



REPUBLIC OF KENYA



**KENYA LAW**  
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**Kiboi & 4 others v Republic (Criminal Appeal E070, E021, E071, E072 & E073 of 2024  
(Consolidated)) [2025] KEHC 6708 (KLR) (20 May 2025) (Judgment)**

Neutral citation: [2025] KEHC 6708 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NYERI  
CRIMINAL APPEAL E070, E021, E071, E072 & E073 OF 2024 (CONSOLIDATED)  
DKN MAGARE, J  
MAY 20, 2025**

**BETWEEN**

**JOHN RITHO KIBOI ..... 1<sup>ST</sup> APPELLANT  
JOHN RITHO MUTHONI ..... 2<sup>ND</sup> APPELLANT  
PAUL KIBOI MUTHONI ..... 3<sup>RD</sup> APPELLANT  
EVANS WATITU KABUI ..... 4<sup>TH</sup> APPELLANT  
KENNETH WACHIRA KARIUKI ..... 5<sup>TH</sup> APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Appeal arises from the Judgment of the trial court, judgement and conviction by the Senior Resident Magistrate Hon. Lubia N. Mercyline in Nyeri Criminal Case No. E326 OF 2020.)*

**JUDGMENT**

1. This appeal arises from the Judgment of the trial court, judgement and conviction by the Senior Resident Magistrate Hon. Lubia N. Mercyline in Nyeri Criminal Case No. E326 OF 2020. The Appellants were charged with the offence of Grievous Harm contrary to section 234 of the [Penal Code](#) and sentenced to 20 years imprisonment. The appeal is against the conviction and sentence meted out to the Appellants. The matter was initially filed as a combined petition of appeal. I directed that each appellant file their appeals.
2. However, the matters were thereafter consolidated HCCRA NO. E070 OF 2024 as consolidated with HCCRA NO. E021 of 2024, HCCRA NO. E071 OF 2024, HCCRA NO. E072 OF 2024 and HCCRA NO. E073 OF 2024.



3. All the Petitions of Appeal were identical in every aspect. Each of the Appellants raised the following grounds, which we have edited slightly to remove tautology:
  1. The learned magistrate erred in both points of law and facts for failing to note that the prosecution's evidence was inadequate to hold a conviction.
  2. The learned trial magistrate erred in both points of law and facts by convicting the appellant without considering that the prosecution evidence was full of contradictions and was not corroborated which was inconsistent with the provisions of the *evidence Act*.
  3. The trial magistrate erred in both matters of law and facts by imposing a harsh sentence without considering the fact that being a first offender, the appellant was lawfully entitled and qualified to benefit from Article 50(2) of *the Constitution*.
  4. The Learned Senior Resident Magistrate erred in Law and in fact by relying on evidence of identification, without observing that the lighting conditions prevailing at the scene as well as the time of the offence is alleged to have taken place were absolutely difficult for a witness to make any significant identification and thus an injustice was thus occasioned.
  5. The learned trial magistrate erred in both points of law and facts by disregarding the appellant's defence without giving cogent reasons.
  6. That the Learned Senior Resident Magistrate erred in Law and in fact in convicting the appellant on evidence that was not corroborated, substantiated, credited, consistent, full of contradictions and one that the prosecution never proved its case beyond reasonable doubt being the standard of proof for criminal cases and thus an injustice was occasioned.
  7. The learned trial magistrates erred in law and in fact in convicting the appellants without taking into consideration that the totality of the evidence presented by the Prosecution witnesses was not one that would sustain a conviction and thus an injustice was occasioned.
  8. The learned trial magistrates erred in law and in fact in convicting the appellant without taking into consideration that the evidence produced in court did not directly or indirectly link the Appellant to the offence.
  9. The learned trial magistrates erred in law and in fact in convicting the appellant without taking into consideration that the medical evidence relied upon was not collaborated and was full of pure negligence.
  10. The learned trial magistrates erred in law and in fact in convicting the appellant without taking into consideration that the evidence adduced by the Investigating Officer was not properly documented and it was clear it was full of contradictions, inconsistent, uncredited, uncollaborated, pure negligence and malice.
2. There are two petitions of appeal. The first one filed on 17.05.2024 raises the following grounds of appeal.
  - a. The learned trial Magistrate erred in Law and in fact by relying on evidence of identification without observing that the lighting conditions prevailing at the scene and at the time the offence is alleged to have taken place made it absolutely difficult for witnesses to make any significant identification.
  - b. The learned trial Magistrate erred in Law and in fact in convicting the appellants on evidence that was uncorroborated, unsubstantiated, uncredible, inconsistent, full of contradictions and



one that the prosecution never proved its case beyond reasonable doubt being the standard on proof for criminal cases.

- c. The learned trial Magistrate erred in Law and in fact in convicting the appellants without taking into consideration that the totality of the evidence presented by the prosecution witnesses was not one that could sustain a conviction.
2. The first petition of appeal challenges the conviction only. However, the amended petition, along with subsequent petitions filed in the series, raise an additional issue concerning the imposition of a harsh sentence allegedly without the appellants having benefited from the safeguards provided under Article 50(2) of *the Constitution*. Accordingly, the court will address two key issues in respect of each appeal:
    - a. Whether the conviction was proper in law based on the evidence presented; and
    - b. Whether the sentence imposed was lawful, fair, and in accordance with the constitutional guarantees under Article 50(2) of *the Constitution*.

