Kipkemboi v Republic (Criminal Appeal E063 of 2024)
[2025] KEHC 9585 (KLR) (4 July 2025) (Judgment)

Neutral citation: [2025] KEHC 9585 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ITEN

CRIMINAL APPEAL E063 OF 2024

JRA WANANDA, J

JULY 4, 2025

BETWEEN

HARON KIBET KIPKEMBOI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal against the Judgment of Hon. E. Kigen - PM, delivered on 18/11/2024 in Iten Senior Principal Magistrate's Court Criminal Case No. E1187 of 2023)

JUDGMENT

1. The background of this Appeal is that the Appellant was charged in the above case with the offence of causing grievous harm contrary to Section 234 of the *Penal Code*. The particulars were that on 8/12/2023 around 0330 hrs at Kapyego Shopping Centre, Marakwet County, he wilfully and unlawfully did grievous harm to one Peninah Jepchumba, by beating her on the head, hand and legs using a wooden stick.

2. The Appellant pleaded not guilty, and the case proceeded to full trial in which the prosecution called 5 witnesses. At the close of the Prosecution case, the Court found the Appellant with a case to answer and placed him on his defence. He then gave sworn testimony and did not call any other witness. By the said Judgment, the Appellant was convicted and sentenced to serve 25 years' imprisonment.

3. Dissatisfied with the decision, the Appellant, through Messrs Chebii & Co Advocates, filed this Appeal on 28/11/2024, against both conviction and sentence. The following Grounds were preferred:

    i. That the learned trial Magistrate erred in law and in fact in holding that the accused was guilty of the offence alleged yet the injuries stated in the charge did not reflect what the doctor adduced as evidence.

ii. That the learned trial Magistrate erred in law and in fact in holding that the charges against the accused person were proved yet there was no evidence of any injury to the head by the doctor or at all.

iii. That the learned trial Magistrate erred in law and in fact in not making a finding that what was proved in evidence differed from the charge and did not amount to grievous harm.

iv. That the learned trial Magistrate erred in law and in fact in not making a finding that the offence occurred at 3 am in the morning and evidence of identification was crucial and the Court needed to satisfy itself on this before convicting the Appellant.

v. That the learned trial Magistrate erred in law and in fact in not making a finding that the standard of proof was not achieved.

vi. That the learned trial Magistrate erred in law and in fact in imposing a sentence that was manifestly excessive in the circumstances of the case.

vii. That the learned trial Magistrate erred in law and in fact in not holding that the evidence was contradictory.

Prosecution evidence at the trial Court

4. PW1 was Penina Jepchumba, the complainant. She testified that the Appellant is the father to his child, that on 8/12/2023 at 3.30 am, she was with her boyfriend, Mwangi, with whom they were coming out of a lodging and who was escorting her when they met the Appellant who pulled her by the neck and took her to a deserted murram road where he took her phone and hit her on the legs with a stick. She stated that the Appellant hit her on the head as she used her hand to shield herself and that she got injured on the hand and fingers. She stated that Mwangi had gone to pick his phone and came in time but the Appellant hit him with a stone, they struggled and the phone fell and Mwangi helped her to her feet and took her back inside the lodging but the Appellant jumped over the fence and confronted them again, the watchman asked the Appellant to leave but he instead, took the same stick and again, hit the complainant on the head. She stated that the Appellant pulled her by the skirt towards the road and told her that he was taking her to hospital but instead, took her to a club where he works and locked it while threatening to kill her. She added that the Appellant then took her to his house and pushed her to the bed then took a pair of scissors and cut her skirt while threatening to kill her as he was looking for a knife. She stated that her jacket was soaked in blood and the Appellant removed it, he cut her pants and hit her on the nose and she started bleeding from the nose too, he knocked her on the chest using his knee, and that just then her brother arrived and the Appellant told her that she was lucky because her brother had arrived. She stated that her said brother threatened to break the door and when he gained entry, he demanded that the Appellant take the complainant to hospital upon which the Appellant took her to a chemist where she was attended to before she later went to Chebiemit for treatment and then reported the matter at the Kapyego Police Station.

