



REPUBLIC OF KENYA



**Republic Through ODPP v Njenga (Criminal Appeal 2 of 2023)
[2024] KEHC 3769 (KLR) (18 April 2024) (Judgment)**

Neutral citation: [2024] KEHC 3769 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDAMA RAVINE
CRIMINAL APPEAL 2 OF 2023**

RB NGETICH, J

APRIL 18, 2024

BETWEEN

REPUBLIC THROUGH ODPP APPELLANT

AND

JOSEPH THAIYA NJENGA RESPONDENT

(Being an appeal against the Sentence arising from Eldama Ravine SRM Court Criminal case No. 668 of 2018 Hon Ntbuku J.N SRM Judgement delivered on 29th April, 2019)

JUDGMENT

1. The Respondent Joseph Thaiya Njenga was charged with the offence of Grievous Harm contrary to Section 234 of the *Penal Code*. The particulars of offence are that on the 29th of November, 2015 at Timboroa trading centre in Koibatek Sub- County within Baringo County jointly with others not before court unlawfully did grievous harm to John Samwel Ndegwa.
2. The Respondent pleaded not guilty and the matter proceeded to trial and upon conclusion of trial, the appellant was found guilty, convicted and sentenced to a fine Kshs 50,000/= and in default, to serve 6 months imprisonment.
3. Being dissatisfied with the Sentence meted by the trial Court, the state/ Appellant filed this appeal dated 9th May 2019 on the following grounds of appeal: -
 - i. The Learned trial magistrate erred in law and in fact by sentencing the Respondent to a fine of Kshs 50,000/= in default imprisonment of 6 months for the offence of causing grievous harm contrary to section 234 of the *Penal Code*.
 - ii. The Learned trial magistrate erred in law and in fact by failing to consider the gravity of the injuries sustained by the complainant and consequently passing a lenient sentence against the Respondent.



4. The Appellant prays that the Honourable court allows the appeal and increase and/or alter the sentence imposed by the trial court against the Respondent.
5. The Appellant subsequently filed an application dated 12th July, 2019 seeking to allow the appeal and increase and or alter the sentence imposed by the trial court against the Respondent.
6. The application is founded on the grounds on the face of it and supported by an affidavit by the complainant one John Samwel Ndegwa who avers that on the 29th of November, 2015, he was assaulted by the Respondent jointly with others who have not been arraigned in court and as a result, he sustained grievous bodily harm; and the resulting injuries being permanent in nature, his view is that the sentence of fine of Kshs 50,000/= in default 6 months imprisonment imposed against the appellant is too lenient.
7. The Appeal was canvassed orally in court. Ms. Ratemo representing the state submitted that they are appealing against the sentence and ground 1 is that the trial court fined the Respondent Kshs 50,000/= in default to serve 6 months imprisonment for the offence of grievous harm. It is their submission that the sentence meted out by the trial court was very lenient as the offence of grievous harm attract up to life imprisonment. That the victim in this case suffered great loss and the same was particularized in P3 Form. She prayed that this court review sentence meted out by the trial court and enhance the sentence.
8. In response, the Respondent submits that this case was filed to cover what the complainant had done. He stated that the complainant had tried to kill him with a gun and said he was satisfied with the court's decision and did not file appeal. He stated that he accepts conviction though he did not inflict injuries on the complainant as he was beaten by members of the public for attempting to shoot him. He further stated that the complainant is a senior military officer and he interfered with all witnesses. That it is the police officer who took the gun from him. He stated that the court sought protection of witnesses but they were not given security. That the P3 Form was filled in 2015 and the case was registered in 2018 and no one said he had grievous harm and was waiting to recover. He said the complainant said he went to Hospital and he was given Panadol. He submitted that the P3 Form was fake and his prayer is that the order earlier made remain. He said he was charged because he was a driver driving North Rift vehicles.
9. The court directed that a presentence report be filed by the probation officer. The Report was filed in court on the 17th January, 2024. The report indicate that the respondent did KCSE and obtained grade D+ (plus). He then engaged in casual jobs and later acquired a driving License and has been working as a matatu driver since the year 2004. He is married with 4 children. He has no history of criminality.
10. The Respondent stated that he stopped the matatu he was driving at Timboroa centre along the Nakuru Eldoret highway for his passengers to purchase food staff. He said he was not able to move back to the road because there was a private vehicle which had stopped. Shortly after, the owner of the vehicle came back and the two engaged in bitter exchange of words which degenerated into physical confrontation and the respondent attacked the complainant with a *rungu*. The complainant responded by drawing his gun. This worsened the situation as the commuters in his matatu and other people at the trading centre suspected that the complainant was an armed robber and joined the respondent in assaulting the complainant. The complainant was later rescued after they established that he was a military officer and he was licensed to carry a gun. Both the complainant and the respondent drove to Timboroa Police station to report the incident.
11. The respondent regrets the incident and blames anger for the incident. Complainant is still bitter with the respondent. He laments that he still suffers as a result of the injuries inflicted. He said he suffers numbness on his hands and neck. He is unforgiving and believes that the respondent was not



handed a sentence equivalent to the harm that was inflicted on him. He says he has been traumatized psychologically and has avoided using the road to try and erase memory.

