



**REPUBLIC OF KENYA**

**IN THE HIGH COURT**

**AT CHUKA**

**CRIMINAL APPEAL NO. 16 OF 2020**

**REPUBLIC.....APPELLANT**

**VERSUS**

**MARTHA KINYA JUSTIN.....RESPONDENT**

**(Being an appeal against judgment by Hon. N. Kahara (SRM) sitting at Chuka Law Courts**

**in Criminal Case No. 1028 of 2017 and delivered on the 27<sup>th</sup> .07.2020)**

**JUDGMENT**

**INTRODUCTION**

The Respondent Martha Kinya Justin was charged before the ***Senior Resident Magistrate's Court at Chuka*** with the offence of assault causing actual bodily harm contrary to ***Section 251 of the Penal Code, Cap 63 Laws of Kenya***. It was alleged that on 15<sup>th</sup> December 2017 at Caramba Location Maara Sub-County within Tharaka Nithi County, she unlawfully assaulted George Murithi M'Arachi thereby occasioning him actual bodily harm.

The Respondent pleaded not guilty to the charge and a full trial was conducted. The prosecution called five witnesses in support of their case. At the close of the prosecution's case, the trial magistrate ruled that a *prima facie* case had been established to warrant the respondent to be put on her defence as charged.

The respondent opted to give her defence on oath. She also called one witness in support of her case. The trial magistrate proceeded to deliver her Judgment and held that the prosecution had failed to prove its case against the respondent beyond any reasonable doubts. The court proceeded to acquit the respondent under ***Section 215 of the Criminal Procedure Code***.

The State who is the appellant in this case was dissatisfied with the Judgment and to file this appeal vide a petition of appeal dated 10<sup>th</sup> August 2020. The appeal is based on the following grounds:

- i. THAT the learned trial magistrate erred in law and fact by finding that the prosecution failed to prove its case beyond reasonable doubt.**
- ii. THAT the learned trial magistrate erred in law and in fact by finding that the complainant was attacked and injured when the respondent was acting in self defence.**
- iii. THAT the learned trial magistrate erred in law and in fact by holding that the complaint and his brothers had ill intentions going to the home of the accused.**
- iv. THAT the learned trial magistrate erred in law and in fact by finding that the prosecution witnesses were inconsistent and were lying.**
- v. THAT the learned trial magistrate erred in law and fact by disregarding complainant's testimony.**
- vi. THAT the learned trial magistrate erred in law and in fact by placing heavy reliance on the defence untruthful evidence.**
- vii. THAT the learned trial magistrate erred in law and in fact by condoning and praising the violent nature of the accused**

person.

**viii. THAT the learned trial magistrate erred in law and in fact by acquitting the respondent against the weight of the evidence adduced.**

The appellant prays that the order of acquittal be set aside.

The Respondent opposed the appeal. This court gave directions that the appeal be disposed of by way of written submissions.

For the appellant submissions were filed by the office of the Director of Public Prosecutions on 3/5/2021.

For the respondent, submissions were filed by Moroncha and Munene Advocates on 30/6/2021.

The appellant's main contention is that it had proved its case against the respondent beyond any reasonable doubts.

I have considered the appeal, the submissions and the proceedings and the Judgment of the trial magistrate. It is important at this stage to analyze the evidence tendered before the trial magistrate, the defence of the respondent and the Judgment of the trial magistrate.

### **PROSECUTION'S CASE**

PW1 George Murithi M'Arachi stated that the respondent is a neighbour who stays about 2 – 3 kms from his home. That on the 15<sup>th</sup>.12.2017, he had called his brothers to take him to the Respondent's home since he had acted as a surety the Respondent's son depositing his title deed to secure his release but thereafter, the son did abscond court prompting possibility of the said land being auctioned. That upon reaching the Respondent's home, they found DW2 who was tending to her child. That DW2 instead sent a young man to go call the accused person herein. That after some time, the Respondent person came but entered straight to her bedroom and came out with a panga. That its at this time that the brother to PW1 told him that it was time for them to leave. As PW1 was getting out, the Respon`dent cut him on the forehead and on the right hand side of the head, and further, on the left hand near the thumb. In cross examination, he stated that he was not happy when Respondent's son absconded court yet he had a criminal case and he had stood surety for him.

