



**Mauti v Republic (Criminal Appeal E025 of 2023)  
[2024] KEHC 1922 (KLR) (19 February 2024) (Judgment)**

Neutral citation: [2024] KEHC 1922 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISII  
CRIMINAL APPEAL E025 OF 2023  
TA ODERA, J  
FEBRUARY 19, 2024**

**BETWEEN**

**REUBEN NYANGAU MAUTI ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**JUDGMENT**

1. The Appellant, Reuben Nyangau Mauti, filed a Petition of Appeal dated June 8, 2023 challenging the decision of Hon. C. Sindani (PM) in Ogembo SPMCCR Case No. E2090 of 2021 in Republic v Reuben Nyangau Mauti.
2. The grounds of appeal are as follows: -
  1. The Learned Trial Magistrate erred in fact and in law in convicting the Appellant in the evidence before him.
  2. The Learned Trial Magistrate erred in law and fact in finding that the prosecution had proved the case beyond reasonable doubt in view of glaring contradictions in the evidence of the prosecution.
  3. The Learned Trial Magistrate erred in law and fact in finding the Appellant guilty when the ingredients of the offence had not been proved.
  4. The sentence was manifestly excessive.
  5. The sentence meted upon the Appellant is illegal.
3. The Appellant prayed that the Appeal be allowed and the judgment, conviction and sentence be set aside, varied and/or quashed.



4. The Respondent conceded to the appeal. Mr. Ochengo for the Respondent stated that the fight between the Appellant and the other party was in a private farm which is not a public place. He also stated that the Respondent conceded on the conviction and sentence, that the sentence was excessive.

## Submissions

### Appellant's Submissions

5. The Appellant through the firm of C.R. Sagwa & Company Advocates filed Submissions dated October 6, 2023.
6. The Appellant submitted that under Section 92 of the *Penal Code* which provides for the offence of affray, the ingredients are a) taking part in a fight, and 2) the fight must have taken place in a public place and threatened public tranquility. PW1 testified that the Appellant was picking tea leaves near the trees on the boundary of PW1's and the Appellant's land. She found the Appellant and the co-accused fighting but that they had injured themselves. PW2 testified that the Appellant went to pick coffee and the 1<sup>st</sup> Accused attacked him with a panga and witness the 1<sup>st</sup> Accused assaulting the Appellant. The Investigating Officer stated that the Appellant and co-Accused reported the assault on October 23, 2021 and was issued with a P3 and that they fought at home over a land boundary.
7. That the fight took place on a farm meant that the fight did not take place in a public place hence did not meet the ingredients of the offence of affray.
8. The Appellant submitted that PW1's and PW2's evidence differed on who attacked the other and the said contradictions had to be construed in favour of the Appellant.
9. The Trial Court sentenced the Appellant to 3 years imprisonment whilst the *Penal Code* provided for a 1-year imprisonment and so the Appellant submitted that the sentence was excessive.

### Determination

10. I have considered the Petition of Appeal and the Respondent's submissions.
11. Being a first appellate court, my duties are set out in *Okeno v Republic* [1972] EA 32, where the Court of Appeal set out the duties as follows: -

“ An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (*Pandya v Republic* [1957] EA. (336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and its own conclusion. (*Shantilal M. Ruwala v R.* [1957] EA. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the finding and conclusion; it must make its own finding and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see *Peters v Sunday Post* [1958] EA 424

12. In *Kiilu & Another v Republic* [2005], the Court of Appeal stated:
  1. An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusions.



