



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL APPEAL NO. E025 OF 2020

THAMBURA MUCHUI LEONARD.....APPELLANT

VERSUS

REPUBLIC.....PROSECUTION

(Being an appeal from the original conviction and sentence of the Senior Resident Magistrate's Court at Tigania in Criminal Case No. 1495 of 2018 delivered on 5th November 2020 by Hon. P. M. Wechuli, SRM)

JUDGMENT

1. Thambura Muchui Leonard 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 17th October 2018 were as follows: -

'On the 13th day of December, 2017 at Mukindu Village, Mbeu Location in Tigania West Sub-county, within Meru County, willfully and unlawfully did grievous harm to Elossy Kamathi Kairira by hammering her with a hammer on the head three times and cutting her with a panga on the head, left ear, neck, face and on the left hand.'

2. The Appellant pleaded not guilty and the matter proceeded to trial. The Appellant was placed on his defence and by Judgement delivered on 5th November 2020 by Hon P. M. Wechuli SRM, he was convicted for the offence of grievous harm and was sentenced to 30 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 23rd November 2020, the Appellant has urged the following grounds of appeal: -

i) The Learned Senior Resident Magistrate erred in law and fact in failing to find that the evidence of the prosecution did not meet the threshold of proving the charge of grievous harm to the required standard thus erroneously convicting the Appellant on an unproved charge.

ii) The Learned Senior Magistrate erred in law and fact in failing to find that the Appellant had gone to the complainant's home on invitation of the complainant to visit PW4, who was allegedly unwell, in effect the Appellant falling onto the complainant's trap of bringing the Appellant at the scene and erroneously being influenced by the reason of the Appellant being at the scene of crime to be a basis of conviction.

iii) The Learned Senior Magistrate erred in law and fact in failing to find that the Appellant had gone to the complainant's home on invitation of the complainant which ended up to be a trap by the complainant who had pre-stationed criminals who also grievously injured the Appellant.

iv) The Learned Senior Resident Magistrate erred in law and fact in not allowing the Appellant to adduce all the evidence he had at his disposal in his defence thus erroneously convicting the Appellant.

v) The Learned Senior Magistrate erred in law and fact in failing to find that there was vendetta between the Appellant and the Complainant as former lovers whose relationship had gone sour reason the Complainant could have framed the Appellant and erroneously relying on the evidence of only the complainant's close relatives to convict the Appellant.

vi) The Learned Senior Resident Magistrate erred in law and fact in disregarding in totality the Appellant's evidence in defence.

vii) *The Learned Principal Magistrate erred in law and fact in disregarding the Appellant's mitigation in sentencing the Appellant.*

viii) *The sentence of 30 years imprisonment without the option of a fine meted on the Appellant is excessive and against the weight of the evidence.*

Appellant's Submissions

4. The appeal was canvassed by way of written submissions. The Appellant filed written submissions dated 21st July 2021. He submits that none of the ingredients for the offence of grievous were established by the Prosecution. He urges that he had gone to the complainant's home on invitation by the complainant to visit their child who was allegedly unwell and he in effect fell into the complainant's trap of bringing him to the scene of crime as a basis for a conviction. He urges that he is a teacher who is civilized and educated and he cannot thus walk into the home of his former lover and start injuring her.

5. He urges that the Prosecution failed to show the intention of him harming the complainant. He cites *Francis Kimani Karanja vs Republic* (2016) eKLR for the need to prove intention. He urges that there was no reason why he would want to harm and injure the mother of his child.

6. He urges that he simply went to visit the child on invitation by the complainant and upon his arrival, the complainant's family members attacked him and that they were separated. That he lost consciousness due to the injuries inflicted on him and when he recovered, he found himself at Kiirua hospital. He urges that he had a P3 form, medical report from Nairobi Women's and documents from Meru General Hospital but that he was never given an opportunity to produce these documents as part of his evidence against the rules of natural justice.

7. He urges that there was a personal vendetta between him and the complainant as former lovers whose relationship had gone sour and this could explain why the complainant framed him.

