



**Said v Republic (Criminal Appeal E024 of 2023)
[2024] KEHC 3449 (KLR) (8 March 2024) (Judgment)**

Neutral citation: [2024] KEHC 3449 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT GARISSA
CRIMINAL APPEAL E024 OF 2023
JN ONYIEGO, J
MARCH 8, 2024**

BETWEEN

ROBLE SAID APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal against the conviction & sentencing of Hon. S.O Otuke (R.M.)
delivered on 10.05.2023 MCCR Case No. E696 of 2021 Magistrates' Court at Garissa)*

JUDGMENT

1. The appellant herein was charged with two counts before Garissa CM's court. Count one, he was charged with the offence of grievous harm contrary to section 234 of the Penal Code. Particulars were that on November 5, 2020 at around 1930hrs at Adale area, Madogo location, Tana-North Sub County within Tana-River County unlawfully did grievous harm to Mwanajuma Yusuf
2. Count two, he was faced with the offence of resisting arrest by a police officer contrary to section 254(b) of the Penal Code. Particulars were that, on 31.05.2021 at 1030hrs, at Adale area, Madogo location, Tana-North Sub County within Tana-River County he resisted to be arrested by No. 116817 PC Chegem Silas and No. 92518 PC Bonface Kiptalai who at the time of the said resistance were acting in due execution of their duty.
3. Upon returning a plea of not guilty, the matter proceeded to full trial. The prosecution called four witnesses in support of its case while the defence took a sworn testimony. The trial court upon considering the law and facts in the case reached a determination that the appellant was guilty of Count I and therefore imprisoned him to twenty-two years.
4. The appellant being aggrieved by the finding of the trial court preferred an appeal via his amended petition filed in court on September 25, 2023 on the following grounds:



- i. That the Court ought to observe the rights of his children in regards to Article 53(1)(e),(2) of the Constitution.
 - ii. That he was acting on self defence and therefore he did not intend to harm his wife.
 - iii. The Court considers that he is the only breadwinner to his young family of three children.
5. The court directed that the appeal be canvassed by way of written submissions. In his submissions filed on 25th September 2023, the appellant submitted that for the reason that he has young children who deserve his care, this court should be considerate enough to allow the appeal. Reliance was placed on article 53 of the constitution which buttresses the best interests of a child.
6. Additionally, he contended that his actions were as a result of self defence as he was under attack. That he was irked by the fact that he found his wife with another man who allegedly was responsible for the breakup of his marriage.
7. The appellant cited Articles 21, 20(1) and 20(3)(b) to emphasize the principles in the constitution on the observation, protection and respect for the children's rights.
8. The appellant also relied on sections 216 and 329 of the Criminal Procedure Code to buttress the importance of this court upholding his rights. He also submitted that he was a first offender and being a family person, his presence at home was of paramount importance to ensure that his children's' needs are taken care of. He urged this court to consider the grounds herein and allow the appeal as prayed.
9. Mr. Kihara for the respondent submitted that the prosecution adduced the evidence that was sufficient to sustain a conviction as it was able to prove all the ingredients of the offence. That the sentence invoked by the trial magistrate against the appellant was not only legal but also appropriate bearing in mind the circumstances of the case. He urged this court to dismiss the appeal as the same was devoid of merit.
10. This being a first appeal, this Court is invited to look at both questions of fact and law. The Court is enjoined to analyze the evidence and make its own independent findings bearing in mind that it is the trial Court that had the advantage of seeing the demeanour of the witnesses. See *Okeno v Republic* (1972) EA 32.
11. Brief facts of the case are that, on the material time to this case, PW1, Mwanajuma Yusuf, the complainant herein was the estranged wife to the appellant the two having separated due to domestic differences. That together they had 3 children whom PW1 was staying with at her parents' place. That the appellant visited her father's house on 01.11.20020 and camped there for four days. She stated that on November 5, 2020, the appellant went to her parent's place with a view of talking to her. While at her home, the appellant demanded to know why she had despised him and suddenly kicked her on the right lungs. Since he was armed with a knife, he cut her right thigh right thumb, ring finger, the upper right side of her chest and left arm.
12. It was her evidence that she screamed thus alerting her parents who also came out of the house screaming while calling for help from the neighbours. That the same prompted the accused to run away. The neighbours rushed her to Garissa County Referral Hospital where she got admitted for a period of one week while receiving treatment. Thereafter, she went to report the matter at Madogo Police station noting that the attacker was her former husband. She was given a P3 form which she took to the hospital for filling.
13. PW2, Abdirahman Bucha Noti, an uncle to the complainant recalled that on November 5, 2020 at about 7.30pm he was seated outside their compound when the appellant arrived. That the complainant



