



REPUBLIC OF KENYA



**KENYA LAW**  
THE NATIONAL COUNCIL FOR LAW REPORTING  
Where Legal Information is Public Knowledge

**Ngige v Republic (Criminal Appeal E030 of 2021)  
[2023] KEHC 27445 (KLR) (25 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 27445 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIVASHA  
CRIMINAL APPEAL E030 OF 2021**

**GL NZIOKA, J**

**JULY 25, 2023**

**BETWEEN**

**HANNAH WAITHERA NGIGE ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal against the decision of; Hon. Liluma Musiega, Resident Magistrate (RM), delivered on 20th September 2021, vide Criminal Case No. 1286 of 2020, at the Senior Principal Magistrate's Court at Engineer)*

**JUDGMENT**

1. The appellant was arraigned before the Senior Principal Magistrate's Court at Engineer charged *vide* criminal case No. 1286 of 2020 with the offence of grievous harm contrary to section 234 of the [Penal Code](#) (Cap 63) Laws of Kenya.
2. The particulars of the charge are that, on the 15<sup>th</sup> day of August 2020, at Kamba village in Kinangop within Nyandarua County, she did cause grievous harm to John Ngige Karanja.
3. The appellant pleaded not guilty to the charge and the case proceeded to full hearing. The prosecution's case in a nutshell is that, 15<sup>th</sup> day of August 2020, PW1 John Ngige Karanja (herein "the complainant") who is the appellant's husband returned home from the farm where he had gone to spray medicine on groundnuts. That he noticed the gas was leaking and went to close it. However, the appellant entered the house and closed the door and stood behind it blocking anyone from exiting.
4. That she had a match box and a panga and told the complainant that both of them were going to die. That, as the whole house was engulfed in gas, the appellant became apprehensive that she would cause harm and beat the complainant and she fell down.



5. The complainant further managed to disarm her and open the door to escape but, the appellant pushed him back, took a panga and cut him on the hand as he tried to block the panga. As the complainant was running ran away, the appellant cut him on the rear head, leg and ankle.
6. However, the complainant managed to reach a neighbour's house for help and he was taken to North Kinangop Hospital where he was admitted for treatment. A report of the incident was made at Kamba police post and the appellant was arrested arraigned in court charged accordingly.
7. At the close of the prosecution case, the appellant was placed on defence. She denied vide an unsworn statement assaulting the complainant. She stated the appellant beat her on the head, fell down and lost consciousness. That when she woke up after gaining consciousness, she went to Engineer on the third day.
8. Further on 3<sup>rd</sup> day she called Police Officers and they took her to Engineer Police Station and charged her, and was released on bond by the court.
9. At the conclusion of the case, the trial court found that, the prosecution had proved the case beyond reasonable doubt and convicted the appellant. She was then sentenced to serve five (5) years imprisonment.
10. However, the appellant is aggrieved with the decision of the trial court on both conviction and sentence on the following grounds:
  - a. That the learned Magistrate erred in law and in fact in finding that the appellant was guilty of the offence of causing grievous harm contrary to 234 of the *Penal Code*.
  - b. That the learned Magistrate erred in law and fact by failing to appreciate that the charge sheet was defective and that the appellant pleaded without understanding the charge she was pleading to.
  - c. That the learned Magistrate erred in law and fact in recording the plea which was net unequivocal.
  - d. That the learned magistrate erred in law and in fact by failing to recognize and appreciate the weight of the appellant's testimony that she was beaten by the complainant to the point of losing consciousness.
  - e. That the learned Magistrate erred in law and in fact by failing to clearly explain to the appellant the importance of mitigation despite knowing very well that the appellant was unrepresented.
  - f. That the learned Magistrate erred in law by convicting the appellant despite lack of evidence of evidence of mens rea.
  - g. That the learned judge basing his judgment on the evidence on record should have used his discretion in favor of the appellant.
11. The appeal was opposed by the respondent vide grounds of opposition dated 4<sup>th</sup> November 2022 which states:
  - a. That in response to ground 1 and 2, the charge sheet was proper and the prosecution case was proved beyond reasonable doubt.



