Baishe & another v Republic (Criminal Appeal 2 & 123 of 2022 (Consolidated)) [2025] KECA 37 (KLR) (24 January 2025) (Judgment)

Neutral citation: [2025] KECA 37 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MALINDI

CRIMINAL APPEAL 2 & 123 OF 2022 (CONSOLIDATED)

AK MURGOR, KI LAIBUTA & GWN MACHARIA, JJA

JANUARY 24, 2025

BETWEEN

MOHAMED BAISHE ..... 1ST APPELLANT

MOHAMED SHEE ..... 2ND APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being Appeals from the judgment of the High Court of Kenya at Garsen (Githinji, J.) dated 7{{^th}} June 2022 in Criminal Appeal No. E032 of 2021)

JUDGMENT

1. The appellants were jointly charged with the offence of grievous harm contrary to section 234 of the Penal Code. The particulars of the offence were that, on 30th April 2020 at Kivasasi village in Lamu West Sub-county within Lamu County, they jointly did grievous harm to Yusuf Ali Sese.

2. It suffices to state that, after the appellants' conviction by the trial court, they filed separate appeals to the High Court at Garsen. The 1st appellant filed Criminal Appeal No. 123 of 2022 while the 2nd appellant filed Criminal Appeal No. 2 of 2022. The two appeals were consolidated, and Criminal Appeal No. 123 of 2022 taken as the lead file, hence the reference to the 1st and 2nd appellants herein.

3. At the trial, the prosecution called 8 witnesses to advance its case. In summary, its case was that the 1st appellant prepared a feast which the complainant, Yusuf Ali Sese (PW1), was turned away from. He (PW1) thus proceeded to his house to prepare himself a meal. He went to the 2nd appellant's house to borrow coal to light a fire whereupon he found the 1st appellant, who started an argument with him, and who subsequently shoved him to the ground. The 1st appellant then grabbed a panga that was on the wall and started slashing him on both arms as he tried to shield himself. He also cut his head and shoulders. He could not escape as the 2nd appellant was holding him by his trousers. It was not until

he dropped on the floor that the 2nd appellant let him loose, and the 1st appellant casually walked out of the house.

4. PW3, Ali Share Nyunyi, passed by the 2nd appellant's house after hearing a loud cry calling out for help. There, he found PW1 lying on the floor with cuts all over his body. PW1 told him that it was the appellants who had cut him. The 1st appellant immediately fled from the house. PW1 then asked PW3 to remove his mobile phone and call a man called Ibrahim to come to his rescue. Ibrahim came riding a motor cycle and, together with PW3, stabilized PW1 by making a makeshift stretcher. Owing to the condition of PW1, Ibrahim raised PW8, Isaac Kinuthia Kamau, who came with a vehicle. According to PW8, PW1 was in a critical condition. They took him to Hindi Magongoni Dispensary for first aid before being referred to King Fahd Hospital.

5. It is not clear whether PW4, Mohamed, is one and the same person as Ibrahim referred to above. His testimony was that he received a call from PW1 and the 2nd appellant, with the 2nd appellant using PW1's mobile phone. PW4 testified that PW1 was calling for his immediate assistance while the 2nd appellant was just mentioning PW1's name. He rushed to the scene where he found PW1 lying on the ground with serious cut wounds on the head, face, arms, shoulder and torso. At the time, none of the appellants was at the scene. He made frantic calls to neighbours, and that is when PW8 arrived with a vehicle which they used to ferry PW1 to hospital. He stated that PW1 told him that the 1st appellant cut him as the 2nd appellant pinned him to the ground. PW1 lost consciousness and came to a few days later in hospital where he had to undergo surgery to restore both arms and shoulder plates.

6. PW5, PC David Thiong'o, then based at Lamu Police Station, is one of the officers who arrested the 1st appellant. On 1st May 2020, he was called by the OCS and was informed that the 1st appellant had been detained by doctors at King Fayd Hospital on suspicious of wanting to cause harm to PW1. He was accompanied by PC Kibet and PC Abubakar to the hospital where they re-arrested the 1st appellant. PW6, PC Antony Kibet, basically recited the evidence of PW5. Suffice it to state that both testified that the 1st appellant had a small cut on the face.

