Kangogo v Republic (Criminal Appeal E030 of 2024)
[2025] KEHC 5742 (KLR) (9 May 2025) (Judgment)

Neutral citation: [2025] KEHC 5742 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ITEN

CRIMINAL APPEAL E030 OF 2024

JRA WANANDA, J

MAY 9, 2025

BETWEEN

DUNCAN KIBET KANGOGO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

((Appeal against the Judgment of Hon. V. Karanja - PM, delivered on 30/07/2024 in Iten Senior Principal Magistrate's Court Criminal Case No. E151 of 2024))

JUDGMENT

1. The Appellant was charged in the said criminal case with the offence of causing grievous harm contrary to Section 234 of the *Penal Code*. The particulars were that on 1/02/2024, at around 1530 hours at Kapkpoi village, in Kabulwo sub-Location, Keu Location within Keiyo North Sub-County within Elgeyo Marakwet County, he wilfully and unlawfully did grievous harm to Caroline Jepkoech. The complainant is the Appellant's wife.

2. The Appellant pleaded not guilty to the charges and the case then proceeded to full trial in which the prosecution called 5 witnesses. I however note that before the trial commenced, the Prosecutor informed the Court that the parties had reconciled and that the complainant wished to withdraw the case. This request was however rejected by the trial Court.

3. At the close of the prosecution's case, the Court found the Appellant as having a case to answer and placed him on his defence. He then gave a sworn statement, was cross-examined and he called 1 other witness of his own. By the Judgment delivered on 30/7/2024, the Appellant was convicted and sentenced to serve 10 years imprisonment.

4. Dissatisfied with the decision, the Appellant filed this Appeal on 7/08/2024 against both conviction and sentence. His Petition of Appeal, reproduced verbatim, is crafted as follows:

i. That the trial Court erred in both laws and facts by convicting and sentencing the Appellant without considering his mitigation.

ii. That the trial Magistrate erred both in law and fact by failing to consider alternative dispute resolutions as the complainant was ready to withdraw the case.

iii. That the trial Court erred in both law and facts by imposing harsh and excessive sentence.

iv. That the more grounds to be adduced when served with the record of appeal.

Prosecution testimony at the trial Court.

5. PW1 was the complainant, Caroline Chepkoech. She stated that she is a casual labourer and that the Appellant is her husband, that on 1/02/2024, at 3.30 pm, the Appellant went to the place where she was working, at Ezekiel's Farm, and asked her why she had gone for that job, when she responded that it was because the children did not have food, the Appellant slapped her then took a stick and hit her on the head and hand, she tried to run away but he followed her, threw her on the ground and kicked her all over. She stated that she screamed and people came to rescue her but the Appellant threatened to cut them, he dragged the complainant to their home and locked her inside, the complainant, while inside the house, saw one Festus and other people passing by road and she called them, they came and took her to hospital where she was admitted for 1 month at Iten Hospital. She testified further that the Appellant has always assaulted her and he had earlier been imprisoned for 2 years. She stated further that the Appellant was drunk, and that she reported the assault at the police station and was issued with a P3. In cross-examination, she testified that she was with the Appellant's brother, Charles, Philemon, Cherono and Beatrice. Regarding the stick that the Appellant used to assault her, she agreed that she had not brought it to Court. She stated that among the people who came to her rescue when she screamed was one Paul, that the Appellant threatened to cut them with a panga although the Appellant did not have a panga at that time. She stated further she slept in a maize plantation where the Appellant had dragged and left her, the maize plantation is about 6 kilometres from their home and that the Appellant dragged her for 6 kilometres.

6. PW2 was Festus Chepkwony. He stated that the complainant is his sister, on 2/02/2024 at 9 am he received phone calls from the complainant's neighbours informing him that she was missing, he walked to the complainant's home which is about 200 metres away and they started looking for her eventually finding her in a nearby forest where she had lost consciousness and had blood all over. He testified that they gave her milk and when she woke up, she told them that it is her husband (Appellant) who assaulted her, they hired a rider who took the complainant to the police station and then to Chigile dispensary from where she was referred to Iten Referral Hospital. According to him, the complainant had injuries on the head, legs and hands and that the Appellant had been jailed for a previous assault against the complainant. In cross-examination, he stated that they were in a big crowd when they found the complainant in the forest.

