REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL APPEAL NO. E058 OF 2021

MISHEK GITONGA MUGAMBI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence of the Senior Resident Magistrate's Court

at Tigania in Criminal Case No. 2312 of 2014 delivered on 19th October 2021 by Hon. G. Sogomo SRM)

JUDGMENT

1. The Appellant, Mishek Gitonga Mugambi, was charged with the offence of 'Grevious Harm contrary to Section 234 of the Penal Code.' The particulars of offence as set out in the charge sheet dated 31st October 2014 were as follows: -

> ***'On the 30th day of October 2014 at Mikinduri Market, Anjuki Location in Tigania East District within Meru County, willfully and unlawfully did grievous harm to Jeremiah Nyaga by cutting the right hand upper arm using a panga, thereby occasioning him grievous harm.'***

2. The Appellant pleaded not guilty and he was placed on his defence. By Judgment delivered on 19th October 2018, the trial Court, Hon. G. Sogomo, SRM convicted the Appellant and sentenced him to serve 10 years imprisonment with hard labour.

The Appeal

3. Being dissatisfied with both the Judgement and the Sentence meted by the trial Court, he has preferred the instant appeal raising the following grounds of appeal: -

> ***i) That, the learned trial magistrate erred in law and fact by failing to note that the key witness were not called.***
>
> ***ii) That, the learned trial magistrate erred in law and fact by failing to note that there was contradiction in the evidence adduced by prosecution witnesses.***
>
> ***iii) That, the learned trial magistrate erred in both law and fact by failing to note that there was grudge between the appellant and the complainant.***
>
> ***iv) That, the learned trial magistrate erred in both law and fact by relying on the evidence of single witness.***
>
> ***v) That, the learned trial magistrate erred in both law and fact by rejecting the appellant's defence without giving cogent reasons.***

Appellant's Submissions

4. The appeal was canvassed by way of written submissions. The Appellant filed submissions on 3rd September 2021. He urges that the Prosecution did not prove their case beyond reasonable doubt, since there were no any other witnesses called to support the complainant's testimony. He urges that the complainant alleged he was the one who cut him but the Prosecution failed to call the key witnesses (people from the market) who were alleged by the complainant to have been at the scene of crime. He urges that there was need of those people to be

called to prove the allegations of the complainant. He cites *David Mwingirwa vs Republic* [2017] eKLR for the proposition that the failure to call crucial witnesses where the evidence is barely adequate is fatal.

5. He urges that there was contradiction in the evidence adduced by PW1 and the investigation officer Corporal Antony Leiborke. That according to the investigation officer, the complainant was the one who reported first to the police and the Appellant was brought to the police thereafter, but that according to the complainant, when he went to report the matter to the police, he was told that the Appellant was already in their custody having taken himself to the police station. He urges that the contradictions and uncollaborated testimonies are a basis of creating lies and the same cannot secure a safe conviction in this case. He urges that this was contrary to Section 163 (1) of Evidence Act. That the contradictions and discrepancies made by PWl and the investigation officer, the key witnesses in this case renders them non-credible witnesses. He urges that it was a misdirection for the trial Court to rely on their evidence. He cites *John Barasa vs Republic*, Criminal Appeal No. 22 of 2005 and *Bunkrish Padya vs Republic* (1983) E.A.C.A.

6. He further urges that the trial was conducted irregularly, because the exhibits relied upon (P3 form) were received and admitted in evidence contrary to Section 77(2) of evidence. He urges that PW3 Dr. Samwel Mutegi who was not the maker of the P3 form produced the same on behalf of Dr. Belinda. He urges that the Prosecution did not apply to have the P3 forms produced by Dr. Mutegi on behalf of Dr. Belinda and that the court had a duty to inquire from him, the Appellant, if he objected or consented to the production of the P3 forms. He urges that he was prejudiced by the manner in which the trial Court handled the matter.

7. He urges that the trial Court failed to order the sentence of ten years to run from the date of arrest since he was in custody. He urges that he was in and out of custody and that this omission was contrary to Section 333 (2) of the Criminal Procedure Code and to the Kenya Judiciary Sentencing Guidelines, 2016. He prays that the sentence be ordered to run from the date of taking plea. He cites *Ahamad Abolfathi Mohammed & Another vs Republic* [2018] eKLR and *Bethwel Wilson Kibor vs Republic* [2009] KLR.