PW2, Silas Mwongera M'Arachi informed court that PW1 is his elder brother and the Respondent is their aunt. That on the 15<sup>th</sup>.12.2017, he accompanied PW1 to the Respondent's home to go seek for reasons why PW1's son had absconded court thus exposing PW1's land to a possibility of being auctioned. That upon reaching, they found PW1's daughter tending to her child and she welcomed them and thereafter sent a young man who was repairing a television to go call DW1. When she came, she went straight to her bedroom and told PW1 to leave her home. PW1 did leave the house but the accused person followed him and cut him two times on the head and on the left hand near the thumb. That PW1 started bleeding and so he decided to take him to the hospital.

PW3, Frankline Kaburu stated that he is a farmer and that PW1 and PW2 are his brothers. He went on to say that on the 15<sup>th</sup>.12.2017, he accompanied PW1 and PW2 to visit DW1's home since the son to DW1 had absconded court after PW1 stood as a surety for him thus exposing PW1's land to a possibility of being auctioned. That upon reaching her home they found a young man repairing a radio and DW2 was equally tending to her child. At that stage, DW2 sent the young man to go call DW1 and after a short while, DW1 came and out rightly told PW1 to get out of her home. She then entered her bedroom and came out with a panga which she used to cut PW1 on the head twice. At this point, PW2 decided to take PW1 to the hospital for medical care. He further reiterated that PW1 never attacked DW1 with a piece of wood in that they were never armed when they visited DW1's home.

PW4, Joseph Mwenda, a registered clinical officer attached to Chuka District hospital, filled the P3 form for PW1. That PW1 had alleged to have been assaulted on the 15<sup>th</sup>.12.2017 at about 10.30 a.m. by someone who was well known to him. He further stated that PW1 had a cut on his forehead, right hand side of the head and superficial cut on the left hand at the base of the thumb and the probable weapon used was a sharp object. He produced before the court the treatment notes as PEx 1 and the P3 form as PEx 2.

PW5, of Service Number 111772, P.C. Amos Tali who is attached at DCI Maara sub county stated that he was the investigating officer since the earlier investigating officer P.C. John Ekali had been transferred to DCI Kigumo and that all along, he had been present and had further visited the scene of the crime with the previous investigating officer. He further stated that he was present in the office when PW1 arrived to report the incident. That his face was covered in blood and left hand had an injury and too covered with blood. He advised PW1 to seek medical attention and then issued him with a P3 form. That he later arrested and charged the Respondent when she had equally visited the police station to report a complaint. On cross examination, PW5 confirmed having gone to DW1's home several times looking for the son who had absconded court and equally visited the scene when the incident occurred.

### **Defence Case**

DW1, Martha Kinya Justin testified that she is a farmer and the complainant is her nephew. That on the 15<sup>th</sup>.12.2017 at 10.00 a.m., while weeding in her coffee farm, which is about 50 m from her home, she heard someone screaming and it was coming from her homestead. At that point, she rushed to her homestead and found PW1, PW2, PW3 and DW2. That PW1 and DW1 were in her bedroom while PW2 and PW3 were in the table room. That upon entering she heard someone say '*ukikataa kunionyesha Mwiti Mukiwa na mama yako nitawaua*' and that it was PW1 who stated those words. That she told PW1 to leave her bedroom and at that time, DW2 was holding unto her child; DW1 thus got hold of PW1 and pulled him outside the house while PW2 and PW3 continued to stay inside the house. PW1 thus picked a piece of wood which he wanted to hit DW1 with. That DW2 did shield DW1 and the wood hit DW2 on the hand instead. The struggle continued where upon DW1 picked a panga from a chicken pen and hit PW1 on the face and further on the hand when PW1 still insisted on hitting her. She further informed court that she cut PW1 in self defence since PW1 had come to kill her. On cross examination, DW1 agreed

that she had been in good terms with PW1 and that he had gone to her home several times with police to look for her son. That neither her nor DW2 went to the hospital.

