



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MERU**

**CRIMINAL APPEAL NO. E039 OF 2020**

**DANIEL NG'OLUA.....APPELLANT**

**VERSUS**

**REPUBLIC.....PROSECUTION**

***(Being an appeal from the original conviction of the Principal Magistrate's Court at Tigania in***

***Criminal Case No. 411 of 2019 delivered on 1<sup>st</sup> February 2021 by Hon. Sogomo, PM)***

**JUDGMENT**

1. Daniel Ng'olua was charged with the offence of 'Grievous Harm' contrary to Section 234 of the Penal Code. The particulars of offence in the charge sheet dated 26<sup>th</sup> April 2019 were as follows: -

*'On the 24<sup>th</sup> day of April, 2019 at Mbaranga Location in Tigania East Sub-county, within Meru County, unlawfully did grievous harm to Cyprian Kirunyu by biting him on the lower lips using his teeth.'*

2. The Appellant pleaded not guilty and the matter proceeded to trial. The Appellant was placed on his defence and by Judgement delivered on 1<sup>st</sup> February 2021 by Hon Sogomo PM, he was convicted for the offence of grievous harm and was sentenced to pay a fine of Ksh 100,000/= and in default, 3 years imprisonment.

***The Appeal***

3. Being dissatisfied with both the Judgement and the Sentence meted by the trial Court, he has preferred the instant appeal. In his Petition of Appeal dated 12<sup>th</sup> February 2021, the Appellant has urged the following grounds of appeal: -

***i) The Learned Principal Magistrate erred in law and fact in failing to find that the bruises, wound on the lower lip and human bite marks on the right thumb, injuries allegedly sustained by the complainant did not fall within the definition of grievous harm thus erroneously convicting the Appellant on unproved charge.***

***ii) The Learned Principal Magistrate erred in law and fact in failing to find that there having been an accident between the complainant and the Appellant after the complainant lost control of the motorcycle he was riding and knocked the Appellant it was doubtful that the subject injuries were inflicted by the Appellant and thus erroneously proceeding to convict the Appellant.***

***iii) The Learned Principal Magistrate erred in law and fact in disregarding the Appellant's evidence in defence and proceeding to rely on uncorroborated evidence to convict the Appellant.***

***Appellant's Submissions***

4. The appeal was canvassed by way of written submissions. The Appellant filed written submissions dated 21<sup>st</sup> July 2021. He submits that the injuries sustained by the complainant of bruises, wound on the lower limb and human bite marks on the right thumb do not fall within the definition of grievous harm.

5. He urges that PW3, the clinician did not have an opportunity to see the complainant on the date of examination because he confirmed that the complainant was treated by another clinician. That PW3 stated that from the patient's history, he was not involved in a motorcycle

accident. He urges that the said witness was thus not aware that the complainant was involved in an accident. He urges that during cross-examination, the witness confirmed that a motorcycle injury can lead to a degloving injury, which the complainant had sustained. He urges that PW3 had stated that the probable weapon was blunt and that teeth are blunt. That it can thus be deduced that the clinician's evidence was that teeth were the weapon used to cause the grievous harm.

6. He refers to Section 231 of the Penal Code on the acts intended to cause grievous harm or to prevent arrest. He further refers to Section 89 (4) of the Penal Code on the definition of an offensive weapon. He urges that the dictionary has defined weapon as a thing designed or used for inflicting bodily harm or physical damage. He urges that teeth do not fall under the definition of a weapon. He cites **State vs Kuperus**, Oregon Court of Appeal, 251 P3d. 240 (2011) for this proposition.

7. He thus urges that teeth do not comprise articles made or adapted for use of causing injury going by the definition of offensive weapon and therefore, human teeth cannot be defined as a weapon. That even if the Court was to find otherwise, the injuries sustained by PW1 did not fall within the definition of grievous harm.

8. He urges that PW1 testified that he was bitten on the finger but the treatment notes show that he had lacerations on the lower lip, left side of the face and left hand. That injuries have since healed. That the P3 described the injuries as 'bruises, degloving wound on the lower lip and human bite marks on the right thumb.' He urges that the medical officer circled the term grievous harm on the P3 form without a proper explanation as to why the same was circled. He urges that the only explanation is that the injuries do not fall within the ambit of grievous harm. He cites Section 4 of the Penal Code and **Francis Kimani Karanja vs Republic** (2016) eKLR to indicate the nature of injuries that fall within the definition of grievous harm.

