



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 99 OF 2017

THOMAS MUINDI KITULYA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal against the conviction and sentence by Hon. M. Opanga (SRM) delivered in Kangundo Senior Principal Magistrates Court Criminal Case No. 993 of 2016 on 30th August, 2017)

JUDGEMENT

1. This is an appeal against the appellant's conviction of the offence of causing grievous harm contrary to section 234 of the Penal Code and the three (3) years sentence meted upon him.
2. He pleaded not guilty to the charge and was put to trial. The particulars of the charge were that; the appellant on the 4th day of April, 2016 at Kithimani village in Matungulu Sub-county within Machakos County unlawfully assaulted and occasioned grievous harm to Stephen Kimeu Kitulya.
3. Facts from the prosecution's end were that Stephen Kimeu Kitulya (PW1) and his son Peter Kasyoka Kimeu (PW3) went to till their land on 4th April, 2016. They then found the appellant and his son Kioko planting. He inquired why they were doing so yet they had been stopped by court. The appellant did not respond. He instead hit PW1's legs with a *jembe* stick causing him to fall then cut his head using a panga. Kioko held PW1 on the shoulder while the appellant was doing so. PW1 held the appellant by his waist to prevent him from hitting him. Robert Kimeu Mukola (PW2) who is a neighbour heard quarrels and later screams. When he went to the scene he found that the appellant and PW1. The appellant had a stick and a panga and PW1's head was cut and bleeding and his left hand was broken. PW 1 produced a letter from lands office (P. Exhibit 1) showing that he was the owner of Plot No. 2410 Mitaboni. A report was made at an AP post and PW1 taken to hospital. He also had a bite mark on his left cheek. Dominic Mbindyo (PW4) who is a Clinical Officer at Kangundo Level 4 Hospital confirmed having examined PW1. He stated that he had sustained a deep cut wound on the head that was stitched. He produced treatment notes, an x-ray film and P3 form in that regard as P. Exhibit 2, 3 and 4. Police Constable Henry Mutua (PW5) attached to Tala Police Post stated that the report was documented. PW1 was issued with a P3 form and referred to hospital. That PW1 was bleeding profusely from the head and had injuries on the left arm.
4. The appellant was found to have a case to answer and was put on his defence. The defence case was that PW1 transferred the land from their father to himself. The appellant followed up and the family allowed one person to be the administrator of the land. He was on the material day with his son Kioko ploughing when PW1 armed with a stick instructed them to stop ploughing. PW1 beat the appellant on the shoulder using the stick. He raised alarm and their mother went to his rescue. He reported to Kangundo Police Station and given treatment notes and a p3 form. He stated that the charges were fabricated. Nthangu Kitulya (DW2) who the appellant's mother denied that the appellant beat PW1. She stated that PW1 fell and injured himself on a stone. That she threatened to curse PW1 if he beat up the appellant. That PW1 started the dispute and so the two fought. That PW1 went and removed the ox plough and pushed the appellant on the ground when the appellant was ploughing for DW2 and that both suffered injuries. Nicholas Kioko Muindi stated that he and the appellant who is his father were ploughing when PW1 took a stick and beat up the appellant.
5. The appellant's grounds of appeal were that his conviction was based on theories and that his defence was not considered. The appellant took issue that the trial magistrate's finding was that DW2 took sides with him since they lived in the same house, that DW1 must have suffered minor injuries due to the struggle as PW1 tried to defend himself facts which he stated are not on record. In this regard he cited **Suleiman Kamau Nyambura v. R [2015] eKLR** and **Okethi Okale v. Republic [1965] E. A. 550**. On the second ground, the appellant submitted that he put up a defence that he was attacked by PW1. That he bore no burden of proving the same and cited **Ibrahim Kunyua Kingau v. R [2010] eKLR**.
6. The respondent on the other hand submitted that the court considered the evidence on record and proceeded to draw a conclusion from the evidence tendered and not on theories as stated by the appellant. It was further submitted that the evidence produced placed the appellant at the scene of crime and eye witness confirmed that he saw the appellant assault PW1. On the issue of consideration of defence, it was stated that the correct approach is for the trial court to exhaustively examine the entire prosecution evidence in totality and weigh it as against that

of an accused person then make a finding. That a careful examination of the trial court's judgment specifically at page 4 reveal that the trial court considered the evidence adduced by both sides and submitted that no one should take the law into their own hands and harm the other. That at page 8 of the judgement, the trial court analytically considered the defence and proceeded to state that the appellant was the aggressor who unlawfully and without justifiable cause assaulted the complainant. It was further submitted that the burden of proof was discharged. That PW3's evidence is well corroborated with that of the PW2 who stated that when he got to the scene he found PW1 already wounded and the appellant was holding a stick and panga. That at all the time during the trial the burden of proof never shifted to the appellant and the prosecution proved their case beyond reasonable doubt.

7. I have given due consideration to the appeal herein and the rival submissions together with the authorities cited. This being a first appeal, this court is charged with the duty of re-evaluating and re-considering the evidence afresh with the view of arriving at its own independent conclusion. This court's view is that the issues that fall for determination are whether or not the trial court based the conviction on theories; whether or not the appellant's defence was considered and whether or not the prosecution proved its case beyond reasonable doubt.

8. A reading of the trial court's judgment reveal that the trial court noted thus *"In her evidence she seems to have taken sides with DW1 because she lives in the same home with DW1 and also threatened to curse anyone who beat up DW1. DW3 also told the court that it was PW1 who beat DW1 with a stick but he did not explain how DW1 ended up holding a stick and panga. In my considered view it is DW1 who assaulted PW1 if DW1 suffered any minor injuries as shown in the copy of p3 form...it must have been in the struggle as PW1 tried to defend himself."* From a reading of the record and my analysis, it is clear to me that it emerged from the evidence of PW2 that when he went to the scene, he found the appellant with a panga and stick in his hand and PW1 had sustained a cut wound on his hand and had an injury on his left hand. The evidence therein placed him at the scene and going by the injuries sustained by PW1, the trial court was right to draw an inference as it did. It also emerged that PW2 in the midst of being assaulted held the appellant. Again the trial court inference that the injuries sustained by the appellant were likely to be as a result of the struggle are in my view not based on theory. That ground therefore fails.

9. On whether or not the defence was considered, it is my considered view that the prosecution case was watertight. PW1's evidence was corroborated by the other witnesses and the defence case could not shake the same or rather did not cast any doubt on the prosecution case. The said ground too fails. The Appellant took the law unto his hands and attacked the Complainant. The sentence meted to say the least was a pat on the face as it was quite lenient bearing in mind the offence could attract life imprisonment. In the circumstances, this appeal is without merit and is hereby dismissed. The trial court's conviction and sentence is affirmed.

Orders accordingly.

Dated and delivered at Machakos this 4th day of October, 2018.

D. K. KEMEI

JUDGE

In the presence of:

Thomas Muindi Kitulya - the Appellant

Machogu - for the Respondent

Josephine - Court Assistant