



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Barasa v Republic (Criminal Appeal E065 of 2024)
[2025] KEHC 10254 (KLR) (16 July 2025) (Judgment)**

Neutral citation: [2025] KEHC 10254 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KITALE
CRIMINAL APPEAL E065 OF 2024**

RPV WENDOH, J

JULY 16, 2025

BETWEEN

CHEROBEN NDIWA BARASA APPELLANT

AND

REPUBLIC RESPONDENT

JUDGMENT

1. Cheroben Ndiwa Barasa was charged with two others, for the offence of grievous harm contrary to section 234 of the Penal Code. The appellant was the second accused in the trial court. The particulars of the charge were that on 13/4/2023 at Berur Village, in Trans Nzoia Sub County, within Trans Nzoia County, jointly with others before court, unlawfully did grievous harm to Patrick Kibet Kimokoit
2. The appellant denied the offence and the case proceeded to full trial with five (5) witnesses testifying for the prosecution.
3. The 3rd accused died before defence hearing. The Appellant gave unsworn evidence in his defence and did not call any other witness. Upon conviction, the appellant, was sentenced to five years imprisonment. The appellant is aggrieved by both conviction and sentence and filed this appeal based on the amended grounds of appeal filed together with the submission. The grounds are as follows: -
 1. That the appellant's right to fair hearing under Article 50(2) (g) of the Constitution was violated;
 2. That the principles on amendment of the charge sheet were not complied with;
 3. That the charge was defective;
 4. That the appellant's defence was not considered;
 5. That some crucial witnesses were not called;



6. That the case was not proved to the required standard.
4. The appellant prays that the court do quash the conviction, set aside the sentence and set the appellant at liberty.
5. This being a first appeal this court is duty bound to reexamine all the evidence tendered in the trial court, evaluate it and draw its own conclusions but always bear in mind that it neither saw nor heard the witnesses testify. The Court is guided by the decision in *Okeno v Republic* (1972) EA32.

The Prosecution Case: -

6. PW1 Patrick Kibet a farmer at Kalaa Village, recalled that on 13/11/2023 about 6.00p.m., he left Kisawai Centre for home and when at Berur, he saw Esau and Cheruben who had panga and metal rod; that Moses, Martin, Esau and another came from his front and Esau hit him with a panga on the head while Cheruben (Appellant) injured him on the hand and they started to beat him, Moses beat him with a panga on the back as he tried to resist till he lost consciousness; that he came to when at Kitale County Referral Hospital. During the attack, he lost his 25,000/= and a phone. He was admitted for two weeks. He was found to have suffered injuries to the jaw, lost three teeth, metal implants were fixed on the jaw. He identified his blood stained clothes which were produced as P.Exh.1-4. He produced a discharge summary and P3 form P.Exh.6. PW1 denied that he had any dispute with any of the suspects.
7. PW2 John Mose Barasa of Cheptembe Kasawai Location, recalled 13/4/2023 about 7.30p.m., he was at his home, when Elias Kipyegon went to his house on a motor cycle and told him that his uncle Patrick was being beaten at Berur. They went to Berur on the motor cycle. At the scene, he saw Esau, Cheruben, Martin, Stano, Nyagi, Godfrey and Moses beating PW1 (Patrick); that Martin had a solar light; that they rushed to report at Kalaa police post and police rushed to the scene and found the village elder and 'Nyumba Kumi' official; that PW1 lay down soaked in blood, jaw was cut, and they took him to Kitale Hospital. PW2 denied having any dispute with the appellant but that he had a land dispute with the appellant.
8. PW3 Elias Kipyegon of Cheptumwe, Kisawai said that he is a motor cycle rider. He identified the complainant as his grandfather; that on 13/4/2023, about 6.00p.m., he was at Kisawai Centre when Patrick asked him to take him to Kalaa. They went upto Berur and found a group of people among them Esau, Cheruben, and Moses standing beside the road; that when he wanted to pick Patrick, Esau told him to leave; that the people surrounded Patrick; that Esau had a panga and iron rod, Cheruben had an iron rod and Moses a rungu (club); that Esau threw a stone at Patrick's head and started to assault Patrick. He rushed home to inform his father (PW2) and they went back to the scene and found them still beating Patrick. They went to report at Kalaa police post. On returning to the scene, they found Patrick in a pool of blood and they took him to hospital.
9. PW5 Cpl. Danson Mageta of Kisawai Police post was the Investigating officer in this case. He received a report of assault from the complainant on 25/4/2023, recorded witness statements; that the complainant had cut wounds on head and lower jaw; PW1 handed over to PW5 his blood stained clothes P.Exh.2, and that he had been admitted at Kitale County Referral Hospital for eleven 11 days. PW5 said that the appellant was arrested in Kitale town.