8. He urges that the evidence adduced by PW2, Marete Karambu a business woman, shows that she was coached to give evidence against him since she didn't record her evidence in time and her evidence indicate that she was the attendant of the sister of PWl. He urges that the trial Court relied on the evidence of a single witness despite the fact that there were other people present at the scene during the alleged incident. He urges that the evidence of PW2 indicates that she was not at the scene of crime as she stated that she was selling groceries at the bus stage in Mikinduri when she heard screams, went to the source of the commotion and found Jeremiah having been cut on the hand and he was being helped.

9. He urges that the complainant had a grudge with the Appellant, and the charges were framed against him to settle their personals scores. He cites the complainant's testimony where he stated that he, the Appellant had also previously cut the hand of his brother, Gideon. He prays that this appeal be allowed conviction and sentence be set aside.

Prosecution's Submissions

10. The Prosecution filed submissions dated 15th September 2021. They cite the definition of grievous harm under Section 4 of the Penal Code which they urge means "any harm which amounts to a maim or dangerous harm or seriously or permanently injuries 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."

11. They urge that the evidence of the prosecution was clear, concise and consistent. That PW1 testified that he was aboard a motorcycle rushing home when he had learnt there were problems. That along the way he met one Sebastian driving a vehicle and the Appellant whom he knew well, riding as a passenger in the car. That upon the 2 men catching sight of the complainant, Sebastian stopped the vehicle and accused alighted where after he cut the complainant on the right upper arm with a C-line make *matchete* forcing the complainant to disembark from the motorcycle and flee to seek refuge at a nearby house. That this was collaborated by PW2 who testified that she heard screams and upon going to the source of the commotion she found the complainant having been cut on the hand and was being helped.

12. They urge that the Appellant was armed with a *matchete* and a mob wanted to stone him demanding that he explains his actions but he fled from the angry crowd. They cite *Erick Onyango Odeng vs Republic* [2014] eKLR wherein the Court of Appeal cited with approval the Uganda Court of Appeal case of *Trochangane Alfred v. Uganda* Criminal Appeal No. 139 of 2001, [2003] UGCA, 6 in which it was held as follows: -

> *"With regard to contradictions in the prosecution's case the law as set out in numerous authorities is that grave contradiction unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution case."*

13. They also cite *Joseph Maina Mwangi vs Republic*, Criminal Appeal No. 73 of 1993, where it was held, inter alia, that: -

> *"In any trial there are bound to be discrepancies. An appellate court in considering those discrepancies, must be guided by the wording of section 382 of the criminal procedure code viz whether such discrepancies are so fundamental as to cause prejudice to the appellant or they are inconsequential to the conviction and sentences."*

14. They urge that the ingredients of the offence of grievous harm are that the complainant suffered grievous harm and that the harm was caused by the Appellant. For the first ingredient, they urge that it was the evidence of PW3 a doctor that the complainant had sustained a deep cut wound on the right upper arm extending from the lower portion running across the limb. The wound was sutured but developed a deformity that rendered loss of function. The weapon used to cause the injury was a sharp object. The degree of injury was assessed as grievous harm and P3 form was filled and produced to court as prosecution exhibit 1. That PW4 also stated in his testimony that when PW1 had gone to make a report about the incident at the Police station he saw that PW1 was bleeding profusely from the right hand.

15. On the second ingredient, they urge that harm was caused by the appellant. That PW2 testified that when the appellant in company of another by the name Sebastian saw him on a motorcycle they stopped the car driven by Sebastian and the Appellant alighted from the car and cut him with a long *matchete* on the right upper arm, PW1 testified that he could clearly identify the appellant as it was around 2:00 pm and that he knew as he was a former deacon at their church in Amugaa. That PW2 also identified the appellant as the individual who had cut PW1. PW2 did also see the Appellant while he was armed with a *matchete* of c-line type. Additionally PW2 stated that the Appellant was known to her because she used to see him at her home area in Amugaa where she lived before she got married.

16. With respect to the Appellant's defence of *alibi*, citing *Republic vs GNK* [2017] eKLR, they urge that where an accused person wishes to rely on a defence of *alibi*, he must raise it at the earliest opportunity to afford he prosecution an opportunity to investigate truth or otherwise of the *alibi*." They also cite *R vs Sukha Singh s/o Wazir Sing Others* (1939) 6EACA 145 which was cited in *Bernard Odongo Okutu vs Republic* [2018] eKLR.

