



REPUBLIC OF KENYA



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**Rugut v Republic (Criminal Appeal E041 of 2023)
[2024] KEHC 15527 (KLR) (28 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 15527 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BOMET
CRIMINAL APPEAL E041 OF 2023
RL KORIR, J
NOVEMBER 28, 2024**

BETWEEN

SAMWEL RUGUT APPELLANT

AND

REPUBLIC RESPONDENT

(From the Conviction and Sentence in Criminal Case Number E097 of 2020 by Hon. L. Kiniale in the Principal Magistrate's Court at Bomet)

JUDGMENT

1. The Appellant was charged with the offence of grievous harm contrary to section 234 of the [Penal Code](#). The particulars of the charge were that on 8th November 2020 at around 1200 hours at Makimeny Location in Chepalungu Sub-County within Bomet County, he unlawfully did grievous harm to Enock Kiprotich.
2. The Appellant pleaded not guilty to the charge before the trial court, and a full hearing was conducted. The prosecution called six (6) witnesses in support of its case. At the conclusion of the Prosecution case, the court found a *prima facie* case against the Appellant and put him on his defence. The Appellant on the other hand testified in person and did not call any witnesses.
3. At the conclusion of the trial, the Appellant was convicted for the offence of grievous harm and sentenced to serve 20 years in prison.
4. Being dissatisfied with the Judgment dated 15th December 2022, the Appellant appealed against his conviction and sentence and relied on the grounds reproduced verbatim as:-
 - i. That the learned trial Magistrate erred in law and fact by convicting the Appellant when the Prosecution did not prove their case to the required standard thereby occasioning the Appellant a miscarriage of justice.



- ii. That the learned trial Magistrate erred in law by basing her Judgment on inconsistent and contradictory evidence of the Prosecution witnesses and in failing to consider the evidence as a whole and especially for the defence.
 - iii. That the learned trial Magistrate completely misunderstood the case that was before her, misconceived the issue and as a result came to a wrong decision.
 - iv. That in whole, the finding and holding of the learned trial Magistrate as contained in her Judgement delivered on 15th December 2022 is inconsiderate, erroneous, unlawful, biased and untenable in law.
5. This being the first appellate court, I have a duty to re-evaluate the evidence on record and come to my own conclusion. See *Peter M. Kariuki vs Attorney General* (2014) eKLR.

The Prosecution's Case.

6. It was the Prosecution's case that the Appellant attacked Enock Kiprotich (PW1) with a stick causing him serious bodily injuries. PW1 testified that the Appellant attacked him because he suspected that he (PW1) had beat his goats.
7. Kennedy Laboso (PW5) who was a clinical officer stated that he examined PW1 and found that he had multiple scratch marks behind both ears, swelling on his thorax and abdomen and tenderness on his lower stomach. PW5 further stated that PW1 had a plaster of paris on his right hand that ran from his forearm to his fingers and had a swelling on the upper parts of both thighs. PW5 classified the degree of injuries as grievous harm.

The Appellant's case.

8. The Appellant, Samwel Rugut denied committing the offence. He stated that on the material day, he was called and informed that a boy had beaten his goats and ran away. That he went to the farm and chased the boys away.
9. The Appellant testified that people came to his house and burnt it and he ran away to report the incident at the Police Station.
10. On 23rd May 2023, parties took directions that the Appeal be canvassed by written submissions.
11. I have read the parties' submissions, given due consideration to the trial court's proceedings, the Petition of Appeal dated 27th July 2023, the Appellant's written submissions dated 1st July 2024 and the Respondent's written submissions filed on 30th May 2024. The following issues arise for my determination:-
 - i. Whether the Prosecution proved its case beyond reasonable doubt.
 - ii. Whether the Accused had a plausible defence which cast doubt on the Prosecution case.
 - iii. Whether the sentence was harsh and excessive.

i. Whether the Prosecution proved its case beyond reasonable doubt.

12. Section 234 of the *Penal Code* provides for the offence of grievous harm as follows:-

Any person who unlawfully does grievous harm to another is guilty of a felony and is liable to imprisonment for life.



