Choge v Republic (Criminal Appeal E064 of 2021)
[2024] KEHC 3029 (KLR) (14 March 2024) (Judgment)

Neutral citation: [2024] KEHC 3029 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KITALE

CRIMINAL APPEAL E064 OF 2021

AC MRIMA, J

MARCH 14, 2024

BETWEEN

DANIEL KIPSONGOK CHOGE ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal arising out of the conviction and sentence of Hon. M.I.G Moranga (SPM) in Kitale Chief Magistrate's Court Criminal Case No. 1081 of 2020 delivered on 27th August, 2020)

JUDGMENT

Background:

1. Daniel Kipsongok Choge, the Appellant herein, was charged with the offence of Robbery with violence contrary to section 296(2) of the Penal Code.

2. The particulars of the offence are that on the 2nd March 2019 at Kiptenden Farm in Trans-Nzoia East Sub-County within Trans-Nzoia County jointly with another not before Court robbed Jonuneko JebuigutNgeny cash of Kshs. 8,000/- and immediately after the time of such robbery pushed the said Jebuneko Jebuigut Ngeny to the ground.

3. The Appellant pleaded not guilty. Upon taking the evidence of 6 prosecution witnesses, the Trial Court was of the assessment that the Prosecution had established a prima facie case. Accordingly, it placed the Appellant on his defence.

4. The Appellant was the sole defence witness. He gave sworn testimony.

5. Upon considering the evidence of both the Prosecution and the Appellant, the Trial Court was of the finding that the offence of robbery with violence was committed by the Appellant contrary to Section 296(2) of the Penal Code. The Trial Court observed that no doubt was created that worked in favour of the Appellant.

6. Accordingly, the Appellant was convicted under section 215 of the Criminal Procedure Code and sentenced to 20 years in jail.

The Appeal:

7. Through an undated Amended Petition of Appeal, the Appellant expressed dissatisfaction with the Trial Court's findings on the following grounds: -

    1. That the learned Trial Magistrate erred in both law and fact by failing to note that the Appellant's absolute rights were violated, infringed and contravened before being produced in Court by holding him in police custody for long without cogent reasons.

    2. That the prosecution did not prove its case beyond reasonable doubt.

    3. That your lordship, the learned trial magistrate erred in both law and fact by not considering that there were graving contradictions that arose during the hearing of my case.

    4. That the learned trial magistrate erred in both law and facts by rejecting the Appellant's defence without cogent reasons.

8. On the foregoing, the Appellant prayed that the Appeal be allowed, his conviction quashed and sentence set aside.

The Submissions:

9. The Appellant urged his case further through undated written submissions. On the first ground of appeal, it was his case that he was arrested and held from 26th June 2020 and taken for plea on 29th June 2020 a period longer than the constitutionally permissible time of 24 hours, thereby occasioning him injustice.

10. The Appellant referred to the decision in Gichuku -vs- Republic (2007) CA. EA 83 where it was observed that there was breach of the Appellant's rights for holding him form more than 24 hours without cogent explanation.

11. On the second ground of appeal, the Appellant submitted that despite the Complainant's assertion that two people beat her up, namely, the Appellant and his wife, he was never caught at the scene of crime to prove that he is the one who robbed the Complainant of her money.

12. The Appellant submitted that it is only her wife Joan who was caught at the scene of crime according to the evidence of PW4. The Appellant referred to PW4's evidence where it was his evidence that;

    .... I went to the house. I found her on the ground with Joan Daniel Accused wife seated on her and beating her up people at the road side were attracted by the noise. Daniel was just standing there watching PW1 being beaten by his wife as he screamed.

13. Based on the foregoing, the Appellant submitted that circumstantially, his wife is the one who was found at the scene of crime but not him. He relied on the decision in Criminal Appeal No. 32 of 1990, Abanga alias Onyango -vs- Republic, where the Court spoke of circumstantial evidence in the following way;

    > .... It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established.

14. On the third ground of appeal in respect of inconsistent evidence, the Appellant referred to PW2's evidence where he stated that on the night the Appellant beat the complainant and escaped away his wife was arrested.

15. The Appellant contended that if he was arrested at the same night of the offence, there is no way he could be arrested at Trans-Mara while hiding his wife whereas his wife had already been arrested.

16. It was the Appellant's case that according to section 77(2) of *the constitution* and section 198(1) of the Criminal Procedure Code, contradiction and misinterpretation of the witnesses' evidence is fatal to the conviction. He urged the Court that he benefits from the same and he be set at liberty.