8. He urges that there was inconsistency in the Prosecution's evidence and that PW3, the complainant's father testified that he arrived at the scene and found him, the Appellant hitting the complainant on the head with a hammer. That she, the complainant then entered the house and that he, the Appellant followed her and that PW3 then testified to have gotten worried and gone to look for help. He urges that if PW3 indeed thought that the complainant's life was in danger, he ought to have followed them to the house and could not have left his own child with him as he injured her. He urges further that PW1 only testified to have been hit on the head and then lost consciousness but she did not testify to have entered the house and followed by him as claimed by other witnesses. He urges that the hammer was never produced in Court and it is not clear where it was gotten from.

9. He further urges that the Prosecution's evidence as to where exactly the complainant was injured is contradictory and that the witnesses refer to various parts of the body as having been injured. He cites *Francis Kimani Karanja vs Republic* (2016) eKLR for the proposition that the contradictions ought to have been taken to cast doubt on the Prosecution's case.

10. He urges that the sentence of 30 years imprisonment without an option of a fine was excessive and against the weight of the evidence. He urges that he and the complainant used to be lovers and they sired a child together. That he is a teacher whose career is on the rise and is also a young man and a father with a responsibility to society and his child. That he was also a first offender who was remorseful and even hope for reconciliation. He cites *Bernard Ochieng Opiyo vs Republic* (2015) eKLR. He urges that he took the complainant to university and also takes care of the child. He urges that in the best interests of the child, he should be allowed to continue taking care of his responsibilities and be able to maintain the child. He further cites *Margaret Njeri Kipchilis vs Republic* (2017) eKLR.

11. He also filed supplementary submissions dated 1st September 2021. He urges that the contradictions on the Prosecution's case were not minor as posited by the Prosecution but were material. That PW1 said she was hit by a hammer twice while PW4 testified that PW1 has hit 3 times. That from observation PW1 sustained injuries of cuts and bites mostly caused by a sharp object but the complainant did not mention of the Appellant having had a panga but a hammer. He urges that the injuries mentioned by PW3 Dr. Njeri Nderitu are not connected with him as none of the witnesses talked of seeing him bite PW1 yet there are bites on the P3 form. That the P3 form alludes to no injury at all caused by a blunt object yet PW1 and PW4 said that PW1 was hit with a hammer 2 or 3 times respectively. He urges that this reveals that the injuries were fabricated or were caused by other person(S) other than him.

12. He urges that he was acting in self defence. That the hammer he is alleged to have used was picked in the compound, either due to provocation or self defence. He urges that he was at the verge of death and may have acted in ways even him cannot recall. He urges that he recovered consciousness in hospital. He urges this shows he did not come to the scene to fight or with the intention of cutting or injuring the complainant. That on the material day, he had gone to visit his sick child and was attacked by PW1 and members of the public and it is the police who rescued him and he later found himself at Kiirua hospital after losing consciousness. That it is witnesses who told him what had happened as confirmed by DW2. He urges that this reveals that when he came to the scene, he was not armed as nobody testified to have seen him remove any hidden weapon. That the Prosecution's evidence is that he picked a hammer which the children were playing with. He makes reference to Section 17 of the Penal Code and the case of *Republic vs Simon Owuor Otieno* (2017) eKLR he urges that the was in danger and use reasonable force in his defence.

13. He urges that the sentence of 30 years imprisonment ought to be reduced because himself and the complainant were former lovers, hence why he honoured the complainant's invitation and that he did not go there armed. That he was attacked and also sustained serious injuries. That he has a child, out of whose love, he was attacked. He urges that his arguments on lack of *mens rea*, the injuries he sustained and the surrounding circumstances should be used to impose a lenient sentence.

Prosecution's Submissions

14. The Prosecution filed submissions dated 15th September 2021. They urge that the Prosecution proved that the complainant sustained harm. That PW1 testified that the Appellant went to her home and took a child they had sired and hit her on the head with a hammer after saying he had been looking for her. That she lost consciousness only to find herself in hospital. That PW3, a neighbor to the complainant testified that he went to the scene after hearing screams from the children and that he saw the Appellant hit the complainant with a hammer and then followed her into the house and that when he went near the door, the Appellant opened and attempted to cut him using a bloodied panga. That PW4 testified that on the material day, she saw the Appellant go to the scene and take a child called Gakii and she asked him where she was taking the child but the complainant who was in the house told her to leave Gakii to be taken by the father. That the Appellant then left the child, took a hammer and hit the complainant 3 times on the head. That he threw her in the kitchen and cut her all over the bod with a panga. That on cross-examination, PW3 averred that she saw the Appellant leave the kitchen with a bloodied panga.

