



REPUBLIC OF KENYA



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**Jepchirchir v Republic (Criminal Appeal 21 of 2023)  
[2024] KEHC 16335 (KLR) (20 December 2024) (Judgment)**

Neutral citation: [2024] KEHC 16335 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ITEN  
CRIMINAL APPEAL 21 OF 2023  
JRA WANANDA, J  
DECEMBER 20, 2024**

**BETWEEN**

**CAROLYNE KOECH JEPCHIRCHIR ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

***(FORMERLY ELDORET HIGH COURT CRIMINAL APPEAL NO. E012 OF 2023)***

**JUDGMENT**

1. This Appellant was charged in Eldoret Senior Principal Magistrate's Court Criminal Case No. E391 of 2021 with 3 counts, as follows:



Count 1	Assault causing actual bodily harm contrary to Section 251 of the Penal Code	On 26/01/2021 at around 1300 hrs in Kaptum village, Kokwao location, in Keiyo North sub-County within Elgeyo Marakwet County, wilfully and unlawfully assaulted Vincent Kemboi Yator thereby occasioning him actual bodily harm
Count 2	Malicious damage to property contrary to Section 339(1) of the Penal Code	On the same date and time as above and at the same place, wilfully and unlawfully damaged one mobile phone make TECNO Y2 smartphone valued at Kshs 5,500/-, the property of the same Vincent Kemboi Yator.
Count 3	Injuring an animal contrary to Section 338 of the Penal Code	On the same date and time as above and at the same place wilfully and unlawfully wounded an animal capable of being stolen, a cow by cutting on a hip joint, valued at Kshs 63,000/-, the property of the same Vincent Kemboi Yator.

2. The Appellant pleaded not guilty to the charges and the case then proceeded to full trial in which the prosecution called 8 witnesses. At the close of the prosecution's case, the Court found that the Appellant had a case to answer and placed her on her defence. The Appellant gave a sworn statement and also called 1 other witness. By the Judgment delivered on 30/11/2021, the Appellant was convicted on all the 3 counts. For the 1<sup>st</sup> count, he was fined Kshs 30,000/- and in default, to serve 3 months in prison, for the 2<sup>nd</sup> count, he was fined Kshs 10,000/- and in default, to serve 3 months in prison, and on the 3<sup>rd</sup> count, he was fined Kshs 20,000/- and in default, to serve 6 months in prison. The total fine was therefore Kshs 60,000/- and the sentences were to run consecutively.
3. Dissatisfied with the decision of the trial Court, the Appellant filed this appeal on 22/12/2022, against both conviction and sentence on the 7 grounds reproduced verbatim as follows:
  - i. The Learned trial Magistrate erred in law and fact in convicting the appellant to six months imprisonment for assault yet the evidence is clear that the complainant was the aggressor rather than the Accused.
  - ii. The Learned trial Magistrate erred in convicting the Accused in respect of all three counts, yet it was clear that the accused was assaulted by the complainant.
  - iii. The Learned trial Magistrate erred in law and fact in convicting the Appellant on count three yet it was clear that this count had earlier been withdrawn on 7.6.2022 as per the Court record.



- iv. The Learned trial Magistrate erred in law and fact in sentencing the Appellant to sentences that were extremely harsh in the circumstances of this case.
- v. The Learned trial Magistrate erred in law and fact in sentencing the Appellant to sentences yet it was clear that the circumstances of this case point towards an affray rather than an assault.
- vi. The Learned trial Magistrate erred in fact and in law in sentencing the Appellant in count III yet it was clear that the evidence was contradictory.
- vii. The Learned trial Magistrate erred in law and fact in convicting the Appellant on a charge that had initially been withdrawn.

