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Kombe v Republic (Criminal Appeal E026 of 2024) [2025] KEHC 7300 (KLR) (15 May 2025) (Judgment)

Neutral citation: [2025] KEHC 7300 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CRIMINAL APPEAL E026 OF 2024

WM KAGENDO., J

MAY 15, 2025

BETWEEN

MOHAMMED MWARANDU KOMBE .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(Being an appeal against both the conviction and sentence arising from the Judgment delivered by Honourable Gladys Ollimo on 8th May 2024 in Mombasa SRM's court in CRC NO. E2307 of 2021)

JUDGMENT

A. Grounds Of Appeal

1. The appeal is based on the following grounds: -

    a. That the learned trial magistrate erred in law and fact by finding the Appellant's conviction and sentence without considering that the medical evidence did not prove the case of Grievous Harm beyond reasonable doubt.

    b. That the learned trial magistrate erred in law and fact by finding the Appellant's conviction and sentence without considering that the prosecution case was governed by massive contradictions and discrepancies.

    c. That the learned trial magistrate erred in law and fact by finding the Appellant's conviction and sentence without considering that the case was poorly investigated.

    d. That the learned trial magistrate erred in law and fact by failing to comply with Section 329 of the *Criminal Procedure Code* as mitigation is part of the trial process.

e. That the learned trial magistrate erred in law and fact by finding the Appellant's conviction and sentence without considering that the Appellant was acting in self- defence.

f. That the learned trial magistrate erred in law and fact by failing to consider that the complainant's condition is reversible with treatment.

g. That the learned trial magistrate erred in law and fact by finding the Appellant's conviction and sentence relying her judgment solely on the prosecution witnesses' statements and in doing so, failed to consider the Appellant's defence.

h. That the learned trial magistrate erred in law and fact by admitting a defective charge sheet from the Prosecution that was later relied on by the court to make the judgment, contrary to Section 134 of the *Criminal Procedure Code*

i. That the learned magistrate erred in law and in fact by relying on a non-specialist instead of admitting a report from an Ophthalmologist to make a conclusion.

j. That the sentencing was excessive and unjustified.

B. The Role Of The Appellate Court

2. The role of this court as the first appellate court is well established. As stated in the case of Selle & another v Associated Motor Boat Co. Ltd & Others [1968] EA 123, an appellate court is mandated to re-evaluate the evidence presented before the trial court as well as the resulting judgment and arrive at its own independent conclusion.

3. This court is therefore empowered to subject the whole of the evidence to a fresh and exhaustive scrutiny and come to its own conclusion on the matter but bearing in mind that the trial court had the advantage of observing the demeanour of the witnesses and hearing them giving evidence firsthand and gives allowance for that.

4. The case of Peter v Sunday Post [1978] EA 424 established that is not the function of the Appellate Court to merely scrutinize the evidence to see if there was some evidence to support the lower court findings and conclusions. It must make its own findings and draw its own conclusion, only then can it decide whether the magistrate's findings should be supported.

5. It should further be noted that the appellate court in David Njuguna Wairimu v Republic [2010] eKLR, stated as follows: -

> "There are instances where the first appellate court may depending on the facts and circumstances of the case, come to the same conclusion as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decisions."

C. Circumstances Of The Case

6. The circumstances of the case are as follows:-

> That on the 15th day of November 2021 at around 2040 HRS at Tudor Area in Mvita Sub-County within Mombasa County, Mohammed Mwarandu Kombe unlawfully committed grievous harm, by throwing a corrosive substance at one Fatuma Kaingu therefore leading to sustained injuries occasioned to her eyes, contrary to Section 234 of the *Penal Code*.

D. Evidence On Record

7. The Prosecution relied on the evidence of seven (7) sworn witnesses in an attempt to secure a judgment against the accused person, that ultimately resulted in the close of the Prosecution's case on the 6 th of February 2024. Thereafter, a ruling was delivered by the learned magistrate in open court on the 14 th of February 2024, finding that the Appellant had a case to answer. He was thereafter placed on his defence.

8. The Appellant went on to tender sworn defence evidence on the 20 th of March 2024 and the trial court proceeded to deliver its judgment on the 8 th of May 2024 where the Appellant was convicted in the first count and was acquitted in the second count of malicious damage to property. He was therefore sentenced to thirty (30) years imprisonment on the first count.

9. Aggrieved and dissatisfied by the conviction and sentencing meted out by the trial court, the Appellant has preferred ten (10) grounds of Appeal vide the Memorandum of Appeal dated the 20 th of May 2024 and the Petition of Appeal dated 4 th of June 2024.