2. It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's findings and conclusions; Only then can it decide whether the Magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial Court has had the advantage of hearing and seeing the witnesses."
13. PW1 was Elizabeth Makori. She testified that on 21.10.2021 at around 10.00 a.m., she was on the farm when she heard the noises and found Jared and Reuben fighting. She tried separating them but they had already injured themselves. Jared had gone to enquire about the trees but they started fighting and PW1 took them both to hospital. On cross-examination by the 2<sup>nd</sup> Accused (Appellant herein), she testified that the trees in question were on the boundary of his land and PW1's. He was picking tea near the trees when the 1<sup>st</sup> Accused asked about the trees and they started fighting.
14. PW2 was Caroline Mokeira Ongeche. She testified that on 23.11.2021, her father, the 2<sup>nd</sup> Accused and the Appellant herein, went to pick coffee. Jared Mauti's son (his nephew) came and attacked him with a panga. She was cross-examined by the 1<sup>st</sup> Accused. She testified that she witnessed him assaulting her father and found him already injured. She testified that the 1<sup>st</sup> Accused used a slasher and cut the 2<sup>nd</sup> Accused on the head.
15. PW3 was PC Caroline Onyanyi, the Investigating Officer. She testified that the 2<sup>nd</sup> Accused filed a report on 23.10.2021 claiming to have been assaulted by Jared. The 1<sup>st</sup> Accused also reported having been assaulted by the 2<sup>nd</sup> Accused. The Investigations Officer investigated and noted that both planned a fight at home and injured each other. She testified that they fought at home over a land boundary.
16. In its Judgment, the Trial Court found that the fight took place in the neighborhood thus deemed a public place. That PW2 screamed and many people rushed to the scene meant that the place was a public place. The Trial Court thus found that the Prosecution had proven its case and found the Accused Person's guilty and sentenced them to serve 3 years in prison.
17. Looking at the Petition of Appeal, I find that the issues for consideration are whether the Prosecution proved its case beyond reasonable doubt and whether the conviction and sentence were safe in the circumstances.

**Did the Prosecution prove its case beyond reasonable doubt?**

18. Section 92 of the [Penal Code](#), Cap 63 of the Laws of Kenya provides as follows: -
 

Any person who takes part in a fight in a public place is guilty of a misdemeanour and is liable to imprisonment for one year.
19. What then are the ingredients for the offence of affray? They are:
  - a. Taking part in a fight
  - b. The fight must be had in a public place
20. *Blacks' Law Dictionary, 5<sup>th</sup> Edition*, affray is defined as The fighting of two or more persons in some public place to the disturbance of the people e.g. where two or more persons voluntarily or by agreement engage in any fight, or use any blows or violence towards each other in any angry or quarrelsome manner, in any public place to the disturbance of others.
21. [Black's Law 9<sup>th</sup> Edition](#) defines affray as "The fighting, by mutual consent, of two or more persons in some public place, to the terror of onlookers. The fighting must be mutual. If one person unlawfully



- attacks another who resorts to self-defense, the first is guilty of assault and battery, but there is no affray.”
22. The author further writes “The word ‘affray’ comes from the same source as the word ‘afraid’, and the tendency to alarm the community is the very essence of this offense.”
  23. It is not disputed that there was a physical altercation between the 1<sup>st</sup> and 2<sup>nd</sup> Accused Persons. PW1 testified that she heard some noise and she proceeded to the scene and found the Accused Persons fighting. PW2 testified that his father, 2<sup>nd</sup> Accused, went to pick tea and Jared Mauti’s son attacked him with a panga and witnessed the 1<sup>st</sup> Accused assaulting the 2<sup>nd</sup> Accused. PW3 testified that the 2 Accused Persons separately reported being assaulted by the other. Investigations revealed that the 2 Accused Persons planned a fight at home and injured each other. Notably, the Accused Persons did not challenge that they both planned to fight at home.
  24. The Appellant disputes that the fight occurred at a public place but a private place and hence affray does not arise.
  25. *Black’s Law Dictionary, 9<sup>th</sup> Edition*, defines public place as Any location that the local, state, or national government maintains for the use of the public, such as a highway, park, or public building.
  26. Private property is defined as Property- protected from public appropriation- over which the owner has exclusive and absolute rights.
  27. The Trial Court held thus “...I have considered the evidence from the medical documents each of the accused was injured. PW1 confirmed that she found the accused fighting and separated them. It’s at a boundary near her home as such it was in the neighborhood thus deemed public place. The accused persons offered no justification for their actions. From PW2’s evidence when she screamed many people came to the scene as such depicting a public place...”
  28. With due respect, there was nothing pointing to the place of fighting being a public place. The Trial Court erred when it held that the place was public because it was on private land. The Trial Court further erred when it held that when PW2 screamed, many people came thus depicting it to be a public place. PW3 clearly testified that the Accused Persons fought at the boundary of private land parcels. I find the Trial Court erred when it drew conclusions that were not supported by the evidence on record.