### **Prosecution evidence before the trial Court**

4. PW1 was the complainant, Victor Yator. He testified that the Appellant is his neighbour, that on 26/01/2021 they had a meeting to choose committee members for a hospital, and that he had tied his animals on his land, next to the Appellant's land, and that he then went for the meeting. He stated that when he arrived there, he met the Appellant coming from the hospital which is about 50 metres away from his home, that while at the hospital, he could see his home and the cows, that she saw the Appellant take other cows to where PW1's were, and that since he feared that the Appellant's cows could injure his, he went over there as the Appellant was inside her house and moved the Appellant's cows. He testified further that the Appellant angrily emerged and approached, picked a rock and threw it at him, hitting him on the nose, that he jumped over the fence and fell down as the Appellant continued throwing stones at him. He stated further that he fled and his phone fell down, and that the Appellant fetched a panga from her house and came out with it, that the elders who were at the hospital went over but the Appellant proceeded to cut one cow with a panga before one elder overpowered her and dispossessed her of the panga. He claimed that the Appellant continued being wild and broke the fence, picked one post and went to the Appellant's kiosk and hit it severally then uprooted more posts, that he saw her return and pick up PW1's phone which she hit with rocks and announced the same to PW1's wife. He stated that he then went to the Police Post to get a P3 Form as he was injured, that the elders were to meet on the next day to discuss the matter but the Appellant did not turn up, and that he then took his witnesses to the police station where they recorded statements. He identified the P3 Form, the damaged phone and a Report from the Veterinary Office which were marked for identification. In cross-examination, he testified that the Veterinary Officer came after 2 days, that the cow was injured on the hind legs, that he had no dispute with the Appellant and that he was injured on the upper lip, next to the nose and he bled around the mouth.
5. PW2 was one Paul Kipkoech Katam. He testified that he is a village elder in the locality and that PW1 and the Appellant are neighbours, that on 26/01/2021, they were in a meeting at a dispensary to elect committee members thereof at around 1:00 pm when they heard screams from about 100 metres away. He testified when they rushed there, they found the Appellant near the road screaming and throwing stones across the road towards PW1 and that PW1's wife was also there, that the Appellant then threw away a phone which they later learnt belonged to PW1. He testified further that the Appellant then started uprooting the fence then went into her house and came out brandishing a panga which she used to hit one of the cows on the back before one Peter managed to wrestle the panga from her. According to PW2, the Appellant then pulled off a stick off the fence and which she used to cut a nearby shop and that the Appellant was uncontrollable. In cross-examination, he denied witnessing the Appellant and the PW1 fighting or that he saw the Appellant injured.
6. PW3 was one Joan Rotich. She testified that she is PW1's wife and that the Appellant is their neighbour, that on 26/01/2021 at 1:00 pm, she was at home as her husband had gone for a meeting,



that she went out to tend to her sheep when the Appellant emerged with 2 cows which she brought to where PW1 and PW2's cows were tied, that PW1 then came over and changed the Appellant's cows' positions when she heard noise from the Appellant's house who then came out shouting and picked rocks which she started to hit the cow with and which also hit PW1. She testified further that PW1's phone had fallen down and the Appellant smashed it with rocks and threw it away before she started damaging the fence, that she (Appellant) then came out with a panga and cut 1 cow 3 times, that the people at the meeting rushed over and one Peter managed to disarm the Appellant of the panga as another one (Philip) untied the cow. She added that the Appellant continued hitting the wood then went to a shop and started hitting hit as well while removing wooden planes therefrom. She stated that it is then that they went to the police to report and recorded statements. In cross-examination, she stated that they never had any dispute with the Appellant before the incident

