REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL APPEAL NO. 165 OF 2010

LESIIT J.

EDWARD MUTHENGI.....APPELLANT

V E R S U S

REPUBLIC.....RESPONDENT

(From the original conviction and sentence in Marimanti SRM'S case No. 546 of 2009 – T. A. Obutu (SRM)

J U D G M E N T

The appellant Edward Muthengi was convicted of grievous harm contrary 234 of the Penal Code and sentenced to 20 years imprisonment. Being aggrieved by the conviction and sentence he filed this appeal.

Messrs M. M. Kioga & Co Advocates filed a memorandum of appeal (instead of a petition of appeal) on behalf of the appellant. Mr. Kaumbi who argued this appeal relied on grounds 1, 3 to 5 which states as follows:-

1. The learned magistrate erred in law and fact by failing to consider the complainant was the aggressor having, confronted the appellant herein, who in turn acted in self defence.

2. …….

3. The learned magistrate erred in law and I fact by his failure to appreciate that from the evidence adduced by the prosecution and the defence, the only charge which could stand was affray and not assault causing grievous harm.

4. The learned Magistrate erred in law by imposing excessively heavy sentence (20 years imprisonment with no option of fine) thereby exposing his attitude as retributive and totally devoid of justice.

5. The learned magistrate erred in law by failing to consider the mitigating pleas of the appellant and sarcastically held that while giving a sentence of 20 years imprisonment with no option of fine the court was lenient.

Ground one of the appeal raises the issue whether self defence was available to the appellant. Grounds 3,4 and 5 all challenge the sentence imposed by the learned trial magistrate for being excessive, harsh and devoid of justice and in disregard to mitigating factors raised by the defence.
The facts of the case were that the complainant PW1 rented a piece of land which neighboured the appellant's land. The appellant quarreled with the complainant over the use of a road as part of the rented land. Eventually the appellant found the complainant tilling the hired land with his wife, PW2 and an employee. The appellant attacked the complainant with a panga causing him serious injuries.
The appellants defence was that he fought with the complainant and PW2. That in a bid to assist her husband aimed a panga at him but that she accidentally cut her husband. The appellant said that PW2 continued to cut her husband even after he fell down unconscious. The appellant called DW2 and 3 who supported his evidence.

I have carefully considered re-analyzed and re-evaluated the entire evidence adduced before the trial court. I have borne in mind that I neither saw nor heard any of the witnesses and have given due allowance. I am guided by the court of appeal case of **Okeno vs Republic 1972 EA 32,**

"**An appellant on first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination [**Pandya vs. Republic (1957) EA 336] **and to the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusion** (Shantilal M. Ruwala v. Republic [1957] EA 570.) **It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses,** (SeePeters v. Sunday Post, [1958] EA 424.)"

Mr. Kaumbi for the appellant urged that the defence put forward by the appellant was good and ought not to have been disregarded.

Mr. Kimathi, learned State Counsel opposed this appeal on behalf of the State. Mr. Kimathi, in answer to the submission by Mr. Kaumbi urged that the evidence of the prosecution was water tight that the appellant attacked and wounded the complainant inflicting multiple cuts on his body. Mr. Kimathi urged that the attack was witnessed by PW2 and 3. That the doctor's findings confirmed cuts inflicted on the complainant were multiple ones. Counsel urged that the appellant's defence that PW2 cut her husband the complainant once by mistake, and then continued to cut him severally could not be believed. Mr. Kimathi also urged that DW2 contradicted the appellant when she said that the complainant tried to cut the appellant when his wife cut him.

The law is very clear as to when the defence of self defence is available.

Copy judge to provide

The learned trial magistrate after considering the evidence adduced in this case observed:-

"**I have considered the evidence on record. The issue for determination is whether PW1 sustained grievous injuries and whether it was the accused who inflicted the injuries. Apparently the offense was committed at 2.00 pm on a clear day. Accused was seen and properly identified as the person who cut the complainant PW1. He was positively identified by PW1, PW2, PW3 and PW4. He was seen disappearing from the scene. He then proceeded to report to the police that he had been**

assaulted only to be arrested. He did not have any record that he was also injured during the flight. I have also considered the defense of the accused and his two witnesses. I find it as sham and meant to mislead this court. It's not possible that PW2, the wife of PW1 continued cutting her husband with a panga without her knowledge. The doctor examined the complainant and found an opinion that the injuries were grievous".