DW2, Anne Kagwiria Justin stated that, on the 15<sup>th</sup>.12.2017, while she was sitting in their sitting room PW1, PW2 and PW3 suddenly entered the house and sat down in different seats. At that point, PW1 enquired the whereabouts of DW1 and thereafter forced her to DW1's bedroom. She then started screaming while struggling to prevent PW1 from entering DW1's bedroom. That DW1 came in and told PW1 to leave her house and thereafter dragged him out of the house. DW2 then followed them out and while still holding the baby, PW1 took a piece of wood as he wanted to hit DW1 on the head and so DW2 instead blocked the blow with her hand. That at this point, DW1 took a panga and cut the head of PW1 who was still insisting he would kill them. At a second chance, DW1 hit PW1 twice with the panga and at this time, PW2 and PW3 came out and told PW1 to stop the fight. On cross examination, she informed court that PW1, PW2 and PW3 did not come with any weapon; and that she is the one who blocked the big piece of wood so that it would not hit her mother and that even after all that, they did not go to the hospital.

## **JUDGEMENT**

After consideration of the facts and law, the court found the evidence adduced by the prosecution to be marred with lots of contradictions. The trial magistrate further held that the respondent had acted in self defence and that the prosecution had failed to prove its case against the Respondent to the required standard. In the end, the Respondent was acquitted of the charge of assault under **Section 215 of the Criminal Procedure Code**.

### **Analysis and determination:**

The issues which arise for determination this appeal are:-

1. Whether the defence was a valid defence available to the respondent.
2. Whether the prosecution discharged its burden to prove the charge against the respondent beyond any reasonable doubts.

This being a first appeal, this court is enjoined as a matter of law to analyse and re-evaluate the evidence afresh and come up with its own independent finding while bearing in mind it never saw the witnesses when they testified and leave room for that. The leading authority on this authority is **Okeno –v- Republic (1972) E.A 32**. This court has a duty and the appellant has a legitimate expectation that all the evidence will be subjected to a fresh scrutiny and an independent decision by the appellate court. It is not the role of the court to seek to confirm the finding by the trial magistrate, it is supposed to make its own independent finding.

The respondent in her sworn defence stated as follows:-

**“ Suddenly, I saw PW1 with a piece of wood and wanted to hit me on the head with the wood. Kagwiria shielded with her hand and the wood hit her hand. PW1 continued to attack me. He tried to hit me a second time. I pulled a panga from near the chicken pen. I hit him with it on the face in self defence. I had placed the panga near the chicken pen when I came from the farm. Even after I cut him PW1 continued to want to beat me. He tried to hit me on the hand. I cut him again on the hand.”**

The respondent was charged with assault causing actual bodily harm. **Section 251 of the Penal Code**, Cap 63 Laws of Kenya provides as follows:-

**“ Any person who commits an assault occasioning actual bodily harm is guilty of a misdemeanour and is liable to imprisonment for five years.”**

The ingredients of the charge are, unlawfully assaulting another and occasioning the person actual bodily harm. Assault defined as a physical attack on a person. The prosecution proved the fact of assault with the evidence of the complainant who testified that the respondent injured her using a panga. This was corroborated by medical evidence as adduced by PW4, the clinical officer who testified that the complainant had sustained injuries which were bodily harm. The fact of assault on PW1 is therefore not in dispute. From the above analysis of the defence of the respondent, it is admitted that she is the one who inflicted the injuries on the PW1. I will therefore proceed to determine whether the defence advanced by the respondent was plausible.

### **Whether self defence was a valid defence available to the appellant?**

The pertinent issue to be settled is whether anyone in the respondent's position would perceive the same danger and act the same way. Was there imminent danger following the events described by both the prosecution and the accused person's defence?

After perceiving danger did the accused use excessive force to avert the danger? The law on self defence is under **Section 17 of the Penal Code** which provides that:

**“Subject to any express provisions in this code or any other law in operation in Kenya, criminal responsibility for the use of force in the defence of person or property shall be determined according to the principles of English Common Law.”**

The test in our law as enacted in **Section 17 of the Penal Code** as interpreted in various court decisions is both objective on one hand and

subjective on the other hand. In essence, section 17 does not prevent an accused person from relying on self defence where she/he believes that someone approaching him is armed with a dangerous weapon, but it turns out that in reality he did not have any such kind of weapon, but in that mistaken belief if she/he acts in self defence can rely on the doctrine.