5. PW2 was Pius Kiplagat who testified that he used to work at a lodge as a security guard, that on 8/12/2023, he was at work when at about 3.00 am, he heard screams and when he went to check, he found people fighting on the road, that the area was well lit and he noticed that there were 3 people involved, among whom he recognized the Appellant and Chumbaa (the complainant). He stated that they came towards the lodge, that the complainant sat next to the gate while the 3rd person went to a room, that the Appellant told PW2 that his wife (the complainant) was the problem, that PW2 asked the Appellant to leave but the Appellant picked up a stick and hit Chumbaa on the head, the Appellant dragged her to his house and PW2 followed them from behind. He testified that he then phoned the

complainant's brother and told him about the incident, they went with the brother to the Appellant's house upon which the Appellant came out with the complainant, put her on a motor-cycle and took her to a Chemist. He stated further that the complainant was already injured at the lodge and that he saw the Appellant hit her on the head. He testified further that he knew the Appellant as he is from the area where he also owns a club. He stated further that the complainant had come to the lodge with a friend who was holding her and the Appellant followed them from behind. He also stated that he pleaded with the Appellant not to kill the complainant in their compound. In cross-examination, he stated that he knew the complainant as the Appellant's friend.

6. PW3 was Jacob Khajiji. He testified that on 8/12/2023, at 3.00 am, he was in his house when he heard someone screaming and when he went to check, he found that it was a lady who had fallen outside the gate and whom he recognized as a hotel customer whom he knew well. He stated that upon asking, the lady told him that the Appellant had found her with someone in the lodge. He stated that the Appellant then followed and hit the complainant on the head and she bled and the Appellant forcefully dragged her out of the hotel. He stated that he pleaded with the Appellant to leave the complainant alone, and that the area is well lit. He also testified that the complainant had injuries on the leg and reiterated that he saw the Appellant hit her.

7. PW4 was Police Constable Peter Mwakio from Kapyego Police Station and who stated that he took over the case from another officer who had been transferred. He testified that the Appellant had assaulted his ex-wife when he found her with another man and that the stick he used to commit the assault was not recovered. He stated that he knew the Appellant as a businessman in the area and he also knew the complainant as she used to work in a hotel where he (PW4) used to go to eat.

8. PW5 was Henry Kiplagat who stated that he is a clinician at Kapyego Health Centre. He testified that on 8/12/2023, the complainant went to the hospital with injuries on the head and on the left leg, that upon examining her, he found that she had a deep cut wound on the head which was bleeding, a fracture on the left leg at the tibia and fibula, a fracture of the medial maleoli, and injuries on the left hand and on the small finger. He testified that the complainant told her that the Appellant had hit her with a blunt object, a stick, and that he classified the injuries as "grievous harm". He stated that he then referred the complainant to Chebiemit for further treatment. He then produced the P3 Form and the Treatment notes.

Defence testimony before the trial Court

9. As aforesaid, at the close of the Prosecution case, the Court found the Appellant with a case to answer and placed him on his defence. He then gave sworn testimony and did not call any other witness

10. The Appellant testified as DW1 and stated that he was living with the Appellant when on the night of 7/12/2023, he was unwell and told the complainant that he was going home to collect his identity card and other documents. He stated that when he came back he did not find the complainant who eventually appeared at 4.00 am in the company of another man. He stated that he chased them away but the man picked a stone and threw it at him injuring him. He stated that he beat the complainant and the other person ran away and he and the complainant's brothers then took the complainant to hospital. According to him, he informed his parents about the matter and the two families discussed the matter.

11. As aforesaid, after the trial, the Court convicted the Appellant and sentenced him to 25 years' imprisonment.

Hearing of the Appeal

12. The Appeal was canvassed by way of written Submissions. The Appellant's Advocates filed the Submissions dated 5/05/2025 while the Respondent (State) filed, through Prosecution Counsel Rachel Mwangi, filed the Submissions dated 15/05/2025.

