



REPUBLIC OF KENYA



KENYA LAW
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**Kariuki v Republic (Criminal Appeal E002 of 2023)
[2025] KEHC 4544 (KLR) (Crim) (1 April 2025) (Judgment)**

Neutral citation: [2025] KEHC 4544 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CRIMINAL
CRIMINAL APPEAL E002 OF 2023**

CJ KENDAGOR, J

APRIL 1, 2025

BETWEEN

ELIJAH NGAYUNI KARIUKI APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal against the Sentence Ruling delivered by Hon. L.K Gatheru,
Senior Resident Magistrate in Chief Magistrates Court Makadara Criminal
Case No. 1949 of 2017(Formerly CM Mavoko Criminal Case No. 98 of 2016))*

JUDGMENT

1. This decision concerns the appeal lodged by the appellant on 3rd January, 2023 against the Sentence Ruling delivered in the lower court.
2. The Appellant was arrested on 16th February, 2016 and charged at the Mavoko Chief Magistrate's Court on 17th February, 2016 with attempted murder contrary to Section 220 (a) of the [Penal Code](#). A substituted Charge Sheet was drawn by the Respondent and six other Counts were added. The case was thereafter transferred to Makadara Law Courts for hearing and determination.
3. The Appellant and the Respondent entered into a plea bargain, and on 12th July, 2021 the Charge Sheet was amended to in Count I to a charge of causing grievous harm contrary to Section 234 of the [Penal Code](#). The rest of the charges were as earlier added.
4. Following the plea bargain, the appellant entered a new plea on the following charges:
 - i. Count I – Causing grievous harm contrary to Section 234 of the [Penal Code](#).



Particulars; On the 14th day of January 2016 at [Particulars Withheld] area in Athi River sub county within Machakos county wilfully and unlawfully caused grievous harm to NKR.

- ii. Count II – Committing an unnatural offence contrary to Section 162 (a) of the *Penal Code*.

Particulars; On the 14th day of January 2016 at [Particulars Withheld] area in Athi River sub county within Machakos County wilfully and unlawfully had carnal knowledge of one NKR against the order of nature by inserting his genital organ (penis) into the female genital organ (anus).

- iii. Count III – Making a document without authority contrary to Section 357 (a) of the *Penal Code*

Particulars; At unknown date and place within the Republic of Kenya with intent to deceive and without lawful authority or excuse made a Kenya Defence Forces identity card with force No.25XXXXX purporting it to be a genuine Kenya Defence Forces identity card.

- iv. Count IV – Uttering a document with intent to deceive contrary to section 357 (b) of the *Penal Code*

Particulars; On the 18th day of January 2016 at the DCI Athi River office in Athi River sub county within Machakos County with intent to deceive knowingly uttered a Kenya Defence Forces identity card Force Number 25XXXXX to No. 21XXXXXX Mr. Joseph Mumira.

- v. Count V – Personating a police officer contrary to Section 105 (b) of the *Penal Code*

Particulars; On 18th day of January 2016 at DCI Athi River office in Athi River sub county within Machakos District falsely presented himself to No.21XXXXXX Joseph Mumira as a person employed in the Kenya Defence Forces.

- vi. Count VI – Uttering a document with intent to deceive contrary to Section 357 (b) of the *Penal Code*

Particulars; On the 17th day of February 2016 at Athi River GK Prison in Kitengela within Kajiado County with intent to deceive, knowingly uttered a Kenya Defence Forces identity card Force No.25XXXXX to No.32XXX PC. Paul Mutinda Munyoki.

- vii. Count VII – Personating a police officer contrary to Section 105 (b) of the *Penal Code*.

Particulars; On the 17th day of February 2016 at Athi River GK Prison in Kitengela within Kajiado county falsely presented himself to No.32XXX PC. Paul Mutinga Munyoki as a person employed in the Kenya Defence Forces.

