Kiptanui & another v Republic (Criminal Appeal E012 & E022 of 2024 (Consolidated)) [2025] KEHC 7200 (KLR) (23 May 2025) (Judgment)

Neutral citation: [2025] KEHC 7200 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ITEN

CRIMINAL APPEAL E012 & E022 OF 2024 (CONSOLIDATED)

JRA WANANDA, J

MAY 23, 2025

BETWEEN

ESTHER KIPTANUI ..... 1ST APPELLANT

MONICA SIWA ..... 2ND APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal against the Judgment of Hon. E. Kigen - PM, delivered on 16/05/2024 in Iten Senior Principal Magistrate's Court Criminal Case No. E787 of 2024)

JUDGMENT

1. This is another of those very sad cases that a Judicial Officer comes across once in a while. It is an alleged case of a young boy of 10 years in age who is said to have been caught "harvesting" or "stealing" potatoes from a farm within his village, upon which he is alleged to have been frogmarched to a house, locked up and subjected to vicious "mob justice" by 7 adults, out of which the minor is said to have suffered multiple injuries. This was the case against the Appellants and 3 others before the trial Court.

2. The two Appeals having been consolidated, I may also state that the Court Registry staff discovered that the 1st Appellant also filed a subsequent Appeal, namely, Iten High Court Criminal Appeal No. E023 of 2024 in respect to the same conviction and sentence the subject hereof. She therefore had 2 parallel Appeals. The effect of this is therefore that the decision herein, apart from determining these two consolidated Appeals, will also determine the 1st Appellant's said subsequent Appeal.

3. The background of the instant Appeals is that the Appellant, alongside 3 others, were charged in the said case with the offence of causing grievous harm contrary to Section 234 of the *Penal Code*. The 1st Appellant was the 5th accused while the 2nd Appellant was the 4th accused. The particulars were that on the 12/07/2023 at Cherorget village, Keiyo South sub-County within Elgeyo Marakwet County,

jointly with others not before Court, they wilfully and unlawfully did grievous harm to AK, the child aged 10 years.

4. The 1st Appellant had initially been charged alone in Iten SPM Criminal Case No. E972 of 2023, while the 2nd Appellant had initially been charged alone in Iten SPM Criminal Case No. E892 of 2023. The two cases, together with Iten SPM Criminal Case No. E787 of 2023, were however later consolidated with Iten SPM Criminal Case No. E787 of 2023, as the lead file and under which all the cases then proceeded. Before the consolidation, Iten SPM Criminal Case No. E787 of 2023 had already proceeded to trial with 2 prosecution witnesses having already testified. However, upon consolidation, all the accused persons took plea afresh and the trial began de novo.

5. The Appellants and her co-accused, all pleaded not guilty, and the case proceeded to full trial in which the prosecution called 4 witnesses. At the close of the prosecution's case, the Court found them, including the Appellant, with a case to answer and placed them on their defence. They all then gave sworn statements and called 2 other witnesses. By the Judgment delivered on 16/05/2024, 2 of the accused persons were acquitted while 3, including the Appellants herein, were convicted and then each sentenced to serve 30 years' imprisonment.

6. Dissatisfied with the said decision, the 1st Appellant, through Messrs Anassi Momanyi & Co Advocates, instituted her said Appeal on 24/05/2024, against both conviction and sentence. She listed the following Grounds:

    i. The Honourable Magistrate erred in law and in fact in failing to discharge her mandate under *the Constitution*, explain to the accused her constitutional right to engage the services of an Advocate at the earliest opportunity.

    ii. The Honourable Magistrate erred in law and in fact in holding that the prosecution had proved its case against the Appellant to the requisite standard.

    iii. The Honourable Magistrate erred in law and in fact in sentencing the Appellant to serve 30 years' imprisonment, a sentence which was highly excessive.

    iv The Honourable Magistrate erred in law and in fact in failing to comply with the law before proceeding to take the evidence of a complainant who was a child of tender years.

    v The decision is as a whole untenable and unjust.

7. On her part, the 2nd Appellant, also dissatisfied with said decision, in person, filed her said Appeal on 17/06/2024, also against both conviction and sentence. She listed the following Grounds, quoted verbatim:

    i. That, the trial Magistrate grossly erred in law and facts by convicting me based on evidence that was not proved beyond reasonable doubt.

    ii. That the trial Magistrate grossly erred in law and facts by convicting me without proper evaluation of the fact that the complainant to this case once wanted to withdraw but was compelled by the court to proceed with the case.

    iii. That the trial magistrate greatly erred in law and facts by convicting me based on unfair (sic) that greatly breached Article 49 & 50 of the current 2016 constitution of Kenya.

    iv That the trial Magistrate grossly misdirected herself by convicting me without proper evaluation of my defense of alibi.

v That the trial Magistrate grossly erred in law and facts by convicting without observing section 333(2) of the CPC.

vi. That the learned trial Magistrate failed to note that I did not understand the charge facing me and the facts read were not clear due to the poor reception of the Skype system.

vii. That the learned trial Magistrate erred in law and fact by sentencing me to a sentence that is manifestly harsh. excessive and oppressive in the circumstances.

viii. That I wish to be present during the hearing and determination of this appeal.

