



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NANYUKI**

**HCCRA NO. 155 OF 2015**

**(CONSOLIDATED WITH CRIMINAL APPEALS NO.S 154 AND 153 OF 2015 )**

**T W M..... 1<sup>st</sup> APPELLANT**

**M W M .....2<sup>nd</sup> APPELLANT**

**M W M .....3<sup>rd</sup> APPELLANT**

**-VERSUS—**

**REPUBLIC ..... RESPONDENT**

**JUDGMENT**

**(Being an appeal from the original conviction and sentence in Nanyuki Chief Magistrate’s Court Criminal case No. 221 of 2014 Hon. E. Bett Senior Resident Magistrate delivered on 30<sup>th</sup> October, 2015.)**

1. **T W M**, the 1<sup>st</sup> appellant, and **M W MI**, the 2<sup>nd</sup> Appellant; and **M W M** the 3<sup>rd</sup> Appellant, are appealing against their conviction before the Nanyuki Chief Magistrate’s court. All the three appellants were charged on the first count before that court with the offence of causing grievous harm **Contrary to Section 234 of the penal code**. They were all convicted by the trial court and sentenced to 3 years imprisonment. The 3<sup>rd</sup> appellant was convicted of the offence of assault causing actual bodily harm **Contrary to Section 251 of the Penal Code**. . On being so convicted the 3<sup>rd</sup> appellant was sentence to 18 months imprisonment which sentence was to run consecutively with the sentence on the first count.
2. They were aggrieved by that conviction and sentence and have preferred this against both conviction and sentence.
3. I will remind myself of the duty of this court as the first appellant court. The court of appeal court. The court of appeal in the case **AHMED MOHAMMED OMAR & 5 others – V-Republic [2014] eKLR** in considering that duty stated:

*“This being the first appellant court, the court is enjoined to re-evaluate, re-assess and re-examine the evidence that was tendered before the trial court and arrive at its own conclusion. **See OKENO-v-REPUBLIC (1972)E.A 32**. The court must however, remind itself that unlike the trial court, it did not have the benefit of hearing and observing the demeanor of the prosecution witnesses as well as the deportment of the appellants as they testified and must therefore make*

*due allowance for that.”*

4. P M M who was defence witness number 4 is the husband of 1<sup>st</sup> appellant. In that union they bore the 2<sup>nd</sup> and 3<sup>rd</sup> appellants. D W 4 is also the father of R G M (P W 1 and complainant in respect to first count); and M M M (P W 3, and complainant in respect to the 2<sup>nd</sup> count); and J M M; and W M M, all who were born between D W 4 and his other wife whom he said he had divorced.
5. P W 1 (R G M) stated that on 9<sup>th</sup> March, 2014 he and his brothers of the first marriage of D W 4 were summoned by the Officer in charge of station (O C S) Nanyuki police station. O C S had encouraged them to meet with D W 4 so that they could discuss how D W 4 was to distribute his wealth amongst his family . P W 1 said that they met at Windlodge in Nanyuki, that is himself, and his brothers J M, W M and M M. Their father (D W 4) went to that venue later. P W 1 stated as follows in respect of what D W 4 told them:

*“He (D W 4) told us that the property in Nanyuki was for the 1<sup>st</sup> accused (1<sup>st</sup> appellant) and for us had (D W 4) had given us 2 acres in Nyeri. We were dissatisfied and we came to pyramid club which is owned by our father (D W 4).”*

6. It is clear from the evidence that the property in Nanyuki which D W 4 gave to the 1<sup>st</sup> appellant, as narrated by P W 1 above, is a club and bar called Pyramid. It is also clear that P W 1 and his brothers were unhappy that their father ( D w 4) gave that club/bar (pyramid ) to their step – mother 1<sup>st</sup> appellant.
7. P W 2 M M, contrary to the evidence of P W 1 stated that when he and his brothers met their father (D W 4) at Windlodge their father requested them to meet him at the Pyramid.
8. According to P W 1 he and his brothers reached at Pyramid at 3.p.m. Again according to P W 1 he and his brothers went to the Pyramid because they were displeased with the decision of their father (D W 4) in giving ownership of Pyramid to 1<sup>st</sup> appellant. P W 1 confirmed of their displeasure when under cross examinations he said:

*“We are not happy by this act of our mother being denied property. This property she (1<sup>st</sup> appellant) is being given is a premises where our mother used to live.”*

9. Although P W 1 said that neither he or his brothers drunk alcohol he was contradicted by P W 2 who said that at the Pyramid:

*“... at least some of my brothers were taking beers.”*

10. P W 1 said while he and his brothers were at the Pyramid their father (D W 4) and the 1<sup>st</sup> appellant went to the pyramid and it does seem that their father then went to Nanyuki police station and requested the police to eject P W 1 and his brothers from Pyramid. The police went to the pyramid and requested P W 1 and his brothers to finish their drinks and leave the pyramid. Their father did request the patrons at the Pyramid to leave, but P W 1 and his brother did not leave. This is what D W 4 said in his evidence.