The common law position as regards the defence of self defence was well articulated in **Solomon Beckford vs The Queen** as cited in **I.P Veronicah Gitahi & Another Vs Republic [2017] eKLR [1987] 3 All ER 425**, and of this Court in **Ahmed Mohammed Omar & 5 Others v. Republic, Cr. App. No. 414 of 2012**, In short, at Common law, defence of self-defence allows one to use reasonable force to:

- (1) defend oneself,
- (2) prevent attack of another person; and
- (3) defend their property.

The primary factor to consider in determination of whether force used is whether it was necessary? Was there need for the use of such force. An accused person must show that there was reasonable apprehension and the circumstances warranted a response in form of self-defence.

In **Koitee Jackson v Republic (2014) Cr. Appeal 146 of 2009** the court held *inter alia* that, “self defence has a limitation and it must be shown that there was no malice on the part of the accused in committing the acts causing death or bodily harm.” Further the court held that, “acts done in self-defence should not be vicious”.

From the above reasoning/s the following evidential issues are relevant which the prosecution has the burden to negate that the accused in using force had no honest and reasonable belief that she was under threat of bodily injury from her attackers. That though the attack was imminent she had an opportunity to retreat. Further, the use of force was disproportionate to the imminent or immediate danger from the assailant. That the use of reasonable force was not for the sole objective to protect self and some other person.

In this case, did the respondent have any reason to perceive any danger. Bearing in mind all the circumstances that existed proven by the evidence, the prevailing conditions that the respondent found herself, was she justified to use a panga?

I would adopt the test laid down in the case of Republic V. Joseph Chege Njora 2007 EKLR where the Court of Appeal said:

“A killing of a person is excusable where the accused action which causes the death was in the source of overtaking a felonious attack and no more force than is necessary is applied for that purpose. For the plea to succeed, it must be shown by the accused on a balance of probabilities that he was in immediate danger arising from a sudden and serious attack by his victim it must also be shown that reasonable force was used to avert or forestall the attack”

In this case, a scene is depicted where DW1 comes right from her coffee bushes, gets into her house, finds PW1, PW2, PW3 and DW2 and goes ahead to order PW1 to get out of her house and even pulls PW1 out of her house.

The trial court record notes that: ‘I was in my farm weeding on my coffee bushes. The farm is about 50 meters from my house I heard someone screaming and it was coming from my homestead. I rushed to my homestead in a hurry. I found 3 people inside my house. The 3 people were George Mureithi, Kaburu and Silas.....I heard someone say ‘Ukikataa kunionyesha Mwiti mkiwa na mama yako nitawaua’.....I pulled him outside the house. When we reached outside, Kaburu and Silas continued to stay inside the house.....Suddenly I saw PW1 with a piece of wood trying to hit me on the head, Kagwiria shielded with her hand and the wood hit her hand....

In my view, the scene depicted by the evidence provided by DW1 and DW2 does not at all depict people who were in danger; I further believe that DW1 was already tired from the pressures exerted to her - to tell the whereabouts of his son - by PW1 in regard to the fact that PW1 had stood as a surety to DW1's son and the son had absconded court and for that reason, PW1's land stood exposed to a possibility of being auctioned.

While DW2 in both exam in chief and cross-examination that she blocked a blow by PW1 towards DW.

My view is that the testimony was not credible for the following reasons:-

- i. Though DW1 stated that she screamed, no neighbours were attracted by the screams.
- ii. The piece of wood was not produced in court.
- iii. The complainant was not a stranger to the respondent. It is the respondent who started it all by holding him and pushing him outside the house. All this while the PW1 was unarmed. All this time PW2 and PW3 never intervened until they saw that the PW1 had been injured. There was no evidence that PW1, 2 and 3 had gone to wage war on the respondent. This holding by the learned trial magistrate is not supported by evidence. The evidence placed before the learned trial magistrate did not show that the respondent was provoked as to lose her self control or that given the circumstances a reasonable man would have been so provoked. These are the subjective and objective test whether the respondent was provoked is a question of fact which is determined on evidence. See **U.M.K. -v- Republic (2015) eKLR**.

In my view the learned trial magistrate erred by finding that the respondent used a panga and was able to scare the three whereas evidence was laid before her to prove that she indeed assaulted the complainant (PW1).