Prosecution evidence at the trial Court

8. PW1 was Irene Keitany. She testified that the 1st and 3rd accused persons are her relatives, the 2nd accused and the 2nd Appellant are her neighbours, and the 1st Appellant is her co-wife. She stated that on 12/07/2023 at 6.00 pm, she had returned from buying vegetables, when the 1st Appellant called her and asked her to go and see what PW1's grandson (the complainant-minor herein) had done, that when PW1 went, she noted that the complainant had removed potatoes, that PW1 then left for the posho mill but on returning, and that the 1st Appellant told her that the complainant-minor had been brought by one Sheila, the wife of Kibunja. PW1 She stated that the minor told her that the 1st Appellant and the said Sheila had locked the minor inside the house and the 1st Appellant was standing on the door and told PW1 that she was waiting for the 3rd accused. PW1 stated that she then left briefly to go to the Centre to collect her phone which was charging and upon collecting it, she phoned the minor's mother to tell her about what the minor had done, and on returning, she found that the minor had been beaten and had injuries in the anus. She testified that they fed the minor and slept but he complained of stomach pains and by morning he was sick and was urinating blood, she then took him to hospital in Chepkorio and then reported at Kaptagat Police Station. In cross-examination, she stated that the 1st and 2nd accused persons were not at the scene and that when, before going to the Centre, she went to ask the 1st Appellant why she had locked the minor in her house, the 1st Appellant told her that she was waiting for the 3rd accused.

9. PW2 was the minor-victim. He stated that he was 10 years old and was therefore taken through voire dire examination upon which the trial Magistrate held that the minor did not understand the nature of an oath and directed that he gives unsworn statement.

10. Pursuant thereto, the minor testified that he is a Grade 3 pupil, and stated that the 1st and the 2nd accused persons, together with the Appellants, are his neighbours, and PW1 is his grandmother. He stated that on 12/07/2023 at 4 pm, he had gone to the Appellant's shamba when one Sheila chased him with a panga and took him to the 1st Appellant's house and who then locked the minor inside and said that she was waiting for the 3rd accused. He added that the Appellant then called the 3rd accused and other people, including some of the accused persons, who came and started beating the minor. She listed the Appellants as being among the people who assaulted him, and stated that the Appellants beat him on the buttocks using sticks and firewood, and the 1st Appellant pinched his ears and also stepped on his stomach. He added that Sheila brought paraffin and threatened to burn him and then put the paraffin and salt in his anus, that the 1st Appellant is the one who removed his trousers and thus he was naked when he was being beaten. He testified further that the 1st Appellant stepped on and kicked him, that he felt pain on the ears, buttocks and anus and also bled from the same areas, that he thereafter went home and told his grandmother (PW1) about the incident, and who called the teacher and the police and he was then taken to Kipkogei hospital. In cross-examination, he, too, stated that the 1st and 2nd

accused persons were not at the scene and reiterated that the Appellants assaulted in the manner he described above.

11. PW3 was Patrick Kigen, a Clinical Officer attached at Chepkorio Health Center. He referred to the P3 Form in respect to the 10-year-old minor and stated that the minor was brought by his guardian on allegation of having been assaulted on 12/07/2023 by 7 people known to him. He testified that the minor was sick-looking, was in pain and had difficulty in walking. He testified that upon examining the minor, he noted that he had bruises on the left part of the head along the hairline, swelling on the right part of the head along the hairline, the right ear had a bruise on the corner part, he had tenderness on the chest, left side of the ribs and left abdomen, bruises on the left-hand knuckles, his right hand had bruises on the dorsal aspect, he had a septic wound with pus on his right buttock with skin peeling off, and also pain on the ankle joint. According to him, the approximate age of the injuries was 126 hours (5 days and 6 hours), that the probable type of weapon used was a blunt object and he categorized the injuries as "grievous harm". He then produced the P3 Form. None of the accused persons had any questions to ask in cross-examination.

12. PW4 was Police Corporal Alex Kigai attached at Kaptagat Police Station. He testified that on 16/07/2023, upon perusal of the Occurrence Book, he found a case assigned to him in which the complainant was 10 years old and was brought by his grandmother. He stated that he phoned the grandmother who came and he recorded their statements, the minor narrated that he had stolen potatoes and was caught and beaten thoroughly by the accused persons. PW4 stated that he issued a P3 Form to the minor who was then treated at Chepkorio sub-County Hospital, that he had visible injuries, including on the buttocks, which were red and swollen and that with the help of the Chief, they then arrested the suspects.

