



**JOM & another v Republic (Criminal Appeal E035 of 2023)
[2025] KEHC 237 (KLR) (23 January 2025) (Judgment)**

Neutral citation: [2025] KEHC 237 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAMIRA
CRIMINAL APPEAL E035 OF 2023
WA OKWANY, J
JANUARY 23, 2025**

BETWEEN

JOM 1ST APPELLANT

JOO 2ND APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an Appeal against the Judgment and Sentence at the Chief
Magistrate's Court in Nyamira, Criminal Case No. E947 of 2022,
delivered by Hon. B.O. Okong'o, Resident Magistrate on 26th April 2023)*

JUDGMENT

1. The Appellants herein were convicted for the offence of grievous harm contrary to Section 234 of the Penal Code. The particulars of the charge were that on the 24th August 2022 in Nyamira South Sub-County within Nyamira County, jointly, wilfully and unlawfully did grievous harm to NM.
2. The Appellants were also convicted for the second count of assault causing actual bodily harm contrary to Section 251 of the Penal Code. The particulars of the second count were that on the 24th August 2022 in Nyamira South Sub-County within Nyamira County, jointly, wilfully and unlawfully assaulted DOM.
3. The Appellants were, upon conviction, sentenced to serve 7 years' imprisonment with the option of paying a fine of Kshs. 1 Million thereby precipitating the filing of the instant appeal in which they listed the following grounds of appeal: -
 - a. That the trial magistrate failed in both law and facts by imposing a harsh sentence of seven years' imprisonment to the Appellants without observing that the offence of grievous harm was not proved beyond all reasonable doubt thus making their conviction unsafe.



- b. That the trial magistrate erred in both law and facts by imposing a seven year's sentence to the Appellants who are twins, the only brothers and the sole breadwinners to their family without considering the general circumstances of the offence bearing in mind that there was a land dispute between the Appellant and the Complainant.
 - c. That the learned trial magistrate erred in law and facts by using a scanty, fabricated and exaggerated medical report which purported the offence to be grievous harm.
 - d. That the two brothers (twins) hailed from a poor background and ailments dominated the family where the wife of the 1st Appellant had a serious stomach operation and the 2nd Appellant's wife had a mental problem thus asking the Honourable Court to act in its own motion and give an independent and serious verdict to these vulnerable young men.
 - e. That the genesis of this matter is all about the land dispute between the Appellants and the complainants who had already exploited and tilled 95% of their piece of land purporting and claiming to be his (sic).
 - f. That it is quite unfair for the trial court to slap the Appellants to serve 7 years' imprisonment bearing in mind that the two brothers are bona fide (sic) of their piece of land parcel No. Nyasunda Masogo No. xx Nyamaiya, thus making their conviction unsound.
 - g. That this honourable Court has the inherent powers of analysing the general circumstances surrounding this case and serve the two twin brothers with the justice deserved.
4. The Appeal was canvassed by way of written submissions which I have considered.
 5. The duty of the first appellate court is to reanalyse and re-evaluate the evidence presented before the trial court with a view to arriving at its own independent findings while bearing in mind the fact that it neither heard nor saw the witnesses testify. In John Oketch Abongo vs. Republic [2000] eKLR it was held thus: -

“The duty of a first appellate court in regard to the evidence and facts is now settled in law. It is required to subject the evidence to fresh and independent analysis and, in appropriate circumstances, even to make its own independent findings and conclusions. In doing so however, the first appellate court must bear in mind that it has only the record and has not enjoyed the advantage of seeing and observing witnesses under testimony.”
 6. The Prosecution called a total of 6 witnesses. A summary of the Prosecution's case was as follows: -
 7. PW1 NM, the 1st complainant and the uncle to the Appellants was on 24th August 2022 at his home with his brother one DO (PW2), who had paid him a visit. As PW1, was escorting PW2 back to his home at about 7 p.m., they saw the Appellants, who were at the time armed with pangas in the compound. The Appellants assaulted PW2 by cutting him on the head but he managed to escape after which they turned on PW1 and cut him on the left hand and eyes.
 8. PW2 fell down and raised an alarm thereby attracting the attention of EN (PW3) and NK (PW4) who were then in the house. PW3, the 1st Complainant's wife, and PW4, the Appellants' cousin, responded to the complainants' alarm by rushing to the scene where they witnessed the attack before the assailants escaped. PW1 was thereafter escorted to Nyamira Referral Hospital where he was admitted for a week.
 9. PW5, No. 96145 P.C. Nicholas Kiprono, investigated the case and visited PW1 in the hospital where he was admitted under Patient No. 08366xxxx with a cut wound on the left wrist. He also interviewed the 2nd complainant, who had also been injured in the attack.



