REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

HCCRA. NO. 248 OF 2017

WAMBUA MULU.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

AS HEARD TOGETHER WITH HCCRA 249 OF 2017

PETER MAKIO.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

JUDGEMENT

INTRODUCTION

1. The Appellants were charged with offence of Grievous Harm Contrary to Section 234 of Penal Code.

2. Particulars of the charge being that on the 1st February 2015, at Utaati village, Makueni District within Makueni County Wambua Mulu and Peter Makio unlawfully did grievous harm to Simon Safari Mutindwa.

3. They pleaded not guilty and matter went to full trial.

4. The Appellants were found guilty and convicted and sentenced to serve:-

Appellant I: Seven years imprisonment.

Appellant II: Five year imprisonment.

5. Being aggrieved by the above verdict the Appellants lodged instant appeals and set out the following Grounds of Appeal namely:-

APPELLANT NO 1 IN HCCRA 248 OF 2017 GROUNDS

1) The Learned Trial Magistrate erred in law and fact by failing to appreciate that the prosecution's evidence were marred with inconsistencies.

2) The Learned Trial Magistrate erred in law and in fact by wrongfully dismissing the Appellant's defense.

3.)The Learned Trial Magistrate wrongfully admitted hearsay evidence.

APPELLANT NO 2 IN HCCRA 249 OF 017 GROUNDS

1) The Learned Magistrate misdirected himself in fact and law by not appreciating that the Appellant did grievous harm as testified by the prosecution's witness PW1 SIMON SAFARI CONTRARY to what has been categorically stated by PW4 BONIFACE WAMBUA NZIOKA that it was the Complainant who started the fight by attacking the Appellant when he gravely and suddenly provoked the Appellant.

2) The Learned Magistrate misdirected himself in law and in fact by not appreciating that the grievous hurt occasioned by PW1 was out of an a fight between PW1 and the Appellant.

3) The Learned Magistrate misdirected himself in fact and law by not appreciating that the evidence of the prosecution witnesses PW2, NAHASHON KAGWE a doctor clearly indicated that there was no physical injury on PW1 chest contrary to PW1 statement that the Appellant injure his ribs.

4) The Learned Magistrate misdirected himself in fact and law by appreciating and admitting the evidence of PW3, FRANCIS MUTINDA MULINGE which is hearsay as to the fact of PW1 informing him that he was assaulted by the Appellant.

5) The Learned Magistrate misdirected himself in fact and law by not attaching requisite weight on the defense witness DW1, WAMBUA MULU who testified and stated very clearly that he was attacked by PW1, SIMON SAFARI MUTINDA and he fought back in defense to prevent himself from being injured.

6) The Learned Magistrate misdirected himself in fact and by law by appreciating PW4 statement that is circumstantial evidence more so not direct evidence that he PW4 found when the Appellant had hit PW1 with a log.

7) The Learned Magistrate misdirected himself in fact and I law by appreciating and admitting a log MF11 AS exhibit since the same was picked as testified by PW4 by PW1 brother without the supervision of PW5 the investigating officer.

6. The parties agreed to canvass appeal via Written Submissions.

7. The Appellants filed and served same but the prosecution opted to rely on evidence on record.

APPELLANT'S NO.1 SUBMISSIONS

8. The Appellant submitted that, the Trial Magistrate failed to appreciate that the prosecution evidence were inconsistent.

9. PW1 testified that he was hit on the chest. However, PW2 the doctor who examined him only one hour after the alleged offence confirmed to court that there were no injuries on the chest of PW1 at the time of examination.

10. It is contended that, there were no evidence adduced by the prosecution that proved that PW1 were indeed hit on the chest.

11. The Trial Magistrate did not appreciate this material inconsistency. Thus, the witness (PW1) were not a truthful witness and therefore his evidence could not form any basis of conviction.

12. The Appellant submits that, the Trial Magistrate wrongfully dismissed the Appellant's defense of self-defense. He contends that, the evidence of PW4 were that PW1 insulted the Appellant the same way as he had insulted DW1. The fight then broke and PW1 were hurt in the process of the fight.

13. The Appellant contends that, it were the evidence of PW1 through PW5 that at the time of the offence the Appellant were drunk and that PW1 were not drunk.

14. It is elementary knowledge that a drunk person is highly disadvantaged if he is attacked by a person who is not drunk.

15. A normal fist fight would not be enough to defend a drunk person from a person who is not drunk. Thus he relies of defense of self-defense.