*“Earlier the O C S had directed them to file a suit in court and should not go to Pyramid Bar. On arrival I saw the car of M parked outside Pyramid bar. We then went through the bar and I saw my four sons drinking. We then passed without talking to them. I then took my motor vehicle to go and report them at the police station. I met the O C S Nyachiro who told me to go back to the bar and close the bar and chaser out customers. I went to them and close the bar and told the customers to go out but my sons refused to go out. The four refused to go out and insisted they must finish their drinks. I went back to the police station to the O C S and he gave me two police officers who I came with at Pyramid. They came into the bar and I saw that my sons laughing with the police officers.*

*They then said they would finish the drink and said they would not use the police vehicle but would come to the police station with their motor vehicle.”*

11. Although P W 1 and his brothers went to the police station as stated above they did again return to the pyramid, which their father had re-opened for patrons after they had left.

12. P W 1 said that around 7.30p.m the three appellants went to the pyramid club/bar. P W 1 said that all the appellants had panga (simis). P W 1 said that the 3<sup>rd</sup> appellant banged the panga and told P W 1 and his brothers they would know that they (the appellants) were from Kirinyaga. P W 1 said:

*“We chased them (appellants) away and they (appellants) went back to the house.”*

13. The house that is mentioned by P W 1 is the house where 1<sup>st</sup> appellant and D W 4 reside. It is situated at the back of the Pyramid.

14. P W 1 said at 8p.m. he heard his brother M, who had gone to the toilet, scream. When P W 1 went there he found Michael (P w 2) down. P W 1 said:

*“Then the 1<sup>st</sup> accused (1<sup>st</sup> Appellant) slashed me on both hands as I tried to block more pangas. The two others (other appellants) joined in and they all slashed me.”*

15. P W 1 said he was cut on both his hands, neck, and two cuts on head and legs. That it was when his brother M came that he got the opportunity to run away. His brother M rushed him to Nanyuki hospital. P W 1 was admitted to Nanyuki hospital for two days then he was transferred to Kijabe hospital for further treatment. He was admitted at that hospital for one month.

16. On being cross-examined P W 1 denied that he and his brothers were unruly at the pyramid.

17. P W 1 further while being cross-examined stated the three appellants went into the Pyramid from the house at the back of the Pyramid and denied that it was his brothers who went to the house. Inside the pyramid P W 1 said that the 3<sup>rd</sup> appellant began to sharpen a panga on the floor. He however denied that he and his brothers threw beer bottles at the appellants.

18. P W 2 also stated that the three appellants, in the company of another lady, went into the Pyramid with pangas when the 3<sup>rd</sup> appellant told him and his brothers they would know the appellants were from Kirinyaga.

19. Unlike P W 1 who said that they chased the appellants away P W 2 said the appellants re-treated to the house. Once they (appellants) left the Pyramid P W 2 said that he went to the toilet and it was then he was hit by the 3<sup>rd</sup> appellant. He stated:

*“She (3<sup>rd</sup> appellant) hit me with a panga and I fell down. I was also cut on the left hand. ... I could not tell who hit me on the back as I become unconscious.”*

20. P W 5 P C Gabriel Njuguna was the investigating officer of the case. When he went on the scene after the incident he said he found blood on the floor and there was damage. Although he did not when testifying in chief where the blood and damage was he did on being cross examined state:

*“I visited the scene and there was blood marks at the entrance behind the building. It is ... at the kitchen of the bar. I also visited the house of the 1<sup>st</sup> accused (1<sup>st</sup> appellant) there were blood marks as well as broken window panes. ... The windows were broken by some people who came on a rescue mission. Two sons came with members of the public to rescue their brothers.”*

21. Those two brothers M and M were charge in Chief Magistrate Nanyuki Criminal Case no. 520 of 2014 with assault against some of the appellants.

