Simiyu v Republic (Criminal Appeal E024 of 2023)
[2024] KEHC 1697 (KLR) (22 February 2024) (Judgment)

Neutral citation: [2024] KEHC 1697 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BUNGOMA

CRIMINAL APPEAL E024 OF 2023

DK KEMEI, J

FEBRUARY 22, 2024

BETWEEN

ALBERT KAKAI SIMIYU ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal from the conviction and sentence by Hon. G.Adhiambo (PM) in original Kimilili Law Courts Criminal Case No. E331 of 2022 delivered on 3rd April 2023)

JUDGMENT

1. The appellant was charged in the subordinate Court to answer to charges of grievous harm contrary to section 234 of the *Penal Code*. The particulars of the offence are that on 22nd May 2022 at Lukhuna Market in Bungoma North Sub-County within Bungoma County jointly with two others in court and another not before the Court, unlawfully did grievous harm to Elias Barasa.

2. The Appellant also faced a second count of malicious damage to property contrary to section 330 (1) of the *Penal Code* with the particulars being that on 22nd day of May, 2022 at Lukhuna Market in Bungoma North Sub- County within Bungoma County jointly with two others before court and another not before court did break property worth Kshs 11, 750/= which comprised thermos, cups, bucket, sufuria, jerricans and table of Gladys Baraza.

3. The Appellant denied the charges and that the prosecution called six (6) witnesses in support of their case against the Appellant. The Appellant and his two co-accused tendered sworn testimonies denying the offence and called seven (7) witnesses in support of their defence case.

4. The trial magistrate found the Appellant guilty of the offence as charged, convicted him and sentenced him to serve 18 months imprisonment for the offence of grievous harm contrary to section 234 of the *Penal Code*. The Appellant's co-accused were all acquitted of the charges.

5. It is that conviction and sentence that provoked this appeal by the Appellant who raised the following grounds of appeal:

   a. That the trial magistrate erred in law and fact in holding that the prosecution had proved its case beyond reasonable doubt.

   b. That the trial magistrate erred in law by convicting and sentencing him while discharging his co-accused without any clear evidence.

   c. That the conviction and sentence was against the weight of the evidence adduced by the prosecution.

   d. That the trial magistrate erred in law and in fact in basing her findings on unsworn and uncorroborated evidence of the accused persons.

   e. That the trial magistrate erred in law and fact by failing to adhere to the provisions of the law when she failed to subjecting the Appellant to similar medical attention and scientific tests so as to establish whether or not the appellant committed the offence.

   f. That the trial magistrate erred in law and fact when she failed to consider the pre-sentence report by a probation officer which was favourable.

6. In determining this appeal, the Court must fully understand its duty as the first Appellate Court as stated in the case of Pandya v R (1957) EA 336 and Ruwala v R (1957) EA 570 which is to subject "the evidence as a whole to a fresh and exhaustive examination and for this court to arrive at its own decision on the evidence, it must weigh evidence and draw its own conclusions and its own findings while making allowance for the fact that the trial court had the advantage of hearing and seeing the witnesses."

7. Revisiting the evidence before the trial Court, PW1 Gladys Barasa, testified that she is a resident of Lukhuna and that she is the complainant's mother and a farmer. She recalled on 22nd May 2022, at around 7.30 pm while at her home seated outside her kitchen she spotted a crowd of people entering her home and canning people who were taking alcohol prompting her to run away for her safety. According to her, the individuals canning people were the Appellant herein and three village elders. She stated that prior to the accident she had known them very well and indicated that she had known the Appellant for five years. She testified that the assailants bore canes and other weapons. She stated that she saw the Appellant and others with the help of the moonlight and the security lights. She testified that she heard her daughter Elizabeth calling her and when she returned to the house she saw her holding the complainant and that she noticed that he was bleeding from the right eye, had a cut on the right eye and on inquiry, her daughter informed her that the Appellant and others not before the Court had injured him. She took the complainant to Lukhuna Police Station then to the Lukhuna dispensary where they referred her to Naitiri Sub-County Hospital where she was further referred to Webuye Sub-County Hospital for treatment. She was able to identify the Appellant as one of the people who injured her son.

   On cross-examination, she stated that she saw the Appellant and others not before the Court.