E. Relevant Facts

10. In a brief manner, the Prosecution's case is that on the 15 th of November 2021 at around 2040 HRS, the Complainant, Fatuma Kaingu, met the Appellant, an ex-lover in Tudor Area in Mombasa to give him the spare keys to his house. The testimony provided by PW1 and further corroborated by PW2 and PW6 stated that the Appellant then got a hold of the Complainant's wrist as she gave him the keys and threw a corrosive substance at her face.

11. This substance would later be confirmed by PW5, a Government Chemist to be Hydrochloric Acid vide Exhibit 5, a Government Analyst Report. PW4 thereafter adduced a P3 Form which disclosed that the Complainant sustained the following injuries: reduced vision, photophobia, an infected, red and swollen conjunctiva, a lacerated upper lip and a swollen face as a result of the incident.

12. Succinctly, the Defence's case is that on the 15 th of November 2021 at around 2040 HRS, the Appellant met with the Complainant with the objective of obtaining the keys to his house. She acted in a grumpy manner, proceeded to tell him to "give them to his women friends" and hurled her phone and afterwards, a stone at him.

13. It is his evidence that the liquid was clothes' washing soap and that it spilled when he threw it at the Complainant in an act of self-defence. He further stated that he left after she returned to her place of work.

F. Issues For Determination

14. Having considered the record of appeal as well as the rival submissions by the parties, I discern the following issues for determination:

    a. Whether the offence of Grievous Harm was proven beyond reasonable doubt;

    b. Whether the charge sheet was defective;

    c. Whether the defense of self-defense was considered.

    d. Whether the sentence meted on the Appellant was excessive and unjustified;

G. Analysis

Whether the offence of Grievous Harm was proven beyond reasonable doubt;

15. Section 4 of the *Penal Code* provides the following definitions:

> 'Grievous Harm is 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'.
>
> '"Maim" means the destruction or permanent disabling of any external or internal organ, member, or sense.'
>
> '"Harm" is defined as bodily hurt, disease, or disorder whether permanent or temporary.'

16. To secure a conviction under the offence of grievous harm, the prosecution had to prove the following essential elements beyond reasonable doubt:-

    a. Victim sustained grievous harm;

    b. Harm occasioned on the victim was caused unlawfully;

    c. That it is the Appellant who caused the grievous harm to be occasioned upon the Complainant.

17. The first element to prove grievous harm is that the victim sustained grievous harm. This Court has considered the evidence tendered by PW1, PW4, PW6 in establishing that the Complainant has sustained serious injuries occasioned to her eyes, which has resulted in discolouration and blindness.

18. According to the Record of Appeal, one of the grounds of appeal was that the medical report failed to prove the case of grievous harm beyond reasonable doubt. Examining the definitions provided above and the evidence tendered by PW4, a medical officer, and the mere appearance of the Complainant, it is evident that the dangerous harm that was dealt to the Complainant, resulted in a serious injury to her eyes, an external organ.

19. The use of disjunctive words such as "or" in the above legal provision, supports this case in that, where an injury seriously injures the health of someone, or extends to a disfigurement of an external organ or sense, this amounts to grievous harm. The injury need not be permanent to amount to a successful claim of the same.

20. Furthermore, the photographic evidence tendered by PW7, marked PMFI 8(a-b) and 10(a-b) clearly delineate the difference between the Complainant's eyes before the harm was occasioned to her by the Appellant and after the injuries were sustained that resulted in discolouration and blindness.

21. The Appellant further stated that he appealed on the grounds that an Ophthalmologist's opinion was not provided as to the condition of the Complainant. It is my finding that PW4, a medical officer who adduced the P3 Form on behalf of a practicing doctor suffices as an adequate expert to discern the condition of the Complainant, even at face value. This is further buttressed by PW1, PW6 and PW7 who provided testimonies as to the damaged condition of the Complainant's eyes and the photographic evidence that clearly demonstrated loss of vision.

22. The Appellant further averred that the Complainant's condition is reversible with treatment. It is this court's finding that this does not vary the fact that grievous harm was still inflicted upon the Complainant, even though the condition may tentatively be found to be reversible.

23. The second element to prove the offence of Grievous Harm is that the harm was caused unlawfully, meaning that the harm was caused without legal justification.

24. In this instance, PW1 stated that the Appellant threw the corrosive substance on her face due to the fact that she had rejected his romantic advances with intention to marry her stating that she was "not interested".

25. DW1 in turn claimed that he threw the object that contained the corrosive substance as an act of self-defence. The issue as to whether this defence is sustainable in evading liability in a case of grievous harm has been discussed extensively in the third issue.

26. I have considered the evidence provided by both the adverse parties, PW1 and DW1, with regards to the circumstances that resulted in the act of grievous harm being committed. I am convinced that neither reason provided by either party would warrant the infliction of grievous harm upon the Complainant.