15. They urge that PW5, a doctor testified that the complainant had a cut wound on the scalp, the ear pinnae was missing, the forehead and neck cut, left pelvis had a cut with bite marks, mid back region and buttocks had bite marks. Left arm and right arm had cuts, the right ulna had a fracture, right fibula had a cut wound, Achilles tendon also had a cut wound. That PW5 classified the degree of injury as grievous harm. That the complainant was taken for surgery and done for blood transfusion. That PW6, another medic testified how the complainant went to hospital on 18th April 2018 over an old fracture of the ulna which hadn't healed and was treated for nerve injury.

16. They urge that the Prosecution proved that it was the Appellant who caused the grievous harm to the complainant. That this was so from the evidence of PW1, PW3 and PW4. They urge that on the material date, the Appellant could clearly see the complainant as there was light. That PW3 testified to have seen the Appellant hit the complainant with a panga and when he approached the door and attempted to open it, the Appellant attempted to cut him with a bloodied panga. That PW4 also testified to have seen the Appellant take a hammer and hit the complainant 3 times on the head. They cite **Wamunga vs Republic** (1989) KLR 426 for the requirement for the Court to satisfy itself that the circumstances of identification are free from error when the evidence of identification or recognition is the only evidence.

17. They further cite **Erick Onyango Odeng' vs Republic** (2014) eKLR and **Joseph Maina vs Republic** (2000) eKLR for the proposition that the Court should ignore minor contradictions unless they point to deliberate untruthfulness. They urge that the Prosecution's case was proven beyond reasonable doubt.

Evidence adduced at trial Court

18. 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

19. PW1 was taken through a voir dire and found competent to testify. She first testified as follows: -

"I am Agnes Kagwiria. I come from Muriri. I go to Manyiri Primary School Standard 8. I do not know Ezekiel Mwenda."

20. The Prosecution prayed to stand her down. She later on took the stand again and testified as follows: -

"I am Elossy Kamathi from Mbeu. I am unemployed. The accused used to be my friend. On 13th December 2017, I recall at 6.00 p.m, while serving children food, I heard Kawira asking someone why he was taking a child. I went out and found the accused holding the child we sired. He had a hammer. I had no issue since he was the father. When he saw me he hit my head with a hammer after saying he was looking for me. He had let go of the child. I lost consciousness and found myself in hospital. I found that I had injuries on the head, 7 cut wounds on the head, injury on the left arm till the chest, both legs were fractured and the arm was well. The injuries on my arm are panga cuts. The back and face also had injuries together with the ears.

I was admitted from December till February. I was in bad shape. I couldn't even go to police immediately. However, police had been informed immediately after the incident. I have medical document (P - MFI 1). (Discharge summary P - MFI 2) I have additional documents."

Recall

"I am Elossy Kimathi. I testified on 31st October 2019 and I was stood down. I now have X-ray documents from Chaaria hospital. (P - MFI 3) I have a document from Cottelengo hospital. (MFI 4a, b, c, d, e)

Cross examination

"We have a child with the complainant. I had not called him to come and see the child. I was at our home with children. I was with Grace Kawira, my sister's child Martin. They were just children. I then heard the accused talk with Grace. Grace was asking him why he was taking the child. When I went out, I found the accused talking with Grace. I told her to let him go with the child. He hadn't knocked. I was inside. He took a hammer which children were playing with. He hit me twice on the head with a hammer. I lost consciousness. I got injured all over the body. I was unconscious at that time. I fell inside the house. The hammer is at the police station. I don't know where the panga is."

Re-examination

“I hadn’t called Muchui. He had even taken the phone from me.”

