



REPUBLIC OF KENYA



**KENYA LAW**  
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**Tanui v Republic (Criminal Appeal E0140 of 2019)  
[2024] KEHC 4270 (KLR) (11 April 2024) (Judgment)**

Neutral citation: [2024] KEHC 4270 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ELDORET  
CRIMINAL APPEAL E0140 OF 2019  
RN NYAKUNDI, J  
APRIL 11, 2024**

**BETWEEN**

**JOSEPH KIMUTAI TANUI ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an Appeal from the Judgment of Hon. C.  
Obulutsa in Eldoret Law courts Cr. No. 3503 of 2018)*

**JUDGMENT**

1. The appellant herein was charged with the offence of causing grievous harm contrary to section 234 of the *Penal Code*. The particulars of the offence being that on 12th August, 2018 at Kapchorwa village in Metkei location in Keiyo South sub-county within Elgeyo Marakwet County wilfully and unlawfully did grievous harm to Kiprono Cheptoo.
2. He was tried and convicted by the trial court and sentenced to a term of 15 years' imprisonment. It is that judgment only on sentence that provoked this appeal by the appellant
3. Parties filed written submissions in support of their arguments, which this court has considered in making its final determination.

**Appellant's Submissions**

4. It was the appellant's submission that the he has spent 5 years in custody, which is a long time. He argued that true, it is in the interest of justice that crime should be punished. However, punishment that is excessive serves neither the interests of justice nor those of the society.
5. The appellant argued that the sentence imposed against him was not illegal but rather long given that the provisions of section 234 of the *Penal Code* provide for even a lesser punishment.



6. It was the appellants submission that he is a sole bread winner to his children who are schooling at secondary and primary schools. That his wife is jobless and she suffers from high blood pressure, a condition that does not enable her to any task to secure a living. That the complainant of the instant case is his father who is currently unable to work as well hence he needs support from his children, including the appellant.
7. The appellant stated that he regrets that transpired on the material day. That he was under the influence of alcohol thus temporary insane. That while in prison he got to know Jesus Christ and he has seen a tremendous transformation in his life.
8. He finally stated that he has since taken various life courses that have shaped him as a person and that if given a chance, he will be ready to get back to the society and help in building our beloved country.

### **Respondent's Submissions**

9. The respondent in opposition to the appeal urged this court to maintain the same for the following reasons:
  - a. The sentence was legal
  - b. The sentence was not excessive at all.
10. The Respondent's counsel identified the main issue for determination, which is whether the court should interfere with the sentence pronounced by the trial court. According to the respondent, the principles upon which an appellate court can interfere with the sentence of the trial court were set out in the case of *Nilsson Versus Republic* (1970) KLR 552., [\*Benard Kimani Gacheru v Republic\*](#) (2002) eKLR
11. Counsel maintained that for an appeal against the sentence to succeed, the appellant's entry point ought to have been on any of the following four grounds: That the sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor or, took into account, some wrong material, or acted on a wrong principle. That on the contrary, the appellant instead opted to challenge the sentence on the ground that he was his family's bread winner, that he was inebriated at the time of committing the offence and that lastly, he is deserving of a second chance having acquired life skills while serving his time in prison.
12. It was submitted for the respondent that the sentence of 15 years was neither excessive nor harsh. Counsel maintained that mitigation was considered together with the aggravating circumstances. He urged the court not to interfere with the sentence.

### **Analysis And Determination**

13. I have considered the appeal and submissions by both parties. I have also read the record of the trial court and the judgment. The guiding principle on issues of sentencing is that it is a matter at the discretion of the trial court. An appellate court will under normal circumstances not interfere with the lower courts exercise of discretion unless it is apparent that the trial court relied on a wrong principle of the law or has overlooked material factors, or where the court finds that the sentence is manifestly harsh and excessive. See *Ogolla s/o Owuor v. Republic* (1954) EACA 270, and *Wanjema v. Republic* [1971] E.A 494



14. In the case of *Shadrack Kipkoech Kogo v R.* Eldoret Criminal Appeal No.253 of 2003 the Court of Appeal stated thus: -
- “Sentence is essentially an exercise of discretion by the trial court and for this court to interfere it must be shown that in passing the sentence, the sentencing court took into account an irrelevant factor or that a wrong principle was applied or that short of these, the sentence itself is so excessive and therefore an error of principle must be interfered.
15. Section 234 of the [Penal Code](#) states thus:
- “Any person who unlawfully does grievous harm to another is guilty of a felony and is liable to imprisonment for life.”
16. In sentencing the accused person, the trial court noted that the offence attracts a sentence of life imprisonment. It is then apparent that the sentence meted was well within the provisions of the law. Even though the Applicant appears to have reformed whilst in prison, it ought to be remembered that when he committed the offence, he broke the trust and responsibility that was bestowed on him by the community, or even better his family given that the complainant is his father.
17. In the final analysis, the aggravating factors weigh heavy. I find that the sentence is appropriate. The only responsive factor to this appeal is the application of the provisions Under Section 333(2) of the *CPC*. The profound statement on the legal elements of the statutory provision is as stated in the case of *Abamad Abolfathi.Mohammed & Another v Republic* (2018) eKLR Criminal Appeal No 135 OF2016 the court of appeal held that: “ The second is the failure by the court to take into account in a meaningful way, the period that the appellants had spent in custody as required by section 333(2) of the [Criminal Procedure Code](#), the court was obligated to take into account the period that they had spent in custody before they were sentenced. Although the learned judge stated that he had taken into account the period the appellants had been in custody, he ordered that their sentence shall take effect from the date of their conviction by the trial court. With respect, there is no evidence that the court took into account the period already spent by the appellants in custody. Taking into account the period spent in custody must mean considering that period so that the imposed sentence is reduced proportionately by the period already spent in custody. It is not enough for the court to merely state that, it has taken into account the period already spent in custody and still order the sentence to run from date of the conviction because that amounts to ignoring altogether the period already spent in custody. It must be remembered that the provision to section 333(2) of the [Criminal Procedure Code](#) was introduced in 2007 to give the court power to include the period already spent in custody in the sentence that it metes out to the accused person.
18. The universal purpose of sentencing are deterrence, retribution, rehabilitation, compensation, and reparation. The Appeal before this court on sentence as imposed by the subordinate court and the sentence herein paints the picture of why level planning, a premeditation, significant actual intended and foreseeable impact, the unlawful Act would occasion the victim. The effect of the crime on the victims physical, mental, emotional, and psychological trauma is unprecedented. The kind of violence released by the Appellant the victim is one such that threatened the right to life under Art.26 of the [Constitution](#). In the nature and gravity of the offence fifteen (15) years imprisonment is on the Lower side. Given the birth relationship between the Appellant and the victim.
19. This appeal has no merit and is hereby dismissed. I affirm and uphold the 15-year term of imprisonment meted against the Appellant with the residual clause applicable in Section 333(2) of the [CPC](#) for the commencement date of the sentence to be effected from the 17.8.2018.



20. Orders accordingly

**DATED AND SIGNED AT ELDORET THIS 11<sup>TH</sup> DAY OF APRIL, 2024**

In the Presence

Mr.Mugun for the State

Appellant

.....

**R. NYAKUNDI**

**JUDGE**