8. After a brief *voire dire* examination, the Court formed the view that the complainant understood the importance of telling the truth and the dire consequences to be meted out for speaking lies. It further observed that the Complainant's level of comprehension is not well advanced to understand the implications of oath taking and therefore directed him to tender unsworn evidence.

9. According to E.B, on 22nd May 2022 while he was in his mother's kitchen with his sister, people came to their house and beat them. He told testified that the kitchen had no light but the fire was blazing

bright and thus he was able to see them. He saw the Appellant whom he referred to as Tuso and that he hit his left eye with a metal rod. (Court noted he could only see with his right eye as the left one is not functioning and it lacks an eye ball). He testified that he knew the Appellant prior to the incident and that the Appellant gained access to their kitchen and hit him then left. He also added that he was in the company of another not before this Court and was able to do a dock identification and referred him as Mose. He further stated that there was an additional security light from their main house which did shine directly outside the kitchen.

On cross-examination, he testified that the Appellant works on motorcycles and that nobody informed him to say that it was the Appellant who hit him.

10. PW3 Elizabeth Barasa, testified that she was a student at Lukhuna Secondary School as she just cleared fourth form. On 22nd May 2022 at around 7.30pm while watching television, one Kombo opened their door then she heard things being hit outside the house. She heard containers and sufurias being hit. She heard the complainant screaming in the kitchen which is three meters from the main house. She ran outside and saw the Appellant in the company of others whom she identified in court while armed with a metal rod and wooden sticks. She testified that there was a security light outside the house which made it possible for her to see them. The Appellant had a metal rod and that he was standing outside the kitchen. She entered the kitchen and found the complainant lying on the ground and vide the security light she was able to see him lying on the ground and bleeding from the eye. On inquiring what exactly happened, the complainant informed her that the Appellant had hit him. They rushed him to hospital.

On cross-examination, she stated that the Appellant dropped his weapon on the ground and escaped.

11. PW4 Kennedy Ekisa Anguchi, testified that he is a clinical officer at Webuye Sub-County Hospital and that he was before the Court to produce the P3 form of the complainant. According to him, the complainant was brought in by his mother with a history of assault by a group of people well known to him. The complainant had a cut wound on his left eye and which was swollen. On examining the eye, he observed tenderness and ecchymosis. The wound on the brow was already stitched at the casualty. On further examination of the ocular structures, he noted that there was perforation of the cornea and prolapse of the urial tissue. The perforation was extending to the sclera by about 2mm. He was able to repair the cornea and after recovery the complainant was released. He observed that the injuries were caused by a blunt object. The complainant's P3 form dated 31st May 2022 was produced as PEXH1, the treatment notes as PEXH2 and the discharge summary as PEXH3.

On cross-examination he testified that he did not witness the incident.

12. PW5 Japhetha Saisi, testified that he is a resident of Lukhuna and a farmer. According to him, on 22nd May 2022 at around 7.30pm he left his house to go to the home of PW1 and on arrival he found her seated outside her kitchen but that the complainant was in the kitchen. As they spoke concerning the debt she owed him, one village elder, Maurice, passed him and stood infront of him. He proceeded to hit him with a walking stick and on shielding himself, he hit his hand. He jumped over the fence to the neighbouring land. He then heard something being hit continuously then he heard screams. He testified that the Complainant was injured. When he decided to go back to the house of PW1, he saw the Appellant and others not before the Court leaving the home of PW1. He saw that the Complainant was bleeding from the eye and that he advised them to report the incident to the police. He added that he saw the attackers clearly as the M-kopa lights were on. He saw the Appellant with something like a metal

On cross-examination, he stated that he found PW1 seated outside and that the complainant was okay but after the attack, he found the complainant had been injured and that he saw the Appellant.

13. PW6 No. 64120 Corporal Abdul Hassan, testified that he is based at Kiminini Police Station-Lukhuna Patrol Base. He recalled on 22nd May 2022 at 8.15pm he received a report that the complainant had been assaulted and had lost one eye in the process. The report was made by PW1 and PW3. He proceeded to book the same in the OB and referred them to the hospital. The complainant was taken to Naitiri Sub-County Hospital where they were referred to Webuye Sub-County Hospital. He recorded their statements and while in the company of another colleague they visited the scene and established that the attackers also destroyed some properties. They recovered the iron rod at the scene and he proceeded to arrest the Appellant and two other people. He later charged them with the offence of causing grievous harm.