PW2

21. PW2 testified as follows: -

“I am Margaret Nkirote from Mbeu. I am a farmer. Elossy is my child. The accused wanted to marry the complainant. On 13th December 2017, I recall at 1700 hrs I was in church. A child called Winfred Kathambi phoned to say the accused had cut the Complainant until she was dead. I ran. I found the complainant was not at the scene. She had been taken to hospital in blankets. The house was full of blood. On 19th December 2018, I went to report. I found the Complainant in the ICU. She was in critical condition. Her head was swollen. She couldn’t identify anyone. The legs had been cut. The left ear was cut. The body had been cut 22 times. She stayed in ICU for 2 weeks and in the ward for 1 month. The accused used to be a teacher. He got a transfer and disappeared. We searched for him through the education office. Elossy couldn’t walk. I had to teach her to walk.”

Cross examination

“I left church at 6.00pm and reached home at 7.00pm. I didn’t see who assaulted the Complainant. I found blood in the kitchen. There was a grey bed sheet which covered her blood. I took it to police on 14th.”

PW3

22. PW3 testified as follows: -

“I am John Mugambi from Mbeu. I am a farmer. The Complainant is my child. On 13th December 2017, while on the farm, I heard the children crying. I went to the scene and found Muchui hitting Elossy with a hammer. She entered the house and he followed her. He closed the door. I got worried and I went to look for someone else to help me. Near the door, Muchui opened the door. He attempted to cut me. At that time Elossy was in the house. The panga was bloodied. I screamed and witnesses came. I didn’t see the complainant. Members of the public chased Muchui. I ran after him. Those who remained took the complainant to hospital. The complainant was unconscious and in critical condition. She was injured on the head, arm and body. We took Muchui to police. He is in dock.”

Cross examination

“My farm is at a distance from the home. I found children, Muchui and Elossy. He hit her on the head with a hammer and she entered the house. They closed the door. I don’t know what happened in the house. It is villagers who took care of her. We reported the same day.”

Re-examination

“I am not the biological father of Elossy but she stays at my home.”

PW4

23. PW4 went through a voir dire and was found competent to testify. She testified as follows: -

“I am Grace Kawira from Mbeu. My primary school is Mwema Junior. I am in class 5. Elossy is my aunt. The accused used to be a teacher. On 13th December 2017, at 6.00p.m, I recall the accused came and took our child called Gakii. He stated Gakii is not ours. I asked him where he was taking the child. Aunt who was in the kitchen heard. She said leave the child alone. She belongs to him. The accused left the child. He took a hammer and hit her 3 times on the head. He threw her in the kitchen and cut her all over the body with a panga. At that time, she had lost consciousness. He locked himself in the kitchen with aunt and cut her. He had hidden the panga in his trouser at the waist. I screamed and people came. John Mugambi came. He is my shushu. He waited for the accused to leave. I saw my aunt unconscious. I screamed. Leonard ran away. I don’t know where he went. Leonard is in dock.”

Cross examination

“The Accused came carrying a panga. The hammer was outside. He knocked aunt 3 times. I didn’t enter the kitchen with them. He came out with a panga while it was bloodied.”

PW5

24. PW5 testified as follows: -

"I am Dr. Njeru Nderitu of Meru Teaching and Referral Hospital. I graduated in 2013 with MbchB from University Wenzhou Medical College in China. I have a P3 report, discharge summary and X-Ray report for Elossy Kamatha. The P3 is signed by Dr. Onyango who I have worked with. I am aware of his handwriting and signature. State of clothing hasn't been presented. She alleges to have been assaulted by a person known to her. She was calm. Her head and neck had a cut wound on scalp on the right temporal region. The ear pinna was missing. Her forehead and posterior neck had a cut. The left side of the ulna had a cut, with bite marks on the lower side. Mid back region and buttocks had bite marks. There were cuts on the left arm and cut arm in left axilla, close to armpit and right forearm. Ultra had a fracture cut wound on left hand and wrist. The right fibia had a cut wound and achilles tendon also had a cut wound. Age of injuries was weeks. Weapons were sharp objects. Stitching, surgery of wounds and blood transfusion 4 pints was done. The degree was grievous harm. Dr. Onyango signed on 28th August 2018. I know Dr. Onyango's signature. It is the one on this document. The stamp was from our hospital."

