



REPUBLIC OF KENYA



KENYA LAW
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**Nyongesa v Republic (Criminal Appeal E033 of 2022)
[2023] KEHC 3688 (KLR) (25 April 2023) (Judgment)**

Neutral citation: [2023] KEHC 3688 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
CRIMINAL APPEAL E033 OF 2022**

REA OUGO, J

APRIL 25, 2023

BETWEEN

JACOB NYONGESA ALIAS MUTATA SIMIYU APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal against the conviction and sentence delivered by Hon. N.Barasa,
Principal Magistrate in Criminal Case no 112 of 2020, SPM's Court at Webuye)*

JUDGMENT

1. Jacob Nyongesa Alias Mutata Simiyu, the appellant was charged with the offence of grievous harm contrary to section 234 of the *Penal Code*. The particulars of the offence are, on the 7th December 2017 at Namwanga area, Miendo location in Webuye west sub-county within Bungoma county jointly with another before the court unlawfully did grievous harm to Collins Sirengo Sakari.
2. The appellant pleaded not guilty and the prosecution called (5) five witnesses to prove their case. The trial court found the appellant guilty of the said offence, convicted him and sentenced him to 25 years imprisonment. This is what has led to this appeal.
3. This being a first appeal, this court is under a duty to reevaluate the evidence and draw its own inferences of fact so as to come to its own independent conclusion, as to whether or not, the decision of the trial court can be sustained. (See *Okeno v Republic* [1972] EA 32,).
4. This was the prosecution case; on the 7/12/2017 Collins Sirengo Zachary, Pw1, was heading home from work in Machakha to Namawanga. It was 8.00pm. He had a torch. He saw four people on the road. He recognized the said people. They were Jacob, Andrew, Jarius and Kilobi. He shone his torch on them. They were 2 meters away from him. Jacob had a talimbo, Kilobi had a jembe, Jarius had a panga and Andrew had a panga. They are person he knows well as his aunty is married in their home. Suddenly the 4 started cutting him. His torch was his source of light. Andrew cut him on the shoulder,



Jarius cut him on the back of his head, Kilobi cut him with the jembe in the middle of the head and Jacob hit him with the talimbo on the head. He saw them as they attacked him and he screamed.

5. Geoffrey Walela Mulati (Pw2) was also from work at about 8:00 p.m. the same day. As he headed home he saw people on the road. One of them ran towards him. He recognized him as Sirengo his uncle. Andrew was running after him. He saw Andrew hit Pw1 with a slasher and then he fled. Pw1 fell. He saw Jarius come from the direction Pw1 had come from. He saw Jarius with a panga, Kilobi had a jembe, Mutata the appellant had a talimbo. Jarius slapped him on the buttock with the panga. Pw1 was cut severally on the head and was bleeding. He rang the police and sought their assistance. Pw1 was taken to Lugulu hospital. Mutata and Kilobi were arrested. Andrew and Jarius went into hiding. The accused is well known to him, he is his brother-in-law.
6. Adelide Machuma Makokha, Pw3, was in her house on the material. She heard noise and went out to check. She saw Pw1 screaming and crying. She had a torch which she used to see him. He had several cuts on the head and neck. She called Munyendo police post for assistance. Pw1 told her that Julius, Kilobi, Jarius, Nyongesa and Andrew Wekesa attacked him. When she went out she saw Julius, Kilobi, Jarius, Andrew and Nyongesa. They were armed. Nyongesa had an object in his hand, Julius a jembe and Andrew a talimbo. They appeared rough. Pw1 is her neighbour. No.77480 Cpl. Ochieng Amollo attached to Webuye Police station, Pw4, received the appellant from officers from Miendo on the 16.2.2020. The appellant been accused of assaulting and inflicting injuries on someone. He traced the complainant and established the report Pw1 had made on the 7/12/2017. During his investigations he established that the appellant and his accomplices fled from home but Kilobi and Julius had been arrested and handed over to police officers, Julius and Kilobi absconded vide Cr. 695/ 2017. He also established that the appellant Jacob Nyongesa Simiyu had nicknames Mutata Simiyu. He charged the appellant.
7. Dr. Philemon Choge, Pw5, testified that Pw1 was seen at their facility Moi Teaching and Referral Hospital Eldoret on the 31/5/2018 by Doctor Rono who filed the P3 form. Pw1 had been admitted in the facility from 8/12/2017 to 12/12/2017. He had been assaulted by a group of 4 people and sustained injuries on the head. He had multiple skull fractures. Both ears were cut, he had cuts on the shoulder 5cm on the right shoulder. Sharp objects were used to inflict the said injuries. Degree of injury was grievous harm.
8. The appellant in his defence stated that he does small businesses like selling tomatoes. He denies the charges. He moved to Kitale. The incident took place when he had moved out. He is battling land issues with his cousins. They fixed him with claims of complainant who is not their clansman. They want him jailed. They planned to fix him.
9. The appellant has 6 grounds of appeal as follows;
 - i. That the trial magistrate erred in law and fact to rely on a defective charge sheet under section 214 (1) of the CPC.
 - ii. That the trial magistrate erred in law and fact to convicting the appellant while relying on evidence that were marred with contradictions on prosecution witnesses thus bias in law
 - iii. That the prosecution and trial magistrate erred in law and fact not to consider the source and the cause of the act since there was a grudge between the suspect and the victim hence were related under test of relationship of marriage.
 - iv. That the trial process was not fair and just since the ordeal took place at night and the circumstances of identification were not therefore established beyond doubt through the persecutive of intensity of light used.