7. The injuries suffered by PW1 were confirmed by PW7, Madi Shejyyumbe Munyali, a clinical officer at King Fayd Hospital. His testimony was that the complainant had a 13cm long and deep cut wound on the head; 15cm cut wound on the left rib side; 10cm deep cut wound on the right back side; the right arm's radius and ulna were deeply cut and fractured; and a deep cut wound 20 cm on left buttock. He stated that PW1 was admitted for two weeks and underwent surgery. In his opinion, a sharp object was used to cause the injuries. He adduced in evidence a medical report (P3 form) dated 4th May 2020 in this regard.

8. The case was investigated by PW2, PC Stephen Ngei, of Hindi Police Station. He summed up the prosecution evidence. It was his testimony that the 2nd appellant was also arrested at King Fayd Hospital while he attempted to visit the victim. He preferred the charge against both appellants.

9. The trial court placed the appellants on their defence, and both elected to give sworn testimonies. The 1st appellant testified that it was the complainant who came to his farm armed with a knife and a panga; that he started insulting him and striking him with the panga; and that he later picked a piece of wood with which he started hitting him on the back until he fell down; and that the 2nd appellant came and found him lying on the ground whereupon he jumped between them and tried to block the attacks. He went on to state that it was then that he managed to get his hands on the panga as the complainant now had a knife; that, in the tussle, he managed to cut the complainant on the head, thighs and legs; that he tried to retreat, but that the complainant followed him, forcing him to swing the panga to avert more attacks; that he fled the scene and went to his mother's place at Kwasasi; that, from there, he got

transport to Lamu island where he sought treatment at King Fahd Hospital where he was arrested as he was being treated. He also stated that he underwent treatment three times, but that the police officers deprived him of his medical notes; and that he had to revert to traditional medicine to manage pain as he was unable to get medical attention in a modern hospital.

10. The 1st appellant called one witness in support of his defence, namely Julius Njoroge Waceke, who testified as DW2. He stated that the 1st appellant was brought into cells at Lamu Police Station where he was being held; that he recalled seeing the 1st appellant with an injury on the wrist, bruises and swellings on his back; that the 1st appellant claimed that he had been beaten by PW1 while he was at King Fayd Hospital; and that he was later charged in court.

11. The 2nd appellant testified that, earlier on the material day, the complainant had not received relief maize flour as he was not a beneficiary; that later when the complainant learnt that the 1st appellant was in his house, he came and charged at him (the 1st appellant) while asking him what grudge he had with him; that, when the 1st appellant said there was no grudge, the complainant became infuriated and charged at him; that, as a Muslim, he tried to intervene by asking the complainant to leave his house, but he refused; that he then asked the 1st appellant to pack up the maize flour and any other item he had and also leave; that he later heard a loud cry from the 1st appellant saying "he has cut me"; and that he went outside and found the 1st appellant holding his bleeding left wrist and the complainant holding a piece of firewood aiming to strike the 1st appellant again. He went on to state that he jumped in between them and held the weapon; that he shouted for help, but was distracted when the 1st appellant picked up a panga and struck the complainant; that the two fought as a result of which he also got injured in the process; that a neighbor, PW3, came but left him with the complainant to go and get help from other neighbours; and that he also called the area chief and asked him to come with a vehicle and the police. It was his further defence that he became confused and lost his way into the bush; that he found himself 4 hours later at Sina Mbio village; that he later went to hospital where the chief was; that he was advised to get first aid; and that the police later escorted him to the police station where he was informed that he was a suspect.

12. On his part, the 2nd appellant called two witnesses in support of his defence. The first, DW3, Henry Karuga Mbichire, testified that the 2nd appellant suddenly showed up in his compound; that he had been pricked by thorns on both palms; that he asked him to take him to the chief; that he looked for a motor cycle and took him to the chief, one Jamal; that the chief directed him to take him to Magongoni Dispensary where he (the chief) was responding to another assault case; that he left the 2nd appellant there; and that he and the chief left. It was his testimony that he did not know what transpired thereafter.

13. DW4, Jamal Keya, the chief of Hindi Location, was the 2nd appellant's witness. He confirmed that the 2nd appellant was the headman of Kwasasi Village which is under his authority. He also testified that the 2nd appellant called and told him that two men had fought, and that he had been injured in the process; that he looked for transport to Hindi Dispensary for the injured man; that, while at the dispensary, the injured man (PW1) told him that the 2nd appellant and another, Baishe (referring to the 1st appellant), are the ones who had assaulted him; that he was with the OCS when PW1 named his assailants; that one Karuga, also a headman, told him that he was with the 2nd appellant whom he asked that they go to where he was; that, after the OCS interrogated the 2nd appellant, he arrested him.