7. PW3 was David Kangogo. He testified that he repairs motorcycles and lives in the same village as the couple herein, that on 3/02/2024 he heard people discussing how someone had been badly injured by the husband and that good Samaritans had taken her to hospital. He stated that in the evening, he spotted the Appellant at a hotel and notified Kenya Police Reservist officers who came and arrested the Appellant. In cross-examination, he stated that it is the Appellant's brother and children who came to the Centre and notified people about the incident and that the story was all over the Centre.

8. PW4 was the Philemon Kitonye, a Clinical Officer at Iten Hospital. He stated that the complainant went to the hospital on 5/02/2024 with a history of assault and she was then admitted at the facility. He

stated that the complainant had a cut upper lip, facial bruises, swollen back of the hand, neck swelling and tenderness, that she was not able to move the head, she had severe chest pains, a cut on anterior chest above the right breast, several scratch marks at the back, fracture on the left hand and left elbow, several bruises on both arms, both the hands were swollen, she had fracture fibular on the left limb, a swelling on one neck and bilateral on both legs. He testified that the age of the injury was about 72 hours, the injuries had been inflicted by a blunt object and that he classified the injuries as "grievous". He then produced the P3 Form. In cross-examination, he denied that the injuries could have been a result of a fall. According to him, the injuries were multiple thus indicating an assault. He testified further that the injuries were recent, X-rays were taken, and that the nature of blunt object used was such as a stick.

9. PW5 was Police Constable David Lelei, the Investigating Officer. He stated that he was attached to Kabulwo Location, that on 2/02/2024 the complainant went to the station and reported that she had been assaulted by her husband, he referred her to the hospital, and that the Appellant was brought to the station by officers from the Kenya Police Reservist unit accompanied by members of the public. He testified that during his investigations, her gathered that the Appellant had assaulted his wife (complainant) when she went to for a casual job at Ezekiel's Farm, that he slapped her and beat her with a stick and dragged her on the road, and that she was admitted at the Iten County Referral Hospital. He stated that the P3 Form was filled and he then charged the Appellant for the offence herein. In cross-examination, he stated that the Appellant had threatened some witnesses and as a result, some refused to testify as witnesses and some relocated.

Defence testimony before the trial Court.

10. As aforesaid, the Appellant as DW1, in his defence, gave sworn testimony. He stated that on 1/02/2024, he woke up and went to the shamba when he received a phone call from the school requesting for birth certificate for his 2 daughters, he went to the Chief to get the Forms and he then went to the school where he waited for the Principal who however never turned up, he spent the night at a friend's house and returned to school in the morning. He testified that he returned to the Chief where he was told to go and bring his wife's (complainant) Identity Card, when he went home he did not find her, he later received a call informing him that his wife was in hospital and was being transferred to Iten and that funds was required for an ambulance. He thus denied committing the offence.

11. DW2 was Philemon Kipkoech who stated that he was the Assistant Chief Kabulwa. He testified that on 1/02/2024 the Appellant went to his office seeking to apply for a Certificate of Birth, that he gave the Appellant the requisite Forms to fill, he told the Appellant to obtain school documents and that when the Appellant returned in the morning, he told him to bring his wife's Identity Card. In cross-examination, he stated that the Appellant went to school and brought the school certificates but he conceded that he could not tell whether the Appellant went to school after leaving the Chief's office as he brought the documents the following day.

12. As aforesaid, after the trial, by the Judgment delivered on 30/07/2024, the Appellant was convicted and sentenced to serve 10 years imprisonment.

Hearing of the Appeal.

13. The Appeal was canvassed by way of written submissions. There is a not very legible photocopy of handwritten Submissions in the Court file, apparently filed by the Appellant whose date is however not clear, and neither is its date of filing. On its part, the Respondent, through Prosecution Counsel Calvin Kirui, filed the Submissions dated 25/11/2024.

Appellant's Submissions.

