



REPUBLIC OF KENYA



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**Rotich & 2 others v Republic (Criminal Appeal E005 of 2023)
[2025] KEHC 6197 (KLR) (19 May 2025) (Judgment)**

Neutral citation: [2025] KEHC 6197 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BOMET
CRIMINAL APPEAL E005 OF 2023
JK NG'ARNG'AR, J
MAY 19, 2025**

BETWEEN

KIPNGETICH ROTICH 1ST APPELLANT

SAMMY KIPLANGAT 2ND APPELLANT

NICHOLAS KIPLANGAT 3RD APPELLANT

AND

REPUBLIC RESPONDENT

*(From the conviction and sentence in Criminal Case Number E1116 of
2012 by Hon. Kiniale in the Senior Principal Magistrate's Court at Bomet)*

JUDGMENT

1. The Appellants were charged with the offence of grievous harm contrary to section 234 of the [Penal Code](#). The particulars of the offence were that on 25th December 2020 at around 2030 hrs at Ndubai Sub-Location in Kiprerer Location in Bomet County, they jointly and unlawfully did grievous harm to Kipngeno Cheruiyot.
2. On count II, the Appellants were charged with the offence of malicious damage to property contrary to section 339 of the [Penal Code](#). The trial court dismissed this charge.
3. The Appellants pleaded not guilty to the charge of grievous harm and a full hearing was conducted. The prosecution called five (5) witnesses in support of its case. At the conclusion of the Prosecution case, the court found a prima facie case against the Appellants and they were put on their defences. The 1st and 3rd Appellants gave unsworn testimony while the 2nd Appellant tendered sworn testimony. The Appellants did not call any witnesses in aid of their defences.



4. At the conclusion of the trial, the Appellants were convicted for the offence of grievous harm and were each sentenced to serve 20 years in prison.
5. Being dissatisfied with the Judgment dated 26th January 2023, the Appellants appealed against their convictions and sentences.
6. This being the first appellate court, I have a duty to re-evaluate the evidence on record and come to my own conclusion. See Peter M. Kariuki vs Attorney General (2014) eKLR.
7. I shall now proceed to summarize the case in the trial court and the respective parties' submissions in the present Appeal.

The Prosecution's/Respondent's case.

8. It was the Prosecution's case that the Appellants attacked Kipngeno Cheruiyot (PW1) with stones on the allegation that PW1 had stabbed "Sumbua". PW1 testified he suffered injuries to his stomach and legs and had to undergo two operations as his intestines were damaged.
9. It was the Prosecution's case that the victim (PW1) was able to identify all the Appellants as they were his neighbours and that they had grown up together since their childhood.
10. Dr. Langat (PW4) who was a clinical officer stated that he examined PW1 after he had been treated at Tenwek Hospital and that PW1 looked sick and walked with a gait from his injuries.
11. Through its written submissions dated 28th April 2025, the Respondent submitted that this was a village fight occasioned by a disagreement amongst the Appellants and the victim over the condition of one Gideon alias Sumbua. The Respondent submitted that the injuries occasioned to the victim were not in the nature of grievous harm and that the Appellants ought to have been charged and convicted of the offence of assault causing bodily harm and not grievous harm. That they will not be aggrieved if the Appellants' sentences were reduced as it considered the 20-year sentence as excessive.

The Appellants' case.

12. The 1st Appellant, Kenneth Kipngetch Rono (DW1) testified that on the material day he had visitors. DW1 further testified that after a while they had a scream and together with his visitors, they went to check out what the problem was and when they arrived at the scene, they did not find anyone. It was DW1's testimony that upon inquiry, they were told that someone had been stabbed and the offender had rushed to an uncle's house.
13. In his submissions filed on 6th August 2024, the 1st Appellant submitted that the Prosecution did not prove its case beyond reasonable doubt. That the Prosecution did not call the rider of the motorcycle as a witness. The 1st Appellant further submitted that the Prosecution evidence was marred with contradictions, discrepancies and glaring gaps. That there was no connection between himself and the hearsay evidence tendered in court in relation to the commission of the offence.
14. It was the 1st Appellant's submission that the charge sheet was defective as it contained duplex charges and it could not be cured under the provisions of section 382 of the *Criminal Procedure Code*. That his conviction was therefore unsafe.
15. The 2nd Appellant, Sammy Kiplangat Koech (DW2) testified that on the material day, he stayed in his workshop until 8 pm and he headed home. DW2 further testified that upon reaching the river, he heard an alarm being raised and a motorcycle headed towards the scene and when he reached the scene, he



found people claiming that someone had been assaulted with a knife. It was DW2's testimony that he left for his home and slept and he heard the following day that Josephat had assaulted "Sumbua".

