

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA

CRIMINAL APPEAL NO 347 OF 1999
(From Original Conviction and Sentence in Criminal Case No. 107 of
1999 of the Senior Resident Magistrate's Court at Malindi -J.M. Matu
- S.P.M.)

SONGEA LONGANI APPELLANT

- VERSUS -

REPUBLIC RESPONDENT

CONSOLIDATED WITH

CRIMINAL CASE NO. 349 OF 1999

(From Original Conviction and Sentence in Criminal Case No. 107 of 1999 of the Senior Resident
Magistrate's Court at Malindi – J.Matu – S.R.M.)

THOMAS AYIER APPELLANT

- VERSUS -

REPUBLIC RESPONDENT

J U D G E M E N T

THOMAS AYIER (THOMAS) and SONGEA LONGANI (SONGEA) were both charged and convicted on a charge of causing grievous harm contrary to Section 251 of the Penal Code. The Court convicted and sentenced each to serve 5 years imprisonment plus 10 strokes on Count 1 and 2 years imprisonment in respect of Count II. It is this Conviction and Sentence that they now prefer an appeal against. The evidence before the Trial Court is that on the morning of 11.1.99 at around 8.30 a.m. RICHARD SAKARI (PW1) and CHRISPIN MAJENGO (pw2) were on duty at their employer's site at Watamu known as Piero Reporte Co. Ltd. where they worked as watchmen. While so performing their duties SONGEA who was employed as a watchman of the bordering property owned by Sun Palm Ltd. crossed over to their side of the fence and enquired from the Manager one Salim why construction work was going on. He was told by Salim that work would proceed as ordered by the O.C.S. which was until the Court had made a decision on the boundary dispute between Sun Palm Ltd. and Piero Reporte Co. Ltd. PW1 said, at this point THOMAS said if they continued with the construction, someone would die and he left only to return with THOMAS who was also employed as a watchman by Sun Palm Ltd.

They together commanded the workers to stop working and when PW2 tried to enquire from SONGEA why the work should stop he set upon him with a Rungu. PW1 tried to separate them and he was hit with the Rungu only to get to his feet again to find THOMAS aiming to stab PW1 with a knife. In the scuffle both parties suffered various degrees of injury. The incident was reported to the Police and THOMAS and SONGEA were arrested and charged.

THOMAS gave an unsworn defence while SONGEA gave a sworn one. Both stated that it was PW1,2 and other workers from their site who attacked them while on their side of the boundary. The called Two witnesses.

PW1 said, SONGEA had said that they were under instructions of their employer to stop the work and

for which they would be paid. The Appeals are grounded on 10 grounds each with grounds No.1 to 8 touching on the evidence being consolidated while the other grounds touch on the arrest and the sentence. The State Counsel Mr. Gumo supported both the Conviction and Sentence on the grounds that the evidence against them was overwhelming and leaves no doubt as to who the aggressors were. He said the defence of self defence was an after thought.

I have read the record of the Trial court and note that there is no dispute that a boundary disputer was in existence at the time and in fact a suit was pending before the court between the employers of the two fighting groups. The attackers and attacked were employed as watchman. SONGEA told PW1 they were under instructions to stop the work for which they would be paid a lot of money. While cross-examining PW1 and 3, THOMAS did put it to the two witnesses that they attacked PW1 and 2 because they refused to stop continuing with the construction work. PW2 and PW3 in their evidence in chief as well as in cross-examination, said they continued with the construction work because the O.C.S. had instructed the two sides to continue with their normal work until the Court came up with a decision on the dispute as the case was pending before the court.

CPL. RICHARD MANA (PW4) on visiting the scene recovered a Rungu, knife and a whip which the Appellants did not deny belonged to them.

The evidence clearly points to the fact that the Appellants attacked PW1 and 2 while on their correct side and without any provocation. It is a very unfortunate state of affairs as the Appellants in my view acted unreasonably with a view to please their employer.

They allowed the dispute between the two employers to control of their emotions in complete disregard of all else around them. In the circumstances I do not see any reason to warrant any interference with the Trial Court's finding. However for the simple reason that they were carrying out instructions their employer though in an excessive manner. I will reduce the sentence to one of 3 1/2 years imprisonment and 3 strokes of the cane. The Appeal shall succeed to that extent only.

Dated and delivered at Mombasa this 16th day of June, 2000.

P.M. TUTUI

COMMISSIONER OF ASSIZE