17. They urge that the Prosecution did prove its case beyond reasonable doubt against the Appellant in the offence of grievous harm for which he was found guilty and convicted. The evidence of the prosecution was clear, concise and consistent. They therefore pray for the court to uphold both the conviction and sentence of the trial court.

Evidence at the trial Court

18. In a first appeal, the Court is enjoined to consider both issues of law and fact and make its own independent findings, bearing in mind that it is the trial Court that had the benefit of observing the demeanour of the witnesses. See ***Okeno v Republic (1972) EA 32.*** The evidence adduces at the trial Court is reproduced hereunder: -

Prosecution's Case

PW1

19. PW1, the complainant testified as follows: -

> ***"My name is Jeremiah Nyagah, a resident of Gitimene in Meru town. I am a businessman running a hotel. On 30th October, 2014 I recall that I was from Meru and arrived at Mikinduri at around 2:00 p.m. I met some youths who told me that our home in Amugaa is on fire. My father Jessee Kane had called me via cellphone days before to inform me that they had been harassed and beaten by Gitonga and Sebastian. After having tea in Mikinduri I boarded a motorcycle taxi to take me to Amugaa and that is when as I was leaving I saw Sebastian in his motor vehicle. Sebastian who was driving the motor vehicle blocked the motorcycle I had boarded right next to Mikinduri Police Station. Gitonga alighted from the car and cut me with a long matchete of C-line brand on the right upper arm. I jumped off the motorcycle and ran to a crowd with Sebastian and Gitonga in hot pursuit. I found safe haven in a nearby house in what appeared to be a school. I locked myself in the house whose owner I did not know and I heard Sebastian call out from outside and said that I come out or he burns the house. Many people from the nearby market had arrived at the house and they are the ones that assured me of my safety. I opened the door and saw Sebastian and Gitonga. The multitude formed a ring around me and that is when Gitonga ran off with the matchete towards the police station. He was being pelted with stones by the mob. When I reported the matter to the police they told me that Gitonga was already in their custody having taken himself to the police station. I was taken to hospital and admitted for 15 days. Upon discharge the police gave me a P3 form which was filled at Meru General Hospital where I had been admitted. The document is before court. The C-line matchete is also before court. I saw it at the police station and it is the weapon Gitonga used to cut my right arm. Gitonga is the one seated there (pointing at accused). He was well known to me because he is a former deacon at our church in Amugaa. Gitonga, Sebastian and others have since evicted us from our family land in Amugaa."***

Cross examination

> ***"When you alighted from Sebastian's vehicle to attack me I was with the motorcycle rider whose identification I do not know. It is not true that I am the one that attacked you first. It is not true that I attacked you in the absence of Sebastian as you slept in his car. Before attacking me you and Sebastian had invaded my father's land, killed a goat and a cow, cut crops and torched his house. That happened a year before you cut me. You and Sebastian together with others also severed my brother Gedion Mwiti's hand and went away with it."***

PW2

20. PW2 testified as follows: -

> ***"My name is Mareta Karambu a businesswoman at Mikinduri and resident in the area. On 30th October 2014, I was selling groceries at the bus stage in Mikinduri when I heard screams. I went to the source of the commotion and I found Jeremiah having been cut on the hand and he was being helped. The assailant was armed with a matchete and a mob wanted to stone him demanding that he explains his actions. The assailant, one Gitonga, then fled from the angry crowd. Gitonga had an accomplice, Sebastian who was demanding to know why he had cut the victim on the hand and not the neck as instructed. Jeremiah was then taken to hospital. He is not related to me. Gitonga is seated there (pointing at accused). He was known to me because I used to see him at my home area in Amugaa where I lived before getting married. The matchete I saw the accused wielding is before Court. The matchete is of "C-Line" type."***

Cross examination

"I saw you with the raised matchete when I answered to the distress. It is true that I did not record a statement immediately because I had a small child and no one asked me to record one. It is true that I am Jeremy Attendant's Sister."

Reexamination

"I managed to record a statement later on after Jeremiah had left hospital."

