



**Kadika v Republic (Criminal Appeal E041 of 2023)
[2024] KEHC 15546 (KLR) (6 December 2024) (Judgment)**

Neutral citation: [2024] KEHC 15546 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT SIAYA
CRIMINAL APPEAL E041 OF 2023
DK KEMEL, J
DECEMBER 6, 2024**

BETWEEN

LYDIA ADHIAMBO KADIKA APPELLANT

AND

REPUBLIC RESPONDENT

*(Appeal arising out of the conviction and sentence of Hon J.P. NANDI
(Principal Magistrate) in Bondo Principal Magistrate's Court
Criminal Case No. E236 of 2020 delivered on 17th August 2022)*

JUDGMENT

1. The Appellant herein Lydia Adhiambo Kadika was charged before the trial court with the offence of grievous harm contrary to section 234 of the Penal Code. The particulars of the offence are that on the 28th March 2023 at around 1900hrs in Opolimbo village in Barkowino sub location, Bondo Sub County within Siaya County willfully and unlawfully did grievous harm to Dorothy Atieno.
2. On count two the accused was also charged with the offence of assault contrary to section 251 of the Penal Code. Upon a full hearing, the Appellant was convicted and sentenced to 15 years and 3 years' imprisonment respectively.
3. The Appellant was aggrieved by the said conviction and sentence, she lodged this appeal wherein she raised several grounds of appeal wherein she contended that the learned trial magistrate erred both in law and fact and which are summarized as follows:
 - i. Failing to consider the inconsistencies and contradictions in the prosecution witness's testimonies.
 - ii. Failing to consider that the prosecution failed to call all witnesses and bring exhibits to prove their case, including the liquid that was poured on the complainant



- iii. Failing to consider that the prosecution failed to conduct an identification parade despite the Appellant not being known to the prosecution witnesses and relying on the evidence of minors.
 - iv. Failing to consider the Appellant's mitigation in sentencing her to 18 years which is excessive in the circumstances.
 - v. Violating the Appellants constitutional rights by not informing her of her right to get legal representation despite the seriousness of the charges she was facing and illegally holding her beyond 24 hrs. before arraigning her in court.
4. This being the first appellate court, its jurisdiction is well settled. In the widely quoted case of OKENO –VS. R (1972) EA32 it was held that the duty of the first Appellate Court is to re-assess, re-evaluate and re-analyze the evidence tendered and to itself come to its own conclusions of course bearing in mind that the court did not have the benefit of seeing or observing the witnesses as they testified. It is therefore imperative that this court to proceed and consider the evidence on record and to reach own determination.
5. The respondent called six witnesses in support of its case. PW1 Dorothy Atieno the complainant, testified that on 28/03.2023 at about 7.00pm she was in her house cooking when suddenly the Appellant came in and seized some ugali which was on her table and hit her with it. The Appellant then walked out and came back in and poured a certain liquid on her that burnt her. The acid likewise burnt her son Ray. That happened in the presence of her two children and her husband Fred. That she was then rushed to Haven hospital where she was admitted for seven days. That the appellant pointed out to her that she had come to kill. That the Appellant had earlier visited her three times and thus she was able to recognize her. That a report was lodged at Bondo police station where a P3 form was issued and which was filled at Bondo Sub-County hospital

On cross-examination, she stated inter alia; that the Appellant was armed with a kitchen knife and a certain bottle; that she did not have a document showing that Fredrick is her husband; that she had been selling chips in town;

6. PW2 was Ray Emmanuel a male minor. The court examined him to ascertain that he understood the repercussions of telling the truth and lying. Upon the court being satisfied, he proceeded to testify that the appellant came on that fateful night when their mother was cooking and poured acid on her mother which burnt him as well. That it was Fred who took them to hospital. He identified the appellant as Lydia or Mama Fred.

On cross-examination, he stated inter alia; that he knew the Appellant as Lydia alias Mama Fred; that he saw what happened with his mother; that Fred is his father; that he was injured on the head, ears and the knees; that one cannot know everyone passing by the road; that Fred took them to hospital; that they were cooking when the Appellant came to their house.

7. PW3 Versherly Achieng, a minor also testified after the court verified that she had the mental capacity to understand what happened. She stated that she was nine years and a grade one pupil at Atilili primary school. That the appellant came to their house and assaulted their mother by pouring acid on her which likewise injured her young brother Ray. She likewise positively identified the appellant as Lydia. That her aunty had informed her about the name.