13. Section 4 of the *Penal Code* defines grievous harm as follows: -
- “grievous harm” means 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;
14. I am persuaded by Kemei J. in *Pius Mutua Mbuvi vs Republic* (2021) eKLR, where he held that:-
- “.....For the appellant to be convicted of the offence of doing grievous harm c/s 231 as read with section 234 of The Penal Code, the prosecution had to prove each of the following essential ingredients beyond reasonable doubt;
- a. The victim sustained grievous harm.
 - b. The harm was caused unlawfully.
 - c. The accused caused or participated in causing the grievous harm.....”
15. In *John Oketch Abongo vs Republic* (2000) eKLR, the Court of Appeal held that:-
- “Whether or not grievous harm or any other form of harm is disclosed must be a matter for the court to find from the evidence led and guided by the definition in the Penal Code. A court will be assisted by medical evidence given in coming to the conclusion on the nature and classification of the injury. In many cases the courts have accepted and gone by the findings and opinions in the medical evidence. But, in appropriate circumstances, the court is at liberty to form its own opinion, having regard to the evidence before it as to the nature and classification of the injury.”
16. In the present case, the victim Enock Kiprotich (PW1) testified that on the material day, the Appellant who was armed with a stick approached him and pulled his ears asking him why he had hit his goat. PW1 said that he responded that he had chased but not hit them. That the Appellant chased him to the river where he hit him on his legs, abdomen, right arm and the top of his head and below his abdomen near his private parts. PW1 further stated that he was unable to walk and raised an alarm.
17. It was PW1’s testimony that after he was treated his arm was placed in a plaster of paris and later when an x-ray was done, a fracture was seen in his leg and it was equally put in a plaster of paris.
18. When PW1 was cross examined, he stated that it was the Appellant who had assaulted him by hitting him with a stick.
19. Kennedy Laboso (PW5) who was a clinical officer stated that after examining the victim, he found that he had multiple scratch marks behind both ears, swelling on his thorax and abdomen and tenderness on his lower stomach. PW5 further stated that PW1 had a plaster of paris on his right hand that ran from his forearm to his fingers and had a swelling on the upper parts of both thighs. PW5 stated that the weapon used to cause the injuries could have been a blunt or sharp object. In conclusion, he (PW5) classified the degree of injuries as grievous harm. He produced a P3 Form as P.Exh 1. I have looked at and considered the P3 Form (P.Exh 1) and I have found that its contents mirror the testimony of PW5.
20. When PW5 was cross examined, he confirmed that the victim was beaten either by a sharp or blunt object and had a plaster of paris on his right upper hand that ran from his forearm and covered most of his fingers.



21. The Appellant strongly contested the classification of the injuries sustained by PW1. The Appellant submitted that the injuries suffered by the victim (PW1) did not amount to grievous harm. That the evidence showed that the victim was given painkillers and antibiotics and was not admitted to any medical facility. The Appellant further submitted that when the victim testified, he told the trial court that he had marks on his head which were fully healed. That PW1 did not suffer any permanent disfigurement. He relied on section 4 of the *Penal Code* and *Francis Kimani Karanja vs Republic* (2016) eKLR which stated that even though courts were guided by medical evidence, they were at liberty to form their own opinion having regard to the evidence before it and the classification of the injury.
22. The Prosecution on the other hand submitted that the victim testified that the Appellant hit him with a stick on both legs, right arm and head and as a result, the victim sustained a fracture on his arm. That the examining clinician classified the nature of injuries as grievous harm.
23. It was the Prosecution's submission that the incident occurred during the day and there was sufficient light to identify the Appellant. That the Appellant was well known to the victim as he knew where the Appellant resided. The Prosecution further submitted that PW2 and PW4 were eye witnesses and their testimonies were not shaken during cross examination. That the Appellant was clearly identified as the perpetrator.
24. On the issue whether the injuries suffered by PW1 amounted to grievous harm, section 4 of the *Penal Code* defined grievous harm 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.
25. In *Pius Mutua Mbuvi vs Republic* (2021) eKLR, Kemei J. held:-
- “The specificities of "grievous harm" therefore are;
- (1) in the case of grievous harm, the injury to health must be permanent or likely to be permanent, whereas, to amount to bodily harm, the injury to health need not be permanent
 - (2) a mental injury may amount to grievous harm but not to bodily harm
 - (3) the injury must be "of such a nature as to cause or be likely to cause" permanent injury to health.”
26. I have considered the victim's (PW1) evidence, the clinical officer's (PW5) medical evidence and the respective parties' submissions on the nature of injuries suffered by PW1. It is my finding that PW1 suffered the injuries as enumerated by himself and the clinical officer (PW5). It is my finding however that going by the nature of the injuries (multiple scratch marks behind both ears, swelling on his thorax and abdomen, tenderness on his lower stomach and a swelling on the upper parts of both thighs) that the injuries did not amount to grievous harm.
27. I disagree with PW5's classification of the injuries as grievous harm. There was no evidence that the injuries were permanent in nature, caused permanent disability or dangerous harm. I agree with the Appellant that the trial court erred when it found and classified the injury as grievous harm. The court was not bound by the classification made by the clinical officer. It is the view of this court that the Appellant ought to have been charged with the offence of assault causing actual bodily harm under



