



**Kalela v Republic (Criminal Appeal E004 of 2023)
[2023] KEHC 22721 (KLR) (27 September 2023) (Judgment)**

Neutral citation: [2023] KEHC 22721 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VOI
CRIMINAL APPEAL E004 OF 2023
GMA DULU, J
SEPTEMBER 27, 2023**

BETWEEN

LUCAS KALELA APPELLANT

AND

REPUBLIC RESPONDENT

(From the conviction and sentence in Criminal Case No. E209 of 2017 at Voi Law Courts delivered on 25th January 2023 by Hon. A.M.Obura (Mrs.) (CM))

JUDGMENT

1. The appellant Lucas Kalela was charged in the Magistrate's court with three others for malicious damage to property contrary to Section 339 (1) of the [Penal Code](#). The particulars of offence were that on April 9, 2017 at 10:00p.m at Birikani in Voi within Taita Taveta County, jointly with another not before court wilfully and unlawfully damaged a windscreen and dashboard of a motor vehicle registration number KAJ 728S a Mitsubishi Pick Up blue in colour all valued at Kshs 65,000/= the property of Mwasingi Mwakio.
2. He was also charged alone with a second count of grievous harm contrary to Section 234 of the [Penal Code](#), the particulars of which being that on the same date, time and place wilfully and unlawfully did grievous harm to Mwasingi Mwakio.
3. He denied both charges. After a full trial, he was acquitted of Count I for malicious damage to property. He was however convicted of grievous harm contrary to Section 234 of the [Penal Code](#) and sentenced to five (5) years imprisonment.
4. Dissatisfied with the conviction and sentence, the appellant has come to this court on appeal on his own, but was later represented by counsel Juma, Nyaga & Company. The grounds of appeal are as follows:-



1. The charge resulting in the conviction was defective as drawn and the court was in error firstly, finding that the defect was curable, secondly in failing to rectify or give the identified defect in the charge sheet, thirdly deciding that the accused was not prejudiced by the defective charge sheet, and fourthly, proceedings to convict the accused on a charge admitted to be defective.
2. The court erred in relying on the vague, inconsistent and contradictory evidence of one ambivalent and untrustworthy witness to convict the accused while ignoring glaring defects and inconsistencies in the prosecution evidence, particularly as to the ambient light at the scene, number of people and their arrival.
3. The complainant having testified that he was assaulted by several people who caused him injuries, the honourable court failed to identify and to make a specific determination on which specific injury was supposedly caused by the appellant, and the degree thereof, to justify the conviction of the accused of the offence of causing grievous harm.
4. The prosecution evidence was contradictory as to what particular weapon, implement, or instrument the accused was armed with, whether a whistle, a slasher or panga or a stick.
5. The court erred in treating the fact of previous interaction between the accused and the complainant as full and incontrovertible evidence of the perpetrator of alleged assault on the accused, and ignoring other material evidence on record to the contrary.
6. In relation to the P3 form produced and relied upon in the lower court, the appellant avers that in the particular circumstance of the case, the court erred, firstly, in admitting the P3 form in the absence of the maker and or a proper explanation for the maker's absence and secondly, in ignoring inconsistencies and unexplainable defects on the face of the P3 form, and thirdly treating all alleged injuries as having been caused by the appellant in spite of the complainant's own testimony to the contrary (sic).
7. The court erred in finding that the complainant had no reason to give false evidence against the accused yet there was a long history of infractions against the accused in which the complainant was an active participant.
8. The court erred in stating the order of arrival of people to the scene did not matter in this case.
9. The court erred in not requiring corroboration of the complainant's evidence in the circumstances of the case.
10. The court failed to acknowledge that there were serious inconsistencies in the prosecution's case and evidence.
11. The court erred in ignoring and dismissing the evidence tendered on behalf of the defence in its totality.
12. The trial court misdirected itself in shifting the burden of proof to accused and requiring the defence (sic)
13. The charges were not proved to the required standard.
14. The appellant shall argue that the court severally misdirected itself in the case in whole and the conviction was not warranted in all circumstances of the case.