    On cross-examination, he stated that he knew the Appellant very well as he is a a village vigilante officer and that he works with the Police.

14. At the close of the prosecution case, the Appellant was found to have a case to answer and placed on his defence. He gave unsworn evidence. According to DW1, Albert Kakai Simiyu, he is a resident of Lukhuna and a wood maker. He made it clear that he was aware of the charges that he faced and denied the same. He testified that on 22nd May 2022 at 8.00 AM, he left his phone in the house to charge its battery and that his child was there. The Assistant Chief reached out asking him to avail himself at Lukhuna as there were people there who had fought and stabbed each other. He reached out to Emmanuel Juma to reiterate what the Assistant Chief had told him. He rung the Assistant Chief who notified him that he was at the home of PW1, that was the scene. On arrival, they found Maurice and Moses, the 3rd and 2nd accused in the trial Court and that he saw the Assistant Chief pouring the alcohol that had been found at the house of PW1. He stated that he later left as there was a customer who was calling him. He testified that after six six days, a police officer from Lukhuna Police Station called him and informed him to avail himself at the Police station. He stated that on his way he met with the officer and on asking as to what the problem was, he informed him that some women had complained that he had poured their alcohol and even drunk it. He was later arrested.

15. DW4 A.L.K, testified that he is a student going to Grade 7 at Manyasa FYM Primary. He stated that he knows the Appellant and that at 8 .00am going to 9.00am while at the house and his father at the farm, he heard the phone ringing. He saw the caller was George Manyasi so he took the phone to his father and was able to hear the caller informing his father that some people had stabbed someone. He testified that one Manu, who works with his father, came and that his father left him with him.

    On cross-examination, he stated that his father is called Tuso and is popularly known as Tuso.

16. DW5 Emmanuel Juma, testified that he is a power saw operator and that he knew about the charge the Appellant faced. According to him, 22nd May 2022 in the morning he went to the Appellant's home and then went to work with him. They went to Lukhuna Petrol Station and that the Appellant then rung the Assistant Chief and proceeded to meet him and came back after thirty minutes then went to make wood. He stated that they closed work at around 6.30 pm and he headed back home.

    On cross-examination, he stated that there was a police station close to the petrol station.

17. DW6 David Aseka Isambera, testified that he is a community policing officer/nyumba kumi and that he is aware of the charges facing the Appellant. According to him, they had planned with the Chief that every Sunday there was a woman (PW1) who sold alcohol and had agreed that with the help of nyumba kumi officers they would go to the home of PW1 and destroy the alcohol. They agreed that they would meet at the market on Sunday 7.00 am then proceed to the home. They did so and poured all the alcohol that is Chang'aa, Busaa, Kangara then he went back home. The next day, he learnt of the report that Moses, the 2nd Accused, was arrested on allegation that he had beaten up the woman who

sells alcohol. He stated that at 8.00pm he was at the hotel belonging to Moses and that he was the one who served them and that he could not tell whether they went back to the home of PW1.

On cross-examination, he stated that it was planned with the chief that they would go to the home of PW1 to destroy the alcohol and that the stabbing took place on the previous night yet they planned to head there in the morning. He further stated that the case of stabbing was not investigated but he believed the Chief had informed the police.

18. DW7 Fred Mutali Wanyama, testified that he is a farmer and was in Court as a witness of the 3rd Accused (he is not part of this appeal). He testified that on 22nd May 2022 at around 6.00pm the 3rd accused came to his home and informed him that his grandchildren had gone to the sugarcane plantation of a neighbour and that they were with him from 6.00pm to 8.00pm and that he even took supper at his home before he left.

On cross-examination, he stated that the 3rd Accused person had come to inform him that his grandchildren had stolen sugarcane from a neighbour's farm. He further stated that he is not aware where exactly the 3rd Accused person went to when he left his home but he believed he went back to his house.