### **Background and Evidence**

4. The Appellants were charged with one count of grievous harm contrary to Section 234 of the *Penal Code*. The particulars were that on 17.11.2019, at Kiaragana Village in Kieni West Subcounty within Nyeri County, they jointly unlawfully did grievous harm to John Gichuki Kimani.
5. The Appellants were the 1-5 Accused persons in the trial court. The appellants were arraigned in court on 18.12.2020, where they pleaded not guilty. this was one year, one month and one day after the incident occurred. The appellants were released on bond. The Appellants posted bail as follows:
  - a. first Appellant on 26.04.2021
  - b. second Appellant on 08.04.2021
  - c. third Appellant on 10.05.2021
  - d. fourth Appellant on 31.03.2021
  - e. fifth Appellant on 8.04.2021
6. John Gichuki Kimani, the complainant, testified on 12.04.2021 as PW1. He stated that on 17.11.2019 at 9.00 pm, he was on his way home. He met the accused persons while armed, and they started attacking him. he called out all the accused by name. he was hit by a metal rod, fracturing his right hand. The first appellant had a mason's hammer, which he hit the witness on the head. He lost consciousness. The appellants kicked him with kicks and blows. He taken to Mathari Hospital and later woke up and found himself in Outspan Hospital. The matter had been reported by the sister to the Kiawara police station.
7. On cross-examination by the 1-3 appellants, PW1 stated he was from the bar but was not drunk. He had earlier been in a bar in the Ganyuthe area, and he said the bar was known to the appellants.
8. On cross-examination by the fourth Appellant and fifth Appellant, the witness stated that the documents produced by the prosecutor did not include hand injury. He stated that he had stopped using alcohol, though he was in the bar before the incident occurred. He stated that the first appellant was in the bar and had an altercation with the witness. He also saw the fourth appellant in the bar. They were quarrelling about the pride of the witness and his family.
9. The witness stated that he left the bar with his wife. The first Appellant went back to the bar after the altercation. He stated that though he could not describe the clothes the suspects were wearing, the first



- Respondent had a mason hammer in his right hand and was wearing orange jeans and safari boots. The second Appellant did not have any weapon. The third Respondent also did not have any weapon.
10. The witness stated that the fifth Appellant may have been wearing a leather jacket, but the witness was not sure about the fifth accused's clothes. On re-examination, PW1 stated that he saw his attackers.
  11. Mary Wanjiru Ndirangu (PW2) testified that she received a call from her niece, Ruth Wangui Gichuki, who explained that her brother (PW2) had arrived home bleeding. A vehicle was arranged, and Ruth Wangui Gichuki along with Baba Baragu took him to the hospital. She reported the matter to Kiawara Police Station on 21.11.2019. Additionally, she stated that PW1 was taken to Outspan Hospital on the same day, 21.11.2019.
  12. On cross-examination, by counsel for the 1-3 Appellants, she stated that she did not see PW1 on the date he was beaten. He stated that she reported to the police station after being told to report by the assistant chief.
  13. On cross-examination, by counsel for the fourth and fifth appellant she stated that PW1 and his wife first went to her house before going to the bar. she testified that Elizabeth was left at her home. she went to the police station with Elizabeth to report.
  14. PW3 was corporal James Njoka of Kiawara police station. He stated that on 19.11.2019 at 10:00 a.m., he received a report of an assault case which was minuted to him for investigation. The complaint indicated that the incident had occurred on 17th November 2019 at around 9:00 p.m., and that the complainant had been assaulted by individuals known to him. Upon investigation, it was established that the complainant had been waylaid by five individuals. In an attempt to shield himself, he used his hand, but he fell, after which the assailants began pelting him with stones. The first appellant was reportedly armed with a hammer, which he used to strike the complainant on the left side of his head.
  15. PW3, further testified that the complainant was hospitalized and discharged on 30.12. 2019. He was issued with a P3 form, which was subsequently filled at the Nyeri Provincial General Hospital. The degree of injury was assessed as grievous harm. He further stated that the appellants were arrested on 17.12.2020.
  16. On cross-examination, he stated that the incident took place on a road. He did not know why the appellants attacked the complainant. He stated that the suspects had gone into hiding after the incident.
  17. Dr William Muriuki testified as PW4. He stated that he was a medical doctor at Nyeri Provincial General Hospital and held a degree in Medicine and Surgery. On 18th November 2019, he received a report from Kiawara Police Station concerning a patient, PW1. Upon examination, PW1 was found to have sustained a severe head injury, including a depressed scalp fracture and a laceration on the head. He underwent surgery as a result of these injuries. The injuries were consistent with trauma inflicted by force using a blunt object. PW4 produced the duly completed P3 form in evidence.
  18. During cross-examination by the first appellant, PW4 stated that he used notes from Outspan Hospital and that the patient provided the history. The rest of the accused cross-examined the witness, who acknowledged that the report did not specify whether the complainant was conscious or unconscious. He further explained that he examined the witness five months after the incident and had extracted notes from the initial treatment records. On re-examination, he confirmed that the notes did not indicate whether the patient was conscious or unconscious.
  19. The appellants were placed on their defence. After Section 211 of the *Criminal Procedure Code* was explained to them, they each made their choices. The first appellant opted to remain silent, while the



rest chose to give evidence and call one witness. The court then stamped its authority for the matter to proceed, and the hearing resumed with the appellants effectively taking the lead—metaphorically described as starting the “reed dance” with the hearing. Repeated attempts were made to delay the proceedings, with various excuses being advanced. However, the court, having exhausted its patience, firmly directed that the matter to proceed. Following this directive, the hearing progressed smoothly without further interruption.

20. The first appellant chose to remain silent, thereby exercising his constitutional right against self-incrimination. The second appellant gave sworn testimony on 4.12.2023. He stated that he knew the complainant and heard that he had been beaten in November 2019. He stated he did not know what happened that night. On cross-examination, he stated that he was not in Kiawara Trading Centre, on the said day. He heard animals and took care of onions. He did not say where he was.
21. The third appellant stated that he lived in Gitegi. He stated that he was not at the said place, and he did not say where he was. He stated that he was nowhere near the incident. He stated he heard that the first appellant had fought with the complainant.
22. The third appellant testified that he resided in Gitegi. He denied being present at the scene of the incident but did not disclose his whereabouts at the material time. He maintained that he was nowhere near the incident location. He further stated that he only heard that the first appellant had been involved in a fight with the complainant.
23. The fourth appellant testified that he too had heard that the first appellant had been involved in a fight with the complainant. He stated that he was married into the first appellant’s family and was arrested approximately one year after the incident. He indicated that he worked in the bodaboda business. On the day in question, he accompanied the first appellant to the trading centre to purchase some items. After making their purchases, they passed by Nduriri’s bar, where they consumed alcohol and became intoxicated.
24. He further stated that by the time they entered the bar, they were already intoxicated. According to his testimony, a fight then ensued between the complainant and the first appellant outside the bar. Following the altercation, the complainant fled the scene. The fourth appellant testified that he subsequently took the first appellant home and that only the two of them were present at the time. He explained that his involvement arose solely because he was acting as a rider.
25. The fifth Appellant testified DW4. he stated that that he heard someone had been assaulted, but he was not present at the scene of the incident. He stated that he was arrested approximately one year after the incident. According to him, he only heard that the complainant had beaten the first appellant and reiterated that he was not at the scene when the alleged assault took place.

