



REPUBLIC OF KENYA



**Alango v Republic (Criminal Appeal E065 of 2023)
[2025] KEHC 6736 (KLR) (20 March 2025) (Judgment)**

Neutral citation: [2025] KEHC 6736 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MIGORI
CRIMINAL APPEAL E065 OF 2023
A. ONG'INJO, J
MARCH 20, 2025**

BETWEEN

CALVINCE ODHIAMBO ALANGO APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal against the Judgment of Hon. C. N. ORUO Principal
Magistrate and delivered on 27th September 2023 in Rongo CR.
Case No. E103 of 2023, Republic Vs Calvince Odhiambo Alango))*

JUDGMENT

Background

1. The Appellant was charged with offence of causing grievous harm contrary to Section 234 of the [Penal Code](#).
2. The particulars are that on the 5th day of February 2023 at East Sakwa Sub –Location in Awendo Sub County in Migori County within the Republic of Kenya the Accused person Calvince Odhiambo Alango willingly and unlawfully did grievous harm to Paul Odoyo Ayieko.
3. The Trial Magistrate considered the evidence of six (6) Prosecution witnesses and the Accused Parsons's defense and gave a verdict that the Prosecution had proved its case without beyond reasonable doubt and convicted the Accused person.
4. Consequently, upon consideration of the mitigation and Probation Officer's Report the Trial Magistrate said the Probation Officer's Report and the Victim Impact Statement were not positive and the Appellant could not benefit from a non-custodial sentence. The Appellant was then sentenced to serve life imprisonment.



5. Being aggrieved by the conviction and sentence the Appellant preferred petition of Appeal 9th October 2023 on the following grounds:-
1. That the offence was not proved
 2. That the Learned Trial Magistrate disregarded all the open discrepancies in the evidence of the Complainant thereby occasioning an injustice on the Appellant's part.
 3. That the Learned Trial Magistrate misdirected herself when he failed to critically analyze the entire evidence and realize that the inconsistencies could not sustain a conviction.
 4. That the sentence was is illegal in its entirety

Reasons wherefore the Appellant prayed that the appeal be allowed, conviction quashed and sentence set aside.

3. The Prosecution's case was that the Complainant was on his way to his brother's place when he met the Appellant who is his nephew armed with a panga. He said the Appellant had earlier on threatened him. The Complainant said the Appellant had defiled his daughter and he was charged and sentenced to serve 15 years imprisonment. That the Appellant wanted to cut him on the head but he used his hand to block the panga and he sustained 2 cuts on his hand. PW1 said that his brother Joseph Ayieko saw the Appellant cut him. He said he lost consciousness and came to while at Migori County Hospital. The Complainant was treated for his injuries at Life Care, Kendu Adventist, St Luke, Tenwek and Jaramogi Oginga Odinga Hospitals and he produced the medical documents and P3 form the said hospitals as exhibits I to 14
4. PW1 said that apart from his brother Lydia also witnessed the assault and she screamed and the Appellant ran away. He said he reported the assault after being discharged from hospital.
5. PW2 Joseph Obiero Ayieko testified that the Appellant was his nephew and the Complainant his cousin. He said that while he was in his house on 5/ 2/ 2023 he heard distress calls from a lady who was screaming and saying "Odhiambo don't cut Paul." That when he got out he saw Paul outside his gate bleeding from the hand which had been cut and he gave instructions that he should be taken to hospital. PW2 also said he saw the Appellant at the scene armed with a panga.
6. PW3 Lydia Auma Ochieng testified that on 5/ 2/ 2023 she was at the Complainant's home when she saw Calvince cut PW1 using a panga severally at PW2's gate. That she screamed for help and the owner of the home went to talk to the Appellant to leave PW1. She said PW1 was bleeding and fell unconscious.
7. In cross examination PW3 said there is no land dispute between the Appellant and PW1.
8. PW4 Moses Ojwang' Ayieko testified that on 5/ 2/ 2023 he was not at home and on return in the evening he was informed by his brother Joseph PW2 that PW1 had been assaulted and was unable to walk. That he went to the scene and found PW1 bleeding and was unconscious and took him to hospital. PW4 said he was informed that it was the Appellant who cut the Complainant but he was not at the scene.
9. PW5 CPL Thomas Mutua of Awendo Police Station investigated the offence of grievous harm that was reported by PW1 . That PW1 availed Treatment Notes from
-Jaramogi Oginga Odinga TRH
-Bliss Hospital