5. The Appellant pleaded guilty to Counts I, III, IV, V, VI and VII.
6. He pleaded not guilty to Count II. The matter proceeded to a hearing on this Count, and the Appellant was acquitted. The decision of acquittal is not a subject of the present appeal.
7. The prosecution applied to withdraw Counts V and VII under Section 87 (a) of the *Criminal Procedure Code*. The withdrawal was allowed, and the Appellant was discharged of the two counts.
8. The Appellant was convicted on the plea of guilty for Counts I, III, IV and VI on 12th July, 2021.
9. The presented plea bargain agreement included the following terms:
 - I. Count I – was reduced from attempted murder to causing grievous harm, with the time spent in custody to be considered as the applicable sentence;



- II. Proposed prison sentence of one year each for counts III, IV and VI to run concurrently;
10. The complainant submitted an application opposing the plea bargain but later withdrew it.
11. The trial court issued a sentencing ruling on 21st December, 2022, which is the subject of the present appeal, and made the following decision:
 - I. Count I- Causing grievous harm contrary to Section 234 of the [Penal Code](#); sentenced to twenty years imprisonment;
 - II. Count III- Making a document without authority contrary to Section 357 (a) of the [Penal Code](#); two years imprisonment;
 - III. Counts IV and VI – Uttering a document with intent to deceive contrary to Section 357 (b) of the [Penal Code](#); two years imprisonment on each count;
 - IV. The Trial Court reduced the one-year from each sentence based on the time served while in custody.
 - V. The sentences to run concurrently
12. The Appeal is based on the following grounds;
 - i. That the learned trial Magistrate erred in law and in fact for meting upon the Appellant a sentence of 20 years imprisonment that is harsh and excessive in the circumstances;
 - ii. That the learned trial Magistrate erred in law and in fact in sentencing the accused to harsh and excessive years in prison based on the misapprehension that the aggravating circumstances of the offence outweighed the mitigating factors adduced by the Appellant and the pre-sentencing report;
 - iii. That the learned trial Magistrate erred in law and in fact by sentencing the Appellant to 20 years imprisonment without due regard to the circumstances of the plea agreement between the Appellant and the prosecution;
 - iv. That the learned trial Magistrate erred in law and in fact by considering factors that constituted bias in sentencing the Appellant to imprisonment of 20 years despite being a plea agreement between the Appellant and the prosecution;
 - v. That the trial Magistrate erred in law and in fact as the Honourable Magistrate was persuaded by factors and circumstances beyond the case in meting out an imprisonment of 20 years, a sentence that is harsh and excessive in the circumstances;
 - vi. That the learned trial Magistrate erred in law and in fact by failing or refusing to consider the mitigating factors of the Appellant, and in particular the attitude of the Appellant and his actions after the incident, before sentencing the Appellant to 20 years imprisonment;
 - vii. That the learned trial Magistrate erred in law and in fact by misapprehending that the Appellant had only served one (1) year imprisonment and only reduced the sentence of 20 years imprisonment by the same one (1) year, without any legal or factual basis;
 - viii. That the learned trial Magistrate erred in law and in fact by failing or neglecting to consider the time served by the Appellant in custody when calculating the sentence period for the Appellant based on the 20 years imprisonment meted by the learned trial Magistrate;



- ix. That the learned trial Magistrate erred in fact and in law when sentencing the Appellant based on the plea agreement by being persuaded by the past record and actions of the Appellant in another criminal matter upon which a right of appeal did lie;
 - x. That the learned trial Magistrate erred in law and in fact by meting out a harsh excessive sentence of 20 years imprisonment against the Appellant without due regard sentencing objectives vis-a-viz the change in Appellant's character and attitude;
 - xi. That the trial Magistrate erred in law and in fact by basing the sentence of 20 years imprisonment on conjecture, one-sided perception and in disregard of the Appellant's plea agreement with the prosecution as well as the Appellant's mitigating factors.
13. The Appeal was canvassed through submissions. The Appellant contended that the sentence imposed by the trial court was not only harsh but also excessively punitive, arguing that it violated the terms of the plea bargain agreement that stated that the time the Appellant had already spent in custody should be regarded as sufficient and appropriate punishment. Furthermore, the Appellant faulted the trial magistrate for failing to take into account the period of pre-sentence detention, which they argued should have been factored into the final sentencing decision together with his mitigation. Consequently, the Appellant maintained that the imposition of the sentence, as it stood, constituted a miscarriage of justice, undermining the intent of the plea agreement and disregarding the principles of fair sentencing.
14. Although the Respondent's submissions were stated to have been prepared, they were neither placed before the court via the case tracking system nor delivered.

