



**Republic v Sagirai (Criminal Case E049 of 2022)
[2023] KEHC 938 (KLR) (26 January 2023) (Judgment)**

Neutral citation: [2023] KEHC 938 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MIGORI
CRIMINAL CASE E049 OF 2022
RPV WENDOH, J
JANUARY 26, 2023**

BETWEEN

REPUBLIC PROSECUTOR

AND

AMOS MWITA SAGIRAI ACCUSED

JUDGMENT

1. Amos Mwita Sagirai, the appellant faced a charge of grievous harm Contrary to section 234 of the [Penal Code](#) before the Kehancha Resident Magistrate Court.
2. The particulars of the charge were that on 25/12/2020 at about 0600 hours at Makararangwe, Bwirege West Location in Kuria East, unlawfully caused grievous harm to Maroa Chacha Wambura.
3. Upon conviction, the appellant was sentenced to serve seven years imprisonment.
4. The appellant is dissatisfied with both the conviction and sentence. He preferred this appeal which is premised in the following grounds;-
 1. That the charge was not proved
 2. That the prosecution case was full of contradictions.
 3. That the prosecution failed to call a key witness
 4. That there was no linkage between the exhibits and the appellant
5. That the sentence meted out was manifestly excessive.
6. The appellant also filed written submissions and supplementary submissions in support of the appeal.
7. It was the appellant's assertion that the complainant's testimony on the reasons for the assault was contradictory and hence it points to the fact that his case was one of mistaken identity.



8. As regards, PW4's testimony that the appellant reported to the police station that he had assaulted somebody it is a game to fix him and contrary to section 25 A (1) of the Evidence Act and that it was never documented.
9. It was the appellant's further submission that PW3 named one Wambura as the person who assisted him but the said person was never called as a witnesses.
10. The appellant also questioned why PW3 was not subjected to voire dire examination and testify; that no tests were done on the panga and stick to confirm that they were used in the course of the offence.
11. In the further submissions the appellant purported to submit on the witnesses statements but the same were not the subject in the trial court. The appellant urged the court to quash the conviction and set aside the sentence.
12. The appeal was opposed. Mr. Mulama the prosecution counsel submitted that the testimonies of PW2 and PW3 were unchallenged on how the appellant accosted and assaulted the complainant ; that the offence occurred in broad daylight; that the appellant was a person known to the witnesses as a neighbour and that one Wambura rescued PW2 but did not attend court because he was attending to a case of his child who had been defiled.
13. As to PW4's testimony, he recorded a report of assault from the appellant and upon visiting his house recovered the exhibits which were positively identified by PW2 and PW3; That the appellant has not reported that he acted in self defence.
14. Counsel relied on the case of Pius Mutua Mbuvi v Republic (2021) eKLR where the court discussed the ingredients of the offence of grievous harm i.e that the harm must have been caused unlawfully, caused by the suspect and that all the three ingredients were proved.
15. On failure to call key witnesses , counsel urged that an explanation was given as to why the witness Wambura could not attend court; Counsel relied on the case of Bukenya & others v Uganda (1972) EA 549 where it was held that, where the prosecution fails to call important witnesses; the court is entitled draw to an inference that the evidence of their witness would have been adverse to the prosecution case. Counsel however submitted that attempts to call the witness failed because of plausible reasons; that there were no ill motives to shield the witnesses from testifying; that in any event, the witness would only report a what PW2 and PW3 told the court and that he was not a key witness. See also Donald Majiwa Achilwa & 2 others v Republic (2009) eKLR. Counsel urged that the testimonies of PW2 and PW3 were sufficient to prove the prosecution case. Reliance was also made on section 143 of the Evidence Act. As regards sentence, counsel submitted that the trial court considered the appellant's mitigation and the injuries inflicted before passing sentence. Counsel relied on the case of Kariuki v Republic (1970) EA 230 where the court observed that sentencing is the discretion of the court; that the court exercised its discretion judiciously and this court should not interfere because the sentence was lenient and proportionate to the offence. He urged the court to dismiss the appeal.
16. I have duly considered the evidence on record, the grounds of appeal and submissions of the rival sides.
17. According to the testimonies of PW2 and PW3, the offence took place in broad daylight about 6.30 am . PW2 and PW3 both said that appellant is their neighbour. The evidence of PW2 and PW3 was unchallenged in the cross examination and this court is satisfied that PW2 and PW3 identified the appellant as the assailant.
18. As to whether the offence was committed, PW2 and PW3 testified that PW2 was injured on the hand. PW3 who watched PW2 getting attacked said she saw the appellant emerge from the thicket, trying to cut off the complainant's neck but he blocked with his hand and no wonder the injury was on the hand.