Cross examination

"It is another doctor who examined the accused. Dr. Onyango is no longer working at Meru TRH. He is gone to school. Injuries were weeks. Its not specified. I didn't examine the patient."

PW6

25. PW6 testified as follows: -

"I am Reuben Mwiti. We received the patient on 18th April 2018. She couldn't use her left upper arm. In documentation, there was an error. It was left ulna not right. She had an old fracture of ulna. It had not healed. So she came for treatment. She also came back on 25th May 2018 for a nerve injury. I attended to the patient. I filed the 1st discharge summary."

Cross examination

"The patient was in the ward. I didn't look at discharge summary from previous facilities. I personally wrote the first discharge summary. The second discharge summary was written by another clinical officer but I was in charge of the ward. Dr. Lusiano did the surgery."

PW7

26. PW7 testified as follows: -

"I am No. 78021 Corporal Owundo of Mbeu Patrol Base. I am the Investigating Officer. I took over this case on 10th September 2019 from late Corporal Chesison. I proceeded with investigations. I wrote an arrest order. Accused is in dock."

Cross examination

"The case was reported on 14th December 2017. I followed up on 10th September 2018. I didn't visit the scene. The initial Investigating Officer visited the scene."

Defence Case

DW1

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

"I am Thambura Muchui Leonard. I am from Akithi. I am a teacher. On 13th December 2017, I recall during the holidays, I went to visit my child. He was sick and I was to take an NHIF card. It is his mother who told me. When the child saw me, she ran to me. The mother then came and attacked me. We were separated. She was taken to hospital while police rescue me. I found myself at Kiirua hospital. I had lost consciousness. It is witnesses who told me. I even have head problem to date. I was stitched and a CT scan was done at Meru hospital. CT scan was at Nairobi Women. I have all the medical documents, an X-ray record."

Cross examination

"I saw Elossy on that day. She is the mother of my child. I reported a case of assault. I have an O.B. I even took Elossy to Chuka University. However, the father came back and chased them from the land. Pauline Kawira is the child of her cousin. We have never fought before."

Reexamination

"Yes, I reported vide O.B 17.13.12. Complainants O.B 14.12.17."

DW2

28. DW2 testified as follows: -

“I am Solomon Thurania. I am from Rungu. I am a boda rider. I had come from Kagaene with a customer. At Mikinduri I heard screams. A teacher was being beaten by a mob. They wanted to lynch him. I called Kamanda who is deceased. I came with police and found accused unconscious. He had an injured eye.”

Cross examination

“On 13th September 2017, I had a passenger. Its people who told me that the accused wanted to be lynched since he was a thief. He had made a mistake. The person I called came with police. Kiburine was near hospital but they refused to treat us. We went to Kiirua. I am not lying. I wasn't told. I saw.”

Issues for Determination

29. 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.

ii) Whether there is reason to disturb the sentence meted out by the trial Court.

Determination

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

30. 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.

31. 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;

32. The complainant, PW1 led evidence to the effect that the Appellant came to their home, and when he saw her he hit her on the head with a hammer after saying that he was looking for her. She testified to have lost consciousness and found herself in hospital with injuries on the head, 7 cut wounds on the head, injury on the left arm till the chest, both legs were fractured and the arm was well. She testified that the injuries on her arm were panga cuts and that the back and face also had injuries together with the ears. She testified to have been admitted from December till February. The Court considers that the Appellant and the complainant were former lovers who had sired a child together and the complainant could thus not have been mistaken as to the Appellant's identity.

33. PW2, also confirmed that upon getting news that the complainant, her daughter has been killed to the point of death, she ran to the house but did not find her. She got information that she had been taken to hospital in blankets. She testified to have found the house was full of blood and that the Complainant spent 2 weeks in the ICU and 1 month in the ward. She testified that the complainant was in critical condition, her head was swollen, her legs had been cut and her left ear was cut. That the body had been cut 22 times.

34. PW3 also testified to have seen the Appellant hit the complainant on the head with a hammer and then locked himself up in the kitchen with her. He testified that he knocked on the door and saw the Appellant with a bloodied panga.

