



**REPUBLIC OF KENYA**

**High Court at Bungoma**

**Criminal Appeal 21 of 2008**

**PATRICK KUTORE MATENDEKERE.....APPELLANT**

**~VERSUS~**

**REPUBLIC.....RESPONDENT**

(Appeal from the judgment of the Resident Magistrate Hon. F. Kyambia in Bungoma court in cr. case no.2470 of 2008)

**JUDGEMENT**

The Appellant was convicted of reckless and negligent act contrary to section 243 (d) of the Penal Code. The particulars of the offence were that 27/10/2007 at Syombe Shopping Centre in Kimaeti Location of Bungoma District in Western Province, in a manner that was so negligent he omitted to take precautions against probable danger to wit his dog which bit Judith Nekesa Wasike (PW1) and occasioned her actual bodily harm. He was fined Ksh.2,000/= in default to serve 3 months in jail.

The prosecution evidence was that on 17/10/2007 at about 6.00 p.m PW1 was with her husband Wenslaus Mulongo Wakali (PW3) at the home of one Luka Makokha. PW3 entered the house of Luka and left PW1 outside. She was bitten by the Appellant's dog. She was taken to Kocholia for treatment and later to Bungoma District Hospital. Elias Adoka (PW2), Clinical Officer at Bungoma District Hospital, who examined PW1 found her with dog bites on left leg.

The Appellant denied the prosecution evidence in sworn defence. He testified that he had never owned a dog and that the dog that bit PW1 was not his. He called two witnesses, Assistant Chief Reuben Nyongesa (DW1) and Doris Nanjala (DW2). DW2 stated that the Appellant had no dog. DW1 stated that the dog that was photographed belonged to one Meshack Barasa, and not the Appellant.

Assistant Chief John Nyongesa (PW4) testified for the prosecution to say that he knew the Appellant's dog and that it was the one photographed. The photos were produced as exhibits 3. These are the same photos DW1 said were of Meshack's dog. It is notable that neither PW4 nor DW1 were at the scene on the day in question. PW1 and PW4 testified that the dog belonged to the Appellant.

It is material that the attack happened in the home of Luka Makokha. PW1 stated that the dog had moved from the home of the Appellant to the home of Luka. PW3 stated that Luka was present during the incident. Unfortunately, Luka was not called as a witness. If the incident was in his home is it not possible that this was his dog, now that the Appellant says this was not his dog? In other words, Luka was a crucial witness whom the prosecution should have called.

On the whole, my independent view is that the evidence that the dog that bit PW1 belonged to the Appellant was not sufficient. Even if the evidence was sufficient, the charge was not proved beyond doubt. Under section 243 (d) of the Penal Code:

*“243 Any person who, in a manner so rash or negligent as to endanger human life or to be likely to cause harm to any other person:*

- (a) .....
- (b) .....
- (c) .....
- (d) *omits to take precautions against any probable danger from any animal in his possession;*  
*or*
- (e) .....
- (f) .....
- (g) .....
- (h) .....

*is guilty of a misdemeanour.”*

For an accused to be convicted under the section evidence has to be led by the prosecution to show that the dog was known to be naturally fierce or vicious (**Kinyanjui v. Republic [1980] KLR 119**). Evidence has to be led that the dog was known to be ferocious and that it was negligently kept. This is because where the dog is tame and mild in its general temper no mischievous disposition is presumed. It must be shown that the Appellant knew that the dog was accustomed to do mischief. In the instant case, there was no evidence that this dog was known to be fierce or ferocious or mischievous and therefore that the Appellant negligently omitted to tether or guard it.

It is for these reasons that I allow the appeal, quash the conviction and set aside the sentence. Any fine paid should be refunded.

Dated, signed and delivered at Bungoma this 22<sup>nd</sup> day of October, 2012.

**A. O. MUCHELULE**  
**JUDGE**