### **Submissions**

26. The Appellant filed submissions dated 15.01.2025. They submitted that there are two issues in these matters, that is:
  - i. Whether the prosecution proved their case beyond reasonable doubt.
  - ii. Whether the sentence imposed against the appellants by the trial court was manifestly excessive
27. They stated that the court prosecution was under duty to prove the three elements. They stated that grievous harm is defined in Section 4 of the [Penal Code](#) ought to be considered and which provides 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 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.”

28. They submitted that the examination was carried out months after the offence and extracted notes from the initial doctor’s notes. The doctor further states on cross-examination that he did not indicate any other injuries other than to the head.

29. They submitted that based on the evidence presented, it is not clear and safe to conclude that the complainant had head injuries as well as a hand fracture in the absence of treatment notes to corroborate the allegations. They stated that, it was noted that at paragraph 9 of the judgment as follows:

“...I note that there were alterations on the face of the P3 form. I note that these alterations were on the part filled by the police officer and not the part filled by the doctor. I wonder why an investigating officer would feel confident enough to tender such evidence to be used in court noting very well that this is a criminal matter and that the evidence produced must be solid. Was it a case of negligence, incompetence or just malice?”

30. It was further submitted that the critical elements of the offence were not proven beyond a reasonable doubt, particularly due to the alleged lack of proper identification of the appellants from the mob that allegedly attacked the complainant. However, the evidence on record, especially from PW1, suggests otherwise.

31. They stated that the complainant found himself when he came to, the proper dates on when he was discharged, and the general lack of discharge summary and institutional records to prove the facts alleged. They submitted that the standard of proof in criminal matters is beyond a reasonable doubt. They relied on the decision of Mativo J, (as he then was) in the case of Elizabeth Waiithiegeni Gatimu vs. Republic (2015) eKLR.

32. The Appellants also submitted that there were discrepancies and inconsistencies in the evidence by the prosecution. Therefore, it was submitted that the testimony and evidence of the prosecution witnesses lacked credibility.

33. Furthermore, the appellants contended that the sentence imposed was manifestly excessive. In support of their position, they cited the decision of L.N. Njuguna, sitting in Embu, in the case of Makumbi v. Republic [2022], where the court relied on the Supreme Court of India’s decision in State of M.P. v. Bablu Natt [(2012) SCC 648], which held similarly on the issue of evidentiary inconsistencies undermining the prosecution’s case as follows:

“Sentencing is an important task in the matters of crime. One of the prime objectives of the criminal law is imposition of an appropriate, adequate, just and proportionate sentence commensurate with the nature and gravity of the crime and the manner in which the crime is done. There is no straitjacket formula for sentencing an accused on proof of crime. What sentence would meet the ends of justice depends on the facts and circumstances of each case and the court must keep the gravity of the crime, motive for the crime, nature of the offence and all other attendant circumstances.”

34. The appellants prayed that the appeal be allowed in its entirety, both as to conviction and sentence.



35. The Respondent filed submissions dated 6.3.2025. They stated that the court decision was proper and that the court rightly sentenced the appellants to 20 years' imprisonment. According to the Respondent, 20 years out of the possible life sentence is proper. They relied on the case of *Ambani v Republic* [1990] 161 KLR.
36. The Respondent submitted that there are three y stated that they relied on the case of *Ambani –Vs– Republic* (1990) KLR 161. They submitted that the court stated that a sentence imposed on an accused person must be commensurate to the offender's moral blameworthiness and that it is not proper to exercise discretion in sentencing for the court to fail to look at the facts and circumstances of the case in their entirety before settling for any given sentence. They relied on the Court of Appeal case of *Shadrack Kipkoech Kogo - vs - R. Eldoret Criminal Appeal No.253 of 2003*,
37. The appellants argued that the state was required to prove three essential elements under Section 231, as read with Section 234 of the *Penal Code*. These elements are:
- a) The victim sustained grievous harm.
  - b) The harm was caused unlawfully.
  - c) The accused caused or participated in causing the grievous harm.
38. According to the Respondent, these elements were sufficiently proven. They submitted that the first element was established through the complainant's testimony and the P3 form. The second element, unlawful harm, was evident from the evidence presented by the Respondent. Finally, the identity of the perpetrator was clearly established as the appellant. the sentence was said to be reasonable and befitting the crime committed.

## Analysis

39. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand. The duty of the first Appellate court remains as set out in the Court of Appeal for Eastern Africa in *Pandya -vs- Republic* [1957] EA 336 as follows:-
- “On a first appeal from a conviction by a Judge or magistrate sitting without a jury the appellant is entitled to have the appellate court's own consideration and views of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the witnesses before the Judge or magistrate with such other material as it may have decided to admit. The appellate court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises which witness is to be believed rather than another and that question turns on manner and demeanor, the appellate court must be guided by the impression made on the Judge or magistrate who saw the witness but there may be other circumstances, quite apart from manner and demeanor which may show whether a statement is credible or not which may warrant a court differing from the Judge or magistrate even on a question of fact turning on the credibility of witnesses whom the appellate court has not seen.”
40. Appellants, on a first appeal are entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and the function of this court is not merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions. The duty is for the court to make its own findings and draw its own conclusions having regard that the trial court had the



advantage of hearing witness evidence and observing their demeanour. In the case of *Okeno v Republic* [1972] EA 32 at 36 the East Africa Court of Appeal stated on the duty of the Court on a first appeal:

“An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (*Pandya v. R.*, [1957] E. A. 336) and to the appellate court’s own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (*Shantilal M. Ruwala v. R.*, [1957] E.A. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court’s findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate’s findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see *Peters v. Sunday Post*, [1958] E. A. 424.”