-Kijabe Hospital

10. PW5 testified that the Appellant had been charged for defiling the Complainant's daughter and was convicted and sentenced and on release in 2021 he started threatening the Complainant. That the Appellant met the Complainant when he was going to pick his cart and accosted him while armed with a panga and cut him on the left arm. He said the Appellant ran from scene and was arrested in Ranen on 10th February 2023.
11. PW6 Dancun Nyabala Clinical Officer at Awendo Sub-County Hospital filled P3 form in respect to the injuries suffered by the Complainant on 8th February 2023 after one year since the date of the assault. He observed the Complainant suffered a fracture of the upper limb that led to deformity of the forearm. He also testified that the Complainant went through surgery on the upper limb and he formed the opinion that the injuries were grievous harm. He said the Appellant sought treatment in various health facilities and he produced the said documents as exhibits.
12. When the Appellant was placed on defense he gave sworn statement and denied having committed the offence. He said that on 2/2/23 he was at home and he had a land dispute with his brother after his father's death. That he reported to the Chief and his brothers were summoned but they refused. He said he was chased from the village.
21. In cross examination the Appellant said that the Complainant was cut. He said that the Complainant was his uncle and they did not have good relationship. He said he did not meet PW1 on 5th February 2023. He said he did not meet Lydia on 5th February 2023.
22. The appeal herein was canvassed by way of written submissions.
23. The Appellant's submissions were filed on 25th October 2024. The Appellant submitted that the evidence of prosecution witnesses had material discrepancies that destroyed and weakened the inference of guilt. The Appellant argued that the treatment notes produced had different dates ranging from 2021, 2022 and 2023 when the offence was alleged to have been committed in 2023. The Appellant further submitted that PW5 said that the offence was committed in 2022 when cross examined. The Appellant questioned how exhibits for 2022 were connected to the offence alleged committed in 2023. He further said that evidence of PW1 and PW2 contradicted each other as to where PW1 was when he was allegedly assaulted and PW2 and PW3's evidence was contradictory as to whether there were other people at the scene of assault or not.
24. The Appellant also submitted that the allegations of threats to the Complainant were not proved as he did not report to police and there was no independent evidence that he was threatened.
25. The Appellant submitted that the reason for being charged arises out of land dispute with the Complainant who has been fabricating him with the intention of grabbing land left by his deceased father. He said he was implicated in a defilement case and he served and completed the sentence. That in 2008 he was also implicated in an assault case and he was convicted and sentenced to serve jail term and he completed. The Appellant claimed the Complainant used money to obtain medical documents in order to frame him up as there were no treatment notes for 2023 when the Complainant was allegedly assaulted. He said he reported the matter to the Chief when the Complainant chased him from home due to a land dispute.
26. The Appellant submitted that the sentence passed against him was harsh and excessive in consideration of the contradictions in the prosecution evidence. He urged the court to review the sentence and / or set it aside and acquit him.



27. The Appellant cited the holding in Julius Kitsao Manyeso in which the Court of Appeal at Malindi declared Life Imprisonment to be unconstitutional. He urged the court to consider that he was a lone son and that he was married with one child and that his parents were deceased.
28. The Respondent's submissions are dated 29th January 2025 and are to the effect that the Appeal should be dismissed for reasons that the Trial Courts conviction was safe considering that the Appellant was not a 1st offender.
29. The Respondent submitted that the mere fact that the Appellant was armed with a panga which he aimed at the Complainant's head and he cut his hand meant he intended to cause harm which he did when he cut PW1. That the fact that the Complainant was injured was confirmed by PW6 who filled P3 form and confirmed PW1 had a fracture of the upper limb that deformed the forearm and same will not have normal functioning again.
30. It was submitted that the Appellant acted unlawfully by cutting the Complainant.
31. Regarding the contradictions alleged by the Appellant the Respondent submitted that they were minor and did not prejudice the Appellant as he was aware of the nature of the charges against him and he was able to put up an appropriate defense. It was submitted that the Prosecution evidence was not rebutted and thus the case against the Appellant was proved beyond all reasonable doubt.

ANALYSIS AND DETERMINATION

32. In a first appeal, the duty of the court was held in Mark Oiruri Mose vs. R (2013) eKLR thus;

.... the Court is duty bound to revisit the evidence tendered before the trial court afresh, evaluate it, analyze it and come to its own independent conclusion on the matter but always bearing in mind that the trial court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and give allowance for that.”
33. Having considered the grounds of Appeal, and revisited the evidence tendered before the trial court afresh as well as the submissions by the rival parties, the issues for determination are:-
 - a. Whether the ingredients of the offence of grievous harm were proved beyond reasonable doubt.
 - b. Whether the Appellant's conviction was based on inconsistent and contradictory evidence
 - c. Whether the sentence was harsh and excessive in the circumstances.
34. Concerning the sentence meted against the Appellant the offence of grievous harm contrary to Section 234 of the [Penal Code](#) provides:-