9. He further urges that from the evidence on record, an accident occurred and the said accident led to the injuries suffered by the complainant and this was by no means his fault. He urges that there having been an accident between him and the complainant after the complainant lost control of his motorcycle, it is doubtful as to whether he inflicted the injuries on the complainant.

10. He urges that the evidence of PW1 contradicts that of PW2 in that PW1 testified that after the accident, the motorcycle fell on the right side of the road while facing Mbaranga direction while PW2 testified that the motorcycle stopped and overturned on the opposite left side of the road. PW2's evidence corroborated with his evidence and that of his witness.

11. He urges that PW1 was either drunk or an inexperienced motorist because he rose the motorcycle in a zigzag manner as he headed towards where he was and this explains why members of the public became so hostile with the Appellant making him rush to the police station. He urges that the Prosecution's witnesses did not see him bite the complainant and the complaint by the complainant was malicious so as to hide his carelessness.

12. He further urges that *mens rea* has to be proved so as to show criminal intention to cause harm to the complainant. He cites **Francis Kimani Karanja vs Republic** (2016) eKLR. He urges that no *mens rea* was proved in the instant case.

#### **Prosecution's Submissions**

13. The Prosecution filed submissions dated 14<sup>th</sup> September 2021. They urge that the Prosecution proved that the complainant sustained harm. They urge that the complainant had a bitten off lower lip meaning that the lower lip in part or in full was completely severed from the body of the complainant. They urge that the definition of maim, which amounts to grievous harm is the destruction or permanent disabling of any external organ, member or sense. That harm means any bodily hurt disease whether permanent or temporary. He urges that as per Section 231 of the Penal Code, the causation means is of no importance but that the end result is what matters. That therefore, the Appellant did not have to have used an external dangerous weapon in order to inflict grievous harm upon the complainant. They cite **John Oketch Abongo vs Republic** (2000) eKLR.

14. They urge that while it is not in contention that the complainant had fallen off from his motorcycle just before the altercation with the Appellant, the injuries he sustained were not consistent with motorcycle accident injuries. That human bite injuries can only be sustained from another person and not motorcycle injuries. That the clinician clarified that teeth are blunt as they don't give a clean cut and hat degloving injury can also be caused by a blunt object.

15. On sentencing, they cite **Diego vs Republic** (1985) KLR 621 and **Dismas vs Republic** (1984) KLR 634 for the proposition that an appellate Court should not interfere with the discretion of a trial Court as to sentence except where it appears that the trial court acted on some wrong principle or when the sentence is manifestly excessive or inadequate. They urge that the offence of grievous harm attracts a penalty of up to life imprisonment and thus, the sentence of Ksh 100,000/= in default 3 years imprisonment was lenient.

#### **Evidence adduced at trial Court**

16. This being a first appeal, this Court is invited to look at both questions of fact and of law. The Court is enjoined to analyze the evidence and make its own independent findings bearing in mind that it is the trial Court that had the advantage of seeing the demeanour of the witnesses. See **Okeno v Republic** (1972) EA 32. The evidence adduced at the trial Court is reproduced hereunder as follows: -

##### **Prosecution's Case**

##### **PW1**

17. PW1 testified as follows: -

*“I am Cyprian Kiruniju, a resident of Mbaranga and I am a teacher at Mathiritini Primary School. On 24<sup>th</sup> April 2019 at around 4.00 p.m, I was riding my motorcycle from the local market heading home and on arrival at Mtutu area, I saw Ngolua Daniel walking in the direction I was coming from. When I reached where Daniel was, he staggered as if he was drunk and tended towards my side and that is when I stepped on the emergency brakes and crusted to one side. I rose to pick up my motorcycle and that is when Daniel announced that I had injured him. He picked a stone and threw it hitting my left temple. Daniel then attacked me and when I held him back, he bit my left thumb. I fell down and Daniel came on top of me and bit off part of my lip. Many people arrived drawn at the commotion amongst them James Mwika wo took me to Muthara Police Station. I was issued with a P3 form after reporting the incident and took the document to Muthara Hospital where it was filled. I also have treatment notes. Daniel is seated there. He hails from Mbaranga and I know him quite well.”*

