



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

(CORAM: CHERERE-J)

CRIMINAL APPEAL NO. 37 OF 2019

BETWEEN

REPUBLICAPPELLANT

AND

CONTUS KARIETHI & JOHN MAINGIRESPONDENTS

(Being an appeal from the judgment of Hon. P.M Wechuli SRM at Tigania Law Court in Criminal

Case No. 1652 of 2016 delivered on 6th February 2019)

JUDGMENT

The Trial

1. The State has filed this appeal the acquittal of **Contus Kariethi & John Maingi (Respondents)** on a charge of grievous harm contrary to section 234 of the Penal Code Cap 63 Laws of Kenya. The particulars of the offence were that:

On 24th July, 2016 at Amuruyu village in Tigania East Sub-County within Meru County jointly with others not before the court unlawfully did grievous harm to John Maingi Cyprian by cutting his right hand

Prosecution case

2. The prosecution called a total of five (5) witnesses in support of their case. Complainant recalled that on 14.07.2016, some children namely K and L informed him that some people were driving away his animals. That when he went to check, Appellants who were armed with pangas attacked him. That 1st Appellant hit him with a stone and when he fell, the 2nd Respondent chopped off his right hand from the wrist. Complainant's son Harrison who was with complainant stated that he saw the Appellants charge at his father and that when 1st Appellant knocked him down with a stone, he rushed home to call for help and returned to find his father's right hand had been chopped from the wrist. L a minor ran away from the scene when he saw two men he did not know armed with pangas. He returned to find complainant's hand had been chopped. Complainant was on 31.08.2016 examined by Kenneth Kimathi a clinical officer who found him with a deep cut wound on the right shoulder, tenderness on chest wall, tender and swollen left knee and traumatic amputation of right forearm at the wrist. The witness prepared the P3 form **PEXH. 1** in which he assessed the degree of injury as grievous harm. Upon receiving complainant's report, PC Kamau commenced investigations and subsequently arrested Appellants and caused them to be charged.

Defence case

3. In his sworn defence, Respondents conceded that they had gone to drive complainant's animals from their farm when complainant and his son Isaiah attacked them and Isaiah who had a panga injured 2nd Respondent on the left hand. The deep cut on left elbow was confirmed by treatment notes tendered by Kenneth Kimathi a clinical officer. PC Kamau confirmed that 2nd Respondent reported he had been injured by the complainant on 24.07.2016 and he sent him to hospital.

4. By a judgment dated on 6th February 2019, Respondents were acquitted.

The appeal

5. Aggrieved by the conviction and sentence, the state appealed on the ground that the acquittal was against the weight of evidence.

Analysis and determination

6. This is the first appellate court; I am guided by the principles set out in the case **David Njuguna Wairimu V Republic [2010] eKLR** where the Court of Appeal stated:

“The duty of the first appellate court is to analyse the re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decisions.”

7. The legal onus is always on the prosecution to prove its case beyond reasonable doubt (See **Ramanlal Trambakal Bhatt V Republic (1957) EA 332**). I have considered the appeal in the light of the evidence on record, the grounds of appeal and submissions on behalf of both the state and the Respondent.

8. Whereas the complainant and his witnesses maintained throughout their evidence in chief and cross-examination that it was Respondents that attacked the Complainant, the Respondents did not raise the issue that complainant’s son Isaiah was at the scene and that he had attacked 2nd Respondent and also cut complainant’s hand until at the time of giving their defence. If indeed Isaiah was at the scene and had injured the complainant and 2nd Respondent, nothing would have easier than for the defence to cross-examine complainant on that issue.

9. A defence such as the one raised by the Respondents ought to have been raised at the earliest opportunity to enable the prosecution test it and not at the tail end when the complainant and his witnesses would have no opportunity to respond to it. The trial magistrate erred when he failed to appreciate that fact and incorrectly shifted the burden to prove how the 2nd Respondent had been injured to the complainant which duty the complainant had no obligation to discharge.

10. From the foregoing, I find that the defence that places Isaiah at the scene and as the assailant is an afterthought and it ought to have raised judicial antenna in the mind of the trial magistrate that Respondents were either being economical with the truth or untruthful and their defence ought to have been treated with a lot of caution.

11. Having said that, I find that there is no doubt that Respondents were at the scene. Complainant has identified them as the persons that assaulted him and specifically that it was the 2nd Respondent chopped off his right hand from the wrist.

12. Section 21 of the Penal Code defines joint offenders in prosecution of common purpose to mean:

When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence.

13. From the evidence on record, I am persuaded that the Respondents jointly undertook to commit a crime. The Prosecution proved beyond reasonable doubt that whereas the 1st Respondent knocked down the complainant with a stone, the 2nd Respondent chopped off the Complainant’s right hand from the wrist.

14. From the foregoing analysis, I have come to the conclusion that the appeal has merit. The order of acquittal made in favour of the Respondents on 06.02.2019 is set aside and substituted with an order that Respondents are guilty of the offence of grievous harm contrary to section 234 of the Penal Code Cap 63 Laws of Kenya.

DATED THIS 09th DAY OF DECEMBER 2021

WAMAE. T. W. CHERERE

JUDGE

Court Assistant	- Kinoti
1st Respondent	- Present
2nd Respondent	- Present
For the Respondents	- Mrs. Kaume Advocate
For the State/Appellant	- Ms. Mwaniki