35. PW4 also testified to have seen the Appellant hit the complainant on the head with a hammer. She had a chance to interact with the complainant when she was asking where he was taking their child and she could thus not be mistaken as to his identity.

36. There was also medical evidence by PW6 to confirm the injuries sustained by the complainant. PW6 confirmed that the examination of the Appellant revealed the following: -

i) Her head and neck had a cut wound on scalp on the right temporal region.

ii) Her ear pinna was missing.

iii) Her forehead and posterior neck had a cut.

iv) The left side of the ulna had a cut, with bite marks on the lower side.

v) Mid back region and buttocks had bite marks.

vi) There were cuts on the left arm and cut arm in left axilla, close to armpit and right forearm.

vii) Ulna had a fracture cut wound on left hand and wrist.

viii) The right fibia had a cut wound and achilles tendon also had a cut wound. Age of injuries was weeks.

37. She testified that the weapon used was sharp object. She testified that stitching, surgery of wounds and blood transfusion 4 pints was done. She stated that the degree was ***grievous harm***.

38. PW7 also confirmed that the Appellant was examined and treated at their facility in April and May 2018, a whole 5 months after the incident. The Court also considers that PW2, the complainant's mother confirmed that after the injuries, she had to teach the complainant how to walk again.

39. The above reveals that the nature of injuries that the Appellant sustained were serious.

40. The Appellant has urged that there was inconsistency in the Prosecution's evidence with regard to the areas where the Appellant sustained injuries. The Court however considers that the complainant was severely injured all over her body. The unchallenged medical evidence confirms as much. This explains why she spent over a month in hospital and was even at one point in the ICU. Her condition was terrible. This Court is not convinced that the inconsistencies, if any, were material enough to cast doubt on the Prosecution's case.

41. The Appellant also urged that if PW4 really believed that his daughter was in danger, he should have entered the house to protect her. This Court, however, does not find it strange that PW4 did not enter the house as the evidence shows that the Appellant was armed and any insistence on entering the house may have led to further harm to any other person, including PW4. PW4 testified that when he tried to get in, he was the Appellant with a bloodied panga.

42. Concerning the weapon used to inflict the injury, this Court considers that PW4, saw the Appellant, when he was coming, with the panga hidden in the waist. PW3 confirms that when the Appellant opened the door, he attempted to cut him with the bloodied panga. The Court does not find that the omission to produce the panga is reason enough to doubt the evidence of PW4 as corroborated by PW3. The fact that the complainant did not mention having been cut by a panga is explained by her having lost consciousness. Indeed, this must have been the Appellant's intention when he hit her on the head with a hammer.

Appellant's Defence

43. The Appellant has urged that it is the complainant who invited him so as to frame him and also to attack him. He urges that it is the complainant and her family who attacked her. The Court observes that although the Appellant claims to have been invited by the Complainant, the evidence recorded indicates that DW1 took himself to visit his child (on his own right) after getting wind that the child was sick. The complainant in her evidence denied having invited the Appellant to go and see the child. She also testified that when the Appellant saw her, he hit her with a hammer while saying that he had been looking for her. The Court further finds that whether or not he had been invited, the main issue is whether he caused grievous harm to the accused. It is instructive that by his own evidence, the Appellant does not deny being at the scene of crime on the material day.

44. The Court observes that whereas the Accused says that the Complainant and his family attacked him, DW2 doesn't confirm this and merely says that he was informed that a mob was beating up the Accused because he was a thief. To this end, the evidence of DW1 and DW2 do not corroborate each other. The Court considers that the evidence on record confirms that it is the Complainant who was taken to hospital and the Appellant, on the other hand was rescued by police from an angry mob. The Court also considers that during cross-examination, the Appellant never put any forth any questions to the Prosecution witnesses to prove that he had been attacked by the Complainant and her family as alleged.

Self Defence

45. In his supplementary submissions, the Appellant has urged that he must have been acting in self defence or out of provocation owing to the attack that was meted out against him by the complainant and his family. To begin with, there was no evidence to prove that the complainant attacked the Appellant as alleged. To the contrary, there was overwhelming evidence by PW1, PW3 and PW4 to confirm that the Appellant was the aggressor. The defence of self defence would thus not be available to the Appellant.