On cross-examination, she stated inter alia; that the bottle containing the liquid was colourless; that she saw the Appellant pouring the liquid while she was with her mother, Fred and Ray; that Ray got injured on the head, ear and knees.



8. PW4 Fredrick Oduor Ogoro testified that he was in the house of PW1 his friend when PW1 screamed that she had been beaten. That he did not see what happened and that he was forced by the police to testify against the appellant who is his wife. That he managed to take PW1 to hospital as she had burns on her face. That PW1 is his friend while the Appellant is his wife.

On cross-examination, he stated that the Appellant is his wife while the complainant is his friend. That he only has one wife.

9. PW5 PC Julian Otieno testified that she is the investigating officer. She stated that a report was made on 2/4/2023 by one Sara Adhiambo a sister to the complainant. That PW1 had been assaulted and was admitted at Haven hospital. That the reporter did not record a statement because she did not witness the incident. That she issued the complainant with a P3 form that was filled at Bondo Sub County Hospital. That the ODPP later advised them to charge the appellant with the offences before the court.

On cross-examination, she stated inter alia; that there are many people going by the name of Lydia; that Sarah reported the incident but did not record a statement as she did not witness the incident; that the Appellant was identified by the complainant; that she did not visit the scene; that the treatment notes from Haven hospital were used to fill the P3 form at the sub-county hospital. That the complainant's children knew the Appellant as Mama Fred and wife to Fred.

10. PW6 Stephen Okwiri Okumu, testified that he was a clinical officer at Bondo sub county hospital. That he filled the treatment notes from Haven hospital and that they likewise treated her at the Bondo Hospital of the burns. He formed an opinion that the likely weapon used was chemical fluid and that the degree of injuries was burns. He produced the treatment notes from Haven and Bondo sub county hospitals as exhibit 1 and 2 respectively. He likewise produced the P3 form as exhibit 3.

On cross-examination, he stated that they offered treatment to both patients. That he did not have the clothes the patient wore at the time of the incident. That the liquid was acidic in nature.

11. The trial court later ruled that the Respondent had established a prima facie case against the Appellant who was thus placed on her defense. The Appellant tendered an unsworn statement.

12. DW1 Lydia Mary Kadeha Adhiambo stated that those were her real names and not Kadeka. She produced her ID as D exhibit 1. She still denied the charges. She stated that on that day she worked till 10.00 pm when she went to her house which is nearby. That she has never seen the complainant and her son before. That the complainant and her witnesses have called her mama Fred but she has no child called Fred. That on a Sunday at 8.00 PM she was arrested and informed that she had assaulted a person.

13. DW2 Mary Umaya testified that she was a neighbour to the appellant and that the appellant usually washed clothes for her. That on the 28/03/2023 she was very sick so she invited the appellant to do cleaning for her and they stayed until 1.000 PM when the appellant left her house.

On cross-examination, she stated that she did not leave her house that day as she was sick and bedridden. That marked the close of the appellant's case.

14. The appeal was canvassed by way of written submissions. Both parties duly filed and exchanged submissions. It was submitted for the Appellant that the prosecution witnesses gave inconsistent evidence. Further, that the prosecution failed to prove the case beyond reasonable doubt; that an identification parade was not conducted instead it relied on evidence of minors. Lastly, it was contended that her mitigation was not considered which violated her constitutional rights under Article 50(g) and (h). On this, reliance was placed on the case of CHACHA MWITA VS. REPUBLIC (2020) EKLK. The Appellant prayed that the appeal be allowed as prayed.



15. In a rebuttal, it was submitted for the Respondent that it had proved the offences beyond reasonable doubt as by law required and that the several grounds of appeal lack merit and should be dismissed.
16. I have keenly considered the evidence of the trial court, its judgement plus the submissions on appeal and find the issues for determination are firstly, whether the Respondent proved its case against the Appellant beyond reasonable doubt and secondly, whether appellant's constitutional right was violated by not being informed of her of her right to procure legal representation despite the gravity of the offence.
17. The first count is that of grievous harm. The definition of grievous harm as found in section 4 of the Penal Code which reads as follows:

“grievous harm means any harm which amounts to maim or dangerous harm or seriously and permanently injures health, or which is likely so to injure health, or which extends to the permanent disfigurement, or to any permanent or serious injury to any external or internal organ, membrane or sense.”