*Cross examination*

*“Daniel hails from my location and I know him quite well. I crashed to one side in order to avoid the accused who was staggering as if drunk. I crashed on the side opposite to where the accused was on the right side of the road. It is true that the accused also fell to one side but he did so deliberately not because I had hit him with my motorcycle. It is not true that I got injured during the crash. I did not see the accused at the police station reporting that I had hit him with my motorcycle. James Mwika and Benson Kailema amongst many others witnessed the accident.”*

*PW2*

18. PW2 testified as follows: -

*“My name is Benson Kailema, a resident of Karama and I am a teacher at Mwerakieni Secondary School. On 24<sup>th</sup> April 2019, at around 4.00 p.m, I was at Ntutu on my way to Karama when I met Ngolua on top of Cyprian Kirunjiu. There were many people at the scene pleading with Ngolua to let off Cyprian. Cyprian had blood stains on his shirt. The following day, when I visited Cyprian, I saw that he had a wound on the mouth. Ngolua is seated there. He was not known to me prior to the incident.”*

*Cross examination*

*“I did not witness anything other than Ngolua on top of Cyprian and blood on the father’s shirt. I saw a motorcycle on the left side of the road and many others parked nearby. I did not see any injuries on Ngolua. There were between 8 to 10 people who witnessed the episode. I recorded a statement with police on the same day of the incident. Cyprian is a fellow teacher but we do not teach in the same school. We hail from different location. Cyprian taught me in primary school years back.”*

*PW3*

19. PW3 testified as follows: -

*“My name is Kenneth Kimathi a clinician at Muthara Subcounty Hospital. I have a P3 form for Cyprian Kirunju who was seen at our facility on 24<sup>th</sup> April 2019, with a history of assault by someone known to him on the same date at 4.00 p.m. upon examination of the patient aged 40 years, he had a bruise on the left jaw, bitten off lower lip and a human bite on the right thumb. The injuries were a day old as at the time of filling the PR3 form on 25<sup>th</sup> April 2019. The patient was placed on a post of posture prophylaxis antibiotics, anaelgesics and antigenus toxoid. I classified the injuries as grievous and I ask to produce notes form and treatment.”*

*Cross examination*

*“The patient was treated by another clinician on 24<sup>th</sup> April 2019. It is true that I have indicated as blunt the probable weapon. Teeth are blunt because they do not give a clean cut. Degloving injury is where body injury is cut off and it may as well be penetrated with a blunt object. A motorcycle injury can cause degloving.”*

*Re-examination*

*“From the history, the patient was not involved in a motorcycle accident.”*

*PW4*

20. PW4 testified as follows: -

*“My name is No. 92511 Corporal Margaret Mwende of Muthara Police Patrol Base performing general duties. On 24<sup>th</sup> April 2019, I received Cyprian Kiruniju at around 1800 hours who made a report at our station of having been assaulted by Daniel Ngolua on the same day about an hour earlier. Cyprian was bleeding from his mouth with 3 of his lower lips bitten off and a bite mark on his right thumb. After booking the report, I referred the reportee to hospital. Minutes later, Daniel arrived to report having been assaulted. He appeared drunk and failed to give the name of his alleged assailant. Cyprian who was still in the vicinity identified Daniel as his attacker and I promptly arrested the latter. A P3 form was issued to Cyprian was filled and is before Court. Daniel is seated there. He was unknown to me prior to the report.”*

*Cross examination*

*“The incident occurred at Ntutu Area as the reportee tried to swerve his motorcycle to avert a collision with the accused who was staggering on the road. The accused never told me that he was hit by the motorcycle. I never visited the crime scene. It is true that the reportee fell off his motorcycle. I did not report the accused’s complaint because I was not the one manning the report desk. The injury to the right thumb was visibly inflicted by a bite. It is not true that I was on duty influenced by the complainant. I never saw the complainant’s motorcycle.”*

*Defence Case*

*DW1*

21. The Appellant was placed on his defence. He testified as follows: -

*“My name is Daniel Ngolua, a resident of Mbaranga and I am a farmer. On 24<sup>th</sup> April 2019, at around 3.30 p.m, I was from my farm heading home on the left side of the road when I saw someone riding an oncoming motorcycle in a zigzag manner. The motorcyclist hit me and I fell down. People who saw the incident screamed and the motorcyclist rode off. In the incident, the motorcyclist also fell off the motorcycle. I was injured on both hands and legs together with my ribs. I went to Muthara Police Station to report the incident but then I found that the motorcyclist had made his own report earlier. The police handcuffed and arrested me after realizing that I was injured they took me to hospital at Muthara. The police also issued me with a P3 form. It is not true that I bit the motorcyclist on the mouth. He fell from the motorcycle and injured his mouth. The motorcyclist is one Kiruniju Cyprian and I knew him well prior to the incident. The police did not take action for the report I had made.”*