17. On the last ground of appeal, the Appellant claimed that the trial Court rejected his credible defence by classifying it as a mere denial and untrustworthy. He submitted that his wife Joan Chepkoech pushed the Complainant but not him.

18. It was his case that later in the case, he claimed that he was drunk, a position that was not challenged by the Prosecution. He submitted that the prosecution did not adduce evidence to rebut is defence. He asserted that the prosecution shifted the burden of proof to him contrary to the law.

19. In conclusion, the Appellant claimed that the Prosecution did not prove its case beyond reasonable doubt and the Trial Court did not properly arrive at the Judgment in convicting and sentencing him. He urged this Court to allow the appeal, quash the conviction and set aside his sentence.

The Respondent's case:

20. The Prosecution challenged the appeal through written submissions dated 20th June 2023.

21. It was its case that the ingredients for the office of robbery with violence were met as was held in the Criminal Appeal No. 116 of 1995, Johanna Ndungu -vs- Republic.

22. To prove the Appellant was in the company of more than one person, the Respondent referred to the Complainant's testimony where she stated that the Appellant pushed him and Joan beat her up while he (the Appellant) held her to the ground.

23. On the second ingredient of use of violence the Respondent relied on the Complainant's evidence where when stated that Joan beat her while the Appellant held her down to the ground. The Respondent further referred to the evidence of PW4 where he stated that he saw the complainant on the ground while the Appellant's wife sat on her.

24. To further lend credence to the incidence of violence, reference was made to PW5's evidence who examined the Complainant by conducting X-rays which established that she had a broken right femur.

25. The Respondent submitted that the act of stealing was also proved. It was its case that the Complainant testified that Kshs. 8,000/-was snatched from her. It was, therefore, their case that the aspect of robbery was proved.

26. As regards, identification of the Appellant, it was the Respondent's case that the Appellant and the complainant were neighbours. It was submitted that PW4 placed the Appellant and his wife at the scene of crime and recognized them.

27. The Respondent argued that since the elements contemplated by Section 295 and 296(2) of the Penal Code did manifest themselves at different stages during the incident, it urged the Court to consider the sequence of events.

28. It was its case that the actions of the Appellant as described fit in the offence he was charged with.

29. It was its case that the offence of robbery with violence was proved by the prosecution beyond reasonable doubt and that the trial court correctly found that the Appellant's defence did not shake its case.

30. In the end, the respondent urged this Court to find that the Appellant's conviction was proper and to dismiss the appeal.

Analysis:

31. The pertinent issue that emerges for determination is whether the Prosecution proved its case beyond reasonable doubt.

32. This being a first appeal, it's the duty of this Court to re-consider and to re-evaluate the evidence adduced before the trial Court with a view to arriving at its own independent conclusions and findings (See Okono vs. Republic [1972] EA 74). In doing so, this Court is required to take cognizance of the fact that it neither saw nor heard the witnesses as they testified before the trial Court and, therefore, it ought to give due regard in that respect as so held in Ajode v. Republic [2004] KLR 81.

33. Before delving into the merits of the appeal, as guided by foregoing decisions, I will first deal with the offence of robbery with violence, the requisite ingredients and how Courts have appreciated its prosecution.

34. The Penal Code defines robbery is section 295 as follows;

> Any person who steals anything, and, at or immediately before or immediately after the time of stealing it, uses or threatens to use actual violence to any person or property in order to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained, is guilty of the felony termed robbery.

35. In the process of prescribing punishment for the offence of Robbery, the Penal Code in Section 296(2) provides for the of offence of Robbery with Violence in the following manner;

> If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons, or if, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death.

36. The Court of Appeal spoke to the foregoing provision in Oluoch -vs- Republic [1985] KLR. The learned Judges observed as follows;

> Robbery with violence is committed in any of the following circumstances:
>
> a) The offender is armed with any dangerous and offensive weapon or instrument; or
>
> b) The offender is in company with one or more person or persons; or
>
> c) At or immediately before or immediately after the time of the robbery the offender wounds, beats, strikes or uses other personal violence to any person ...

37. In Criminal Appeal No. 300 of 2007, Dima Denge Dima & Others vs Republic, the Court stated that the ingredients of the offence of robbery with violence are appreciated disjunctively. It is, therefore,

proper to convict an offender in instances where only one of the ingredients is proved. The Court observed;

> .....The elements of the offence under Section 296(2) are three in number and they are to be read not conjunctively, but disjunctively. One element is sufficient to found an offence of robbery with violence....

