Wanyingi v Republic (Criminal Appeal E014 of 2023)
[2024] KEHC 9127 (KLR) (18 July 2024) (Judgment)

Neutral citation: [2024] KEHC 9127 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

CRIMINAL APPEAL E014 OF 2023

DKN MAGARE, J

JULY 18, 2024

BETWEEN

PETER KANYI WANYINGI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

1. This is an appeal from sentence and conviction given on 7th February, 2023 in Mukurwe-ini SRM Case No. E1131of 2021. The Appellant was charged with four counts of assault as follows:

   a. Count 1

      On the 30th day of August, 2020 at around 1230hrs at Kiahungu area of Mukurwe-ini Sub County within Nyeri County, unlawfully did grievous harm to Mary Wangui Kanyingi.

   b. Count II

      On 30th day of August, 2020, at around 1230hrs at Kiahungu area of Mukurwe-ini Sub County within Nyeri County, unlawfully did grievous harm to Grace Kirangari.

   c. Count III

      On 30th day of August, 2020, at around 1230hrs at Kiahungu area of Mukurwe-ini County within Nyeri County, assaulted Benard Mwangi Wanyingi thereby causing actual bodily harm.

   d. Count IV

      On 30th day of August, 2020 at around 1230hrs at Kiahungu area of Mukurwe-ini Sub County within Nyeri County, assaulted Mercy Ngima Wanyingi thereby occasioning her actual bodily harm.

2. He was charged together with his wife. The wife was acquitted of the single charge of assault causing actual bodily harm. All the complainants and the Appellant are siblings. They were fighting over a toilet that was allegedly stinky and had to be removed. Hitherto, there were orders obtained barring deconstruction of that toilet. It appears upon the orders lapsing the complainants decided to deconstruct it at the expense of the Appellant.

3. From the totality of the evidence, it came out that the complainants confronted their brother but all ended up injured. The Appellant filed a Petition and raised numerous grounds of appeal.

4. The grounds are prolixious and repetitive and unseemly. They are 34 in number. The Court of Appeal had this to say about compliance with Rule 86 of the Court of Appeal Rules (which is pari materia with Order 42 Rule 1 of the Civil Procedure Rules) in the case of Robinson Kiplagat Tuwei v Felix Kipchoge Limo Langat [2020] eKLR: -

> " We are yet again confronted with an appeal founded on a memorandum of appeal that is drawn in total disregard of rule 86 of the Court of Appeal Rules. That rule demands that a memorandum of appeal must set forth concisely, without argument or narrative, the grounds upon which a judgment is impugned. What we have before us are some 18 grounds of appeal that lack focus and are repetitively tedious. It is certainly not edifying for counsel to present two dozen grounds of appeal, and end up arguing only two or three issues, on the myth that he has condensed the grounds of appeal. This Court has repeatedly stated that counsel must take time to draw the memoranda of appeal in strict compliance with the rules of the Court. (See Abdi Ali Dere v. Firoz Hussein Tundal & 2 Others [2013] eKLR) and Nasri Ibrahim v. IEBC & 2 Others [2018] eKLR. In the latter case, this Court lamented:
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> "We must reiterate that counsel must strive to make drafting of grounds of appeal an art, not an exercise in verbosity, repetition, or empty rhetoric...A surfeit of prolixious grounds of appeal do not in anyway enhance the chances of success of an appeal. If they achieve anything, it is only to obfuscate the real issues in dispute, vex and irritate the opposite parties, waste valuable judicial time, and increase costs." The 18 grounds of appeal presented by the appellant, Robinson Kiplagat Tuwei against the judgment of the Environment and Land Court at Eldoret (Odeny, J.) dated 19th September 2018 raise only two issues..."

5. In the case of Kenya Ports Authority v Threeways Shipping Services (K) Limited [2019] eKLR, the court of appeal observed that: -

> " Our first observation is that the memorandum of appeal in this matter sets out repetitive grounds of appeal. The singular issue in this appeal is whether Section 62 of the *Kenya Ports Authority Act* ousts the jurisdiction of the High Court. We abhor repetitiveness of grounds of appeal which tend to cloud the key issue in dispute for determination by the Court. In *William Koross V. Hezekiah Kiptoo Kimue & 4 others, Civil Appeal No. 223 of 2013*, this Court stated:
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> "The memorandum of appeal contains some thirty-two grounds of appeal, too many by any measure and serving only to repeat and obscure. We have said it before and will repeat that memoranda of appeal need to be more carefully and efficiently crafted by counsel. In this regard, precise, concise and brief is wiser and better."