Grievous harm Any person who unlawfully does grievous harm to another is guilty of a felony and is liable to imprisonment for life.”
35. PW2 Joseph Obiero Ayieko testified that he saw the Appellant at the scene of the attack while armed with a panga and the Complainant at the gate and he was bleeding from the hand that had been cut.
36. PW3 testified that she saw the Appellant cut the Complainant on his left hand and she screamed and attracted the owner of the home where the offence happened at the gate. She said the person came and talked to the Appellant to leave the Complainant alone.
37. There is therefore evidence that the Complainant was assaulted on 5th February 2023 and PW4 is the one who took him to hospital. According to PW1 he regained consciousness when he was at Migori



- County Hospital but there is no evidence that he was admitted at the County Hospital and his brother PW4 did not say to which hospital PW1 was taken on 5th February 2023. Exhibit P 3 from Awendo Sub-County Hospital indicates that the Complainant was attended to on 8th February 2023 with history of having been assaulted by a known person and that he had radial medial nerve injury post ORIF secondary to fracture of the ulna. It is not indicated if the Complainant received any treatment and/or the purpose of going to the Sub-County Hospital if he had been attended at different hospitals between 5th to 8th of February 2023.
38. The 2nd document is an invoice from Jaramogi Oginga Odinga TRH dated 2nd April 2022-Ex P12; there is also Discharge summary from Life Care Hospitals dated 19th January 2022 indicating that showing the Complainant suffered deep cut wound and open left ulna fracture and he was advised to use armling and have wound cleaned daily at the nearest health facility. Exhibit 10 is request for X-Ray at JOOTRH for the right forearm with results that there was septic implant. The document is dated 5th March 2022.
 39. Exhibit 8(a) is Discharge Summary from JOOTRH dated 2nd April 2022 showing the patient was admitted due to sepsis around the fractured right forearm with diagnosis of infected implant which was removed in the theater.
 40. Exhibit 9(b) also from Life Care Hospitals indicates that the Complainant was assaulted on 9th January 2021 and he sustained multiple cut wounds on the left forearm with open fracture of the ulna shaft and Dr Sam Kanyangi assessed extent of the injuries on the functionality of the said hand.
 41. The Discharge Summaries from Life Care Hospitals indicates the Complainant was admitted on 11th January 2022 and discharged on 19th January 2022 and again admitted on 2nd February 2022 and was discharged on 4th February 2022ulnar and and that he had been treated at different facilities.
 42. The Complainant also produced Exhibit P7 (a) Discharge Summary from St. Luke Medical Centre Kisumu showing he was admitted on 24th February 2022with severe neurotmesis of the left ulnar radial median nerve post ORIF due to comminuted fracture of the left ulnar and he was referred for surgical exploration.
 43. Exhibit P 1 is Discharge Summary from Kendu Adventist Hospital showing the Complainant was admitted on 24th January 2022 and discharged on 28th January 2022.
 44. In Exhibit P2 Dr. Jules Fidele and Dr. Erick Kariuki of Aga Khan Hospital Kisumu examined the Complainant and said that the nerve conduction studies done on both upper limbs is abnormal suggestive of severe (neurotmesis) motor and sensory axonal neuropathesis of the median, radial and ulnar nerves of the left forearm and moderate sensory neuropathy of the right ulnar nerve.
 45. In the P3 form produced to prove that the Complainant suffered grievous harm Exhibit P 14 the Complainant is said to have been assaulted on 5th January 2022 and he was attended at different health facilities for which treatment notes were said to have been attached and he suffered fracture of the left ulnar with deformed forearm and wrist drop. He was assessed to have suffered grievous harm.
 46. Although the Complainant and PW2, 3 and 4 allude to the Appellant having assaulted and caused grievous harm to the Complainant none of the exhibits produced as evidence of the said assault show that the Complainant's injuries were sustained on 5th February 2023. As enumerated in all the exhibits it cannot be ascertained whether the Complainant was being treated for alleged assault or degeneration of nerve tissues as shown in some of the exhibits. This raises the suspicion as to whether the Appellant is being kept out of the way for some ulterior motive on the part of the Complainant as alleged by the Appellant.



47. There is no way that injuries suffered on 5th February 2023 could have been documented by various health facilities as having occurred on different dates, months and years if at all the Complainant's claim is true. The evidence adduced as to the alleged injuries suffered by the Complainant are not consistent with the particulars of the charge on the charge sheet and the Trial Magistrate was therefore in error to find that the prosecution had proved its case beyond reasonable doubt. It may be true that the Appellant was a repeat offender but that does not mean that he is not entitled to the rights to fair trial as enshrined in [the constitution](#) for every offence brought against him.
48. In consideration of the analysis above this court finds that the appeal has merit and the conviction is quashed and sentence set aside. The Appellant is set at liberty forthwith unless lawfully detained.
49. Right of appeal 14 days explained.

DATED, SIGNED AND DELIVERED THIS 20TH MARCH, 2025

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HON. JUSTICE A. ONGINJO

JUDGE

In the presence of: -