41. The standard of proof is on beyond reasonable doubt. In the case of *R vs. Lifchus* {1997}3 SCR 320 the Supreme court of Canada explained the standard of proof as doth:-

“The accused enters these proceedings presumed to be innocent. That presumption of innocence remains throughout the case until such time as the crown has on evidence put before you satisfied you beyond a reasonable doubt that the accused is guilty...the term beyond a reasonable doubt has been used for a very long time and is a part of our history and traditions of justice. It is so engrained in our criminal law that some think it needs no explanation, yet something must be said regarding its meaning. A reasonable doubt is not imaginary or frivolous doubt. It must not be based upon sympathy or prejudice. Rather, it is based on reason and common sense. It is logically derived from the evidence or absence of evidence. Even if you believe the accused is guilty or likely guilty, that is not sufficient. In those circumstances you must give the benefit of the doubt to the accused and acquit because the crown has failed to satisfy you of the guilty of the accused beyond a reasonable doubt. On the other hand you must remember that it is virtually impossible to prove anything to an absolute certainty and the crown is not required to do so. Such a standard of proof is impossibly high. In short if, based upon the evidence before the court, you are sure that the accused committed the offence you should convict since this demonstrates that you are satisfied of his guilty beyond reasonable doubt.”

42. The legal burden of proof remains constant throughout a trial and does not shift to the accused. *Halsbury’s Laws of England*, fourth Edition, Volume 17, paras 13 and 14 posit as follows:

“The legal burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party’s case. If at the conclusion of the trial he has failed to establish these to the appropriate standard, he will lose. The legal burden of proof normally rests upon the party desiring the court to take action; thus a claimant must satisfy the court or tribunal that the conditions which entitle him to an award have been satisfied. In respect of a particular allegation, the burden lies upon the party for whom substantiation of that particular allegation is an essential of his case. There may therefore be separate burdens in a case of with separate issues.”



43. The standard of proof required in such cases was addressed by Brennan, J in the United States Supreme Court decision in *Re Winship* 397 US 358 {1970}, at pages 361-64 that: -

“The accused during a criminal prosecution has at stake interests of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatised by the conviction...Moreover use of the reasonable doubt standard is indispensable to command the respect and confidence of the community. It is critical that the moral force of criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned.”

44. The ingredients of the offence of grievous harm were elaborated by the Honourable Court in Criminal Appeal No. 88 of 2019 *Pius Mutua Mbuvi Vs Republic* where the Court held:

“I note that the appellant was charged under section 234 of the Penal code and that the same is the punishment section; the charge sheet ought to have indicated section 231 as read with section 234 of the *Penal Code*. For the appellant to be convicted of the offence of doing grievous harm, c/s 231 as read with section 234 of The *Penal Code*, the prosecution had to prove each of the following essential ingredients beyond a reasonable doubt: The victim sustained grievous harm. The harm was caused unlawfully. The accused caused or participated in causing the grievous harm.”

45. The Appellants were charged with 1 count of grievous harm. The offence of grievous harm is established under section 234 of the *Penal Code* as doth:

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

46. Section 4 of the *Penal Code* provides that 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. The appellants argued that the court expressed doubt doubts regarding the sufficiency of the prosecution’s evidence. However, upon reviewing the alleged alterations, I find that they are not material to the determination of the case. The police officer who filled out the P3 form displayed poor handwriting and syntax. While he did initially make errors in recording the appellant’s name—such as mixing capital and lowercase letters and making grammatical mistakes—these were subsequently corrected. He also showed inconsistency in applying either the American or British date format. Nonetheless, these were clerical issues that did not go to the root of the P3 form or affect its evidentiary value.

48. The test for proof of the offence as set out in Section 231 of the penal code as follows:

231. Acts intended to cause grievous harm or to prevent arrest

Any person who, with intent to maim, disfigure or disable any person, or to do some grievous harm to any person, or to resist or prevent the lawful arrest or detention of any person-

- a. unlawfully wounds or does any grievous harm to any person by any means whatever;
- b. or unlawfully attempts in any manner to strike any person with any kind of projectile or with a spear, sword, knife or other dangerous or offensive weapon; or



- c. unlawfully causes any explosive substance to explode; or
  - d. sends or delivers any explosive substance or other dangerous or noxious thing to any person; or
  - e. causes any such substance or thing to be taken or received by any person; or
  - f. puts any corrosive fluid or any destructive or explosive substance in any place; or
  - g. unlawfully casts or throws any such fluid or substance at or upon any person, or otherwise applies any such fluid or substance to the person of any person, is guilty of a felony and is liable to imprisonment for life.
49. The proper test for grievous harm is proof of the following beyond reasonable doubt as set out in Uganda *v Akaka (Criminal Appeal No. 8 of 2015)* [2019] UGHCCRD 12 (28 February 2019), where Mubiru, J stated:
- 14. For the Respondent to be convicted of the offence of Doing grievous harm contrary to section 219 of The *Penal Code Act*, the prosecution had to prove each of the following essential ingredients beyond reasonable doubt;
    - 1. The accused caused or participated in causing the grievous harm.
    - 2. The harm was caused unlawfully.
    - 3. The victim sustained grievous harm.
50. PW1 5 testified that he knew the assailants, not only by appearance but also by name. He stated that the first and fourth appellants were involved in an altercation outside a bar in the Ganyuthe area. The appellants appeared more focused on the injuries to the complainant's hand and whether he was unconscious.
51. In defining grievous harm, the court is not concerned with proving the individual injuries or identifying the person responsible for each injury. Rather, the focus is on the overall nature of the injuries and their dangerous character. The injuries sustained by the complainant were confirmed by the doctor, PW4 as grievous harm. These injuries were life-threatening, resulting in the complainant being hospitalized for over a month and a half. The P3 is usually filled after the patient has healed. questioning the filling of the P3 after five months has no basis. PW4 was not impeached on the professional opinion he made.
52. The consent of the victim was crucial as stated in the case of *Gerald Wathiu Kiragu v Republic* [2016] eKLR, where the court referred to the case of *R versus Luseru Wandera s/o Wandera, Republic versus Luseru Wandera s/o Wandera (1948) EACA 105* where, the court held that though the attempt to murder was not proved against the appellant, the court was entitled to presume that the appellant knew and intended the natural and probable consequences of an assault committed by him with the knife and that those consequences were likely to cause grievous harm; the court thus sustained the conviction under section 220(1) of the Code of wounding with intent to cause grievous harm. By parity of reasoning, the appellant ought to have been convicted for the offence of unlawful wounding rather than attempted murder.
53. Grievous harm is the most serious injury outside murder and allied offences. The P3 and the evidence of all the prosecution witnesses was succinct that the injuries suffered were life threatening. I am satisfied, beyond any reasonable doubt, that the element of grievous harm was proven.