- b. That in response to ground 3 , charges were read and explained in Kiswahili in the language she understands.
  - c. That in response to ground 4, the appellant evidence was non-plausible.
  - d. That in response to grounds 5,6 and 7, the appellant, an adult, did not seek to appoint counsel during her trial. She understood the charges facing her and participated in the trial
  - e. That, the petition is devoid of merit and ought to be dismissed forthwith and conviction and sentence upheld.
12. The appeal was disposed of through filing of submissions. The appellant in submissions dated 6<sup>th</sup> March, 2023 argued that the prosecution failed to prove its case beyond reasonable doubt. That, the appellant was defending herself from the complainant and in the process she was hit on the head and lost consciousness.
  13. She relied on the case of; *Pius Mutua Mbuvi v Republic* (2021) eKLR where the court held that the evidence by the appellant raised the defence of self-defence, and that the prosecution failed to prove beyond reasonable doubt that the injury sustained by the complainant was caused unlawful other than through an act of self-defence.
  14. The appellant submitted that, the trial Magistrate failed to consider the appellant’s defence and relied on the prosecution evidence that was not conclusive. That, PW2 Wallace Karanja Ngugi did not witness the offence and therefore there was no clear evidence on who really assaulted the complainant. She relied on the case of; *Christine Okoth Owiso v Republic* (2021) where the court quoted the case of; *Ambani v Republic* (1990) eKLR that the sentence imposed must be commensurate to the moral blame worthiness of the offender.
  15. The appellant further submitted that, before an accused is convicted for any offence mens rea must be proved. She cited section 206 of the *Penal Code* that set out what constitutes malice aforethought and states:
  16. She further relied on the case of; *Joseph Kimani Njau v Republic* (2014) eKLR where the Court of Appeal stated that, in a criminal trial the trial court has a duty to ensure that before any conviction is entered both actus reus and mens rea are proved beyond reasonable doubt.
  17. The appellant reiterated that she was defending herself from the complainant’s attack and therefore did not intend to harm him. She urged the court to quash the conviction, set aside the sentence by the trial court and set her at liberty.
  18. However, the respondent in submissions dated 15<sup>th</sup> February, 2023 argued that the prosecution proved its case beyond reasonable doubt. That, the complainant testified how the appellant cut him on the head and ankle of the left leg which was corroborated by the PW2 Wallace Karanja Ngugi that the complainant had sustained injuries.
  19. Further, the medical evidence adduced by PW3 Dr. Karanja who examined the complainant indicated that he had two deep cut wounds on the optical region of the scalp measuring 2x1 centimetre, and a deep cut wound on the posterior aspect of the leg. That the doctor classified the injuries as grievous harm. Further, the complainant identified the appellant, his wife as the person who inflicted the injuries on him.



20. The respondent submitted that, the charge sheet was not defective as the particulars and evidence adduced supported the main charge that the appellant was convicted.
21. Further, the charges were read out to the appellant in Kiswahili, a language she understood on two occasions 4<sup>th</sup> and 7<sup>th</sup> September, 2020. Furthermore, the trial was conducted in Kiswahili a language the appellant understands and she was allowed to cross-examine all the witnesses
22. The respondent submitted that, the appellant's defence was not plausible as she did not give a clear testimony of what happened of the particular day and neither did she deny she had an altercation with the complainant. That, considering the nature of the injuries the complainant sustained he cannot have inflicted them on himself.
23. Further, the appellant was given an opportunity to offer mitigation but she failed to do so. Additionally, the sentence of five (5) years meted out is lawful and lenient taking into consideration that the appellant was not remorseful and that the law prescribes life imprisonment for the offence.
24. Having considered the appeal in the light of all the materials placed before the court, I note that the role of the 1<sup>st</sup> appellant court is to re-evaluate the evidence afresh and arrive at its own decision taking caution it did not benefit from the demeanour of the witnesses.
25. In that regard, the Court of Appeal in the case of; *Okeno v. Republic* (1972) EA 32 stated that: -
 