16. In his submissions filed on 6th August 2024, the 2nd Appellant submitted that the Prosecution did not prove its case beyond reasonable doubt. That the Prosecution did not call the rider of the motorcycle as a witness. The 2nd Appellant further submitted that the Prosecution evidence was marred with contradictions, discrepancies and glaring gaps. That there was no connection between himself and the hearsay evidence tendered in court in relation to the commission of the offence.
17. It was the 2nd Appellant's submission that his defence was not considered. It was his further submission that his right to legal representation and a fair trial was infringed upon as the trial court failed to inform him of his right to legal representation at the state's expense. He relied on Article 50 of *the Constitution* of Kenya.
18. The 3rd Appellant, Nicholas Kiplangat (DW3) testified that he saw DW2 lock his shop and leave. DW3 further testified that he was later called and told that people were raising an alarm and when he got home, he found people had gathered at Alfred's (PW2) home. It was DW3's testimony that Alfred accused him and others of attacking the victim.
19. In his submissions filed on 6th August 2024, the 3rd Appellant submitted that the Prosecution did not prove its case beyond reasonable doubt. That the Prosecution did not call the rider of the motorcycle as a witness. The 3rd Appellant further submitted that the Prosecution evidence was marred with contradictions, discrepancies and glaring gaps. That there was no connection between himself and the hearsay evidence tendered in court in relation to the commission of the offence.
20. It was the 3rd Appellant's submission that the charge sheet was defective as it contained duplex charges and it could not be cured under the provisions of section 382 of the *Criminal Procedure Code*. That his conviction was therefore unsafe.
21. I have read and considered the trial court record, the 1st Appellants grounds of Appeal, the 2nd Appellant's grounds of Appeal, the 3rd Appellants grounds of Appeal, the Appellants' submissions all filed on 6th August 2024 and the Respondent's written submissions dated 28th April 2025. The following issues arise for my determination: -
 - i. Whether there were procedural issues affecting a fair trial.
 - ii. Whether the Prosecution proved its case beyond reasonable doubt.
 - iii. Whether the Appellants had plausible defences which cast doubt on the Prosecution case.
 - iv. Whether the sentences were harsh and excessive.

i. Whether there were procedural issues affecting a fair trial.

22. It was a ground of the Appeal that the 2nd Appellant's right to a fair hearing under Article 50(2) (h) of *the Constitution* of Kenya had been violated. Article 50(2) (h) of *the Constitution* of Kenya provided: -

Every accused person has the right to a fair trial, which includes the right to have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly.
23. The Supreme Court of Kenya in *Republic v Chengo & 2 others* [2017] KESC 15 (KLR) held: -

“the right to legal representation at state expense, under the said article, is a fundamental ingredient of the right to a fair trial and is to be enjoyed pursuant to the constitutional edict



without more. We must however emphasize the fact that in accordance with the language of *the Constitution*, this particular right is not open ended. It only becomes available “ if substantial injustice would otherwise result.....

..... In the above context, it is obvious to us that in criminal proceedings legal representation is important. However, a distinction must always be drawn between the right to representation per se and the right to representation at State expense specifically. Inevitably, there will be instances in which legal representation at the expense of the State will not be accorded in criminal proceedings. Consequently, in view of the principles already expounded above, it is clear that with regard to criminal matters, in determining whether substantial injustice will be suffered, a Court ought to consider, in addition to the relevant provisions of the *Legal Aid Act*, various other factors which include:

- (i) the seriousness of the offence;
- (ii) the severity of the sentence;
- (iii) the ability of the accused person to pay for his own legal representation;
- (iv) whether the accused is a minor;
- (v) the literacy of the accused;
- (vi) the complexity of the charge against the accused.....”

24. Similarly, the court in *Mashimo v Republic* [2022] KEHC 11255 (KLR) held: -

“ As regard article 50(2) (h) of *the Constitution*, the said right is not absolute because the court has to satisfy itself that injustice may result before the right can be enforced. Presently, the State only provides free legal services to child offenders and murder suspects. The State has not fully operationalized a fund for provision of free legal services for all accused persons.”