16. He relies on the case of **Ahmed Mohammed Omar & 5 Others –Vs- Republic (2014) eKLR,** the Court of appeal expounded on Section 17 of the Penal Code where the court considered the case of **Republic -Vs- McINNES, 55 Cr. Appl. R. 551**.

17. In this case, Lord Morris, delivering the Judgment of the Board said:-

"It is both good law and good sense that a man who is attacked may defend himself. It is both good law and common sense that he may do but may only do what is reasonably necessary….."

18. The court proceeded to hold that

"There is no rule of law that a man must wait until he is struck before striking in self-defense."

19. Secondly, he relies on a case where the court of appeal considered the case of **Republic –Vs- Williams (1987) 3 ALL ER 411** where lord Lane C.J held:-

"In a case of self-defense, where self-defense or the prevention of crime is concerned, if the jury come to the conclusion that the defendant believed, or may have believed, that he were being attacked or that a crime were being committed, and that force were necessary to protect himself or to prevent the crime, then the prosecution have not proved their case."

20. He thus submits that, the Trial Magistrate misdirected herself in holding that the Appellant used excessive force in self-defense.

21. Using a rod were the most appropriate weapon the drunk Appellant could have used to defend himself from a sober attacker.

22. The Appellant finally submits that, that Trial Magistrate wrongfully admitted hearsay evidence. The evidence of PW3 was purely hearsay.

23. The said witnesses were not present when the Complainant was allegedly assaulted. He never perceived the alleged offence with any of his senses.

24. The Appellant finally submits that, the principle of law to the effect that the burden of proof in criminal matters lies with the prosecution is now old hat.

25. The Court of Appeal recently gave judicial pronouncement to this principle in the case of **Moses Nato Raphael –Vs- Republic (2015) eKLR** where the court referred to the *locus classicus* on burden of proof in criminal matters, the case of **Woolmington –Vs- DPP (1935) A.C 462** .

APPELLANT NO. 2 SUBMISSIONS

26. Appellant No. 2 submits that the Learned Trial Magistrate failed to appreciate that the prosecution evidence was inconsistent.

27. PW1 testified that he was hit on the chest. However PW2, the doctor who examined him only one hour after the alleged offence confirmed to court that there were no injuries on the chest of PW1 at the time of examination.

28. Further he submits that it is apparent on the face of record that there is no evidence adduced by the prosecution that proved that PW1 was indeed hit on the chest.

29. He (2nd Appellant) submits that the Learned Trial Magistrate did not appreciate this material inconsistency. It is obvious that the witness (PW1) was not a truthful witness and therefore his evidence could not form any basis of conviction.

30. The Learned Trial Magistrate wrongfully dismissed the Appellant's defense of self.

31. PW4 who was the only independent eye witness testified that safari (PW1) kicked peter (Appellant) outside while at the door. The evidence of PW4 was that PW1 insulted the Appellant same was way as he had insulted DW1. The Complainant was the first to kick a fight that broke and PW1 was hurt in the process of the fight.

32. Section 17 of the Penal Code 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 defense of person or property shall be determined according to the principles of English Common Law."***

33. In the case of **Ahmed Mohammed Omar & 5 Others –Vs- Republic (2014) eKLR**, the court of appeal expounded on Section 17 of the Penal Code where the court considered the case of **Republic –Vs- McINNES, 55 Cr, Appl. R. 551.**

34. It is the evidence of PW1 through PW5 that at the time of the offence the Appellant was drunk and that PW1 was not drunk.

35. It is elementary knowledge that a drunk person is highly disadvantaged if he is attacked by a person who is drunk. A normal fist fight would not be enough to defend a drunk person from a person who is not drunk.

36.. Therefore the Trial Magistrate misdirected herself in holding that the Appellant used excessive force in self-defense. Using a rod was the most appropriate weapon the drunk Appellant could have used to defend himself from a sober attacker.

37. The Learned Trial Magistrate wrongfully admitted hearsay evidence.

38. The Appellant No. 2 submits that the evidence of PW3 was purely hearsay. The said witness was not present when the Complainant was allegedly assaulted. He never perceived the alleged offence with any of his senses.

39. The Learned Trial Magistrate wrongfully relied on this hearsay evidence in her judgment. It is trite law that hearsay evidence is not admissible.

DUTY OF FIRST APPELLATE COURT

40. The duty of the court of appeal has been established in a long line of cases. The position is that the court ought to subject the evidence tendered in the Trial Court to fresh scrutiny and subsequently determine whether the said court erred in both law and fact in arriving at the impugned decision.