7. PW4 was one Philip Kemboi Chemutai. He testified that he is a village elder and that the Appellant and PW1 are neighbours. He basically echoed the same narrative given by the previous witnesses, namely that they were at the dispensary for a meeting when they heard screams and saw someone hitting the fence, that when they went over, they realized that it was the Appellant who was also throwing stones at PW1, that she even removed her blouse and went into her house then came out with a panga and used it to hit a cow that was tied. He, too, stated that Peter managed to disarm the Appellant of the panga, that PW4 untied the cow and that they left the Appellant still causing commotion as they took the panga to the Assistant Chief. In cross-examination, he stated that he did not know the reason why the Appellant was charged, and that PW1 was injured around the mouth.
8. PW5 was Peter Kirwa Cheruiyot. His testimony also tallied with that of the previous witnesses, namely, the testimony that the Appellant removed her blouse then went into her house and came back with a panga which she used to hit the cow on the back. He stated that he is the one who wrestled and dispossessed the Appellant of the panga, that the Appellant then started damaging the fence and also continued throwing rocks at PW1 who was across the road, that she also started hitting the kiosk and that PW1's wife was also across the road. In cross-examination, he denied witnessing the Appellant and PW1 fighting and stated that he saw PW1 injured, and that he heard the Appellant claiming that she was beaten.
9. PW6 was Dr. Kelvin Kiptoo, a Veterinary Surgeon. He testified that a farmer telephoned him on 26/01/2021 at about 4:00 pm with a request that he goes to examine and treat his 2 cows that had been attacked by a neighbour. He stated that he went there and found that the cow had become very wild and had to be restrained, and that upon examination, he noted that the cow had physical loss of hair on the back left hip bone and also had marks on the tail head. He added that the cow's hostile behaviour meant that it was in pain and discomfort and that the loss of hair was caused by a blunt object and that the marks on the rear area were consistent with a smooth object hitting the animal on the back, possibly a metal. He then produced his Report.
10. PW7 was Gilbert Koech, a Clinical Officer. He testified that he examined PW1 on 26/01/2021 when he came to the clinic complaining of having been assaulted. He testified that PW1's clothing had no stains or tears but he had minor injuries on the mouth, soft tissue injuries on the scapula-back and the wrists which were swollen, that the injuries were classified as "harm" and that he examined PW1 about 5 hours after the injury. In cross-examination, he testified that PW1 told him that the injury on his upper lip were caused by a stone.
11. The last Prosecution witness, PW8 was the Investigating Officer, Police Constable Edmond Bunyasi from Tambach Police Station. He stated that on 26/01/2021, a report of assault, malicious damage and injury on an animal was reported by PW1 at Kapchela Police Post which is under Tambach Police Station. He added that in his Report, PW1 stated that at around 1300 hours he was attending a meeting



when he left to go home and was attacked from behind using stones and that when he turned, he saw the Appellant, that he escaped to his home but the Appellant followed him with a panga, that his phone fell out of his pocket and that he saw the Appellant damaging it with stones. He added that according to PW1, the Appellant damaged mabati (iron sheets) on a kiosk then turned to PW1's cow and cut it on the back occasioning it injury before she was restrained by village elders. He testified further that the Appellant had relocated to her paternal home and she could not be traced until 6/03/2021 when the police received information that she had returned and duly arrested her, that as she had a young child, they gave her police bond and gave her the date of 12/03/2021 to report back but she did not return. He stated that they had to look for her and only managed to re-arrest her on 4/06/2021 when she returned to her matrimonial home. In cross-examination, he denied any knowledge that the Appellant had made complaints to the police. He also stated that he visited the scene and saw the cow. Initially, he stated that the injured cow was white and black but upon being shown the Veterinary Report, he clarified that it was brown and white.

### **Defence evidence**

12. The Appellant gave sworn testimony as DW1. She testified that on 26/01/2021, she had taken a child to hospital when PW1 went to her house and attacked her as she was giving medicine to the child and boxed her ribs, cheeks and breasts, that she screamed and PW1 pulled her braids before neighbours came to her rescue and that she was taken to hospital. She stated that she went to the police and reported the matter and was issued with a P3 Form, that one Officer Munyasi told her that they would call her once they arrested PW1 but that on 5/03/2021 she was arrested and the same Officer Munyasi abused and threatened her. She testified that on 3/06/2021, she was re-arrested and that the Officer told her that they would frame her for the offence.
13. DW2 was one Joseph Koech. He testified that on 26/01/2021 at 12:00 pm, he was in his hotel when he heard noises and that when he checked, he found PW1 attacking the Appellant and asked him (PW1) to stop beating the Appellant.

### **Hearing of the Appeal**

14. The parties were then given liberty to file written Submissions. While the State, through Prosecution Counsel Calvin Kirui filed its Submissions dated 4/06/2024, up to the time of concluding this Judgment, I had not come across any Submissions filed by the Appellant and the Judiciary Case Tracking System (CTS) portal does not reflect any such filing.