25. I have looked at the trial court record and I have noted that the 2nd Appellant fully participated in his trial and ably cross examined all the Prosecution’s witnesses. The 2nd Appellant then ably presented his defence. At no point during the trial was he prejudiced by his lack of representation by an advocate. As the authorities above have indicated, his right under Article 50 (2) (h) of *the Constitution* was not absolute or given, it would only suffice if the 2nd Appellant would suffer substantial injustice if he was not represented by an advocate. It is my finding therefore that the 2nd Appellant’s rights under Article 50 (2) (h) of *the Constitution* were not infringed upon and I therefore dismiss this ground.

26. It was a ground of the Appeal that the charge sheet was defective by dint of having a duplex charge. A duplex charge was defined in *Ankush Manoj Shah v Republic* [2016] KEHC 8448 (KLR), where the court held: -

“A charge is said to be duplex when it contains more than one offence in a single count. It is simplified in the definition given in *Arcbold Criminal Pleading, Evidence and Practice*, 2010 at pg 9 in the following words:

“the indictment must be double; that is to say, no one count of indictment should charge the defendant with having committed two or more separate offences...”

The question on whether a count breaches the general rule against duplicity is a question relating to the form of the count not the underlying evidence... thus if the particulars set out



in the count allege only one offence, the fact that the evidence at trial may reveal more than one offence does not make the count bad for duplicity”.

27. Similarly, Nyamweya J. (as she was then) in *Hassan Jillo Bwanamaka & another v Republic* [2018] KEHC 2065 (KLR), held: -

“.....the rule against duplicity provides that the prosecution must not allege the commission of two or more offences in a single charge in a charge-sheet. Such a charge is sometimes said to be 'duplex' or 'duplicitous'. The rule stems from two important principles: firstly, as a matter of fairness, a person charged with a criminal offence is entitled to know the crime that they are alleged to have committed, so they can either prepare and/or present the appropriate defence.

Secondly, the court hearing the charge must also know what is alleged so that it can determine the relevant evidence, consider any possible defences and determine the appropriate punishment in the event of a conviction.”

28. Flowing from the above, if one count revealed more than one offence, it would make it a duplex charge and that would render the Charge Sheet defective. The law on Charge Sheets is contained in Section 134 of the *Criminal Procedure Code* which provides as follows: -

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

29. In the present case, the Appellants were charged with the offence of grievous harm. The particulars of the offence contained in the Charge Sheet revealed only one offence. It is my finding therefore that there was no duplicity of charges in the Charge Sheet. Accordingly, this ground of the Appeal is dismissed.

ii. Whether the Prosecution proved its case beyond reasonable doubt.

30. Section 4 of the *Penal Code* defines grievous harm 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;

31. I am persuaded by Kemei J. in *Pius Mutua Mbuvi v Republic* [2021] KEHC 9695 (KLR), where he held that: -

“.....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 reasonable doubt;

- a. The victim sustained grievous harm.
- b. The harm was caused unlawfully.
- c. The accused caused or participated in causing the grievous harm.....”



32. In *John Oketch Abongo v Republic* [2000] KECA 300 (KLR), the Court of Appeal held that: -

“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.”

33. In regards to the injuries sustained by the victim; the victim Kipngeno Cheruiyot (PW1) testified that the Appellants attacked him with stones at Alfred’s (PW2) house. He testified that the Appellants accused him of stabling Gedion alias Sumbua with a knife, allegations of which he denied. PW1 further testified that he suffered injuries on his stomach and legs. PW1’s testimony remained uncontroverted upon cross examination.

34. Dr. Langat (PW4) testified that he examined PW1 after he had been examined at Tenwek Hospital. PW4 further testified that upon examination, he found the victim to be generally in a good condition, had a normal neck and chest and had a dressing on his abdomen which had an incision wound. PW4 produced the treatment notes and P3 Form as P. Exh 1 and 2 respectively. I have looked at the treatment notes and the P3 Form and the P3 Form indicated that the victim was examined on 3rd February 2021 which was approximately two months after the commission of the offence. The treatment notes indicated that the victim required daily wound care. I agree with the Prosecution that the injuries suffered by the victim (PW1) were not in the nature of grievous harm. The injuries neither maimed the victim or threatened his life.

35. Regarding the identity of the Appellant as the perpetrator of the offence, the Court of Appeal in the case of *Wamunga v Republic* [1989] KECA 47 (KLR) expressed itself 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....”