- was in the kitchen and when she came out, she and the appellant went aside for a private chat which was followed by prolonged silence between them thus prompting pw2 to enquire why the two were not talking.
14. That he entered in the house and shortly his wife called informing him that there was a fight. On rushing outside, he found the complainant bleeding profusely while crying that the appellant had cut her severally. That he poured cold water on the complainant as his wife screamed seeking for help from the neighbours. Thereafter, the complainant was taken to the hospital.
 15. It was his testimony that upon being discharged, he took the complainant to Madogo Police Station to report the incident. The witness stated that the complainant was at her parents' home because she had quarreled with the accused. He further stated that he used to solve issues between the two together with the accused's father.
 16. PW3, Ali Maalim Dero, a clinical officer at Garissa General Referral hospital, stated that on November 17, 2020 a client by the name Mwanjuma Yussuf aged 27 years, who had already changed her clothes by the time he was examining her, presented with a history of assault. That she had sustained multiple bodily injuries; cut wound on the right side of the head; a wound measuring 5cm by 2cm around the right breast, a deep cut wound on the medio posterior aspect of the thigh and a right hand distant pholigial bone was amputated (as there was a cut wound on the 4th digit and the 1st digit). The witness classified the injuries as maim.
 17. PW4, No. 116817 P.C Chegem Silas, the investigating officer in this matter stated that, on November 10, 2020 he was assigned by the OCS to investigate a case reported by the family of the complainant. That he went to Garissa General Referral hospital to visit the victim who had been injured seriously. He recorded the statement of the witnesses and went looking for the appellant who had fled to unknown destination hence it took long to have him arrested. That when he resurfaced bragging to the family of the victim that he had cleared the case with the officers he was arrested.
 18. The appellant was placed on his defence upon the trial magistrate making a determination that the prosecution had established a prima facie case.
 19. DW1, Roble Said, the accused in this matter stated that he was married to PW1 and they were blessed with three children. That on November 5, 2020 he went to the complainant's home and found her with a man who was armed with a panga. He claimed that it was the said man who hurt him on the right hand. That it was in the process of fighting when his wife sustained the injuries in question.
 20. On mitigation, the appellant prayed for forgiveness stating that he had been in custody for over a year. He prayed the court to consider the time he had spent in custody.
 21. I have considered the record of appeal, grounds of appeal and the parties' submissions on record. Issues that emerge for determination are;
 - a) Whether the prosecution discharged its burden of proof.
 - b) Whether there was sufficient evidence to convict the appellant.
 - c) Whether the sentence imposed on the appellant was harsh.
 22. I note that the appellant was charged under section 234 of the *Penal Code*. For the appellant to be convicted of the offence of causing grievous harm c/s 231 as read with section 234 of The *Penal Code*, the prosecution had to prove each of the following essential ingredients beyond reasonable doubt;
 - i. The victim sustained grievous harm.



- ii. The harm was caused unlawfully.
 - iii. The accused caused or participated in causing the 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 injures 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 case, it was the testimony of PW3 that the complainant had sustained multiple bodily injuries listed as follows; the right side of the head had a cut wound measuring 5cm by 2cm, around the right breast a deep cut wound, on the medio posterior aspect of the thigh and a right hand distant pholigial bone was amputated (there was a cut wound on the 4th digit and the 1st digit). The witness concluded the injuries as maim.
 26. These findings were all reflected in the P3 Form and the discharge summary.” It is worth noting that this evidence was not impeached in cross-examination nor controverted by the appellant in his defence. The appellant does not dispute the fact that the complainant did sustain injuries. He instead confirmed that she did sustain injuries as he allegedly fought with the man he allegedly found her (PW1) with. To that extent, there is sufficient evidence that the complainant sustained injuries classified as maim.
 27. 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. PW1 submitted that the appellant was not pleased by the fact that she had left her matrimonial home. It was stated that the appellant alleged that the complainant despised him hence the attack. PW2 who was at the scene when the incident took place as the same occurred at his home testified that, the appellant was responsible for the injuries of his wife. The appellant on the other hand testified that he went to the complainant’s home and found her with a man who was armed with a panga. That he hurt him on the right hand and in the process of fighting, his wife sustained the injuries.
 28. Of importance to note is the fact that the appellant was at the scene where the incident occurred. A careful examination of the evidence of the prosecution and that of the appellant, it is clear that the prosecution’s evidence displaced that of the appellant as the pieces of the evidence corroborated each other unlike that of the appellant. In fact, his was a clear case of an afterthought having finally realized the consequences of his actions. He did not cross examination raise the issue of having found the complainant with a man and that he acted in self defence.
 29. I find that the evidence of the appellant seemed to raise the issue of self defence. It is trite law that an accused person bears no obligation of proving his innocence but the prosecution bears the burden of proving the guilt of the accused.
 30. Section 17 of the *Penal Code* provides as follows; -
 - “subject to any express provides in the code or any other law in operation in Kenya , criminal responsibility for the use of force in the defence of person or property shall be determined according to the principles of English Common law.”



