



REPUBLIC OF KENYA



KENYA LAW
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**Ngeno v Republic (Criminal Appeal E002 of 2024)
[2024] KEHC 8087 (KLR) (4 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 8087 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERICHO
CRIMINAL APPEAL E002 OF 2024**

JR KARANJA, J

JULY 4, 2024

BETWEEN

VICTOR CHERUIYOT NGENO APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from the conviction of the Learned Trial Magistrate Hon. Japheth Cheruiyot Bii read and delivered on 23rd day of January 2024 and subsequent setence delivered on 23rd January 2024 in Kericho Magistrate's Court Case No. MCCR NO. E1423 OF 2023)

JUDGMENT

1. The Appellant, Victor Cheruiyot Ngeno, appeared before the Senior Resident Magistrate at Kericho charged with the offence of grievous harm, contrary to Section 234 of the *Penal Code*, in that on the 26th March 2022 at around 10:00pm at Olive hostels Kabianga Market in Belgut Sub County within Kericho County unlawfully did grievous harm to Patrick Evans Mumo.
2. After pleading not guilty to the charge, the Appellant was tried, convicted and sentenced to serve seven (7) years imprisonment.

Being aggrieved by the conviction and sentence the Appellant proffered the eleven (11) grounds of appeal set out in the petition of appeal dated the 2nd February 2024.

The hearing of the appeal was largely by way of written submissions which were filed on behalf of the Appellant by Messers Etyang & Company Advocates.
3. On the date set for hearing of the appeal i.e. 27th June 2024, Learned Counsel, Mr. Ngetich, appeared for the Appellant while the Learned Prosecution Counsel, Mr. Ogutu appeared for the State/ Respondent.

The Appellant was not produced in court for hearing.



In his oral highlights of the written submissions, the Appellant's learned Counsel merely reiterated and re-emphasized the grounds of appeal as argued in the written submissions.

4. In response, the Learned Prosecution Counsel, opposed the appeal and orally submitted that the offence of grievous harm was clearly proved against the Appellant as he was positively identified and placed at the scene of the offence by PW2 and PW3 and the Clinical Officer (PW1) confirmed vide the medical P3 form that the Appellant suffered grievous harm.

The prosecution counsel contended that the Appellant's conviction was proper and the sentence imposed upon him was lenient.

5. In the rejoinder to the Respondent's submissions, the Appellant's Learned Counsel contended that Section 231 of the Penal Code ought to have been invoked together with Section 234 of the Penal Code in charging the Appellant and that the Appellant was not identified as the assailant since he was not placed at the scene of the offence by PW3 who was an unreliable witness as she firstly indicated that it was the Appellant who was assaulted and later changed the story to indicate that it was the Complainant who was assaulted.

6. Learned Counsel further contended that there was no evidence of identification against the Appellant and that the Clinical Officer (PW1) could not demonstrate through the P3 form that the Complainant suffered grievous harm. That, no treatment notes or x-rays were tendered in evidence, yet the P3 form was filled and completed almost one hundred and eighty three (183) days after the fact.

7. Having considered the appeal, the supporting grounds and the rival submissions, the duty of this court was to re-visit the evidence and arrive at its own conclusions bearing in mind that the trial court had the advantage of seeing and hearing the witnesses (See, Okeno Vs. Republic (1972) EA 32).

8. In that regard, the prosecution case was briefly that on the material date and time the Complainant Patrick Evans Mumo (PW2), a student at Kabianga University proceeded to the house of a fellow student, Millicent Chepkoech (PW3) and found the Appellant therein.

The Appellant was a stranger to him. The two engaged in an argument and in the process the Complainant was pushed out of the house before he was stabbed on the neck with a knife.

The complainant lost consciousness after the assault and was taken to hospital.

9. Later, a Clinical Officer at Kericho County Referral Hospital, Robert Kipyegon Langat (PW1), examined the Complainant and compiled the necessary medical report in form P3 (P. Exhibit 1) indicating that the Complainant suffered grievous harm from the assault inflicted upon him.

Millicent (PW3) confirmed that the Complainant came to her house on the material night and found the Appellant with whom they quarreled and both went out of the house. Shortly thereafter, she heard screams and on getting out of the house she found that fellow students had gathered at the scene and the Appellant was lying down injured after being stabbed.

