



REPUBLIC OF KENYA



**KENYA LAW**  
THE NATIONAL COUNCIL FOR LAW REPORTING  
Where Legal Information is Public Knowledge

**Kivingu v Republic (Criminal Appeal E002 of 2021)  
[2022] KEHC 347 (KLR) (26 April 2022) (Judgment)**

Neutral citation: [2022] KEHC 347 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT EMBU  
CRIMINAL APPEAL E002 OF 2021  
LM NJUGUNA, J  
APRIL 26, 2022**

**BETWEEN**

**JACKSON MWANGANGI KIVINGU ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(sentence in PM's Court at Siakago Criminal Case Number 354 of 2018)*

**JUDGMENT**

1. The appeal herein was instituted vide a Petition of Appeal dated 8<sup>th</sup> of January, 2021 and amended on the 26.01.2022 challenging the sentence in PM's Court at Siakago Criminal Case Number 354 of 2018 where the appellant was convicted of the offence of grievous harm contrary to Section 234 of the [Penal Code](#) and thereafter sentenced to serve 30 (Thirty) years imprisonment.
2. The appellant has challenged the sentence raising three main grounds of appeal but which grounds in my view can be collapsed into one ground; that the trial magistrate meted harsh and excessive sentence given the circumstances of the case.
3. The appeal was argued by way of written submissions.
4. The appellant submitted *inter alia* that the trial court failed to recognize the fact that he is a first offender and that he ought to have benefited from the least severe punishment as enunciated in article 50 (2) (p); further, that the court meted harsh and excessive sentence without taking into consideration that the purpose of sentencing is not only for deterrence but also to promote the rehabilitation purposes. The respondent on the other hand chose not to file its submissions but nonetheless, this court has an obligation to consider the evidence on record and arrive at its own verdict. [See [Odhiambo v Republic](#) [2008] KLR 565; [Norman Abich Mero & Another v Republic](#) Nyeri Criminal Appeal No. 279 of 2005].



5. The duty of this court while exercising its appellate jurisdiction (1<sup>st</sup> appellate court) was set out by the Court of Appeal in *Okeno v Republic* [1972] E.A. 32 and re-stated in *Kiilu and another v R* (2005) 1 KLR 174 and is to submit the evidence as a whole to a fresh and exhaustive examination and weigh conflicting evidence and draw its own conclusions. In doing so, it has been held that an appellate court's power is limited and that it can only interfere with the sentence meted by a trial court only if the sentence is manifestly excessive in the circumstances of the case or that the court overlooked some material facts or took into account wrong facts and or acted on wrong principles. [See *Benard Kimani Gacheru v Republic* [2002] eKLR].
6. In the re-evaluation of the trial court's evidence, there is no set format to which this court ought to conform to but the evaluation should be done depending on the circumstances of each case. [See the Supreme Court of Uganda's decision in *Uganda Breweries Ltd v Uganda Railways Corporation* [2002] 2 EA 634 and *Odongo and Another v Bonge* Supreme Court Uganda Civil Appeal 10 of 1987 (UR) as was quoted with approval by Odunga J in *Alex Nzalu Ndaka v Republic* [2019] eKLR].
7. I have considered the grounds of appeal, the record of appeal and the submissions by the appellant and it is my view that the issue which this court ought to determine is whether the sentence meted out by the trial court was harsh and or excessive.
8. The appellant herein was charged with the offence of causing grievous harm contrary to Section 234 of the Penal Code after having attacked the complainant (his aunt) with arrows when the complainant visited the appellant's parents seeking for Kshs.500 to pay school fees for her child. That from nowhere, the appellant attacked the complainant in the stomach and that the metallic part of the arrow penetrated the stomach of the complainant; another arrow was directed on her loins and the third arrow narrowly missed her after the appellant was restrained by his dad. That upon being taken to hospital, she got admitted and she had to undergo two surgeries. That even at the time of the hearing, she was still under medication given that she suffered a permanent degree of injury categorized as "maim" and that there was a permanent destruction of her colon and she was still awaiting a subsequent surgery.
9. Section 234 of the Penal Code stipulates that any person who unlawfully does grievous harm to another is guilty of a felony and is liable to imprisonment for life. In the instant case, the appellant was sentenced to serve 30 years imprisonment. The Court of Appeal for East Africa in the case of *Ogola s/o Owoura v Reginum* (1954) 21 270 stated as follows:-
 

"The principles upon which an Appellate Court will act in exercising its jurisdiction to review sentences are firmly established. 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 v R.*, (1950) 18 E.A.C.A 147:

"It is evident that the Judge has acted upon some wrong principle or overlooked some material factor."

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 v Shersbewky*, (1912) C.C.A. 28 T.L.R. 364."
10. In my view, there is nothing which can prevent the trial court from imposing a sentence as long as the same is legal. The sentence imposed despite being harsh according to the appellant, was within the law and within the discretionary powers of the court. This court finds no reason to interfere with the exercise of the said discretion as the appellant did not justify the interference. He did not prove that



the trial court overlooked some material factor, or took into account some wrong material, or acted on a wrong principle.

11. In view of the foregoing, it is my finding that the sentence was proper and lawful in the given circumstances.
12. The appeal is hereby dismissed.
13. It is so ordered.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 26 TH DAY OF APRIL, 2022.**

**L. NJUGUNA**

**JUDGE**

.....for the Appellant

.....for the Respondent