### **Respondents' Submissions**

15. Prosecution Counsel basically cited the provisions of law under which the Appellant was charged and submitted that all the required ingredients of the 3 charges had been proved. Regarding the Appellant's allegation that the evidence pointed out to an affray, that PW1 was the aggressor, and that she was assaulted by PW1, he submitted that no P3 Form was produced to prove any alleged injuries and that the defence also failed to give any reason why the complaint would attack her. According to him, the defence was untrustworthy. Regarding the allegation that Count III of the charges were withdrawn on 7/06/2022, he submitted that the trial Court did not handle this matter on the said date. In respect to the sentence, he submitted that the trial Court considered the offence and mitigation by the Appellant and exercised its discretion judiciously and in accordance in law.
16. In conclusion, Counsel submitted that the Prosecution availed overwhelming, credible and admissible evidence proving each of the counts and elements of the offences, and that the prosecution proved beyond reasonable doubt that the Appellant committed the offences



## Determination

17. As a first appellate forum, this Court is obligated to revisit and re-evaluate the evidence afresh, assess the same and make its own conclusions bearing in mind that the trial Court had the advantage of hearing and observing the demeanour of the witnesses (See *Okeno vs. Republic* [1972] E.A 32).
18. The two issues that arise for determination in this Appeal are the following:
  - a. Whether the offences of assault causing actual harm, malicious damage to property and injuring an animal were proved against the Appellant beyond reasonable doubt.
  - b. Whether the respective sentences imposed against the Appellant were justified.
19. I now proceed to analyze and determine the said issues:

### a. Whether the respective charges were proved beyond reasonable doubt

20. Regarding the 1<sup>st</sup> count of “assault causing actual harm”, Section 251 of the Penal Code provides that:

“Any person who commits an assault occasioning actual bodily harm is guilty of a misdemeanour and is liable to imprisonment for five years. “
21. From the foregoing, and as was stated by the Court of Appeal in the case of *Ndaa v Republic* [1985] eKLR, it is evident that the essential elements of the offence are that the accused:
  - i. assaulted the complainant or victim, and which assault:
  - ii. occasioned actual bodily harm.
22. Regarding the phrase “actual bodily harm” or “injury”, in the case of *Rex vs Donovan CCA 1934*, Swift J stated the following:

“For this purpose, we think that "bodily harm" has its ordinary meaning and includes any hurt or injury calculated to interfere with the health or comfort of the complainant. Such hurt or injury need not be permanent, but must, no doubt, be more than merely transient and trifling.”
23. The prosecution must therefore show that there was an intention to assault (*mens rea*), that the assault took place (*actus reus*) and that it resulted in actual bodily harm.
24. In this case, PW2, PW3, PW4 and PW5 all testified that they witnessed the Appellant continuously throwing stones at the complainant (PW1). Although they stated that they arrived at the scene after the commotion had already commenced after they heard screams and noises coming from the scene, and thus did not witness how it began, they testified that they saw the complainant with an injury around his mouth and that the complainant proclaimed to all present that it is one of the stones thrown by the Appellant that had hit him. Indeed, the P3 Form produced in evidence confirmed the injury. There was therefore sufficient corroboration of the complainant’s testimony. From my assessment of the record, I am satisfied that this evidence was not shaken or controverted either during cross-examination or in the Appellant’s defence. I am also satisfied that the Appellant, by continuously throwing stones at the complainant, despite being restrained, intended to and did cause the complainant harm.
25. The incident occurred at around 1.00 pm during the day, and the Appellant was well-known to the complainant as they were neighbours, a fact confirmed by the Appellant in her defence. She was therefore positively identified and such identification was by recognition.



