



REPUBLIC OF KENYA



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**Kalayu v Republic (Criminal Appeal E031 of 2022)
[2023] KEHC 18348 (KLR) (31 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 18348 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CRIMINAL APPEAL E031 OF 2022
EM MURIITHI, J
MAY 31, 2023**

BETWEEN

JULIA KALAYU APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal from the original conviction and sentence by
Hon. R. Ongira RM in Tigania Cr. No.E270 of 2021 on 3/2/2022)*

JUDGMENT

1. Julia Kalayu, the appellant herein was charged with grievous harm contrary to section 234 of the *Penal Code*. The particulars were that, on 25/6/2021 at around 1530 hours at Antuarimata village, Ankamia location in Tigania Central Sub-County within Meru County, she willfully and unlawfully did grievous harm to Atanasio Gitonga.
2. She denied the charges but upon full trial, she was convicted and sentenced to 10 years' imprisonment.

The Appeal

3. On appeal, the appellant raised 5 grounds of appeal as follows: -
 1. The learned trial magistrate erred in law and fact by failing to note that key witnesses weren't invited to adduce testimony against the appellant.
 2. The learned trial magistrate erred in law and fact by relying on uncorroborated and contradicting evidence tendered by the prosecution witnesses.
 3. The learned trial magistrate erred in law and fact by failing to exercise prudence thus relied on hearsay rather than facts based on factual findings.



4. The learned trial magistrate failed to consider his mitigation.
5. The learned trial magistrate erred in matters of law and fact by failing to consider his defence.

Duty of the Court

4. The duty of this court as the first appellate court is to re-evaluate the evidence on record and draw its own independent conclusions, bearing in mind that it neither saw nor heard the witnesses and should make due allowance in that respect. (See *Okeno v R* [1972] EA 32).

Evidence

5. PW1, Atanasio Gitonga and the complainant herein, gave sworn testimony that, “I am a casual worker. On 25/06/2021 at 3.30 p.m I was from buying Macadamia from peoples farms in Gitumbi village. I was taking the Macadamia to a store near a market called Uli Ndaya. When I passed the accused person home which is near the road. I passed accused persons gate about 150 meters away I then heard that she had out me on the elbow of the right hand using a panga. I was carrying macadamia on my head and he cut my right hand so I dropped the macadamia and I turned just for me to see the accused person armed with a panga and she cut my lip until a tooth fell off. I then proceeded and I went and reported to the police and I was issued with an OB at Mikinduri police station I then went to the hospital called Ebenezer where I was treated and I was stitched and I was put on drip. Yes I have treatment notes, these are the treatment notes that were filled by the doctor. I was then sent to the doctor a dentist. These are pieces of my tooth that come off (court sees). When accused cut me up I was on the road alone but Laban Munene witnessed it as he was passing by the road going his way. Laban was a bit far when he saw what accused did before he started screaming while running. Laban was approaching me when he saw what happened. Mutwiri was walking approaching from behind me and he too saw what had happened. Mutwiri also came to my aid and when accused saw them she ran away. Munene and Mutwiri looked for a motorcycle and I was rushed to the hospital. P3 form – pmfi1. At Ebenezer hospital I saw a dentist who removed my tooth and I went home afterwards. The doctor gave me the teeth and it’s before court. Treatment notes – pmfi2. 6 pieces of teeth – pmfi3 (a) (b) (c) (d) (e) and (f). Yes I can see the accused person before court. She’s a neighbor. We have never quarreled before. Laban Munene also comes from our village. Godfrey Mutwiri is also a neighbor.”
6. On cross examination, he stated that, “We have never disagreed before. You have never reported me to the police. I have never demolished and sold you house to Laban as I never come to your home. I never demolished your house neither did I take a mattress for a student as you would have reported me to the police. You assaulted me on the road. You cut my right hand as I was going away and I dropped the Macadamia I was carrying and when I was turning to see who had assaulted me I saw you and you proceeded to cut my noses and mouth with the panga that you were holding. You are the one who knows why you assaulted me because I had never spoken to you or argued with you before. I don’t know if Laban had been jailed in court I and count 2.”
7. PW2 Geoffrey Mutwiri, testified that, “On 25/06/2021 at 3.30 p.m I was heading to Buuri Ndaya when I heard scream. I was on the road. The screams were emanating from where I was going to. I rushed to go and establish why there were screams. I rushed and saw Laban Munene. I saw accused person who was near Atanasio Gitonga. I met accused quarreling Pw1 and accused had already cut Pw1. Pw1 was bleeding on the right hand and PW1 was also bleeding from his mouth. Yes accused person was holding a pang at the time as she was armed. Accused person saw us and took off and then she went to her house which is about 70 – 100 meters. We then took Pw1 to the police station with Laban. We went to Mikinduri police station and a report was made and then we took PW1 to the