6. The duty of the first Appellate court remains as set out in the Court of Appeal for Eastern Africa in Pandya -vs- Republic [1957] EA 336 is as follows:-

> " On a first appeal from a conviction by a Judge or magistrate sitting without a jury the appellant is entitled to have the appellate court's own consideration and views of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the witnesses before the Judge or magistrate with such other material as it may have decided to admit. The appellate court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises which witness is to be believed rather than another and that question turns on manner and demeanor, the appellate court must be guided by the impression made on the Judge or magistrate who saw the witness but there may be other circumstances, quite apart from manner and demeanor which may show whether a statement is credible or not which may warrant a court differing from the Judge or magistrate even on a question of fact turning on the credibility of witnesses whom the appellate court has not seen."

7. In the case of Okeno v Republic [1972] EA 32 at 36 the East Africa Court of Appeal stated on the duty of the Court on a first appeal:

> " An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya v. R., [1957] E. A. 336) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (Shantilal M. Ruwala v. R., [1957] E.A. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters v. Sunday Post, [1958] E. A. 424."

8. The issue in this case is whether the prosecution proved its case to the required standards. Most oft quoted English decision of by Viscount Sankey L.C in the case of H.L. (E) Woolmington vs. DPP [1935] A.C 462 pp 481, comes in handy in describing the legal burden of proof in criminal matters, that;

> " Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt subject to what I have already said as to the defence of insanity and subject also to any statutory exception. If at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given either by the prosecution or the prisoner, as to whether [the offence was committed by him], the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained."

9. In the case of R vs. Lifchus {1997}3 SCR 320 the Supreme Court of Canada explained the standard of proof as doth: -

> " The accused enters these proceedings presumed to be innocent. That presumption of innocence remains throughout the case until such time as the crown has on evidence put before you satisfied you beyond a reasonable doubt that the accused is guilty...the term beyond a reasonable doubt has been used for a very long time and is a part of our history and traditions of justice. It is so engrained in our criminal law that some think it needs no explanation, yet something must be said regarding its meaning. A reasonable doubt is not imaginary or frivolous doubt. It must not be based upon sympathy or prejudice. Rather, it is based on reason and common sense. It is logically derived from the evidence or absence of evidence. Even if you believe the accused is guilty or likely guilty, that is not sufficient. In those circumstances you must give the benefit of the doubt to the accused and acquit because the crown has failed to satisfy you of the guilty of the accused beyond a reasonable doubt. On the other hand you must remember that it is virtually impossible to prove anything to an absolute certainty and the crown is not required to do so. Such a standard of proof is impossibly high. In short if, based upon the evidence before the court, you are sure that the accused committed the offence you should convict since this demonstrates that you are satisfied of his guilty beyond reasonable doubt."

10. According to Halsbury's Laws of England, 4th Edition, Volume 17, paras 13 and 14:

> " The legal burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party's case. If at the conclusion of the trial he has failed to establish these to the appropriate standard, he will lose. The legal burden of proof normally rests upon the party desiring the court to take action; thus a claimant must satisfy the court or tribunal that the conditions which entitle him to an award have been satisfied. In respect of a particular allegation, the burden lies upon the party for whom substantiation of that particular allegation is an essential of his case. There may therefore be separate burdens in a case of with separate issues."

11. The standard of proof required in such cases was addressed by Brennan, J in the United States Supreme Court decision in Re Winship 397 US 358 {1970}, at pages 361-64 stated that:-

> " The accused during a criminal prosecution has at stake interests of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatised by the conviction...Moreover use of the reasonable doubt standard is indispensable to command the respect and confidence of the community. It is critical that the moral force of criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned."