46. Further, this Court considers that the said defences of self defence and provocation are being raised for the first time on appeal, and even then, in supplementary submissions. The appeal stage is not the proper time to raise a defence as that would negate the essence of a trial. The Court thus considers that the Appellant's 'defence' of self defence and provocation is an afterthought.

47. Further, the Court considers the defence of provocation as defined under Section 207 and 208 of the Penal Code is only available to persons who have been charged with murder. As for self defence, even if it were a proper defence in the circumstances of the case and had been raised at the appropriate time during trial, this Court considers that the defence of self-defence will only be admitted if it was done within the bounds of reasonable force. This issue was dealt with by the Court of Appeal in ***Lucy Mueni Mutava v Republic, Criminal Appeal No. 52 of 2013 [2019] eKLR*** where A. Visram, W. Karanja, JJA. and M. K. Koome JA (*as she then was*) held as follows when addressing the defence of self-defence: -

“...the multiple cut injuries she inflicted on the deceased at the back of his neck which led to the spinal cord being severed, in our view, was way excessive and negated any defence of self defence, if any, in light of the surrounding circumstances. See *Racho Kuno Hameso vs. R* [2014] eKLR.

Our position is further fortified by the case of *Victor Nthiga Kiruthu & another vs. R* [2017] eKLR wherein this Court while discussing self defence stated:

“The principles that have emerged from these and other authorities are as follows:-

(i) Self defence, as the term suggests, is defence of self. It is the use of force or threat to use force to defend one self, one’s family or one’s property from a real or threatened attack. Self defence is therefore a justification in the application of force recognized by the common law.

(ii) The law generally abhors the use of force or violence, but there are instances when a person is justified in using a reasonable amount of force in self defence if he or she believes that the danger of bodily harm is imminent and that force is necessary to repel it, meaning that the force must be necessary and that it must be reasonable.

(iii) It is not necessary, however, for there to be an actual attack in progress before the accused may use force in self defence. It is sufficient if he apprehends an attack and uses force to prevent it.

(iv) The danger the accused apprehends however must be sufficiently specific or imminent to justify the action he takes and must be of a nature which could not reasonably be met by mere pacific means.

(v) What amounts to reasonable force is a matter of fact to be determined from evidence and the circumstances of each case...”

See also *R. v. Duffy* (1967) 1 Q.B. 63. on the common law position that a person is entitled to use such force as was *reasonably necessary* to protect himself or another or property

48. Going by the nature of injuries and grievous harm sustained by the complainant, this Court is not convinced that the Appellant used reasonable force as was required when acting in self defence.

49. The Court does not, therefore, see any prejudice that was occasioned to the Appellant when his request to adduce medical evidence was refused.

Mens Rea

50. The Appellant has urged that the Prosecution failed to show the intention of him harming the complainant. He cites *Francis Kimani Karanja vs Republic* (2016) eKLR for the need to prove intention. He urges that there was no reason why he would want to harm and injure the mother of his child.

51. The issue of *mens rea* is the subject of principle of responsibility for criminal offence under section 9 of the Penal Code which provides as follows: -

“9. Intention and motive

1. Subject to the express provisions of this Code relating to negligent acts and omissions, a person is not criminally responsible for an act or omission which occurs independently of the exercise of his will, or for an event which occurs by accident.

2. Unless the intention to cause a particular result is expressly declared to be an element of the offence constituted, in whole or part, by an act or omission, the result intended to be caused by an act or omission is immaterial.

3. Unless otherwise expressly declared, the motive by which a person is induced to do or omit to do an act, or to form an intention, is immaterial so far as regards criminal responsibility.”

52. *Mens rea* is the guilty intention to commit the offence and it is necessary to point out at this stage that *mens rea* is not taken away by the fact that the Appellant was allegedly invited by the complainant to their home. In any event, this Court has already found above that the evidence does not prove that the Appellant was invited by the complainant, but that he took himself to the complainant.

53. This Court has considered that the Appellant and the Complainant were former lovers whose relationship had gone sour. PW2, the complainant’s mother testified that the Appellant wanted to marry the accused. These circumstances may be inferred as to constitute motive as to why the Appellant would want to harm the complainant.