14. In its judgment delivered on 12th August 2021, the trial court found both appellants culpable, holding that the prosecution had proved its case beyond reasonable doubt. They were both convicted and each sentenced to serve 20 years imprisonment.

15. Dissatisfied with the trial court's judgment, they appealed to the High Court at Garsen where they mounted 7 grounds of appeal, namely that: the prosecution evidence was insufficient to sustain a conviction; the magistrate considered extraneous factors as part of evidence; the available evidence was not properly evaluated; the magistrate was biased against the appellants; the learned magistrate should have found that the victim was the aggressor and that he was injured as the appellants mounted self defence; the trial court should have found that the 2nd appellant was a good Samaritan; and that the sentence of 20 years imprisonment was harsh and excessive in the circumstances.

16. The appeal was heard by S. M. Githinji, J. who, by a judgment dated 7th June April 2022, held that the case was one of direct evidence; that the attack could not have been in self defence as some of the injuries were inflicted upon the victim while he lay on the ground harmless; that the two appellants escaped fully aware of what they had done; that, if the 2nd appellant was not involved, he would have remained at the scene to help the victim, but their guilty conscious made them flee; that the defence of both appellants' was not convincing as true, as there cannot be a fierce fight between two persons where only one is badly injured and the other two (one allegedly being the good Samaritan) escape with very minor injuries; and that the sentence meted out was lawful and fair. Consequently, the court found the appeal to be unmerited and dismiss it in its entirety.

17. Aggrieved by the learned Judge's decision, the appellants preferred separate and perhaps their last appeals as hereby consolidated. In each of their memorandum of appeal, they raised 2 grounds, namely:

    1. That the learned Judge erred in law by upholding their conviction, and in failing to consider that they were not legally represented by counsel at the State expense as contemplated in Article 50(2) (g) and (h) of *the Constitution*.

    2. That the learned judge erred in law by upholding their conviction by failing to adequately consider their defence evidence.

18. We were urged to allow the appeal, quash the conviction, set aside the sentence, and set them at liberty.

19. When the consolidated appeals came up for virtual hearing before us on 23rd September 2024, learned counsel Mr. Achoka appeared for the appellant while learned Senior Principal Prosecution Counsel Ms. Nyawinda appeared for the respondent. Both counsel relied wholly on their respective written submissions. Those of the appellants are dated 23rd July 2024 whilst the respondent's are dated 16th July 2024.

20. According to the appellants, they are aggrieved that the learned Judge failed to pronounce himself on how the 1st appellant injured his wrist; that it was established that the 2nd appellant is the one who held the complainant as the 1st appellant stabbed him; and that therefore, the 2nd appellant should not have been found culpable for the assault. It was further submitted that this was attested by the fact that no dusting of the 2nd appellant's finger prints or DNA test were conducted to ascertain that he (the 2nd appellant) had any contact with the complainant.

21. It was also contended that the first appellate court should have poked holes into the fact that the complainant had gone to the 2nd appellant's house while he was armed with a panga, yet his mission was to go and borrow coal for lighting fire; that, on the whole, the prosecution's evidence was full of gaps which raised reasonable doubts as to the guilt of the appellants; and that, in the circumstances, the safest decision the learned Judge would have arrived at was to allow their appeal.

22. On the part of the respondent, it was submitted that the appellants never raised the issue of representation by counsel in the High Court, and that, therefore, the same cannot be considered on second appeal; that, during the trial, they were informed of their right to elect to have an advocate

of their own choice, but that they did not engage any; and that, in any case, they had failed to demonstrate what substantial injustice they have suffered for failure to be represented by counsel. It was also submitted that their respective defences were ably considered by the two courts below, which concluded that they were untrue; and that the defences they proffered raised matters of fact which this Court is deprived of jurisdiction to consider on second appeal. We were urged to find the appeal unmerited and dismiss it.

23. This being a second appeal, the Court is restricted to addressing itself on matters of law only. It will not normally interfere with concurrent findings of fact by the two courts below, unless such findings are based on no evidence, or are based on a misapprehension of the evidence, or that the courts below are demonstrably shown to have acted on wrong principles in making the findings. See the case of Kaingo vs. Republic [1982] KLR 213 at 219 where this Court stated:

> "A second appeal must be confined to points of law and this Court will not interfere with concurrent findings of fact arrived at in the two courts below unless based on no evidence. The test to be applied on second appeal is whether there was evidence on which the trial court could find as it did (Reuben Karari C/o Karanja VS. R [1956] 17 EACA 146)."