38. Having appreciated the way Courts have handled the threshold required for the successful conviction for the offence of robbery with violence, I now turn to this Court's crucial role of re-evaluating and re-analysing the evidence and how it squares against the Appellant's grounds of appeal.

39. The complainant, Jabuneko Jebuigut, testified as PW1. She was deaf and gave her evidence through Simon Cheruiyot, a sign language interpreter at St. Luke's ACK Church.

40. The Complainant testified that she is an 83 years old unmarried lady who stays near her relative at Cherangany.

41. It was her case that next to her is a married man who used to beat her with his wife. It was her case that the Appellant's wife, Joan, pushed her and beat her with her fist and lost seven teeth and stole her money. She stated that they both stole the money she had received from 'Inua Jamii'.

42. The complainant asserted that the Appellant would take half for his use and then drinks it away and would leave her with very little that could not meet her needs.

43. In respect to the instant case, the Complainant testified that she had received Kshs. 8,000/- and the Appellant came and pushed and fell backwards. She stated that it was in the evening. It was her case that he stepped on her on the head. It was her evidence that she was injured in the leg and had to go for treatment.

44. She stated further that Joan beat her up with her fist while the Appellant held her down to the ground. It was her case that her right leg was fractured.

45. At the point of identification, the Court asked the Appellant to remove his mask and the Complainant pointed straight at him and repeatedly gestured being pushed and that of sharp movements across her throat.

46. Due to the Complainant's intense emotions, the Trial Court paused. Later, she stated that her right leg was operated on, lost her teeth and suffered injury on her forehead. She stated that she did not want to see the Appellant and his wife.

47. Corporal No. 80449, Hillary Kiprono Koech testified as PW2. It was his case that he was called by his wife and informed that the Complainant had been hit and seriously injured by persons known to her.

48. It was his case that the Complainant is a sister to the Appellant's mother and that on the day of the crime he was away on duty in South Sudan. He stated that he made the official report on 16th March 2020.

49. On cross-examination, it was his evidence that he beat her up on 2nd March 2019, and had her taken to hospital on 5th March 2019. That, when they came to take her to hospital, the Appellant chased the village elder, a woman for Nyumba Kumi. It was his evidence that the Appellant ran away but later resurfaced and was arrested.

50. He asserted that the Appellant was arrested in Trans-Mara while hiding and his wife was in Kericho. That, they both went to Trans-Mara when they knew that they were being looked for.

51. Japheth Mitei testified as PW3. He testified that on Saturday 2nd March 2019, he had gone to Kachibora Centre. While there, he was informed that the complainant wanted someone to get her fish.

52. It was his evidence that when she went to her house to get money, the Appellant and Joan, people he had known for 10 years, were in the Kitchen.

53. He then stated that he heard them quarrelling with the Complainant and when he went closer, she saw the complainant hitting her walking stick on the ground and gesturing them to get out of her house. He stated that he went out of the kitchen and stood by the door.

54. He testified that suddenly, the Complainant, albeit deaf, was shouting very hard. Upon going inside the house, he found the complainant on the ground with Joan, the Appellant's wife seated on her and beating her up. He stated that the Appellant was just standing there watching the Complainant being beaten up by his wife.

55. It was stated that the commotion attracted people at the road side and the village elder came and handcuffed Joan and was taken to Assistant Chief's office.

56. It was his further evidence that the complainant was taken to the hospital after 3 days and that he got to learn of what had happened when he went to record his statement after a week.

57. Upon being cross-examined by the Appellant it was his case that he did not see him beating the complainant, but that he just saw him standing there as his wife beat the complainant up.

58. Joel Kipchirchir, a student at Eldoret Technical University who lives about 100 metres from the complainant's house testified as PW4. It was his case that on 2nd March 2019, he heard distress sounds from the Complainant's house.

59. It was his evidence that on arriving at the Complainant's house, she found her on the floor. The complainant gestured and pointed to the Appellant and his wife who were standing close by.

60. It was his case that the Appellant and his wife were quarrelling and they both appeared drunk. That, the complainant showed some mothers who were there the injuries that she suffered and that she was unable to stand up after two days.

61. He testified that he and his cousin took the Complainant to Moi Teaching and Referral Hospital where she was discharged after three weeks. On cross-examination, PW4 stated that the complainant gestured that the Appellant and his wife pushed her to the ground.