12. The area administrator stated that he knew the Respondent and said he has no past criminal activities and also confirmed knowledge of his family set up and his occupation.
13. The Respondent when interviewed said the incident occurred some years back but has continued to haunt him. He regrets his action which he blames on provocation and anger. He pleads with the court to consider his role as the sole breadwinner in the family.
14. The complainant when interviewed by the probation officer said the Respondent has never approached him to seek forgiveness while the Respondent on his part responded by stating that he feared approaching the complainant given that he is a firearm holder.

Determination

15. The appeal herein is on sentence. The state appealed against sentence on the ground that the trial court imposed a lenient sentence by imposing a fine of Kshs 50,000 in default of 6 months imprisonment. Their argument is that the offence of grievous harm attracts up to life imprisonment.
16. The Court of Appeal in the case of *Ogolla s/o Owuor v Republic*, [1954] EACA 270, pronounced itself on this issue as follows:-

“The Court does not alter a sentence unless the trial Judge has acted upon wrong principles or overlooked some material factors.”

17. Section 234 of the Penal Code provides for the offence of Grievous Harm as follows:

234. Grievous Harm

Any person who unlawfully does grievous harm to another is guilty of a felony and is liable to imprisonment for life.

18. The Appellant's contention is that the sentence meted out by the trial Court was too low in the circumstances and urges this court to enhance the sentence. The Appellant was sentenced to pay a fine of Ksh 50,000/= in default of which he is to serve 6 Months imprisonment.
19. The Court considers that Section 234 of the Penal Code provides that any person who unlawfully does grievous harm to another is guilty of a felony and is liable to imprisonment for life.
20. Section 28 (2) of the Criminal Procedure Code provides as follows: -

In the absence of express provisions in any written law relating thereto, the term of imprisonment or detention under the Detention Camps Act (Cap. 91) ordered by a court in respect of the non-payment of any sum adjudged to be paid for costs under section 32 or compensation under section 31 or in respect of the non-payment of a fine or of any sum adjudged to be paid under the provisions of any written law shall be such term as in the opinion of the court will satisfy the justice of the case, but shall not exceed in any such case the maximum fixed by the following scale—

Amount Maximum period

Not exceeding Sh. 500 14 days

Exceeding Sh. 500 but not exceeding Sh. 2,500 1 month



Exceeding Sh. 2,500 but not exceeding Sh. 15,000 3 months

Exceeding Sh. 15,000 but not exceeding Sh. 50,000 6 months

Exceeding Sh. 50,000

12

Month

21. In view of Section 28 (2) of the [Criminal Procedure Code](#) above, default sentence for a fine of over Kshs 50,000/= is 12 months. By imposing default sentence of six months in my view was in error. Section 234 of the [Penal Code](#) provides that any person who unlawfully does grievous harm to another is guilty of a felony and is liable to imprisonment for life. In my view being liable to life sentence is not mandatory life sentence but it may attract life sentence or any other lower sentence depending on circumstances of each case.
22. I have considered the circumstances under which the offence was committed being the complainant who was a private motorist and the accused who was a public service driver had altercation after stopping on the road for passengers to buy goods as stated by the respondent/accused; and the complainant being a military officer armed at the time and drawing a gun during the altercation, I am of the view that the incident occurred as a result of extreme anger. The resulting act is however not excusable but the circumstances surrounding the offence ought to be considered in sentencing.
23. Besides the default sentence being shorter than provided under section 28 of [CPC](#), I find the fine of Kshs 50,000/= low bearing in mind the fact that the offence attracts life sentence and considering injuries inflicted on the complainant. From the foregoing, I am inclined to set aside the sentence imposed by the trial court and impose a fine of Kshs 150,000 in default 2 years imprisonment.
24. Final Orders: -
 1. Sentence imposed by trial court is set aside.
 2. I hereby impose a fine of Kshs 150,000 or 2 years imprisonment.

JUDGMENT DELIVERED, DATED AND SIGNED IN VIRTUALLY AT KABARNET

THIS 18TH DAY OF APRIL 2024.

.....

RACHEL NGETICH

JUDGE

In the presence of:

CA Karanja.

Ms. Ratemo for state.

Respondent present.