24. We have carefully considered the record of appeal and the submissions by both parties. In our view, the issues for consideration are: whether the appellants' right to a fair trial was violated on the ground that they were not provided with an advocate at the State expense; and whether they were properly convicted.

25. The appellants contend that they were not provided with an advocate at State expense. We agree with the respondent that this issue was not raised before the two courts below. However, since it touches on one of the fundamental constitutional rights, namely the right to a fair trial, which cannot be derogated from as stipulated in Article 25, we deem it crucial to consider it even at this stage.

26. The right of legal representation by an advocate at State expense constitutes one of the rights to a fair trial, and is set out under Article 50(2) (h) of *the Constitution* as follows:

> Every accused person has the right to a fair trial, which includes the right-
>
> to have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly;

27. It is important to emphasise that the right to legal representation is not an automatic or absolute right. An accused person has to establish that failure to have an advocate represent him or her would occasion him or her substantial prejudice.

28. We take to mind the Supreme Court decision in Charles Maina Gitonga vs. Republic (2018) eKLR where the Court observed that:

> "...legal representation is not an inherent right available to an accused person under Article 50 of *the Constitution* or any provision of the REPEALED constitution and that under section 36(3) of the *Legal Aid Act* No. 6 of 2016, an accused person has to first establish that he was unable to meet the expenses of his trial."

29. From the proceedings of the trial court recorded on 7th May 2020, it is clear that the learned trial magistrate informed the appellants that they may instruct an advocate of their own choice. The record shows that none instructed counsel, but they ably and intensely cross examined the prosecution witnesses. They also gave detailed respective submissions, and, as well, called witnesses to support their

defences. Surely, such effective conduct of a trial cannot be from a person who, too late in the day, can claim he was prejudiced by lack of representation by legal counsel.

30. In our view, the appellants have not demonstrated what substantial injustice they suffered on account of lack of representation. As submitted by the respondent, and likewise we have observed from the record, that after they were informed of the right to instruct legal counsel, they did not inform the trial court that they could not afford one, but instead chose to represent themselves. Having said that, we conclude that the appellants do not meet the threshold set out in *the Constitution* for us to find that failure to have legal representation infringed their right to a fair trial.

31. In regards to the second issue, their ground of appeal is hinged on the assertion that their respective defences were not considered. The 1st appellant advanced the defence of self defence by stating that it was the complainant who was the aggressor and that he hit him back in self defence. He particularly took issue with the holding of the learned Judge in his judgment starting at page 9 paragraph *2* when he delivered himself thus:

> "...The attack could not have been in self defence, as some injuries were inflicted when the victim was on the ground and harmless. The two escaped having known what they had done. If the 2nd appellant was not involved, he would have remained to help as the village elder. Guilty conscious, knowing what he had done, made him flee into the bush, only to emerge at a different point 4 hours later.
>
> The prosecution case is plausible and convincing as true. I agree with the prosecution that the two acted in concert and had common intention of doing harm to the victim, if not to kill him.
>
> The defence by the appellants is not convincing as true. There cannot be a fierce fight between two where one is injured fatally and the other escapes only with a very minor injury. The defence was just a made up story"

32. The defence of self defence is provided for under section 17 of the Penal Code which states:

> "Subject to any 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"

33. The stated common law principles were enunciated in Palmer vs. Republic (1971) AC 814 thus:

> "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 particular facts and circumstances. Some attacks may be serious and dangerous, others may not be. If then 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 in an mediate defensive action may be necessary. If the moment is out 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. That may be no longer any link with a necessity of disproved, in which case these circumstances may be such that it will become an issue as to whether there was provocation so that the verdict might be out 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."

34. In the case of Mokwa vs. Republic, (1976-80)1KLR 1337, this Court had this to say as regards the defence of self defence:

> " Self defence is an absolute defence even on a charge of murder unless in the circumstances of the case the accused applied excessive force."