*Cross examination*

*“It was Cyprian who was drunk because of the erratic way he rode the motorcycle. I did not measure his intoxication. I am a farmer. I fell unconscious when I got knocked by Cyprian’s motorcycle. I was unconscious but my legs were paralyzed.”*

*Reexamination*

*“I heard screams from onlookers after I was knocked down.”*

*DW2*

22. DW2 testified as follows: -

*“My name is Maurice Gikundi, a resident of Mbaranga and I am a miraa trader. On 24<sup>th</sup> April 2019, I recall that I was at Karithi’s hotel besides the Karama-Mbaranga road when I saw Kiruniju Cyprian riding his motorcycle from Mbaranga direction and he met that person (accused) walking in the opposite direction on the left lane. Cyprian’s motorcycle was moving from side to side and when it reached where the accused was, it hit him and he fell down. Together with others, I rushed to the accident scene and that is when Cyprian rode off. We assisted the accused to Muthara Police Station and that is where he was arrested. I did not see the accused bite Cyprian on the mouth. I did not see him bleeding at the scene and did not see any bite marks on his mouth.”*

*Cross examination*

*“The incident happened at around 3.30 p.m. it is the police who took the accused to hospital and not myself. I was about 50 metres away when I witnessed the accident. I saw the accident clearly. The hotel I was in overlooks the road where the accident occurred and I was seated on a bench outside the eatery. The accused is my neighbour and so is Cyprian. I know both of them prior to the accident. The accused has not paid my bus fare and he is not going to buy me lunch today.”*

*DW3*

23. DW3 testified as follows: -

*“My name is Peter Murithi, a resident of Mbaranga and I am a miraa trader. That person (accused) is well known to me. On 24<sup>th</sup> April 2019, I was chewing miraa besides the road when I saw the accused walking towards me. Kiruniju was riding a motorcycle in the opposite direction. I saw Kiruniju’s motorcycle hit the accused and later fell down. Kiruniju then escaped with his motorcycle and we assisted the accused to his feet and took him to Muthara Police Station. The police arrested he accused and took him to hospital. Prior to the accident, the motorcycle was moving in zig zag fashion. Accused was walking on the left lane.”*

*Cross examination*

*“I was with Maurice Gikundi chewing miraa outside a hotel. We were seated on a bench. My vision and mind was not impeded by the effects of chewing miraa.”*

## ***Issues for Determination***

24. From the evidence adduced at the trial Court, contents of the Petition of Appeal and the submissions by parties, the following issues arise for determination: -

***i) Whether the Prosecution proved their case beyond reasonable doubt.***

### ***Determination***

***i) Whether the Prosecution proved their case beyond reasonable doubt.***

25. Section 234 of the Penal Code provides for the offence of Grievous Harm 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.***

26. Section 4 of the Penal Code defines grievous 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;***

27. The complainant, PW1 led evidence to the effect that on the material day, he was riding his motorcycle from the local market heading home when he met the Appellant, whom he knew very well. He testified that the Appellant was staggering as if drunk and tended towards his side, thus forcing him to step on the emergency brakes. That when he rose to pick up his motorcycle the Appellant attacked him, first by throwing a stone at him on the left temple and then biting his left thumb and when he fell down, the Appellant came on top of him and bit off part of his lip.

28. PW2 testified to have come to the scene of crime and witnessed the Appellant on top of the complainant. His evidence corroborates that of PW1.

29. The Court considers that both the Appellant and the complainant confirmed to have known each other very well and there could therefore not have been mistaken to their respective identities.

30. Although the Appellant urges that the injuries sustained by the complainant were as a result of him falling off his motorcycle, this Court considers that there is medical evidence to confirm that the injuries were as a result of human bites. This Court considers that human bites could only be inflicted by a human, notwithstanding that the Appellant may have sustained other injuries as a result of him falling off the motorcycle. This Court also considers that PW2 found the Appellant on top of the complainant.

