REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

CRIMINAL APPEAL NO. 6 OF 2017

NIXON NAYENI ....APPELLANT

VERSUS

REPUBLIC ....RESPONDENT

[Being an Appeal from the Conviction and Sentence by Hon. Dr. Julie Oseko, CM dated 22nd February, 2017 in Malindi CM Court Criminal Case No. 6 of 2017, Republic v Nixon Nayeni]

JUDGEMENT

1. The Appellant, Nixon Nayeni, was charged with grevious harm contrary to Section 234 of the Penal Code. The particulars of the offence being that on 24th June, 2009 at Kanani Village, Watamu Location in Malindi District within Coast Province the Appellant unlawfully did grievous harm to one Kahindi Shombo.

2. The Appellant aggrieved by both conviction and sentence has appealed to this court on the grounds that the trial magistrate erred in law and in fact by finding him guilty against the weight of the evidence adduced at the trial; failing to consider material evidence that would have exonerated him; failing to correctly analyse the prosecution evidence vis-à-vis his defence which would have led to a different conclusion; and failing to consider that the Appellant was provoked by the complainant.

3. This being a first appeal the same is a retrial only that consideration should be given to the fact that, unlike the trial court, this court did not observe the demeanor of witnesses as they testified.

4. The prosecution's case was that on 24th June, 2009 the complainant (PW1 Kahindi Shombo) went with his uncle PW2 Charo Baya to inspect their farms. When they reached the complainant's farm, the complainant entered his farm as PW2 walked ahead to his own farm. At his farm the complainant found the Appellant who was in the company of one Mulewa preparing to fix a pole.

5. Upon being asked by the complainant what he was doing, the Appellant warned the complainant not to approach him or else he would kill him. It was the complainant's testimony that as he was talking to Mulewa, the Appellant picked a stone and hit him on the back of the head with the stone. The complainant fell down. At this point the Appellant sat on him and hit him with stones until he became unconscious. The complainant came to at Malindi District Hospital where he was admitted for 5 days.

6. It emerged from the evidence that the assault was a result of a dispute over land parcel number Kilifi/Jimba/767 which allegedly belonged to the complainant.

7. The Appellant testified in his defence as DW1 and told the court that on the material day he was inside his house with his wife, DW2 Zawadi Ngowa when he heard trees being cut. He went out to check and found the complainant and three others removing the fencing poles. Upon asking the complainant what he was doing, the complainant turned on him telling him he was looking for him and he was going to finish him. The complainant picked stones and threw them at him. The first stone missed him and the second one hit him on the chest. The complainant picked more stones and continued throwing them at him.

8. Meanwhile the other three people were uprooting the fencing poles as they urged the complainant to kill him. The Appellant told the court that as he tried retreating the other three came after him shouting "ua, ua, ua". It was then that the complainant threw a stone that hit him near the left eye and he bled profusely.

9. The Appellant told the court that it was at this juncture that he picked a stone and the complainant retreated falling into a coconut tree hole in the process. He then hit the complainant with a stone in order to get an opportunity to escape. The other three men advanced towards him and he escaped into the bush. He identified one of the three men as PW2 Charo Baya.

10. The Appellant stated that he later reported the matter at Watamu Police Station where he was issued with a P3 form. The P3 form was

filled at Malindi District Hospital and was produced during the trial as an exhibit.

11. A perusal of the record shows that it is only the complainant who witnessed the commission of the offence on the side of the prosecution. PW2 arrived after the alleged assault although he found the Appellant leaving the scene. On the side of the Appellant, DW2 Zawadi Ngowa, DW3 Faith Pendo, DW4 Josephat Chai and DW5 Vincent Keah Mlewa who was also given the number DW6, are all said to have witnessed the incident.

12. The undisputed facts that emerged at the conclusion of the trial are that on the material day there was an altercation between the complainant and the Appellant over some piece of land. At the end of it all the complainant and the Appellant both suffered injuries.

13. PW7 Ibrahim Abdullahi who also testified for the defence as DW7 confirmed that he examined both the complainant and the Appellant and confirmed that they had sustained injuries. Although the complainant stated that he did not see the Appellant with any injuries, PW2 stated that when he arrived back from his shamba he found the Appellant with blood on his face. He confirmed this fact when he stated during cross-examination that the Appellant was bleeding.