54. The second limb is whether the injuries were unlawfully caused. Parties agree that there was a fight or attack of some kind or another. The injuries were not from a sporting event. They were as such unlawfully caused. I adopt the definition of unlawfully caused by CM Kariuki, J in the case of *Ndung'u v Republic* (Criminal Appeal E002 of 2022) [2023] KEHC 1518 (KLR) (1 March 2023) (judgment), where he stated as follows;

The second element required proof that the harm occasioned on the victim was caused unlawfully, meaning that the same was without legal justification

55. None of the parties stated that she suffered injuries while playing. It was common ground that PW1 was attacked. The only dispute was whether the Appellants caused this or not. The harm must not be caused by play or activity that the parties agreed to. For example, if a person attends a bull fight and is gored, he cannot be said to be unlawfully harmed.

56. In regard to the participation of the accused, it is important to note that the requirement will be satisfied, if one ingredient of the two ingredients of grievous harm is proved and not necessarily all that are set out in Section 231 of the *Penal Code*. This was more eloquently set out in the case of *John Oketch Abongo v Republic* [2000] eKLR where the Court of Appeal (Chunga, C.J., Akiwumi & Owuor, J.J.A.), posited as doth;

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.

57. The actions that resulted in the injury of PW1 were thus unlawfully caused. The next and last question will be whether, each of the Appellants participated in the commission of the offence. In regard to this limb, participation of each of the Accused persons is crucial. There are four defences given. They are:

- a. The right to remain silent
- b. Not being at the crime scene
- c. Intoxication
- d. Contradictory evidence
- e. The right to remain silent

58. The 1st appellant opted to remain silent. his right against self incrimination is sacrosanct. this was addressed in the case of *Mini Cabs & Tours Company Limited v Attorney General & 2 others* (Petition 450 of 2019) [2022] KEHC 11207 (KLR) (Constitutional and Human Rights) (16 June 2022) (Judgment), HI Ong'udi, J posited as follows:

Speaking on the right against adducing self-incriminating evidence the court in the case of *Republic v John Kithyululu* [2016] eKLR opined as follows: "7. The question of self-incrimination has been dealt with in several cases. In the case of *Richard Dickson Ogendo & 2 others v Attorney General & 5 others* [2014] eKLR, Majanja J stated as follows: "To my mind the, the privilege of an accused person not to incriminate himself, protects against compulsory oral examination for the purposes of extorting unwilling confessions or declarations implicating the accused in the commission of the crime. The purpose of protection against self-incrimination was summed up by the US Supreme Court in *Miranda v Arizona* 384 US 436 (1996)"...8. In the case of *Pennsylvania v Muniz* 496 US 582, the United States Supreme Court further held as follows: "The privilege against self-incrimination



protects an "accused from being compelled to testify against himself, or otherwise provide the State with evidence of a testimonial or communicative nature," *Schmerber v California*, 384 US 757, 384 US 761, but not from being compelled by the State to produce "real or physical evidence," *id* at 384 US 764."

51. Equally the court in the case [\*Republic v Mark Lloyd Steveson Criminal Revision 1 of 2016\*](#); [2016] KEHC 4022 (KLR), expounded on the right as follows:

"The privilege against compulsory self-incrimination is part of the common law of human rights. It is based on the desire to protect personal freedom and human dignity. These social values justify the impediment the privilege presents to judicial or other investigations. It protects the innocent as well as the guilty from the indignity and invasion of privacy which occurs in compulsory self-incrimination; it is society's acceptance of the inviolability of human personality. . . .30. I believe that this statement captures the position under the Kenyan Constitution: The right against self-incrimination covers both testimonial as well as documentary evidence. As long as the evidence sought to be adduced is or was compelled either in court or outside court by an Investigating Officer or some other person in authority, such evidence is given due to testimonial obligation and will be excluded from the criminal trial of the accused person who is so compelled.31. It follows that any questioning of or eliciting of any documents or things from an accused person without the proper administration of caution or under circumstances in which the rules on confessions would apply is covered by the right against self-incrimination."

52. The consensus of the existing jurisprudence as seen in the cited authorities is that an accused person's right against self-incrimination constitutes giving oral or documentary evidence that will be used against that person. ....

59. The court cannot, ipso facto hold the exercise of this right against the accused. The right to prove the case is on the state. The burden of proof is on the state. In case there is doubt, such doubt is to be resolved in favour of an accused person. The principle is that the prosecution must prove the guilt of an accused. Viscount Sankey L.C. in the case of *H.L. (E) Woolmington vs. DPP* [1935] A.C. 462 pp 481, comes in handy in describing the legal burden of proof in criminal matters, that:

"Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt subject to what I have already said as to the defence of insanity and subject also to any statutory exception. If at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given either by the prosecution or the prisoner, as to whether [the offence was committed by him], the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained.

60. However, the evidence on record was from all sources. I need to address the evidence of the all the other appellants. Their testimony was of the nature of evidence of accomplices. The evidence this tendered by DW1 TO DW4 is not admissible as against the 1<sup>st</sup> appellant. The requirements for evidence of the accomplices to be admitted has not been met.



61. Regarding evidence of accomplices, the court of appeal [Madan, Miller & Potter JJ A)] in the case of Benard Munungi Njau v Republic [1979] eKLR, posted as follows:

Turning to the question of corroboration of the evidence of Kaigwa, the accomplice, although this was expressly dealt with by both Courts below with reference to dicta in several decided cases including *Akibaya v The Republic* (unreported) and *Canisio s/o Walwa v The Republic* (1956) 23 EACA 453, we would also draw attention to *R v Baskerville* [1916] 2 KB 658, where the rule is adequately stated:

Where on the trial of an accused person evidence is given against him by an accomplice, the corroboration which the common law requires is corroboration in some material particular tending to show that the accused committed the crime charged. It is not enough that the corroboration shows the witness to have told the truth in matters unconnected with the guilt of the accused.

