



**Mwashaga v Republic (Criminal Appeal E001 of 2020)
[2023] KEHC 27106 (KLR) (30 November 2023) (Judgment)**

Neutral citation: [2023] KEHC 27106 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VOI
CRIMINAL APPEAL E001 OF 2020
DO CHEPKWONY, J
NOVEMBER 30, 2023**

BETWEEN

BRIAN MWASHAGA APPELLANT

AND

REPUBLIC RESPONDENT

*(From the original conviction and Sentence in Criminal Case No.408 of 2019 by
C.L. ADISA – Resident Magistrate, Principal Magistrate’s Court at Taveta by)*

JUDGMENT

1. Brian Mwashaga, the Appellant herein was charged, tried and convicted of the offence of grievous harm contrary to Section 234 of the Penal Code. The particular of the offence being that:-

“On the 12th day of July, 2019, at about 1233 hours at Lessesia in Taveta Sub-County within Taita Taveta County, the Appellant unlawfully did grievous harm to Lucy Joseph”.
2. The Appellant pleaded “Not Guilty” and the matter proceeded for trial with the prosecution calling six witnesses. The Appellant gave unsworn evidence in his defence and Judgment was delivered on 22nd January, 2022 wherein the trial court found him guilty and convicted. He was then sentenced to serve a life imprisonment.
3. Being dissatisfied with both the Judgment and conviction meted by the trial court, the Appellant has preferred the instant appeal and in his petition of appeal, the Appellant person has raised the following grounds of appeal: -
 - (a) The learned trial Magistrate failed in law when she/he misdirected herself/Himself.
 - (b) The learned trial Magistrate failed in law when she shifted the burden of proof from prosecution to the Appellant.



- (c) The learned trial Magistrate failed in law when he considered the evidence adduced by prosecution full of massive contradiction.
 - (d) The learned trial Magistrate failed in law in convicting the appellant on alibi difference.
 - (f) The learned trial Magistrate failed in law in convicting the Appellant on poor investigation conducted by the prosecution.
4. By the directions of this court, the appeal was canvassed by way of written submissions. The Appellant filed his written submissions on 10th March, 2021 wherein he argued that the learned trial Magistrate failed to consider his mitigating factors when passing the conviction thereby occasioning him injustice. He submitted that the life imprisonment imposed on him was harsh in the circumstances and did not conform to the dictates of *the Constitution* especially under Article 28 thereof which guarantees and protects person's dignity. He submits that life imprisonment thus undermines his dignity, and this court should consider a more appropriate sentence while taking into account the decision in Francis Muruatetu Case which broke the yokes for mandatory death sentence. He also pointed out that he is remorseful for his actions and has reformed since the day he was imprisoned.
 5. The prosecution on the other hand filed submissions 19th May, 2021. It is argued that Section 234 of the Penal Code does not impose a mandatory life imprisonment but merely describe it as the maximum sentence which the court may impose. Thus, it is not prudent to look at the sentence prescribed under Section 234 of the Penal Code in light of the Muruatetu Case since the sentence was passed at the discretion of the trial court based on the circumstances of the case. That in view of the present case, the trial court correctly exercised its discretion in finding that an Appellant who had caused grievous harm to his ex-wife was liable for life imprisonment. In that case, the prosecution prays the appeal be dismissed and the conviction by the trial court be upheld.
 6. This being the first appellate court, it is this court's duty to analyze and evaluate afresh all the evidence that was adduced before the trial court and draw its own conclusion while having in mind that the court neither saw nor heard any of the witnesses. (See the case of Okeno -vs-Republic, 1972 EA 32).
 7. Now revisiting the evidence before the trial court, PW1 Jane Wambui Njuguna stated that the Appellant who she knew the Appellant as "Baba James" confronted her on 12th July, 2019 at around 6.00am demanding to see James' Mother (PW3). She, however, informed the Appellant that it was too early to wake someone up and he left as she went back to her house. She added that she was staying in the same compound with Mama James who James was living at PW2's house. PW1 further told the court that after parting with the Appellant, she was awoken up by some noise around 8.00am and when she went to check, she found the Appellant quarrelling PW3 and her intervention could hardly stop the Applicant. She then called PW2 and left. Later, at around 12.00 noon she heard screams within the compound and while proceeding to the scene, she met the Appellant running away and saw PW3 lying on the ground unconsciously with a deep cut on her stomach. She identified the Appellant at the dock as the person she knew as "Baba James" translated into English language to mean "James' Father.
 8. On cross-examination, she reiterated that she saw the Applicant running from the scene and stated that it was not true that the deceased fallen on the iron gate or was at all cut by the gate.
 9. George Okumu, testified as PW2. He told the court that the complainant (PW3) is his sister-in-law and had been married to the Appellant n although they had parted ways. That on 12th July, 2019, at around 8.00am, he was called by PW1 and informed that the Appellant was causing fracas at his home. He then went home and found the Appellant assaulting PW3. On inquiring, the Appellant told him that PW3 had not been picking his calls, but he nonetheless asked him to leave. PW2 then went on