### ***Nature of Injuries***

31. One of the Appellant’s main ground of appeal is that the nature of injuries sustained by the complainant do not constitute grievous harm. This Court considers that there is medical evidence by PW3, the clinician, to confirm the nature of injuries sustained by the complainant. He testified that the complainant had a bruise on the left jaw, bitten off lower lip and a human bite on the right thumb. The P3 form indicated that the complainant had a degloving wound on the lower lip.

32. The term degloving is used to describe an injury where an extensive section of the skin is ripped off from the underlying muscle. As a consequence of the degloving injury, the affected body part does not receive supply of blood.

33. Section 4 of the Penal Code defines grievous 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;***

34. Section 4 of the Penal Code further defines ‘maim’ as ***the destruction or permanent disabling of any external or internal organ, member or sense.***

35. The Court considers that the Appellant’s lower lip was bitten off and this constitutes destruction and serious injury to an external organ of the body. Although the Appellant urges that the complainant has already healed, this Court considers that the Appellant was scarred and the scarred will remain noticeable. Although the speed of healing may be a factor to consider when determining the nature of injuries, it does not always follow the quicker an injury heals, the lesser the degree of harm that was caused. While the bruises may be considered soft tissue injuries, the bitten lip was a serious and maim injury.

### ***Nature of Weapon***

36. The Appellant further urges that from the clinician's evidence, the probable weapon used to inflict the injury was blunt and that clinician confirmed that teeth are blunt. He urges that Section 231 (b) of the Penal Code on the acts intended to cause grievous harm makes reference to the use of a dangerous or offensive weapon. He then urges that definition of an offensive weapon under Section 89 (4) of the Penal Code which makes use of the terms articles i.e items or objects rules out the possibility of teeth. In essence, he urges that teeth do not constitute weapons.

37. To this end, this Court considers that Section 231 of the Penal Code has other subsections and subsection b) is only one of the many. The Court considers that the Appellant is reading the section selectively and has sought to benefit from that provision which favours him. Section 231 provides 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**

**(b) unlawfully attempts in any manner to strike any person with any kind of projectile or with a spear, sword, knife or other dangerous or offensive weapon; or**

**(c) unlawfully causes any explosive substance to explode; or**

**(d) sends or delivers any explosive substance or other dangerous or noxious thing to any person; or**

**(e) causes any such substance or thing to be taken or received by any person; or**

**(f) puts any corrosive fluid or any destructive or explosive substance in any place; or**

**(g) unlawfully casts or throws any such fluid or substance at or upon any person or otherwise applies any such fluid or substance to the person of any person; is guilty of a felony and is liable to imprisonment for life.**

38. Section 231 (a) is undoubtedly general and refers to the act of causing harm by any means whatever. It therefore does not matter that the injuries sustained were occasioned by use of teeth as the section does not restrict the manner of inflicting injuries to only by the use of offensive weapon(s).

39. The Court further considers that term 'blunt weapon' as used by the medics who filled the P3 form and treatment notes does not have a bearing on the elements of the offence of grievous harm. The P3 form is a standard document which always has a part of weapons used and the same may or may not be of relevance to the charge that is later on drafted by the Prosecution.

40. This Court does not therefore find that the fact that the injuries were inflicted by human teeth is an indication that the charge of grievous harm was not proven.

**Mens Rea**

41. The other issue raised by the Appellant is on the question of *mens rea*. He urges that he had no intentions whatsoever of attacking the complainant.

42. The Court considers that there is no question that it is **unlawful** to strike, cut or otherwise wound another person. The offence of grievous harm is, therefore, complete when the Appellant *intentionally* assaults the complainant and causes him grievous harm. The *mens rea* may only be taken away in the circumstances described under Section 9 of the Penal Code. *Mens rea* can only be taken away if it can be shown that the Appellant was by reason of insanity (Section 12 of the Penal Code) or intoxication induced by the complainant (Section 13 of the Penal Code) not aware of what he was doing, or that it was unlawful. None of these factors were urged by the Appellant.

43. The Court ultimately finds that all the ingredients for the offence of grievous harm were proved against the Appellant beyond reasonable doubt.

**Whether there is reason to disturb the sentence of the trial Court.**

44. The Appellant did not raise an issue with the sentence meted out by the trial Court. The Court however observes that the Appellant was sentenced to pay a fine of Ksh 100,000/= in default of which he is to serve 3 years imprisonment.

45. The Court considers that Section 234 of the Penal Code provides that any person who unlawfully does grievous harm to another is guilty of a felony and **is liable to imprisonment for life**.