62. Dr. Joseph Rop, a Medical Doctor at Moi Teaching and Referral Hospital testified as PW5. It was his testimony that he saw the Complainant on 5th March 2019 where he established that he had been unable to walk for three days. It was her case that she was deaf and got the information that the complainant had been pushed by a neighbour.

63. It was his case that on conducting X-ray they found out that the Complainant had broken right femur. It was his case she was admitted and did open internal reduction operation. It was his evidence that she was discharged after three days and to that end, gave the complainant an artificial limb hemiarthroplasty.

64. To that end, produced P3 form as P. Exh 1(a) Discharge Summary as P. Exh 1(b), the Consultation request as P. Ex1(c), Radiology paper 1(d) Interim invoice as P. Exh 1(e) inpatient report as 1(f) and X-ray as P. Exh. 2(a) and (b).

65. No. 235855 PC Samuel Wasike of Cherangany Police Station was the Investigating Officer. He testified as PW6. It was his case that the complaint was reported by the Complainant in the company of Hillary, one of his relatives on 16th March 2020.

66. It was his evidence that on after he recorded the statement, he tracked the Appellant to Trans-Mara on 26th June 2020. That, on the day the complainant was pushed, the Appellant and Joan stole Kshs. 8,000/- from the complainant.

67. On cross examination, the Investigating Officer stated that he did not know exactly how the Appellant snatched her money.

68. With the close of the prosecution's case, the Appellant was placed on his defence. He gave sworn testimony. It was his case the it is his wife who pushed and injured the complainant. That, he went to Narok Trans Mara, after two months to wait for sugarcane to mature.

69. On cross-examination, it was his evidence that he could not remember the events of the day since he was drunk.

70. Upon considering the foregoing evidence the Trial Court was of the position that it was only PW3 who witnessed the Appellant's wife beat up the complainant. The Court also took the Complainant's evidence that the Appellant and his wife took her money.

71. The Court observed further that the Complainant's injuries were consistent with the findings of the Doctor and that the Appellant and his wife had the common intention of taking away her money.

72. The Trial Court observed further that the incident of escaping to Narok was a clear sign of the Appellant's guilt.

73. The Court was of the finding further that PW3 and PW4's evidence was a continuation of the events which were narrated by the Complainant.

74. With the foregoing evidence, this Court will now consider the grounds of appeal.

75. On the first ground of appeal, the Appellant contended that he was held in custody longer than what is constitutionally permissible.

76. The ground notably was raised for the first time on appeal. It was not addressed by the Trial Court.

77. Be that as it may, the 26th June 2020 was a Friday and the 29th June 2020 was the subsequent Monday. As such, there was no infringement of Article 49(1)(f) of *the Constitution*.

78. The ground, therefore, does not hold and is hereby dismissed.

79. The 2nd, 3rd and 4th grounds of appeal can be discussed together since they all hinge on the question on whether the prosecution established their case beyond reasonable doubt.

80. The Appellant contended that he was not caught at the scene of crime and there is no evidence of him seen beating the Complainant.

81. It was his case that he only was seen standing next to his wife, Joan who was beating the complainant.

82. PW1 testified at first that the Appellant's wife pushed her. She later stated that it is the Appellant who did so and a result she fell backwards and injured her leg.

83. It also was her case that the Appellant the Appellant's wife stepped on her head, hit her with her fist and lost seven teeth.

84. It was also her evidence that as Joan beat her, the Appellant held her down to the ground.

85. The Appellant was well known to the Complainant. She identified her by pointing right at him in Court.

86. This Court has keenly sifted through the evidence. Concededly, the Appellant was a bit wavery as to the person that pushed her to the ground. At some point she stated that it was the Appellant and at another she said that it was the Appellants' wife Joan.

87. However, two things are certain according to the evidence. That, the Appellant held the Complainant to the ground as his wife beat her up thereby placing the two at the scene of crime at the same time.

88. The evidence of Hillary Kiprono, who testified PW2, had very little probative value since it amounted to hearsay evidence. He was in South Sudan on the fateful day.

89. Japhet Mitei, Joel Kipchirchir and Dr. Rop testified as PW3, PW4 and PW5 respectively. Their evidence corroborated the evidence of the complainant to the extent that harm was inflicted upon her.

90. Whereas the said witnesses did not see, first hand, the participation of the Appellant, PW3 and PW4's evidence was conclusive that Appellant with his wife Joan were the sole people at the scene of crime.

