



**Republic v Kiboiwo & another (Criminal Appeal E036 of 2022)
[2024] KEHC 11168 (KLR) (26 September 2024) (Ruling)**

Neutral citation: [2024] KEHC 11168 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KABARNET
CRIMINAL APPEAL E036 OF 2022
RB NGETICH, J
SEPTEMBER 26, 2024**

BETWEEN

REPUBLIC PROSECUTION

AND

AMOS KIBOIWO 1ST ACCUSED

ELIJAH BARKWANY KIBOIWO 2ND ACCUSED

RULING

1. By a judgement delivered on the 8th day of June,2024, this court quashed and/or set aside the trial court’s finding on acquittal and the accused persons were found guilty and convicted of the offence of grievous harm contrary to section 234 of the *Penal Code*. The particulars of the charge were that the accused persons on the 15th day of November, 2020 at around 1020hours at Akorian village Bartum Sub-Location, Bartum Location in Baringo County jointly with others not before court, unlawfully did grievous harm to Joel Kipyegon Kimosop.
2. The court directed that pre-sentence report to be prepared by the probation officer, and fixed a date for records and mitigation before sentencing.

Pre-Sentencing Report

1st Accused Pre-sentence Report

3. From the report, the 1st accused is aged 27 years old. He dropped out of school in class 7 due to lack of school fees. He engaged in herding from 2010 to the year 2012 before proceeding to Eldama Ravine where he engaged in casual labor up to 2014. He returned to Kabarnet in the year 2015 and has been working as a hawker since then within Kabarnet Township. The offender is married with three children aged between 9 years and 4 years old.



4. The offender and his co-accused are step siblings. They have a land dispute with the complainant herein. From the report the two accused persons went to disputed land on the material day and assaulted the complainant causing him grievous harm. However, despite being found guilty by the court, they still deny committing the offence and pray for a non-custodial sentence.
5. They further state that they paid the complainant Kshs 10,000 shillings and a goat while seeking reconciliation but that despite the complainant taking the money and a goat, he still demanded Kshs 300,000 which made it difficult for them to reconcile.
6. The victim denied the claims that he received Kshs 10,000 shillings and a goat and asked for additional 300,000 shillings so as to reconcile with the two. He further added that after the 2 were acquitted by the lower court, they were still rude to him telling him that he could not take them anywhere and therefore believes the 2 offenders are not remorseful. The complainant is opposed to the two offenders being sentenced to non-custodial sentence. He stated that he had given the accused persons a chance for reconciliation but they instead hired an advocate to represent them in court making him decide to let the matter proceed in court to its logical conclusion.
7. The local administration confirmed that the victim and offenders had differences over a piece of land which created tension between them. They stated that they tried reconciliation but the victim declined on ground that the issue was grievous harm and not a land matter and the local administration were not therefore able to reconcile the parties. He stated that there is still tension between the parties but the offenders were of good conduct prior to the incident. He proposed custodial sentence so as to deter the offenders and other members of their family from further conflict with the victim but to use the correct channels for resolving the land issue.
8. The Probation Officer is of the view that the offender is not suitable for a non-custodial sentence and recommends that he be dealt with otherwise subject to the discretion of the honorable court.

2nd Accused Pre-sentence Report

9. The offender who is aged 30 years old did not have any formal education. He was herding the family cattle and later engaged in casual jobs. At the time of his arrest, he had also started working as a boda boda rider to supplement his income. The offender is married with two young children and his wife is currently expectant.
10. The sentiments from the victim, local administration and recommendation by probation officer are as captured under accused 1 above.

Mitigation

11. The defence counsel Mr. Kenda mitigated on behalf of the two offenders. He submitted that both accused persons are married with families who depend solely on them. He stated that the Respondents are step siblings and are orphans having lost their parents in their young age and they were not able to access formal education. That the events leading to the case at hand was land dispute between the Appellants and the Respondents. He submitted that the Respondents attempted reconciliation where they gave a goat, 5 Kgs of honey and Kshs.10,000/= to the victim as a show of remorse on their part and also paid for meat at a butchery for the complainant.
12. Counsel submitted that negotiations collapsed when the complainant decided to take possession of the disputed property, but the conduct of the Respondents has exhibited nothing but remorse. He submitted that the only issue pending is a land dispute and they have agreed to use formal and legal channel to address the issue. He submitted that the Respondents have refrained from any other conflict



and they are seeking leniency to enable them provide for their children. He further submitted that although the report proposes custodial sentence, the same is based solely on land dispute between the complainant and the Respondents. He prayed for a non-custodial sentence to allow the Respondents continue to providing for their dependants.

13. The Prosecution Counsel Ms. Ratemo submitted on behalf of the state. She submitted that they fully associate with the pre-sentence report filed. She submitted that there was a land dispute but the Respondents ought to have followed the correct channels. She submitted that the complainant was severely injured and prayed for custodial sentence. She added that the security of the complainant will be prejudiced if a non-custodial sentence is imposed.

Determination

14. Under Section 234 of the *Penal Code*, a person who unlawfully commit grievous harm to another is guilty of a felony and is liable to imprisonment for life. Grievous harm is defined under Section 4 of the *Penal Code* as any harm which amounts to a maim or dangerous harm, or seriously or permanently injures health, or which is likely so to injure health, or which extends to permanent disfigurement, or to any permanent or serious injury to any external or internal organ, membrane or sense.
15. In deciding whether to impose a custodial or non-custodial sentence, the court is required to take into account the following factors: -
 - i. Gravity of the offence: - sentence of imprisonment should be avoided for misdemeanor.
 - ii. Criminal history of the offender. Taking into account the seriousness of the offences, first offenders should be considered for non-custodial sentence.
 - iii. Character of the offender:- non-custodial sentence are best suited for offenders who are already remorseful and receptive to rehabilitative measures.
 - iv. Protection of the community:- where the offender is likely to pose a threat to the community.
 - v. Offender's responsibility to third parties:- where there are people depending on the offender.
 - vi. Children in conflict with the law:- non- custodial orders should be imposed as a matter of course in cases of children in conflict with law, except in circumstances where, in light of the seriousness of the offence coupled with other factors, the court is satisfied that a custodial order is the most appropriate.
16. I have considered circumstances surrounding the offence and even though the Advocate submitted that the offenders are remorseful, from presentence report, the offenders have not taken steps to ensure that animosity between them and complainant is reduced. From sentiments by Local administration, bitterness still exist between complainant and the offenders herein. Reason given for the offence is land dispute but even if there was a land dispute between the parties, the offenders had no reasons to take the law in their hands but should have used lawful means to resolve dispute. They inflicted serious injuries on the complaint which in my view call for deterrent sentence. In view of the seriousness of the offence I am inclined to impose custodial sentence and proceed to impose sentence of 10 years imprisonment.
17. Final orders: -
 1. Each accused to serve 10 years imprisonment.
 2. Period served in remand to be computed in the sentence.
 3. Right of appeal 14 days.



RULING DELIVERED, DATED AND SIGNED VIRTUALLY AT KABARNET THIS 26TH DAY OF SEPTEMBER 2024.

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RACHEL NGETICH

JUDGE

In the presence of:

- Elvis/Beatrice – Court Assistants.
- Mr. Kenda for Accused.
- Ms. Ratemo for State.