62. The accomplice evidence was in a formal of inadmissible hearsay. There was no other material, corroborating the accomplice evidence. I shall disregard that evidence. PW1 recognized and knew PW1 as the person who hit him using a stone mallet. Madan J.A in *Reuben Taabu Anjononi & 2 Others v Republic* [1980] eKLR,

The proper identification of robbers is always an important issue in a case of capital robbery, emphatically so in a case like the present one where no stolen property is found in possession of the accused. 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).

63. PW1 was able to positively identify all the appellants by way of recognition. in regard to first appellant, evidence had established that he had an earlier altercation with PW1, which culminated in the complainant being waylaid on his way home. PW3 testified that the appellants disappeared from their usual place of residence for over one year and were only arrested thereafter. This testimony was neither challenged in cross-examination nor rebutted in any other way.

64. Notably, the issue of the appellants going into hiding was elicited during cross-examination of the witness and was not contradicted by any of the appellants. The court finds this conduct consistent guilt. For circumstantial evidence to work, it must be inconsistent with the accused's innocence. In the case of *Ahamad Abolfathi Mohammed and Another v Republic* [2018] eKLR, [P. Kihara Kariuki, PCA, M'inoti & Murgor, JJ.A] Court had this to say on circumstantial evidence:

“However, it is a truism that the guilt of an Accused person can be proved by either direct or circumstantial evidence. Circumstantial evidence is evidence which enables a court to deduce a particular fact from circumstances or facts that have been proved. Such evidence can form a strong basis for proving the guilt of an Accused person just as direct evidence. Way back in 1928 Lord Heward, CJ stated as follows on circumstantial evidence in *R v Taylor, Weaver and Donovan* [1928] Cr. App. R 21: -‘It has been said that the evidence against the Applicant is circumstantial. So it is, but circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which, by intensified examination is



capable of proving a proposition with the accuracy of mathematics. It is no derogation from evidence to say that it is circumstantial.”

65. All factors considered, there are no exculpatory evidence inconsistent with the innocence of the first Appellant. I therefore find and hold that the first Appellant was properly convicted in accordance with the law.
66. In regard to the 2nd Appellant, his Defence was that he was at home. he heard of the incident but did not say from whom he heard of the incident. The evidence tendered against him was that the PW1 testified recognized he recognized the 2<sup>nd</sup> second Appellant. There was rebuttal of this evidence. The animus of PW1 was not challenged. there was absolutely no reason to say that the attackers were the Appellants, if it were not true. the injuries were extensively inflicted by people known to the Complainant.
67. It is important that proof of participation by any of the Appellants, however minute their roles, connotes proof of the crime. One does not need to have the actual person who inflicted the blow that resulted in the change of injuries from harm to grievous harm. A common intention is inferred in that respect and, each of them is deemed to have committed the offence as stated in the case of *Kipngetich & 2 others v Republic (Criminal Appeal 20 & 19 of 2019 & 140 of 2017 (Consolidated))* [2021] KEHC 447 (KLR) (4 March 2021) (Judgment), where the court posited as follows:
68. The scope of the doctrine on common intention as defined under section 21 of the *Penal Code* as provided for herein is to the effect:

“When two or more persons from a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence.”

69. The provision squares well with the following passage in the case of *Njoroge in the case of Njoroge v Republic 1983 KLR 197* and *Solomon Munga v Republic 1965 EA 363* where both courts held as to the elements on the principle of common intention thus. “If several persons combine for an unlawful purpose and one of them kills a man, it is murder in all who are present whether they actually aided or abated or not, provided that the death was caused by act of someone of the party in the course of the endeavours to effect the common object of the assembly.
70. The second Appellant used blows and kicked to injure the complainant. It does not matter. that he may has used less force than anyone else. I find that the case against the second Appellant was properly proved.
71. The third appellant, testified as DW2. He stated that he was nowhere near the incident. ipso facto, he did not set an alibi. in this court posited as doth:

The Appellant set up an alibi that he was working at Crispy Hotel. The alibi needed to be counter checked. The duty of proof the falsity of an alibi is on the prosecution. The court failed to address the aspect of the alibi. The court concentrated on lack of contradictions. The court is supposed to see wither the offence was proved.

32. In the case of *J M v Republic [2015] eKLR*, Justice Edward M. Muriithi, stated as doth:

“[13] It is cardinal principle that in offering an alibi, an accused does not thereby assume a duty to prove the alibi. See *Karanja v. R. 1983) KLR 501*. The duty to prove the falsity



of the defence and the guilt of the accused and therefore to discharge the alibi remains with the Prosecution. As held in *Kiarie v. R.* (1984) KLR 739, 740:

“An alibi raise a specific defence and an accused person who puts forward an alibi as an answer to a charge does not in law thereby assume any burden of proving that answer and it is sufficient if an alibi introduces into the mind of a court a doubt that is not unreasonable.

”(14) However, where the defence of alibi is offered through unsworn statements of the accused the same cannot be taken as raising a reasonable doubt because as held by the Court of Appeal in *May v. R.*, (1981) KLR 129, -

“An unsworn statement is not, strictly speaking, evidence and the rules of evidence cannot be applied to an unsworn statement. It has no probative value, but it should be considered in relation to the whole of the evidence. Its potential value is persuasive rather than evidential. For it to have value, it must be supported by the evidence recorded in the case.”

33. The duty to prove the falsity of an alibi lies with the state. In the case of *Republic v Julius M’marion Marungu* [2018] eKLR, Justice RPV Wendoh stated as doth:

“The burden always remains on the prosecution to prove its case against the accused beyond reasonable doubt. In the case of *Karanja v Republic* (1983) KLR 501 the court held that the burden of proving the falsity, if at all, of an accused’s defence of alibi lies with the prosecution. The court also held that the court may, in testing the defence of alibi, weigh it against all the evidence adduced to see if the accused’s guilt is established beyond all reasonable doubt and that if an alibi is raised late in the defence, the court should take into account the fact that the alibi defence was put forward at a late stage of the case that it cannot be tested by those responsible for investigation and prevent the suggestion that it is an afterthought.