Defence testimony before the trial Court

13. DW1 was the 1st accused, Kelvin Kibet. He stated that on the date that the minor was beaten, he was in Kapkenda and came to Cherorget on 17th and he was arrested by the Chief for sleeping in the house of one Cornelius Kiptoo who, according to him, was among the people that had beaten the minor.

14. DW2 was the 2nd accused, Evans Kiptum. He stated that he was not there when the child was beaten as he had gone to the farm and returned in the evening. He stated that he only leant on the next day about the minor's beating but on 17th, the Assistant Chief came and arrested him while he was sleeping in the house of one Emmanuel Kipchumba.

15. DW3, Elias Kipkosgei Kipkurui was the 3rd accused. He denied being present when the offence was committed as he had gone to the forest and did not come even after he was called.

16. DW4, the 2nd Appellant herein, confirmed that the minor is her neighbour and she, too, denied that she participated in the assault.

17. DW5, the 1st Appellant herein, denied that she was at the scene on the material date and accused the minor of lying that she assaulted him.

18. DW6 was one Jaqueline Jemutai. She testified that the 1st accused was not in Kipkenda from 12/07/2023 to 17/07/2023 and that he only returned on 17th when he was arrested.

19. DW7 was Anthony Kimutai. He testified that the 2nd accused person is his neighbour and friend and stated that on 12/07/2023, he had had gone with him to Plateau and they came back in the evening and passed by DW7's brother's house where they stayed up to 8 pm. According to him, they reached home at about 9 pm and they only earnt of the incident the next day.

20. As aforesaid, after the trial, the Court convicted the 3rd accused and the Appellants herein of the offence, and sentenced them each to 30 years' imprisonment.

21. The parties were then given liberty to file written Submissions. The 2nd Appellant however stated that she would not be filing any Submissions. On her part, the 1st Appellant, through Messrs Anassi Momanyi & Co., filed the Submissions dated 7/10/2024 while the State, through Prosecution Counsel Calvin Kirui, filed the Submissions dated 26/11/2024.

1st Appellants' Submissions

22. Counsel for the 1st Appellant submitted that Article 50 of *the Constitution* provides for rights of every accused person and that the right to legal representation is founded upon well-known principles, doctrines and concepts which include access to justice, right to fair trial, the rule of law and equality before the law and that Article 50(2)(g) guarantees a fair trial to every accused person which includes the right to be represented by an advocate and to be informed of that right promptly. He submitted that from the proceedings of the trial Court, it is clear the 1st Appellant was never informed of her right to choose to be represented by an Advocate. He cited the case of Joseph Kiema Philip v Republic (2019) eKLR, the case of Chacha Mwita v Republic Criminal Appeal No 33 of 2019 and also the Supreme Court Petition No 5 of 2015, Republic v Karisa Chengo & 2 others [2017] eKLR. According to him, the failure by the trial Court to comply with Article 50 renders the entire trial a nullity.

23. Counsel submitted further that the 1st Appellant was charged under Section 234 of the *Penal Code* yet that the same is only the punishment Section, that the charge sheet ought to have indicated "Section 231 as read with Section 234 of the *Penal Code*".

24. He submitted further that PW3, the clinical officer, classified the minor's injuries as 'grievous harm'' but that, he urged, the P3 Form was filled 5 days after the alleged incident, and that although the complainant was reported to have been treated at Chepkorio Health Centre on 13/7/2023, no treatment notes were produced. He contended that for the Court to be convinced that indeed the injuries that the injuries alleged in the P3 Form were the same as those noted when he was first attended to at the said facility 2 hours within the injury being suffered, it was expected that the Court be provided with the treatment notes from Chepkorio Health Centre. He urged that the exclusion of the earlier medical reports could be by design and points towards deliberate untruth with a view to conceal what exactly happened on the material date. On the aspect of the 1st Appellant's participation in the offence, he observed that the only evidence relied upon by the trial Court was that of the minor yet it was uncorroborated unsworn evidence. He urged that the minor's evidence is full of inconsistencies and that although the minor alleged that the 1st Appellant stepped on his stomach and held her neck, the P3 Form does not reflect any injuries on the neck, and that even though the minor alleged that salt and diesel were inserted in his anus, the medical report did not reflect any of such.

25. On sentence, he urged that the 1st Appellant being unrepresented, had no clue on how to conduct her mitigation, that she had no prior record and the sentence was therefore too harsh.

26. Counsel recalled that the minor testified on two occasions and on both occasions, the Court did not examine the minor to ascertain whether he understood the meaning of an oath and the duty of telling the truth. Counsel further submitted that the trial Magistrate, in convicting the Appellant, stated that she had observed the minor when he was testifying and there was nothing from his demeanour to suggest that he was lying or that he was inconsistent in his testimony. According to Counsel, the trial Magistrate did not place the evidence of the child in its proper place as the Court did not examine the child to ascertain whether he understood the meaning of an oath and the duty of telling the truth. According to him therefore, the trial Magistrate could not form a sufficient basis for the minor's

demeanour when he did not test through a voir dire examination to ascertain the minor's competency to testify on oath.