“An appellant on a first appeal is entitled to expect the evidence as a whole to be subjected to a fresh and exhaustive examination (*Pandya V R* 1975) EA. 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] EA. 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”
26. Pursuant to the aforesaid and having evaluated the evidence adduced afresh, I find that there is no dispute that, on material date, 15<sup>th</sup> August, 2020 the complainant was injured as evidenced by the medical evidence vide a P3 form produced by PW3 Dr. Newton Karanja. According to the Doctor, the complainant sustained two deep cut wounds on the occipital region of the scalp measuring 2.2cm x1cm each with associated tenderness.
27. Further, he also sustained a deep cut on the posterior aspect of the left leg with associated tenderness. That the degree of injury was classified in the P3 form as “Maim” and the probable weapon used was a sharp object. That the medical evidence corroborates the complainant's evidence that he was assaulted with a panga.
28. In addition, the notes in the P3 form at page 2, paragraph 5 states that, maim is the destruction or permanent disabling of any external or internal organ, member or sense an indication of the gravity of the injuries.
29. The key question to determine is whether, the appellant is the one who caused the complainant bodily harm to. The appellant has denied the same. However, from the evidence of the complainant they were only two of them in their house when the offence occurred. The appellant confirmed that, indeed she was in the house with the complainant. The complainant testified that, the appellant was armed with a panga. The appellant has not denied the same.



30. Further it is likely that she was armed with for use to injure the complainant, as the medical evidence revealed the injuries the complainant sustained were caused by a sharp object. Furthermore, it is in evidence that, indeed the appellant had opened gas and the whole house was engulfed with gas. That she was armed with a match box and was ready to light the fire to kill either both or the complainant. All this evidence is not rebutted.
31. The afore occurrence is confirmed by the evidence that, the appellant and the complainant had a troubled marriage life and efforts made severally to reconcile them did not yield much. Further, there are instances where the appellant tried to take her life by taking poison. Based on the evidence adduced it is possible that the appellant committed the offence as she was unhappy with their relationship.
32. In summation I find that although the appellant submitted that she did not intend to harm the complainant but that is not supported by the evidence. Firstly, the appellant had put on the gas that filled the whole house. Secondly, the appellant had a match box. Further, the appellant waited for the complainant to arrive home so that she could light the house. Lastly she was armed with a panga. Therefore, appellant cannot claim that she had not prepared and/or anticipated to harm the complainant
33. The appellant submitted that the trial Magistrate did not consider her defence. I have read the judgment of the trial Magistrate and note that the court found that the appellant's defence had no weight and that the evidence by the complainant and the doctor made it clear that the appellant was responsible for committing the offence.
34. In the circumstances, I concur with the trial Magistrate that the appellant is the one who assaulted the complainant and uphold the conviction.
35. On the sentence, the trial court imposed a sentence of five (5) years. The provisions of section 234 of the [Penal Code](#) provides:

“Any person who unlawfully does grievous harm to another is guilty of a felony and is liable to imprisonment for life.”
36. In the circumstance taking into account that the trial Magistrate noted that the appellant was not remorseful or that she had committed an offence I find that the sentence was lenient.
37. However, I note the trial Magistrate should have requested for a pre-sentence report, as the offence was committed between family members and would have influenced the sentence to be imposed.
38. In the circumstances, I cancel the bond granted pending appeal and order that the Probation Department files a pre-sentence report that will capture the views of all persons involved to ascertain whether the appellant can live peacefully within the community, and whether she may attack the complainant again or if she has learnt her lesson and is remorseful so as to enable the court to decide whether to revise the sentence or whether the appellant will complete the sentence imposed by the trial court. The pre-sentence report be filed on or before the 3<sup>rd</sup> August, 2023,
39. It is so ordered.

**DATED DELIVERED AND SIGNED THIS 25<sup>TH</sup> DAY OF JULY, 2023.**

**GRACE. L. NZIOKA**

**JUDGE**

In the presence of:



The appellant present physically

Ms. Wanjiku for the appellant

Mr. Atika for the respondent

Ms. Ogutu court assistant