Appellants' Submissions

13. Counsel for the Appellant submitted that the Court erred in its reliance on the evidence of identification of the severity of injuries inflicted given that the alleged offence occurred at 3.00 am when visibility was inherently poor and impaired. He urged further that the trial Court also failed to consider that there was lack of corroborative evidence as medical reports or expert testimony did not reflect what was stated in the charge. On the issue of identification, he cited the case of Wamunga v Republic [1989] KLR 424, and the case of R v Turnbull (1977). On the Prosecution's burden of proof, he cited Section 107 of the *Evidence Act* and submitted that the trial Court erred in relying on circumstantial evidence that was not corroborated by independent and reliable sources. On sentencing, Counsel submitted that the sentence of 25 years imprisonment is manifestly harsh and excessive, that the trial Court failed to consider the principles of proportionality and fairness as outlined in Section 216 of the *Criminal Procedure Code* and in the Sentencing Policy Guidelines, 2023. He pointed out that the Appellant is a 1st offender, that the Appellant has shown remorse and has been co-operative throughout the trial. He cited the case of Francis Karioko Muruatetu & Another v Republic [2017].

Respondents' Submissions

14. On the issue of identification, Prosecution Counsel Ms. Mwangi, submitted that the complainant was able to positively identify the Appellant as the person who attacked her since the Appellant was the father of her child and thus not a stranger to her. Counsel also observed that the complainant testified that at the lodge where she was attacked there were security lights and she was able to see the attacker well and which was corroborated by PW2 and PW3. On the issue of sentence, she denied that the same was harsh or manifestly excessive, and submitted that the Court considered the gravity of the offence, and noted that "the country is grappling with cases of femicide and gender-based violence, which have become apparent". She also cited the case of Bernard Kimani Gacheru v R [2002] eKLR on the principles applicable when an appellate Court is handling an Appeal on the issue of sentence.

Determination

15. This being a first appeal, the duty of the Court is to analyze and re-evaluate afresh the evidence adduced at the lower Court and draw its own independent conclusions while bearing in mind that the trial Court had the advantage of seeing and hearing the witnesses testify (See Okeno v Republic (1972) EA 32).

16. The issues that arise for determination in this Appeal are evidently the following:

    a. Whether the prosecution proved the offence of grievous harm to the required standard.

    b. Whether the sentence of 25 years imprisonment was harsh and excessive.

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

a. Whether the prosecution case was proved beyond reasonable doubt

18. 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."

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

20. 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".

21. 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).

22. 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.

23. 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.

24. In this case, the Appellant, in his defence, admitted that he beat up the complainant and because of the injuries she suffered as a result thereof, he took her to a chemist for treatment. The Clinician (PW5) who examined the complainant testified that the complainant went to the hospital with injuries on the head and on the left leg, that upon examining her, he found that she had a deep cut wound on the head which was bleeding, a fracture on the left leg at the tibia and fibula, a fracture of the medial maleoli, and injuries on the left hand and on the small finger. He testified that the complainant told her that the Appellant had hit her with a blunt object, a stick, and that he classified the injuries as "grievous harm" It is evident that the complainant had been through a vicious beating and had sustained the injuries therefrom. The injuries alleged by the complainant in her testimony were therefore clearly corroborated by the medical evidence. PW2 and PW3 also confirmed witnessing the assault and seeing the injuries sustained by the complainant.

25. A look at the extent of the injuries listed in the P3 Form clearly 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". It is therefore apparent. from the evidence on record, that the trial Magistrate correctly found that the complainant sustained injuries that were "grievous".

26. On the second element, namely, proof that the injuries sustained by the minor were "caused unlawfully", and thus without legal justification or excuse, the evidence on record points to the beatings being a consequence of a jilted love and by extension, a love triangle. While the same may have been a reaction to what the Appellant could have deemed as provocation, seeing his ex-lover with another man, the magnitude of the violence he meted out on the complainant was excessive and unwarranted. The same cannot therefore be termed "legal". In any event, no "lawful" reason for the assault was alleged. Under these circumstances, I have no reason to disagree with the trial Magistrate on her finding that there was proof that the injury sustained by the minor "was caused unlawfully", and thus "without legal justification or excuse".