54. This Court considers that *Mens rea* for the offence of grievous harm consists in the **knowledge** of the unlawfulness of the act leading to grievous harm and the **intent** to commit it. There is no question that it is **unlawful** to strike, cut or otherwise wound another person. The offence is complete when the Appellant *intentionally* assaults the complainant and causes her grievous harm. The intention 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.

55. Further, this Court considers that *mens rea* need not be confined to the relationship of the parties prior to the incident, but it can also be inferred from the circumstances surrounding the attack that lead to the grievous harm. This Court considers that a sharp object and in this case, a panga as was observed by PW3 and PW4 was used to harm the complainant. Further, the complainant was severely injured all over her body to the point of spending 2 weeks in the ICU. This Court finds that the Appellant undoubtedly knew that the use of a panga to inflict harm on the complainant would cause grievous harm.

56. Finally, the Court considers that the Appellant is said to have been gotten a transfer and disappeared after the incident and was only arrested much later. This Court takes this event to add to his guilt.

57. The Court ultimately finds that all the ingredients for the offence of grievous harms were proved against the Appellant.

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

58. The leading authority on the question of interfering with sentence is that of ***Wanjema vs Republic***, Criminal Appeal No. 204 of 1970 (1971) EA 493, 494, where Trevelyan J held as follows: -

“An appellate Court should not interfere with the discretion which a trial Court has exercised as to sentence unless it is evident that it overlooked some material factor, took into account some immaterial factor, acted on a wrong principle or the sentence is manifestly excessive in the circumstances of the case.”

59. 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***. The Appellant got a sentence of 30 years and this Court thus finds that the same was within the confines of the law and was not excessive. The nature of injuries inflicted on the complainant were serious and were grave as she spent 2 weeks in the ICU. The complainant was at the verge of losing her life.

60. The penalty section does not provide for the option of a fine and the Court thus reject the Appellant’s request for a fine.

61. The fact that he was a first offender, that they were once lover with the complainant used, that they sired a child together, that he is a teacher whose career is on the rise and that he is a young man and a father with a responsibility to society and his child, that he is remorseful and wishes to reconcile are merely mitigating circumstances. These were considered by the trial Court. The fact that the took the complainant to university does not qualify as a mitigating circumstance and it would not be a reason to injure her as he did it out of his own volition.

62. The Court does not see any reason to disturb the finding of the trial Court on sentencing.

Conclusion

63. On the afternoon of 13th December 2017, the Appellant, a former lover to the complainant went to the complainant’s home and attacked her. He first used a hammer to hit her on the head and then locked himself up in the kitchen with the complainant and used a panga to cause her grievous harm.

64. The complainant was severely injured and spent 2 weeks in the ICU. Her body faculties were rendered functionless and she was unable to walk for a long time. PW2, her mother testified as to how she had to teach her to walk again. She went through severe physical and mental trauma under the hands of her former lover and the father of their child.

65. The ordeal was witnessed by PW3 and PW4. There was also medical evidence to confirm the grievous harm occasioned to her.

66. The Court rejects that Appellant’s defence of self defence because it has been raised for the first time on appeal. The Court also finds that the Appellant had the necessary *mens rea* to commit the offence of grievous harm under Section 234 of the Penal Code.

67. The Court further finds no reason to disturb the finding of the trial court on sentencing because the sentence meted out against the Appellant is within the confines of the law. The complainant was at the verge of losing her life at the hand of the Appellant and the manner in which the harm was inflicted was cruel and savage. In the circumstances, this Court does not find that the sentence of 30 years was in any way excessive and there is thus no reason to interfere with the sentencing discretion of the trial Court.

ORDERS

68. 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 Appeal on sentence is declined and the finding of the lower Court on sentence is upheld.

Order accordingly.

DATED AND DELIVERED THIS 25TH DAY OF NOVEMBER 2021.

EDWARD M. MURIITHI

JUDGE

Appearances

M/C Thurania Atheru & Co. Advocates for the Appellant.

Ms Nandwa, Prosecution Counsel for the Respondent.