10. PW6, Rodgers Onganga, the clinical officer at Nyamira County Referral Hospital examined the victims. He noted that PW1 had deep cut wounds on the face region and left wrist joint while PW2 had a cut on the head. He classified the injuries as grievous harm and noted that the probable weapon was a sharp object (panga).
11. PW6 produced the Complainants' P3 forms, Treatment Notes and Discharge Summaries as exhibits.
12. When placed on their defence, the Appellant opted to tender sworn testimonies and called 2 witnesses.
13. DW1, JO (1st Appellant), testified that he was on the material day in his house with his wife and children when at about midnight the 2nd Appellant called him to enquire about screams that were emanating from his (the 1st Appellant's) home. DW1 however informed him that the screams were not from his house. He explained that he noted that there was a large crowd at the home of PW1 on the following day and that he was informed that PW1 had been assaulted that night. He stated that he did not assault the complainants.
14. DW2, Josphat Ondicho (2nd Appellant), testified that he was, on 24th August 2022 at his house where he spent the night with his wife and four children, when at about midnight, he heard screams emanating from the house of DW1 who however confirmed that he was fine. He met PW2 the following who informed him that he had been assaulted. He advised PW3 to take PW2 to hospital. He stated that he was arrested after about 2 weeks and did not understand the reason for his arrest considering that he had assisted PW2 by advising him to go to hospital. He denied the assault charges.
15. DW3, Enock Agusa, testified that the 1st Appellant reported to him a land dispute he had with PW2. He stated that the Appellants presented their title deed, Green Card and a Search. DW3 reported the matter to the Chief after which they proceeded to the Land's Office at Nyamira where they found that the title had been changed to the name of one Nyasinda Masogo. He explained that they went to the Chief's office on 5th September 2022 to discuss the issue of the title change and was later informed that the Appellants had been arrested on assault charges.
16. DW4, Richard Nyakundi, a friend to the Appellants testified that he on the morning of 25th August 2022 saw PW2 going to the hospital and that PW2 was bleeding. PW2 informed him that the Appellants had assaulted him.
17. As I have already stated in this judgment, the trial court found that the offences had been proved to the required standard and convicted the Appellants on both counts.

Analysis and Determination

18. I have considered the Record of Appeal and the parties' respective written submissions. I find that the main issues for determination are as follows: -
 - i. Whether the Offences in both counts were proved to the required standard.
 - ii. Whether the sentences were legal and just.

Grievous harm

19. Section 234 of the Penal Code Cap 63 stipulates 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.



20. 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;

21. The Prosecution is required to establish the following ingredients, beyond reasonable doubt, in order to secure a conviction for the offence of grievous harm: -

- a. The victim sustained grievous harm.
- b. That the harm was caused unlawfully.
- c. That the accused persons caused or participated in causing the grievous harm.

22. In the present case, PW1 testified that that the Appellants assaulted him with a panga and cut him on the left hand and face. PW3 testified that her husband sustained a cut wound on the hand while PW4 confirmed that PW1’s hand was cut and was dangling and almost falling off from his body. She testified as follows: -

“The hand was cut and dangling as if to leave the body. There was equally a lot of blood. My mother in law came later. I wrapped Nelson’s hand using a piece of cloth. Then we took Nelson to the hospital at Nyamira.”

23. PW6, the Clinical Officer, stated that PW1 sustained deep cut wounds on the face region and left wrist joint. He assessed the degree of injury as grievous harm.

24. A perusal of the 1st complainant’s P3 Form (P.Exh1) reveals that he suffered the injuries as stated by the Prosecution witnesses. The P3 Form also records a further blunt chest injury. I note that the trial court observed that the victim’s hand was severely cut. It is my finding that it was not in doubt that PW1 sustained grievous injuries on the night of 24th August 2022.

25. PW1 testified that they were attacked at his home at about 7pm as he was seeing off his brother (PW2) who had visited him. I find that the complainants’ assailants inflicted the said injuries unlawfully and without any prior provocation. I find that the first and second ingredients of the offence of grievous harm were therefore proved to the required standard.

26. On whether the Appellants committed the offence of grievous harm, the Prosecution presented the evidence of PW1 and PW2 who testified that they saw their assailants on the night in question and that they were both armed with pangas. The complainants’ evidence was corroborated by the evidence of PW3 who stated she heard screams outside her house and looked outside the window when she saw the 1st Appellant attack PW1 and cut his hand with a panga. PW4 fortified this evidence as she also heard the screams and rushed to the scene where she saw the Appellants cutting PW1 with a panga.