10. Millicent (PW3) indicated that the Complainant was drunk when he went to her house and whereas he was just a friend to her, the Appellant was her boyfriend. The Complainant's brother, Ben Gitang'a Patrick (PW4), a student at the University of Nairobi was in Nairobi when he was informed on phone that the Complainant, had been taken to hospital unconscious and unable to talk. He attempted to talk to the Complainant on phone and later travelled to Eldoret where he proceeded to Moi Teaching and Referral Hospital and found the Complainant in the emergency ward and out of danger.

11. Nancy Muli (PW5), also a student at Kibianga University was on the material night in her house when she heard noises outside. On enquiry, she saw people running around helter-skelter. Her neighbour, the



Complainant, whom they referred to by his nickname “Pato” was lying down on the ground bleeding from the neck. She and others including Kibet Felix (PW6) took him to hospital from where he was referred to Eldoret.

12. Kibet (PW6) also got out of his hostel room after being attracted by commotions outside. He also found the Complainant lying down on the grounds and bleeding from the neck before he was taken to hospital.

The incident was reported to the police and was investigated by Cpl. Joshua Amwayi (PW7), of Kabianga Police Station who gathered that the Complainant had been stabbed with a pair of scissors on the left side of the neck by the Appellant.

13. The Investigating Officer indicated that he visited the Complainant in hospital at Eldoret and found him in pain. He (Complainant) informed him (PW7) that he had no issues with the Appellant who surrendered himself at the police station and was arrested. The alleged assault weapon was produced in court (P. Exhibit 3). The Investigating Officer interrogated Millicent (PW3) who denied that she was in a love triangle with the Complainant and the Appellant.
14. The defence case was a denial and an indication that the Appellant (DW1) was not at the scene of the offence when it occurred. He stated that he was on the material date invited to a ceremony where he hosted one Denis and one Brian. They were at Olive hostels when a drunk Complainant appeared there. He (Appellant) asked Denis to pick him up. He was escorted out of the venue by Millicent (PW3) who later called him while he was already in Nairobi. He returned to Kabianga and was informed that he had harmed the Complainant. He contended that he was not at the scene at the material time of the assault.
15. The said Denis Kipkurui Langat (DW2), a teacher at Roret Boys High School and a friend to the Appellant confirmed that the Appellant had attended his graduation after which he was supposed to meet his girlfriend Chepkoech (PW3). The two could not meet as the Appellant had already booked a bus to travel to Nairobi. However, they met briefly and he (DW2) took them to Kabianga on his motor cycle. He later at about 9:30pm picked the Appellant and took him to a bus stage in Kericho from where he departed for Nairobi at 10:15pm.
16. The trial court considered the evidence in its totality and arrived at the following conclusion: -

“I find that the prosecution has proved the case against the Accused as required. The Accused brutally stabbed the Complainant perhaps suspecting an affair between the Complainant and the Accused’s girlfriend.

That was savage and uncivilized.

The Accused is hereby found guilty as charged. He is consequently convicted under Section 215 of the *Criminal Procedure Code*.”
17. Basically, the burden to establish and prove the charge against the Appellant lay squarely with the prosecution and did not shift to the Appellant even in the face of the alibi defence raised by him. There is no duty placed on an Accused Person to prove his innocence or his alibi. It is instead the duty of the prosecution to disprove the innocence and alibi of an Accused Person.



18. The offence of grievous harm is created by Section 234 of the Penal Code which also serves as the punishment provision in as much as it is framed in the following terms: -

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

Therefore, any person who assaults another and causes him grievous harm would be guilty of the offence of grievous harm under Section 234 of the Penal Code rather than Section 231 of the Penal Code which provides for a separate offence of acts intended to cause grievous harm.

19. Under Section 4 of the Penal Code, “harm” is defined to mean any bodily hurt, disease or disorder whether permanent or temporary and “grievous harm” is defined to mean 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 any permanent or serious injury to any external or internal organ, membrane or sense.

20. In the present case, the charge as framed was proper and what the prosecution was required to do was to establish and prove the necessary ingredients of the charge against the Accused/ Appellant.

In that regard, the prosecution evidence was sufficient and credible enough in establishing that the Complainant was indeed assaulted on the material date and occasioned grievous harm. The complainant (PW2) and the Clinical Officer (PW1) testified to that effect without any or substantial dispute from the Appellant.

