



REPUBLIC OF KENYA



KENYA LAW
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**Bosire v Republic (Criminal Appeal 10 of 2020)
[2023] KEHC 848 (KLR) (10 February 2023) (Judgment)**

Neutral citation: [2023] KEHC 848 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISII
CRIMINAL APPEAL 10 OF 2020
REA OUGO, J
FEBRUARY 10, 2023**

BETWEEN

HESBON OKARI BOSIRE APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal from the judgment, conviction and sentence by Hon N.S. MAKILA
(SRM) in KISII Criminal Case No. 1840 of 2013 delivered on 16/11/2018)*

JUDGMENT

1. The appellant, Hesbon Ogari Bosire, was charged with the offence of grievous harm contrary to section 354 of the Penal Code. The particulars were that on June 19, 2013 at Ngenyi Location, Mirani District within Kisii County wilfully and unlawfully did grievous harm to Samuel Bruce Ongera. After hearing the case and considering the evidence before the subordinate court, the trial magistrate found that the prosecution established its case to the required standard and convicted the appellant of the offence. The appellant was sentenced for 10 years.
2. The appellant is dissatisfied with his conviction on grounds that he was denied the opportunity to conclude reconciliation with the complainant who was his cousin. The appellant also seeks to have this court consider his mitigation.
3. This being first appeal, it is the duty of this court to re-evaluate the evidence before the trial court and to arrive at its own conclusion whether or not to support the conviction while bearing in mind that the trial court had the advantage of seeing the witnesses (see *Okeno V Republic* [1972] EA 32).
4. The evidence before the subordinate court was as follows:
5. Samuel Bruce Ongina (Pw1) recalled that on June 19, 2013 at 3:00 p.m. he heard a lady screaming that someone was being strangled. He responded to the alarm and found the appellant assaulting Kerebi.



Once the appellant saw him, he started kicking and beating Pw1. The assistant chief came to the scene and intervened. Pw1 testified that he injured his left hand. Pw1 left but was followed by the appellant who hit him with a stone injuring him. Pw1 testified that his left hand joint is dislocated. Kerebi Sibia (Pw3) testified that as she was chatting with the appellant's step mother when the appellant came and hit their heads together. She told the subordinate court that Pw1 came to their aid. James Orina (Pw2) recalled that on the material day the appellant assaulted 2 women and the sub chief and Pw1 intervened. Once Pw1 left, Pw2 saw the appellant follow Pw1. Pw2 in an attempt to ensure that the peace was maintained followed the appellant. He then found Pw1 screaming in pain saying that the appellant had broken his arm. He took Pw1 to Nyamira hospital but they were referred to Tenwek hospital.

6. No 62862 Corporal Paul Muoki Kavoi (Pw4) the investigating officer from Rioma police station testified that the appellant wanted to assault an old woman but was stopped by Pw1. The appellant then turned on Pw1 assaulted him with a stone and fractured his hand. The complainant went for treatment and later reported the matter. Daniel Nyameino (Pw5) testified that he is a clinical at Kisii Teaching and Referral Hospital and examined the complainant. Pw1 had a history of being assaulted by a person known to him. His left upper limb was supported by an arm sling. He complained of the injury to the left shoulder joint. The x-ray done on June 19, 2013 revealed a fracture dislocation of left shoulder joint.
7. When placed on his defence, the appellant testified as Dw1. He recalled that on the material day he was drunk and met his aunt who was equally drunk. Her aunt asked her for money, and the appellant gave her all the money he had but she still complained that it was little. He put the money back in his pocket and his aunty started struggling with him. Pw1 came and found them struggling and beat the appellant with a stick.

Submissions

8. The appellant in his submissions argued that one of the steps he took towards reconciliation was sending his uncles to the complainant to give him money for treatment. The appellant maintained that he was remorseful and had gone through carpentry training while in prison. He also urged the court to consider that he had 5 children.
9. The respondent submitted that the evidence against the appellant is cogent and that there were no contradictions in the prosecution case. The appellant was placed at the scene by the prosecution witnesses. The appellant's defence was considered by the trial magistrate but the same did not compromise the prosecution's water tight case. The respondent submitted that it proved its case to the required degree.

Analysis and Determination

10. The appellant was charged with the offence of grievous harm. Section 4 of the *Penal Code* defines the offence of "grievous harm" as 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. The Court of Appeal in *John Oketch Abongo v Republic* [2000] eKLR stated: Whether or not grievous harm or any other form of harm is disclosed must be a matter for the court to find from the evidence led and guided by the definition in the *Penal Code*. A court will be assisted by medical evidence given in coming to the conclusion on the nature and classification of the injury.
11. However before I look at the medical evidence that was presented by the prosecution, I note that the appellant was charged with the offence of grievous harm contrary to section 354 of the *Penal Code*. Interestingly, section 354 of the *Penal Code* provides for the offence of uttering cancelled or exhausted



documents. The particulars of the offence however disclose the offence of grievous harm under section 234 of the *Penal Code* which provides that any person who unlawfully does grievous harm to another is guilty of a felony and is liable to imprisonment for life. Therefore there are two offences within the same charge. In such instances, the charge is said to be duplex. In the case of *Hassan Jillo Bwanamaka & another v Republic* [2018] eKLR where the court held that:

20. On the first issue, the rule against duplicity provides that the prosecution must not allege the commission of two or more offences in a single charge in a charge-sheet. Such a charge is sometimes said to be 'duplex' or 'duplicitous'. The rule stems from two important principles: firstly, as a matter of fairness, a person charged with a criminal offence is entitled to know the crime that they are alleged to have committed, so they can either prepare and/or present the appropriate defence.
 21. Secondly, the court hearing the charge must also know what is alleged so that it can determine the relevant evidence, consider any possible defences and determine the appropriate punishment in the event of a conviction.
12. The offence of grievous harm and that of utterance of cancelled or exhausted documents are not related and require. The effect of duplicity in such scenario was discussed in *Hassan Jillo Bwanamaka & another v Republic* (supra) as follows:
34. ...if the charge sheet reveals two independent offences where one cannot be subsumed in the other in the sense of all the ingredients of one of the offences being included in the other offence, and the evidence adduced pursuant to such a charge does not disclose any of the offences, then this is a defect that is not curable under section 382 of the *Criminal Procedure Code*.
13. While I recognize that the charge was duplex, the particulars of the charge and the evidence presented by the prosecution support the charge of grievous harm. Looking the record, the appellant understood that the charge that he was facing and the defence he raised was against the charge of grievous harm. The appellant was therefore not prejudiced and in any event the charge sheet was curable under section 382 of the *Criminal Procedure Code*.
14. According to the P3 form the injury sustained by Pw1 was described as grievous harm. Pw5 testified that because of the fracture dislocation sustained by Pw1 on the left shoulder, he was required to undergo surgery so that they could carry out a procedure of reduction. However, Pw5 explained that the complainant's first reduction surgery at Tenwek did not succeed and he was to undergo a second surgery. He testified that the injuries were caused by a blunt object.
15. It was also vital for the prosecution to lead evidence showing that the appellant is the one who inflicted the injuries on the complainant. Pw1, Pw2 and Pw3 in their testimonies put the appellant within the *locus in quo*. Pw3 testified that the appellant assaulted her together with another woman when Pw1 intervened. When Pw1 left, the appellant followed him. This raised suspicion and Pw2 decided to follow them. Shortly thereafter, Pw2 heard Pw1 crying in pain saying that the appellant injured his hand. The prosecution evidence was clear and unshaken. The appellant in his defence recognized that he had a struggle with his aunt and that Pw1 assaulted him with a stick. I find that the appellant's defence against the prosecution evidence did not tilt the scales in his favour. The prosecution evidence was strong and solid pointing to the appellant as the person who caused Pw1 grievous harm. The prosecution proved its case beyond any reasonable doubt.



16. The appellant in his appeal argued that he was in the process of pursuing reconciliation with the complainant who was his cousin and that the conviction against him frustrated his attempt at arriving at a settlement with Pw1. The court in Republic v Abdulabi Noor Mohamed (alias Arab) [2016] eKLR held that alternative dispute resolution in criminal matters is limited and even when allowed; their application is limited to misdemeanours. The court stated:

20. The accused herein has been charged with the offence of murder, which has been classified as a felony and therefore, among the crimes that section 176 of the Criminal Procedure Code prohibits the courts from adopting reconciliation as a form of justice. In the case of Juma Faraji Serenge alias Juma Hamisi v Republic [2007] eKLR, Maraga, J. (as he then was) in his ruling stated:

To the best of my knowledge, other than in cases of minor assault in which a court can promote reconciliation under section 176.... of the Criminal Procedure Code and such minor cases a complainant is not allowed to withdraw a criminal case for whatsoever reason. In any case the real complainant in all criminal cases, and especially so felonies, is the state. The victims of such crimes are nominal complainants. And the state, as the complainant, cannot be allowed to withdraw any such case because the victim has forgiven the accused as happened in this case or any such other reason. The state can only be allowed to withdraw a criminal case under section 87A of the Criminal procedure Code or enter a *nolle prosequi* when it has no evidence against the accused or on some ground of public interest. And even then when it has convinced the court that the case should be so withdrawn.

To allow withdrawals of criminal cases like this is tantamount to saying that relatives of murdered persons can be allowed to withdraw murder charges against accused persons whom they have forgiven. That cannot be allowed in our judicial system.

21. This is applicable in the instant case where the deceased family are seeking to withdraw from the case on account of the signed agreement of reconciliation, which should not be allowed unless the prosecution is involved.

17. The offence of grievous harm is a felony and attracts sentence of up to life imprisonment. At the sentence hearing, the appellant told the trial magistrate that he had 5 children and the trial magistrate considered his mitigation before sentence. He was sentenced to 10 years imprisonment. In my view a 10-year sentence was excessive. I therefore reduce the 10 years imprisonment and to the period the appellant has served from the date of sentence by the trial court.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS AT KISII THIS 10TH DAY OF FEBRUARY 2023

R.E. OUGO

JUDGE

In the presence of:

Appellant in person

Mr. Kaino for the State/Respondent



Orwasa C/A