27. He also faulted the trial Magistrate's holding that the minor's testimony was corroborated by the clinical officer which according to Counsel, was not independent evidence. In his view, the independent evidence that was required was one which connected or tended to connect the 1st Appellant to the crime, confirming in some material particular not only the evidence that the crime has been committed but also that the accused committed it. On the issue of voir dire examination, he cited the case of Sammy Ngetich v Republic [2018] eKLR. He also cited the case of Moses Mutahi Muso v Republic [2022] eKLR and urged that in the instant case, there was no independent evidence to support the allegation that the 1st Appellant committed the offence. He pointed out that the evidence of the clinical officer was to the effect that the complainant had injuries but not that the 1st Appellant is the one who inflicted them, and thus, it was not independent corroborative evidence that the 1st Appellant committed the offence.

Respondents' submissions

28. Prosecution Counsel recounted the ingredients of the offence of "grievous harm" and cited the provisions of Section 4 of the *Penal Code* on the definition of "grievous harm" and its specificities. He recounted the minor's testimony and submitted that his testimony on the injuries he suffered were all reflected in the P3 Form, in which the injury sustained was classified as "grievous harm"'. In respect to the second element, namely, that the harm occasioned on the victim was "caused unlawfully", meaning that the same was without legal justification, Counsel submitted that the minor (PWI), PW2, and PW4 were consistent with their testimonies that the minor was in the 1st Appellant's farm digging out potatoes and it was inferred that the actions were not sanctioned by the 1st Appellant hence the reason why she was punishing the minor. He urged that the minor was a 10-year-old boy who, and though he made a mistake, needed a befitting punishment but there is no stretch of punishment that the 1st Appellant meted on him, that the 1st Appellant was inhuman to a young child and thus the second element was proved. On "positive identification", Counsel submitted that the minor was categorical that it is the 1st Appellant who took him to her house and beat him using sticks and firewood on the buttocks, pinched his ears and stepped on his stomach. He then recounted the nature of injuries listed by the Clinical Officer as suffered by the minor. According to Counsel therefore, the trial Court rightfully held that the prosecution had discharged its burden to prove all the ingredients of the offence beyond any reasonable doubt as the prosecution witnesses and the evidence adduced were credible.

Determination

29. This being a first appeal, the duty of the Court is to analyze and re-evaluate afresh the evidence adduced at the lower Court and draw its own independent conclusions while bearing in mind that the trial Court had the advantage of seeing and hearing the witnesses testify (See Okeno v Republic [1972] EA 32).

30. Before I identify the issues for determination, I note that the 2nd Appellant raised the claim in sentencing, the trial Magistrate erred in failing to apply the provisions of Section 333(2) of the *Criminal Procedure Code* which requires that the period spent in custody or remand by a convict during the trial be taken into account. However, this limb of the grounds has not been pursued further or urged in the these Appeals nor has any attempt been made to demonstrate it. In any case, from the record, it appears that the accused persons were granted bail during the trial. At some point, even warrants of arrest were issued when they failed to attend Court.

31. The 2nd Appellant also claimed the trial Magistrate failed to note that the 2nd Appellant did not understand the charge facing him and the facts read were not clear due to the poor reception of the Skype system. Similarly, this limb of the grounds has not been pursued further or urged in the these Appeals nor has any attempt been made to demonstrate it. In any case, the record does not reflect that the 2nd Appellant, at any time raised this issue with the trial Court.

32. In view of the foregoing, I find the issues that remain for determination in this Appeal to be as follows;

    a. Whether the charge sheet was defective.

    b. Whether the Appellants' rights to a fair trial were violated by not being informed of their right to legal representation.

    c. Whether the voir dire examination conducted on the complainant-minor was defective.

    d. Whether the prosecution proved the offence of grievous harm to the required standard.

    e. Whether the sentence of 30 years imprisonment was harsh and excessive.

33. I now proceed to analyze and determine the said issues.

a. Whether the charge sheet was defective

34. The 1st Appellant's Counsel submitted that the charge sheet was defective because the Appellants were charged under Section 234 of the *Penal Code* yet that the same is only the punishment Section and that the charge sheet ought to have indicated "Section 231 as read with Section 234 of the *Penal Code*".

35. In regard to drafting of charge sheets, Section 134 of the *Criminal Procedure Code* provides as follows:

> " Every charge or information shall contain and shall be sufficient if it contains a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged."

36. The above position was amplified by Kimaru J (as he then was), in the case of Kipkurui Arap Sigilani v Republic, [2004] 2 KLR, 480 in which he stated that:

> " The principle of the law governing charge sheets is that an accused should be charged with an offence known in law. The offence should be disclosed and stated in a clear and unambiguous manner so that the accused may be able to plead to specific charge that he can understand. It will also enable the accused to prepare his defence."

37. On its part, Section 382 of the *Criminal Procedure Code* provides as follows:

> " Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice. Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard

to the question whether the objection could and should have been raised at an earlier stage in the proceedings."