26. Regarding the Appellant's allegation that the evidence pointed out to an affray, that it is the complainant who was the aggressor, and that she was assaulted by him, I note that no P3 Form was produced to prove any alleged injuries suffered by the Appellant. The prosecution witnesses who were at the scene also all denied seeing any injuries on the Appellant nor witnessed any fighting between the Appellant and the complainant nor did they see the complainant assaulting the Appellant. The one defence witness who alleged that he saw the complainant beating the Appellant was not even mentioned by the Prosecution witnesses as having been among the people at the scene. I agree with the Prosecution Counsel that the defence advanced was untrustworthy and appeared to be an afterthought.
27. The allegation that the trial Court erred in convicting the Appellant on this count I has therefore not been demonstrated or established.
28. Regarding the charge on the offence of "malicious damage to property", Section 339(1) of the Penal Code provides as follows:
- "Any person who wilfully and unlawfully destroys or damages any property is guilty of an offence, which, unless otherwise stated, is a misdemeanour, and is liable, if no other punishment is provided, to imprisonment for five years."
29. In the case of *Simon Kiama Ndiagui vs. Republic* (2017) eKLR, Jairus Ngaah J held that:
- 'In order to convict the court must be satisfied that, first, some property was destroyed; second, that a person destroyed the property; third that the destruction was wilful and therefore there must be proof of intent; and fourth, the court must also be satisfied that the destruction was unlawful.
30. To secure a conviction on the offence of malicious damage to property therefore, the prosecution must prove that;
- i. That there is existence of some property, although strict proof ownership of the property is not per se a requirement.
  - ii. That the property was destroyed or damaged.
  - iii. That the destruction or damage was occasioned by the accused.
  - iv. That the destruction was wilful and unlawful.
31. The "Black's Law Dictionary", 8<sup>th</sup> Edition describes the term "wilful" as follows:
- "the word 'wilful' or 'wilfully' when used in the definition of a crime, it has been said time and again, means only intentionally or purposely as distinguished from accidentally or negligently and does not require any actual impropriety; while on the other hand it has been stated with equal repetition and insistence that the requirement added by such a word is not satisfied unless there is a bad purpose or evil intent."
32. The words "wilfully and unlawfully" therefore can be said to allude to a situation where the destruction or damage to the property was wanton and without any colour of right or authority.
33. As in the case of count 1 above, PW2 and PW both testified that they witnessed the Appellant smashing the complainant's mobile phone which was on the ground with rocks and throwing it away. According to the complainant, the phone had fallen from his pocket as he was fleeing from the Appellant's rage



Once more therefore, there was sufficient corroboration of the complainant's testimony. Again, this evidence was not controverted either during cross-examination or in the Appellant's defence. In the circumstances, I am also satisfied that the Appellant, by continuously smashing the phone with rocks and then throwing it away, wilfully, purposely and unlawfully intended to and did cause damage to it phone. The trial Court, again, under these circumstances, cannot be faulted for convicting the Appellant on this count II.

34. Regarding the offence of "injuring an animal", Section 338 of the Penal Code provides thus:

"Any person who wilfully and unlawfully kills, maims or wounds any animal capable of being stolen is guilty of a felony and is liable, if the animal is an animal such as is referred to in section 278, to imprisonment for fourteen years, and, in any other case, to imprisonment for three years."

35. Section 278 of the Penal Code referred to above is premised as follows:

"If the thing stolen is any of the following things, that is to say, a horse, mare, gelding, ass, mule, camel, ostrich, bull, cow, ox, ram, ewe, wether, goat or pig, or the young thereof the offender is liable to imprisonment for a period not exceeding fourteen years."

36. A "cow" being one of the animals referred to in Section 278 above, the maximum prison sentence prescribed for the offence is therefore 14 years.

37. The Appellant, in her Memorandum of Appeal, alleged that trial Magistrate erred in convicting the Appellant on this count III yet this count had earlier been withdrawn on 7/06/2022. A perusal of the record shows that indeed on 7/06/2021, not 2022 as alleged, when the Appellant was presented in Court for taking of plea, the Prosecution withdrew this count III under Section 87(a) of the Criminal Procedure Code. However, it is also clear that subsequently, on 15/06/2021, the Prosecution applied to amend the Charge Sheet by reinstating this count III. There is no indication that the Application was opposed. It was allowed and it is then that the Appellant took plea on all 3 counts. It is also lost on me that the Appellant was thereafter represented by an able Counsel who never raised the issue, even though he may have only come on record after the reinstatement of count III This ground therefore fails.

38. Regarding the evidence adduced, PW2, PW3, PW4 and PW5 all testified that they witnessed the Appellant hitting the cow with the panga while the cow was still tied to a tree with a rope. The Veterinary Officer also testified that when he examined the cow, he confirmed the injuries and which, according to him, were caused by a flat and smooth blunt object consistent with a metallic object. He produced the Report in evidence. There was therefore also sufficient corroboration of the complainant's testimony on this count III. The allegation that the trial Court erred in convicting the Appellant on this count III has also not therefore been demonstrated and remains just that, a mere allegation.