27. In this case both parties agree that they met together and that there was a confrontation which led to the complainant sustaining serious injuries.

28. The accused person says he was acting in self defence. I however note that he did not sustain any injury and I do not agree with his version that he was attacked.

29. Further, he had purchased and carried with him an extremely corrosive chemical; hydrochloric acid. I take Judicial notice that hydrochloric acid is not a common detergent. Further he did not say why would it have been unconcerned so as to accidentally spill

30. I am convinced like the trial court that the appellant specifically purchased this chemical and he intentionally splashed it on the complainant when she rejected his advances.

31. Accordingly, I find that the Prosecution proved beyond reasonable doubt that the injury sustained by the Complainant was caused unlawfully. Similarly, that there was no legal justification to warrant the harm from being occasioned to the Complainant.

32. Thirdly, to establish grievous harm, the Prosecution must prove beyond reasonable doubt, the aspect of positive identification of the Appellant. This issue is not disputed by either party.

33. Both PW1, alongside other Prosecution witnesses, and the Appellant have given testimonies so as to demonstrate that the bottle containing the liquid, whether corrosive or not, was thrown by the Appellant, subsequently inflicting grievous harm upon the Complainant. There was no mention of a different name other than the Appellant's, in the commission of the crime.

34. I accordingly find that the Prosecution testimonies accompanied with medical reports and photographic evidence sufficiently satisfy the standard of proof in finding that Grievous Harm was indeed occasioned by the Appellant towards the Complainant.

Whether the charge sheet was defective;

35. One of the grounds of appeal filed by the Appellant was that the charge sheet was defective and was thereafter relied upon by the learned magistrate in coming to a decision.

36. As to whether the charge sheet was defective, it has been held that a court must consider the defects in a charge from a two-step test. First is to determine whether the charge is defective and if so, whether such

defect can be remedied. This was stated by the Court of Appeal in Peter Ngure Mwangi v Republic [2014] eKLR as follows:-

> “ On the issue of a defective charge sheet, there are two limbs to it. The first one deals with the issue as to whether the charge sheet is indeed defective, whereas the second one deals with the issue as to whether even if a charge sheet is defective, that defect is curable or not.”

37. Furthermore, the Court of Appeal in the case of Benard Ombuna v Republic [2019] eKLR stated as follows:-

> “ Of relevance is whether a defect on the charge sheet prejudiced the appellant to the extent that he was not aware of or at least he was confused with respect to the nature of the charges preferred against him and as a result, he was not able to put up an appropriate defence [emphasis mine].”

38. In this instance, the Appellant was charged with the offence of Grievous harm contrary to Section 234 of the *Penal Code*; the section that provides for the punishment of the offence.

39. 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.

40. In applying the above test, the Appellant participated in the trial in a manner that suggested that he understood the charge. He demonstrated this by cross-examining the Prosecution Witnesses with clarity and was further able to put up an appropriate defence to the crime with which he was charged for.

41. Additionally, the appellant did not at the first instance raise an objection or rather contend that the charge sheet was defective.

42. Furthermore, the Court of Appeal in Yongo v Republic [1983] KLR held as follows:

> “ In our opinion a charge is defective under Section 214(1) of the *Criminal Procedure Code* where:
>
> [...]
>
> (c) It gives a misdescription of the alleged offence in its particulars.”

43. In this instance, the charge sheet clearly delineated the offence with which the Appellant was charged with and provided no such misdescription.

44. It is my therefore my finding that neither was the charge sheet defective nor was any prejudice occasioned to the Appellant to warrant such a claim.

Whether the defense of self-defense was considered;

45. Self-defense in Kenyan law is recognized as a complete defense if the force used was necessary and proportionate to the threat faced. This is further established in law under Section 17 of the *Penal Code* that provides that:

> "Subject to any express provisions in this Code or any other law in operation in Kenya, criminal responsibility for the use of force in the defense of person or property shall be determined according to the principles of English Common Law."

46. As in the case of Republic v. Gusambizi s/o Wesonga [1948] 15 EACA 65, English Common Law dictates that self-defense is a lawful defense if the accused believed on reasonable grounds that their life was in danger and that the force used was necessary to avert that danger. Thus:-

The principle derivable from the above case is that, self-defense is a valid legal defense when:

a. The accused reasonably believed they were in imminent danger.

b. The force used was necessary to avert the threat.

c. The force applied was proportionate to the danger posed.

47. In the present instance, the Appellant raised the aspect of self-defense in describing his actions in throwing the object that contained the corrosive liquid at the Complainant. He further claimed that the fact that the liquid spilled on her was an accident and was not intended. The Appellant contended that his defence of self-defense was not considered.