- v. That the magistrate breached his cogent and alibi defence which discharged him out of the act and disregarded his credibility of trust cause prejudice on his rights.
10. That this is a family matter where the Hon. Court could have considered and allowed proper investigation over the same and given the family an opportunity to properly identify the real culprit who committed the offence than arresting a wrong person herein.
11. The appellant seeks to have his appeal allowed. That the judgment by the trial court be quashed and set aside and that he set free.
12. Parties filed written submissions. I have read the said submissions. This is what I understand the appellant's submissions to be. On ground no. 1 he raises the issue that the charge talks on, jointly with another, yet the evidence adduced refers 4 persons. He claims that the charge sheet is defective under section 214 (1) of the *CPC*. On ground no.2 there was contradictions in the evidence of Pw1 and Pw2 on the weapons the assailants had with them . That the incident happened at night there was no evidence on the mode of light around the place of the incident. On ground no. 3 that the trial magistrate did not make the proper approach to weigh up all the elements which points towards the guilt of the appellant. On ground no. 4 the appellant raises the issue of identification and contradiction in the evidence of the witnesses and on ground no. 5 the appellant submits that his defense of alibi was not given any consideration by the trial court and that the court should investigate the reasons behind the attack.
13. The respondent response was as follows; that the prosecution proved its case beyond reasonable doubt. That the persons who attacked Pw1 were known to him. It was a case of recognition. That the evidence of who had which weapon had minor discrepancies and did not go into the substantive aspects of the case. Reliance was made in the case of *Philip Nzaka Watu v R* [2016] eKLR where the court acknowledged that minor discrepancies in the testimony of witnesses are normal as no human recollection is infallible. On the issue of framing charges, it was submitted that section 137 of the *Criminal Procedure Code* provides rules for framing charges and that as per the said section the charge sheet in this case complied with the basic requirements. That only the appellant and another were arrested and charged accordingly. On the defense of alibi, it was submitted the defense was an afterthought and that it never came up during the trial. That it was not raised at the earliest opportunity to enable the prosecution and the investigating officer to check it out determine its veracity or lack thereof. Reliance was made on *R v Sukha Singh s/o Wazir Singh & Others* (1939) 6 EACA 145. It was submitted that the sentence was appropriate as the trial court exercised its discretion judiciously.