#### **b. Whether the respective sentences imposed were justified**

39. Regarding the sentences imposed, the applicable principles in determining sentence on appeal were restated by the Court of Appeal in *Bernard Kimani Gacheru v Republic* [2002] eKLR, in the following terms:

"It is now settled law, following several authorities by this court and the high court, that sentence is a matter that rests in the discretion of the trial court. Similarly, the sentence must



depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account the wrong material, or acted on the wrong principle. Even if, the appellate court feels that the sentence is heavy and that the appellate court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exist”.

40. I also cite Majanja J, quoting the case of Francis Karioko Muruatetu & Another v Republic [2017] eKLR) in the case of Michael Kathewa Laichena & another v Republic [2018] eKLR, where he stated as follows:

“The Sentencing Policy Guidelines, 2016 (“the Guidelines”) published by the Kenya Judiciary provide a four tier methodology for determination of a custodial sentence. The starting point is establishing the custodial sentence under the applicable statute. Second, consider the mitigating circumstances or circumstances that would lessen the term of the custodial sentence. Third, aggravating circumstances that will go to increase the sentence. Fourth, weigh both aggravating and mitigating circumstances. ....”

41. The Court in the Muruatetu Case also guided that, in re-sentencing, the following mitigating factors would be applicable; (a) age of the offender; (b) being a first offender; (c) whether the offender pleaded guilty; (d) character and record of the offender; (e) commission of the offence in response to gender-based violence; (f) remorsefulness of the offender; (g) the possibility of reform and social re-adaptation of the offender; and (h) any other factor that the Court considers relevant.

42. Similarly, in the case of Daniel Kipkosgei Letting Vs. Republic [2021] eKLR, the Court of Appeal pronounced itself as follows;

“With regard to the above, we observe that the purpose and objectives of sentencing as stated in the Judiciary Sentencing policy should be commensurate and proportionate to the crime committed and the manner in which it was committed. The sentencing should be one that meets the end of justice and ensures that the principles of proportionality, deterrence and rehabilitation are adhered to. ....”

43. Applying the above principles to the facts and circumstances of this case, and upon appreciating the respective sentences prescribed in the relevant provisions of law under which the Appellant was charged, I cannot find any indication that the respective sentences imposed by the trial Court were harsh. The charge of “assault causing harm” attracts a maximum sentence of 5 years but the sentence imposed on the Appellant was 6 months imprisonment, the charge of “malicious damage to property” also attracts a maximum sentence of 5 years but, again, she was given 3 months imprisonment, and while the charge of “injuring an animal” attracts a maximum sentence of 14 years, she was given 6 months imprisonment. For each sentence, the Appellant was also given the option of paying a fine. Clearly, there was no harshness in the respective sentences imposed.

44. From the evidence on record, the Appellant appears to suffer from challenges concerning her anger management. Even assuming that the Appellant wronged her by untying her cows as alleged, the overreaction, rage and wild scenes displayed by the Appellant, including almost undressing herself in public, and the wanton damage she caused was clearly overboard. There was completely no reason why she had to run to her house to fetch a panga which she came out with brandishing and which she in fact used to harm the “innocent” cow. I also note that when given a chance to mitigate, she opted not to say



anything. She did not and still does not show any remorse for her actions. I also consider her conduct and attitude after the incident as testified by the Investigating Officer, namely, her disappearance from the locality immediately thereafter, thus causing the police a lot of challenges in re-arresting her. She is also said to have breached and violated the free bond given to her by the police when she failed to report back at the police station on the date she was given to do so. She is also said to have refused to attend the meeting called by the village elders after the incident to discuss an amicable settlement. Considering the above circumstances, it is my reasoned conclusion that the trial Court meted out sentences that were proportionate to the respective offence committed.

**Final Order**

45. In the circumstances, the Appeal fails against both on conviction and sentence and is dismissed in its entirety.

**DELIVERED, DATED AND SIGNED AT ELDORET THIS 20<sup>TH</sup> DAY OF DECEMBER 2024**

.....

**WANANDA J.R. ANURO**

**JUDGE**

Delivered in the presence of:

Mr. Oduor h/b for Dr. Chebii for Appellant

N/A for the State

Court Assistant: Brian Kimathi

