



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 238 OF 2010

THOMAS MUTUKU WAMBUA APPELLANT

VERSUS

REPUBLIC

(Being an appeal from the conviction and sentence of Hon. E juma Osoro Senior Resident Magistrate delivered on 12/8/2010 in Kitui Senior Principal Magistrate Court Criminal Case No. 1096 of 2009)

(Before Hon. B. Thurairaja Jaden J)

J U D G M E N T

1. The Appellant, **Thomas Mutuku** was charged as follows:-

Count I: Attempted robbery with violence contrary to **section 297 (2)** of the **Penal Code**.

The particulars of the offence were that on the 1st day of September 2008 at around 1.30 p.m. at *[particulars withheld]*, in **Kitui District** of the **Eastern Province** while armed with a dangerous weapon namely *panga* attempted to rob one **E N K** off her money and immediately before or immediately after the time of such robbery used actual violence on the said **E N K**.

2. **Count II:-** Grievous harm contrary to **section 234** of the **Penal Code**.

The particulars of the offence were that on the 1st day of September 2008 at around 1.30 p.m. at *[particulars withheld]*, in **Kitui District** of the Eastern Province, unlawfully did grievous harm to **G K**.

3. When the Appellant was arraigned before the lower court, he pleaded not guilty. The case proceeded to a full hearing.
4. The prosecution case was that at the material time, the complainant in count I, **E N K** (PW1) was at her home washing clothes. She was in the company of her sister, **G D** the complainant in count II (PW2). The complainant's (PW1) children, eleven (11) year old **W** and nine (9) years old **B** were also present.
5. The Appellant who was a former employee of the complainant in count I (PW1) came to the complainant's (PW1) home. The Appellant grabbed the complainant's (PW1) cell phone that was with her son **W K (PW3)**, and started making a telephone call. The complainant in count I (PW1) then told the Appellant not to make telephone calls using her phone. The complainant in count I

- (PW1) then bent down and continued washing her clothes. The Appellant made a telephone call then threw the phone down then whipped out a *panga* from his clothes and slapped PW1 with it at the back. PW2 asked what was wrong. The Appellant then turned on PW2 and cut her twice on the left hand and on the thigh and then turned on the complainant in count I (PW1). The Appellant cut the complainant (PW1) severally on the hands, head, feet, legs while demanding money from her. The Appellant frisked the complainant in Count II (PW2) up to her underpants and even the private parts then ran away while the people left at the scene screamed for help. The complainant in count I (PW1) who had fallen unconscious was taken to **Kitui District Hospital**. The Appellant was arrested and the *panga* recovered. The Appellant was subsequently charged with the present offences.
6. The Appellant in his defence opted to give sworn evidence and not to call any witness. The Appellant described himself as a houseboy. That at the material time he had gone to get his money from the complainant in count I (PW1). He found the complainant in count I (PW1) at home with her sister (PW2) and the children. PW1 then inquired from the Appellant why the Appellant had arrived at the home before the Assistant Chief. PW1 then told the Appellant to collect the money on Friday.
 7. PW2 then went to the house and got a whip and started beating the Appellant. The Appellant became annoyed and pushed PW2. PW2 then ran inside the house and returned with a *panga*, aiming the same at the Appellant's head. The Appellant blocked the *panga* with his hand and he was cut in the process. The Appellant kicked the *panga* and in the process PW1 was injured. The Appellant ran to the police station but he was arrested and arraigned in court.
 8. The trial magistrate found the Appellant guilty of a lesser charge under **section 179** of the **Criminal Procedure Code** of causing grievous harm instead of the offence of attempted robbery. The Appellant was convicted for the offence of grievous harm in both Count I and II and sentenced to life imprisonment in both counts. The sentences run concurrently.
 9. The Appellant was aggrieved by both the conviction and sentence and appealed to this court on the following grounds:-
 - v. **The prosecution case was not proved.**
 - v. **The defence case was not considered.**
 - v. **The sentence was harsh and excessive.**
 - v. **The mitigation by the Appellant was not considered.**
 10. PW1, her sister PW2 and her son PW3 have given a consistent and corroborative account of evidence that shows both PW1 and PW2 were attacked by the Appellant with a *panga* and cut severally until PW2 became unconscious. The offence took place in broad daylight. The parties knew each other. The Appellant had previously worked for PW1 at her kiosk.
 11. The Clinical Officer PW8 was **Peter Wambua**. His evidence shows that PW1 was unconscious and bleeding actively and had cuts on the head, chest, forearms and a cut on the foot rendering the foot with no sensation. That PW1 was transfused with three units of blood and the cut wounds were stitched. That PW2 had sustained cut wounds on her head. The Clinical Officer described the injuries sustained by both PW1 and PW2 as grievous. The Clinical Officer filled in the P3 form which shows that the complainant in count I (PW1) sustained multiple deep cuts which lead to loss of function to both upper limbs and loss of sensation on the right foot. Treatment involved admission for one month with three units of blood transfusion and surgery. The injuries sustained by PW2 were less severe.
 12. The evidence of PW6 **J M** who had replaced the Appellant as the employee at PW1's kiosk testified that the Appellant passed by the kiosk at about 2.00 p.m. and threatened him with a *panga* telling him to leave the kiosk. PW7 who was telephoned by the complainant's (PW1) husband rushed to the complainant's (PW1) home and found her unconscious with several *panga* cuts on her body and also saw PW2 at the scene with a head injury. PW6 denied any knowledge of a grudge between the Appellant and PW1.
 13. PW5 **Lawrence Kithaka**, the area Assistant Chief and the **OCS** at **Mutitu Police Station** also received the reports of the assault. The Assistant Chief and the **OCS** saw the injuries on PW1. The **OCS** further testified he found the Appellant running away with the *panga*. The *panga* was produced in court as an exhibit.

14. The Appellant in his defence case elected to give sworn evidence. No witnesses were called. The Appellant's case is that he had gone to get his money from the complainant in Count I (PW1) when he was attacked with a whip and a *panga* by the complainant in count II (PW2). It is not clear why PW2 would assault the complainant. According to the Appellant he had no grudge with PW1. The defence by the Appellant that he blocked the *panga* and was defending himself when PW1 was injured is not plausible. PW1 sustained multiple injuries from the head to the feet. The injuries reflect a deliberate intention to injure as opposed to accidental injuries while the Appellant was defending himself. The witnesses who rushed to the scene (the worker, PW5, the Assistant chief PW6 and the OCS PW7) did not testify about having seen the Appellant with any injuries. During cross-examination, the Appellant who said he had a pay dispute with the complainant in count I (PW1) stated that he kicked the *panga* from PW2's hand and it must be then that the *panga* injured PW1. This cannot be the correct version of events taking into account the injuries PW2 sustained.

15. Having evaluated the entire evidence on record, I am satisfied that the Appellant's conviction was based on sound evidence. There was no mitigation by the Appellant that showed any remorse concerning the acts of brutality meted out on the complainants. The sentence cannot be described as harsh and excessive in the circumstances of this case. The sentence is within the law and this court will not interfere with the same. The appeal has no merits and is dismissed.

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B. THURANIRA JADEN

JUDGE

Dated and delivered at Machakos this 28th day of May 2014.

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B. THURANIRA JADEN

JUDGE