Analysis and determination

15. The court accepted the plea bargain agreement, making it part of the Court record. When a plea bargain agreement is accepted, the court still retains discretion regarding sentencing.
16. Section 137L of the *Criminal Procedure Code* provides on the finality of judgement upon conviction following a plea bargain agreement as follows;
1. "Subject to subsection (2), the sentence passed by a court under this Part shall be final and no appeal shall lie therefrom except as to the extent or legality of the sentence imposed.
 2. Notwithstanding subsection (1), the Director of Public Prosecutions, in the public interest and the orderly administration of justice, or the accused person, may apply to the court which passed the sentence to have the conviction and sentence procured pursuant to a plea agreement set aside on the grounds of fraud or misrepresentation.
 3. Where a conviction or sentence has been set aside, under subsection (2), the provisions of section 137J shall apply mutatis mutandis."
17. This Court is being called upon to examine the legality of the imposed sentence in this case. The issue for determination is whether the sentence adheres to relevant laws and the appellant's rights.
18. Section 137(I)(2) & (3) of the *Criminal Procedure Code* provides the considerations that a Court shall take into account when passing a sentence following a plea bargain agreement:
1. Upon conviction, the court may invite the parties to address it on the issue of sentencing in accordance with Section 216.
 2. In passing a sentence, the court shall take into account:



- a. the period during which the accused person has been in custody;
 - b. a victim impact statement, if any, made in accordance with section 329C;
 - c. the stage in the proceedings at which the accused person indicated his intention to enter into a plea agreement and the circumstances in which this indication was given;
 - d. the nature and amount of any restitution or compensation agreed to be made by the accused person.
3. Where necessary and desirable, the court may in passing a sentence, take into account a probation officer's report.
19. In *Bernard Kimani Gacheru vs. Republic* [2002] eKLR the Court stated as follows:
- “It is now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account some wrong material, or acted on a wrong principle. Even if, the Appellate Court feels that the sentence is heavy and that the Appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already states is shown to exist.”
20. The Appellant focused his submissions on Count I, primarily because the sentences for the other Counts had already been served. The facts that were presented for Count I are that the appellant and the Complainant were in a relationship that was marred by gender-based violence, with the Complainant as the victim. The Complainant suffered major burns after the Appellant gauzed her body with petrol and lit up a fire that caused her almost fatal injuries.
 21. Upon conviction, the Court invited the parties to address the issue of sentencing and called for a social inquiry report, which was presented.
 22. The sentencing ruling shows that the trial Court took into consideration the mitigation offered by the Appellant, namely that he was remorseful and stated that he had a family that depended on him. He also urged the Court to consider that he was the one who took the Complainant to the hospital after the incident.
 23. The trial Court also considered the victim impact assessment, which indicated that the Complainant had suffered as a result of the incident, claiming it had far-reaching effects beyond the visible physical scars.
 24. The record indicates that the trial Court considered whether there was a prior criminal history. It was noted that the Appellant had been convicted of a sexual offence in Makadara Criminal Case No. 124 of 2017. This conviction was the subject of an appeal. The trial Court considered the provisions of Section 47A of the *Evidence Act*, and since an appeal was pending, the record was not used to the detriment of the Appellant.
 25. After examining the circumstances surrounding the case, alongside the Judiciary Sentencing Guidelines and the specific provisions outlined in the *Penal Code* regarding the maximum permissible sentences for the offences for which the Appellant was convicted and received sentencing, I conclude that the penalties imposed were neither harsh nor excessive.



26. The trial magistrate meticulously considered all relevant factors, including the mitigation presented by the Appellant and the seriousness of the crimes committed. The Court adhered to a guided approach to sentencing and acknowledged the positive impact of the guilty plea. Furthermore, the provisions of the *Criminal Procedure Code* regarding plea bargain agreements were appropriately considered during the sentencing process.
27. It is impossible to separate or divide a human being, even when in custody or for another offence. This issue is further complicated because the presentation, hearing, and determination of the criminal case (Makadara Criminal Case No. 124 of 2017) occurred concurrently with ongoing proceedings in this case that were before the lower Court.
28. The Appellant was unable to secure bond in this case. He is entitled to the period spent in custody to be considered in the sentence; therefore, pursuant to Section 333 (2) of the *Criminal Procedure Code*, the sentences, which run concurrently, will run from 16th February, 2016 when the Appellant was placed in custody.
29. It is so ordered.

DATED, DELIVERED AND SIGNED AT NAIROBI THROUGH THE MICROSOFT TEAMS ONLINE PLATFORM ON THIS 1ST DAY OF APRIL, 2025.

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C. KENDAGOR

JUDGE

In the presence of:

Court Assistant: Beryl

Appellant – present

Mr. Omondi, ODPP for Respondent