91. Further to the foregoing, the P3 form produced as P. Exh 1(a), the discharge summary produced as P. Exh 1(b), the Consultation request produced as PEx1(c), Radiology paper and Interim invoice produced as P. Exh 1(d) (e), the in-patient report produced as 1(f) and X-ray as PEx2(a) and (b) was irrefutable evidence by PW5's evidence, bodily harm was inflicted on the Complainant.

92. Even if the Complainant was not forthright as to who pushed her, the totality of the evidence leaves no doubt that the Appellant was involved in assisting Joan in the assault. Whereas the other witnesses appeared to have arrived when the Appellant had stepped off from holding the Appellant, according to the Complainant's evidence which, was barely impeached by the Appellant, it is this Court's finding that he was actively involved at the onset in aiding and abetting the infliction of harm upon the Complainant by holding her down.

93. This Court notes that the Complainant was deaf. It took the hands of an interpreter to have her adduce evidence. There was, concededly, a little incoherence in her evidence but viewing it as a whole, it did not disturb the incidence of infliction of bodily harm.

94. Having said so, next is the question whether the element of stealing was proved to the required standard as to constitute the offence of robbery with violence.

95. Other than the Complainant's sole claim that money in the sum of Kshs.8,000/- was taken from her in the process of being assaulted, no evidence was led to fortify that claim.

96. It is also noteworthy that no witness corroborated the claim. Despite PW3 and PW4 being at the scene at time when the incident took place, there is no evidence by either of them that the Complainant mentioned in their presence that the Appellant had stolen her money.

97. In her evidence, the complainant did not give the details of where the money was and how the Appellant stole it from her. Those are important details that would aid this Court assess the authenticity of occurrence of the element of 'stealing' and inference of the Appellant's guilt.

98. In addition, the claim that the Complainant had received money from 'Inua Jamii', was without evidence. Nothing was adduced to corroborate that position.

99. The investigating officer ought to have brought forth the evidence of the Complainant being a member or a beneficiary of Inua Jamii and more importantly, proof that she had received monies round the time of the commission of the offence to corroborate the claim that there was motivation to rob her of it.

100. The Trial Court made the following remarks

> Both (Appellant and his wife) in this Court's view acted in unison with the common intention of taking away her money....

101. This Court, therefore, finds that the offence of stealing was barely proved. Its incidence did not ascend to the required standard of 'beyond reasonable doubt'. There was, however, credible evidence of grievous harm.

102. Having found so, the concept of 'cognate offence' immediately comes to mind. Section 179 of Criminal Procedure Code provides as follows;

> 179. When offence proved is included in offence charged
>
> 1. When a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence, and the combination is proved but the remaining particulars are not proved, he may be convicted of the minor offence although he was not charged with it.
>
> 2. When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence although he was not charged with it.

103. The Black's Law Dictionary, 11th edition defines 'cognate offence' at page 1300 as follows;

> ... A lesser offense that is related to the greater offence because it shares several of the elements of the greater offence and is of the same class or category.

104. The whole idea behind cognate offences is the authority donated to the Court by Section 179(1) as read with (2) of the Criminal Procedure Code to prescribe less punitive convictions for offences whose evidence do not meet the minimum threshold required of the greater charge originally pressed on the accused.

105. The decision to convict on a cognate offence is informed by the fact that all ingredients required of the greater offence were not established. However, the ones that were proved constituted all the ingredients of a lesser charge belonging to the same class/genus or family of the greater offence. Section 179(1) and (2) is not crafted for purposes of substituting and making convictions on offences that are close in nature and carry similar sentences. If that were to be done, it would defeat the very objective intended of "minor cognate offences". It would also strip the accused of the right under Article 50 (1)(p) of *the Constitution* which entitles an accused the benefit of the least severe of the prescribed punishments of an offence.

106. In Criminal Appeal No. 5 of 2013 Robert Mutungi Mumbi [2015] eKLR the Court of Appeal made comprehensive remarks on cognate offences in the following fashion.

> ..... As is apparently clear, section 179 of the Criminal Procedure Code empowers a court, in some particular special circumstances, to convict an accused person of an offence, even though he was not charged with that offence. The court contemplated by section 179 can be either the trial court or the appellate court. The real question here is not whether the

appellant was charged with indecent assault of NK for which the High Court convicted him. That was not necessary under section 179. The question is whether the special circumstances contemplated by section 179 were in existence to enable the court convict the appellant of an offence with which he was not charged.