section 251 of the Penal Code which attracts a sentence of 5 years' imprisonment. The evidence clearly discloses this offence.

28. Regarding the identity of the Appellant as the perpetrator of the offence, the Court of Appeal in the case of Cleophas Wamunga Vs Republic(1989)eKLR expressed itself as follows:-

“Evidence of visual identification in criminal cases can bring about miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimize this danger. Whenever the case against a defendant wholly depends or to a great extent on the correctness of more identifications of the accused which he alleges to be mistaken, the court must warn itself of the special need for caution before convicting the defendant in reliance on the correctness of the identification”.

29. PW1 testified that it was the Appellant who beat him on the material day on suspicion of him (PW1) having beaten the Appellant's goats. PW1 further stated that he knew the Appellant as he lived near a river uphill. PW1 also identified the Appellant in court as the person who had beaten him.

30. Ismael Rono (PW2), Tracy Chebet (PW3) and Richard Siele (PW4) all testified that they saw the Appellant beating PW1 on the material day. Their testimonies of identification remained uncontroverted during cross examination.

31. The Appellant admitted having been present at the scene. He testified that on the material day, upon receiving information that PW1 had beaten his goats, rushed to the farm and chased them away. It is also salient to note that from the evidence on record, the offence was committed at 12 noon which meant there was enough light to identify the Appellant.

32. From the above, there is no doubt in my mind that the Appellant was placed at the scene of the crime on the material day. It is therefore my finding that the Appellant was positively identified as the person who beat up PW1.

33. Having established that PW1 had suffered actual bodily harm which was unlawful and the positive identification of the Appellant as the perpetrator, it is my finding that the Prosecution proved its case against the Appellant beyond reasonable doubt.

ii. Whether the Accused had a plausible defence which cast doubt on the prosecution case.

34. I have considered the Appellant's defence in which he denied committing the offence. He stated that he went to the farm and chased the boys away but did not harm anyone.

35. It is my view that the Appellant's defence was a mere denial and did not displace the victim's (PW1) and the eye witnesses' (PW2, PW3 and PW4) testimonies. The Appellant's defence was weak and shallow and did not place any doubt on the Prosecution's case which I have already found proven.

iii. Whether the sentence was harsh and excessive

36. Sentencing is at the discretion of the trial court but such discretion must be exercised judiciously and not capriciously. The trial court must be guided by the evidence and sound legal principles. An appellate court would be entitled to interfere with the sentence imposed by the trial court if it is demonstrated that the sentence imposed is not legal or is so harsh and excessive as to amount to miscarriage of justice, and or that the court acted upon a wrong principle. These principles were



enunciated by the Court of Appeal in the case of *Ogolla s/o Owuor vs. Republic*, (1954) EACA 270, pronounced itself on this issue as follows:-

“The Court does not alter a sentence unless the trial Judge has acted upon wrong principles or overlooked some material factors.”

37. The penal section for the offence of grievous harm is provided by section 234 of the *Penal Code* which states that:-

Any person who unlawfully does grievous harm to another is guilty of a felony and is liable to imprisonment for life.