22. On being put on their defence the first appellant said that she was managing the Pyramid . That at

a meeting of D W 4 the sons of D W 4 and herself of 7<sup>th</sup> March 2014 O C S ordered the sons of D W 4, Which is P W 1 and 2 and their brothers, not to go to the Pyramid. On the 9<sup>th</sup> March, 2014, the appellants and D W 4 as they arrived at pyramid found P W 1's motor vehicle parked outside the Pyramid. D W 4 went to the police station while the appellants went to the house situated behind the Pyramid. 1<sup>st</sup> appellant then stated:

*"While insider the house I heard noise coming from the bar. I did not go to check. My husband (D W 4) came and told me that the sons had insulted him and he (D W 4) had brought police who had ordered the sons to finish their drinks and go back home. The sons were the ones who were making noise."*

23.1<sup>st</sup> appellant said P W 1 and his brothers began to insult her calling her a prostitute. P W 1 said to 1<sup>st</sup> apellat that her daughters (the 2<sup>nd</sup> and 3<sup>rd</sup> appellants) should go away because the house behind Pyramid was not their home. At that point while she and the other appellants were in the house they heard bottles being thrown to them and P W 1 was calling to them asking them to get out of the house. 1<sup>st</sup> appellant also said she heard P W 1 telling his brothers to come and beat the 2<sup>nd</sup> and 3<sup>rd</sup> appellants.

24. 1<sup>st</sup> appellant described the lay out of the house thus:

*"There is a kitchen bar and my kitchen that separates the bar and my house. There is a small fence and door. Gathiru then kicked the door at the fence and broke it."*

25.1<sup>st</sup> appellant was then hiding in the house as P W 1 and his brothers hit the kitchen widow. She said :

*"... they wanted to get to me."*

26.1<sup>st</sup> Appellant denied assaulting any of the complainants.

27.2<sup>nd</sup> appellant attributed what she did to an act of self defence. She said that in the evening of 9<sup>th</sup> Marh 2014 that they passed Pyramid bar in order to access their mothers (1st appellant's) house at the back of Pyramid bar. They passed P W 1 and his brothers drinking at the Pyramid. P W 1 while standing at the stairs that lead to 1<sup>st</sup> appellant's house began to insult 1<sup>st</sup> appellant. 2<sup>nd</sup> appellant requested P W 1 to respect her mother (1<sup>st</sup> appellant)2<sup>nd</sup> appellant said that it was while she and 3<sup>rd</sup> appellant were at the kitchen when P W 1 and his brothers began throwing bottles at the kitchen. 2<sup>nd</sup> appellant further stated:

*"... Maihenyu (P W 2) told his brothers to come to the house and attack us. Gathiru (P W 1) came and broke the small gate while advancing towards the house. Gathiru was shouting to us (2<sup>nd</sup> and 3<sup>rd</sup> appellants) to move out of the house ad this house was not ours... they had thrown bottles at the windows and the windows got broken... Gathiru (P W 1) came and kicked me on the ribs. I tried to rise up and Maihenyu then came and hit me with a bottle on the head... I then fell down and I took whatever I could get. The only thing I had close to me was a panga. I hit Gathiru (P W 1) with the panga."*

28. 2<sup>nd</sup> Appellant had injuries and was issued with a P3 form which form was produced by D W 6, clinical officer at Nnayuki teaching and Referral hospital. D W 6 found the degree of 2<sup>nd</sup> appellants's injuries to be harm.

29.3<sup>rd</sup> appellant while in her mother's (1<sup>st</sup> appellant's) house on 9<sup>th</sup> March 2014 heard insults and noise coming from the pyramid bar she was able to identify that it was GATHIRU (P W 1) and Maihenyu who were insulting her Mother (1st appellant). 3<sup>rd</sup> appellant similar to 2<sup>nd</sup> appellant

described a scene where P W 1 and 2 were throwing bottles. It was at the kitchen. She said W M cut her on her hand with a bottle. The 2<sup>nd</sup> appellant was by then on the ground unconscious and 3<sup>rd</sup> appellant therefore said:

*“...they were beating me and I saw we had the fight and I used the weapon close to me.”*

30.3<sup>rd</sup> appellant was also treated at the Nanyuki hospital and the clinical officer

(D W 6) found that the 3<sup>rd</sup> appellant had been hit on left forearm with a bottle thereby causing injury. She also had fracture to the left finger. Her injury needed stitches. 3<sup>rd</sup> appellants injury was classified by the clinical officer as grievous harm.

31.P M M (D W 4) said that 1<sup>st</sup> appellant was his wife while 2<sup>nd</sup> and 3<sup>rd</sup> appellants were their daughters.

