



REPUBLIC OF KENYA



**KENYA LAW**  
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**Kiplagat v Republic (Criminal Appeal E020 of 2020)  
[2023] KEHC 26328 (KLR) (30 November 2023) (Judgment)**

Neutral citation: [2023] KEHC 26328 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KABARNET  
CRIMINAL APPEAL E020 OF 2020  
SM MOHOCHI, J  
NOVEMBER 30, 2023**

**BETWEEN**

**EZEKIEL RUTO KIPLAGAT ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Appeal against the sentence in SPMC Cri No. 21 of 2020 - Kabarnet, Republic v Ezekiel Ruto Kiplagat, delivered by Hon. P.C Biwott, S.P.M. delivered on 08.07.2020.)*

**JUDGMENT**

**Introduction**

1. The Appellant was on the 17<sup>th</sup> January 2020 charged with an offence of causing grievous harm contrary to section 234 of the [Penal Code](#).
2. He was convicted and sentenced to imprison for 5 years to which he has appealed against sentence.

**The Appellant's Case**

3. He contends that the sentence was too harsh in all circumstances therefore, he based his entire submissions on mitigation for leniency. That he is a first offender in the case at hand had never stepped in prison before, he promises to shun such immoral behaviors in his life time.
4. That the offence he committed just came unplanned if he could have not found him having sex with my wife in my house, he could not be languishing in prison now. In fact, to put salt to injury he found them on my bed having sex. Instead of running away the complainant attacked me using a stick which led to a fight between him and the complainant and in the process of recuing himself since the complainant was huge and energetic and the Appellant was drunk, and it was at night the stick he was having injured



the Complainant's eye and damaged it. That it was not his fault, and he remains remorseful of what occurred on that fateful night.

5. That he committed the offence under influence of alcohol, the fight just came instantly, he had poor judgment though he was bitter that he found the two enjoying their conjugal rights on his bed, indeed he is remorseful and pray for leniency.
6. That, the sentence meted on him of five (5) years was too harsh considering the circumstances surrounding the case. he is now left with ten (10) months to complete his sentence and pray the honorable court to reduce it to minimum or decide for an acquittal so that he may go and cater for his life which has been ruined behind bars for all this period.
7. That he has children who rely on him as their only sole bread winner their mother has already got married elsewhere leaving the burden of upkeep of his children (siblings) to his aged grandmother making it difficult for her to look for the basic needs among other necessities He pray for the honorable court to be merciful and allow him to go and save the worsening situation of his sibling who are now living like street children and lacking parental care. And also, to be able to assist his aged mother who is now a widow after his father died a year later after conviction.
8. That, having stayed behind bars for over two years he cannot be convinced by people to do lust things, he has known to distinguish what is good and what is bad and their repercussions, he promise to be a good citizen who is law abiding and never again to repeat what occurred on that fateful day.
9. He prays that his appeal be allowed, the sentence be reduced or quashed and set aside and the court do anything favor which will amount to acquittal.
10. On the Hearing date the Appellant claimed that he only had 4 months to serve before finishing his sentence

### **Respondents Case**

11. The state conceded to the appeal if only to the extent that the trial court did not factor in the time the Appellant had spent in custody after entering plea.

### **Analysis and Determination**

12. The duty of the first appellate court in criminal cases was restated in the case of *Charles Mwita -vs- Republic*, CA. Criminal Appeal No. 248 of 2003 (Eldoret) (unreported) where the Court of Appeal, at page 5, recalled that:

“In *Okeno v R* [1972] EA. 32 at page 36 the predecessor of this Court stated: - “An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (*Pandya -v- R* [1957] EA. 336) and to the appellate court's own decision on the evidence”.

13. Being a 1st Appeal Court I must, weigh conflicting evidence and draw conclusions, (*Shantilal M. Ruwalla -v- R* [1957] EA 570) it is not the function of a 1st Appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower courts findings and conclusion; it must make its own findings and draw its own conclusions Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see *Peters v. Sunday Post*, [1958] EA. 424.”



