



**Mutyeleli v Republic (Criminal Appeal E027 of 2021)
[2023] KEHC 24239 (KLR) (16 October 2023) (Judgment)**

Neutral citation: [2023] KEHC 24239 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MAKUENI
CRIMINAL APPEAL E027 OF 2021
GMA DULU, J
OCTOBER 16, 2023**

BETWEEN

MARTIN MUSEMBI MUTYELELI APPELLANT

AND

REPUBLIC RESPONDENT

*(From the conviction and sentence in Criminal Case No. E001 of 2020
delivered on 1st March, 2021 at Makueni Law Court by Hon. Sagero(SRM))*

JUDGMENT

1. The appellant was charged in the Magistrate's court with grievous harm contrary to Section 234 of the [Penal Code](#). The particulars of offence were that on 15th July 2020 at Manyanzaani village Kikuluni location in Makueni County did grievous harm to Nzoka Muli.
2. He denied the charge. After a full trial, he was convicted of the offence and sentenced to five (5) years imprisonment.
3. Dissatisfied with the conviction and sentence, the appellant has come to this court on appeal through counsel Paul Kisongoa & Company Advocates. The appellant however late opted to act in person and relied on the following grounds of appeal:-
 1. 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 Section 234 of the [Penal Code](#) hence failing to appreciate that the charge sheet was defective.
 2. The learned trial Magistrate erred in law and fact when he convicted and sentenced him without regard to his basic rights including the disclosure of the prosecution evidence as provided under Article 50(2)(j) of the [Constitution](#).



3. The learned Magistrate erred in law and in fact by failing to appreciate that the offence was not proved beyond reasonable doubt and in shifting the burden of proof on the appellant, misapprehending and misdirecting himself on the evidence, hence arriving at the wrong conclusion; by failing to observe that the prosecution evidence was untenable, unworthy, contradictory, inconsistent, and full of lies, which required him to resolve doubts in favour of the appellant.
4. That the learned Magistrate erred in law and in fact by failing to appreciate and therefore rejecting the appellant's cogent defence which reasonably exonerated him from any wrongful doing and ignoring the provocation and self-defence put forth which led the trial Magistrate's failure to comply with Section 169 of the Criminal Procedure Code.
4. The appeal was canvassed through written submissions. In this regard, I have perused and considered the submissions filed by the appellant as well as the submissions filed by the Director of Public Prosecutions.
5. This being a first appeal, I have to start by reminding myself that I have a duty to evaluate the evidence on record afresh and come to my own independent conclusions and inferences – see Okeno =Versus= Republic [1972] EA 32.
6. In proving their case, the prosecution called six (6) witnesses. On his part, the appellant tendered sworn defence testimony and did not call any witness.
7. The appellant raised both technical and substantive grounds of appeal. The technical ground is that the charge was defective. Having perused the charge, I find no defect on the same.
8. Indeed, the charge sheet does not cite Section 231 of the Penal Code, and merely refers to Section 234. In this regard Section 234 of the Penal Code provides as follows:-
 234. Any person who unlawfully does grievous harm to another is guilty of a felony and is liable to imprisonment for life.
9. The appellant thinks that the two sections should have been cited in the charge. My view is that the two sections create separate offences or separate and different situations where an offence of grievous harm can be committed. While under Section 234 the charge is based on any unlawful act, under Section 231 the prosecution has to prove an intent.
10. The prosecution having elected to charge merely for an unlawful they were only needed to prove that the harm was unlawful. They were entitled to that choice. Thus the particulars of the charge were proper subject to proof by the prosecution that the harm was caused unlawfully. The ground is hereby dismissed.
11. The second technical ground is violation of principles of fair trial under Article 50 (2)(j) of the Constitution. In this regard, the appellant contends that he was not provided with prosecution evidence, before same was tendered in court.
12. Having perused the record, I find no indication that at any point the appellant asked for prosecution witness statement and documents, and was not availed the same. The appellant infact asked all prosecution witnesses questions in cross-examination except the Clinical Officer PW2 Jackson Masila Kadenge, whom he elected not to cross-examine.
13. I find that there were no violations to the appellant's rights to fair trial contrary to Article 50(2)(j) of the Constitution. I dismiss that ground and turn to the substantive grounds of appeal.



14. Having considered all the evidence on record, I find that the appellant indeed had a fight with the complainant that night. In this regard PW3 Lawrence Mulwa who was in company of the appellant and the complainant that night, riding on the motor cycle of the appellant, stated that there was a quarrel and fight between the two over payment of fare for the ride after all three had consumed alcohol.
15. PW4 Joseph Muthama Kiwinda also testified that he was called to a scene of a fight at 12 midnight and, on arrival with others, found the complainant injured under a fence. Shortly, the appellant arrived and took the complainant to the police station.
16. The evidence of PW4 tallies with that of PW6 PC Wallace Muthuri of Kikumini Police Station that the appellant made a report of theft on motor cycle, and then later the same night the injured complainant was brought to the police station. It was also his evidence that after due investigations, the earlier report of the appellant of theft on motor cycle was substituted with what the police considered to be the more credible report of an offence of grievous harm.
17. I note that, the appellant in his sworn testimony also agreed to being together with the complainant that night, and agreed to the use of his motor cycle on hire with disagreement on failure to pay the transport costs, and a scuffle and rolling of the motor cycle.
18. From the evidence on record, I find that there was indeed a fight between the complainant and the appellant that night, and that the complainant suffered injuries.
19. Were the injuries of the complainant unlawfully caused by the appellant? In my view, in the present case where both the appellant and complainant were drunk, had arguments over payment for the motor bike ride of the appellant, and there was an ensuing scuffle, and the prosecution did not tender evidence on who started the fight and what each of the two did or did not do, it cannot be said that the prosecution proved beyond reasonable doubt that the attack on the respondent, even if true was unlawful especially when the appellant had made a prior report of the incident to the police, and indeed went back to the scene and carried the complainant on his motor cycle to the police station.
20. With regard to whether the injury suffered by the complainant amounted to grievous harm, the evidence of PW2 Jackson Masila Kadenge is very clear that the injury suffered was mere harm not grievous harm. Though in the P3 form grievous harm is underlined, the injuries suffered clearly had healed after two weeks. They thus did not satisfy the requirements for grievous harm which is defined in the same medical examination report (P3) form which defines grievous harm as –

“Any harm which amounts to maim, or endangers life or seriously or permanently injures health or which is likely so to injure health, or which extends to permanent disfigurement, or any permanent or serious injury to any external or internal organ.”
21. Having found as above therefore, the conviction herein for grievous harm will be quashed and sentence set aside.
22. Consequently, and for the above reasons I allow the appeal quash the conviction and set aside the sentence. I order that the appellant be set at liberty unless otherwise lawfully held.

DATED, SIGNED AND DELIVERED THIS 16TH DAY OF OCTOBER 2023 VIRTUALLY AT VOI.

GEORGE DULU

JUDGE

In the presence of:-



Alfred – Court Assistant

Appellant present

Mr. Kazungu for State