32.He said that he had a dispute with his sons. P W 1 and his brothers. He approached the O C S of Nanyuki police station seeking that he would mediate that dispute. O C S however said that the matter was civil in nature. He advised D W 4 to meet his sons and resolve the dispute.

33.On 9<sup>th</sup> March, 2014 he, when approaching Pyramid in the company of the appellants, he saw W M's car parked outside Pyramid. Ongoing through that bar he saw his four sons at the bar. He said they were there even though the O C S had ordered them not to go to that bar.

34.D W 4 reported to the police that his sons were at the Pyramid. He was advised by the police to close the bar and ask the customers to leave. He did so and the customers left but his four sons refused to leave. He went back to the police and was given two police officers to accompany him back at the Pyramid. The four son left but as soon as D W 4 re-opened the bar the four sons were back D W 4 then said;

*“... once i opened [the bar] the four came in at once and began making noise. They then began to say that my wife (1<sup>st</sup> appelant) and children (2<sup>nd</sup> and 3<sup>rd</sup> appellants) must leave that house. I do not know what they intended to do.”*

35.D W 4 went to further report to the police station. It was while he was away that the incidents, that is the fight, narrated above occurred. On his return D W 4 found the kitchen windows were broken and bottles were also broken.

36.On being cross-examined D W 4 said that he had divorced the mother of P W 1 and his brothers along time before. Further in response to cross-examination he said P W 1 and his brothers were drinking and making noise on the material day.

37. D W 5 chief Inspector Joash Nyachiro is the O C S of Nanyuki police station. He confirmed he had been approached to mediate the dispute between D W 4 and his sons. O C S stated:

*“The sons were demanding to have a share in pyramid bar claiming the property was founded by their mother (D W 4's divorced wife) and that D W 4..”*

38.O C S also stated about P W 1 and his brothers.

*“The sons were the aggressors....the sons had gone to pyramid bar to cause disturbance.”*

39.The defence offered during the trial was one of self defence. The trial court rejected that defence. The trial court made a finding that the fight occurred at the bar and therefore was of the opinion that the appellants were the aggressors.

40.I respectfully disagree with that conclusion. It is clear from the evidence that P W 1 and his brothers were very displeased with the decision of D W 4 to give ownership of pyramid to the 1<sup>st</sup>

appellant. It is clear they regard the 1<sup>st</sup> appellant with disdain. P W 1 in describing 1<sup>st</sup> appellant said that she was the person who sells at the club, in other words likening her to a bar maid. This in despite his admission that D W 4 had lived with 1<sup>st</sup> appellant since 1989.

41. P W 2 said of the 1<sup>st</sup> appellant that she was the person employed by his father (D W 4)

42. All the appellant said that before the fighting broke out P W 1 and his brothers were insulting 1<sup>st</sup> appellant describing her as a prostitute.

43. Further I find that P W 1 and his brothers were the aggressors because they had been warned to stay away from Pyramid bar but that is where they went when they came from a meeting where they were unable to dissuade their father from giving Pyramid bar to the 1<sup>st</sup> appellant. The fact they were displeased with that decision of their father was clear from their evidence. It seems they intended to chase the appellants away from the pyramid in the hope they would be left to inherit that bar.

44. I also find that the center of the fight was near 1<sup>st</sup> appellant's house, more likely near her kitchen which would indicate it is the P W 1 and his brothers who provoked the fight. The evidence of the investigating officer and that of D W 4 place the fight there. There was blood at entrance of behind the building at the kitchen, not at the bar. That is what the investigating officer said he found when he went on the scene.

45. D W 4 on his return after the fight, he found broken window and bottles at the kitchen.

46. That evidence supports the appellant's defence who stated that it was P W 1 and his brothers who threw bottles at them as they were at the kitchen and it is thereafter a close combat took place between them leading to 2<sup>nd</sup> and 3<sup>rd</sup> appellants saying they picked the panga and used it against P W 1 and 2 in self defence. It should not escape the attention of the court that P W 1 and his brothers were four men who were against three ladies, one of whom, the 1<sup>st</sup> appellant, is their mother's age and is indeed their step mother. There, then cannot be a match; four men against three ladies.