- hospital in Mikinduri. Later went and I recorded my statement at the police station concerning what was happening. The distance from where I was when I heard the scream to where I found Pw1 was about 100 meters away. Pw1 is a neighbor. Kalayu (accused) is a neighbor. I have never quarreled with accused person before court. Yes I can see her before the court today. She's here (pointing) at accused.”
8. On cross examination, he stated that, “You have never reported me and Laban and we have never been asked to stop quarreling you. I never wanted to buy your piece of land which you refused to sell to me. I don't know of any quarrel between you and laban and I when I reached where the screams you were near where laban was I never go to your home. You have never sent people to me to inform me that you will not sell your land to me. There are no bananas that Pw1 had cut down and then gave to me. He has never given me any bananas. There's nothing laban and Gitonga have ever sold to me after selling your home.”
 9. PW3 Laban Munene, testified that, “On 25/06/2021 at 3.30 p.m I was coming from Kuriyaay and I was going to Kieni market. On my way I saw accused coming from her home with her hands behind her and when she reached Pw1, accused cut Pw1 on the hand and when PW1 turned she cut PW1 on the face and injured his mouth. Accused person approached Pw1 from the back. Accused cut Pw1 on the right hand using a panga that she was holding. I rushed and I went where Pw1 was while screaming when accused person saw me and she retreated to her house. I saw blood oozing from PW1's hand and mouth. I witnessed accused person cutting Pw1 with a panga. PW2 was approaching from behind Pw1. When Pw2 reached he found me and PW1 and accused was retreating to her home. We then took PW1 to the hospital after reporting the incident to the police. PW1 is a neighbor. Pw2 is also a neighbor. The accused person is also a neighbor and yes, I can see her before this court. We have never quarreled with the accused person before this court ever.”
 10. On cross examination, he stated that, “You are my neighbor. We have never quarreled or fought. I was jailed by court 1 and I finished serving my sentence. I had been jailed for the offence of creating disturbance. I am not about anything concerning the sale of your parcel of land. I don't know if you have sale agreements but if there are there, you can bring term to court. There's nothing I had done with Pw1 when you assaulted him as I only saw you cutting him on the road. Pw1 had never bring me bananas and there's no house belonging to Karani that had been demolished by me and PW1. We were never together at the D.O. I never had any case with you before court 2. I had never cut you before I don't know why you claim that I cut you and I have never cut you before. I have never taken anything of your together with Gitonga then we sold the same.”
 11. PW4 P.C John Muiriuri of Mikinduri police station, testified that, “I am the investigating officer in the matter. On 25/06/2021 at around 1820 hours a report was made by Atanasio Gitonga the complainant who stated he was assaulted by a person well known to him. He stated that on the same date at 1530 hours as he was heading to Macadamia center carrying a sack of Macadamia he was attacked from the back and was cut on right elbow and he dropped the sack of Macadamia and turned back to see what was happening and that's when he saw accused who cut him on the left side of the nose and the complainant came and reported to the station and investigations commenced and statement was recorded. She was treated and given p3 form and degree of injury was grievous harm. I visited the scene together with PC Kimata and we found that the incident happed on the road about 30 meters from gate of the accused. We visited the scene on 02/07/2021. Accused person was later on arrested and charged with the offence of grievous harm. Pw1 presented his broken teeth which were removed as a result of the injury he suffered. I was not present when complainant made his report. I can see accused before court and she was known before to me as she has another case before court 2 for possession of illicit alcoholic drink. I have never disagreed with accused before.”



