICULARS: MKK: ON THE 17<sup>TH</sup> Day of May 2013 at Chemasusu forest in Koibatek District within Baringo County jointly with another not before Court entered into Chemasusu forest without authority from Chief Forest Conservator.**

**COUNT IV**

**CHARGE: CUTTING FOREST PRODUCE CONTRARY TO SECTION 52 (1) (a) AS READ WITH SECTION 52 (2) OF THE FOREST ACT 2005.**

**PARTICULARS: MKK: On the 17<sup>th</sup> day of May 2013 at Chemasusu forest in Koibatek District within Baringo County, was found jointly with another not before Court cutting forest produce namely Pod to wit 5 trees all valued at Ksh.114,366/= using one Powersaw make husquarna 268 and 3 Pangas without authority from Chief Forest Conservators.**

3. In sentencing the appellant, the trial Court considered the appellant's health status and the gravity of the offences as follows:

**Accused in Mitigation:**

*I have a child joining Form 4 and I am the only parent he has. I am sick. I attend clinic every time. I have my clinic attendance cards in Court for HIV.*

**HON. J. NTHUK**

**SENIOR RESIDENT MAGISTRATE**

**COURT**

*I have considered the mitigation by the accused person and as much as it is evident he is on ARV's what he did was gross and I shudder to imagine what would have happened if the complainant was all alone during the attack. I therefore sentence the accused person as follows:*

**Count 1:** *he will serve five years (5 years) imprisonment.*

**Count 2:** *he will pay a fine of Ksh.5000/= in default 30 days imprisonment.*

**Count 3:** *he will pay a fine of Ksh.50,000/= in default 6 months imprisonment.*

**Count 4:** *he will pay a fine of Ksh.50,000/= in default 6 months imprisonment.*

*Sentence to run consecutively.*

*Right of appeal 14 days.*

**HON. J. NTHUKU**

**SENIOR RESIDENT MAGISTRATE**

**14.12.2017**

**COURT:**

*Cash Bail of Ksh.20,000/= to be released to the depositor. Concerning the person claiming title deed let him swear an affidavit stating the details of the land and date of deposit for Court action.*

4. The appellant appealed and set out his Grounds of Appeal in the Petition of Appeal dated 20/2/18 as follows:

**"PETITION OF APPEAL**

*My lordship, I kindly make the following submission in report of the petition of an appeal of leniency under the following mitigation condition:*

1. *That my lord's I'm first offender in this case.*

2. *That my lords I have children who are still young and my first born son did his final exams last year at [Particulars Withheld] High School and due to my absence he might not join the university, so I mostly humbly pray that may the honorable Court re-evaluate the said conviction.*

3. *That my lords I am sickly and most of the nutrition and herbal medicine I normally use are not found in prison.*

4. *That, the honorable Court may re-consider my Appeal and quash this conviction and sentence so that I may be set at liberty, given a non-custodial sentence or reduction of sentence.*

5. *That am now a reformed person since I have stayed in prison for a long time and acquired skills which I will use to support myself and my family to earn a living."*

5. The appellant subsequently filed written submissions seeking leniency in the sentencing and appealed for "a non-custodial sentence" and urged that:

*"2. That my lord this matter emanated due to poverty. My lord I come from a poor family. I was struggling with my casual part time*

jobs in order for my family to get their basic needs also my lord, my parents are aging and they cannot afford to do casual jobs in order to meet their basic needs.

3. That my lord as I have indicated in my grounds of Appeal no. 2 that I have a family and my son did national examination at [Particulars Withheld] High School last year and he performed very well. He might not join University due to my absence and also my wife abandoned them after my arrest and imprisonment they are currently staying with my grandparents both of them were depending on me. I humbly seek that this honourable Court may reduce the said sentence to non-custodial sentence so that I may be able to work and provide for my family or I may be set free at liberty or part of sentence be reduced”.

6. The DPP did not oppose the appeal and in oral submissions before the Court urged that the trial was defective for failure to take plea before proceeding to call witnesses after the trial Court reopened following misplacement of Court file, but that an order for retrial would occasion an injustice on the appellant as follows:

**Appellant**

*I have typed submissions. I do not wish to add to the submissions.*

**DPP**

*Appeal is not opposed.*

*Appellant convicted of 4 counts first of grievous harm. The reason why it is not opposed despite overwhelming evidence it was a retrial previously on 2013 matter. At the time the Court file disappeared when the matter was at Defence stage and the exhibits disappeared.*

*This took some time and when the matter started a fresh in 2017. The exhibits were found some of them but the trial Court file was never found.*

*The proceedings that were filed in the appeal show that the matter was a fresh trial. The matter went straight to Pw1 but no **plea** was taken.*

*This was a mistrial because no trial can start without a plea. That was an inconsistency that happened during trial which can only be used for benefit of the accused.*

*Court may consider the order for retrial but because of the Antecedents of the trial it may prejudice the accused. The accused was brought to Court in 2013. I have checked the circumstances and discovered that appellant was injured during the scuffle. Considering that the retrial would not be fair to the accused, the complainant in count I may be advised to seek civil remedy.*

**Appellant in reply**

*I do not have anything to add. I have been in custody for 1 year 9 months since sentence on 14/12/17. I am due for release on January 2022.*

**Issues for Determination**

7. The question before the Court is, therefore, whether the trial was defective and whether a retrial would be ordered or whether the appellant was properly convicted by the trial Court and if so whether the sentences were excessive.