The Evidence tendered by PW4, the medical officer, vide the P3 form demonstrated that PW1, the Complainant, sustained the following injuries: reduced vision, photophobia, an infected, red and swollen conjunctiva, a lacerated upper lip and a swollen face as a result of the incident. The injuries were due to the attack inflicted upon her by the Appellant.

48. The Appellant did not demonstrate that he suffered any injury at all during the incident. Although he stated that he managed to dodge the alleged attacks by the Complainant, throwing an object with a substance capable of harming the Complainant in retaliation would neither be necessary nor proportionate.

49. The absence of injuries on the Appellant therefore demonstrates that he was evidently the perpetrator of the violence inflicted upon the Complainant and not the other way. The Appellant had no reason to believe that there was genuine need to invoke violence as an answer to apprehension caused unto him, if any.

50. Further it is noted that it is the appellant who purchased or sourced the corrosive substance and carried it to where the victim was . This shows both the intention cause the grievous harm and preparation . The defence of self cannot avail in such a scenario.

51. Having examined the above, it is my finding that it would be highly implausible for the bottle that contained the corrosive substance to open and "accidentally" spill on the Complainant's eyes and face. It is too perfect an incident to be disregarded.

52. With regards to this matter, it is my finding that the defense of self-defense in retaliation to the Complainant's actions fails.

d. Whether the sentence meted on the Appellant was excessive and unjustified;

53. Section 231 of the *Penal Code* provides the following sentence for the crime of grievous harm:

> 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— [...]is guilty of a felony and is liable to imprisonment for life.
>
> The same is to be read with Section 234 of the *Penal Code*.

54. The Court in the case of Abdi v Republic [1971] KEHC 6733, spoke to the issue of interference with sentences given by trial courts as follows:-

> " 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 considered some wrong material, or acted on a wrong legal principle. Even if the appellate court feels that the sentence is heavy and that it might itself not have passed that sentence, the same cannot be sufficient ground for interfering with the discretion of the trial court on sentencing unless, anyone of the matters already stated grounds is shown to exist."

55. I am guided by Section 1.2 of the Sentencing Policy Guidelines [2023] from which I derive that, one of the principles of Sentencing is 'Proportionality', in that, the sentence meted out must be proportionate to the offending behavior meaning it must not be more or less than is merited in view of the gravity of the offence.

56. The Appellant was charged with the offence of assault causing grievous harm contrary to Section 234 of the *Penal Code* and was thereafter sentenced to 30 years imprisonment by the learned magistrate. Upon careful re-evaluation of the evidence adduced at trial, including the testimony of all witnesses, medical reports and photographic exhibits, it is evident that the injuries sustained by the Complainant were both grave and life-altering; injuries that, but for the actions of the Appellant, would not have occurred.

57. From an individual once able to sustain herself by working as a house manager, she is now faced with the devastating burden of dependency and high financial and emotional costs of managing a condition she neither deserved nor foresaw. She will no longer be able to work and sustain herself as she had done previously. The Complainant will have to live with this condition, and if she opts to seek treatment, the same would come at a substantive cost.

58. Although this Court is presently aware of the mitigating circumstances provided by the Defendant in line with the Section 4.1.4 of the Sentencing Policy Guidelines [2023], I find that the circumstances and the gravity of the offence far outweigh the mitigating circumstances.

59. Lastly, it must be stated with utmost seriousness that acid attacks are not novel occurrences of violence in our jurisdiction. The courts cannot turn a blind eye to this reality. It is therefore my finding that the nature of the harm inflicted, the premeditated nature of the crime and the blatant disregard for the dignity of the Complainant weigh heavily against leniency and therefore warrant a deterrent sentence.

60. Accordingly, I find that the sentence meted by the trial court was neither excessive nor unlawful. No reason has been discovered to warrant interference with the sentence.

Conclusion

61. Under the present circumstances, I find that the Appellant's defence did not cast any doubts on the evidence tendered by the Prosecution. The elements of grievous harm were sufficiently proved to the standard required of the Prosecution.

62. This court finds that the appeal against both the conviction and the sentence lacks merit and is hereby dismissed.

63. The appellant to continue serving his sentence.

64. It is so ordered.

DELIVERED, DATED AND SIGNED THIS 15th DAY OF MAY 2025.

HON. LADY JUSTICE WENDY KAGENDO MICHENI JUDGE

In The Presence Of: -

Ms Kyalo For The Accused Person Mr Ngiri For The Respondent

Ms. Bebora Court Assistant

SIGNED BY: HON. LADY JUSTICE WENDY MICHENI

THE JUDICIARY OF KENYA.

MOMBASA HIGH COURT HIGH COURT CRIMINAL DATE: 2025-05-15 15:56:16