



REPUBLIC OF KENYA



KENYA LAW
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**Nzeki v Republic (Criminal Appeal E076 of 2021)
[2024] KEHC 292 (KLR) (11 January 2024) (Judgment)**

Neutral citation: [2024] KEHC 292 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MAKUENI
CRIMINAL APPEAL E076 OF 2021
GMA DULU, J
JANUARY 11, 2024**

BETWEEN

PETER MUTISYA NZEKI APPELLANT

AND

REPUBLIC RESPONDENT

*(From the conviction and sentence in Criminal Case No. E113 of 2021 at
Makueni Law Courts delivered on 27th July 2021 by Hon. J. N. Mwaniki (CM))*

JUDGMENT

1. The appellant was charged in the Magistrate's court with grievous harm contrary to section 234 of the Penal Code. The particulars of offence were that on April 25, 2021 at around 8:30hours at Nziu Health Centre within Makueni County, unlawfully did grievous harm to Mercy Mutua using a knife.
2. He denied the charge. After a full trial, he was convicted of the offence under section 215 of the Criminal Procedure Code and sentenced to serve ten (10) years imprisonment.
3. Dissatisfied with the conviction and sentence, the appellant has come to this court on appeal through counsel Omwando Mbaka & Company Advcoates, relying on the following supplementary grounds of appeal:-
 1. That the trial Magistrate erred both in law and fact in unreasonably, unjudiciously and wrongly finding that the prosecution had proved its case beyond reasonable doubt thereby convicting and sentencing the appellant.
 2. The trial Magistrate erred and misdirected himself in law and fact in convicting the appellant without a proper analysis of the evidence.



3. The learned Magistrate erred in law by shifting the burden of proof from the prosecution to the accused person contrary to the common law principle of the prosecution proving (the case) beyond reasonable doubt.
 4. The trial Magistrate erred both in law and fact in failing to take into account the serious inconsistencies and contradictions amongst the prosecution witnesses.
 5. The trial Magistrate erred in law in totally disregarding the appellant's evidence.
 6. The learned Magistrate erred in law and in fact in passing a harsh and excessive sentence against the appellant.
4. The appeal was canvassed through written submissions. In this regard, I have perused and considered the submissions filed by Omwando Mbaka & Company Advocates for the appellant as well as the submissions filed by the Director of Public Prosecutions.
 5. This being a first appeal, I start by reminding myself that I have a duty to re-evaluate all the evidence on record, and come to my own independent conclusions and inferences but bear in mind that I did not have the opportunity to see witnesses testify – see *Okeno v Republic* (1972) EA 32.
 6. I have also to be guided by the principle that this being a criminal case the burden was on the prosecution to prove all the ingredients of the offence beyond reasonable doubt – see section 107 and 108 of the *Evidence Act* (Cap.80), and the case of *Sawe v Republic* (2003) eKLR.
 7. In proving their case, the prosecution called five (5) witnesses. On his part, the appellant tendered a long unsworn defence statement.
 8. In the submissions, the Director of Public Prosecutions relied on the case of *John Oketch Abongo =Versus= Republic* – Kisumu Court of Appeal Criminal Appeal No. 4 of 2000, on the definition of grievous harm. In that particular case, the Court of Appeal stated that the definition of grievous harm contains various ingredients, and that the presence of any of those ingredients would suffice to disclose grievous harm.
 9. Statutorily, under Section 4 of the *Penal Code*, grievous harm is defined 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 to so injure health, or which extends to permanent disfigurement, or to permanent or serious injury to any external or internal organ, membrane or sense.”
 10. In the present case, the occurrence of the alleged stabbing by the appellant of the complainant with a knife was testified to by PW1 Damaris Masila a co-worker with the complainant, PW2 PC Henry Rono a police officer who rushed to the scene, and PW5 Mercy Mukui Mutua the complainant.
 11. The appellant, in his unsworn defence testimony admitted stabbing the complainant but stated that it was due to anger or self defence, and that the injuries were just minor in nature.
 12. In my view, the prosecution proved beyond any reasonable doubt that indeed the injuries inflicted on the complainant were so inflicted by the appellant. The defence of provocation or self defence does not arise in the present case as the appellant, from the evidence on record, had formed the prior intention to assault the complainant due to a love affair gone sour, and did assault the complainant at her employment quarters when the complainant was defenceless.



13. As to whether the injuries suffered by the complainant were minor or amounted to grievous harm, the evidence of PW4 Dr. Stephen Musembi is clear. Several injuries were noted including a two centimetre cut near right ear which was deep and which injured a nerve that controls the upper and lower cheek thus affecting closure of the complainant's eye, stab wound on left shoulder deep to the chest cavity, deep stab wound on the abdomen below the chest cavity, deep stab wound on side of abdomen below chest cavity, fracture on left ninth rib, cut on left index finger, which injuries were classified by Dr. Lugogo (now deceased) as "grievous harm".
14. In my view, the above injuries cannot be described as minor. They satisfied the definition of grievous harm. I am thus of the view that the trial court was correct in finding the appellant guilty and convicting him of grievous harm. I will uphold the conviction.
15. With regard to sentence, the maximum sentence under section 234 of the Penal Code is life imprisonment. In view of the nature and circumstances of this particular case, wherein if the knife had not bent the appellant appears to have been bent on killing the complainant, in my view the sentence of 10 years imprisonment is not harsh or excessive. I will thus uphold the sentence.
16. Consequently, I dismiss the appeal and uphold both the conviction and sentence. Right of appeal 14 days.

**DATED, SIGNED AND DELIVERED THIS 11TH DAY OF JANUARY 2024 VIRTUALLY AT VOI.
GEORGE DULU**

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JUDGE

In the presence of:-

Ms. Nusura – Court Assistant

Appellant

Ms. Omolo for DPP

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