PW3

21. PW3 testified as follows: -

"My name is Dr. Samuel Mutegi currently of Githongo Sub-County Hospital and previously of Meru Level 5 hospital. I have a P3 form for Jeremiah Nyaga, a 28 year old male whose docket number at Meru Level 5 Hospital was No.156546/14. The patient had been seen at the facility alleging assault by 2 people known to him that led to the injury to the left arm that led to the loss of function of that limb. The patient had sustained a deep cut wound on the right upper arm extending from the lower portion running across the limb. The wound was sutured but developed a deformity that rendered loss of function. The weapon used to cause the injury was a sharp object that was penetrative. The patient was admitted at the facility for 2 weeks and at the time of examination, which was 7 months down the line, the limb had lost function. The degree of injury was assessed as grievous harm and P3 form was filled by Dr. Belinda who I had served with at the hospital for 8 months. I am familiar with her handwriting and signature. The doctor has gone to pursue a masters course in Nairobi and I wish to produce the P3 form on her behalf."

Cross examination

"The patient was seen by the doctor on 30th October 2014 as per our records at hospital."

PW4

22. PW4 testified as follows: -

"I am no 73851 Corporal. Antony Leiborke currently of Central Bank of Kenya, Meru but formerly of Mikinduri Police Station. I am the IO in this case. On 30th October, 2014 while at Mikinduri Police Station, I was called by 2 personnel manning the report desk to attend to a report by one Jeremiah Nyaga. When I went to the report office, I established that the reportee was bleeding profusely from the right hand and I advised him to seek treatment from Meru Level 5 Hospital as his injured hand was severed from the elbow. 20 minutes after the reportee had left, members of the public presented the accused Mishek Gitonga Mugambi accompanied by a C-Line matchete which he is alleged to have used to chop off the reportee's hand. I rearrested the suspect and charged him with the instant offence. After the complainant was discharged from hospital, I recorded his statement plus that of his other witnesses. I issued the reportee with a P3 form and upon its completion I amended the charges to grievous harm. The P3 form is before Court. The recovered C-Line Matchete it before Court. When I saw the reportee, his lower hand was dangling from threads elbow and when he went to hospital it had to be amputated."

Cross examination

"I recall recording the complainant's statement and that of his witness. You cut the reportee in public at the local market and you were apprehended by the members of the public soon thereafter."

Defence Case

DW1

23. DW1, the Appellant testified as follows: -

"My name is Mishek Gitonga Mugambi a resident of Amugaa and I am a farmer. What I know about this case is that the charges are fabricated because I was not involved in what I have been accused of."

Cross examination

"I was at home on the night of the alleged incident together with a teacher, one Gilbert who normally visits me. I was also with my wife that night together with my children. It was the night of 23rd February, 2014."

DW2

24. DW2 testified as follows: -

"My name is Baario Peter Koome, a resident of Amugaa and I am a tea farmer. What I know is that Misheck Gitonga is my neighbour and fellow tea farmer. On 20th February, 2014 I was with Misheck who was assisting me to pick my tea crop. There is nothing else I know from that point.

Cross examination

"I know that accused is charged with the offence of cutting someone but on that day which I am not certain whether I was with him at my tea farm picking leaves. I am 100% sure that it was on 20th Feb 2014."

Issues for Determination

25. Appellant's grounds of Appeal raise two main issues for determination as follows:-

i) Whether the Prosecution proved their case beyond reasonable doubt.

ii) Whether there is reason to disturb the sentence of the trial Court.

i) Whether the Prosecution proved their case beyond reasonable doubt.

26. Section 234 of the Penal Code provides for the offence of Grievous Harm as follows:

234. Grievous Harm

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

27. Section 4 of the Penal Code defines grievous harm as follows: -

"grievous harm" means 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;

28. The complainant, PW1 led evidence to the effect that the Appellant cut him with a long *matchete* of C-line brand on the right upper arm. He identified the *matchete* as the one produced in Court. PW2, also confirmed that she saw the complainant with a severed hand and that she witnessed a mob wanting to stone the Appellant together with his accomplice, Sebastian. She confirmed to have seen the Appellant with a C-line *matchete* which she identified as the one in Court. The Court takes note of the Appellant's contention that PW2 appears to have been couched and that the fact that she was an attendant to the complainant's sister discredits her evidence. To this end, the Court observes that the Appellant did not raise these contention during cross-examination. The Court also considers that her evidence was challenged. The fact that she recorded her statement later is of no effect because as required by the Prosecution, the Appellant was supplied with all witness statements, including PW2's in good time, before the trial commenced. In any event, she explained that she recorded her statement later because prior to the date of recording, no one had asked her to record the statement and that on the material day, she had a small child who she was attending to.