12. This surely actually set the correct tone for the case. The parties were involved in a land dispute. One character of the witnesses was that they were omnipresent. Extremely curious and sometimes prophetic. They were able to know what happened to others without being there. The evidence was a story from a horror movie where an unknown ogre turned up and ended up injuring angels who did absolutely nothing. In reviewing the evidence on part of witnesses, the words that Odunga J (as he then

was), alluded to in the case of Kioko Peter v Kisakwa Ndolo Kingóku [2019] eKLR while referring to the reasoning of Madan lamented as follows:

> Parties and Counsel ought to give the courts some credit that the courts are not manned by morons who can be easily duped into believing all manner of incredible stories with little or no iota of truth. It is these kinds of allegations that Madan, J (as he then was) had in mind when in N vs. N [1991] KLR 685 he expressed himself in the following terms:
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> "I wish people would not tell me absurd and unbelievable lies. I feel disappointed if a lie told in court is not reasonable imitation of the truth and is not reasonably intelligently contrived. I wish people who tell lies before me would respect my grey hair even if they consider that my intelligence is not of high order. I wish the witness had not told me the most stupid of his lies, which both disappointed and made me feel intellectually insulted."

13. PW1 Mercy Kinyua stated that she is an administrator of their father's estate and a business lady, residing in Nakuru. I have learnt that when a sister introduces her formal title in succession it is to steal a match and purport to have powers that they do not have. Why will anyone refer to herself as an administrator in a purely assault matter?

14. She testified that on 31/8/2020 she was with the brothers, Bernard and George and with Florence and Mary. They saw the other brother Peter Kanyi Wanyingi heading to his house and met behind Bernard's house. The Appellant's wife and son had gone to collect timber from a fallen house.

15. She peeped to see that he was carrying iron sheet and timber to construct a latrine that George had demolished. She confronted their other brother and was slapped and fell. I could not understand nor fathom why anyone could demolish toilet being used by their brothers and then expect them not to complain. It appears they demolished a toilet and left the Appellant without a place to use.

16. He decided to reconstruct but sister was stopping him. The sister after getting a slap fell and the appellant stopped and the man who destroyed the toilet blocked him. She screamed and was taken to hospital. Mary was not there when she was injured. It appears the police had objected these charges but the complainants followed to ensure it happened. It came out that there was a dispute within the family and they had long outstanding dispute. Mercy Kingola was the aggressor, asked by her brother George.

17. How can a man retain sanity when people demolish his toilet, however useless it is? George Maina testified that he was instructed to demolish a latrine at 11.00 a.m. This confirms the fears. The complainant hired a labourer to demolish a toilet and then their peeping to see Peter's reaction. Appellant came and slapped Mercy. Surprisingly the person who was demolishing did not witness anyone collect iron sheet. This is in direct contradiction with the fable by PW1. He stated that the Appellants were at home but did not get to the scene of fight.

18. PW3 Florence Wambui Kiarie was also resident of Mukurwe-ini and explained she was also at home. She stated that she had gone to visit her brother Benard Mwangi. When the appellant started collecting iron sheets, PW1 asked what he was doing. Mwangi asked why they were fighting. She stated that the Appellant took a wooden stick with nails and hit Mwangi on the head. The witness rose to ask why they were fighting. Appellant's son was on the scene, pushed her and Mary Wayuu who fell.

19. The witness was worried because of the fights and entered the house to pick Mercy's phone to ask for help. The witness started screaming for help. This was in direct contradiction to PW1's evidence that it was PW1 who screamed for help from PW3. They saw Grace coming out with an eye gorged out while bleeding. The Appellant locked the house from outside. She picked shoes from all over. She stated that Mary was pushed by Wahome, the Appellant's son. The said accused did not hit anyone though he had

wrenched fists. They were taken to hospital. PW3 stated that Mwangi tried to separate the Appellant and PW1 as he stood between the two. The 2nd Accused was not present.

20. The accused fell but not immediately. She stated that there was a commotion but parties were not fighting. She said Mary was being pushed when she went indoors. The witness did not know where PW2 was at the time of the commotion. They did not expect the violence to escalate the way it did.

21. PW2 stopped the fight and Mwangi fell when the Appellant shook the door. The witness did not know that Mwangi took part to demolish the latrine. The witness saw Wahome push Mercy and Mercy fell as the witness was standing. The witness was unable to know whether there was a dispute over a toilet or shamba.