46. In the circumstances, the trial exercised its discretion and found it fit to sentence the Appellant to a fine of Ksh 100,000/=. Since the sentence of 3 years imprisonment was a default sentence, to be served, only if the Appellant failed to pay the Ksh 100,000/= fine, Section 28 (2) of the Criminal Procedure Code ought to have been taken into account.

47. Section 28 (2) of the Criminal Procedure Code provides as follows: -

***In the absence of express provisions in any written law relating thereto, the term of imprisonment or detention under the Detention Camps Act (Cap. 91) ordered by a court in respect of the non-payment of any sum adjudged to be paid for costs under section 32 or compensation under section 31 or in respect of the non-payment of a fine or of any sum adjudged to be paid under the provisions of any written law shall be such term as in the opinion of the court will satisfy the justice of the case, but shall not exceed in any such case the maximum fixed by the following scale—***

<i>Amount</i>	<i>Maximum period</i>
<i>Not exceeding Sh. 500 .....</i>	<i>14 days</i>
<i>Exceeding Sh. 500 but not exceeding Sh. 2,500</i>	<i>1 month</i>
<i>Exceeding Sh. 2,500 but not exceeding Sh. 15,000</i>	<i>3 months</i>
<i>Exceeding Sh. 15,000 but not exceeding Sh. 50,000</i>	<i>6 months</i>
<b><u><i>Exceeding Sh. 50,000</i></u></b>	<b><u><i>12 months</i></u></b>

48. Going by the scale in Section 28 (2) of the Criminal Procedure Code, the maximum imprisonment period for all who fail to pay any fine of Ksh 50,000/= and above should be 12 months. The Court thus finds that the default sentence of 3 years imprisonment was excessive in the circumstances.

49. The Court, therefore, finds reason to interfere with the default sentence of the trial Court and substitute the 3 years imprisonment with 12 months.

### **Conclusion**

50. On 24<sup>th</sup> April 2019, the complainant was riding his motorcycle when he met the Appellant who was walking towards his direction. He testified that he avoided the complainant who appeared drunk by stepping on his brakes and this caused him to fall off his motorcycle. As he stood up, the Appellant attacked him and caused him severe injury, including a human bite on his lip. The complainant's evidence was corroborated by that of PW2 who saw the Appellant on top of the complainant, attacking him. The Appellant and the complainant both confirmed to have known each other prior to the incident and this was therefore not a case of mistaken identity.

51. The Court also considers that there was medical evidence which confirmed that the complainant sustained a human bite on the lower lip causing it degloving injury.

52. The Court rejects the Appellant's argument that the nature of injuries sustained do not constitute grievous harm because the bitten and degloving lower lip is indicative of maim harm. The Court also rejects the Appellant's contention that for a charge of grievous harm to be sustained, the injuries must have been inflicted by an offensive weapon. The Court considers that Section 231 (a) of the Penal Code provides that the injuries leading to grievous harm may be those caused by any means whatever. The Court also rejects the Appellant's contention that the injuries sustained were as a result of the complainant falling off his motorcycle because the medical evidence to the effect that the complainant sustained human bites infers that the injuries were caused by a human. The Court also finds that the Appellant had the necessary *mens rea* to commit the offence of grievous harm.

53. As to sentencing, the Court finds that although the Appellant did not raise an issue with sentencing, the trial Court erred in imposing a default sentence of 3 years imprisonment if the Appellant failed to pay the fine of Ksh 100,000/=. This default sentence was manifestly excessive and contrary to the provisions of Section 28 (2) of the Criminal Procedure Code, and the Court will thus substitute it with 12 months.

### **ORDERS**

54. Accordingly, for the reasons set out above, this Court makes the following orders: -

***i) The Appeal on conviction is declined and the finding of the lower Court on conviction is upheld.***

***ii) The Court orders that the default sentence of 3 years imprisonment is substituted with 12 months imprisonment. For the avoidance of doubt, the Ksh 100,000/= fine remains undisturbed.***

Order accordingly.

**DATED AND DELIVERED ON THIS 25<sup>TH</sup> DAY OF NOVEMBER, 2021.**

**EDWARD M. MURIITHI**

**JUDGE**

**Appearances**

**M/S Thurania Atheru & Company Advocates, Advocates for the Appellant.**

**Ms Nandwa, Prosecution Counsel for the Respondent.**