19. PW1 who examined PW2 on 9/1/2021 confirmed that PW2 was injured on the radial ulna joint at the elbow joint and the probable weapon used was sharp. PW1 also saw the treatment notes and the X-ray report showed that there was a fracture at the joint. PW1's testimony corroborated PW2 and PW3's testimonies.
20. To prove a charge of grievous harm, the prosecution has to demonstrate the following essential ingredients; -
1. The victim sustained grievous harm
 2. The harm was caused unlawfully
 3. The accused caused or participated in causing the grievous harm
21. In this case, PW2 and PW3 witnessed the appellant assault the complainant using a panga and I am satisfied that offence of grievous harm was proved.
22. It is true that PW2 stated that he fell down after he was cut and a person by the name of Wambura came to his rescue, bound up his wound and escorted him to the police station. PW3 told the court that when she saw her father fall after the assault, she ran home to get help and on returning, found Wambura attending to the father.
23. Section 143 of the *Evidence Act* provides that a fact can be proved by the evidence of a single witness unless a statute requires otherwise. As held in *Bukenya case (supra)* that where important witnesses are not called by the prosecution; to testify, the court may draw on inference that the evidence of that important witness may have been adverse to the prosecution case. In *Donald Majiwa (supra)* the court said:-

The law as it presently stands is that the prosecution is obliged to call all witnesses who are necessary to establish the truth in a case even though some of those witnesses evidence may be adverse to the prosecution case. However, the prosecution is not bound to call a plurality of witnesses to establish a fact. Where, however, the evidence adduced barely establishes the prosecution case, and the prosecution withholds a witness, the court in an appropriate case is entitled to infer that had that witness been called his evidence would have tended to be adverse to the prosecution case”.

24. In this case there was no indication that the said witness saw the offence being committed. All that is known is that he came to PW2's aid after he fell. Besides, the prosecution intended to call him as a witness but on two occasions on 30/6/2021 and 2/7/2021 the said witness was not available. On 30/6/2021 Wambura was said to be attending to a sick child in Mombasa and on 2/7/2021 the prosecutor indicated that he had spoken to the witness who was attending to his child who had been defiled. Thereafter, there seem not to have been a follow up on calling the said Wambura.
25. However, there is totally no evidence to show that failure to call him was intentional or mischievous and that his evidence would have been adverse to the prosecution case. There was no oblique motive in failing to call the witness. That ground must fail.
26. Whether there were contradictions in the prosecution case. In the case of *Erick Onyango Ondong v Republic* (2014) eKLR, the court cited the case of *Twebangane Alfred v Uganda* CR 139 PF 2001 (2003) UGGA 6, where it said;-

With regard to contradictions in the prosecution case, the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not



necessarily lead to the evidence of a witness being and rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate without fullness or if they do not affect the main substance of the prosecution case “

See also *Philip Nzaka Watu v Republic* (2016) eKLR where the court stated as follows:

However, it must be remembered that when it comes to human recollection, no two witnesses recall exactly the same thing to the minutest detail. Some discrepancies must be expected because human recollection is not infallible and no two people can perceive the same phenomena exactly the same way.

Indeed, as has been recognized in many decisions of this Court, some inconsistency in evidence may signify veracity and honesty, just as unusual uniformity may signal fabrication and coaching of witnesses.

Ultimately, whether discrepancies in evidence render it believable or otherwise must turn on the circumstances of each case and the nature and extent of the discrepancies and inconsistencies in question.”

27. From the above decisions, not all contradictions can lead to invalidating a conviction but must go to the root of the charge.
28. In this case what the appellant refers to as contradictions in the prosecution case especially PW2 is no contradictions at all. At first PW2 said it is the appellant who alleged that PW2 had taken his wife away and later in cross examination, he denied knowing why the applicant was attacking him because he was denying the allegation. I find no contradictions in PW2’s evidence.
29. According to PW4, accused went to report at the police station that he had assaulted somebody and that is how he was arrested. In his defence, he claimed to have gone to the police station to get a permit to hold celebrations over 24th December and that is when he was arrested. The appellant never put such question to PW4 when he testified. He was arrested on 25th and cannot have been going to get a permit for 24th December as he alleged when the date had passed. The defence was a total afterthought. There is no reason why PW4 would have framed the appellant when he did not know of what happened to PW2. I believe it is the appellant who presented himself to police and led to recovery of the panga and stick used in the assault. PW4 evidence does not amount to a confession, but it is evidence that led to accused’s arrest.
30. Having considered all the grounds of appeal, none can be sustained. I find that the conviction is sound and I affirm it.
31. The appellant has also complained that the sentence is harsh and excessive. Sentencing is the discretion of the court guided by the law and the Judiciary Sentencing Policy. The exercise of the discretion must be judicious. Upon conviction under section 234 of the *Penal Code*, one is liable to life imprisonment. The court considered the appellant’s mitigation and the injuries inflicted on the complainant, that they are of a permanent nature and were really uncalled for.
32. The appellant was said to be a first offender. Taking all the above to mind, and in exercise of this court’s discretion, I hereby set aside the sentence and I substitute it with five (5) years imprisonment. The sentence will take effect from the date the appellant was sentenced by the trial court on 23/2/2022.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MIGORI THIS 26TH DAY OF JANUARY, 2023.

R. WENDOH



JUDGE

Judgment delivered in presence of:

Mr. Omooria for state

Ms. Otieno holding brief for Mr. Singei for Accused

Accused present

Ms. Nyauke –Court Assistant