An accused person charged with a major offence may be convicted of a minor offence if the main offence and the minor offence are cognate; that is to say, both are offences that are related or alike; of the same genus or species. To sustain such a conviction, the court must be satisfied on two things. First, that the circumstances embodied in the major charge necessarily and according to the definition of the offence imputed by the charge, constitute the minor offence. Secondly, that the major charge has given the accused person notice of all the circumstances constituting the minor offence of which he is to be convicted. (See Robert Ndecho & Another V. Rex (1950-51) Ea 171 And Wachira S/o Njenga V. Regina (1954) EA 398).

Spry, J. explained the essence of the first consideration as follows in Ali Mohammed Hassani Mpanda V. Republic [1963] EA 294, while construing the provision of the Tanzania Criminal Procedure Code equivalent to section 179 of the Kenya Criminal Procedure Code:

> "Subsection (1) envisages a process of subtraction: the court considers all the essential ingredients of the offence charged, finds one or more not to have been proved, finds that the remaining ingredients include all the essential ingredients of a minor, cognate, offence (proved) and may then, in its discretion, convict of that offence."
>
> That conclusion is reached at the stage of judgment when it is not practical to require the accused person to plead afresh to the minor offence. It is a decision premised on the discretion of the court based on the evidence adduced at the end of the trial.
>
> The second consideration arises, of necessity, precisely because the accused person is not charged with, and has not pleaded to, the minor cognate offence. The purpose of delving into this consideration is to satisfy the court that the accused person was not prejudiced, and that by being charged with the major offence, he had sufficient notice of all the elements that constitute the minor offence. (See Republic V. Cheya & Another [1973] EA 500).
>
> In this case we are satisfied that committing an indecent act with a child is a minor and cognate offence of defilement with which the appellant was charged. The elements of the offence of committing an indecent act with a child are ingrained or subsumed in the elements of the offence of defilement. The former attracts a comparatively lesser sentence than the latter. Accordingly, we find that the appellant was properly convicted of indecent act with a child under section 179 of the Criminal Procedure Code even though he was not charged with that offence and had not pleaded to it. The requirements of section 179 were satisfied.

107. Coming back to the instant case, according to the P3 Form which was produced as an exhibit, the Complainant sustained injuries that were classified as 'harm'.

108. Section 251 of the Penal Code defines the offence of Assault causing actual bodily harm in the following terms;

> 251. Assault causing actual bodily harm
>
> Any person who commits an assault occasioning actual bodily harm is guilty of a misdemeanour and is liable to imprisonment for five years.

109. There is no doubt that actions of the Appellant occasioned harm to the complainant. Equally important is the fact that, whereas the case presented did not meet the ingredients for the offence of robbery with violence, the evidence that was adduces tallied perfectly with the requirements for the offence of assault causing actual bodily harm.

110. It also to be noted that whereas the offence of robbery with violence attracts the greater possible punishment of death sentence, the one of Assault causing actual bodily harm., being a misdemeanour, is lesser as it prescribes liability to imprisonment for 5 years on conviction.

111. In the premises, I find and do hereby hold that the Appellant is guilty of the offence of Assault causing actual bodily harm contrary to section 251 of the Penal Code.

Disposition:

112. With the foregoing discussion, the following final orders hereby issue: -

a. The appeal on the conviction and sentence are merited.

b. The Appellant's conviction for the offence of Robbery with violence is hereby quashed and the sentence of 20 years' imprisonment set aside.

c. Pursuant to Section 179 of the Criminal Procedure Code, the Appellant is hereby found guilty and is hereby convicted for the cognate offence of Assault causing actual bodily Harm contrary to Section 251 of the Penal Code.

d. On sentence, given that the Appellant has been in custody since 29th June, 2020 when he was charged, that is sufficient sentence in respect of the offence of Assault causing actual bodily. The Appellant is hereby sentenced to the period he has been in custody and shall, unless otherwise lawfully held, be set at liberty forthwith.

113. It is so Ordered.

DELIVERED, DATED AND SIGNED AT KITALE THIS 14TH DAY OF MARCH, 2024.

A. C. MRIMA

JUDGE

Judgment delivered in open Court and in the presence of: -

Daniel Kipsongok Choge, the Appellant in person.

Miss Kiptoo, Learned Prosecution Counsel instructed by the Office of the Director of Public Prosecutions for the Respondent.

Chemosop/Duke – Court Assistants.