35. In the same vein in the case of Victor Nthiga Kiruthu & Another vs. Republic (2017) eKLR, this Court held that:

> " The principles that have emerged from these and other authorities are as follows: -
>
> i. Self defence, as the term suggests, is defence of self. It is the use of force or threat to use force to defend oneself, one' family or one's property from a real or threatened attack. Self defence is therefore a justification in the application of force recognized by the common law:
>
> ii. The law generally abhors the use of force or violence, but there are instances when a person is justified in using a reasonable amount of force in self defence if he or she believes that the danger of bodily harm is eminent and that force is necessary to repel it, meaning that the force must be necessary and that it must be reasonable.
>
> iii. It is not necessary, however, for there to be an actual attack in progress before the accused may use force in self defence. It is sufficient if he apprehends an attack and uses force to prevent it.
>
> iv. The danger the accused apprehends however must be sufficiently specific or eminent to justify the action he takes and must be of a nature which could not reasonably be met by mere pacific means.
>
> v. What amounts to reasonable force is a matter of fact to be determined from evidence and the circumstances of each case. [Emphasis added]

36. What is clear is that the defence of self defence is only available to an accused person who is able to demonstrate that he used reasonable force either on provocation or on being threatened by actual danger. However, this case does not present a scenario where the appellants were provoked by, or were in eminent threat or danger from, the complainant. We say so because when the complainant arrived in the 2nd appellant's house where he found the 1st appellant, the latter, who without any provocation picked a quarrel with him. He (the 1st appellant) also without any provocation then took a panga and started slashing him. The 2nd appellant aided the 1st appellant to execute this heinous act by pinning the complainant to the ground as the 1st appellant continued to cut him.

37. We can only agree with the concurrent findings of fact of the two courts below that, indeed, the two appellants are the ones who attacked the complainant, and that they did not attack him in self defence. We particularly take issue with the gravity of the injuries that the complainant suffered, which were classified as grievous. If truly the 1st appellant reacted in self defence, the complainant would not have sustained the serious injuries that were inflicted on him. We also agree with the two courts below that the injuries were a result of deliberate cuts aimed at completely dismembering and disabling the victim, and that the defence of self defence could not hold as the complainant was not armed. Further,

the injuries sustained by the complainant on his torso were consistent with his evidence that the 2nd appellant held him from behind as the 1st appellant cut him from the front. Furthermore, before he lost consciousness, the complainant was able to recount the events to the chief, OCS and police officers whilst the ordeal he underwent was still fresh in his mind and had not had the opportunity to consult anyone to embellish his story.

38. We also discount the 2nd appellant's defence that his role was to separate the 1st appellant and the complainant when they confronted each other. The facts are that he fled the scene upon realizing the magnitude of the injuries that the complainant had suffered. And, as the learned Judge observed, he only resurfaced after 4 hours. PW3 did testify that it is him (the 2nd appellant), who, together with the complainant, called him to the scene. When PW3 arrived at the scene, he was nowhere to be found. He fled the scene without administering first aid, which conduct was consistent with his guilty mind. As the adage goes that 'the guilty are always afraid', this Court in Philip Nzaka Watu vs. Republic (Criminal appeal No. 29 of 2015 at Mombasa) delivered itself thus:

> "Another important piece of in this appeal, which the trial court did not advert to, and which we find provides additional evidence of corroboration of the prosecution case is that conduct of the appellant immediately after stabbing the deceased. The initial reaction was to attempt to flee, forcing PW3 to accost and restrain him. The appellant's attempt to flee the scene is indicative of his guilty mind and may be relied upon as evidence that corroborates the prosecution case. (See Bukenya Patrick & Another V. Uganda, Cr. App. No. 15 OF 2001, Supreme Court of Uganda)."

39. As for the sentence, we find that nothing turns on it as it is not one of the grounds of appeal. We can only mention that it is lawful and deserved in the circumstances of this case.

40. We are satisfied that the appellants were properly convicted by the trial court, and the 1st appellate court carefully reanalyzed the evidence and arrived at a well-founded decision. We are in agreement that both courts below arrived at the correct conclusion as to the culpability of the appellants. Accordingly, the two consolidated appeals lack merit and are hereby dismissed in their entirety. Consequently, the judgment of the High Court of Kenya at Garsen (Githinji, J.) dated 7th June 2022 be and is hereby upheld. Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 24TH DAY OF JANUARY, 2025.

A.K MURGOR

.....

JUDGE OF APPEAL

DR. K. I. LAIBUTA CArb, FCIArb.

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JUDGE OF APPEAL

G. W. NGENYE-MACHARIA

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR