



REPUBLIC OF KENYA



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**Mwikali & 2 others v Republic (Criminal Appeal E058 of 2021)
[2022] KEHC 16063 (KLR) (29 November 2022) (Judgment)**

Neutral citation: [2022] KEHC 16063 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CRIMINAL APPEAL E058 OF 2021
MW MUIGAI, J
NOVEMBER 29, 2022**

BETWEEN

FREDINAH LUCY MWIKALI 1ST APPELLANT

JOEL MWENDWA 2ND APPELLANT

KELVIN MBUGUA 3RD APPELLANT

AND

REPUBLIC RESPONDENT

*(Being An Appeal From The Conviction And Sentence Of Hon. H.
Onkwani Principal Magistrate Delivered On 04.10.2021 At The
Chief Magistrate's Court In Mavoko In Mavoko Cr. 427 Of 2018)*

JUDGMENT

Trial Court Record

1. The Three Appellants were jointly charged with the offence of causing grievous harm contrary to Section 234 of the [Penal Code](#).
2. The particulars of the offence are that on the 23rd day of June 2018 at Site area in Athi River Sub-County within Machakos County, willfully and unlawfully did grievous harm to Justus Mulei Nuna.
3. The Appellants pleaded not guilty.

Prosecution Case

4. At the hearing, the Prosecution called six witnesses.
5. PW1 was Justus Mulei Nuna. He said that on 23rd June 2018 at about 11pm he was at his house staying with the 1st Accused at the time. He went to the bathroom and when he returned he did not find his



- Kshs 4,000 that he had left on the table. He asked her and she denied taking the money. They started arguing. She called her sons who came and she hit him on the head with a rungu on the left side of the head.
6. He stated that he passed out. He said he came back two weeks later at Kenyatta National Hospital and could not talk for a further three weeks. He had internal bleeding. He said the 1st accused hit him with a rungu while the 2nd and 3rd accused hit him with kitchen utensils.
 7. Upon cross examination, he stated that he used to stay with the 1st accused and he passed out after the assault. He indicated that he did not have the rungu in court.
 8. There was no re - examination.
 9. PW2, Joyce Ndukustated that on 23rd June 2018 the 1st accused went to her house and asked for her. She was told that they had differed with PW1 and he was assaulted by some boys using runqus and she had taken him to hospital. PW2 said she went to the hospital with her friend and PW1 was unconscious. They took him to Machakos where an X-ray was done before they transferred him to Kenyatta National Hospital.
 10. She said PW1 was in a coma for 9 days, his head was opened up. They later reported to the police. She said PW1 was discharged on 3rd July 2018. She said he took about 2 months before he could speak properly and he told her how they differed with the 1st accused after she took his money. She called her sons who came and she snatched a hammer from one of them and hit Justus on the head.
 11. In cross examination, she stated that he started speaking after 2months and that his speech has not been restored properly. He was hit with a 'nyundo' (hammer). She also stated that the 1st accused took him to hospital.
 12. There was no re - examination.
 13. PW3, Susan Ngalastated that she works for Golden Africa and on 23/06/2018 she was at her house at 9am. She was called by PW2 who told her that PW1 had been injured by 1st accused. She accompanied her to hospital, Mangeli's clinic. It was her testimony that they found PW1 unconscious and had a bandage on his arm. Later he was taken to Machakos where X ray was done and later referred to KNH. She went back to her house.
 14. Upon Cross- examination, she stated that she did not witness the assault.
 15. There was no re - examination.
 16. Fredrick Mutindawas PW4, a transporter. He stated that on 23/06/2018 at 6 am he was at his house and he heard a knock on his door. the 1st accused was asking for his wife, PW2 that Mulei, PW1, had been injured and was in hospital. She told them that he was seriously injured. They went to hospital and found PW1 unconscious. He was transferred to Machakos hospital. PW4 reported to Athi River Police station and was later referred to Kenyatta National Hospital. An x-ray was done at Machakos. It was his testimony that on 24/6/18 he went to visit PW1 at Kenyatta National Hospital.
 17. Upon cross examination, he stated that the 1st accused told them that her sons had assaulted PW1.
 18. PW5 was Corporal Valentince, the investigating officer was previously stationed at Athi River Police station. He said that the complainant informed him that he went to his girlfriend, Mwikali and had Kshs 4,000 in the house. He went to shower and the money got lost. He asked Lucy and she assaulted him. He found himself at KNH and was admitted for one and a half weeks. He had head injuries. The sister had reported the case when the complainant was in hospital. He recorded statements and went



- to the house of the complainant and arrested one of the sons, the other two came later. He produced the photographs of the scene of crime and said he could see the complainant had been injured.
19. Upon cross-examination, it was his testimony that the complainant was assaulted using a rungu which he did not have in court. He said he did not find it at the scene. He could not differentiate the two boys by name but he was told the names by the complainant. Accused 2 and 3 denied that those were their names and they called neighbors to assist the sister to complainant who reported the accused persons.
 20. Dr. Namu Kimonguiwas PW6, stated that he works at Athi River Level 4 hospital. He stated that the P3 was authored by Dr. Angela Mule. He said he worked with her in Machakos and Athi River Hospital for three years and he knew her handwriting. He produced the P3 form and stated that the complainant was seen at the facility on 11/7/2018. He had been assaulted on 22/6/2018 at 11pm. On examination, he was in fair general condition, slow speaking and slow in following events. He was not under the influence of alcohol and drugs, he was aware of the place and people. It was his testimony from the P3 Form that he had a depressed skull, fracture of the skull, left side with brain injury.
 21. A procedure was done at Kenyatta National Hospital on 26/6/2018 on the head, he had on chest and abdomen- soft tissue injuries and the upper limbs had pain. On the lower limbs, he had soft tissue injuries, 3 weeks after the incident. A blunt force injury had been inflicted and the extent of the injury was classified as grievous harm. From the CT scan report, he had a brain injury, from the KNH report, PW1 was admitted for one week, he had brain injury and skull was opened up to drain the blood clots. He said that Dr. Angela used the medical reports to fill the P3 Form. He produced the Medical Reports, Machakos CT scan and the P3 form.
 22. In cross-examination, he stated that the object of assault had not been indicated in the P3 Form and that a rungu cause the injuries depending on how he was hit. He said he did not know the complainant and did not see the photos.
 23. On 1/3/2021 the court found that the Accused persons had a case to answer.

Defence Case

24. The defence chose to give sworn evidence and called four witnesses.
25. DW1, Fredinah Lucy, the 1st accused person, stated that she knows the complainant and had a relationship with him. On 22/6/2018, they were in the house sleeping in the bedroom while the other accused persons were sleeping in the sitting room. She received a call from an unknown number, she was called again and she did not pick, the third time, the complainant asked why she was not picking the call and she said she did not know the caller. The complainant got annoyed and started abusing her and told her to take care her boyfriends who were calling her. He took the phone by force and he demanded for the password, she refused and he woke up and assaulted her. She shouted for help and her sons, 2nd and 3rd accused persons heard her cry and went to the bedroom door and Joel ordered the door to be opened but the complainant refused. Accused 2 and 3 broke the door and entered the room and he pushed the complainant. The complainant assaulted him with blow on the face. He bled from the nose and mouth. He fell and the complainant took a knife threatening to kill Joel.
26. She said that the complainant had miraa and soda and took the knife to open the soda and then returned to the bedroom. She contended that when she saw he had taken a knife, she held him and told Kelvin to leave the house and seek for help. They ran away. She said she did not run away immediately, that she struggled with him and left and found people gathered outside the house. The children had been taken to Joanita Njiraini's house. She then ran to where her children were and stayed for an hour. After



- the commotion ended they went back to the house and saw the complainant crying on the ground. She stated that she took him to hospital after public said so.
27. DW1 contended that Dr. Mangiti took her sons to hospital, that the complainant was given first aid and she was told by the doctor to go to the police and report. She went to Athi river, reported, recorded a statement and later she was told to go the hospital first. She found the complainant and her sons and the doctor told her to take the complainant to Machakos hospital, she did and he had a head scan done. She paid for it and later he was taken to Kenyatta National Hospital. She contended that she did not steal money from the complainant and when they left the house, the complainant was not injured. She denied injuring him. She prayed for an acquittal.
 28. Upon cross examination, she stated that the complainant lied before the court. She was injured on the hand and did not report the assault. She had no P3 Form. She did not go to hospital. She stated that he lied that her sons beat him until he collapsed. The relatives of the complainant chased her away. She did not report him. She also stated that the police did not chase her but told her to first check on the complainant.
 29. In re- examination, she stated that the police did not investigate and she was arrested and charged.
 30. DW2 was Joel Mutua, a student at Kisii University stated that the complainant was the mother's boyfriend. On 22/6/2018 they were sleeping in the sitting room while the mother and the complainant were in the bedroom. Accused 3 told him of the commotion and they went to the bedroom door, he ordered the complainant to open the door, he delayed to open and they broke the door and entered the room.
 31. He said they found the complainant trying to suffocate their mother and he separated them. The Complainant faced DW2 and hit him with a blow on the face, he fell. He took a knife and wanted to stab him and the 3rd accused helped him leave the house. The complainant was okay. He said that when they left to the neighbours house, the complainant was on the ground. The people told their mother to take the complainant to hospital, they did not assault him. He also stated that the relatives of the complainant were not present. He asked to be released.
 32. Upon cross examination, he stated that he did not take a day to be treated and did not know what a P3 form was. He stated that he did not beat the complainant.
 33. There was no re- examination.
 34. DW3. Kelvin Wambua, a student at Co-operative University stated that Justus Mulei was his mother's boyfriend. On that day, he was sleeping in the sitting room, he heard his mother shouting, he woke up. Accused 2 had ordered the complainant to open the door, they broke the door and found the complainant strangling their mother. He helped the mother. The complainant hit the 2nd Accused and took a knife threatening the 2nd Accused. Their mother held the complainant and they ran away. People gathered. They went to Joanita's house, a neighbour. The complainant as not injured. Later they went back to the house and saw the complainant had collapsed. The people ordered the mother to take the complainant to hospital and he was. He stated that they did not assault the complainant and the sister of the complainant was not present. He prayed for an acquittal.
 35. Upon cross- examination, he stated that the complainant was not injured, that they found him injured but he could not tell who injured him.
 36. There was no re-examination.



37. DW4, Joanita Njiraini stated that she knew the accused persons as her neighbors. On 22/6/18 they were sleeping, she heard people shout. She woke up and looked through the window and saw a crowd, she opened the door. She found Kelvin and Joel coming to her house. Joel was nose bleeding, she cleared his blood. The mother came later and told her she had quarreled with the complainant over a phone. The accused ran to her house, they stayed for an hour. When they left she locked the door and slept.
38. Upon cross examination, she stated that she learnt in the morning that Justus was injured and she did not witness the fight.

Trial Court Judgment

39. The Trial Court determined the matter twofold. On the first issue of whether the accused persons committed the offence of grievous harm, while considering the case of *Republic vs Luseru S/O Wandera* (1948) EACA 105 where the Appellant struck the deceased with a knife without any provocation and was convicted for attempting to unlawfully cause death as per the Uganda Penal Code. The Court held that the intent to cause grievous harm was not sufficient to support the current charge.
40. Having considered Section 17 of the Penal Code, the Trial Court found that in this case the Complainant was a boyfriend to the Accused, accused 2 and 3 were the sons of the 1st accused. The complainant was considered an intruder and even at the point of being attacked and left unconscious, it was the neighbors who pressed on Accused 1 to take him to hospital. That he would have been left for dead had it not been for the neighbors.
41. The Trial Court made reference to Section 4 of the Penal Code on the definition of grievous harm as
“any harm which amounts to a maim or dangerous harm or serious or permanent injures health , or which is likely to injure health or which extends to permanent disfigurement or to any permanent or serious injury to any external or internal organs membrane or sense.”
and found that the prosecution had proved that the complainant sustained serious harm that fractured his skull. He has now slowed speech and may not function normally for the rest of his life.
42. The Trial court also found that there were no medical records produced to prove the injuries sustained by Accused 1 and 2 and found their evidence to be hearsay evidence and a mere denial.
43. The Accused persons were found guilty and in mitigation, they indicated that they were remorseful and 1st time offenders. Accused 1 said she is the breadwinner while accused 2 and 3 are students.
44. Having considered that the accused persons were first offenders and the offence carries a mandatory life sentence, the Trial Court sentenced each accused to serve 20 years imprisonment.

The Appeal

45. Dissatisfied by this judgment, the Appellants filed a Petition of Appeal dated 12th October 2021 seeking the Appeal to be allowed, conviction and sentence to be set aside and the Appellants be set free and, in the alternative, the Hon. Court to disturb the sentence imposed on the Appellants and commit them to a non- custodial sentence.
46. The grounds of the Appeal were that;
 - a. The Hon Magistrate erred in law and in fact in finding that the Appellants were guilty of the offence of causing grievous harm contrary to section 234 of the Penal Code.



- b. The Hon Magistrate erred in law and in fact in convicting and sentencing the Appellants to serve twenty (20) years imprisonment without an option of a fine when there was no sufficient evidence presented to sustain the charge.
 - c. The Hon Magistrate erred in law and in fact by failing to appreciate that the offence was not proved beyond reasonable doubt.
 - d. The Hon Magistrate erred in law and in fact in finding that there was sufficient evidence to prove that the complainant PW1, identified the Appellants as his assailant at the time of the assault, when there were clear contradictions in the evidence of PW2, PW3, PW4 and PW5.
 - e. The Hon. Magistrate erred in law in placing more weight on PW1's case and totally failed to evaluate the evidence by PW2, PW3, PW4 and PW5 was hearsay evidence
 - f. The Hon. Magistrate erred in law and in fact in failing to find that PW5 did not conduct any investigation and her investigation was a shamble and she failed to produce any weapon
 - g. The Hon. Magistrate erred in law and in fact in disregarding the Appellants defense as unbelievable and a mere denial and /or in shifting the burden of proof to the Appellants
 - h. The Hon. Magistrate erred in law and in fact by sentencing the Appellants harshly to twenty (20) years imprisonment while having the full knowledge that the alleged offence was committed while the 2nd Appellant and 3rd Appellant were minors.
 - i. The Hon. Magistrate erred in law and in fact by sentencing the Appellants harshly to Twenty (20) years imprisonment and ignoring the mitigation tendered by the Appellants.
47. The Appeal was canvassed by way of written submissions.

Appellants' Submissions

48. The Appellant filed submissions on 2nd June 2022 in which it was submitted that the burden of proving guilt rests wholly on the prosecution and never leaves the prosecution's backyard. This was buttressed by the case of *Peter Mwangi Kariuki vs Republic* [2015] eKLR, *Sekitoleko vs Uganda* echoed in the case of *Philip Muirui Ndaruga vs Republic* [2016] eKLR and *J.O. vs Republic* [2015] eKLR on the burden and standard of proof in criminal cases and the onus is mostly unless the Accused person has special knowledge or facts they wish to rely on in their defense, on the Prosecution to prove its case beyond reasonable doubt.
49. It was submitted that the Trial Court was misguided to convict the Appellant on the basis that at some point DQ3 slightly contradicted himself and admitted to the crime, that the Trial Court was duty bound to convict the Appellant based on the strength of the prosecution case and not on the 'sickness' of the defense.
50. It was submitted that the prosecution failed to produce the weapon that was used to cause the injury and further that the evidence adduced was not corroborated as PW1 claims that he was hit with a rungu, PW2 and PW3 stated that the complainant was hit with a hammer, PW4 stated that the complainant was hit with a cane and PW6 stated that he was hit with a blunt object.
51. Further, the time of the crime is also not corroborated as the time of the crime according to the complainant is 11.00pm on 23/06/2018 whereas the other witnesses stated that on 23/06/2018 the 1st accused told them that the crime occurred at 2.00am.



52. The Appellants submitted that the evidence of PW2, PW3, PW4 was hearsay evidence which the court ought not rely on. They contended that the allegation by PW2 and PW3 that they were at the crime scene and took the PW1 to hospital was false as this was not confirmed by PW1 at the hearing. Further, that PW4 in his evidence stated that they were informed by the 1st accused that the complainant was injured therefore the evidence of PW2 and PW3 was falsified. The Appellants opine that PW5 did not conduct investigations nor visit the crime scene. The Appellant relied on the cases of Machakos Criminal appeal No. 13 of 2021 [Stephen Ngila Nthenge vs Republic](#), [Njuki vs Republic](#) 2002 1 KLR 77, [Philip Nzaka Watu vs Republic](#) [2016] eKLR and [Erick Onyango Ondeng' vs Republic](#) [2014] eKLR.

Respondent Submissions

53. DPP through State Counsel Martin Mwonger filed submissions dated 12th July 2022. On the issue of whether the elements of the offence were proved, Counsel submitted that the witnesses corroborated the evidence of the complainant that he was injured and was in a coma for two weeks. That the doctor, PW6 concluded from the injuries sustained that the degree of injury was grievous harm. Reliance was placed on the cases of [John Oketch Abongo versus Republic](#) (2000) eKLR and [Rex vs Gwempazi s/o Mukonzho](#) (1943) 10 EACA 101.
54. It was submitted that section 234 of the Penal Code provides for a sentence of life imprisonment and therefore the Trial Magistrate acted in accordance with the law in sentencing the Appellants.
55. On the issue of contradictory evidence, it was submitted that the evidence of PW1 was corroborated by the testimony of PW2 and PW5. To buttress this point, reliance was placed on the case of [Philip Nzaka Watu vs Republic](#) [2016] eKLR.
56. It was submitted that PW1 offered direct evidence to the court, that on 23/08/2018 he was at the 1st accused house when he went to take a shower. Upon return, he discovered Kshs 4,000 was missing. An argument ensued between 1st accused and him which made the 1st accused to seek intervention of 2nd and 3rd accused person. The Respondent submitted that the Trial Court was right in putting weight in the testimony of PW1 evidence since he was the boyfriend of the 1st accused person and also because the 1st Appellant was with the complainant alone in the bedroom. Reliance was placed on the case of [Charles O. Maitanyi vs Republic](#) [1986] KLR 198 and [Ogeto vs Republic](#) [2004] KLR 19.
57. The Respondent contended that PW5 investigated what transpired between the complainant and the accused person and produced exhibits in court. It was submitted that the Appellants testimony was an afterthought which could not shake the well corroborated prosecution case, that the Appellants did not produce any medical evidence indicating any injury suffered while being assaulted by the complainant. Reliance was placed on the case of [Victor Mwendwa Mulinge vs Republic](#) [2014] eKLR.
58. The Respondent admitted that the 2nd and 3rd Accused persons were minors at the time of commission of the crime and submitted that the Court should re-evaluate the sentence imposed by the Trial Court. Reliance was placed on the case of [Benson Ochieng & Another vs Republic](#) [2018] eKLR.
59. It was submitted that the Trial court took the mitigation into consideration before sentencing the Appellants. It was also submitted that the Appellants were properly identified by PW1 as the 1st Accused boyfriend. It was contended that the prosecution was proven beyond reasonable doubt. Reliance was placed on the case of [Wamunga versus Republic](#) (1989) KLR 424 and [Peter Musau Mwanzia vs Republic](#) [2008] eKLR.



Determination

60. This court considered the Trial Court record; proceedings and judgment, the Appeal and the submissions of the parties through respective Counsel
61. This being a first appeal, this court is obliged to reappraise the evidence, subject it to an exhaustive re-evaluation, analysis and reassessment to the end and draw its own inferences of fact and conclusions of fact and law from the evidence as was stated by the Court of Appeal in *Ian Gakoi Maina & 4 Others vs Republic* [2021] KECA 126 KLR.
62. This Court is in the process to arrive to its own independent conclusion, as to whether or not, the decision of the Trial Court is sustained. This Court takes into account that it had no opportunity to hear the witnesses and consider at their demeanor. An appellant on a first appeal is entitled to evaluate the evidence as a whole to be submitted to a fresh and exhaustive examination as stated in the case of *Pandya v Republic* [1957] EA. 336.
63. It is not in dispute that the complainant and the 1st Accused person were in a relationship and on 23rd of June 2018, they were in the bedroom while the 2nd and 3rd Accused persons were in the sitting room.
64. From the Respondent's submission, it is also not in contention that at the 2nd and 3rd accused were minor at the time of commission of the alleged crime.
65. The first issue the Appellants take issue with is that they should not have been found guilty. I note that the Appellants were charged under Section 234 of the Penal Code that provides as follows;
- Any person who unlawfully does grievous harm to another is guilty of a felony and is liable to imprisonment for life.
66. Section 4 of the Penal Code defines grievous harm and harm as follows;
- “grievous harm” means 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”
- “harm” means any bodily hurt, disease or disorder whether permanent or temporary;
67. This Court in the case of *Pius Mutua Mbuvi v Republic* [2021] eKLR noted that the elements that need to be proven beyond reasonable doubt by the prosecution from the reading of this section are;
- i. The victim sustained grievous harm.
 - ii. The harm was caused unlawfully.
 - iii. The accused caused or participated in causing the grievous harm.
68. The Court of Appeal in the case of *John Oketch Abongo v Republic* [2000] eKLR stated that;
- “The definition contains several ingredients of what constitutes grievous harm. We are of the opinion that the presence of any one of these ingredients would suffice to disclose grievous harm.”
69. The Appellants raised the fact that the Prosecution failed to prove all ingredients of the offence beyond reasonable doubt. The ingredients of grievous harm include;



1. The fact or proof of maim or dangerous harm on the Complainant /victim [actus reus]
2. The fact or proof of grievous harm
3. Proof that the victim/complainant suffered grievous harm from the unlawful act of the Accused person(s) and lastly;
4. Proof that the unlawful was committed with malice aforethought by the Accused person/ assailant [mens rea]

Proof Of Maim/dangerous Harm/grievous Harm

70. A perusal of the record indicates only one P3 form filled on 11/7/2018. The P3 form indicates the Complainant sustained the following injuries;
- head and neck;
- depressed parietal skull fracture (left) with traumatic brain injury Craniotomy and elevation duraplasty done in KNH on 26th June 2018.
- Thorax and abdomen;
- Soft tissue injury in several areas on both sides of the chest.
- Pain on palpation
- Upper Limbs:
- Soft tissue injuries on the elbow joints and several regions on both upper limbs. Pain on deep palpation.
- Lower Limbs;
- Diffuse soft tissue injuries on both lower limbs.
- Pain in deep palpation.
71. PW6 in her evidence contended that the CT scan report showed PW1 had a brain injury, and the KNH report of 17/7/2018 the Discharge Summary indicated, that he was admitted for one week, he had depressed parietal bone (Left) traumatic brain injury and skull was opened to drain the blood clots. She concluded that from the assessment, the Complainant suffered grievous harm.
72. The conclusion from the Machakos Imaging Centre; CT scan dated 23rd June 2018 indicated that the injuries were as follows;
- Left parietal bone comminuted depresses (10.4mm) fracture
- Left parietal acute subdural hemorrhage
- Left parietal lobe hemorrhagic contusion
- Left parietal scalp hematoma
- No midline shift
- Bi-maxillary and ethmoid sinusitis
73. From the discharge summary, the complainant was diagnosed with depressed parietal bone(left) / Traumatic brain injury. There are photographs on record that also show stitches on the left side of the head and a long -healed wound /scar on the head.



74. PW2 and PW3 confirm that when they found PW1, he was unconscious. This corroborates the testimony of PW1. PW2 and PW5 evidence also confirm that PW1 sustained a serious head injury and underwent a procedure at the Kenyatta National Hospital. Only PW3 talked about PW1 having a bandage on the arm.
75. The medical reports outlined above depict severe injuries on/to the Complainant, pain and suffering and prolonged medical care. Cumulatively, the injuries, surgery, admission in hospital confirms serious bodily harm, grievous harm arising from the assault by 1st Accused person/Appellant and /or the 2 sons 2nd & 3rd Accused persons.

Proof Of Unlawful Act(s) Of Accused Person(s) Caused Grievious Harm With Malice Aforethought.

76. The 1st Accused person and the Complainant/victim were living together in PW1's house as boyfriend and girlfriend. According to the evidence of PW1, on the fateful night, 23/6/2018 they had an argument over Kshs. 4,000/- PW1 left on the table as he went to shower and came back and found the same missing. On asking the 1st accused person/appellant she refused and he was hit with a rungu by 1st Accused and he woke up 2 weeks later admitted at Kenyatta National Hospital.
77. On the other hand, the 1st Accused person's version is that she refused to answer her phone that was ringing and when she was asked why she was not answering by PW1, she said she did not know the caller. PW1 then took the phone, demanded for the password which she refused and he woke up and started assaulted her. She then screamed for help and her sons and & 3rd Accused /Appellants.
78. The evidence by PW1 was/is direct evidence that it is the 1st Accused /Appellant who hit him on the head with a rungu and he passed out. They were in a relationship and lived together in the same house and had engaged in a quarrel, clearly from these facts/evidence the Complainant identified the 1st Accused by/through recognition, close proximity and close contact.
79. The evidence of PW1 is corroborated by the evidence of PW2 & PW4 that on the same night, on 23/6/2018, the 1st Accused/Appellant came to their house and informed them that she differed with the Complainant/Victim and he was assaulted by boys with rungu. If the 1st Accused person was not at the scene at the time the incident took place then how did she know the Complainant was injured and went to his relatives and informed them?
80. The evidence of PW1 was that he was hit by a rungu by the 1st Accused person and passed out. It was the evidence of PW2 that he 1st accused told her the following;
- “ she told me she had differed with PW1 and that he was assaulted by some by some boys using rungu.”
81. From the evidence on record, the 1st Accused person was with and the last person with the Complainant/victim on the night of 23/6/2018 and in the words of PW1, the 1st Accused person assaulted him by hitting him on the head with a rungu.
82. The 1st Accused stated that it is the people who asked her to take the complainant to hospital. PW2 corroborates this evidence when she says that the 1st Accused looked for her and told her that PW1 had been assaulted by some boys and that she had taken him to hospital.
83. The 1st Accused told PW4 that her sons had assaulted the complainant. Further, from the record once PW2 found out that the PW1 was in hospital , she informed PW3 and they went to hospital where they found the complainant unconscious, took him for X- ray and then he was transferred to Kenyatta National Hospital.



84. PW1 stated that when he was hit, he passed out and woke up 2 weeks later. The 1st Accused/Appellant stated that after the commotion ended they went back to the house and saw the complainant crying on the ground. What commotion was she referring to?
85. At this juncture, it is not in doubt that the complainant sustained grievous harm. Having considered the medical evidence and the definition of grievous harm in the Penal code and in the P3 form, there was grievous harm occasioned upon the complainant. In addition, that the harm was caused unlawfully because there is no justification for hitting someone so hard almost fatally, no matter the extent of the disagreement.
86. According to the P3 form, the weapon that caused the injury was that it was occasioned by a blunt force object. This fortifies the evidence of the Complainant that he was attacked with a rungu on the left side of his head.
87. On the aspect of participation of the appellant, there is credible direct evidence of Pw1 as well as that of the appellants placing the appellants at the scene of the crime and in particular the 1st Appellant as an active participant during the commission of the offence. The complainant and all the accused persons confirm that there was commotion between the complainant and the 1st Accused person. It is not in contention that the two were in a relationship, that the children were in the bedroom while the Complainant and the 1st Accused were in the bedroom. The 2nd and 3rd Appellant in their evidence indicate that they ran to the neighbor's house and the complainant was okay. The 1st Accused person was left alone with the complainant according to the defense theory.
88. The Accused persons stated DW2 broke the door when the complainant refused to open with but none of them indicate how the door was broken down, what was used? Didn't he sustain any injuries? What kind of door was it? The 1st accused person alleged to have been injured, she even took the complainant to hospital and paid some bills, why didn't she get treatment at that time herself? Why didn't her sons get treatment if they were with her in hospital?
89. The complainant is/was very categorical that the 1st Accused person hit him on the head with a rungu. He alleged that the 2nd and 3rd Accused persons hit him with kitchen utensils. It is not clear which particular utensils were referred to and where exactly he was hit with these utensils.
90. There seems to have been a commotion between the 2nd, 3rd Accused persons and the complainant at some point in the ensuing argument and assault with by the 1st Accused, but if so it may have been to the extent of harm and did not amount to grievous harm on their part. The Court finds the conviction of the 2nd and 3rd Accused persons guilty of grievous harm in the circumstances would not legally stand. The head injury and brain damage was caused by 1st Accused/appellant hitting PW1 on the head amounted to grievous harm and not the 2nd & 3rd Accused persons assault with kitchen utensils as no other serious injuries were noted on the complainant.
91. This Court is satisfied that the 1st Accused hitting PW1 on the head with a rungu was the direct cause of the near fatal head injuries he sustained. The 1st accused's defense that suggests that she was accosted by the Complainant and sought help from her sons and therefore was acting in self-defense does ring true or plausible. There may have been a scuffle between the Complainant and the 1st Accused but if her life was in danger as alleged she would have sustained injuries and sought treatment. The mother and her sons as a team were excessive force to the Complainant.
92. Appellants raised issue with the weapon that was used and that it was not produced during trial. There is the direct evidence of PW1 that he was hit with a rungu. PW2 was also told by the 1st Appellant that PW1 was hit with a rungu by some boys when she went to her. PW2 towards the end of her



examination in chief talked about a hammer. PW5 indicated that the complainant was assaulted with a rungu but she did not have it in Court.

PW2, PW3 and PW4 did not witness the altercation but were witnesses from the point they found the complainant unconscious. I agree with the Appellants that their evidence was hearsay but only to the extent of what happened in the house of the complainant.