I find that having considered the evidence on record, the defence of self-defence was not available to the respondent. She was not provoked as she was aware that her son had jumped bail and PW1 had a good cause to go looking for her in her mother's house. The defence tendered was not plausible.

#### **Whether the prosecution evidence was marred with contradictions?**

In **Peter Ngure Mwangi vs Republic [2014] eKLR**, the Court of Appeal, when dealing with the question of alleged inconsistencies in evidence, took the position that the main consideration should be whether the inconsistencies were material enough to weaken the probative value of the prosecution evidence. The Court stated as follows: -

**“We, therefore find that on the totality of the evidence before us, any difference there may have been in the evidence adduced by the prosecution consisted of minor discrepancies and inconsistencies. We find that these were not material and did not weaken the probative value of the evidence tendered by the prosecution in support of their case.”**

In the case of **Njuki V Republic (2002) KLR 77**, the Court addressed itself in respect of discrepancies in evidence of witnesses in criminal cases thus: -

**“In certain criminal cases, particularly those which involve many witnesses, discrepancies are in many instances inevitable. About what is important is whether the discrepancies are of such nature as would create a doubt as to the guilt of the accused.....however, where discrepancies in the evidence do not affect an otherwise proved case against the accused, a court is entitled to overlook those discrepancies and proceed to convict the accused”.**

The trial court in its own motion reasoned that the evidence tendered by the prosecution witness was not enough to convict the respondent in that they were not only untruthful witnesses but equally their testimonies were riddled with inconsistencies and contradictions.

The trial magistrate wonders how the prosecution witnesses who were at the scene together could give variant testimonies. Further to that, the trial court reasons that: on Page 7 Line 1 of the trial court record notes:

‘... That is when she cut PW1 two times on the head and one time on the hand. If accused cut PW1 on the forehead as he was just getting outside the house, then that means accused was then already outside the house in order to be able to cut PW1 on the forehead just as he was getting outside the door. Therefore, PW2 contradicts when he says that PW1 is the one that got outside the house then accused followed him.’

And further Page Line 2:

‘... Again I ask myself if all 3 witnesses were at the scene, how is it that PW1 and PW2 were able to refer to PW1 picking and using a piece of wood but PW3 did not see any piece of wood either in accused's compound or PW1 trying to use it in his defence from accused cutting him with the panga?’

That the obligation of the Court is to determine whether the said discrepancies, contradictions and inconsistencies are of such a nature as would create a doubt to the guilt of the accused. Where they do not, then they are curable under **section 382** of the **Criminal Procedure Code**.

It is not in dispute that DW1 cut PW1 with a panga; DW1 herself confesses to have cut PW1 only that she raises the defence of self defence. The contradictions put forward by the court do not in my view dent the Prosecution case in anyway. I therefore find that the contradictions and inconsistencies raised by the trial magistrate were not material to the issue in dispute and ought to have been disregarded.

#### **In conclusion**

I find that the trial magistrate erred by arriving at a conclusion which was not supported by evidence. The defence of self defence was not available to the respondent. The appellant had laid sufficient evidence before the trial magistrate which proved the case beyond any reasonable doubts.

The appeal was filed by the director of Public Prosecution under **Section 348 A of the Criminal Procedure Code** which gives him power to appeal against an order of acquittal. The Section provides:

**“ (1) When an accused person has been acquitted on a trial held by a subordinate court or High Court, or where an order refusing to admit a complaint or formal charge, or an order dismissing a charge, has been made by a subordinate court or High Court, the Director of Public Prosecutions may appeal to the High Court or the Court of Appeal as the case may be, from the acquittal or order on a matter of fact and law.**

**(2) If the appeal under section (1) is successful, the High Court or Court of Appeal as the case may be, may substitute the acquittal with a conviction and may sentence the accused person appropriately.”**

In the circumstances I order that:-

1. The appeal has merits.

2. The order of acquittal by the learned trial magistrate is set aside.

3. It is substituted with an order convicting the respondent for assaulting the complainant and occasioning him actual bodily harm contrary to **Section 251 of the Penal Code.**

4. The Respondent is fined **Kshs.50,000/-** or in default to serve one year imprisonment.

**DATED, SIGNED AND DELIVERED AT CHUKA THIS 23<sup>RD</sup> DAY OF SEPTEMBER, 2021**

**L.W GITARI**

**JUDGE**