38. The Court of Appeal, in the case of Joseph Onyango Owuor & Cliff Ochieng Oduor v R [2010] eKLR, dealt with a somewhat similar protest to the one raised herein, though on a charge of robbery with violence. In that case, the Appellant had contended that Section 296(2) of the *Penal Code* does not create an offence but merely makes provision for the punishment for robbery with violence. In answering the issues, the Court stated as follows:

> " Mr. Musomba submitted that unless the aforequoted sub-section (section 296) is read with section 295 of the penal code, then reliance on section 296(2), above, without more will not disclose the commission of an offence. Section 295 of the penal code defines the offence of robbery. Section 296(1) and 292(2) of the penal code, have a common marginal note, namely "punishment of robbery". In this country marginal notes are as a general rule, read together with the section. By the ejusden (sic) generis rule, section 296 (1) and 296 (2), have to be read together. Section 296(1), above, provides that a person who commits the felony of robbery is liable to imprisonment for fourteen years. So that when dealing with the offence under section 296(2) of the penal code one has to read the statement of the offence as referring to the aggravated circumstances of the offence, or the robbery provided for under section 296(1) of the penal code."

39. Applying the tests above, I find that the particulars of the offence were clearly spelt out in the charge sheet, and these included the section of the law creating the offence, the date of the offence, the place of the offence, the act constituting the offence and the name of the victim. In the circumstances, my view is that even if there was any defect, the same was minor, not material, and could not honestly have occasioned any injustice or vitiate the conviction.

b. Whether the Appellants' rights to a fair trial were violated by not being informed of his right to legal representation

40. In respect to the 1st Appellants' allegations that they were not informed of their right to legal representation, I agree that the right to fair trial is not only a fundamental principle of law, but is also one of the 4 rights that are recognized under Article 25 of *the Constitution* as being non-derogable. It is true that departure therefrom amounts to violation of an accused person's right to a fair trial as prescribed under Article 50 of *the Constitution*. A grievance of this nature was interrogated by the Court of Appeal in the case of Julius Kitsao Manyeso v R [2023] KECA 827 (KLR) and answered in the following terms:

> " 19. This court (Kairu, Mbogholi-Msagha and Nyamweya JJA) held in William Oongo Arunda (Hitherto referred to as Patrick Oduor Ochieng) *v Republic (Criminal Appeal 49 of 2020*) [2022] KECA 23 (KLR) that the operative circumstance that triggers the necessity of legal representation in criminal proceedings is where substantial injustice would occur arising from the complexity and seriousness of the charge against the accused person, or the incapacity and inability of the accused person to participate in the trial. The court also noted that it should be standard practice in every criminal trial for the accused person to be informed, at the onset, of his right to legal representation since *the Constitution* demands it. However, in the present appeal, the appellant did not raise the issue of legal representation either in the trial court and the High Court, and the record of the trial court shows that the

> appellant participated in the trial and cross-examined the witnesses, and it is not evident that he suffered any or any substantial injustice. For these reasons, we do not find any merit in the appellants arguments that their rights to a fair trial on under articles 50(2)(g) and 50(2)(h) of *the Constitution* were violated."

41. Like in the Court of Appeal case above, in this case, too, the Appellants did not at anytime raise the issue of legal representation before the trial Court, they participated in the trial and cross-examined witnesses. It has also not been demonstrated that they suffered any or any substantial injustice. I cannot therefore find any evidence that the Appellants' rights to a fair trial under Articles 50(2)(g) and 50(2)(h) of *the Constitution* were violated.

c. Whether the voir dire examination conducted on the complainant-minor was defective

42. Although it is not in dispute that the minor being a child of 10 years, the trial Magistrate did take him (PW2) through a voire dire examination before taking his evidence, the 1st Appellant's Counsel contends that the trial Magistrate erred in the manner that she did so because she did not ascertain whether the minor "understood the meaning of an oath" and "the duty of telling the truth". Regarding voire dire examination, the Court of Appeal, in the case of Maripett Loonkomok v Republic [2016] eKLR, guided as follows:

> "We turn to consider the effect of failure by the trial court to administer voir dire on the complainant. It is firmly settled that not in all cases that voir dire is not administered or is not administered properly the entire trial would be vitiated. This Court sitting at Nyeri has recently reiterated what has been said many times before that that question will depend on the peculiar circumstances and particular facts of each case. See James Mwangi Muriithi v R, Criminal Appeal No.10 of 2014."

