



REPUBLIC OF KENYA



**KENYA LAW**  
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**Mohamed v ODPP (Criminal Appeal E018 of 2023)  
[2024] KEHC 8692 (KLR) (18 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 8692 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT GARSEN  
CRIMINAL APPEAL E018 OF 2023  
SM GITHINJI, J  
JULY 18, 2024**

**BETWEEN**

**RUDAI MOHAMED ..... APPELLANT**

**AND**

**ODPP ..... RESPONDENT**

*(Being an appeal from the Judgment of Honourable T.A.Sitati – Senior Principal Magistrate sitting in Lamu in Criminal Case No.E025 of 2022 delivered on 19th May, 2023)*

**JUDGMENT**

1. R M was charged in the lower court with a first count of attempted murder contrary to section 220 (A) of the [Penal Code](#).
2. The particulars of this offence are that on the 5<sup>th</sup> day of January, 2022 at around 12:00 noon in Wiyoni area of Mkomani Location in Lamu Central Sub – County within Lamu County, the appellant unlawfully attempted to cause the death of Daniel Katana by cutting his head twice using a panga.
3. The appellant in the alternative faced a charge of grievous harm, contrary to section 234 of the [Penal Code](#).
4. The particulars hereof being that on the 5<sup>th</sup> day of January, 2022 at around 12.00 noon in Wiyoni area of Mkomani location in Lamu Central Sub-County within Lamu County, the appellant did grievous harm to Daniel Katana.
5. Prosecution case is that a puppy belonging to the appellant was stolen. The appellant suspected that the victim in this case who was his friend, has stolen and sold it. On 5/1/2022 the victim was at home asleep at about noon. The house is at Wiyoni, Lamu. The appellant herein while in company of another friend namely Nyenye, went and woke the victim up. They said they wanted the victim to assist them recover the puppy from the one who had allegedly stolen it. The victim rose and left in company of



- the two. When they got to an abandoned point, Nyenye suddenly turned against the victim. He struck the victim hard with a stick on the back of his head. Before the victim could realize what they were up to, the appellant stabbed him with a knife on the left side of the mouth. The victim decided to escape. He runaway and the appellant pursued him. He caught up with him and cut him on the back of the head using a panga. The victim was weakened and fell ahead near a Bodaboda stage. The two assailants escaped.
6. PW-2 who is the victim's brother was at the time working as a cook at Tunashukuru Hotel. Bodaboda operators called him, telling him that his brother had been attacked. He rushed to the scene and found the victim lying motionless on the ground. He was bleeding from the mouth and head. They got a motor cycle and rushed him to King Fahd Hospital, where he was treated and discharged on 7/1/2022. According to PW-6, he had a cut wound on the neck close to the ears measuring 7cm. He had another cut wound on the right cheek and a posterior thoracic region swelling (back of chest). A done CT scan revealed right front mastoid fracture – a fracture of one of the head bones around the face.
  7. Everline Sidi, the mother to the victim had reported the matter at Lamu Police Station on 5/1/2022, PW-5 who is the investigating officer issued a P-3 form which was filled by PW-6. He assessed the degree of injury as grievous harm. The P3 was produced as Exhibit -1.
  8. On 27/1/2022 PW-3 and PW-4, both police officers from Lamu Police Station were on foot patrol at Wiyoni area. PW-5 called them and told them about the suspect in this case. They were directed to a villager in Wiyoni who was to show them where the appellant was. They were led to where the appellant was hiding in his aunt's house. He was arrested and taken to Lamu Police Station. He was then charged with the offences.
  9. The trial court evaluated the evidence and found that the appellant had a case to answer.
  10. In his sworn defence, the appellant stated that he was a form 4 drop out and was living in Faza. On 5/1/2022 he had visited his uncle Badi Kupi at Wiyoni and he never left the house. While there he was informed by relatives that the appellant had been cut and injured. The appellant was his good friend and he is not the one who injured him. He had no panga and knife and no one saw him attacking him. He later went to victim's home to find out what happened and he was arrested from the place. On cross-examination he agreed that his dog got lost and he suspected the victim to had stolen it.
  11. The trial court evaluated the evidence and acquitted the appellant of the offence in the main count. He however was found guilty on the second count and convicted. Consequently, he was sentenced to serve 10 years imprisonment.
  12. Dissatisfied with the said conviction and sentence he appealed to this Court on the grounds that: -
    1. The court erred in analysis and application of the evidence and convicted him wrongly.
    2. Evidence of the victim was not corroborated and provisions of section 124 of the *Evidence Act* were wrongly invoked in convicting him on the evidence.
    3. A suspect or witness called Nyenye was not summoned to testify, contrary to provisions of section 150 of the *Criminal Procedure Code*.
    4. The offence was not proved against him beyond reasonable doubt.
    5. The law was misapplied in sentencing him.
  13. The appeal was canvassed by way of written submissions and both sides filed their respective submissions.