Analysis and Determination

14. The main issue before the court is whether the prosecution proved its case beyond reasonable doubt. Section 234 of the *Penal Code* provides that any person who unlawfully does grievous harm to another is guilty of a felony and is liable to imprisonment for life. This court is required to examine whether the prosecution proved that the victim sustained grievous harm; the harm was caused unlawfully; and the accused caused or participated in causing the grievous harm. However, before I consider the prosecution's evidence, the appellant asserts that the charge sheet is defective, as the particulars indicate that the crime was committed in collaboration 'another' while the prosecution presented evidence suggesting that the complainant was assaulted by four individuals. I am of the view that the irregularity in question is minor and could be rectified under section 382 of the *Criminal Procedure Code*. I am constrained to agree with the submissions of the prosecution that the charge sheet complied with the basic requirements set out in section 137 of the *Criminal Procedure Code*.



15. I now turn to consider whether the complainant suffered grievous harm. There was sufficient evidence that the complainant sustained grievous harm. Pw1's testimony was that the assailants cut him on the shoulder, at the back of his head and in the middle of his head. He was also hit on the head. Pw2 found the complainant cut severally on the head. Pw1 was hospitalized at the Moi Teaching and Referral Hospital for 2 weeks. A doctor from the hospital, Pw5, confirmed that Pw1 sustained head injuries with multiple cut wounds. He had suffered multiple skull fractures. Pw5 testified that the degree of injury was classified as grievous harm and he produced.
16. The appellant in his submissions argues that the prosecution did not prove that the appellant caused or participated in causing the grievous harm. He submits that the incident took place at night and the evidence in regards to the source of light unclear. It is not in dispute that the incident took place at 8:00 o'clock at night. The guidelines on identification were discussed in *Republic v Turnbull* [1971] QR 227 where the court stated:
- “... The Judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have with the Accused under observation? At what distance? In what light? Was the observation impeded in any way....? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? how long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance?... Recognition may be more reliable than identification of a stranger but even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.”
17. Pw1 testified that he had the light on his cell phone on when he was attacked. He was able to see the 4 assailants who attacked him. Pw1 testified that they were all on the road and in close proximity as he was 2 meters away from them. He saw the 4 assailants who were his relatives. The assailants including the appellant were persons well known to him. Pw3 who went to the scene once an alarm was raised testified that she saw the appellant and the other 3 assailant. She had a touch and saw the appellant including the other assailants who appeared hostile and were armed. Despite the fact that Pw2 claimed to have witnessed the incident, he did not testify as to the source of light. The testimonies of Pw1 and Pw3 on the other hand were clear on the source of light available and they placed the appellant at the crime scene. The appellant's defence that he was in Kitale at the time could not displace the prosecution evidence mounted against him.
18. The appellant has also argued that there was contradiction in regards to the weapons used by the assailants. He pointed out that Pw1 testified that the appellant had a talimbo while Pw3 testified that the appellant had carried an object while it was Andrew that had a talimbo. Only Pw1 and Pw2 were able to support their identification testimony given the fact that they had used a torch while at the scene. I however find no contradiction in their testimonies. The testimony of Pw1 relates to the weapons used during the attack, it is clear from his evidence that the appellant hit him with a talimbo. The evidence of Pw3 relates to moments after the attack and confirms that the appellant was at the scene. She did not see the appellant and the other assailants attack the complainant but arrived at the scene after the attack. She had a torch and saw the appellant with an object after the attack. In my view, there were no contradictions in regards to the weapons whatsoever.



19. It was unlawful for the appellant and the other assailants to hit and cut the complainant. They deliberately assaulted Pw1 with an intention to cause him grievous harm. The prosecution therefore proved its case beyond reasonable doubt.
20. The appeal also challenged the sentence of the trial magistrate. The appellant was sentenced to 25 years imprisonment. The respondent submits that the 25-year sentence was sufficient considering the injuries sustained by the complainant. It emerged from the pre-sentence hearing before the subordinate court that the appellant was a first offender and in his mitigation he was remorseful and asked the court for leniency as he had children that depend on him. I therefore find the 25-year sentence to be excessive.
21. In the end, the Appeal on conviction is declined and the finding of the subordinate court on conviction is upheld. This court further orders that the sentence of 25 years imprisonment is substituted with fifteen (15) years imprisonment.

DATED, SIGNED AND DELIVERED AT BUNGOMA THIS 25TH DAY OF APRIL 2023

R.E. OUGO

JUDGE

In the presence of:

Appellant in person

Miss Omondi For the Respondent

Wilkister C/A