22. There was a struggle at the door with Mercy and Grace who were bleeding, while the Appellant and the witness struggled to open the door, while others pushed to lock it. She went to where Benard, PW1 and the Appellant were and asked why they were fighting. The answer was that the Appellant had insulted her as a dog. The witness could not tell who hit Grace.

23. PW4 Benard Mwangi was the Appellant's brother. He stated that he hired someone to remove iron sheets and wood from a falling toilet and assemble his kitchen. A few minutes later he heard some scream. He tried separating PW1 and Appellant but got hit by accused 2 using a wood.

24. D2 stabbed him with a piece of wood. He lost consciousness. He could not tell what happened. There is clear contradicting evidence on who hit the witness. Accused 2 had been admitted on the basis of evidence of PW4, the third clause cannot stand against the Appellant. The evidence of other witnesses were contradicting.

25. The way to treat contradictions in a case was stated by the Court of Appeal in Jackson Mwanzia Musembi v Republic (2017) eKLR where the court cited with approval the Ugandan case of Twahangane Alfred –Vs- Uganda CR. Appeal No. 139 of 2002 (2003) UGCA,6 where it was held that: -

> "with regard to contradictions in the prosecution's case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution's case".

26. PW5 Mary Wangui testified that the Appellant is the brother. She stated that the Appellant went and took iron sheet from village toilet that had been demolished. He claimed that PW1 had built the toilet for the mother. When PW1 asked about the iron sheet, Appellant slapped her and she fell on the right side. They saw she had been hit. She found Mercy on the ground. The evidence on what happened was hearsay. She stated she asked Appellant why they were taking iron sheets and the son slapped her and the Appellant hit her with timber. She sustained a fracture.

27. Mwangi came to the scene and D1 and D2 beat him and they called him a dog. Mwangi's wife helped Mwangi. He had his head swollen. The Appellant and Accused 2 beat Grace. Her eyes were swollen. Appellant beat Mwangi outside his house. The witness stepped out when she felt that they could kill Mwangi. Florence screamed and attracted a crowd.

28. The public did not assist and for a good reason. They were adults behaving badly. Mwangi is said to have sustained serious injuries.

29. PW6 James Nderitu Njaramba was a Clinical Officer. He produced four P3 forms for Benard Mwangi, who indicated to have been assaulted by three people. He produced the P3 and clinical notes. The court found that there is a standard prima facie to produced documents. This was a new development under Section 33 and 70 of the *Evidence Act*. The medical notes were produced by a person who has no idea who the maker is and has no claim of custody and so are of no probative value. Allowing every random clinical officer to produce documents cannot be countenanced. I shall proceed without the improperly admitted evidence, that is the x-rays, P3 form and notes.

30. The witness produced a P3 for PW1, the next P3 was for Grace M. Mwangi and Mary Wambui aged 70 years.

31. On cross examination she stated that there were no x-rays. She stated that there is no indication in the report that was applied. The report for PW1 indicate a headache. The treatment notes captured a headache while P3 showed pain to the sides of the head. Mary's dress is said to have been stained on the left side.

32. Benard had a laceration on the vulva area. The P3 for the second accused was still filled with injuries. Accused 2 sustained injuries in various parts of the body. There were obtained form of a sharp object. This is why tetanus toxoid was administered. She suffered deep cut. The injury was at noon on the same day. Grace was bleeding on the left eye with a swollen ankle joint.

33. PW7 was a clinical officer from KMC. He had treatment notes. The treatment notes for Mary aged 70 years were also produced.

34. PW8 IP Sally, testified on 25/6/2022 that she was the initial investigating officer. That PW1 was known to her and was brought by the brother and sisters. That everyone complained. She asked medical personnel to report to office. She received a written report from all of them. She interviewed PW1. She repeated the story from PW1. Unfortunately, being known to her she did not take sufficient caution to avoid bias from affecting the investigations. She stated that family members do not get along well. She had recommended the charges.

35. The family had reported many cases to the police. She was aware of the land case and succession but did not know them. In cross examination she stated that parties had a long standing dispute in the family. The appellant had been stopped from constructing a toilet pending hearing a case. However PW1 authorized demolition of the toilet that the Appellant was using. She denied that the appellant was using the troubling land question.