31. At common law, the defence of self defence is available to one who proves that he used reasonable force; -
- i. To defend himself.
 - ii. To prevent attack on other person.
 - iii. To defend his property.
32. In *Palmer v Republic* (1971) ALL ER 1079 the court said:
- “Where the evidence is sufficient to raise the issue of self defence, that defence will only fail if the prosecution shows beyond doubt that what the accused did was not by way of self defence.”
- [Also See the Court of Appeal in *Ahmed Mohamed Omar and 5 Others v Republic* (2014) eKLR].
33. In the instant case, the court appreciates that the accused person and the complainant were on their own prior to the attack herein. But it is not lost to the court that the moment the appellant attacked the complainant, she screamed prompting PW2 to come out. It was the testimony of PW2 that he found the appellant attacking the complainant using a panga. As opposed to the accused person’s testimony that he found the complainant with another man, no evidence was presented before this court on the name or any description of the alleged man that was allegedly with the complainant.
34. Assuming for a moment that the complainant was with another man thus provoking the appellant and that the appellant was fighting the other man, then one wonders how that other man would afford to cut and maim the complainant noting that they were friends who were not fighting.
35. It therefore follows that the only person who could have inflicted the said injuries to the complainant was the appellant. Given the nature of the injuries that he inflicted upon the complainant by cutting her severally, the intention was to harm her. In dismissing the appellant’s defence of self defence, the Court of Appeal in *Lucy Mueni Mutava* case [2019] eKLR observed at paragraph 13.
- “...Besides the multiple cut injuries she inflicted on the deceased at the back of his neck which led to the spinal cord being severed in our view, was way excessive and negated any defence of self defence”.
36. In my view, the appellant was not acting in self defence and he cannot avail himself of that defence. It is therefore clear that the said harm was visited upon the complainant by the appellant unlawfully.
37. On the aspect of participation of the appellant, there is credible direct evidence of PW1 and PW2 as well as the appellant placing himself at the scene of the crime as an active participant in the commission of the offence. In addition, the appellant’s evidence did not controvert the evidence that he was at the scene. He told the court that he went to the complainant’s home and found her with a man who was armed with a panga. That he started a fight with the said man who hurt him on the right hand and in the process of fighting, also hurt his wife.
38. From the explanation that I have already rendered elsewhere in this judgment that there was no other person involved in the fight herein save for the complainant and the accused person, I agree with the trial court’s finding that indeed, the appellant committed the offence herein and that his conviction was safe.



39. On sentence, I note that the appellant did not submit on the same but nonetheless, the offence of grievous harm c/s 231 of the *Penal Code* is a felony attracting a maximum punishment of life imprisonment. The appellant earned a 22-year sentence which in my view was too harsh. I say so for the reason that in as much as sentence is an issue within the discretion of the trial court, the court should also be mindful of the circumstances surrounding the case. In this case, the parties herein were husband and wife and the same notwithstanding, they had separated due to their own differences. That said, I am not complacent to the fact that the appellant unnecessarily injured his wife over issues that they could amicably solve without resorting to violence.
40. From his mitigation, the appellant stated that he is a parent and that he had been in custody for over a year. Further, the pre-sentence report also noted that he was a first offender and that the reason for the attack was because his wife was seeing another man.
41. Indeed, courts are replete with cases that demonstrate the objectives of sentencing. In *R. v. Scott* (2005) NSWCCA 152, Howie J Grove and Barr JJ stated:
- “There is a fundamental and immutable principle of sentencing that this sentence imposed must ultimately reflect the objective seriousness of the offence committed and there must be a reasonable proportionality between the sentence passed in the circumstances of the crime committed...One of the purposes of punishment is to ensure that an offender is adequately punished...a further purpose of punishment is to denounce the conduct of the offender.”
42. The above notwithstanding, the Supreme Court in the case of *Francis Karioko Muruatetu & Another v. Republic*, Petition Number 15 of 2015, while considering the provisions of section 329 of the *Criminal Procedure Code* gave guidance on sentencing as follows:
- “The court may, before passing sentence, receive such evidence as it thinks fit in order to inform itself as to the proper sentence to be passed...It is without a doubt that the court ought to take into account the evidence, the nature of the offence and the circumstances of the case in order to arrive at the appropriate sentence.”
43. For the fore stated reasons, I find that the appeal on conviction is unmerited hence dismissed. However, the appeal against sentence is partially allowed to the extent that the sentence of 22 years which I find to be excessive is hereby replaced with 7 years’ imprisonment less one year the period spent in remand custody.

ROA 14 days.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 8TH DAY OF MARCH, 2024.

J. N. ONYIEGO

JUDGE