12. On cross examination, he stated that, “I cannot tell if you reported initially you reported later and investigations revealed that you made that report to counter report made by Pw1. There’s no wrong the Pw1 had done in your home. You had reported that Gitonga had cut bananas after breaking into your house but on investigations there was no house that was broken into and your witnesses failed to point out that PW1 had cut the bananas. Your witnesses said they found bananas had already been cut and when we conducted investigations bananas were not cut on the day you alleged, they were cut way back.”
13. PW5 Martha Murumba, a clinician of Miathene sub-county Hospital, produced the complainant’s P3 form which was filled on 28/6/2021, the teeth that came out as a result of the cut wound and the treatment notes as exhibits in court. When she examined the complainant, he had a deep cut above upper mouth lip which extended to the left nasal septum and to the upper gums. The cut led to the removal of the middle left incisor and lateral incisor and canine tooth. The complainant also sustained a cut and wound on right forearm elbow region on the lateral side and he had a swollen and tender right anterior chest wall on the upper region and a swollen and tender right thigh anterior side. During the time of filing the P3 form, the injuries were days old, a sharp object occasioned them and the degree of injury was grievous harm.
14. On cross examination, she stated that she had treated the appellant before. She further affirmed that 3 of the complainant’s teeth came off and although there were no photographs that were taken, the P3 form and the treatment notes were genuine documents.
15. In her sworn defence, DW1 Julia Kalayu, the appellant herein testified that, “I am a farmer. On 25/06/2021 Laban and Gitonga cut my bananas and Laban had c-line and Gitonga had a panga. They were cutting my bananas and when they finished cutting my banana. Laban came to my door and Gitonga took the bananas to the road. They waited for Mutwiri to come with a motor cycle to collect the bananas. Gitonga then came and kicked my door and I blocked the door which hit Gitonga and then I complainant cut me and accessed my house. Gitonga and Laban took my items. Gitonga was used to carry my items after he was sent by Mutwiri who I refused to give my parcel of land. I went to the police and made a report and I was arrested. That was not the first time Gitonga cut my bananas when he was with Mutwiri. If Gitonga never came into my house I wouldn’t have cut him. I cut him as I was afraid that he would kill me. I was afraid on the said day as previously complainant Mutwiri had assaulted me and they removed my six teeth. I have treatment notes and photographs of the destroyed items but they’re not before court.”
16. On cross examination, she stated that, “I was arrested on 07/07/2021. The story I have told court about I cannot recall the date when Gitonga came to my house. I cannot say if it was 25/05/2021. Gitonga had come to my house earlier and I was arrested later on. I have told court that I defended myself as Gitonga wanted to rape me. I did not have an OB of that report an attempt rape. On that day Laban and Gitonga would have killed me. It’s Gitonga and Laban who wanted to rape me. They wanted to kill me. Bulindaya Tea buying center is far from me but I cannot say how far. It’s outer number 36. It’s from here to very far. One can go there on foot. I don’t know if it’s 200 meters from home. Mwenda the police officer came and took photographs and he came with Murira and that’s the day I was assaulted. They found laban who took off. In that area, people respond to distress very fast. Laban and Gitonga took off. Gitonga did not remain he took off. They took off after seeing the police officer called Mwenda. They took my bananas and took the same to the road and then Gitonga came to my house and I pushed my door which cut Gitonga on the hands and I cut Gitonga on the face and his teeth came from. They had disturbed me even earlier.”



Submissions

17. The appellant submitted that the evidence by the prosecution witnesses was authored and tailored to pin him. He urged that there is doubt as to whether the alleged assault happened as alleged, and that doubt should be resolved in his favour.
18. The respondent did not file any submissions.

Analysis and determination

19. The essential ingredients of the offence of grievous harm contrary to 234 of the *Penal Code*, which the prosecution had to prove beyond reasonable doubt, are the complainant sustained grievous harm, the harm was caused unlawfully, and the appellant caused or participated in causing the grievous harm.
20. When PW5 examined the complainant, he had a deep cut above upper mouth lip which extended to the left nasal septum and to the upper gums. The cut led to the removal of the middle left incisor and lateral incisor and canine tooth. The complainant also sustained a cut and wound on right forearm elbow region on the lateral side and he had a swollen and tender right anterior chest wall on the upper region and a swollen and tender right thigh anterior side. These findings were all reflected in the P3 form where the degree of injury was classified as grievous harm. PW1 testified that as he had just passed the appellant's home which is near the road carrying macadamia on his head, he was cut on the elbow of the right hand using a panga. He then dropped the macadamia and turned to see the appellant armed with a panga. The appellant cut his lip until a tooth fell off. He remained firm even on cross examination that it was the appellant who had assaulted him without any justification. His testimony was corroborated by both PW2 and PW3, the eye witnesses. PW2 testified that on the material day, he was heading to Buuri Ndaya when he heard screams. When he rushed to go and establish the source of the screams, he saw PW3 and the appellant, who was near PW1. "I met accused quarreling Pw1 and accused had already cut Pw1. Pw1 was bleeding on the right hand and PW1 was also bleeding from his mouth. Yes accused person was holding a panga at the time as she was armed." PW3 testified that on the material day he was going to Kieni market when, "I saw accused coming from her home with her hands behind her and when she reached Pw1, accused cut Pw1 on the hand and when PW1 turned she cut PW1 on the face and injured his mouth. Accused person approached Pw1 from the back. Accused cut Pw1 on the right hand using a panga that she was holding...I saw blood oozing from PW1's hand and mouth. I witnessed accused person cutting Pw1 with a panga."
21. The appellant tried to justify the assault by citing self defence and defence to property. She admitted cutting the complainant in an attempt to defend herself as PW1 and PW3 wanted to rape and kill her. She further stated that PW1 had gone to her house and cut down her bananas. She stated that, "If Gitonga never came into my house I wouldn't have cut him. I cut him as I was afraid that he would kill me. I was afraid on the said day as previously complainant Mutwiri had assaulted me and they removed my six teeth. I have treatment notes and photographs of the destroyed items but they're not before court." She was however categorical that the alleged report of her attempted rape by PW1 and PW3 was not reported to the police.
22. In a bid to confirm whether the allegations by the appellant were true, the investigating officer, PW4 visited the scene where he found that there was no house that was broken into. On further investigations, it was discovered that the bananas were cut way back and not on the material day as alleged by the appellant.
23. Grievous harm is defined under section 4 of the *Penal Code* to mean 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.