It is necessary to consider the evidence on record in order to establish whether that evidence disclosed that indeed that the victim suffered grievous harm as defined. The clinical officer (PW6) stated as follows:

“For Dorothy, on detailed examination, she was referred from Haven hospital. There were multiple burns that were superficial and with multiple blisters. Bleedings from wounds and swelling on the face, some parts were reddish and associated with severe headache, severe chest pain with blisters on the chest and mild bleeding burn wounds on both hands, multiple blisters and peeling of skin, burns on the buttocks with blisters and mild bleeding. The age of the injuries was 9 days old. The type of weapon was chemical fluid which was acidic in nature. The patient was treated and the degree of injury was classified as grievous harm. I signed the P3 form on 5.4.2023 which i produce as Exhibit 3. Treatment notes from Bondo and Haven produced as exhibit 1 and 2 respectively.”

I observe that both in the P3 form and in the evidence in court, the Clinical Officer gave a detailed description of the injuries sustained. They were multiple burns that were superficial and with multiple blisters. Bleedings from wounds and swelling on the face, some parts were reddish and associated with severe headache, severe chest pain with blisters on the chest and mild bleeding burn wounds on both hands, multiple blisters and peeling off skin, burns on the buttocks with blisters and mild bleeding. It is thus clear that the injuries as examined by the clinical officer were indeed sustained by PW1 and that the said injuries fall in the category of grievous harm as defined under section 4 of the Penal Code.

18. 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 presented in coming to the conclusion on the nature and classification of the injury. In many cases, the courts have accepted and persuaded by the findings and opinions in the medical evidence. But, in appropriate circumstances, the court is at liberty to form its own opinion, having regard to the evidence before it as to the nature and classification of the injury.
19. In this case, i have carefully considered the medical evidence and the findings made by the Clinical Officer both in the P3 form and in the evidence in court. I have also carefully considered the definition of grievous harm as contained, not only in the Penal Code but also in the P3 form.



This court is satisfied that the complainant's injury on the first count amounted to grievous harm as defined in the Penal Code. The definition contains several ingredients of what constitutes grievous harm. I am of the view that the presence of any one of these ingredients would suffice to disclose grievous harm. I am satisfied that the complainant's injury did amount to dangerous harm or seriously and permanently injurious health, or which is likely so to injure health, or which extends to the permanent disfigurement, which are ingredients contained in the definition.

For the foregoing reasons, I am unable to agree with the Appellant's submissions that the evidence led fell short of proving grievous harm. This ground of appeal accordingly fails.

20. As regards the second count of assault causing actual bodily harm contrary to section 251 of the Penal Code, the evidence of the said clinical. Officer (PW6) confirmed the said injuries with production of the P3 form in regard to the second complainant (PW2). As the injuries were confirmed, then the said injuries have not been made up but were truly sustained contrary to the Appellant's assertions.
21. All the six prosecution witnesses gave evidence which corroborated each other. The first complainant's two children (PW2 and PW3) witnessed the incident and saw the Appellant attacking PW1 and PW2 on the material date. The Appellant's husband (PW5) who was in company of the two complainants was at pains during his testimony as he tried to deny the incident but at the end confirmed that he took the victims to hospital who had suffered burns. The position of the husband to the Appellant is understandable in view of the fact that he had been having a secret affair with the first complainant as it emerged that the two were friends. The Appellant was not amused by the said love triangle and so she stormed the first complainant's house to teach her a lesson. I am satisfied that the Appellant was the assailant as she was recognized by the first complainant and her two children. The incident also took place in the presence of the Appellant's husband (PW5) but who was already conflicted and hence he was at pains to explain himself as to how he ended up at the house of PW1. It is obvious that he was playing the two women and which led to the turn of events. I am not persuaded by the Appellant's evidence and that of her witness as the same did not cast any doubt upon that of the Respondent which was overwhelming against her. The evidence clearly placed her at the scene of crime. She was not happy about her husband having a love affair with the first complainant and thus she was out to square it out with PW1 and to make it clear that playing with one's husband brings consequences. It seems to me that the Appellant had taken the law into her hands by taking the fight to the doorsteps of PW1. The use of corrosive liquid as a weapon is clear that the Appellant was out to eliminate her competitor or that the injuries sustained would permanently disfigure the victim and thereby eliminate the competition. In the premises, the conviction of the Appellant by the learned trial magistrate was quite sound and must be upheld.
22. As regards the remaining issue, it is noted from the appellant's grounds of appeal that her constitutional rights were violated by not being informed of her right to procure legal representation despite the gravity of the offence.
23. Article 50(2)(g) of *the Constitution* stipulates thus on the right to fair trial: (2) Every accused person has the right to a fair trial, which includes the right— (g) to choose, and be represented by, an advocate, and to be informed of this right promptly;
24. Section 43 of the *Legal Aid Act* stipulate thus:
 43. Duties of the court
 - (1) A court before which an unrepresented accused person is presented shall—
 - (a) promptly inform the accused of his or her right to legal representation;