19. The defence then closed their respective cases and subsequently filed their written submissions.

20. The appeal was disposed of by way of written submissions.

21. I have considered the evidence adduced before the trial Court both for the prosecution and the defence. I have also considered the grounds of appeal and submissions for and against the appeal. Before delving into the main issues for determination, it is also not in dispute that the complainant sustained serious injuries in his left eye as per the P3 form produced in evidence and the treatment notes. Having stated the undisputed fact, in my humble view, the issues for determination are:

    i. Whether the prosecution proved its case against the appellant beyond reasonable doubt.

    ii. Whether sentence meted out on the appellant was manifestly excessive.

22. On the first issue, the Appellant was charged under 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 grievous harm.

23. Concerning the first element, bodily "harm" means any bodily hurt, disease or disorder whether permanent or temporary. The nature of grievous harm is defined by section 4 of the *Penal Code* as any harm which amounts to a maim or dangerous harm or seriously or permanently injurius health or which is likely so to injure health, or which extends to permanent disfigurement or to a permanent or serious injury to any external or internal organ, membrane or sense.

24. The specificities of "grievous harm" therefore are; (1) 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 (2) a mental injury may amount to grievous harm but not to bodily harm (3) the injury must be "of such a nature as to cause or be likely to cause" permanent injury to health.

25. In the instant appeal, it was the testimony of PW4 that on the examination PW2 he observed he had a cut wound on this left eye and which was swollen. Also, he noted that he observed tenderness

and ecchymosis on the eye. The wound on the brow was already stitched at casualty. On further examination of the ocular structures, he noted that there was perforation of the cornea and prolapse of the urial tissue. The perforation was extending to the sclera by about 2mm. He was able to repair the cornea. These findings were all reflected in the P3 form by which the injury was classified as "grievous harm." This evidence was not impeached in cross-examination nor controverted by the defence. I note that the complainant's P3 form dated 31st May 2022 was produced as PEXH1, the treatment notes as PEXH2 and the discharge summary as PEXH3. I am also aware that the lower Court had the privilege of seeing the witnesses herein and that the trial magistrate did make a note during the testimony of PW2 that he could only see with his right eye as the left one is not functioning and it lacks an eye ball. I am therefore convinced that there is sufficient evidence to prove that the assault occasioned on PW2 resulted in grievous bodily harm within the meaning of section 4 of the *Penal Code*.

26. The second element required proof that the injury sustained by the complainant was caused unlawfully. This means that the same was without legal justification or excuse. I find that the evidence of the Appellant seemed to raise the defence of witch hunt by the investigating officer from Lukhuna Patrol Base and it is trite law that an accused person bears no obligation of proving his innocence but that the prosecution bears the burden of proving the guilt of the accused. As noted, most of the defence witnesses who form part of the nyumba kumi, their role was to only identify the homes that sell illicit brew, like the one of PW1, and proceed there to pour out the same. Unfortunately, the Appellant overstepped his role and duties when in the company of others, they proceeded to the home of PW1 and started to cane all the members who were drinking and in the process he assaulted the complainant who was a young boy of the age of 6 years old causing him to lose function of his left eye. I also remind myself of the comment of the Court during the testimony of PW2, where she observed that PW2 could only see with his right eye as the left one is not functioning and it lacks an eye ball. I have come to the conclusion that the prosecution did prove beyond reasonable doubt that the injury sustained by the complainant was caused unlawfully as no nyumba kumi official has been given any right to assault anyone when carrying out their duties.

27. On the aspect of participation of the Appellant, the evidence on record in respect of visual identification at night by PW1, PW2 and PW3 placed him at the scene of the crime. PW1 testified that while she was seated outside her kitchen at around 7.30 pm she saw the Appellant and the others with the help of the moonlight and the security lights as hey canned people who were consuming alcohol in her home from where she stood.

According to PW2, the kitchen had no light but the fire was blazing bright thus he was able to see the people who were attacking them in their home. He saw the Appellant whom he referred to as Tuso and that he hit his left eye with a metal rod. (Court noted he could only see with his right eye as the left one is not functioning and it lacks an eye ball). He stated that he knew the Appellant prior to the incident. He added that the Appellant gained access to their kitchen and hit him then left. He also stated that he was in the company of another and that he was able to do a dock identification. He further added that there was an additional security light from their main house which did shine directly outside the kitchen making it easier to identify the Appellant as his attacker. Evidence of serious injuries on the left eye was confirmed by PW4 who examined the complainant and established that he had sustained grievous harm and that the same was caused by a blunt object. PW2 referred to the Appellant as Tuso and during the defence hearing, DW4 testified that his father, the Appellant, was commonly known as Tuso. This left no doubt about the Appellant's identity.