24. This court is thus convinced that there is sufficient evidence to prove that the assault occasioned on PW1 resulted in grievous bodily harm within the meaning of section 4 of the *Penal code*.
25. On whether the harm was caused unlawfully by the appellant, the appellant in her sworn defence admitted to having assaulted PW1 on the material day. PW1, PW2 and PW3 were all able to place the appellant, who was their neighbor, at the scene of the crime, as they all witnessed the assault taking place.
26. This court finds that the prosecution proved beyond reasonable doubt that it was the appellant who unlawfully caused the complainant grievous harm without any legal justification or excuse.
27. On whether there were contradictions in the evidence adduced by the prosecution witnesses, the Court of Appeal in *John Nyaga Njuki & 4 others v R* [2002] eKLR had this to say on that issue:

“But what is important is whether the discrepancies are of such a nature as would create a doubt as to the guilt of the accused. If so, then the prosecution would not have discharged the burden squarely on it to prove the case beyond any reasonable doubt. However, where discrepancies in the evidence do not affect an otherwise proved case against the accused, a court is entitled to overlook those discrepancies and proceed to convict the accused.”

This court finds that the evidence of PW1 was corroborative and consistent with that of PW2 and PW3.

28. The appellant faults the trial court for failing to consider her defence. To the contrary, this court finds that the trial court duly considered the appellant’s defence when it observed thus:

“The accused person claimed that she had been attacked by Pw1 and Pw3 and she had to defend herself. She claimed that her banana had been cut down by Pw1 and Pw3 who also wanted to rape and kill her. She did not produce anything before court to show that indeed she had reported that Pw1 and Pw3 wanted to rape her yet the said allegations were serious in nature. Further, Pw4 termed the allegations by the accused person as falsehoods stating that investigations revealed that she made a report as against the complainant to counter the report made by the complainant himself as even the bananas she claimed that had been cut down away back before the time she alleged the same had happened. I therefore find that the defence by the accused person of self defence as an afterthought and the same can only be termed as false hoods since the same was never substantiated in any way. The allegations by the accused person that Pw1 and Pw3 wanted to rape her and kill are also hereby rejected in their totality as even during cross examination she did not raise the said issue.”

29. Clearly, the trial court minutely examined the accused’s case of self defence alongside that of the Prosecution. In addition, this court finds the submission ion that the trial court did not consider the appellant’s mitigation to be unfounded, because although the offence of grievous harm contrary to section 234 of the *Penal Code* attracts a maximum punishment of life imprisonment, the trial court considered her mitigation, the circumstances of the case and handed her a 10 year sentence, which was lenient in the circumstances of the case.
30. The appellant further faults the trial court for failing to note that some key witnesses were not called to testify, without specifically stating which witnesses these are. To this court’s mind, the prosecution



called all the witnesses it deemed necessary to prove its case. Section 143 of the [Evidence Act](#) is a complete answer to this objection.

Orders

31. Accordingly, for the reasons set out above, this court finds that the appeal is without merit and it is dismissed.

Order accordingly.

DATED AND DELIVERED THIS 31ST DAY OF MAY, 2023.

EDWARD M. MURIITHI

JUDGE

Appearances:

Mr. Omari Advocate for Appellant.

Mr. Masila State Counsel for D.P.P.