38. It was the Appellant’s submission that the 20 year sentence was harsh and that the trial court erred when it based its rationale in handing the sentence on the age of the victim. He relied on *Republic through ODPP vs Njenga* (Criminal Appeal 2 of 2023) [2024] KEHC 3769 (KLR) (18 April 2024) (Judgment) where the court held that the life sentence under section 234 of the *Penal Code* was not mandatory and the offence of grievous harm could attract a lower sentence depending on the circumstances of the case.

39. The Appellant submitted that the trial court failed to order for the filing of a pre-sentence report. That the report would have captured the Appellant’s mitigating factors. The Appellant further submitted that the trial court failed to give reasons why the Accused deserved the harsh sentence.

40. In his oral submissions before court however, the Appellant asked this court to grant him a non-custodial sentence as he had school going children.

41. It was the Prosecution’s submission that the sentence was legal, fit and proper. That section 234 of the *Penal Code* provided for a maximum sentence of life imprisonment. It was their further submission that the victim was a minor (12 years old) and he was traumatized by the actions of the Appellant.

42. In his oral submissions before court, Mr. Njeru, learned Prosecution Counsel submitted that they were not opposed to the reduction of the sentence.

43. In regard to the submission that the trial court erred when it failed to call for a pre-sentence report, this court expressed its views in Bomet High Court Criminal Appeal Number E010 of 2022, *Gilbert Kosgei vs Republic* where it held:-

“.....It is best judicial practice to ask for a pre-sentence or social inquiry report of an offender to assist the court in meting an appropriate sentence. This is important because the personal circumstances of an offender may provide mitigating circumstances or bring to the fore aggravating circumstances warranting a stiffer penalty.....”

44. However, the absence of a pre-sentence report was not fatal as it only assisted the trial court in determining the sentence it will met out to the Accused. I agree with Odunga J. (as he then was) in *Nicholas Mukila Ndetei v Republic* (2019) eKLR, where he held:-

“It is therefore my view that where a resentencing is directed the trial court ought to consider the filing of a probation report in order to assist it arrive at an appropriate sentence. However, the failure to do so is not necessarily fatal to the sentence.”



45. The Appellant herein was sentenced to 20 years imprisonment. In meeting the sentence, the trial court noted that the victim was a minor of tender years. The [Sentencing Policy Guidelines 2023](#) at paragraph 23.7 provided:-

Aggravating circumstances warrant a stiffer penalty than would be ordinarily imposed in their absence. They include:

.....

- (7) Targeting of vulnerable groups such as children, elderly persons and persons with disability

46. The trial court was therefore right in considering the age of the victim. The Appellant was an adult whom in his own admission was a father. He assaulted the hapless, defenceless minor in a beastly manner causing him grievous harm. He was expected to protect and not harm the minor.

47. The [Sentencing Policy Guidelines 2023](#) also outlines the principles underpinning the sentencing process at paragraph 1.2. A key principle is that the sentence should be proportional to the offence. It provides:-

“Proportionality: The sentence meted out must be proportionate to the offending behaviour meaning it must not be more or less than is merited in view of the gravity of the offence. Proportionality of the sentence to the offending behaviour is weighted in view of the actual, foreseeable and intended impact of the offence as well as the responsibility of the offender.”

48. I have considered the circumstances of the case and the nature of injuries occasioned to the victim (PW1) and it is my view that the 20year prison sentence was harsh and excessive. As I have already stated, the evidence disclosed the offence of causing bodily harm which is a misdemeanor under Section 251 of the [Penal Code](#). As mandated by section 179 of the [Criminal Procedure Code](#), I set aside the conviction for grievous harm and substitute it with a conviction for the charge of assault causing bodily harm contrary to section 251 of the [Penal Code](#).

49. I further set aside the sentence of 20 years imprisonment and substitute with 5 years’ imprisonment as provided by Section 251 of the [Penal Code](#). The sentence shall run from 15th December 2022 being the date of conviction and sentence by the trial court.

JUDGEMENT DELIVERED, DATED AND SIGNED THIS 28TH DAY OF NOVEMBER, 2024.

.....

R. LAGAT-KORIR

JUDGE

Judgement delivered in the presence of the Appellant, Mr. Njeru for the State and Siele (Court Assistant).