14. The Appellant's case at the trial and in this appeal is that he acted in self-defence. The defence of self-defence was explained in **Palmer v The Queen [1971] A.C. 814** thus:-

> **"The defence of self-defence is one which can be and will be readily understood by any jury. It is a straightforward conception. It involves no abstruse legal though…. Only common sense is needed for its understanding. It is both good law and good sense that a man who is attacked may defend himself. It is both good law and good sense that he may do, but may only do, what is reasonably necessary. But everything will depend upon the particular facts and circumstances…. It may in some cases be only sensible and clearly possible to take some simple avoiding action. Some attacks may be serious and dangerous. Others may not be. If there is some relatively minor attack it would not be common sense to permit some action 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 imminent danger he may have [to] avert the danger by some instant reaction. If the attack is all over and no sort of peril remains then the employment of force may be by way of revenge or punishment or by way of paying off an old score or may be pure aggression. There may no longer be any link with a necessity of defence… If a jury thought that in a moment of unexpected anguish a person attacked had only done what he honestly and instinctively thought was necessary that would be most potent evidence that only reasonable defensive action had been taken."**

15. In **R v Beckford (1988) 1 AC 130,** Lord Griffith stated that:-

> **"A man about to be attacked does not have to wait for his assailant to strike the first blow or fire the first shot; circumstances may justify a pre-emptive strike."**

16. The defence of self-defence is availed by Section 17 of the Penal Code, Cap. 63 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."**

17. The question therefore is whether the defence of self-defence was available to the Appellant in the circumstances of the case. The Appellant's case is that the complainant hit him first and he picked a stone and that is when the complainant started retreating and fell into a hole. Even after falling into a hole, the Appellant went and hit the complainant with the stone. The impression given by the Appellant is that he only hit the complainant once.

18. DW4 stated that it was the complainant who was hitting the Appellant with stones. DW4 was categorical that the Appellant never hit the complainant. When cross-examined he stated that:-

> **"I saw PW1 hitting Nixon with stones. I never saw Nixon (DW1) hitting Mzee Shombo with stones…. I never saw Kahindi being stoned by Nixon. I saw Nixon being stoned on the forehead…. I never saw Nixon hitting Mzee Shombo with a stone… I saw Mzee Shombo walking away. I never saw him lying down semi-conscious."**

19. DW5 stated that he watched the drama unfold from about 100 metres away. He testified that the complainant and his gang chased the Appellant into the forest. DW5's testimony was that the Appellant was bleeding from his head.

20. The prosecution's case was that the complainant sustained serious injuries. Their evidence shows that the complainant sustained injuries and became unconscious. PW2 confirmed that he found the complainant unconscious and bleeding profusely. PW3 Hamza Kaingu Shombo, PW4 Kaingu Shombo Mweni and PW6 Benson Masha Kasungu all stated that they found the complainant in bad shape. He was unconscious and had cuts on the head.

21. The injuries sustained by the complainant do not tally with the evidence of the Appellant that he acted in self-defence. The Appellant seriously beat up the complainant. He was no longer acting in self–defence but wanted to teach the complainant a lesson. He has crossed the boundary between self-defence and assault. He viciously attacked the complainant and it could no longer be said that he was acting in self-defence.

22. Although the Appellant claimed that the complainant trespassed on his land, the evidence on record appears to support the

complainant's claim that the land belonged to him. The Appellant's testimony was that the Assistant Chief had resolved the land dispute in his favour. PW6 the Assistant Chief of Jimba Sub-Location stated that the land dispute was dealt with in 2007 and the finding was that the land belonged to the complainant. The Appellant cannot therefore be heard to say that he was defending his property.

23. Looking at the evidence that was adduced at the trial, I find that the Appellant was not acting in self-defence. He intentionally assaulted the complainant causing him grievous harm. I therefore find no merit in his appeal and I uphold the trial court's finding on conviction.

24. The offence for which the Appellant was convicted attracts a life sentence. Considering the injuries sustained by the complainant, a fine of Kshs.100,000 and a default sentence of one year imprisonment was lenient in the circumstances. I find no reason to disturb the sentence imposed. The appeal therefore fails in its entirety and the same is dismissed.

Dated and Signed at Nairobi this 24th day of April, 2019

W. Korir,

Judge of the High Court

Dated, Countersigned and Delivered at Malindi this 13th of June 2019

R. Nyakundi,

Judge of the High Court