41. See the cases of **David Njuguna Wairimu –Vs- Republic [2010] Eklr** **the Court of Appeal** and **Okeno –Vs- Republic [1972] EA. 32 the Court of Appeal for East Africa.**

EVIDENCE IN BRIEF

42. PW1, Simon Safari Mutinda testified on 13/04/2015 that he lives at Kilala and that on 01/02/2015, he went to the shop of one Boniface Mwiwa to pay a bill when Peter (Appellant 2) came drunk and ordered him to keep quiet. That (PW1) he continued talking to Boniface and Peter abused him ***"Wewe makende nyamaza"*** (a Kiswahili word meaning "You testicles keep quiet").

43. That the owner of the shop told them to go and argue outside the shop and that when he got outside and he was hit by a log on the face by Wambua (Appellant 1) and he fell down.

44. That Appellant 2 hit him on the chest and sat on him and he threw him out but Appellant 2 managed to hit his ribs using his legs. That Boniface chased away Appellant 2. That he went to the hospital at Machakos where he were treated and went to the police station to report the incident.

45. The witness identified MFI1 – a log (*mbao*) of wood, MFI – 2A – P3 form, MFI – 2B – Discharge summary from Machakos General Hospital.

46. PW2, Doctor Nahashon Kagwe a medical officer attached to Makueni district Hospital (M.D.H) testified that on 11/02/2015 while on duty, he were approached by the Complainant who alleged assault by a person known to him.

47. The witness testified that the Complainant (PW1) had swollen eyes with blood stained clothes and that the eye (right eye) had traumatic rapture.

48. The witness further testified that PW1 went to the hospital one hour after the incident.

49. The witness classified the degree of injury as grievous harm and explained that he filled the P3 form on 11/02/2015. The witness produced the P3 form as exhibit 2A and the discharge summary as exhibit 2B.

50. The witness further testified that PW1 were admitted and on surgery, the eye ball were removed and discharged after stitches were removed.

51. PW3, Francis Mutinda Mulinge testified that on 01/02/2015, at 7.30 p.m., he saw Safari (PW1) come to the house and asked him to open the door for him. That PW1 told him that Wambua (Appellant 1) hit him at the shop of Boniface.

52. That PW1 had injury on the face and were bleeding and shouting *"nipelekeni hospitali"* (Kiswahili word meaning "take me to the hospital"). That he took PW1 (Complainant) to Makueni District Hospital.

53. That PW1 said he was hit by Peter Makio (Appellant 2) and Wambua Muli (Appellant 1). That the next day the doctor told him (PW1) that his eye were spoilt and he were referred to Machakos Hospital where he were admitted.

54. PW4 one Boniface Wambua Nzioka testified that he owns a shop and that he sells Mutumba (second hand clothes) and that he is a farmer tool that on 01/02/2015, at 6.30 p.m. he met Safari (PW1) as he were going to his shop and Safari paid him Kshs.500/= out of the Kshs.1,200/= that safari owed him then requested his balance.

55. That Peter and Wambua came from the front door of the shop and both Safari and Peter started abusing each other and he told them to leave his shop.

56. That Safari kicked Peter outside while at the door and Wambua asked Safari why he was kicking an old man. That Wambua was abused by Safari who abused him (Wambua) "Kiino".

57. That Wambua in the process kicked safari and Safari fell down. That peter stepped on Safari as Safari was down. That he found when Wambua had hit Safari with a log and Wambua were raising the log.

58. That Peter attempted to hit safari with a bench but he (PW4) held it. That he took away the log and the bench from Wambua and Peter respectively.

59. That he then lifted safari from the ground and that the next day safari's brother went for the log and later on he recorded his statement with the police.

60. The witness further testified that he went to visit Safari at Machakos Hospital. In cross examination, the witness replied that it is Safari who started the kicking.

61. PW5 is the Investigating Officer (I.O.) in this case. The witness further testified that on 01/02/2015 at Utaati village when the Complainant went to the shop of one Boniface, the 2nd accused came and started abusing him.

62. That the 1st Appellant hit the Complainant on his right side of the head causing the Complainant to fall down unconsciously. That the 2nd Appellant joined in hitting the Complainant and hit him on the chest.

63. That the shopkeeper came out of the shop and intervened prompting the two Appellants to run away. That the Complainant went home and were then escorted to Makueni district Hospital by his brother where he was treated and referred to Machakos Hospital where he was treated for one (1) week, that the Appellants were then summoned by the chief of Kilala on 27/02/2015 who then called the police form Makueni Police station who came and arrested the Appellants.

64. That the Appellants were then charged with the offence before the court. The accused having been placed on their defense on 17/01/2017, testified as follows on 15/06/2017.