**Determination**

8. From the record of the trial Court, the matter was pending defence hearing when the Court file went missing and when it was found, the hearing resumed on 6/11/2017 when the prosecution recalled its witnesses Pw1-Pw3 starting with the complainant Pw1. Further hearing was set for 9/11/2017 when the investigating Officer testified (Pw4) and then adjourned to 22/11/2017 when the examining Clinical Officer (Pw5), and the prosecution's case closed. Upon being placed on record, the appellant denied the offences but conceded to having been in the Chemususu forest looking for his brother's cows, having been sent by the brother, and alleged that he had met with armed forest guards one of whom had threatened him with a gun, "I ran towards the opposite direction about 30 metres and I heard a loud noise and I was hit by a bullet and lost consciousness".

9. Having re-evaluated the evidence before the trial Court as required by (**Okeno v. R** (1972) EA 32, I have established, and I respectfully agree with the prosecution that there is overwhelming evidence of the appellant's involvement in offences charged, as detailed by the testimony of Pw1 as follows:

**"PW1**

*I am **KFS NO.01586** Timothy Kipchumba Kosgei. I am a constable at Kenya Forest Service, Chemasusu Forest Station.*

*On 17<sup>th</sup> May, 2013 I was at Chemasusu Forest Station 10:00 a.m. myself and Nyaboga (my colleague) went on patrol in Tripkatoi*

Soi Bei beat. After 3 hours or so in patrol, we heard a power saw in the indigenous forest cutting wood. We followed a foot path in the forest to the scene. We found a man on the narrow path, he saw us and ran towards where the power saw was. We ran after him and he ran away screaming. I was ahead of my colleague in the chase. Both of us were in uniform. He went past the power saw. At the place where the power saw was, there were 4 people, one operating the power saw and 2 standing nearby. On seeing us, the one with power saw dropped it and ran away. One of the two people who were next grabbed the power saw and tried to start it. The other people ran away. I fired one shot with my gun to scare him. He dropped the power saw and advanced towards me then bend down and picked a panga. I kicked him and he fell and let go of the panga. I went and tried to restrain him, he grabbed me as I held my gun with the right hand. One of the people who had ran away came and grabbed me from behind and pulled me. I struggled with both protecting my gun. I called out my colleague to come and help me, I had lost him in the chase. He saw the wrestle and fired a bullet. The person I had been struggling with let go of me and took a panga and attempted to slash my head. I blocked with my left hand and he cut me here. (shows scar on left arm). That is him (points at accused) person. The other man ran away and the accused person herein saw I was fallen. He cut me on the back I knelled and fired two shots but I missed. He saw unperturbed he didn't run away. I grabbed him and threw him on the ground and took away the panga and restrained him.

My colleague who had chased the other man came and helped me restrain the accused person who is in Court. We made a phone call to Inspector Henry Mugendi – our in charge. I was bleeding on the arm and the back. My uniform was soaked in blood. We took the power saw. This is the one orange in colour 268. They had 3 pangas. They are in Court.

- Power saw engine (without blade) – **PMFI – 1**

- Pangas – **PMFI – 2 a, b & c.**

There was a tool box and 2 jerricans for oil.

- Jerricans – **PMFI – 3 a & b.**

**Prosecutor:**

The tool box had been produced in the earlier proceedings but it can't be traced in Court store.

**Witness continued:** They had cut down 5 Podo trees and split into timber. We couldn't carry the timber because it was deep in the forest but our forest in charge prepared a report for the damage. In the depth of the forest, no vehicle can get there so we had to walk to the edge of the forest where our in-charge was waiting with a vehicle. I was rushed to Eldama Ravine Police Station where the OCS said I be rushed to hospital and it was done. I was stitched on the back and hand. I have a copy of the P.3 form which I was issued with. It was filled at Mercy Hospital on 21<sup>st</sup> May, 2013 – **PMFI – 4.** I have recovered save for the 2 scars. The one who cut me is that man (points at accused person).

**COURT:** Accused person identified by the witness.

I knew him before that day as a resident of Tripkatoi. We used to call him Babu.

**Cross-examined by Accused person**

When the person on the foot path saw us in uniform he ran away screaming even before we could identify ourselves. He ran away to alert your there were officers coming so we gave chase. I am the one who shot at you at you but at the scene I didn't know I had hit you. I did it in self defence. When your colleague ran away, you attacked me and your colleague came from behind to help you.