29. There was also medical evidence by PW3, who examined the Appellant on the very 30th October 2014, the same day that the incident happened. He testified that the complainant had sustained a deep cut wound on the right upper arm extending from the lower portion running across the limb. He testified that the wound was sutured but developed a deformity that rendered loss of function. He further testified that the weapon used to cause the injury was a sharp object that was penetrative. He described the degree of injury as *grievous harm*.

30. The Appellant has urged that PW3, Dr. Mutegi, was not the author of the P3 form and was thus not qualified to produce it. To this end, this Court considers that PW3 gave an adequate explanation as to why Dr. Belinda, who filled the P3 form was not able to produce it i.e that she had gone to Nairobi to pursue further studies. The Court further observes that PW3, Dr. Mutegi, confirmed to have known Dr. Belinda as they had worked together for 8 months before she left for further studies and she thus knew her signature and handwriting well enough. This Court thus finds that PW3 was competent to testify. The Court also observes that during trial, the Appellant did not object to PW3's testimony and this thus appears to be an afterthought.

31. Concerning the identification of the Appellant as the assailant, the Court considers that the Appellant was a well-known man. The complainant testified to having known the Appellant as a deacon at their church. The Court thus considers that not only did the Appellant and the complainant attend the same church, but the Appellant was also a known elder, having held the position of a deacon. It is also noted that the complainant, PW2 and the Appellant all lived in Amugaa and were thus from the same village. The Court is therefore satisfied that the Appellant's identification as the assailant was positive.

32. In addition to the Prosecution's independent identification of the Appellant as the assailant, the Court observes that during cross-examination of the complainant, the nature of the questions that the Appellant put to the complainant revealed that he was at the scene of crime. The complainant testified as follows during cross-examination: -

"It is not true that I am the one that attacked you first. It is not true that I attacked you in the absence of Sebastian as you slept in his car."

33. The above reveals that the Appellant posed to the complainant questions intended to create a narrative that it is the complainant who had first attacked him and that he was, therefore, reacting to what the complainant had done. This evidence squarely places him at the scene of crime.

34. The Court further considers that the above analysis, to the extent that it places the Appellant at the scene of crime contradicts his defence of *alibi.* To begin with, the Court considers that the Appellant failed to bring to the attention of the Prosecution his defence of *alibi* at the earliest opportunity. In fact, his defence of *alibi* was raised for the first time during his defence and even then, it was only raised at the point of cross-examination. This, therefore, appears to have been an afterthought. The *alibi* also made reference to 23rd February 2014 which was not the date of the offence and the same is therefore of no probative value.

35. The necessity of an accused person putting the Prosecution to notice of the intention to rely on a defence of *alibi* was discussed in ***Republic vs GNK*** (2017) eKLR where Mutuku J held as follows: -

> *"However, the accused was required to raise the defense of alibi at the earliest opportunity to enable the prosecution and the investigating officer time to check it out to determine its veracity or lack thereof.* ***The principle has long been accepted that an accused person who wishes to rely on a defence of alibi must raise it at the earliest opportunity to afford the prosecution an opportunity to investigate the truth or otherwise of the alibi. In R. v. Sukha Singh s/o Wazir Singh & Others (1939) 6 EACA 145, the former Court of Appeal for Eastern Africa upheld a decision of the High Court in which it was stated:***
>
> > ***"If a person is accused of anything and his defence is an alibi, he should bring forward that alibi as soon as he can because, firstly, if he does not bring it forward until months afterwards there is naturally a doubt as to whether he has not been preparing it in the interval, and secondly, if he brings it forward at the earliest possible moment it will give prosecution an opportunity of inquiring into that alibi and if they are satisfied as to its genuineness proceedings will be stopped."***
>
> ***The accused in this case raised his defense of alibi four years after the offence was committed. Is it an after-thought? In Festo Androa ASenua v. Uganda, Cr. App. No. 1 of 1998 the Court made the following:***
>
> > ***"We should point out that in our experience in Criminal proceedings in this Country it is the tendency for accused persons to raise some sort of alibi always belatedly when such accused persons give evidence. At that stage the most the prosecution can do is to seek adjournment of the hearing of the case and investigate the alibi. But that may be too late. Although for the time being there is no statutory requirement for an accused person to disclose his case prior to presentation of his defence at the trial, or any prohibition of belated disclosure as in the UK statute cited above, such belated disclosure must go to the credibility of the defence."***

The above thus raises doubt as to the genuineness of the Appellant's defence of *alibi.*

36. The Court also considers that DW2, who testified to have been with the Appellant on the material date referred to 20th February 2014. When asked in cross-examination to confirm the date, he reiterated 20th February 2014. The offence in issue, however, occurred on 30th October 2014, over 8 months later, and the Court thus finds that the evidence of DW2 did not support the Appellant's defence in any way.