65. DW1 (Appellant 1) testified that he was beaten for nothing and that he did not commit the offence which he has been charged. That he fought back Safari (PW1) who was beating him. That he reported the incident to the Assistant Chief.

66. DW2 (Appellant 2) testified that he did not assault the Complainant.

ISSUES ANALYSIS AND DETERMINATION

67. The issues before the court are; -

1) Whether the prosecution case was proved beyond reasonable doubt?

2) Whether the prosecution's evidence was marred with inconsistencies?

3) Whether Appellants' defenses were wrongfully dismissed?

4) Whether hearsay evidence was wrongfully admitted?

68. Grievous harm under the Penal Code has been referred to mean; ***"any harm which amounts to a main or dangerous harm, or seriously or permanently injuries, health or which is likely so to injure health, or which extends to permanent disfigurement or to any permanent or serious injury to any external or internal organ, membrane or sense."***

69. The court is cognizant of the fact that the burden of in criminal cases lies with the prosecution. The standard of prove is beyond reasonable doubt. The phrase and burden of proof of beyond reasonable doubt was explicitly captured in the case of **Miller –VS- Minister of Pensions (1947) 2ALL ER 372-373** by none other than Lord Denning who stated as follows:-

> ***"It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. If the evidence is so strong against a man as to leave only a remorse possibility in his favour which can be dismissed with the sentence of course it is possible the case is proved beyond reasonable doubt, but nothing of short of that will suffice."***

70. In **Bhatt –Vs- Republic (1957) EA 332 at 334** the Court held inter alia on *prima facie* evidence:

> ***"A mere scintilla of evidence can never be enough nor can any amount of worthless discredited evidence...."***

71. From the testimony of PW1, the 1st Appellant hit his eye (right eye) with a log which was produced in Trial Court as exhibit 1 leading to the Complainant (PW1) losing his right eye.

72. It's the evidence of PW2 that the right eye of the Complainant was removed when he went to the hospital through a surgery and the eye stitched.

73. The 2nd Appellant hit the Complainant on the chest and even sat on him on the material day of the offence was being committed by the Appellants.

74. PW4, the shopkeeper was an eye witness who saw the Appellants assault the Complainant causing him grievous harm.

75. PW3 confirmed that his brother (PW1) reached home on 01/02/2015 with eye injuries and was told by the Complainant (PW1) that it's the 1st Appellant who injured PW1.

76. PW2 produced the P3 form and the discharge summary (exhibits 2A and 2B respectively) which confirmed the injuries caused to the Complainant by the Appellants. It was the evidence of PW2 that the injuries on the Complainant were classified as grievous harm.

77. PW5 told the court that the chief of Kilala summoned the Appellants on 27/02/2015 after the incident and called the police from Makueni police station who went and arrested the Appellants and charged them with the offence before the court.

78. The Trial Court found that, the entire prosecution case was not rebutted by the Appellants and it was difficult to believe the defense by

the Appellants that they did not assault the Complainant. Appellant (1) says that he was just defending himself and that it's the Complainant who attacked him.

79. If that was so which is not convincing, this court concurs with trial court that, the force applied by Appellant one on the Complainant was apparently excessive in nature and the circumstances obtaining.

80. This is so because he hit Complainant eye (right eye) with a log which were produced in Trial Court as Exhibit 1 leading to the Complainant (PW1) losing his right eye. It was not demonstrated that the Complainant had attacked or threatened to attack Appellant one.

THE LAW ON SELF DEFENCE

81. I will start by setting out the statutory provisions. Section 17 of the Penal Code provides as follows:-

> ***"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."***

82. The English Common Law on this subject dealing with self defence was discussed in the classic cases of **Palmer –Vs- Republic (1971) AC 814** and **Republic –Vs- Mcinness 55 CR R. 551** which is exemplified by the following passage:-

> ***"It is both good law and good sense that a man who is attacked may defend himself. It is both good law and common sense that he may do, but only do, what is reasonably necessary. But everything will depend upon the particular facts and circumstances. Some attacks may be serious and dangerous, others may not. If there is some relatively minor attack, it would not be common sense to permit some act of retaliation which was wholly out of proportion to the necessities of the situation. If an attack is serious so that it puts someone in immediate peril, then immediate defensive action may be necessary. If the moment is one of crisis for someone in immediate danger, he may have to avert the danger by some instant reaction. If the attack is over and no sort of peril remains, then the employment of force may be way of revenge or punishment or by way of paying off an old score or may be pure aggression. There may be no longer any link with a necessity of defense of self –defense either succeeds so as to result in an acquittal or it is disproved, in which case as a defense it is rejected. In homicide case the circumstances may be such that it will become an issue as to whether there was provocation so that the verdict might be one of manslaughter. Any other possible issue will remain if in any case the view is possible that the intent was necessary to constitute the crime of murder was lacking then the matter will be left to the jury."***

83. This decision sets the highlights on the legal threshold on the use of force in exercising one's right to self-defence. The Kenyan courts have adopted an approach similar to that of English courts in determining the scope of self-defence.