The learned trial magistrate had the opportunity to see and examine the demenour of the witness. He was not impressed by the appellant and his two defence witnesses, especially DW2. He found their evidence a sham. On the other hand he believed the evidence of the complainant, PW2, PW3 and PW4.

On my own analyses of the evidence, I agree with the learned trial magistrate's finding that it is not logical, reasonable or plausible that PW2 could have cut the complainant as shown in the medical evidence by mistake. The complainant and his wife PW2 said that the appellant attacked the complainant with a panga, first cutting him on the head and then on the other parts of the body which they specified. The cut on the head was 18 cms long, the cut on the right knee was 20 cms long, cut on right leg was 8 cms long and there was compound fracture of the right femur thigh. All these cuts were described as deep.

The complainant had other deep cuts on the thorax and abdomen measuring 3 cm long and cuts on both hands 5 cm long. These were very serious injuries inflicted by a sharp object. The fact the complainant suffered a compound fracture on the thigh is demonstrative of the great force used to strike the complainant during the attack in question. I cannot believe that PW2 inflicted such serious injuries on the complainant who is her husband. That is unbelievable. I did observe that the appellant cross examined the complainant on the possibility of his wife having cut him. He denied it vehemently. No such question was put to PW2. That in my view spoke volumes. Why would the appellant not raise that serious issue with the culprit if indeed she was the one who injured the complainant? The reason for the omission must be because it was not true the complainant's wife attacked the complainant and I so find.

I do find that indeed the appellants attack on the complainant was witnessed, in addition to PW2, by two other witnesses PW3 and 4. PW4 was related to the complainant PW3 was not. PW3 can be regarded as an independent witness. PW3 and 4 were not at the scene when the attack began but they heard screams and ran to the scene. Both said they found the complainant lying on the ground and with the appellant armed with panga cutting the appellant. PW3 in addition said that two women including PW2 were holding the complainant. That evidence was graphic and corroborated in all material particulars the evidence of PW1 and PW2. The only variation was PW3's evidence that two women including PW2 were holding the appellant. That variation is not inconsistent with the rest of the evidence as it merely added more detail of the events witnessed by PW3.

I considered it important and telling that PW1, 2, 3 and 4 were clear that the appellant was alone at the time of the attack. The appellant did not question them regarding the presence of DW2 and 3, who appeared at the defence stage as eye witnesses of the incident. I agree with the learned trial magistrate that the evidence of DW2 and 3 could not be believed. I find further that the appellant brought them to testify in his defence as an afterthought and that their evidence was manipulated and lock cocted to mislead the court. I agree with Mr. Kimathi that the defence witnesses especially DW2, did not pass the credibility test.

The prosecution was able to establish a motive for the attack. The appellant had quarreled the complainant regarding an access road just before the grievous assault on him. The appellant was the aggressor. He formed an intention to cause grievous injury to the complainant by arming himself with a sharp object, a panga. He executed his intention by cutting the complainant, not once but eight times. The

injuries were deep and serious. The complainant had to be admitted for two months and was still in the process of recovery eight (8) months after the attack. The prosecution proved the appellant attacked the complainant and inflicted the serious injuries he suffered on the material day. The learned trial magistrates finding that the prosecution proved its case against the appellant on the required standard of proof cannot be faulted. The conviction was correct and uphold it.

On the sentence, Mr. Kaumbi urged that it was excessive harsh and devoid of justice and passed in total disregard to the appellant's mitigation.

The appellant's mitigation was that he had a young child, that he would not repeat the offence and that he had a land dispute with the complainant.

As to the land dispute, that cannot be true because the complainant did not own any land in that area. If there was a land dispute, it should have been between the appellant and the land owner not the complainant. The appellant concedes he acted as a bully and unreasonably. He took the law in his own hands against an innocent person. He used excessive force. It was not necessary for the appellant to almost severe the complainants hands, legs and head over a road access. That matter should have been resolved through other lawful means.

I did consider the appellant's personnel circumstances. Those should be weighed against the injuries and suffering he has caused the complainant. Further a person convicted of causing grievous harm is liable to life imprisonment. Taking all these factors and circumstances into consideration, I find the sentence of 20 years quite fair, lenient and legal. I will not disturb it.

In the result the appellants appeal against conviction and sentence has no merit and is dispersed. The conviction is upheld and the sentence confirmed.

Dated, signed and delivered this 22nd day of September 2011

J. LESIIT

JUDGE