47. Section 17 of the Penal code provides:

*"17. Subject to any express provisions in this Code or any other law in operation 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.*

48. The provision of that Section was extensively discussed in the case **AHED MOHAMMED OMAR & 5 OTHERS V- REPUBLIC (SUPRA)**. The court of appeal in that case considered the decision of **PALMER -V-REPUBLIC [1971] A.C.** 814 trying to determine what the principles of the English Common Law and stated:

*"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. But everything will depend upon the particular facts and circumstances. ... Some attacks may be serious and dangerous. Others may not be. If there is some relatively minor attack, it would not be commonsense 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 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 pre aggression. There may be no longer any link with a necessity of defence. ... The defence of self defence either succeeds so as to result in an acquittal or it is disproved, in which cases as defence is rejected. In a 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 issues will remain. If in any case the view is possible that the intent necessary to constitute the crime of murder was lacking, then the matter would be left to the jury.”*

49. The Court of appeal also considered the test whether force used in self defence was reasonable is purely objective test. In that regard the court Cited ARCHBOLD criminal pleading, evidence and practice 2002 as follows:

*“There is no rule of Law that a man must wait until he is truck before striking in self defence.”*

50. In this case it does seem that P W 1 and his brothers had set the stage for a show down with the appellants whom they viewed as taking away their inheritance. It is clear from the evidence that the appellants and D W 4 were apprehensive the end result of P W 1 and his brothers going to the Pyramid would not end well. No wonder D W 4 went to the police station more than once that being requesting the police to assist in the removal of P W 1 and his brothers. But it seems P W 1 and his brothers were ‘spoiling’ for a fight. They adamantly and defiantly refused to go out of the pyramid.

51. It is in that back ground that the actions of the appellants must be viewed.

52. There is a case referred to in the AHMED CASE (Supra) is **ROBERT KINUTHIA MUGAI – V- REPUBLIC [1982-88] AKAR 6I**. It is helpful to consider how the court of appeal considered that case, thus;

*“ In **ROBERT KINUTHIA MUNGAI – v- REPUBLIC (1982-88) 1 KAR 6II** , the appellant visited a lady friend at her house and at 4.30a.m., they were awakened by the deceased, who was also a boyfriend of that lady. He uttered threats to kill them both and attempted to strangle the lady. He also threw a hurricane lamp at the appellant and a piece of glass but him above the eye. The appellant took his gun, which he was licenced to carry, and fired into the air. The deceased was not deterred, he continued with threats. The appellant, fearing for the life of the lady, shot the deceased and killed.”*

53. It is often that news is broadcasted of family feuds which turn violent and eventually leads to death. Those are more often, than not, due to fight for property being inherited. It follows that with the presence of p w 1 and his brothers at the Pyramid, even though they had been warned to stay away, that the appellants would have been apprehensive of their safety.

54. The plea of self defence when raised can be successful even if the one raising it acted on mistake of facts the privy council in the case **DPP V MORGAN (1975) 2 ALL ER 347** (again cited in AHMED CASE (Supra) it was stated:

*“... If the appellant might have been laboring under a mistake as to the facts, he was to be judged according to his mistaken view of facts, whether or not that mistake was, on that mistake was, on an objective view, reasonable or not. The reasonableness or unreasonableness of the appellants’ belief was material to the question whether the belief was held, its unreasonableness, so far as guilt or innocence was concerned, was irrelevant.”*

55. Once the appellants raised the plea of self defence it was the duty of the prosecution to disprove. It is this that was stated in **REPUBLIC - V- WILLIAMS [1987] 3 ALL ER 411** as follows:

*“ In a case of self-defence, where self-defence or the prevention of crime is concerned , if the jury come to the conclusion that the defendant believe, or may have believed, that he was being attacked or that a crime was being committed, and that force was necessary to protect himself or to prevent the crime, then the prosecution have not proved their case, If, however, the defendant’s alleged belief was mistaken and if the mistake was an unreasonable one, that may be a powerful*

*reason for coming to the conclusion that eh belief was not honestly held and.”*

56. In considering the circumstances in which the appellants caused injury to P W 1 and 2 the appellants had reasonable ground to believe that they were in danger of harm and accordingly the plea of self defence was proper. The force use by the appellants was necessary to protect themselves.

57. It is because of the above conclusion that I find the appellants appeal against conviction and sentence does succeed. **The appellant’s conviction is hereby quashed and their sentence is hereby set aside. I order the three appellants, T W M, M W M, AND M W M be set free unless otherwise lawfully held.**

**Dated and Delivered at Nanyuki this 14<sup>th</sup>April, 2016**

MARY KASANGO

**JUDGE**

**Coram**

Before Justice Mary Kasango

Court Assistant – Njue

For state .....

For Appellant .....

Appellant .....

**COURT**

Judgment delivered in open court

MARY KASANGO

**JUDGE**