28. PW3 testified that she heard the complainant screaming in the kitchen which is three meters from the main house. She ran outside and saw the Appellant in the company of others whom she identified in Court with a metal rod and walking sticks. She stated that there was a security light outside the house

which made it possible for her to see them. The Appellant had a metal rod and who was standing outside the kitchen. She entered the kitchen and found the complainant lying on the ground and vide the security light she was able to see him lying on the ground and bleeding from the eye. On inquiring what exactly happened, the complainant informed her that the Appellant had hit him.

29. PW6 the investigating officer received a report on the complainant and instigated investigations and established that the Appellant and others had raided the home of PW1 and assaulted the individuals that were consuming the illicit liquor and that the Appellant was responsible for the grievous injuries sustained by the complainant. He added that they visited the scene of crime.

30. The Court of Appeal in the case of *Wamunga v Republic* (1989) KLR 426 stated:

> "It is trite law that where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of conviction."

31. In *Nzaro v Republic* (1991) KAR 212 and *Kiarie v Republic* (1984) KLR 739 the Court of Appeal further held that evidence of identification/recognition at night must be absolutely watertight to justify conviction.

32. In *R v Turnbull & Others* (1976) 3 ALL ER 549, which decision has been generally accepted and greatly used in the Kenya's system, the English Court considered the factors that ought to be considered when the only evidence turns on identification by a single witness. The Court said:

> "... The Judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have with the Accused under observation? At what distance? In what light? Was the observation impeded in any way....? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? how long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance? Recognition may be more reliable than identification of a stranger but even when the witness is purporting to reorganize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made."

33. The above decision does not say that there cannot be safe recognition even at night. The Court of Appeal in *Douglas Muthanwa Ntoribi v Republic* (2014) eKLR in upholding the evidence of recognition at night held as follows:-

> "On the issue of recognition, the learned Judge evaluated the evidence on record and emphasized that PW1 testified:-
>
> "I flashed my torch and I saw the accused he was 2 meters away from me. That the appellant was not only seen, but was positively and correctly identified or recognized by PW1, the complainant."
>
> The learned Judge further noted that the complainant testified that he used to see the appellant in town. It is our considered view that from the evidence on record, the identification of the appellant based on recognition was free from error..."

34. Subsequently, in the case of Criminal Appeal No. 274 and 275 of 2009 at Eldoret in *Peter Okee Omukaga & Another v Republic* (unreported) the Court of Appeal had this to say on the evidence of recognition at night: -

> " We have re-examined the evidence upon which that conclusion was made, and we find that it was well founded. We have no doubt whatsoever that Francis, John and Rose were familiar with the appellants; that Francis and John had known them by appearance as 'neighbours from the village', that they had played football with them long time ago, and that their voices were so familiar to them. Accordingly, we have no reason to disturb that finding and we dismiss that ground of Appeal. We also reject the argument that failure to hold an identification parade, and the non- recovery of the stolen articles made conviction unsafe. As this was a case of identification by recognition, an identification parade was unnecessary. The non-recovery of the stolen items did not in any way point to the innocence of the appellants."

35. PW2 while in the kitchen stated that he saw people enter their home compound canning people. According to him, the kitchen had no light but that the fire was blazing bright and thus he was able to see the people who were attacking them in their home. He saw the Appellant whom he referred to as Tuso and that he hit his left eye with a metal (Court noted he could only see with his right eye as the left one is not functioning and it lacks an eye ball). He testified that he knew the Appellant prior to the incident. He stated that the Appellant gained access to their kitchen and hit him then left. He also added that the Appellant was in the company of another and he was able to do a dock identification. He further stated that there was an additional security light from their main house which did shine directly outside the kitchen making it easier to identify the Appellant as his attacker.