14. In summary, the Appellant submitted that for the offence of grievous harm, the Court must observe the nature of the offence and the surrounding circumstances, that the trial Court erred in convicting him on reliance on the evidence of PW1 without corroboration from any independent witness, and that the Court failed to consider the provisions of Article 50(2) of *the Constitution* in passing the sentence.

15. He recounted the testimonies of the witnesses, particularly PW1, PW2 and PW3 and urged that the same was contradictory and an afterthought, the witnesses were untruthful and lacked credibility as confirmed by their demeanour, and that the trial Court failed to give him a fair trial and prejudiced his right to equality. It was also his view that during the trial the complainant did not show any signs of injuries. According to him therefore, the prosecution failed to prove the case beyond reasonable doubt. On sentencing, he submitted that the trial Court failed to consider his mitigation and thus violated his rights under Article 48 of *the Constitution*. He also reiterated that the trial Court erred by refusing the parties to seek alternative dispute resolution avenues when the complainant was ready to withdraw the case. He also alluded that the issue of his earlier conviction should not have been considered.

Respondent's Submissions.

16. Prosecution Counsel recounted the provisions of Section 234 of the *Penal Code* in respect to the offence of "grievous harm" and submitted that for the prosecution to secure a conviction under a charge for the offence, it has to prove that (i) the victim sustained grievous harm, (ii) that the harm was caused unlawfully, and (iii) that the accused caused or participated in causing the grievous harm. On the definition of "grievous harm", he cited Section 4 of the *Penal Code* and set that the specificities of the offence. He recounted the complainants' testimony and also that of the Clinical Officer (PW5), and submitted that the medical findings were reflected in the P3 Form in which, the injuries sustained by the complainant were classified as "grievous harm". According to him therefore, the evidence on record proved the first ingredient beyond any reasonable doubt. On the second ingredient, namely, proof that the harm occasioned on the victim was caused unlawfully, and thus without legal justification, he submitted that PW1, PW2, and PW3 were consistent with their testimonies that the complainant was in a farm where she had been employed to till when the Appellant emerged and started beating her without any reason at all and that attempts by members of the public to save the complainant were futile because the Appellant threatened them. On the third ingredient, namely, "positive identification" of the Appellant, Counsel submitted that the complainant and all the other witnesses were consistent that the Appellant was the one who committed the assault, that it also came out in the evidence that the Appellant is the complainant's husband, that it is also in the Court's record that the Appellant had previously assaulted the complainant and was convicted and sentenced to serve 2 years in prison. According to him therefore, there was no room for error in the identification.

17. In respect to the Appellant's defence, he submitted that his denial of the offence was untrustworthy and the trial Court rightfully held that the prosecution had discharged its burden to prove all the ingredients of the offence beyond any reasonable doubt.

Determination.

18. As a first appellate forum, this Court is obligated to revisit and re-evaluate the evidence afresh, assess the same and make its own conclusions bearing in mind that the trial Court had the advantage of hearing and observing the demeanour of the witnesses (see Okeno vs. Republic [1972] E.A 32).

19. The issues that arise for determination in this matter are the following:

i. Whether the grievous harm charge against the Appellant was proved beyond reasonable doubt.

ii. Whether the sentence of 10 years imprisonment imposed against the Appellant was justified.

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

i. Whether the charge was proved case beyond reasonable doubt

21. The offence that the Appellant was 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."

22. To secure a conviction under the offence of grievous harm therefore, the essential 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".

23. 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".

24. 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).

25. 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.

26. 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.

27. In this case, the Clinical Officer (PW5) who examined the complainant on 5/02/2024 produced the P3 Form which indicates that the complainant was brought in a semi-conscious condition. He testified that the complainant sustained multiple injuries, including a cut upper lip, facial bruises, swollen back of the hand, neck swelling and tenderness, inability to move her head, severe chest pains, a cut on the anterior chest above the right breast, several scratch marks on her back, fracture of the left hand and elbow, and several bruises on both arms. He also stated that both arms and legs were swollen.

28. He also testified that the injuries were about 72 hours old thus falling within the timelines given for the date of the attack, namely, 2/02/2024 (3 days before). Further, according to him, the injuries were caused by a blunt object. In the P3 Form, he in fact classified the injuries as "grievous harm" and he also stated that the complainant was hospitalised for about 1 month. It is worth noting that the complainant, in her testimony, stated that the Appellant, besides slapping and kicking her, also severely beat her up with a stick and which testimony tallies with the Clinical Officer's description of the item used as being a "blunt object". The injuries alleged by the complainant were therefore corroborated by the medical evidence on record.