with his errands but 30 minutes later, he was called and informed that the Appellant had done harm to PW3. While going back home he met a group of people chasing the Appellant around Lessesia School where he was also arrested. Upon inquiring on what was going in. he was told that the Appellant had killed PW3. PW3 was rushed to hospital but it was established that she was only unconscious. PW2 identified the Appellant as the perpetrator and added that he had known him for long.

10. On cross-examination, PW2 confirmed that he was present when Appellant arrested although he did not see him injure the complainant. He further clarified he had not engaged the Appellant in any form of employment and neither of them owed the other any funds.
11. The Complainant, Lucy Kwamboka Joseph testified as PW3. She told the court that the Appellant was her husband and although they parted ways back in October, 2018, the Appellant had kept on following her from time to time while issuing her unwarranted threats. She went on to state that after the break-up, she had opted to live at PW2's house and on the fateful day, the Appellant came to her home place, called and started strdngling her. PW1 was attracted to the commotion and when she unsuccessfully asked the Appellant to leave, she called PW2 who made the Appellant leave the compound. Thereafter, everyone went on with their errands until later on the day around 10:45am when the Appellant came back and got hold of the child, he had sired with PW3 while holding a knife in one hand and threatening to kill both PW3 and the child.
12. Fearing that the Appellant would cause harm to their child, PW3 challenged the Appellant but her overpowered her. In the process, the Appellant stabbed her on the legs, thighs, and the stomach. PW3 added that she tried to run away towards the gate but lost consciousness and regained it three (3) days later at the hospital. She was also later re-admitted after the wounds had raptured. PW3 identified the Appellant who was at the dock as her former husband and the person who had caused her harm. She said that the Appellant used a knife with a blue handle to stab her. She also identified the knife and the bloodstained clothes she had worn on that fateful day.
13. On cross-examination, PW3 confirmed that they had separated with the Appellant and she never called him until he came to attack her on that fateful day.
14. George Ombayo, a clinical officer at Taveta Sub-county Hospital, testified as PW4. He testified that PW3 came to the hospital with raw wounds on the abdomen, the left-hand thumb, and the leg. The wounds were stitched before PW3 was referred to KCMC in Tanzania for further stitching and according to him the wounds were grievous.
15. On cross-examination, PW4 stated that he neither asked the name of the assailant and neither did he take photographs of the wounds to confirm his assertions or the information filled in the P3 form.
16. PW5, P.C No.117813 Morris Mutua testified that he was the Investigating Officer in the case and that on the 12th July, 2019 at around 12.00 noon, a pick-up came with so many people. He saw PW3 lying thereon unconscious while bleeding on the stomach, hand and leg. After the report was made, he proceeded to the scene where he found the Appellant lying unconscious on the ground inside the home compound and about three (3) meters from the gate and was surrounded by quite a number of people. PW5 added that on interrogating these people, he was told that it is the Appellant who had injured the complainant. He managed to recover a blood-stained blue kitchen knife. He produced the knife and the complainant's blood-stained clothes as exhibits in the case.
17. On cross-examination, PW5 stated that the blood-stained knife was recovered within the scene and people who responded to the complainant witnessed the incident happen. PW5 further confirmed that at the time he saw the complainant, she had injuries on the left hand, leg and stomach.