34. Further, in *Kiarie v Republic* (1984) KLR the Court of Appeal said:“An alibi raises a specific defence and an accused person who puts forward an alibi in answer to a charge does not in law thereby assume any burden of proving that answer and it is sufficient if an alibi introduces into the mind of a court a doubt that is not unreasonable..”

In this case, the defence was, I was nowhere near the incident. This is not a proper alibi capable of being proved or disproved. It was the duty of the third Appellant to set up an alibi on where he was. Consequently, I dismiss the defence as insufficient. the evidence of PW1 placed the Third appellant in the locus in quo by recognition. in the case of *Republic v Wepukhulu & 3 others* (Criminal Appeal E011 of 2021) [2022] KEHC 13997 (KLR) (6 October 2022) (Judgment), S N. Riechi posited as follows:

On whether the court considered the defence of alibi visa vis the prosecution’s evidence, considering that the defence goes into the identity of the perpetrator/accused. The factors to be taken into account when considering the defence were stated in the case of *Erick Otieno Meda v Republic* [2019] eKLR where the court of appeal set down the following parameters to be considered when the defence is raised thus;a.An alibi needs to be corroborated by the other witnesses, and not just a mere regurgitation of the events from the accused’s point of view.b.An alibi defence needs to be introduced at an early stage so as to allow it to be tested, especially during cross-examination of the trial.c.The alibi defence or evidence may often rest



on the credibility of the accused and the reliability of the evidence that he or she has presented in court. The accused does not need to prove the alibi, but the prosecution must have presented its case that the accused is guilty beyond a reasonable doubt so as to allow the alibi to fail.

14. As regards the burden of proof when the defence is raised, the Court of Appeal in *Mwamusi & another v Republic* [2003] eKLR held that;

15. An alibi raises a specific defence and an accused person who puts forward an alibi as an answer to the charge preferred against him does not in law thereby assume any burden of proving that answer and it is sufficient if an alibi introduces into the mind of a court a doubt that is not unreasonable.

72. The above truism is however modified that the accused is not bound necessarily to raise an alibi early enough. In the case of *thomas patrick gilbert cholmondeley v republic* [2008] eKLR, the Court of Appeal Omolo, O’kubasu & Onyango Otieno, JJ.A posited as follows:

It would clearly be contrary to the spirit if not the letter of our Constitution to lay down a principle that the prosecution is entitled to demand and receive in advance a disclosure of evidence from well-heeled Kenyans but not from the poor and vulnerable. We reject any such distinctions being introduced in the criminal justice system. We think there is merit in the complaints raised by the appellant in grounds one, four, five, six and seven of the grounds of appeal.

73. The defence raised does not amount to an alibi. There was no challenge to the recognition by PW1. Evidence of one witness was enough. Though there are other corroborating evidence. In *Republic v Sagirai (Criminal Case E049 of 2022)* [2023] KEHC 938 (KLR) (26 January 2023) (Judgment), Wendoh J posited as follows:

Section 143 of the *Evidence Act* provides that a fact can be proved by the evidence of a single witness unless a statute requires otherwise. As held in *Bukenya* case (supra) that where important witnesses are not called by the prosecution; to testify, the court may draw on inference that the evidence of that important witness may have been adverse to the prosecution case. In *Donald Majiwa* (supra) the court said:-The law as it presently stands is that the prosecution is obliged to call all witnesses who are necessary to establish the truth in a case even though some of those witnesses evidence may be adverse to the prosecution case. However, the prosecution is not bound to call a plurality of witnesses to establish a fact. Where, however, the evidence adduced barely establishes the prosecution case, and the prosecution withholds a witness, the court in an appropriate case is entitled to infer that had that witness been called his evidence would have tended to be adverse to the prosecution case”.

74. In the case of *Donald Majiwa Achilwa and 2 others -vs-Republic* (2009) eKLR the court stated that:

“The law as it presently stands, is that the prosecution is obliged to call all witnesses who are necessary to establish the truth in a case even though some of those witnesses’ evidence may be adverse to the prosecution case. However, the prosecution is not bound to call a plurality of witnesses to establish a fact. Where, however, the evidence adduced barely establishes the prosecution case, and the prosecution withholds a witness, the court, in an appropriate case, is entitled to infer that had that witness been called his evidence would have tended to be adverse to the prosecution case. (See *Bukenya & Others v. Uganda* [1972] EA 549).”



75. The Court of Appeal in the case of *Richard Munene v Republic* [2018] eKLR stated as follows;
- 'It is a settled principle of law however, that it is not every trifling contradiction or inconsistency in the evidence of the prosecution witness that will be fatal to its case. It is only when such inconsistencies or contradictions are substantial and fundamental to the main issues in question and thus necessarily creates some doubt in the mind of the trial court that an accused person will be entitled to benefit from it.'
76. In *Argut v Republic of Kenya (Criminal Appeal 205 of 2017)* [2023] KEHC 2690 (KLR) (28 March 2023) (Judgment), Matheka J stated as follows:
- Yes, there are authorities about the time an accused person can raise an alibi. However the letter of the law states that the moment an accused person raises an alibi the prosecution can seek an adjournment to go and bring evidence to challenge it. That is what the law says. My view is that it is upon the prosecution to take advantage of that provision of the law and seek to dislodge the alibi. Whether it is too late in the say can only emerge when the prosecution has sought to dislodge the alibi as provided for by the law. The law recognizes that until an accused person is put to his defence he does not have to say anything about his case. So did the Appellant's alibi defence create doubt in the prosecution's case? I say so. The Appellant testified that he was not at the scene at the time the assault allegedly happened. He said he was at the office from morning till 3 p.m. DW2 and DW5 who were his co-employees corroborated this position. The complainant stated that she was assaulted at around 1 pm and her witness PW2 confirmed she witnessed the same.
77. It must be remembered that the burden of disproving an alibi is on the prosecution. In *Kiarie vs Republic* [1984] KLR the Court of Appeal held:
- 'An alibi raises a specific defence and an accused person who puts forward an alibi as an answer to a charge does not in law thereby assume any burden of proving that answer and it sufficient if an alibi introduces into the mind of a court a doubt that is not unreasonable.'
78. The prosecution has a law to dislodge an alibi. It is in the books and cannot be ignored. Section 309 of the *Criminal Procedure Code*, provides that:
- 'If the accused person adduces evidence in his defence introducing new matter which the advocate for the prosecution could not by the exercise of reasonable diligence have foreseen, the court may allow the advocate for the prosecution to adduce evidence in reply to rebut it.'
79. In this case, there was no new evidence introduced. The alibi fell far short of the standards for the alibi. The question one will ask, if the appellant was at home, was not near the scene, where was he and whither was he when he was being sought to be arrested after running away. whereas the state has the burden of proving an alib, the accused has the duty to set up a specific alibi. foes the prosecution go to Azerbaijan or Waziristan to look for the third Appellant. without a specific alibi, the defence falls on it face.
80. The fourth appellant testified as dw3. His defence was that he was arrested after one year. He stated that he was taking the first appellant home. He stated he was drunk after he passed by a bar in the Ganyuthe area. He found the complainant lying on top of the first appellant. being evidence of an accomplice, the evidence cannot be used against the accomplices, except the witness himself.