43. In this case, although it is true that the trial Magistrate did not expressly ask the minor whether "he understood the meaning of an oath" and "the duty of telling the truth", I do not find this to have in any way prejudiced the Appellants since the Magistrate, after examining the minor, at the end of the day directed that the minor gives unsworn testimony which is what he did. The presumption therefore is that the trial Magistrate was satisfied that the minor had not impressed him as one who, despite his age, "understood the meaning of an oath" and "the duty of telling the truth". Had the Magistrate, despite this finding, still proceeded to allow the minor to give sworn testimony, then the Appellants could have had a genuine grievance. In this case however, the minor gave unsworn statement. In my view, the Appellants have not at all demonstrated how this disadvantaged them.

d. Whether the prosecution case was proved beyond reasonable doubt

44. The offence that the Appellants were convicted of was "grievous harm" contrary to Section 234 of the *Penal Code*, which provides as follows:

> "Any person who unlawfully does grievous harm to another is guilty of a felony and is liable to imprisonment for life."

45. To secure a conviction under the offence of "grievous harm" therefore, the elements that the prosecution has to prove are that

    (i) the victim sustained grievous harm,

    (ii) the harm was caused unlawfully and

(iii) the accused caused or participated in causing the "grievous harm".

46. The definition of "grievous harm" is itself set out at Section 4 of the *Penal Code* 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".

47. In breaking down the above provisions of law and principles, the Court of Appeal, in the case of; John Oketch Abongo v Republic [2000] eKLR held as follows:

> "Whether or not grievous harm or any other form of harm is disclosed must be a matter for the court to find from the evidence led and guided by the definition in the *Penal Code*. A court will be assisted by medical evidence given in coming to the conclusion on the nature and classification of the injury. In many cases the courts have accepted and gone by the findings and opinions in the medical evidence. But, in appropriate circumstances, the court is at liberty to form its own opinion, having regard to the evidence before it as to the nature and classification of the injury.
>
> In this case we have carefully considered the medical evidence and the findings made by the Clinical Officer both in the P3 form and in the evidence in court. We have also carefully considered the definition of grievous harm as contained, not only in the *Penal Code* already quoted in this judgment, but also in the P3 form to which we were referred by Mr. Onsongo.
>
> We are satisfied that the complainant's injury amounted to grievous harm as defined in the *Penal Code*. The definition contains several ingredients of what constitutes grievous harm. We are of the opinion that the presence of any one of these ingredients would suffice to disclose grievous harm. Here, we are satisfied that the complainant's injury did amount to dangerous or serious injury to health both of which are ingredients contained in the definition." (emphasis added).

48. From the foregoing, it is clear that although the definition of "grievous harm" contains several ingredients, proof of the presence of any one of those ingredients is sufficient to disclose the offence.

49. As a result of the definition and principles above, it is now generally agreed, as has been restated in various authorities, that the specificities of "grievous harm" are therefore;

(i) in the case of "grievous harm", the injury to health must be permanent or likely to be permanent, whereas, to amount to "bodily harm", the injury to health need not be permanent,

(ii) a mental injury may amount to grievous harm but not to bodily harm, and

(iii) the injury must be of such a nature as to cause or be likely to cause permanent injury to health.

50. In this case, the Clinical Officer (PW3) examined the minor and identified multiple soft injuries, inter alia, bruises on the left part of the head along the hairline, swelling on the right part of the head along the hairline, a bruise on the right ear on the corner part, tenderness on the chest, left side of the ribs and left abdomen, bruises on the left-hand knuckles, bruises on the right hand on the dorsal aspect, a septic wound with pus on the right buttock with skin peeling off, and also pains on the ankle joint. It was evident that the minor had been through a vicious beating and had sustained the injuries therefrom. The Clinical Officer classified these injuries as "grievous". The injuries alleged by the complainant in his testimony were clearly corroborated by the medical evidence on record. The Investigating Officer

(PW4) also confirmed that the injuries were still visible when the minor was brought to the police station on 16/07/2023.

51. A look at the extent of the injuries listed in the P3 Form clearly indicates "harm" which in accordance with the definition given in Section 4 of the *Penal Code* "amounts to a maim or dangerous harm", or "serious or permanent injured health", or "is likely so to injure health" or "cause permanent" or "serious injury to external or internal organ, membrane or sense". It is therefore apparent that. from the evidence on record, the trial Magistratel correctly found that the minor sustained injuries that were "grievous".

52. The 1st Appellant's Counsel contends that the P3 Form was filled 5 days after the alleged incident, and that although the minor was reported to have been treated at Chepkorio Health Centre on 13/7/2023, no treatment notes were produced. According to him, for the Court to be convinced that indeed the injuries alleged in the P3 Form were the same as those noted when he was first attended to at Chepkorio Health Centre 2 hours within the injury being suffered, it was expected that the Court be provided with the treatment notes from Chepkorio Health Centre. He urged that the exclusion of such earlier medical reports could be by design and points towards deliberate untruth with a view to conceal what exactly happened on the material date. I am not persuaded by this line of argument since no contrary medical evidence was presented and Counsel is also merely basing his submissions on speculation. In any event, the P3 Form clearly indicates that the injuries were approximately 126 hours (5 days and 6 hours).