Defence Case: -

10. In his unsworn defence, the appellant told the court that he comes from Berur village and that on 13/4/2023, at midday. he was servicing his motor cycle and went to Kisawai centre at 7.30p.m. and met the Assistant Chief of Kisawai Sub Location. He went home and found a person beaten. He flashed his



torch and saw the complainant was injured. He called the Assistant Chief who told him that he would tell police officers. The next day, the Assistant Chief came and he showed him where the complainant was; that his premises is near the scene.

Appellant's Submissions: -

11. The appellant also filed submissions in support of the appeal.
12. On ground one, he submitted that Articles 50(2) (g) was violated in that he was not informed of his right to chose an Advocate to represent him and to be informed of that right promptly. He relied on section 43 of *Legal Aid Act* which imposes a duty on the court to comply with Article 50(2) (g) and (h) of the *Constitution* before plea. He relied on the decisions of *JOO v Republic* (2021) and *K.O. v Republic* CRA 026 of 2021 where courts found that failure to inform an accused of the said right rendered the proceedings a nullity and quashed the proceedings.
13. On ground two, the appellant urged that the court failed to comply with principles of amending a charge sheet; that when the case had reached the defence, the charge was amended, the accused were called upon to plead to it and after that the court did not advice the appellants on whether or not to recall witnesses as is required.
14. The third ground, is that the charge was defective because the word “intentionally” was omitted. He relied on the case of *Jason Akumu Yongo v Republic* CA 1/1983 where the Court of Appeal held the charge sheet to be fatally defective for omitting the word ‘intentionally’
15. On ground 4, the appellant submitted that his defence was not considered yet it created a doubt in the prosecution case. He relied on the decision of *JOO v Republic* (2015) eKLR.
16. The fifth ground is that the case was not proved to the required standard. The appellant submitted that there were contradictions as to how many people were involved, where the offence was reported and as regards how long the complainant was admitted.
17. On ground six, it was submitted that some crucial witnesses were not called i.e., the village elder, Nyumba Kumi members and the identifying police officer. He relied on the case of *Bukenya v Uganda* (1972) EA 549.

Respondent's Submissions: -

18. In opposing the appeal, the Prosecution Counsel also filed submissions and identified three issues, whether the evidence can sustain a conviction; whether there were contradictions in the prosecution case and whether the sentence was proper.
19. Counsel submitted that the complainant was attacked while on his way home and sustained grievous harm; that there is no doubt that the injuries were inflicted unlawfully without any provocation and so far, there has been no explanation for the attack.
20. It was also submitted that PW1, 2 and 3 identified the appellant as one of the assailants and he is a person known to all of them. Counsel relied on the decision of *Reuben Taabu Anjononi v Republic* (1980) eKLR where the Court of Appeal held that recognition is more reliable than identification of a stranger.
21. As regards sentence, Counsel argued that no good reason has been put forth to warrant interference with the sentence; that under section 234 of the *Penal Code*, upon conviction one is liable to imprisonment for life; that the appellant was sentenced to only five (five) years and has not demonstrated that the court overlooked some material fact, or acted on wrong principles.