The power saw had a blade when we brought it to Court I don't know what happened to it in the Court store. There is no way I could carry that wood from deep in the forest where vehicles can't penetrate and I was badly wounded. It is much later when I realized I had shot you. My aim was to surely shoot you so as to save my life. The tool kit was produced in the earlier proceedings before the Court file disappeared and you know it. There were no cows of other people on the path.

**J.N. NTHUKU**

**SENIOR RESIDENT MAGISTRATE**

**Re-examination by prosecution**

I was shooting in self defence because he was ready to kill me. If I intended to kill him, I would done so after restraining him since I had many bullets but I didn't.

**HON. J. NTHUKU**

**SENIOR RESIDENT MAGISTRATE**

10. The evidence of Pw1 was supported by that of his colleague Pw2 with whom he was on patrol at Chemususu forest on the material date the 17/5/2013 and by their Senior in charge of forests, Koibatek (Pw3) who confirmed that he responded to a call by Pw1 "saying that he had been attacked at Tripkatoi in Chemusus Forest. He said he found the attacker cutting trees. He needed help so I went with 4 officers and

at the forest boundary I found Timothy (Pw1) and Nyaboga and the accused person. Timothy was bleeding on the hand and back while the accused's right hand was bleeding. I took both to Eldama Ravine Police Station".

11. The Investigating Officer Pw4 produced Photographs taken by the scene of crime officer showing the felled trees. He also produced power saw exhibit 1 with blade missing, 2 oil jerry cans Exh 2. (a) and (b) and 3 pangas Exhibit 3 (a) (b) and (c), which were recovered by the complainant. Pw5, the Clinical Officer certified injury on the complainant being "a deep cut on the left elbow joint and at the back".

12. Without placing the burden of proof on the accused, the Court notes that the unsworn statement of the appellant did not explain why the forest guards allegedly attacked the appellant for no apparent provocation. I find the consistent evidence of the prosecution witnesses to be unshaken by the defence statement. I find the offences proved beyond reasonable doubt.

### **Whether trial defective**

13. I am, however, unable to agree with the DPP that the recalling of the prosecution witnesses after the file had gone missing in this case without retaking of plea is a defect which goes to the root of the trial as would necessitate a retrial.

14. No prejudice is shown to have been occasioned on the accused as the trial merely restarted with all the witnesses being called again with full cross examination by the accused who had denied the charges before the Court file went missing. Indeed, the accused had occasion to have cross-examination of all the witnesses twice, before and after the Court file was misplaced, as the earlier trial had gone up to the defence stage.

15. Section 382 of the Criminal Procedure Code provides that a defect in the trial will not lead to automatic quashing of a judgment unless the defect occasions prejudice to the accused as follows:

***"382. Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a Court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice:***

***Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the Court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings.***

16. The appellant had full opportunity to raise the issue of plea taking all through the re-hearing with 5 witnesses for the prosecution and when defence gave an unsworn statement before judgment.

17. And what prejudice can be shown from having a full-trial of a charge in accordance with Article 50 (2) of the Constitution? There could only be prejudice if the accused had wished to plead guilty to the charge but was on account of the failure to take plea a fresh on the restarting of the case delayed in the final determination of the trial. The appellant could have sought to change his plea any time before the sentence of the trial Court. See *Kamundi v. R* (1973) EA 540. No indication was given that the appellant had wished to plead other than the plea of guilty which he had entered and which was the basis of the trial proceeding up to the Defence stage before the Court file went missing, because as the Court of Appeal for East Africa in *Kusenta & Anor v. R* (1975) EA 274 held "only a person who has pleaded not guilty can be tried."

18. I, consequently, do not find that there was a defective trial in this matter. The Court may have sought to confirm that the accused was pleading not guilty before calling for the recall of the witnesses but failure to do so did not occasion any injustice and it was not a defect capable of nullifying the trial.

19. Indeed, had the Court file been found with its evidence intact, the trial Court would have been entitled to proceed to taking the defence statement upon the ruling of case to answer by the previous Court, or in the previous proceedings, before the Court file went missing, pursuant to section 200 of the Criminal Procedure Code.

### **Orders**

20. However, the sentence of imprisonment for 5 years for the offence of grievous harm appears to be excessive in the circumstances of this case. I consider that imprisonment for a period of 3 years meets the justice of the case in count I. The sentence of three (3) years imprisonment shall commence on the date of sentence in trial Court as the appellant had been on bail pending trial

21. The Court does not interfere with the sentences in count II, III and IV of the charge sheet.

*Order accordingly.*

**DATED AND DELIVERED THIS 28<sup>TH</sup> DAY OF OCTOBER 2019**

**EDWARD M. MURIITHI**

**JUDGE**

**Appearances:**

Appellant in person.

Ms. Macharia, Ass. DPP for the Respondent.