## Trial Court Proceedings

14. PW1 Mark Kiptoo, live in Milima Targor. a mason. Recalled that on the 10.12.19 at 10.45 pm he was in his compound, Loruk. He had met accused (pointing) at Marigat stage. they passed each other. At home he found boys celebrating graduates from circumcision taking traditional busaa and joined them. Ezekiel (accused) arrived there asking what we were doing. He was drunk. He was with an object at hand. It was night. he recognized him. Appellant had spotlight also held the witness by the shirt hit him on the head with the blunt object and he got injured on the head and left eye.
15. That the boys there ran away, the Appellant arrived there asking for his wife and he ran away on seeing Appellant. That he was taken to Marigat on boda by his brother and was referred to Kabarnet from where he was further referred to Nakuru where he was admitted for 3 days. That his eye was bleeding and was told it had been ruptured needed surgery. He reported to police upon discharge from hospital. Appellant was arrested at the cereals where he worked. Witness knew Appellant for over 5 years as a violent man.
16. That he never knew the Appellant's wife. That the boys the Appellant found witness with, ran away on seeing him. That the police issued him with a P3 form. It was filled- MFI – 1. The treatment notes from Nakuru hospital MFI2. he still attends hospital for the eye clinic to date. The eye needs cleaning.
17. He was cross examined by appellant stating that had no grudge with him. That Appellant attacked him for no apparent reason. he had not taken alcohol with Appellant who just found him sitting down and attacked him. he was not drunk like Appellant. he was not with Appellant's wife. Appellant did not find him in Appellant's house. Witness is not married. and will marry at 30.
18. He reasserted in reexamination that, he was not with Appellant's wife when he was attacked and he does not know Appellant's wife.
19. PW2- Kiprono Kibet, Resident of Marigat, Matatu driver testified that on 10/12/19 at 10:40 pm he arrived home from work on foot. he found Ezekiel (accused) and Mark (PW 1) quarreling.
20. He did not get reason for quarrel. Bystanders came there. Ezekiel (Appellant) hit PW1 on the eye with metal rod and ran away. He and others started assisting Mark (PW1), the bystanders left scene.
21. He called bodaboda which rushed Mark (PW 1) to Hospital, Mark (PW 1) bled from the eye. That there was moonlight, he also had spotlight and he identified both accused and his victim. Witness did dock identification (pointing at accused). he had known Appellant for over 20 years. He recorded statement in Marigat police when Appellant was arrested.
22. He never knew Appellant 's wife and there was no woman at the scene of attack.
23. In cross examination by accused. Witness stated that Appellant lived near him, he had known Appellant for over 20 years. He never knew Appellant's wife and was not lying to court. He witnessed the incident. He lives 300m from the scene of attack. I did not attack Appellant.
24. PW3 - David Korir, a Clinical Officer at Marigat hospital testified that he had Diploma in Clinical Medicine from Nairobi, MTC, December, 1989. He has been in Marigat hospital from 2015 to date. He presented a P3 form. That on 18/12/19, PW1 came to him having been injured on left eye, courtesy of assault by one person known to him on 10/ 12/ 19 at Tarbut area.
25. His clothes had blood. He was not under influence of alcohol drugs. The side of eye was bleeding and stitched partly. The other parts of body were okay. A sharp object was used on him. He had been treated at Marigat and Nakuru hospitals.



26. The eye had been removed. The degree of injury was grievous harm. he filled P3 form. Notes from Nakuru Provincial General Hospital are here. he produced them as exhibits., P3 form Exhibit 1, Discharge summary exhibit 2.
27. In cross examination by accused the witness reiterated that, the patient was treated at Marigat and referred to Nakuru Provincial General Hospital. That he works in Marigat hospital. We referred complainant to Nakuru specialist. He is not specialist in eye matters.
28. PW4 PC Lidiah Bukach, of Marigat police station, crime office was the investigating officer in this matter. She recalled on 13/12/19 she was at the station when PW1's mum reported that her child was injured. She was called Sarah. The OCS minuted case to me. She saw complainant personally on 14/12/19. He was Mark Kiptoo PW1 who attributed the injury to the Appellant, He lost one eye.
29. The witness issued him P3 form and referred to Hospital. The P3 form was filled. she found that Appellant injured him in rented house in Milimani estate. They had been taking busaa. The Appellant used a metal rod to injured victim. She arrested Appellant on coming for work at DCC's Office. That PW1 identified him. she recorded witness statements and charged the Appellant. That the Appellant allegedly found PW1 with his wife. Appellant never brought woman to record statement. She charged him.
30. on cross examination by Appellant the witness restated she is the investigating officer in the matter. she never visited scene. she would have visited later. she did not record Appellant's statement. Appellant disappeared with the metal rod, ran away after injuring PW1. The incident never happened in Appellant's house. Prosecutor closed its case. Trial Court found that Prima facie case had been made out the Appellant had case to answer was placed on his defense.

### Defense Case

31. Appellant elected to give evidence on oath that he is Ezekiel Rutto Kiplagat, lives in Milimani estate, Marigat he is a mason/ carpenter. PW1 is known to him. That on 11/ 12/ 19 he came from Chemalingot. He was 3 weeks out. He reached at 10.00pm home, Marigat. He bought books, food stuff at center.
32. He walked home, 3 km. he reached home. he knocked house. He never knew why his wife was hesitant to open. PW1 opened it. He was with Ronoh. They attacked him. He ran away. They injured each other. Ronoh mistook him for me. He never injured PW1. Appellant never called any other witness and crossed his case.
33. The trial Court delivered its judgment on the 17/3/2020 finding the Appellant guilty as charged and convicting him accordingly, the Prosecution had no previous records against the Appellant and urged he be treated as first offender.
34. In Mitigation the Appellant insisted on his innocence the trial Court noted that Appellant was not remorseful at all. The victim lost one eye. Appellant was beastly to him. The court sentenced Appellant to serve 5 years imprisonment. The sentence shall run from 17/1/2020 When he was first committed to prison after plea.
35. This Court has considered evidence adduced and submissions by the parties and in line with the decision in the case of *Fappyton Mutuku Nguv v R* [2012] eKLR framed issues for determination as follows;
  - a. Whether the trial court included the pre-trial detention Period in the sentence?



36. The court sentenced the Appellant to serve 5 years' imprisonment, sentence was to run from 17th January 2020, when the Appellant was first committed to prison after plea. This is explicit in the judgment.
37. This court finds that the trial court was not in err in sentencing the Appellant, the sentence included the period the Appellant is seeking consideration of on appeal.
38. For this reason, I find the Appeal to be without merit and accordingly dismiss the same. The Sentence is confirmed that the Appellant is to serve an imprisonment sentence of 5 years from 17th January 2020.

It is so ordered

**SIGNED, DATED AND DELIVERED VIRTUALLY AT NAKURU ON THIS 30<sup>TH</sup> NOVEMBER 2023**

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**MOHOCHI S. M.**

**JUDGE**