27. On the third element, namely, "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".

28. In this case, the Appellant stated that he was living with the complainant. The Appellant, in his defence, then admitted that, indeed, he beat the complainant and that his reason for doing so was because the complainant failed to return home in time, and when she finally emerged at 4.00 am, she was accompanied by another man. The Appellant did not therefore deny the complainant's allegations that they were well-known to each other as they were or had been lovers, in fact, perhaps "husband and

wife". The P3 Form also indicates that the complainant reported being assaulted by a person "known to her". PW2 and PW3 also testified that they interacted with the Appellant during the incident, and did speak with him. PW2 and PW3 both also testified that the Appellant forcefully dragged the complainant to his house, in their full view. PW1, PW2 and PW3 all also stated that the scene where the assault occurred was also well lit with sufficient security lighting. 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". This was restated in the case of R v Turnbull [1976] 3 All E.R. 549, and also the case of Anjononi v Republic (1980) KLR 59.

29. 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. On this issue of identification, considering the overwhelming evidence available, I do not think that the Appellant's Counsel, Dr. Chebii was really serious in advancing this ground.

30. On the Appellant's "participation" in the beating, as aforesaid, the Appellant, in his defence, admitted that he indeed, did beat up the complainant as charged but tried to explain that he did it out of anger because the complainant (his alleged wife) returned home late and showed up with another man. The complainant narrated, in detail, the harrowing experience that she underwent at the hands of the Appellant and this was corroborated by PW2 and PW3. The Appellant's participation in the crime therefore remains uncontroverted.

31. 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 disturb the Appellant's conviction. From the evidence tendered, I am satisfied that the trial Magistrate correctly found that the Prosecution had proved the offence beyond reasonable doubt.

b. Whether the sentence of 25 years imprisonment was justified

32. 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".

33. 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."

34. In view thereof, it is clear that the 25 years prisonment imposed by the trial Court was within the statute. This observation does not however mean that this Court cannot determine the issue whether the sentence was manifestly excessive or harsh, which I now hereby do.

35. 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.

36. 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. ....."

37. 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. ....."

38. 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 statutory punishment being set at up to life imprisonment is enough evidence of its seriousness. It is a crime therefore always severely punished. This was also a gender-based violence case as the assault was committed by an alleged ex-husband who seemingly got jealous of the ex-wife moving on and finding the ex-wife with an alleged new lover. The trial Magistrate, while sentencing, correctly observed that "the country is grappling with cases of femicide and gender-based violence, which have become apparent". I agree this was a proper factor to be taken considered. The attack was also so savage and barbaric as confirmed by the extent of injuries inflicted. Hitting the complainant on the head severally, as he did, means that the Appellant intended to inflict maximum damage. This could have easily turned fatal. The complainant will no doubt suffer lifelong trauma resulting from the assault. Taking all these factors into account, it cannot be denied that the Appellant merited a stiff and deterrent sentence. I also note that he was given an opportunity to mitigate which he did.

39. Nonetheless, I also find the existence of some mitigating factors. For instance, the Appellant was said to be a 1st offender with no past criminal record. The Appellant, in mitigation, also stated that he is a parent with 5 children who depend on him. The record also reflects that the Appellant, after committing the assault, took the complainant to hospital. This demonstrates some level of remorse on

the part of the Appellant and realization of the magnitude and extent of the crime he had committed. 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, and rebuild his life and also bring up his children. In the circumstances, I find that there is justification for reduction of the prison sentence of 25 years which I find manifestly excessive in the circumstances.

Final orders

40. In the end, I make the following Orders:

    i. The appeals against conviction fails and the conviction is upheld.

    ii. On sentence, I hereby set aside the sentence of 25 years imprisonment imposed by the trial Court in Iten Senior Principal Magistrate's Court Criminal Case No. E1187 of 2023 and substitute it with one of 7 years imprisonment.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 4TH DAY OF JULY 2025

.....

WANANDA J. R. ANURO

JUDGE

Delivered in the presence of:

The Appellant (present virtually from Eldoret Main Prison)

Mr Kipkoech hb for the Appellant

Ms. Mwangi for State.

Court Assistant : Brian Kimathi.