18. Dr. Omar, then a Medical Superintendent at Taita Taveta Hospital, testified as PW6. He recalled that on 12th July, 2019 he was called to attend to an emergency case wherein the patient (later the complainant herein) had stab wounds. Upon examining the client, he realized that her intestines were outside, and his immediate action was to compress the stomach and stitch the deep cuts. He then referred the patient to KCMC in Tanzania for proper stitching and thereafter,, he attended the patient on follow up care until she healed.
19. On cross-examination PW6 stated that he only got information that the patient had been stabbed by her husband and nothing more.
20. Upon considering the prosecution's evidence, the court ruled that the Appellant had a case to answer since the prosecution had established a prima facie case against him. The Appellant was then placed on his defence and he offered to give unsworn evidence in defence. He testified that he was living at Langata. He told court that on 11th July, 2019 at around 0900 am, he was at work when two men came and introduced themselves as police officers, asked for his name and then asked him to accompany them to the police station. They placed him on custody only to produce him in court on the present charges. As regards the complainant, the Appellant told the court that he had then parted with her about seven (7) years ago and had since remarried. He emphasized that he was not guilty of the charges placed against him.

Analysis and Determination

21. Having analysed and re-evaluated the evidence adduced before the trial court, contents of the appeal and the submissions filed by the parties, the following key issues arise for determination: -
 - (a) Whether the prosecution proved its case beyond reasonable doubt
 - (b) Whether the Appellant defence was considered
 - (b) Whether the sentence meted against the Appellant by the trial court was manifestly excessive?
22. On the first issue of whether the prosecution proved its case beyond reasonable doubt, the starting point is to consider the provisions of Section 231 as read together with Section 234 of the Penal Code which provides for the offence of grievous harm as follows: -
 - a) Section 231 reads as follows:
 231. Acts intended to cause grievous harm or to prevent arrest;

Any person who, with intent to maim, disfigure or disable any person, or to do some grievous harm to any person, or to resist or prevent the lawful arrest or detention of any person-

 - (a) unlawfully wounds or does any grievous harm to any person by any means whatever; or
 -
 - (g); is guilty of a felony and is liable to imprisonment for life.
 - (b) Section 234 on the other hand reads as follows:
 234. Grievous Harm

Any person who unlawfully does grievous harm to another is guilty of a felony and is liable to imprisonment for life.



23. A reading of the above provisions of the Penal Code, for the Appellant to be convicted of the offence of doing grievous harm, the prosecution has to prove three key essential ingredients beyond reasonable doubt, namely, the victim sustained grievous harm, the harm was caused unlawfully and lastly that the Appellant caused or participated in causing the grievous harm.
24. As concerns the first element, Section 4 of the Penal Code defines grievous harm as 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.
25. In this case, PW4, George Ombayo produced a P3 form which indicates the injuries sustained by the complainant as: -
 - (a) Visible fresh sutured wound on the abdomen (measuring about 30cm long)
 - (b) Sutured wounds on the left thumb, left thigh and left knee. All about 8cm long.
 - (c) Sutured wound on the left thigh, about 8cm long.
26. PW6, while explaining the injuries sustained by the complainant told the court that while attending to her, he observed that the intestines were outside and visible from the deep stab wounds on her stomach. Further, this court has taken into consideration the nature of weapon used to inflict the harm on the complainant was a sharp object as is indicated in the PW3 form and to corroborate this, a blue kitchen knife recovered from the scene was identified as the weapon which was used to inflict the injuries and produced as Plaintiff's Exhibit.
27. Based on the foregoing and the material presented as evidence before the trial court, which was not impeached during cross-examination, this court is persuaded that the injuries inflicted on the complainant were serious and dangerous to the magnitude of exposing the internal intestines, and thus resulted in grievous bodily harm within the meaning of Section 4 of the Penal code.
28. On whether the harm and injuries sustained by the complainant were caused unlawfully, the explanation by all prosecution witnesses is that the injuries were inflicted on the complainant following an attack on the complainant by the Appellant. While testifying as PW3. The complainant explained that the Appellant stabbed her as she tried to save their son whom the Appellant held while cursing and threatening to kill him. There was no explanation or justification for the injuries, say for example that they were caused in the process of self defence. In conclusion thereof, it is this court's view that the injuries were caused without any lawful justification or excuse.
29. Lastly, on whether the Appellant caused or participated in causing the grievous harm, this court finds the prosecution evidence more plausible as it placed the Appellant at the scene of crime as the perpetrator. In their uncontroverted evidence, PW1 and PW2 said that they know the Appellant as a person they knew and in-law to PW2 since he was married to the Complainant although they had separated. The said that the complainant had moved to live in the same homestead with both PW1 and PW2.
30. In his evidence, the Appellant admitted having married the complainant and reasonably the Appellant is a person well known to both PW1 and PW2. Although neither PW1 nor PW2 saw the Appellant commit the offence, they both testified that on the date of commission of the offence, the Appellant came to their homestead demanding to have a talk with the complainant and was asked to leave after causing fracas, which he obliged at the command of PW2. That later, he returned and committed the offence after PW1 and PW2 had left. PW1 testified that indeed while responding to screams by the complainant, she met the Appellant running away from the scene. Their evidence was corroborated