36. PW2 was able to recognize the Appellant by the name he was commonly referred to as noted by DW4. PW1 testified that when he saw the Appellant and others, due to the security lights, she ran away from them but from where she stood she saw the Appellant was part of the assailants. PW3 on the other hand, on hearing the screams of the complainant in the kitchen she rushed there and saw the Appellant whom she referred to as Tuso, standing in front of the kitchen holding a metal rod and on getting into the kitchen she found the complainant on the floor and bleeding from the eye. She testified that she was able to identify the Appellant with the help of the security lights.

37. It is also clear that the Appellant was part of the community policing team aka nyumba kumi and that PW1, PW2 and PW3 were well versed with the Appellant as he himself was part of nyumba kumi. The defence witness DW6 also testified to that effect that the Appellant was part of the community policing team.

38. In my humble view, the prosecution evidence was watertight on the identification or recognition of the complainant's assailant on that material night.

39. The defence witnesses did not in any manner cast doubt on the evidence of the prosecution in this case. DW5 testified that he worked with the Appellant herein on 22nd May 2022 and that they later parted ways at 6.30pm. He also stated that he was not in any position to account for the whereabouts of the Appellant on that fateful night. On the other hand, DW6 testified that on the morning of the incident he was with the Appellant at the home of PW1destroying the recovered illicit liquor and bhang. He failed to avail any evidence in form of an OB number from the police station indicating that the seized bhang was duly surrendered to the Police. DW6 further testified that he could not tell whether the Appellant went back to the home of the complainant on the night of that fateful incident. I find that the prosecution proved its case against the Appellant beyond reasonable doubt. The prosecution

established that on the night of 22nd May 2022, the Appellant grievously harmed the complainant contrary to section 234 of the *Penal Code*. The trial court properly analyzed the entire evidence and came to the conclusion that the Appellant is the one who assaulted the complainant while the rest of the Appellant's co-accused were found not culpable and set free. In the premises, i find the findings by the trial court on the Appellant's conviction were sound and i hereby uphold the same.

40. As regards sentence, the offence of grievous harm contrary to section 234 of the *Penal Code* is a felony attracting a maximum punishment of life imprisonment. The Appellant earned an 18-month sentence that was by all standards lenient. From the victim impact statement on record, from the evidence of the Appellant and of the prosecution, it is quite clear that the Appellant inflicted upon the complainant life-long injuries. The complainant's left eye was subsequently gouged out and that he now uses the right eye. The complainant was at the time aged about six years old. The pre-sentence report dated October 31, 2023 aptly captured the predicament of the minor namely, that he is straining in class and that the injury has negatively impacted his performance in addition to suffering psychological trauma due to being ridiculed by his classmates over his disability. The circumstances of the incident are tragic in that the Appellant being an adult vigilante ought not to have attacked a defenseless young child. The complainant did not deserve such tragedy. It seems the Appellant vented his fury on the complainant after failing to find his parents whom he accused of being notorious changaa brewers in the area. The Appellant had no right at all to attack the complainant and that the least he could do was to escort him to the authorities if the minor had transgressed any law. In any event, the Appellant was aware that the complainant was a young child whose age was within the bracket for purposes of exemption from culpability unless he was a child in conflict with the law in which case, he was to be handled in accordance with the provisions of the *Children Act* 2001. As the injuries sustained by the complainant were life threatening, the sentence imposed by the trial court was so lenient and not commensurate with the Appellant's blameworthiness. Consequently, I find that there was some error of principle in the sentence that was passed by the trial court. It is instructive that the Appellant had inflicted serious injuries on the complainant who has lost one eye and has to make do with one eye for the rest of his life. I am therefore inclined to interfere with the said sentence. I find a sentence of five (5) years' imprisonment is appropriate in the circumstances. As the Appellant was out on bond, the sentence shall commence from the date of conviction.

41. For the aforestated reasons, the appeal herein lacks merit. The same is dismissed. The conviction is upheld while the sentence of eighteen months imprisonment meted on 3.4.2023 is hereby set aside and substituted with a sentence of five (5) years' imprisonment which shall commence from the date of conviction namely March 9, 2023.

Orders accordingly.

DATED AND DELIVERED AT BUNGOMA THIS 22ND DAY Of FEBRUARY 2024.

D. Kemei

Judge

In the presence of:

Albert Kakai Simiyu for Appellant

Miss Kibet for Respondent

Kizito Court Assistants