Case Number:	Criminal Appeal 38 of 2009
Date Delivered:	30 Nov 2009
Case Class:	Criminal
Court:	High Court at Kisumu
Case Action:	Judgment
Judge:	Joseph Raphael Karanja
Citation:	PETER OTIENO ONDOO v REPUBLIC [2009] eKLR
Advocates:	-
Case Summary:	-
Court Division:	-
History Magistrates:	-
County:	-
Docket Number:	-
History Docket Number:	-
Case Outcome:	-
History County:	-
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

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REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU Criminal Appeal 38 of 2009

PETER OTIENO ONDOO……APPELLANT

VERSUS

REPUBLIC……RESPONDENT

[From previous conviction and sentence at Ukwala SRM'S Court Criminal

case No. 113 of 2008].

J U D G M E N T

This appeal arises from the decision and judgment of the Resident Magistrate at Ukwala in SRMCC No. 113 of 2008 in which the appellant, Peter Otieno Ondoo, was charged with the offence of grievous harm contrary to section 234 of the penal code.

The particulars were that on the 15TH April 2008 at Simur sub-location, Siaya District, unlawfully did grievous harm to Charles Omondi Ayugi.

After trial, the appellant was convicted and sentenced to seven (7) years imprisonment. Being dissatisfied with the conviction and sentence, the appellant lodged this appeal on the basis of the grounds contained in his petition of appeal filed herein on 9th March 2009. He complains that the conviction was against the weight of the evidence and that his defence was not given adequate consideration. He represented himself at the hearing of the appeal and contended that the complainant had already fought with many other people and was already injured when he (appellant) appeared at the scene.

The appellant further contended that the P3 form was not produced by a doctor and that he had no opportunity to obtain a panga (machete) since the complainant and PW3 chased him to his house and beat him up.

The learned Senior State Counsel, Miss Oundo, opposed the appeal on behalf of the respondent and contended that the appellant's defence was considered by the trial court and found to be a sham. She called for the dismissal of the appeal and enhancement of the sentence imposed by the trial court.

The obligation of this court is to review the evidence and make its own conclusion bearing in mind that the trial court had the advantage of seeing and hearing the witnesses (See, Okeno –VS-Republic [1972] EA 32).

In summary, the prosecution case was that on the material date the complainant Charles Omondi Owino (PW1) and not Charles Omondi Ayugi as appears in the charge – sheet was at the homestead of one John Opondo listening to the radio at about 6.40 p.m. when the appellant arrived there and chided Opondo for sitting with youngmen. The appellant remarked that the youngmen were thieves and turning on the complainant told him to go and build a house at his (complainant's) grandmother's homestead.

The appellant then threatened the complainant and both were asked by Opondo to leave the homestead. While outside the homestead, the appellant and the complainant engaged in a scuffle and were separated by one Zachary Okello Opondo.

Thereafter, the appellant went to his house and returned with a panga which he used to cut the complainant on his right ear.

The incident was reported to the police. The complainant was taken and admitted to the Siaya District Hospital. The appellant was arrested and charged.

George Opondo Owige (PW2) was the owner of the aforementioned homestead. He confirmed that he was in the company of the complainant and others when the appellant arrived there and accused the complainant of being a chicken thief. He (PW2) said that the two went outside the homestead and fought. He did not however witness the fight.

Later, he (PW2) was informed that the appellant had cut the complainant on the ear with a panga. Opondo (PW2) and others took the complainant to the hospital and later recorded a statement.

Zachary Koko Opondo (PW3) was also at the homestead of Opondo (PW2) on that material date and time. He also said that the appellant arrived at the homestead and accused the complainant of being a chicken thief. The two were asked to leave the homestead and while outside they briefly engaged in a scuffle.

Zachary (PW3) said that after the scuffle, the appellant rushed to his house and returned with a panga which he used to cut the complainant's right ear. He (PW3) confirmed that he saw the appellant cutting the complainant. He said that the panga was snatched from the appellant by himself and one Fredrick Odhiambo. They then reported to the village elder who referred them to the police.