by that of PW3, the complainant, who told the court that the Appellant came to the homestead and started quarrelling about their son and about the complainant not answering his phone calls. However, the Appellant's confrontation was intervened by PW2 and he left the compound after being ordered by PW2 to do so.

31. Further, PW3 testified that later in the day while on her errands, the Appellant returned and got hold of their son while cursing and threatening that he would kill both her and their son. PW3 then intervened and in the process, the Appellant overpowered and stabbed her on the stomach, left hand, left thigh and the left knee. In response to the foregoing, the Appellant pleaded the defence of alibi. He alleged that on the date he is Appellant of committing the offence, he was working at Langata and two men who introduced themselves as policemen, went, arrested and placed him in custody.
32. This court is alive to the widely accepted legal principle that by setting up an alibi defence, the Appellant does not assume the burden of proving the alibi. The prosecution always bears the burden of disproving the alibi, falsifying the allegations and proving the Appellant's guilt. However, the Appellant is always required to raise the defence of alibi at the earliest opportunity to enable the prosecution and the Investigating Officer time to check it out so as to determine its veracity or lack thereof. In reiterating the principle, the defunct East African Court of Appeal in the case of R -vs- Sukha Singh s/o Wazir Singh & others (1939) 6 EACA 145 had the following to say:

“If a person is Appellant of anything and his defence is an alibi, he should bring forward that alibi as soon as he can because, firstly, if he does not bring it forward until months afterwards there is naturally a doubt as to whether he has not been preparing it in the interval, and secondly, if he brings it forward at the earliest possible moment it will give prosecution an opportunity of inquiring into that alibi and if they are satisfied as to its genuineness proceedings will be stopped”.
33. It therefore goes without saying that a credible defence of alibi may only succeed if it is raised at the earliest opportunity available and not late in the day so as to defeat the prosecution's ability to investigate on the same. In this case, the Appellant raised the alibi when giving his evidence in defence, which was after the closure of the prosecution's case. Whereas the prosecution did not adjourn the matter to call additional witness to rebutt the alibi defence, the evidence of PW5 squarely gives another picture contra the plea of alibi. He testified that on 12th July, 2019 at around 12.00noon, while at Taita Taveta police station, the complainant was brought at the station by a group of people aboard a pickup. After dismissing the group to take the complainant to hospital, PW5 together with Cpl. Ng'ang'a proceeded to the scene where they found the Appellant surrounded by another group of people and upon interrogating them, he was told the Appellant had committed the offence and had been arrested by villagers.
34. PW2 on the other hand testified that after she had ordered the Appellant to leave his homestead, he was later called and told that the Appellant had injured the complainant. On his way home, he met the Appellant being chased by a group of people, and he was among the group of people who arrested the Appellant around Lessesia School.
35. The Appellant did not rebut the above evidence or controvert PW2 and PW5's evidence during cross-examination, leading this court to find that the Appellant was merely avoiding the truth by telling the trial court that he was at work in Langata and was arrested by two persons who identified themselves as police officers.
36. This court is convinced beyond reasonable doubt that the facts and circumstances surrounding the commission of the offence are incapable of explanation upon any other reasonable hypothesis other



than that of the Appellant's guilt. Equally, there is evidently no reason to doubt the evidence of PW1 and PW2 is connecting the appellant as the complainant's assailant and that of PW3 in identifying the Appellant as the person who attacked her. To this end, the court agree with the trial court's finding that the prosecution had proven their case beyond reasonable doubt.