#### **Was the conviction and sentence safe in the circumstances?**

29. For a conviction to be deemed as being safe, it must be supported by the evidence on record and the law.
30. I have already found that the evidence was insufficient to support the offence of affray. Therefore, the conviction was unsafe in the circumstances.
31. It is trite that sentencing is a duty of the Trial Court.
32. I am persuaded by the decision in *Maingi & 5 Others v Director of Public Prosecutions & Another* (Petition E017 of 2021) [2022] KEHC 13118 (KLR) (17 May 2022) (Judgment), the Court held that “...In *S v Mchunu and Another* (AR24/11) [2012] ZAKZPHC 6, Kwa Zulu Natal High Court held that:

“It is trite law that the issue of resentencing is one which vests a discretion in the trial court. The trial court considers what a fair and appropriate sentence should be. The purpose behind a sentence was set out in *S v Scott-Crossley* 2008 (1) SACR 223 (SCA) at para 35:



‘Plainly any sentence imposed must have deterrent and retributive force. But of course one must not sacrifice an accused person on the altar of deterrence. Whilst deterrence and retribution are legitimate elements of punishments, they are not the only ones, or for that matter, even the over-riding ones.’

33. The Court further held that the purpose of sentencing is to ensure that the sentence imposed is commensurate and proportional to the offence committed.

34. However, the Court may interfere with the same where the circumstances so dictate. I am persuaded by the decision in *MM1 v Republic* [2022] eKLR, where the Court held as follows:

The principles guiding interference with sentencing by the appellate Court were properly, in my view, set out in *S v Malgas* 2001 (1) SACR 469 (SCA) at para 12 where it was held that:

“A Court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court, approach the question of sentence as if it were the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would usurp the sentencing discretion of the trial court... However, even in the absence of material misdirection, an appellate court may yet be justified in interfering with the sentence imposed by the trial court. It may do so when the disparity between the sentence of the trial court and the sentence which the appellate court would have imposed had it been the trial court is so marked that it can properly be described as “shocking”, “startling” or “disturbingly inappropriate.”

35. The Court further held as follows: -

16. The difficulty arises from the interpretation of the phrase “shall be liable to.” Sir Henry Webb C.J. in *Kichanjele S/O Ndamungu v Republic* [1941] 8 EACA 64 had this to say on the proper construction of the words “liable to”:

“The wording used throughout the code is “shall be liable to” but a consideration of the various sections shows in our judgment, that the use of the words “shall be liable to” does not import that the sentence mentioned in any particular section in which these words occur is merely a maximum and that the court may impose any lesser sentence below the limit indicated.”

17. The predecessor of the court went further in *Opoya v Uganda* [1967] EA 752 at page 754 where Sir Clement DeLestang V.P. picked up the conversation inter alia thus:

“It seems to us beyond argument that the words “shall be liable to” do not in the ordinary meaning require the imposition of the stated penalty but merely express the stated penalty which may be imposed at the discretion of the court. In other words, they are not mandatory but provide a maximum sentence only and while the liability existed, the court might not see fit to impose it.”

18. A similar position was adopted in *DWM vs Republic (supra)* where the Court held that:

“As for the sentence the 1<sup>st</sup> appellate court properly addressed its mind to the operative words in Section 20(1) of the *Sexual Offences Act* that the offender “Shall be liable to imprisonment for life” means that imprisonment for life was the maximum sentence for an offence under the section. A lesser sentence could be



imposed considering that the appellant was first offender though the offence was said to be prevalent, serious and most importantly that the appellant was supposed to be the complainant's protector turned out to be her tormentor and perpetrator of the defilement. The judge however deemed it proper to substitute the sentence for life imprisonment with that of twenty years (20) years imprisonment and it was within his powers to do so. The resulting sentence was within the limits permitted by law and we find no reason to interfere with the exercise of that discretion."

36. Section 92 prescribes a maximum punishment of one-year imprisonment. Assuming that indeed the Appellant was guilty of affray, there would have been no legal justification whatsoever for imposing a sentence of 3 years.
37. In conclusion, I find that the conviction of the Trial Court was in the circumstances was unsafe. The sentence imposed was overall illegal, excessive and harsh and ought not to have been imposed since the offence of affray was not proved as I have found herein above.
38. I hereby set aside the conviction and sentence. The Appellant shall be set at liberty forthwith unless otherwise lawfully held.

**DATED, DELIVERED AND SIGNED AT KISII THIS 19TH DAY OF FEBRUARY, 2024.**

**TERESA ODERA**

**JUDGE**

**In the presence of:**

**Miss Sagwe for the Appellant: absent**

**Koima for the Respondent.**

**Oigo - Court Assistant**