37. Concerning the omission to call other witnesses to corroborate the Prosecution's case, the Court considers that the evidence produced by the Prosecution was enough to prove the elements of the offence of grievous harm against the Appellant. The fact that the offence occurred in the market area, in the presence of many others who were within the vicinity did not obligate the Prosecution to call all the people in the area. This was discussed by the Court of Appeal in ***Keter vs Republic [2007] 1 EA 135*** where Bosire, Githinji and Onyango-Otieno JJA held as follows: -

> ***"The prosecution is not obliged to call a superfluity of witnesses but only such witnesses are sufficient to establish the charge beyond any reasonable doubt."***

See also Section 143 of Evidence Act.

38. The Appellant has urged that there was discrepancy as to which between the making of the report by the complainant and the arrest of the Appellant came first. This Court has considered this issue and does not find this to be material enough to discredit the other evidence linking him to the offence. The also observes that the complaint as well as the arrest were made on the same day and the discrepancy may have been caused by the complainant's processing of the numerous events of the day.

Whether there is reason to disturb the sentence of the trial Court.

39. On sentencing, the Court observes that indeed, the trial Court failed to take into account the period of pre-trial detention when sentencing the Appellant to 10 years imprisonment. The Court observed that for majority of the time, the Appellant was out on bond with the exception of a few days before he was granted bond and the few days when his bond was cancelled for being absent. The Court will therefore order that in computing his term, regard shall be made to the period of pre-trial detention that he spent in custody.

Conclusion

40. On the afternoon of 30th October 2014, the Appellant, in the company of another attacked the complainant who was aboard a motorcycle headed home. The Appellant used a C-line *matchete* to attack the complainant and he cut his right hand upper arm. There was medical

evidence to confirm that the complainant was injured on his arm and the injuries suffered were described to be of the nature of grievous harm.

41. On identification of the Appellant as the assailant, the Court considers that this was positive. The complainant himself testified that the Appellant, who hailed from the same village as himself and who was a deacon at their home church, thus very well known to him is the one who cut him. There was also evidence by PW2 who testified to have rushed to the scene of crime on the material date and found a mob wanting to stone the Appellant and his accomplice while the complainant whose hand had been cut was being helped.

42. The Court rejects the Appellant's defence of *alibi* as an afterthought because it contradicts his earlier defence of provocation and/or retaliation that came out during cross-examination of the complainant. The Court also considers that the alibi defence was only raised at the very tail end during cross-examination of the Appellant, contrary to the principle in ***R. v. Sukha Singh s/o Wazir Singh & Others*** **(1939) 6 EACA 145, cited in** ***Republic vs GNK*** (2017) eKLR. The Court further considers that both the Appellant as well as his witness, DW2, in an attempt to support the *alibi*, gave different dates other than the date of the offence and their evidence, to this extent was of no probative value.

43. As to sentencing, the Court finds that the trial Court omitted to take into account the period of pre-trial detention spent in custody by the Appellant in accordance with Section 333 (2) of the Criminal Procedure Code, and this Court will, therefore, order that the same be taken into account when computing his term. However, the Court is appalled by the grievous intention of the Appellant to kill the complainant, which he and his accomplice might have executed were it not for the intervention of the public. In the circumstances, this Court does not find that the sentence of 10 years was in any way excessive and there is thus no reason to interfere with the sentencing discretion of the trial Court.

ORDERS

44. Accordingly, for the reasons set out above, this Court makes the following orders: -

i) The Appeal on conviction is declined and the finding of the lower Court on conviction is upheld.

ii) The Appeal on sentence is allowed to the extent that in computing the Appellant's term of imprisonment of 10 years, regard shall be had to the period of his pre-trial detention of approximately 41 days.

Order accordingly.

DATED AND DELIVERED THIS 11TH DAY OF NOVEMBER 2021.

EDWARD M. MURIITHI

JUDGE

Appearances

MISHEK GITONGA MUGAMBI, THE APPELLANT IN PERSON.

MS NANDWA, PROSECUTION COUNSEL FOR THE RESPONDENT.