P. C. Reuben Khaemba (PW4) of Ukwala police Station received the appellant at the police station on the 22nd April 2008 where he had been taken by members of the public accompanied by the complainant.

It was alleged that the appellant had severed the complainant's right ear with a panga which was handed over to the police.

P. C. Khaemba interrogated and arrested the appellant. A clinical officer at Ambira Sub location District hospital Duncan Orado Ochieng (PW5) examined the complainant and thereafter completed and signed the necessary P3 form. He said that the degree of injury was harm.

In his defence, the appellant made an unsworn statement and said that he found the complainant at the material homestead drinking chang'aa (illicit liquor) with others.

He (appellant) offered to buy one Zakaria Okok the liquor and then went inside the house where he was followed by the said Zakaria and the complainant. The complainant then slapped him (appellant) hard on the face causing some liquor to fall down. He (appellant) ran to his house where he was followed and assaulted by the complainant and Zakaria. To defend and protect himself, the appellant got hold of a panga and during a struggle cut the complainant's ear. His (appellant's) child called Lillian called his wife who separated the appellant and the complainant.

The appellant's child Lillian Atieno (DW1) testified on oath and confirmed that the complainant and

Zakaria followed her father into their homestead and assaulted him. She further confirmed that her father got hold of a panga in the process and while he was struggling with the intruders she went to call her mother.

The mother Felgona Anyango (DW2) on receipt of the necessary information rushed to her homestead and found the appellant engaged in a fight with the complainant and Okoko. She pulled the appellant away and took him into their house. The complainant and Okoko then left the scene.

The learned trial magistrate considered all the foregoing evidence and concluded that the prosecution case had been proved beyond reasonable doubt. The appellant was therefore found guilty as charged and convicted.

On reviewing the evidence, this court is of the opinion that the conviction was unsafe for the reasons that follow:-

First and foremost, there was no evidence that the complainant suffered grievous harm. The evidence by the clinical officer (PW5) was very specific with regard to the degree of injury. He said that the degree of injury was harm meaning that the offence fell under section 251 of the penal code rather that section 234 of the penal code.

Section 251 of the penal code provides for assault causing actual bodily harm while section 234 of the penal code provides for grievous harm. These are distinct offences carrying different penalties. Section 251 provides for a lesser offence than grievous harm.

Interestingly, the P3 form which was produced by the Clinical Officer (PW5) as P.EX 1 could not be traced in the original lower court file.

Secondly, whereas no dispute arose that the injury inflicted on the complainant was occasioned by the appellant using a panga, he (appellant) contended that he was acting in self defence.

He stated that he was under attack from the complainant and another such that he had to defend and protect himself. His daughter (DW1) and his wife (DW2) confirmed that he was followed into his homestead by the complainant and the other called Zakaria or Okoko and attacked by them.

Self – defence is a defence recognized under the law.

Section 17 of the penal code provides that:-

“Subject to any express provision 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”.

Having raised the defence of self – defence, the issue that arose was whether the appellant was justified in causing injury upon the complainant given the circumstances then arising.

In the opinion of this court, the appellant was in the cause of averting a felonious attack, he was in immediate danger arising from a serious attack by the complainant and another. In the circumstances, he was entitled to apply reasonable force to defend himself.

The force used may not be said to have been unreasonable in view of the medical evidence that the

complainant suffered mere bodily harm and not grievous harm.

With due respect, if the learned trial magistrate had given the appellant's defence serious consideration he most probably would not have convicted the appellant.

From all the foregoing, it is apparent that the appellant's conviction was not sound and safe.

Consequently, the appeal is allowed. The conviction is quashed and the sentence set aside.

The appellant shall forthwith be set at liberty unless lawfully held.

Dated, signed and delivered at Kisumu this 30th day of November 2009

J. R. KARANJA

JUDGE

J.R.K/va

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