27. The prosecution witnesses testified that the offence was committed at around 7.00 p.m. I am therefore minded to consider the issue of whether there was sufficient light to enable the positive identification of the assailants. Suffice is to say that this court takes cognizance of the principles laid out in Nzaro vs. Republic (1991) KAR 212 where it was held that: -

“Identification/recognition at night must be absolutely watertight to justify conviction.”



28. In the instant case, it was not in doubt that the Appellants were well known to the victims as they were the sons of PW2 and therefore the nephews of PW1. The 1st Appellant was also a close neighbour to PW1. This was therefore a case of identification by recognition as opposed to mere identification of a stranger. In *Reuben Taabu Anjononi, Benjamin Akisa Anjononi and Monya Anjononi vs. Republic* [1980] KECA 23 (KLR) it was held thus: -

“...Being night time the conditions for identification of the robbers in this case were not favourable. This was, however, a case of recognition, not identification, of the assailants; recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other. We drew attention to the distinction between recognition and identification in *Siro Ole Giteya v The Republic* (unreported).

29. I have considered the evidence of PW1, on cross-examination by the 1st Appellant, when he stated that there was sufficient light and that he positively identified the 1st Appellant as his assailant. PW3 stated, on cross-examination, that she was able to see and recognize the 1st Appellant clearly when she opened the window because there was moonlight. PW4 also confirmed that she saw the Appellants at the scene on the said night. In *R vs. Turnbull* [1977] QB 224 it was held thus:-

“If the quality [of the identification evidence] is good and remains good at the close of the accused’s case, the danger of mistaken identification is lessened; but the poorer the quality, the greater the danger. In our judgment when the quality is good, as for example when the identification is made after a long period of observation, or in satisfactory conditions by a relative, a neighbour, a close friend, a workmate and the like, the jury can safely be left to assess the value of the identifying evidence even though there is no other evidence to support it; provided always, however, that an adequate warning has been given about the special need for caution [...]”

30. My finding is that the evidence presented by the Prosecution witnesses were credible, consistent and was not impeached on cross examination. It is my view that the evidence on identification was watertight and that there was therefore no possibility of mistaken identity bearing in mind the fact that the Appellants and the key eye witnesses were close relatives and neighbours.

31. I further find that the eye witnesses’ evidence was not controverted and especially the evidence of PW3 who testified that she clearly recognized the 1st Appellant when she looked through her window while PW4 rushed to the scene where she found the Appellants in the act of assaulting the complainants I am satisfied that the Appellants were positively identified as the assailants and that there was also no possibility that Appellants were victims of mistaken identity.

32. I am satisfied that the evidence linking the Appellants to the offence of grievous harm was watertight and free from error. It is therefore my finding that the 1st counts was proved beyond reasonable doubt. I therefore uphold the conviction on the 1st count.

33. Turning to the 2nd count of assault causing actual bodily harm, Section 251 of the Penal Code as follows: -

251. Any person who commits an assault occasioning actual bodily harm is guilty of a misdemeanour and is liable to imprisonment for five years.

34. In *Ndaa vs. Republic* (1984) KLR the Court explained the elements of the offence thus: -



- i. Assaulting the complainant or victim,
 - ii. Occasioning actual bodily harm.
35. Section 2 of the Penal Code sets out the definition of harm as follows;
- “harm” means any bodily hurt, disease or disorder whether permanent or temporary;
36. PW2 stated testified as follows during examination-in-chief: -
- “... we met the accused persons holding a panga. When I saw them, I thought they were just passing. Then the 1st Accused cut my left hand. ... then I scampered for safety and they followed me and cut me on my head. Then I got confused. I laid down and the 2nd Accused cut me on my back. Then I lost consciousness and the following morning I found myself outside the compound....”
37. Having regard to the above extract of the testimony of PW2, I am satisfied that the Appellants unlawfully assaulted the victim with the intention of occasioning him bodily injuries. A perusal of the P3 Forms and Treatment Notes also confirms the injuries. It is my finding that the second count was also proved beyond reasonable doubt.
38. I have considered the Appellants’ testimonies when placed on their defence and I note that apart from merely denying any involvement in the offences, they alleged that the matter arose out of a land dispute. DW3, confirmed the existence of a land dispute between the parties herein. I however find that the mere existence of a land dispute did not displace the cogent evidence presented by the prosecution or explain the serious injuries that were inflicted on the complainants.
39. I further find that the alleged existence of a land dispute was an afterthought as it was not raised during cross-examination of the Prosecution’s witnesses. It is noteworthy that DW4 who was the Appellants’ friend confirmed that he saw PW2 bleeding one day after the incident and that the victim informed him that the Appellants had assaulted him.
40. In sum, I find that the Prosecutions proved the charges beyond reasonable doubt and I therefore uphold the conviction by the trial court.