53. Again, I am not persuaded by Counsel's argument that that the complainant's evidence is full of inconsistencies merely because although the minor alleged that the 1st Appellant stepped on his stomach and held her neck, the P3 Form does not reflect any injuries suffered on the neck, and also that even though the minor alleged that salt and diesel were inserted in his anus, the medical report did not reflect any of such. Even assuming that this argument is correct, its effect is so minimal to the case since the rest of the injuries alleged, and they were many, are consistent with the injuries listed in the P3 Form.

54. On the second element, namely, proof that the injuries sustained by the minor were "caused unlawfully", and thus without legal justification or excuse, my view is that the evidence on record points to the beatings being a consequence of the "stealing" or unauthorized harvesting of potatoes, by the minor, from the 1st Appellant's farm. While the same may indeed have been an act of a devious child and he may indeed have required to be disciplined, the nature of the violence meted out on the minor in the name of "discipline" was far and beyond what would be expected. The same cannot therefore be termed "legal". In any event, no "lawful" reason for the assault was alleged. Under these circumstances, I have no reason to disagree with the trial Magistrate on her finding that there was proof that the injury sustained by the minor "was caused unlawfully", and thus "without legal justification or excuse".

55. On the third element, "identification" and/or participation of the Appellants in the offence, the Court of Appeal, in the case of Cleophas Wamunga v Republic [1989] eKLR cautioned as follows:

> " Evidence of visual identification in criminal cases can bring about miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimize this danger. Whenever the case against a defendant wholly depends or to a great extent on the correctness of more identifications of the accused which he alleges to be mistaken, the Court must warn itself of the special need for caution before convicting the defendant in reliance on the correctness of the identification".

56. In this case, the Appellants did not deny the minor's allegations that they were well-known to each other as they are neighbours, which testimony was also reiterated by the minor's mother (PW1).

According to the Investigating Officer (PW4) too, the report made at the police station was that the minor had been assaulted by a group of 7 people "known to him". Among the 7 assailants, the minor expressly identified the 1st Appellant as the one in whose house he was locked and beaten up. In fact, he expressly stated that it is the 1st Appellant who locked him up in her house and then called the other assailants, including the 2nd Appellant, who then came and assisted the Appellant in executing the "mob justice" on the minor. The assault is also said to have occurred during the day. This was therefore a case of "recognition" rather than identification of a stranger. Such evidence of "recognition" is clearly more reliable and believable in "identification".

57. In light of the foregoing, I am also satisfied that the trial Magistrate correctly found that the Appellants were positively identified. The ground of Appeal challenging "identification" also therefore fails.

58. On the Appellants' "participation" in the beating, the minor narrated, in detail, the harrowing experience that he underwent at the hands of the assailants. In respect to the 1st Appellant, he was emphatic that it is her who locked him in the house and called the other accused persons, and further, actively participated in the beating. He was particular in his testimony and described the role played by the 1st Appellant in the whole beating, including that she even stepped on his stomach and beat him with sticks and/or firewood. Regarding the 2nd Appellant, the minor also described her participation and expressly mentioned her as one of the people who beat him up using sticks and firewood

59. I also agree that the Appellants' defence was simply a mere denial of the incident and which did not at all tackle the specific accusations raised against her. The 1st Appellant simply stated that she "was not around" but she did not say where she had gone to and also, she did not give the name of any person who could have vindicated her on her alleged absence. The 2nd Appellant simply denied participating in the assault. Any presumed alibi defence was obviously false as the Appellants were both emphatically placed at the scene of crime by both the minor (PW2) and the minor's mother (PW1). During their cross-examination of the prosecution witnesses, they never also alluded to any such alibi defence. Raising the same for the first time when giving their statement was therefore clearly an afterthought.

60. It is therefore true that although the primary testimony against the Appellants in this case was the one given by the minor, my view is that such testimony was sufficiently corroborated by the testimony of other witnesses. Besides the minor, the minor's mother also placed the 1st Appellant at the scene of crime. According to the mother, the minor also told her that the 2nd Appellant, too, was among the assailants and that the minor maintained this same account throughout. The investigating Officer also testified that from his own independent investigations, he established that indeed the Appellants were amongst the people who committed the assault.

61. No justification has therefore been demonstrated to warrant this appellate Court's interference with the verdict of conviction arrived at by the trial Court. In the premises, I find no reason to interfere with the Appellants' conviction. From the evidence tendered, I am satisfied that the trial Magistrate correctly found that the prosecution had proved the offence beyond reasonable doubt.

e. Whether the sentence of 30 years imprisonment was justified

62. The applicable principles in considering sentence on appeal were restated by the Court of Appeal in Bernard Kimani Gacheru v Republic [2002] eKLR, in the following terms:

> " It is now settled law, following several authorities by this Court and the high Court, that sentence is a matter that rests in the discretion of the trial Court. Similarly, the 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 the wrong material, or acted on the 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 stated is shown to exist".

63. As earlier observed Section 234 of the *Penal Code* provides as follows:

> " Any person who unlawfully does grievous harm to another is guilty of a felony and is liable to imprisonment for life."