15. The appellant shall argue that the sentence imposed was unduly harsh and unjustified as grounded on all the alleged injuries caused to the complainant including by other persons and not based on the correct principles of law.
5. The appeal was canvassed through written submissions. In this regard, I have perused and considered the submissions filed by the appellant's counsel as well as the submissions filed by the Director of Public Prosecutions.
6. This being a first appeal, I am required to evaluate all the evidence on record afresh and come to my own independent conclusions and inferences – see *Okeno Versus Republic* [1972] EA 32.
7. In proving their case, the prosecution called five (5) witnesses. On his part, the appellant gave sworn defence testimony. There were also four (4) other defence witnesses, three of whom were co-accused in another charge in the same case, and one a police officer.
8. I note that the appellant was acquitted of the charge of malicious damage to property in which he was charged with others. He was however, convicted on the charge of grievous harm in which he was charged alone.
9. The appellant has raised technical as well as substantive grounds of appeal.
10. On the technical grounds he complains that the charge was defective. The ground of appeal does not give the nature of the defects but instead describes the errors committed by the Magistrate in accepting the charge.
11. From the proceedings, the defect complained on is that it does not contain the offence section but merely the punishment section for grievous harm.
12. Indeed the trial Magistrate noted that the charge referred to Section 234 of the *Penal Code*, but did not also refer to Section 231 of the *Penal Code* which has the ingredients of the offence of grievous harm.
13. The trial Magistrate found that the defect was curable under Section 382 of the *Criminal Procedure Code* (Cap 75) and relied on Section 134 of the *Criminal Procedure Code*.
14. In this regard, Section 134 of the *Criminal Procedure Code* states as follows:-

“134 Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accuse is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charge.”
15. Thus in my view, though the section or sections of the law creating the offence and sentence are important to be listed in the charge sheet, the fact that they are not all listed or there is a misdescription of the same is not fatal to the charge. The important thing would be to find out if indeed, such offence as described in the charge exists in the statute. If the offence exists as in the present case, then if the charge contained a statement of the particulars given in the statutory section containing the charge, that charge cannot be said to be fatally defective, as no prejudice will have been caused to the accused person in defending himself or herself.
16. In the present case, I agree with the trial Magistrate that no prejudice was caused on the appellant. I dismiss that ground.
17. The substantive grounds of appeal relate to adequacy of evidence on identification and the medical evidence.



18. With regard to identification, the incident occurred at night. The evidence on record is that PW1, PW2 and PW3 knew the appellant well before. The appellant also stated as much, and added that there existed a land dispute between him and one Jacob who had sent PW1 to the subject disputed land that night.
19. Indeed, it was night time but the evidence on record is very detailed on the offloading of materials from a pick-up, lights from the pick-up which were on, light from the vehicles plying the Nairobi – Mombasa highway, attack and verbal interaction among people who knew one another and roles played by the various actors.
20. In my view, the totality of the evidence on record was that the appellant did take part in the attack of the complainant PW1 even if he was with others. His assertion that the description as to who arrived earlier or later should exonerate him in my view did not help him. He was a principal participant in the alleged land dispute, and was put at the scene by eye witnesses as an aggressor and not as a victim of an attack or a victim of an attempted night eviction. His own defence evidence of an earlier report of a land dispute to the police strengthened rather than weakened the prosecution evidence.
21. Like the trial Magistrate therefore, I find that the appellant was proved by the prosecution beyond reasonable doubt to have assaulted the complainant PW1, or participated in the assault as a principal offender.
22. I now turn to the medical evidence, as the other substantive grounds of appeal attack the medical evidence of grievous harm. Indeed, the doctor who prepared the P3 form did not testify. However, the prosecution gave an explanation to court about his absence of the particular doctor and the trial Magistrate made a ruling and allowed another doctor to testify on same under Section 77 of the *Evidence Act* (Cap.80). The medical examination report or P3 form was produced as an exhibit and the injuries suffered were classified therein as “maim”.
23. I note that Section 231 of the *Penal Code* refers to several and varied acts that could amount to grievous harm, and a sentence of life imprisonment is also prescribed in that section. On the other hand Section 234 of the *Penal Code* talks of unlawful acts that cause grievous harm, and the same sentence of life imprisonment was described under this section.
24. With the evidence tendered before the Magistrate’s court and the injuries described in the P3 form which were bruise on the head at scalp region of face with associated soft tissue injuries; bruises and cuts on the thorax, abdomen and back with associated soft tissue injury; cuts on the left hand and swollen left hand; bruises and cuts associated with fracture right ankle joint; all of which were classified as “maim” in my view the trial Magistrate was correct in finding that the offence of grievous harm was proved, as “maim” falls within the definition of grievous harm.
25. With regard to sentence, in my view bearing in mind the facts and circumstances of the offence and the nature of injuries suffered by the complainant, a sentence of five (5) years imprisonment was neither harsh nor excessive, as the maximum sentence was life imprisonment.
26. Consequently and for the above reasons, I find no merits in the appeal. I dismiss the appeal and uphold the conviction and sentence of the trial court. Right of appeal 14 days.

DATED, SIGNED AND DELIVERED THIS 27TH DAY OF SEPTEMBER 2023 IN OPEN COURT AT VOI.

GEORGE DULU

JUDGE



In the presence of:-

Nusura – Court Assistant

Appellant

Mr. Sirima for State