29. A look at the extent of injuries suffered by the complainant 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".

30. Accordingly, I find no reason to depart from the trial Court's findings that the complainant indeed sustained "grievous harm" within the meaning contemplated under Section 4 of the *Penal Code*.

31. On whether the harm was caused "unlawfully", from the sequence of events, it is evident that there was no lawful reason for the attack and none has been offered or even alleged in any event. To follow someone to her place of work, assault her severely then in that severe injured state, aggravate the assault by dragging her across a long distance of rough surface and then lock her in a house with no medical attention can never be considered lawful in any way, shape or form. In the circumstances, I am also satisfied that this element was satisfied.

32. On the issue of "identification" and/or participation of the Appellant 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".

33. In this case, as aforesaid, the Appellant and the complainant are husband and wife. The complainant expressly identified the Appellant as the person who assaulted her thus causing her the injuries. Further, the Investigating Officer (PW6) also testified that he was able to confirm that it is the Appellant who assaulted the complainant. The Appellant did not deny, and in fact confirmed, that the complainant was his wife. They are therefore familiar with and were well known to each other even prior to the incident. The assault is also said to have occurred around 1530 hours thus 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".

34. The Appellant has placed much reliance on the fact that no other eye-witness were called to testify. I agree that from the evidence, it does not appear that the complainant was at the workplace alone when the Appellant appeared and assaulted her. There must have been other workmates who must have then witnessed the incident. I however note that the Investigating Officer when cross-examined about this omission, stated that the Appellant had threatened witnesses and thus some had chickened out and some even relocated. I however also observe that each one of the relevant witnesses, namely, the complainant's brother (PW2), the Investigating Officer (PW4) and the Investigating Officer (PW5) stated that the complainant expressly named the Appellant as the person who assaulted her. She has therefore been consistent in respect to who the perpetrator was. It is also evident from the record that in view of the severity of the Appellant's assault on the complainant (his wife), the story thereof quickly spread around the Centre and it was in fact members of the public who were instrumental in arresting the Appellant when he was spotted. No theory has been presented on why the complainant and all the other witnesses would gang up and frame the Appellant for such a heinous offence. Even the Appellant himself did not make any such allegation in any case. No other suspected perpetrator has also been alleged.

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

36. I am also not persuaded by the Appellant's argument that the prosecution case was not proved simply because other witnesses were not called. In my view, the testimony of the witnesses who testified was sufficient to establish and prove the case against the Appellant. In any event, the law grants the prosecution the discretion to decide the nature and number of witnesses that it requires in proving its case. This is accordance with Section 143 of the *Evidence Act* which provides as follows:

> "No particular number of witnesses shall in the absence of any provision of law to the contrary be required for the proof of any fact"

37. This principle was upheld by the Court of Appeal in the case of Keter –V- Republic [2007]1 E.A. 135 as follows:

> "The Prosecution is not obliged to call a superfluity of witnesses, but only such witnesses as are sufficient to establish the charge beyond any reasonable doubt".

38. Unless therefore it can be demonstrated that the omission to call some crucial witnesses is a consequence of a deliberate ploy to mislead or to shield the truth from the Court, the decision not to call some witnesses cannot affect the strength of a criminal case.

39. I also agree that the Appellant's defence was simply a mere denial of the incident which did not tackle the specific accusations raised against him. His purported alibi defence was also obviously false as he was placed at the scene of crime by the evidence on record. During his cross-examination, he never also alluded to any such alibi defence. Raising the same for the first time when giving his unsworn statement was therefore clearly an afterthought. The witness that he called as DW2, namely, the Assistant Chief conceded that he could not tell where the Appellant went to after leaving his office. The incident occurred in the afternoon around 3:30 pm while the Assistant Chief testified that the Appellant left his office in the morning. His testimony does not therefore in any way address the alibi allegation.