- (b) if substantial injustice is likely to result, promptly inform the accused of the right to have an advocate assigned to him or her; and
 - (c) inform the Service to provide legal aid to the accused person.
- (1A) In determining whether substantial injustice referred to in paragraph (1) (b) likely to occur, the court shall take into consideration—
 - (a) the severity of the charge and sentence;
 - (b) the complexity of the case; and
 - (c) the capacity of the accused to defend themselves.
- 25. In this instant case, the appellant has been charged with the offence of grievous harm contrary to section 234 of the Penal Code which provide that any person who unlawfully does grievous harm to another is guilty of a felony and is liable to imprisonment for life.
- 26. It goes without saying that the Appellant herein is charged with one of the very serious offences in the Kenyan jurisdiction which attracts a penalty of life imprisonment. This therefore means that the trial court ought to have applied itself to the provisions of section 43 of the Legal Aid Act No. 6 of 2016 as stipulated above.
- 27. In the case of *SHERIA MTAANI NA SHADRACK WAMBUI VS. THE OFFICE OF THE CHIEF JUSTICE & ANOTHER; ODPP & ANOTHER* [2021] ECLR the court affirmed the constitutional right provided for under Article 50(2) (g) by stating that a trial court before whom an unrepresented accused person is arraigned is under the constitutional duty to inform the accused person of the right to choose and have an advocate represent him or her. Consequently, the court stated that it is paramount for judicial officers to ensure that the right to legal representation is promptly and sufficiently explained to unrepresented accused persons and that any necessary assistance is accorded to such accused persons towards seeking the representation. The court held that a failure on the part of a judicial officer to do so, having regard to the circumstances of a particular case, may result in an unfair trial and injustice and render the trial a nullity.
- 28. From the proceedings of the trial court, dated 11/4/2023 after the accused chose the language she understands as Kiswahili, the court stated this in verbatim:

COURT: “You have the right to a legal representation of your choice. You are encouraged to exercise it. You are hereby informed that you are also entitled to apply to the legal aid board to for assistance should you desire.” And the Accused/Appellant said “Nimeelewa”
- 29. Having regard to the above, i find that the trial court adequately informed the Appellant of her right to get legal representation of her own choice but she chose not to exercise it. The right to a fair trial was therefore not infringed as claimed by the Appellant and thus the ground of appeal in this regard must fail.
- 30. As regards sentence, it is noted that the Appellant was sentenced to serve 15 years and 3 years imprisonment respectively on each count and which were to run concurrently. It is trite that sentence is a matter for the discretion of the trial court. It is noted that the trial court duly considered the Appellant’s mitigation as well as the pre-sentence report and came up with the said sentences. I have looked at the sentencing provisions of section 234 and 251 of the Penal Code and note that the sentences imposed were neither harsh nor excessive. It is instructive that the injuries suffered by the victims were serious as they suffered bodily burns which have become permanent features for the rest



of their lives. The action of the Appellant was not warranted yet she had the option of using legal channels to pursue her grievances but not to take the law into her hands. The pre-sentence report that was presented to the trial court indicated that the Appellant is a temperamental lady who is always quick to react at the slightest provocation. It further indicated that the Appellant was not remorseful for the offence and still denies the offence despite having been found guilty. I do not see any reason to interfere with the sentences.

31. In view of the foregoing observations, it is my finding that the Appellant's appeal lacks merit. The same is dismissed. I uphold the decision of the trial court on both conviction and sentence.

Orders accordingly.

DATED AND DELIVERED AT SIAYA THIS 6TH DAY OF DECEMBER, 2024.

D. KEMEI

JUDGE

In the presence of :

Lydia Adhiambo Kadika.....Appellant

Ongonga.....For Appellant

Mocha.....for Respondent

Ogendo.....Court Assistant

