



**Mkalla v Republic (Criminal Appeal E023 of 2023)
[2024] KEHC 12162 (KLR) (11 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 12162 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
CRIMINAL APPEAL E023 OF 2023
M THANDE, J
OCTOBER 11, 2024**

BETWEEN

SAID MWABEJA MKALLA APPELLANT

AND

REPUBLIC RESPONDENT

*(An Appeal arising out of the conviction on 29.7.22 and sentence by Hon.
Stephen Ngii PM on 6.9.22 in Mariakani Criminal Case No. E196 of 2020)*

JUDGMENT

1. The Appellant was charged with the offence of grievous harm contrary to Section 234 of the [Penal Code](#). The particulars of the offence are that on 27.9.2020 at about 1930 hours at Duvaro sublocation, Taru location, Kinango, sub-county of Kwale county the Appellant willfully and unlawfully did grievous harm to Cleophas Mdune Komboza (the Complainant). Following trial, the Appellant was convicted of the offence and sentenced to 9 years imprisonment.
2. The Appellant has appealed against the sentence vide a petition of appeal filed on 8.5.23 which he later amended. The somewhat difficult to understand are that the trial Magistrate erred in convicting the Appellant ye there was no strict liability and that the matter resulted in a misdemeanor. Further that the trial Magistrate failed to consider that the arresting and investigating officers were or are non-existent elements and hence prejudice the Appellant. Lastly that the trial Magistrate erred when entering conviction, failed to notice that causation occurred dur to intoxication.
3. As a first appellate Court, I have subjected the evidence adduced before the trial Magistrate to a fresh analysis and evaluation while giving due allowance for the fact that unlike the trial court, I neither saw nor heard the witnesses. See *Okeno v. Republic* [1972] EA 32.
4. At the hearing, the Complainant stated that on the material day at around 8 pm, he was in a group of 7 people taking alcohol in Taru town where a misunderstanding arose with another group. He further



stated that a member of his group boasted that they had money and that is why their table full of beer while that of the Appellant's group was empty. Further that this remark displeased the Appellant asked if they were boasting because they sell omena and the Complainant responded that they were dealers in sand and stones. He added that in response, the Appellant threw a stone at the Complainant which hit him on the left eye resulting in loss of sight. He was taken to hospital by his friends and thereafter had eye surgery.

5. The Complainant's testimony was corroborated by PW2 and PW3 who testified that the Appellant hit the Complainant with a stone in the left eye following his boastful remarks regarding the fact that they had bought plenty of beer. PW6 the clinical officer at Samburu subcounty hospital testified that he examined the Complainant. He stated that the lens of the Complainant's left eye was damaged and that that he had surgery where an artificial lens was fitted.
6. In his defence, the Appellant stated that he did not commit the offence and prayed for forgiveness. He stated that he is an orphan and that his children and kin depended on him.
7. The Respondent chose not to file any submissions.
8. In his submissions, the Appellant submitted that the trial Magistrate erred in failing to notice that the incident was an accident as there was no criminal intent on his part. As such, by dint of Section 9(1) of the *Penal Code*, he was not criminally responsible for the act. Further that the act was a misdemeanor which is punishable by a term not exceeding 2 years, or fine or both. He contended that the sentence imposed was harsh and urged the Court to comply with Section 24(h) or Section 35(2) of the *Penal Code*. The Appellant further asserted that there was provocation and the act took place due to intoxication.
9. The Appellant further submitted that essential witnesses were never summoned by the prosecution to shed more light in the matter. He contended that failure to attend court by the arresting and investigating officers who were the most vital witnesses was fatal. The Appellant further took issue with the fact that the treatment notes from the Kwale Eye Centre and Aga Khan Hospital, s were signed by Dr. Hellen Roberts. He contended that there was no way a doctor from a government facility in one county can operate in a non-governmental facility in another county. Further that failure to call the 2 doctors.
10. The Appellant has also faulted the trial Magistrate for failing to find that the incident occurred due to intoxication. He submitted that an incident that occurs when parties are drunk cannot be said to be premeditated. In an apparent admission of guilt, he went on to submit that he was in prison due to a deserving punishment and to restore himself.
11. I have considered the Appellant's submissions. I have also carefully examined the record including the Appellant's cross examination of witnesses and his defence. At no point did the Appellant raise the issues he now raises that crucial witnesses were not called, that he was intoxicated and that there was no criminal intent on his part. In his defence, he simply stated that he did not commit the offence and went on to mitigate. The issues he now raises are fresh issues that ought to have been raised during trial so as to enable the trial court address its mind to the same and make a finding thereon. This was not done.
12. It is trite law that issues not raised in the trial court cannot be raised at the appellate stage. In the case of *Japheth Mwambire Mbitha v Republic* [2019] eKLR the Court of Appeal addressed its mind to an invitation to consider fresh issues and stated:

Needless to say, the Court declined to entertain fresh issues on appeal. In line with that finding, we too are disinclined to address the allegations of a defective charge sheet as it is a new matter and there is no opinion by the two courts below on this new issue which was



introduced for the first time on second appeal. Put differently, the appellant cannot fault the first appellate court for failing to make a finding on an issue that was never advanced at the hearing of the first appeal. Consequently, that ground of appeal should of necessity fail.

13. I am duly guided. The Appellant cannot invite this Court to entertain fresh issues at the appellate stage, which he did not raise in the court below. Accordingly, these grounds fail. is ground fails.
14. On the sentence imposed, the Appellant contended that the same was harsh and urged sentence imposed was harsh and urged the Court to comply with Section 24(h) or Section 35(2) of the [Penal Code](#).
15. Section 234 of the [Penal Code](#) provides as follows:

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

16. The maximum sentence that may be imposed on a person convicted of the offence of grievous harm as the Appellant, is life imprisonment. In sentencing, the learned Magistrate noted that the Appellant persisted in denying the offence. Further that in spite of causing irreversible deformity to the Complainant's left eye, he did not demonstrate any remorsefulness. The trial Magistrate however considered that the Appellant was a first offender and, in exercise of his discretion, spared him the life imprisonment, which the offence carried. He sentenced the Appellant, not to the maximum life imprisonment, but to a lenient 9 years in prison.
17. It is well settled that appellate courts must exercise restraint in interfering with judicial discretion. In the case of *Mbogo v Shah* [1968] EA 93 where the Court of Appeal considered an invitation to interfere with the exercise of judicial discretion and stated:

[A] Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been misjustice."

18. Having reviewed the impugned decision and duly guided by the holding by the Court of Appeal, I find that there is nothing to show that the trial Magistrate in the exercise his discretion, misdirected himself in some matter thereby arriving at a wrong decision. The Appellant has not argued or even suggested that the trial Magistrate was clearly wrong in exercising his discretion in imposing as he did, the sentence of 9 years imprisonment, thereby occasioning a miscarriage of justice. He has also not demonstrated that the trial Magistrate acted on wrong principle or omitted relevant factors or took into account irrelevant factors in sentencing, or that the proceedings were irregular or in violation of his rights or fundamental freedoms. In the absence of any manifest irregularity or illegality in the sentence I find no basis for interfering with the discretion of the trial Magistrate or to upset the sentence imposed.
19. In the end, and for the stated reasons, I find and hold that the Appeal herein lacks merit and the same is hereby dismissed.

DATED SIGNED AND DELIVERED IN MALINDI THIS 11TH DAY OF OCTOBER 2024

M. THANDE
JUDGE