Whether the sentences were legal and just.

41. It is a well-established principle that sentencing is at the discretion of the trial court and that such discretion can only be interfered with under specific circumstances. In *Shadrack Kipchoge Kogo vs Republic*, Criminal Appeal No. 253 of 2003 The Court of Appeal held that: -
- “Sentence is essentially an exercise of the trial court and for this court to interfere, it must be shown that in passing the sentence, the court took into account an irrelevant factor or that a wrong principle was applied or short of those the sentence was so harsh and excessive that an error in principle must be inferred.”
42. The Penal Code stipulates that a person who commits the offence of grievous harm as ‘is liable to imprisonment for life’, while the offence of assault causing actual bodily harm attracts a sentence of



‘imprisonment for five years’. The import of the term “is liable to”, was discussed by Mativo J. (as he then was) in *NOO vs. Republic* [2019] eKLR as follows: -

“It seems to me beyond argument the words “shall be liable to” does not in their ordinary meaning require the imposition of the stated penalty but merely express the stated penalty which may be imposed at the discretion of the court. In other words they are not mandatory but provide a maximum sentence only and while the liability existed the court might not see fit to impose it.”

43. In the present case, I note that the trial court considered the injuries that the complainants sustained in the attack alongside the pre-sentence report before passing the sentence. In *State of M.P. vs. Bablu Natt* {2009}2S.C.C 272 at Para 13 the Supreme Court of India held that: -

“The principle governing imposition of punishment would depend upon the facts and circumstances of each case.”

44. In *Wanjema vs. Republic* (1971) KLR 493, 494 the Court of Appeal held as follows:-

“A sentence must in the end, however, depend upon the facts of its own particular case. In the circumstances with which we are concerned a custodial order was appropriately made. But that which was made cannot possibly be allowed to stand. 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.”

45. The trial court rendered itself as follows during sentencing: -

“In the circumstances, the accused persons are hereby sentenced to serve 7 years’ imprisonment with the option of paying a Kshs. 1,000,000 fine..”

46. It is evident that, following the conviction, the trial court passed an omnibus sentence for the two separate and distinct offences. In *Burton Mwakapesile v. R* (1965) EA 407, 413 the court rendered itself as follows on an omnibus sentence: -

“In Criminal Case No. 355 of 1964, it will be remembered, the Court passed one “omnibus” sentence of two years’ imprisonment which carried with it twenty-four strokes of corporal punishment in respect of the eleven counts which it had convicted the appellant and ordered him to compensate each of the eleven rate payers concerned in an amount equal to that which the Court had found the appellant had received from him. An “omnibus” sentence is unlawful and the compensation order is misconceived. As to the former, there is must be a separate sentence for each count on which a conviction is had – see Mohamed Warsame S. T. Musa Aboker Majelo v. R (1956) 23 E.A.C.A. 576. As to the latter, ‘the owner of the property’ obtained by the appellant within the meaning of s. 6(1) of the Minimum Sentences act was the Rungwe District Council and not any rate payer. Accordingly, I would allow the appellant’s appeal against the sentence in this case, set aside the sentence imposed, and would substitute for it a sentence of two years’ imprisonment in respect of each of the eleven counts on which the appellant was convicted, the terms to run concurrently....” (emphasis added).



47. Taking a cue from the above cited decision, I find that the trial court erred and acted on wrong principles in meting an omnibus sentence for the two offences. I further note that the trial court did not specify if the Appellants were required to each pay a fine of Kshs. 1,000,000/= as an alternative to imprisonment or if the same was a joint fine. I find that the sentence was illegal as there should have been a separate sentence for each accused person and for each count on which a conviction was pronounced. I therefore find that there is justification in interfering with the sentence passed by the trial court.
48. In conclusion, I uphold the trial court's verdict on conviction on both counts. I however allow the appeal on the sentence passed by the trial court which I hereby set aside and substitute it with an order that the Appellants shall each serve a sentence of 7 years imprisonment for the first count and 5 years imprisonment for the second count. The sentences shall run concurrently. The sentence period shall be computed to take into account (factor in) the period, if any, that the Appellants spent in custody while awaiting their trial.
49. It is so ordered.

JUDGMENT SIGNED, DATED AND DELIVERED VIRTUALLY AT NYAMIRA THIS 23RD DAY OF JANUARY 2025.

W. A. OKWANY

JUDGE