64. In view thereof, it is clear that the sentence imposed by the trial Court was within the statute. This observation does however not mean that this Court cannot determine the issue whether the sentence was manifestly excessive or harsh, which I now hereby do.

65. The Supreme Court, in the case of Francis Karioko Muruatetu & Another v Republic [2017] eKLR), guided that, in sentencing, the following mitigating factors would be applicable;

(a) age of the offender;

(b) being a first offender;

(c) whether the offender pleaded guilty;

(d) character and record of the offender;

(e) commission of the offence in response to gender-based violence;

(f) remorsefulness of the offender;

(g) the possibility of reform and social re-adaptation of the offender; and

(h) any other factor that the Court considers relevant.

66. I also cite Majanja J, in the case of Michael Kathewa Laichena & another v Republic [2018] eKLR, in which, quoting the Muruatetu case (supra), he stated as follows:

> " The Sentencing Policy Guidelines, 2016 ("the Guidelines") published by the Kenya Judiciary provide a four tier methodology for determination of a custodial sentence. The starting point is establishing the custodial sentence under the applicable statute. Second, consider the mitigating circumstances or circumstances that would lessen the term of the custodial sentence. Third, aggravating circumstances that will go to increase the sentence. Fourth, weigh both aggravating and mitigating circumstances. ....."

67. Similarly, in the case of Daniel Kipkosgei Letting v Republic [2021] eKLR, the Court of Appeal pronounced itself as follows;

> " ..... we observe that the purpose and objectives of sentencing as stated in the Judiciary Sentencing policy should be commensurate and proportionate to the crime committed and the manner in which it was committed. The sentencing should be one that meets the end of justice and ensures that the principles of proportionality, deterrence and rehabilitation are adhered to. ....."

68. Applying the above principles to the facts of this case, I consider that the offence of "grievous harm" committed by the Appellants was a serious one and under the *Penal Code*, is categorized as a felony. The statutory punishment being set at up to life imprisonment is enough evidence of its seriousness. It is a crime therefore always severely punished. It is also relevant to note that the victim in this case was a young boy of only 10 years old who was needlessly subjected to "mob justice" by adults. The attack was also savage and barbaric as confirmed by the extent of injuries inflicted. While some of the assailants hit him with sticks and other crude weapons, the 1st Appellant even stepped on his stomach while others pulled his ears. To aggravate his pain, the assailants even undressed the minor and while he was naked, poured and/inserted paraffin and salt in his anus. Even with this state and extent of injuries, instead of taking him to hospital, the assailants left the boy to his own devices, with no medical attention extended. Had he not been attended to by her grandmother, his fate could have been different. The motive of the attack was also unreasonable as it appears that it was because the boy was caught harvesting the 1st Appellant's potatoes, perhaps out of hunger and starvation. As adults, instead of sympathizing with the boy, and perhaps even offering him food, and or in the alternative, report him to his parents or guardians for indiscipline, or even to the authorities for action, they instead took matters in their own hands, frog-marched the boy to the 1st Appellant's house, locked him up and viciously applied "mob justice" on him. A boy of 10 years? What kind of heartless people were these?

69. The minor will no doubt suffer lifelong trauma resulting from the assault. Taking all these factors into account, it cannot be denied that the Appellants and their co-accused merited a stiff and deterrent sentence.

70. Having said so however, and although I note that the Appellants were given the opportunity to mitigate, which they did, I also find the existence of some mitigating factors. The Appellants' ages age has not been disclosed but they appear to be in their prime. The Appellant, in their mitigation, stated that they are single parents and the 1st Appellant stated that she has been unwell. Although the offences they were convicted of merits their being put away for a long time, I believe that retribution will be best achieved, not by incarcerating them for an unreasonably long period of time but by giving them a second chance in life, to come out of jail, once they have hopefully learnt their lesson, rebuild their lives and also bring up their or children. According to the prosecution, they were also 1st offenders. In the circumstances, I find that there is justification to reduce the prison sentence of 30 years.

Final orders

71. In the end, I make the following Orders:

    i. The appeals against conviction fails and the conviction is upheld.

    ii. On sentence, I hereby set aside the sentence of 30 years imprisonment imposed by the trial Court and substitute it with one of 10 years imprisonment to apply to each of the two Appellants.

    iii. Since as aforesaid, the Court Registry staff discovered that the 1st Appellant also filed a subsequent Appeal, namely, Iten High Court Criminal Appeal No. E023 of 2024 in respect to the same conviction and sentence the subject hereof, and had therefore filed 2 parallel Appeals, the said subsequent Appeal, namely, Iten High Court Criminal Appeal No. E023 of 2024, now also therefore also stands determined and all the said 3 files are now marked as closed.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 23RD DAY OF MAY 2025.

.....

WANANDA J. R. ANURO

JUDGE

Delivered in the presence of:

The Appellant

Mr. Wainaina for the Appellant

N/A for the State

Court Assistant: Edwin Lotieng