93. The nature of the injuries in the medical evidence P3 Form before this court is that the probable type of weapon causing injury is one of blunt force which is commensurate to an injury that would have been caused by a rungu. What is not clear is what could have caused the other injuries seen on the complainant's body. These were soft tissue injuries. The evidence before the court outweighs the slight contradictions.
94. The Court of Appeal in the case of *Abamad Abolfathi Mohammed and Another v Republic* [2018] eKLR espoused on circumstantial evidence and stated as follows:
- (55) The law on the definition, application and reliability of circumstantial evidence, has, for decades been well settled in common law as well as other jurisdictions. Circumstantial evidence is "indirect [or] oblique evidence ... that is not given by eyewitness testimony." It is "[a]n indirect form of proof, permitting inferences from the circumstances surrounding disputed questions of fact." [6] It is also said to be "[evidence of some collateral fact, from which the existence or non-existence of some fact in question may be inferred as a probable consequence....]" [7]
- (56) On its application, circumstantial evidence is like any other evidence. Though, it finds its probative value in reasonable, and not speculative, inferences to be drawn from the facts of a case, [8] and, in contrast to direct testimonial evidence, it is conceptualized in circumstances surrounding disputed questions of fact [9], circumstantial evidence should never be given a derogatory tag.

Sentence

95. The second issue that has been raised by the Appellants is being sentenced to serve twenty (20) years imprisonment without an option of a fine when there was no sufficient evidence presented to sustain the charge.
96. Section 234 of the Penal code provides that a person found guilty of the offence of grievous harm shall be sentenced to life imprisonment. There is no provision for a fine. The Trial court took into consideration the fact that the Appellants were first offenders and in exercising discretion, sentenced them to 20 years.
97. The Court finds therefore that the conviction was merited against the 1st Appellant and there is no need to disturb that conviction. However, the conviction against the 2nd and 3rd Appellant is not. According to the Pre-bail Report, the 2nd Appellant was born in 2001 while the 3rd Appellant was born in 2002 so that at the time this offence was committed they were 17 and 16 years respectively.
98. Clause 20.11 of the Sentencing Policy Guidelines provides for custodial sentence as a last resort when dealing with children. Depending on the circumstances of the case Section 191 of the *Children Act* provides a wide range of rehabilitative orders the Court should consider. These factors ought to have been considered at the time of sentencing.
99. For the 1st Accused person the Court considered Aggravating circumstances spelt out in the Sentencing Policy Guidelines Clause 23.7, the relevant ones being;



- a) use of weapon to injure a victim
 - b) serious physical or psychological effect on the victim
 - c) flagrant use of violence
100. The mitigating Circumstances are outlined in Clause 23.8 of Sentencing Policy Guidelines; the relevant ones being; the 1st Accused person is advanced in
- a) Age
 - b) 1st Offender
 - c) Remorsefulness
101. Balancing both the aggravating circumstances and the mitigating circumstances and in the process finds on the one hand the 1st Accused is the breadwinner and mother to 2nd & 3rd Accused persons. The 1st accused person took the Complainant to hospital and despite the mishap he survived.
102. On the other there was/is PW1, the Complainant sustained life threatening injuries on the head by being hit with a rungu by 1st Accused person. He was in a coma for 9 days, underwent head surgery was admitted to hospital and after treatment and discharge was slow-speaking and regaining focus to follow flow of events. He underwent pain and suffering incurred financial drain due to medical expenses and despite recovery he remains socially and gainful employment disadvantaged.

Disposition

1. In the end, I find that the prosecution managed to prove beyond all reasonable doubt the case against the 1st Appellant but not against the 2nd and 3rd Appellant.
2. The threshold for grievous harm was not met in 2nd & 3rd Appellants case.
3. I therefore uphold the conviction and sentence against the 1st Appellant and reduce it to 15 years and acquit the 2nd and 3rd Appellants.

**DATED, DELIVERED & SIGNED AT MACHAKOS THIS 29TH DAY OF NOVEMBER, 2022
(VIRTUAL/PHYSICAL CONFERENCE).**

M. W. MUIGAI

JUDGE

IN THE PRESENCE OF:

MR. OCHIENG - FOR THE APPELLANTS

MR. MWONGERA - FOR THE RESPONDENT

GEOFFREY/PATRICK - COURT ASSISTANT(S)

Mr. Ochieng: We apply for release of cash bail.

COURT: Cash bail be released to Depositor.

M. W. MUIGAI

JUDGE

29/11/2022