81. He admitted being in the palace the duo were fighting. He also blamed alcohol. At least he places himself on the locus in quo. the court therefore has to weigh the circumstantial evidence available in this regard. In the case of Ahamad Abolfathi Mohammed and Another v Republic [2018] eKLR, Court had this to say on circumstantial evidence:

“However, it is a truism that the guilt of an Accused person can be proved by either direct or circumstantial evidence. Circumstantial evidence is evidence which enables a court to deduce a particular fact from circumstances or facts that have been proved. Such evidence can form a strong basis for proving the guilt of an Accused person just as direct evidence. Way back in 1928 Lord Heward, CJ stated as follows on circumstantial evidence in R v Taylor, Weaver and Donovan [1928] Cr. App. R 21:

‘It has been said that the evidence against the Applicant is circumstantial. So it is, but circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which, by intensified examination is capable of proving a proposition with the accuracy of mathematics. It is no derogation from evidence to say that it is circumstantial.’

82. There was no evidence presented that was consistent with the innocence of the fourth accused. In other words, the evidence tendered was consistent with the guilt of the said Appellant. In light of the circumstances, the fourth Appellant’s appeal against conviction is untenable and is consequently dismissed.
83. The court must treat with caution evidence of a single identifying witness. We had one identifying witness, whom the court believed. circumstantial evidence as led by PW2 shows that the witness was credible. Wamunga vs. Republic (1989) KLR 424 the Court posited as hereunder:

It is trite law that where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility or effort before it can safely make it the basis of a conviction.”

84. The witnesses provided a detailed and vivid account of the evidence presented by both parties. Upon evaluation, the court found the prosecution’s evidence to be credible and truthful. His evidence was that ‘i was not present when he was beaten. This does not amount to an Alibi Defence as aforesaid. Consequently, the Fifth Respondent’s appeal is dismissed.
85. Fifth accused testified as PW 4. He stated that he heard that the complainant had beaten someone. This evidence is inconsistent with medical evidence. It is not another person who was beaten by the complainant. The defence raised was a sieve that does not contain anything.

## **Sentencing**

86. It must be conceded that sentencing is a complex arena and the court below must as a corollary seek guidance from the sentencing guidelines paragraphs 2.3.21 to 2.3.30. In considering the sentences the court is guided by the policy guidelines No. 37.7 where, the use of a weapon to frighten or injure a victim; the more dangerous the weapon, the higher the culpability. In this case, they used heavy weapons like pieces of sticks to unleash untold violence, which in effect created serious physical or psychological effect on the victim. Further, the offence was committed by a gang or group.
87. The court considered mitigating circumstances in determining the appropriate sentence. Apart from the fact that the appellants were first offenders, no substantial mitigating factors were presented.



Despite this, the court imposed a sentence of 20 years' imprisonment, which was significantly lenient given the severity of the offence and the availability of a life sentence.

88. By all standards, the sentence did not reflect the gravity of the crime and as such it amounted to a mere slap on the wrist. The appellants displayed no remorse and rejected the olive branch extended by the near-death complainant. The injuries inflicted, particularly to the head, were life-threatening.

89. In the circumstances, the sentences imposed were appropriate. There are no materials that the court ignored in giving the sentence. The Appeal on sentences is thus untenable. It must be recalled that the Court of Appeal in the case of Ogolla s/o Owuor vs. Republic, [1954] EACA 270 pronounced itself on this issue as follows:

“The Court does not alter a sentence unless the trial Judge has acted upon wrong principles or overlooked some material factors.”

90. Wanjema vs Republic [1971] EA 493, where the Court stated as follows regarding interference with sentencing:

The Appellate court should not interfere with the discretion which a trial court extended as to sentence unless it is evident that it overlooked some material factors, took into account some immaterial factors, acted on a wrong principle, or the sentence is manifestly excessive in the circumstances of the case.”

91. The sentence in for grievous harm contrary to Section 234 of the *Penal Code* is hereby affirmed. However, the appellant were arrested on 17.12.2020 and arraigned in court on 18.12.2020 and released on bond. The court rightly had the sentence to run from 2024, when the judgment was delivered. However, there is one day that was not counted. The sentence shall be less two days.

## **Order**

92. In view of the foregoing, I make the following orders:

- a. HCCRA NO. E021 of 2024, HCCRA NO. E070 OF 2024, HCCRA NO. E071 OF 2024, E072 OF 2024 and E073 OF 2024 as consolidated are dismissed on conviction and sentence.
- b. The sentence 20 years against each appellant meted out by the court below is affirmed save the appellants were arrested on 17.12.2020 and arraigned in court on 18.12.2020 and released on bond. The court rightly had the sentence to run from 2.4. 2024, when the judgment was delivered. The sentence shall however be less two days, they were in custody before delivery of the judgment.
- c. Right of appeal 14 days.

**DELIVERED, DATED AND SIGNED AT NYERI ON THIS 20<sup>TH</sup> DAY OF MAY, 2025.  
JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

**KIZITO MAGARE**

**JUDGE**

In the presence of: -

Dr. Kamotho and Mr. Lerionka for the appellant

Mr. Kimani for the Respondent



Court Assistant – Michael