84. In cases of murder and acts causing grievous harm, the cases of **Palmer –Vs- Republic** and **Republic –Vs- Mcinness** set the basic principles of self-defence;

> ***"It is both good law and good sense that a man who is attacked may defend himself. It is both good law and common sense that he may do, but only do, what is reasonably necessary."***

85. The primary factor to consider in determination of whether force used was necessary, is whether there was need for the use of such force?

86. An accused person must prove that there was reasonable apprehension and the circumstances warranted a response in form of self-defence. The Kenyan courts taking the queue from the decision of **Palmer and Mcinness** case have stated as follows in the following cited authorities:-

87. In **Republic –Vs- Joseph Chege Njora (2007) eKLR,** The Court of Appeal held;

> ***"……. For the plea to succeed, it must be shown by the accused on a balance of probabilities that he was in immediate danger or peril 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."***

88. In **Koitee Jackson -Vs- REPUBLIC (2014) CR. Appeal 146 of 2009** the court held inter alia that;

> ***"Self-defense 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-defense should not be vicious."***

89. PW4, the shopkeeper was an eye witness who saw the Appellants assault the Complainant causing him grievous harm.

90. He witnessed Appellants come from the front door of his shop and both Complainant and Appellant 2 started abusing each other and he told them to leave his shop.

91. The Complainant kicked Appellant 2 outside while at the door and Appellant one asked Complainant why he was kicking an old man. That Appellant one was abused by the Complainant who abused him (Wambua) *"Kiino"*.

92. That Appellant one in the process kicked Complainant and Complainant fell down. Then Appellant 2 stepped on Complainant as Complainant was down. Then Appellant 1 hit Complainant with a log, before he (PW4) separated them.

93. The medical evidence confirmed the injuries inflicted on the PW1 eye were grievous and in fact the eye had to be removed.

94. When the Complainant fell down why didn't the Appellants abandon him? Why was it necessary to continue beating him even when he was on the ground after the Appellant kicked him? Why use a log to inflict injuries so vicious that the eye had to be removed?

95. The Appellants did not demonstrate that after the Complainant fell down after the kick it was necessary to continue beating him as they did.

96. The use of force reinforced with the log ceased to be self-defense and escalated to excessive force. At no time did PW1 beat or attack the Appellants after they went out of the shop.

97. They never produced any evidence to prove that they were beaten or were so threatened to warrant them mount the attack they visited on the PW1 and especially when he fell down before he was rescued.

98. There was no evidence that they were in a situation of danger such that they were to attack pw1 so viciously to avert it. See **Republic – Vs- Williams (1987) 3 ALL ER 411**.

99. The fact is that in law criminal culpability does not visit only the person who committed the act in question, equal criminal culpability lies with any person or persons who aided, abetted or were in any other way complicit in the illegal act or omission.

100. In this regard Section 20(1) of the Penal Code Cap 21 Laws of Kenya provides as follows:-

> ***"20(1) When an offence is committed each of the following persons is deemed to have taken part in committing the offence and to be guilty of the offence, and may be charged with actually committing it that is to say;***
>
> ***Every person who actually does the act or makes the omission which constitutes the offence;***
>
> ***Every person who does or omits to do any act for the purpose of enabling or aiding another person to commit the offence;***
>
> ***Every person who aids or abets another person in committing the offence;***
>
> ***Any person who counsels or procures any other person to commit the offence……."***

101. Appellant two abetted, aided and was complicit to the commission of the offence charged.

102. On the complaint that hearsay evidence was wrongly admitted, the court finds that ground out rightly unmeritorious.

103. The court has already found that the direct evidence of PW1, PW2 and PW4 were overwhelming to warrant conviction.

104. None of those pieces of evidence lies in the realm of hearsay evidence.

105. Thus that ground of appeal fails.

106. The court therefore finds that, the appeals have no merit and makes the following orders;

> ***- Appeal is dismissed, conviction upheld and sentence confirmed.***

DATED AND DELIVERED THIS 19TH DAY OF FEBRUARY, 2019 IN OPEN COURT.

……..……

HON. C. KARIUKI

JUDGE