37. As singled out, the next issue for determination is whether the trial court considered the Appellant's defence. Having evaluated and analyzed the Appellant's alibi defence and found the same not persuasive enough to cast doubts on the prosecution's case, I have read through the trial court's Judgment and on the last page find that the trial court clearly expressed itself that it considered the defence and found the same to be a sham and mere denial vis-à-vis the prosecution's case. It therefore cannot be said that the trial court failed to consider the appellant's defence.
38. Lastly, on whether the sentence meted out by the trial court was manifestly excessive, this court associates itself with the sentiments of the court in the case of MACHARIA- VS- R. [2003] 2 E.A. 559 where the court expressed itself as follows:-

“The principle upon which this Court will act in exercising its jurisdiction to review or alter a sentence imposed by the trial court have been firmly settled as far back as 1954, in the case of Ogola S/O Owuor (1954) EACA 270 wherein the predecessor of this Court stated:-

“The Court does not alter a sentence on the mere ground that if the members of the Court had been trying the appellant they might have passed a somewhat different sentence, and it will not ordinarily interfere with the discretion exercised by a trial Judge unless as was said in JAMES VS. R. (1950) 18 EACA 147 it is evident that the judge has acted upon some wrong principle or overlooked some material factors. To this we would also add a third criterion namely, that the sentence is manifestly excessive in view of the circumstances of the case R. Vs- Shershawsky (1912) CCA 28 TLR 263.”

39. Section 234 of the Penal Code under which the Appellant was charged, tried and convicted provides that anyone found guilty of the offence under that Section is liable to imprisonment for life. Therefore, the trial court had the discretion to impose a life sentence as provided for and clearly the sentence imposed on the Appellant is lawful.
40. This court has taken into account the circumstances under which the offense was committed. The presentence report is evident that the Appellant was a habitual offender, and he is violent to others with no regard for the rule of law. He has been convicted previously, on not less than two times and sentenced on a minimum sentence of 3 years. Although separated from the complainant in the year 2018, it is confirmed in the pre-sentence report that the Appellant has occasionally threatened the complainant and assaulted her in many unreported instances until the instant incident where she almost succumbed to the assault. In a nutshell, the pre-sentence report is not favourable to the Appellant. It states that he is violent and has no regard for the rule of law.
41. It is also worth-noting that the impact of the Appellant's actions on the victim/complainant were far reaching. The record confirms that she (the complainant) sustained grievous injuries which healed after a long period of time and she almost succumbed to the same. She gradually lives in fear of the Appellant, and she is also afraid that the Appellant may resort to avenging if released from custody. In mitigation, the Appellant begged for forgiveness and added that he is HIV positive, hence the sentence should be lenient.



42. In addition to the foregoing discussion, it is imperative to point out that sentencing is a process by which a Court imposes a penal sanction once an accused person has pleaded guilty or has been convicted of an offence following a trial. The key objective is to inter alia rehabilitate, deter, retribute and protect the community. And in doing so, the court ought to have due regard to the nature of the crime, the offender and the purpose for which the sentence is aimed.
43. Consequently, considering that this was a case of domestic violence highly motivated by the bitterness of separation in marriage, this court finds that the life imprisonment sentence imposed against the Appellant was manifestly harsh and excessive, thus calls for its intervention. Taking into account the pre-sentence report and the social misfit habits previously demonstrated by the Appellant, this court proceeds to reduce the life sentence imposed on the Appellant to fifteen (15) years imprisonment starting from the date of the trial court's Judgment.

It is so ordered.

JUDGMENT DELIVERED VIRTUALLY, DATED AND SIGNED AT KIAMBU THIS 30TH DAY OF NOVEMBER, 2023.

D. O. CHEPKWONY

JUDGE

In the presence of:

Mr. Sirma counsel for the Respondent

Appellant in person present

Court Assistant - Martin