21. The medical P3 form (P. Exhibit 1) completed and signed by the Clinical Officer (PW1) indicated that the Complainant suffered grievous harm after being assaulted with a sharp object. The Complainant (PW2) thought that the object was a knife because he heard someone shout “he has a knife.” The police investigations through Cpl. Amwayi (PW7) revealed that the sharp object was actually a pair of scissors (P. Exhibit 3).

The fact remained that the Complainant was assaulted and grievously harmed by a person who used a sharp object or weapon to accomplish his unlawful mission. It therefore did not matter whether the object or weapon was a knife or a pair of scissors.

22. At most, the bone of contention was the identification of the Appellant as the assailant. In that regard, the Appellant denied that he was the culprit assailant as he was not at the scene at the material time of the offence having earlier travelled back to Nairobi. His witness (DW2) confirmed that the Appellant travelled back to Nairobi on the material night between 9:30pm to 10:15p.m. He also confirmed that the Appellant had been with his girlfriend (PW3) prior to his departure to Nairobi, but could not say what had transpired between the two prior to the Appellant’s departure.

23. However, the evidence by the Complainant, (PW2) as corroborated by that of the Appellant’s girlfriend (PW3) clearly placed the Appellant at the scene of the offence on the material date and time. He also did not deny having been with his girlfriend on that material date. His girlfriend’s house was the actual scene of crime and that is where the criminal transaction which led to the Complainant suffering grievous harm started.

24. The girlfriend (PW3) confirmed that the Appellant was at her house when the Complainant arrived there in a state of intoxication thereby creating a quarrel between the two men. Seemingly, it was that quarrel which generated into a physical assault on the person of the Complainant. It was impossible in the circumstances for the Complainant to have been assaulted by a third party who was not even at



the scene. It was also impossible that the Complainant could have stabbed himself on the neck with a sharp weapon.

25. Although the Appellant's girlfriend (PW3) attempted to cover up for her boyfriend by indicating that he was the victim of his quarrel with the Complainant, the cover was blown up by the Complainant's evidence which was found to be credible by the trial court and which clearly showed that the Complainant was the victim and the Appellant was the Assailant.

Kibet Felix (PW6) and Nancy Muli (PW5) confirmed that the Complainant was the victim even though they did not know or see the assailant. The two found the Complainant on the ground and bleeding from the neck. They then assisted in taking him to the hospital.

26. Clearly, the prosecution evidence was sufficient and credible in establishing that the Appellant was actually at the scene of the offence on the material date and time and was actually the perpetrator of the offence. His defence was thus disproved and discredited in as much as it amounted to outright lies with weak support from his girlfriend (PW3) who attempted to portray him as the victim of the offence rather than the offending assailant.

27. The evidence as a whole clearly suggested that what happened between the Complainant and the Appellant was to be blamed on the Appellant's girlfriend, Millicent Chepkoech (PW3), for creating a love triangle between the three of them. Unknown to both men, she was double dealing them and being the men that they were, they each decided to "*fight*" for what each considered to be his "*lovebird*". The fight was initially a harmless war of words or oratory warfare, but was turned into a physical harmful fight by the Appellant's unlawful action of assaulting the Complainant with a sharp object and causing him grievous bodily injury.

28. This court must therefore find and hold that the Appellant was the person who attacked the Complainant with an offensive weapon thereby occasioning him grievous harm.

The Appellant's conviction by the trial court was thus lawful, safe, proper and sound and is hereby affirmed by this court with the result that grounds one (1) to ten (10) of the Appellant's appeal which are specifically on conviction together with the Appellant's submissions in respect thereof cannot be sustained and are hereby overruled and dismissed for want of merit.

29. Ground eleven (11) of the appeal is essentially on sentence and is also devoid of merit considering that the sentence imposed by the trial court was lawful and extremely lenient given that the Appellant was handed seven (7) years imprisonment out of a possible sentence of life imprisonment provided for under Section 234 of the [Penal Code](#). However, regard being given to the circumstances of the case and that both the Complainant and the Appellant are in their youth belonging to the so called "*generation Z*" or rather "*Gen Zee*" and also that the judiciary is in partnership with other necessary players in the administration of justice in the decongestion of prisons, the sentence imposed on the Appellant by the trial court may be reviewed downwards dependant on a favourable pre-sentence report from the appropriate probation officer. A mention date shall be given for the purpose.

Ordered accordingly.

DELIVERED AND DATED THIS 4TH DAY OF JULY 2024

J. R. KARANJAH,

JUDGE