36. I note PW1 introduced herself as an administrator. Secondly, if it is true that the toilet was in Benard's home, why did it take PW1 to travel all the way from Nakuru to Mukurweini to instruct demolition of a toilet. Thirdly the instructor was Benard. What comes out was that the demolition of the toilet was what provoked the Appellant to fight. Unfortunately, the Appellant overpowered the others.

37. PW1 is the one who started the whole thing in cohort with Benard. She helped his wife PW2 who demolished a toilet knowing that the same was contentious. The toilet could be smelling but they did not allow the Appellant to construct toilet. They then demolished the one he was using. To start a cock and bull story that PW1 built the toilet is to miss the point. The appellant needed a toilet, however smelly it is. I do not buy the story that it was on Benard's land. The land was said to be ancestral and there was no evidence of succession being completed and title coming out. The Appellant appears to have gone to rebuild a toilet or have a makeshift. They only had his own sister peep to see what he was doing.

38. It is said that serious injuries were suffered. However, this court cannot place the matter on the Appellant. A person cannot be guilty of assault in such circumstances. The only reason the appellant is charged is because IP Sally believed her friend PW1 was mistreated.

39. There was a push by some witnesses to have the wife and son pursued into the case. This created irreparable contradiction. It is laughable for an Inspector of Police to allude to the appellant disregarding court orders on one hand, and on another, state that the case was long concluded as such the Appellant could not be using the toilet. The investigating officer became an investigating officer putting a friend ahead of independence required of investigation.

40. The evidence she gave was not from the investigation point of view but her personal knowledge. The investigator, in spite of not being neutral was able to recommend affray. The Office of the Director of Public Prosecution overruled her and recommended the current charges. The evidence before the court indicted that the investigator was correct in her assessment of the situation.

41. The court allowed the relevant evidence to be brought related to a charge where the appellant had been acquitted for disobeying a court order. This is where the police were misusing the friendship since the case ceased to exist after the acquittal.

42. On cross examination she stated that the appellant had been stopped from building a toilet. However, PW1 authorized the demolition. She wrongly believed that an administrator had power to authorize anything. This was a mistake as she only had powers to correct and not to give away or destroy. Any connection was from outside not from beneficiaries. The administration appeared to have given PW1 a false sense of self importance that she had a right to gloat over the other beneficiaries. She was simply trustee and did not have power to do what she purported to do against the beneficiaries.

43. The witness stated that as an administrator she is the head of the family which is equally erroneous and the cause of the current issue in that family. She admitted the latrine was between the appellant and Mwangi's home and she did not involve the appellant in the decision to demolish the toilet which provoked the fight, yet they had stopped him from building another for a whole year.

44. The witness is a 14 years police veteran. She stated that she recommended affray since the home is next to a public road and there were many people involved actively in the fight. She stated that everyone involved in the fight was at the station reporting the fight. The Appellant is said to have suffered harm and the wife had suffered grievous harm. It was evidence that the subject latrine was 50 metres from the Appellant's house and 100 metres from Mwangi's house. From her investigations, all parties suffered injuries over a toilet that she knew belonged to the family and was full.

45. PW9 Grace Kirangari Mwangi testified that she resided in Kiahugu with the husband Benard Mwangi. She identified the appellant as a brother-in-law and the co-accused as his wife. She stated that the Appellant was not allowed to his home as he had previously assaulted the witness without any basis. She stated on the material day, she saw the husband on the ground and went to put fire off and she was attacked for no reason. It was her evidence that this was not the first assault by the Appellant as there is a case pending in court between them.

46. On being put on their defence, the Appellant stated that he was an interior designer and resided in Mukurue-ini, that is his ancestral home where he lives with his wife and children. The wife alerted him that their toilet was being demolished and he came back home and found materials had been arranged and the toilet fully demolished. He had been using that toilet though it had been built by Mwangi.

47. He recalled that he attempted to build one since the toilet had filled up but he was sued by the siblings in a case that run up to September 2020. He stated that he was building another one when the family

one was filled up. It forced him to use the family toilet pending succession. When he came to the site, he instructed Maina Mwangi to reconstruct the latrine as the toilet was not yet ready.