22. He urged the court to dismiss the appeal in its entirety.

Determination: -

23. Having considered the grounds of appeal, the evidence on record and rival submissions and before I delve into whether or not the offence of grievous harm was proved, I will consider whether or not the amendment of the charge on 1/8/2024 was proper. Amendment of charge sheets is governed by section 214 of the CPC. The said section provides as follows; -

214. Variance between charge and evidence, and amendment of charge

(1) Where, at any stage of a trial before the close of the case for the prosecution, it appears to the court that the charge is defective, either in substance or in form, the court may make such order for the alteration of the charge, either by way of amendment of the charge or by the substitution or addition of a new charge, as the court thinks necessary to meet the circumstances of the case: Provided that—

(i) where a charge is so altered, the court shall thereupon call upon the accused person to plead to the altered charge;

(ii) where a charge is altered under this subsection the accused may demand that the witnesses or any of them be recalled and give their evidence afresh or be further cross-examined by the accused or his advocate, and, in the last-mentioned event, the prosecution shall have the right to re-examine the witness on matters arising out of further cross-examination.

(2) Variance between the charge and the evidence adduced in support of it with respect to the time at which the alleged offence was committed is not material and the charge need not be amended for the variance if it is proved that the proceedings were in fact instituted within the time (if any) limited by law for the institution thereof. CAP. 75 [Rev. 2012] Criminal Procedure Code [Issue 1] 78

(3) Where an alteration of a charge is made under subsection (1) and there is a variance between the charge and the evidence as described in subsection (2), the court shall, if it is of the opinion that the accused has been thereby misled or deceived, adjourn the trial for such period as may be reasonably necessary.

24. From the provisions of the above section, an amendment of a charge cannot be done after close of the Prosecution case. In this case, the appellant had already been placed on his defence and was waiting to give his defence. It was irregular for the court to allow an amendment at the stage. In addition, when the Prosecutor made the application for amendment, he did not disclose what he needed to be amended. The court did not record it.

25. In addition to the above, upon application by the prosecution, the appellant should have been accorded an opportunity to respond, as to whether he had objection to the amendment or not before the court made an order for amendment. Again, the court did not record what was amended.

26. After an order of amendment of the charge sheet is made, the court has the duty to explain to the accused person whether or not the accused wishes to recall any or all of the witnesses following the amendment. The court did not invite or allow the appellant to indicate whether or not to recall witnesses. But in any event, the witnesses could not be recalled because it would amount to reopening the Prosecution case which would have again been irregular.



27. Even without considering the other grounds of appeal, I find that the amendment of the charge sheet was irregular and that was prejudicial to the appellant.
28. Did that irregularity render the proceedings fatal? In my view it did not. It is an irregularity that does not go to the root of the charge and I find that it renders the proceedings a nullity. The conviction is hereby quashed and sentence set aside.
29. Having found as above, the question is whether this court should order a retrial. In the case of *Samuel Wabini Ngugi v Republic* [2012] eKLR, the court stated:-
- The law as regards what the court should consider on whether or not to order a retrial is now well settled. In the case of *Abmed Sumar v Republic* [1964] EALR 483;
- “...in general, a retrial will be ordered only when the original trial was illegal or defective; it will not be ordered where the conviction is set aside because of insufficient of evidence or for the purposes of enabling the prosecution to fill up gaps in its evidence at the first trial; even where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame, it does not necessarily follow that a retrial should be ordered.”
30. The appellant faced a very serious charge of grievous harm and was sentenced to five (5) years imprisonment on 4/11/2024. So far, he has served about eight months in jail. This court is satisfied that he has not served a substantial part of the sentence and will not be prejudiced if a retrial is ordered.
31. Besides, the court has considered the potentially admissible evidence on record and finds that it is likely to result in a conviction. The complainant was seriously injured and the perpetrators if found guilty, should be brought to book. For the above reasons, I order that there be a retrial.
32. The appellant be released to the arresting police station forthwith i.e., Kinyoro police station and be produced before the Chief Magistrate Kitale on 21/7/2025 for fresh plea and the case be heard by any other magistrate other than S.K. Mutai – Senior Principal Magistrate. It is so ordered.

DELIVERED, DATED AND SIGNED AT KAPENGURIA THIS 16TH DAY OF JULY, 2025

R. WENDOH

JUDGE

Judgment delivered in open court at Kapenguria in the presence of:-

Prosecution Counsel - Mr. Suter Present

Appellant present (virtually)

Juma/Hellen – Court Assistants