36. It was evident that the offence was committed at night. The Court of Appeal in the case of *Nzaro vs Republic* (1991) KAR 212 held: -

“Identification/recognition at night must be absolutely watertight to justify conviction”.

37. In regards to identification, the victim (PW1) testified that the Appellants attacked him with stones. PW1 further testified that he identified the 1st Appellant as his neighbour from the year 2003, that he knew the 2nd Appellant since his childhood and that he had known the 3rd Appellant for over 5 years. It was PW1’s testimony that one of the 2nd Appellant had a torch and further that there was bright moon light. PW1’s testimony on identification remained uncontroverted upon cross examination.

38. Alfred Kibet Ruto (PW2) and Rose Chebet Ruto (PW3) both testified that the Appellants attacked PW1 with stones in their home and when PW2 tried to stop them, the 2nd Appellant hit PW2. Both their testimonies were uncontroverted upon cross examination. Additionally, the 3rd Appellant admitted during cross examination that PW2 and PW3 were his neighbours.



39. PW1 testified that he also identified the Appellants by their voices. The Court of Appeal in *Dishon Litwaka Limbambula v Republic* [2003] KECA 180 (KLR) held: -

“Normally, evidence of voice identification is receivable and admissible in evidence and it can, depending on the circumstances, carry as much weight as visual identification. In receiving such evidence, care would be necessary to ensure that it was the accused person’s voice, the witness was familiar with it and recognized it and that the conditions obtaining at the time it was made were such that there was no mistake in testifying to that which was said and who had said it.....”

40. From the evidence above, it was clear that the evidence of the victim was more of recognition than identification. The Appellants were also placed in the scene of the crime by the victim (PW1) and the two eye witnesses (PW2 and PW3. There is no doubt in my mind that the Appellants were well known to the victim (PW1). It is my finding therefore that the Appellants were positively identified as the perpetrator of the offence by the victim.

41. Flowing from the above, it is my finding that the Prosecution proved its case against all the Appellants beyond reasonable doubt.

iii. Whether the Appellants had plausible defences which cast doubt on the prosecution case.

42. I have considered the 1st Appellant’s defence in which he denied committing the offence. His defence has been aptly captured earlier on in this Judgement. Having considered the 1st Appellant’s defence, it is my finding that it was a mere denial and an afterthought and did not displace the Prosecution case which I have already found proven.

43. I have considered the 2nd Appellant’s defence in which he denied committing the offence. His defence has been aptly captured earlier on in this Judgement. Having considered the 2nd Appellant’s defence, it is my finding that it was a mere denial and an afterthought and did not displace the Prosecution case which I have already found proven.

44. I have considered the 3rd Appellant’s defence in which he denied committing the offence. His defence has been aptly captured earlier on in this Judgement. Having considered the 3rd Appellant’s defence, it is my finding that it was a mere denial and an afterthought and did not displace the Prosecution case which I have already found proven.

iv. Whether the sentences were harsh and excessive

45. Sentencing is at the discretion of the trial court but such discretion must be exercised judiciously and not capriciously. The trial court must be guided by the evidence and sound legal principles. An appellate court would be entitled to interfere with the sentence imposed by the trial court if it is demonstrated that the sentence imposed is not legal or is so harsh and excessive as to amount to miscarriage of justice, and or that the court acted upon a wrong principle.

46. The penal section for the offence of grievous harm is provided by Section 234 of the *Penal Code* which states that: -

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

47. I have considered the circumstances of the case and the nature of injuries occasioned to the victim (PW1) which I have found not to be in the nature of grievous harm. It is my view that the 20-year



prison sentence for each Appellant was not commensurate to the injuries suffered by the victim (PW1). I will therefore interfere with the sentence issued by the trial court.

48. In the final analysis, I affirm the Appellants' conviction. However, the sentence of 20 years is vacated and substituted with 5 years' imprisonment. For avoidance of doubt, each Appellant shall serve 5 years imprisonment. In accordance to section 333(2) of the *Criminal Procedure Code*, the above sentence was to begin on 14th May 2020 being the date of their date of arrest. In essence, as the day of delivery of this Judgment, the prescribed sentence above shall have lapsed.
49. In the end, the Appellants have served their sentences and are set at liberty.

JUDGEMENT DELIVERED, DATED AND SIGNED THIS 19TH DAY OF MAY, 2025.

J.K.NG'ARNG'AR

JUDGE