48. While that was going on, one of the siblings came and hit him on the head with timber and when he attempted to look he was hit again by Mwangi Ngima, Mary Wangui and Grace Kirangari. He confirmed that Florence and her husband Jack were mere spectators. It was his evidence that Ngima and Wangui insulted him as "Kihii" before they approached him. He was angered but he did not want to fight that is when Mwangi hit him and he hid in a coffee plantation. He was hit again on the legs, head, while Grace screamed. He saw his wife being beaten but she blocked. The sisters joined in hitting the wife all over.

49. Florence was the first one to leave after the fight. He testified that he arose when his wife was attacked and the rest of the siblings left and locked themselves. Some fell including Mwangi as they run away and was injured by the terrain. The appellant sustained injuries and was treated. It was his evidence that the son only raised his mother when the mother fell on the ground and he did not participate in the fight.

50. The on-looker surrounded the area to see free cinema but did not intervene. It appears that the fights are normal colours for this family. And a source of entertainment for neighbours.

51. It was his evidence further that they had problem with siblings since 2017 and does not get along with his siblings due to the succession matter. Their sisters wherever they visit, they create trouble. It was his case that succession had been completed with all the beneficiaries getting an equal share but has not been done on the ground. He lamented that had the sister approached him before demolishing the toilet, the fight would not have occurred. The matter was left to lie for sometimes until one year later when the Appellant was called and charged.

52. On cross examination the Appellant stated that the incident took place after the other criminal case over the toilet had been concluded. He confirmed he was hit on the head and he was cross examined on a question of lack of independent witnesses. On re-examination he stated that the fight was over the toilet that the complainant had destroyed. The fight resulted in injuries.

53. DW2, second accused stated that she saw Maina demolishing toilet and transporting materials to Mwangi's place. At that time their own toilet was under construction. She called the husband. Shortly she heard noises and found that it was Mercy, Grace, Mary Bernerd and Maina who were in Mwangi's place. Mwangi hit the appellant with a 2 x 2 timber which caused him to fall. The Appellant was asking the sisters why they were demolishing the toilet which was 40 to 50 metres away from their home. The sisters called the Appellant a 'kihii' and a 'dog'. When the appellant was hit, he fell and they pulled the witness and started beating her. She stepped back after Mwangi hit her in the middle of the head using timber with a 4-inch nail attached. She sustained serious injury. She described a horror scene that was their home on that day.

54. It appears that the sisters wanted to settle a succession cause by reducing the number of mouths on the table. She stated that after demolition of the toilet they started using bush to relieve themselves. She stated that after attack, they went to the police station to report the incident, all of them. On cross examination, she stated that she saw Maina, PW2, demolish the toilet and it is Mwangi who hit the Appellant with a piece of timber.

55. DW3 Antony Kanyi, a son to the appellant, described what he saw when he went to the scene and found Maina demolishing the latrine. He enquired from Maina why he was demolishing and he was told it is Mwangi who ordered it. He called his father. After sometimes the father came. PW1 came to the scene and got hold of the Appellant calling him devil and a 'Kihii'. In the meantime, Mwangi hit

the appellant the second time and the appellant fell and they started beating him. They also beat the mother DW2 where a nail pricked her hand and tore her.

56. The father rose from the ground and others scampered. They tripped on the ground and fell as they were running away. He denied ever beating Benard but stated that Benard fell as he was running away. He was shocked and could not act in time. It was his evidence that the toilet was not in anyone's compound but between the two houses. He admitted the accused were his parents and he saw them fall. He also saw Wangari scratching the Appellants with wood. He confirmed that Benard hit his father with timber and all parties sustained injuries and not fractures. It was his case that all the aunts sustained injuries as they ran. The aunt's fled without being chased. It was his case that he was present when the fight took place.

57. DW4 Edwin Ng'ang'a a clinical officer produced treatment notes and the P3 for both accused and was familiar with the handwriting of Martha Wangari who filled the notes for both accused. He described the injuries vividly. Second accused suffered grievous harm while the appellant suffered harm. He stated that the appellant's injuries were superficial while the wife were serious. The court analyzed evidence, found the appellant guilty of four counts and acquitted the wife.

