



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MERU**

**Criminal Appeal 202 of 2002**

**PATRICK MUGAMBI M'AMUGA.....**  
**APPELLANT**

**V E R S U S**

**REPUBLIC..... RESPONDENT**

**J U D G M E N T**

1. Patrick Mugambi M'Amuga was on 11/4/2002 arraigned before the Chuka S.R.M.'s court in its Criminal Case No. 372/2002 and charged with the offence of omitting to take precautions against any probable danger contrary to s.243(d) of the Penal Code. It was alleged that on 14<sup>th</sup> February 2002 at Kithaki Village, Maara Location, Meru South District omitted to take precautions against any probable danger from an animal namely a dog in his possession in that he let it loose and it bit Kelvin Mwenda and thereby caused him injury.
2. The evidence of the complainant and P.W.1 Kelvin Mwenda, a 12 year old student at Mburiki Primary School was that he was going to school after lunch on 14/1/2002 when two dogs lurched onto him and one of them bit his right leg as the other was tearing his shorts. That one Murithi then came and chased the dogs and the witness and his father later went to the home of the Appellant where the witness pointed out the loose dogs which he said he knew belonged to the Appellant. He was subsequently treated.
3. During cross examination P.W.1 said that there are several homesteads adjoining the Appellant's home and that the dogs attacked him on a road he uses on his way to school. He said that he knew the dogs were kept in the homestead of the Appellant and that is to where they retreated to after biting him. He further stated that one of the dogs was brown while the other was grey.
4. P.W.2 Eric Mureithi a 13 year old stated that he was following P.W.1 when dogs emerged from the Appellant's home, and the brown one bit P.W.1 whereupon P.W. 2 used a stick to chase them away.
5. Like P.W. 1 he identified the dogs as male and female and that one was brown while the other was grey. That they were on a public road during the attack and that after P.W.1 was bitten the dogs ran back to the Appellants home.
6. P.W.3, George Kigathi Thomas was at his home when he heard his son P.W.1 screaming and when he came out to check on him found that he had been bitten by a dog. That he took P.W.1 to hospital and later made a report to the police.
7. In cross-examination the witness said that the dogs were generally known in the locality as being fierce and had previously attempted to bite P.W.1 and other people in the area.
8. P.W.4 Joseph Mwenda, a clinical Officer at Chuka General Hospital examined P.W.1, noted his

injuries on the material date and issued him with a P.3 form.

9. P.W.5 P.C. Cyrus Kaira received the report of P.W.1's attack by dogs, recorded statements from witnesses, visited the scene of the attack and saw the brown assailant dog but was unable to take photographs as the dogs ran away after initially trying to attack the visiting team.
10. Later P.W.5 was recalled and produced photographs of a brown dog and a grey one.

11. The Appellant in his defence said that he knew nothing about his case, was any way convicted and sentenced to serve 9 months in prison. It was the learned magistrate's view that the dog that bit P.W.1 belonged to the Appellant and that the Appellant failed to take precautions to stop it from attacking members of the public and especially P.W.1.

12. The Appellant, upon conviction appealed to this court on the grounds that;-

1. The trial Magistrate erred in law and in fact in holding that the dogs in question belonged to the accused person even though evidence to that effect was scanty.
2. The trial Magistrate disregarded the glaring contradictions in respect of the date the bites were allegedly inflicted on the complainant and the date, time and period when the medical officer (P.W.4) allegedly saw the complainant.
3. The learned Magistrate erred in law and in fact in admitting the photographs produced by P.W.5 regardless of the fact that the witness acknowledged that the photograph differed with the one taken at the scene.
4. It was irregular for the trial Magistrate to allow P.W.5 produce the photographs of the dogs since he was an officer of the scene-of-crime.
5. The trial Magistrate erred in law and in fact in failing to afford the appellant adequate opportunity to exhaustively tender his defence.
6. The conviction is against the weight of the evidence tendered by prosecution witness.

13. Counsel appearing for the Appellant argued that the evidence as to ownership of the dogs was not conclusive, as the dogs were not connected to the Appellant. That they were on a public road and later disappeared into a conglomerate of homesteads that did not belong to the Appellant. In any event that P.W.5 who produced the photographs of the dogs said that they ran away from the Appellant's home when he tried to take photographs. That the photographs of the dogs he actually produced differed from those he had seen.

14. Counsel also argued that the Appellant was not given a chance to defend himself, as his advocate was not in court to guide him. Lastly, that the Appellant had no control over the dogs and he ought not to have been convicted.

15. Counsel for the State argued on the other hand that all evidence especially that of P.W.1 and P.W.2 shared that the dogs belonged to the appellant and that they were not tethered or in any way stopped from being a nuisance or danger to the public. That the Appellant defended himself properly and the proceedings were not in any way defective.

s.243 (d) of the Penal Code reads as follow:-

“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.....

is guilty of a misdemeanour”

16. This offence is in the group of offences generally classified as criminal recklessness and negligence. The elements of this offence are:

(i) that there should be an animal

(ii) that the animal is in the possession of the accused person.

(iii) That the accused has omitted to take the necessary precaution to ensure that the animal does not cause probable danger.

(iv) That the accused having negligently failed to take that precaution, a person has come to harm as a result thereof or human life has thereby been endangered.

2. The Appellant denied that he was the custodian of the vicious dogs or that they were in his possession. Possession is defined as “the fact of having or holding property in one’s power; the exercise of dominion over property” (Blacks Law Dictionary 8<sup>th</sup> Edition 2004). I was incumbent upon the prosecution to prove that the dogs were under the control of the Appellant. The line taken by the Appellant in the trial was that firstly he did not know anything about the case and that he did not know where P.W.1 was bitten and by whom(?) and secondly, that the dogs were not his nor were they under his control. That line was however cut by the evidence of P.W.1 and P.W.2 who had known the dogs before as belonging to the Appellant; the evidence of P.W.3 who was told by the Appellant’s brother that the dogs belonged to the Appellant and the admission when he met the Appellant that the dogs belonged to him; the evidence of P.W.5 who found the dogs at the home of the Appellant and produced photographs of the dogs at the scene. There is no evidence to rebut this consistent and reasonable line of evidence and I would as did the trial magistrate find that the dogs were under the control and possession of the Appellant.

17. That the dogs then strayed away from home onto a publicly accessible road and had done so on as many occasions prior to the date of attack on P.W.1 clearly shows that the Appellant failed to take the necessary precautions to ensure that they were not a danger to human beings. P.W.1, P.W.2 and P.W.3 clearly gave examples of attempts by the dogs to attack them prior to the relevant date and mentioned a part from P.W.1 and P.W.2, one Mrs. Reuben and one Dira as others who had been attacked by the dogs.

18. That P.W.1 was attacked sealed all the proof necessary to establish the offence under s.243(d) of the Penal Code.

19. I have therefore seen the grounds of Appeal filed, and heard counsel for the Appellant and for the State. None of the issues raised materially affect the proof of the offence and the Appeal must fail.

20. The Appeal is hereby dismissed.

21. Orders accordingly.

**Dated, signed and delivered in open court at MERU this 21st Day of July 2006**

**ISAAC LENAOLA**

**JUDGE**