14. I have re-evaluated the charges, evidence adduced in the lower court, judgment and sentence meted, grounds of the appeal and the filed submissions.
15. Section 234 of the *Penal Code* states that; -

"Any person who unlawfully does grievous harm to another is guilty of a felony and is liable to imprisonment for life."
16. It therefore follows from the said provision that for the said offence, the prosecution need establish beyond reasonable doubt that; -
  - a. The victim suffered grievous harm.
  - b. The harm was caused unlawfully.
  - c. The accused is the one who caused the grievous harm.
17. Exploring on the first ingredient, the complainant herein in accordance to the evidence of PW-6 suffered grievous harm. He had a cut wound on the neck close to the ears measuring 7cm; another cut wound on the right cheek and a posterior thoracic region swelling (back of chest). A CT scan revealed a fracture of right front mastoid – one of the head bones around the face. PW-6 filled the P-3 form and classified the degree of injury as grievous harm.
18. In simple terms, grievous bodily harm refers to serious physical injury inflicted on a person. As a legal term it describes severe injuries that go beyond minor or superficial harm. Good examples are injuries such as broken bones, deep wounds or lacerations, damage to internal organs, permanent disfigurement and significant loss of blood.
19. PW-6 who is a clinical officer rightly clarified the injuries sustained by the victim as grievous harm. There is therefore no doubt in the case that the victim suffered grievous harm.
20. On whether the harm was caused unlawfully, the victim in his evidence-in-chief narrated how he was called by the appellant herein together with another called Nyenye, to go and assist them recover a puppy which had been stolen. Along the way the two turned against him and attacked him with a knife, panga and a stick, causing the said injuries. Lawful physical attacks could be those caused in self defence, defence of others, in law enforcement, allowed parental discipline, sporting events and medical procedure. It is therefore vivid that the harm to the victim was not caused lawfully and the ingredient was satisfied by the prosecution.
20. The last one is whether the appellant is the real culprit. There is no dispute that the appellant and the victim were friends and knew each other very well. The incident happened during the day at around noon. The appellant was arrested while he had made effort to initiate talks with the victim's family members not to pursue the case with the police. It's clear that he is the real culprit. The issue that arises is only that he was with another called Nyenye. The particulars of the offence did not reflect that the offence was committed together with another not before court. However, under section 382 of the *Criminal Procedure Code* the said error is curable as it has not occasioned a failure of justice.
21. On sentence, the offence under section 234 of the *Penal Code* carries a maximum of life imprisonment. The trial court in a five page write up expressed the factors it considered in settling at a sentence of 10 years imprisonment. As was well submitted by the prosecution while relying on the case of *Ogola s/o Owoura v Neginum*[1954] 21 270, this court cannot alter a sentence on the mere ground that if I am the one who had tried it, I may have passed somewhat a different sentence, and I cannot ordinarily



interfere with the discretion exercised by the trial court unless it's evident that the trial court acted upon some wrong principle or overlooked some material factor.

22. Considering the circumstances under which the offence was committed and the injuries inflicted upon the victim, the sentence of 10 years' imprisonment is deserved. I find no reason to hold otherwise.

23. The bottom line is that the appeal lacks merit and is hereby dismissed.

**DATED, SIGNED AND DELIVERED AT MALINDI THIS 18<sup>TH</sup> DAY OF JULY, 2024**

.....  
**S.M.GITHINJI**

**JUDGE**

In the Presence of; -

Appellant

Ms Ochola holding brief for Mr Mulamula for ODPP

.....  
**S.M.GITHINJI**

**JUDGE**