58. The court sentenced the Appellant to five years in prison for count 1 and 2 and one year for count 3 and 4. This is subject of the appeal.

Submissions

59. The Respondent submitted on 13th March, 2024 that the sentence is proper and the conviction was well founded. They went to great length to deal with the definition of grievous and harm. They relied on the case of John Oketch Abongo vs Republic 2000 eKLR.

60. They stated that the elements were proved especially harm. They also relied on the case of Lomodo vs Uganda 2014 ughhccr 49. They also stated that whether the appellant participated, the assault was proved. They relied on the case of Uganda vs Akaka (2019) UG HCCRD 12.

Analysis

61. This matter presents a unique situation of selective prosecution. The appellant was the aggressor. PW1 confirmed that she ordered the toilet to be demolished knowing that the same toilet has been a subject of provocation between siblings for a long time. This resulted in the appellant being called by the wife and son. The evidence is consistent that on arrival the appellant was attacked by Mwangi and insulted by two of his sisters. The appellant's story was more consistent otherwise the others could not be having injuries.

62. PW1 gives a story on an attack on herself but omits actions by Mwangi and herself. It is clear that the two had participated in the demolition of an old toilet which they had no right to remove. They had maliciously stopped the appellant from building the latrine earlier and sued him when he went ahead and built one. They took him through a trial for absolutely no reason but he was acquitted under Section 215 of the CPC.

63. As if that was not enough, they conspired to have the toilet he was using destroyed. PW1 had voyeurism and I cannot assume how an adult can admit to be peeping to see his brother. The story by Grace is out of this world and simply false. Who in his right mind goes to switch off fire when the husband is being fought and is on the ground? The correct position is that she went to get timber as per DW3's evidence to beat accused 2.

64. It is the act of wanting to kill accused 2 that woke the appellant to reality that resulted in an impressive injury to six people including the appellant and accused 2. The court ignored cogent evidence which was to the effect that his sisters had planned the attack on the appellant and placed themselves strategically to effect their plans. They destroyed a toilet he was using to provoke him but did not anticipate that accused 2 will resist, giving time to the appellant to rise and defend himself.

65. The terrain chosen for the best known display of affection was not ideal for the duel. PW1 was the least injured because she was younger and the masterminder of the aggression. The older siblings who were in their 50's and their 70's got injured when they fell or they were beaten. They have themselves to blame for the tragedy that befell them. They need to understand that the court is not a solution to the aggrieved. Their plans to kill or maim the appellant and his family failed and it resulted in affray.

66. Whatever happened between the recommendation of affray and charging of appellant one year later remains a mystery. The evidence showed a fight where it was everyone against all. The parties did not realize that the fight did not have to increase an inch of their land.

67. I find and hold that in spite of the injury inflicted, the appellant was provoked to the extreme. He was viciously attacked by his own siblings. They tore clothes of the appellant's wife in the presence of their son and destroyed the only toilet he had. PW1 had no business removing a toilet she was not using which was 100 metres from Mwangi, 50 metres from the appellant, and 150 kilometres from PW1 in Nakuru. The demolition was the course of ire that irked all of them.

68. I find that the four counts of assault were not proved. The injuries were self-inflicted by causing violence and a fight with a man who had seen death with his own eyes and was in danger of losing his dear wife and having his dignity destroyed. It is only due to divine mercy that there were no fatalities. The ODPP was plainly wrong with the choice of offence to prefer. It was selective and unattainable in the circumstances. The charges were dead on arrival. In the circumstances, I set aside the conviction on all the four counts.

69. On sentence, the court gave five years for count 1 and 2. This was excessive given the circumstances. Had the charge been proved, I would have reduced the sentence to two years. This is because the victims were the perpetrators.

Order

70. The court makes the following orders:

    a. The sentence and conviction on four counts meted out to the appellant are hereby set aside. In lieu thereof the appellant shall be set fee unless otherwise lawfully held.

    b. The file is closed.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 18TH DAY OF JULY, 2024.

KIZITO MAGARE

JUDGE

Judgment delivered through Microsoft Teams Online Platform.

In the presence of: -

Miss. Kaniu for the State

Mr. Kimuru for the Appellant

Appellant – present

Court Assistant – Jedidah