40. It is therefore true that although the primary testimony against the Appellant in this case was the one given by the complainant (PW1), my view is that such testimony was sufficiently corroborated by the testimony of the rest of the witnesses and also by documentary evidence.

41. The Appellant has also argued that the trial Magistrate should have allowed the complainant's request to withdraw the charges which request was made before the trial commenced. In respect to that issue, this is what the trial Magistrate is recorded to have stated:

> " This is a gender-based violence case and since it is not the first time the accused person is committing the said offence as against the complainant who is his wife, from the affidavit of the Investigating Officer, PC Lelei the accused person is a threat to the complainant and allowing such actions will be legitimizing gender-based violence. I have seen the complainant who is in a plaster and I disallow the withdrawal. The matter to proceed for full hearing and the bond terms will not be issued."

42. The decision whether to allow the request for withdrawal of the case was one that was entirely within the discretion of the trial Magistrate and she recorded her reasons for rejecting that request. As it has not been shown that she did not exercise that discretion judiciously, I find no reason to interfere. In any event, that issue is now overtaken by events as the Appellant did not challenge that decision at the time it was made and the trial has now been long finalized.

43. 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 conviction of the appellant.

ii. Whether the sentence of 10 years imprisonment was justified

44. 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".

45. 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."

46. 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.

47. 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.

48. 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. ....."

49. Similarly, in the case of Daniel Kipkosgei Letting Vs. 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. ....."

50. Applying the above principles to the facts of this case, I consider that the offence of "grievous harm" committed by the Appellant was a serious one and under the *Penal Code*, is categorized as a felony. The possible 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 the Appellant's wife thus this was a case of gender-based violence. The attack was also savage and barbaric as confirmed by the extent of injuries inflicted. Even with this extent of injuries, instead of taking her to hospital, the Appellant locked up the complainant in the house with no medical attention. Had she not been rescued by neighbours, her fate could have been different. It seems the Appellant hoped that the complainant would die in the house.

51. The complainant will no doubt suffer lifelong trauma resulting from the assault. According to the complainant, the Appellant has always assaulted her and it has also not been denied that the Appellant is a repeat offender having been previously jailed for 2 years for committing the same offence against the same complainant. There is also on record an Affidavit on record filed before the trial Court at the bail Application stage indicating that the Appellant threatened the complainant and other witnesses and warned them against testifying.

52. Further, the Appellant was given the opportunity to mitigate, which he did by claiming that he was "sorry". On her part, the trial Magistrate observed that the Appellant was not remorseful. Taking all these factors into account, it cannot be denied that the Appellant merits a stiff and deterrent sentence.

53. Having said so however, I also find the existence of some mitigating factors. The Appellant is currently aged just about 33 years, thus at his prime. He also alleged in his mitigation, that he has 2 young children who require his presence in their life. Although the offence he was convicted of merits his being put away for a long time, I believe that retribution will be best achieved, not by incarcerating him for an unreasonably long period of time but by giving him a second chance in life, to come out of jail, once he has hopefully learnt his lesson, rebuild his life and also participate in the parental role of bringing

up his children. I also consider that, as aforesaid, his wife (the complainant), before commencement of the trial, requested to withdraw the case as she had allegedly reconciled with the Appellant. In the circumstances, I, reduce the prison sentence from 10 years to 7 years.

54. I also note that the record does not reflect that the Appellant was at any time released on bail/bond during the entire trial. From the charge sheet, he was arrested on 3/02/2024 and the trial was concluded on 30/07/2024 when the sentence was read out. He was therefore in custody for about 6 months. Under the provisions of Section 333(2) of the *Criminal Procedure Code*, the period of time spent by the Appellant in custody as aforesaid ought to have been taken into account. The trial Magistrate did not however mention whether she took into account this period spent in custody by the Appellant during the trial.

Final orders.

55. In the end, I make the following final Orders:

    i. The appeal against conviction fails and the same is upheld

    ii. On sentence, I hereby set aside the sentence of 10 years imprisonment imposed by the trial Court and substitute it with a sentence of 7 years imprisonment, to be computed from the date of arrest, namely, 3/02/2024.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 9TH DAY OF MAY 2025

WANANDA J. R. ANURO

JUDGE