Mohamed v Republic (Criminal Appeal E015 of 2025)
[2025] KEHC 15142 (KLR) (24 October 2025) (Judgment)

Neutral citation: [2025] KEHC 15142 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT GARSEN

CRIMINAL APPEAL E015 OF 2025

L NJAGI, J

OCTOBER 24, 2025

BETWEEN

IDRIS HUSSEIN MUHAJ MOHAMED ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the original conviction and sentence by Hon.P.W.Wasike, PM, in Lamu Principal Magistrate's Criminal Case No. MCCRE 230 of 2024 delivered on 24/2/2025)

JUDGMENT

1. The Appellant herein was convicted for the offence assault causing actual bodily harm contrary to section 251 of the Penal Code. The particulars of the offence were that on 20th June 2024 at around 0220 hours at Kashmir area of Langoni location, Lamu Central sub county within Lamu county he unlawfully assaulted Harum Musa (herein referred to as the complainant) thereby occasioning him actual bodily harm.

2. The appellant was sentenced to serve 4 years imprisonment. He was aggrieved by the conviction and the sentence and filed the present appeal. The grounds of appeal are in summary that:

   (1) The trial court erred in law and fact in shifting the burden of proof to the Appellant.

   (2) The trial court erred in law and fact by relying on hearsay and contradictory evidence to convict the Appellant.

   (3) The trial court erred in law and fact in failing to call crucial witnesses in the case.

3. The case for the prosecution was that the complainant (PW2 in the case) and the Appellant are from the same village. That on the night of the material day the complainant was attending a ceremony at Kashmir area of Lamu county. That at 2am he went to the sides to relief himself. He had a torch and

a stick. That as he went back he saw 2 people going towards him. One of them was armed with a stick and a knife while the other had a panga. He feared and ran away. He reached a dead end. The people got to him. He flashed a torch at them and identified them as Idris, the Appellant, who had a stick and a knife and Famau who had a panga. He asked them what they wanted. They ordered him to drop his stick but he refused. Idris hit him on his hand. He defended himself with his stick. He pushed the person who had the panga. He, the complainant, fell down and Famau cut him on the shoulder. He got a chance and escaped. Idris chased him and hit him on the back of the head with the stick. He went to the function and informed his friends. He was bleeding. He was taken to King Fadh Hospital.

4. The father to the complainant PW1 testified that he received a report of the assault from the complainant`s mother. He went to King Fahad Hospital where he found the complainant with a cut on the head and shoulder. He told him that he had been cut by the Appellant and another one called Famau.

5. A doctor at King Fadh Hospital PW3 testified that the complainant was admitted at the said hospital on 20/6/2024 with a deep cut wound on the left shoulder that was 10 cm deep and another cut wound on the back of the head. A P3 form was filled at the hospital and the degree of injury classified as harm.

6. The case was investigated by Cpl Mwendo PW4 of Lamu police station. He recorded statements of witnesses. The Appellant herein was arrested by other policemen on 21/8/2024. PW4 charged him with the offence. During the hearing, a doctor from King Fadh Hospital PW3 produced the P3 form as exhibit, P.Exh. 2.

7. When placed to his defence the Appellant opted to exercise his constitutional right to remain silent.

Submissions

8. The appellant submitted that the duty was on the prosecution to prove the case against him beyond reasonable doubt. That the prosecution did no attain this threshold in the case.

9. It was submitted that the trial court erred by admitting hearsay evidence of PW1, PW2 and PW3 whose evidence was not corroborated.

10. The appellant submitted that the prosecution failed to call crucial witnesses such as the complainant`s mother who happened to inform the complainant`s father, PW1, of the incident on the material night at 2am.

11. It was submitted that evidence o f the prosecution witnesses was full of contradictions.

12. The Respondent on the other hand submitted that the Appellant was a person well known to the complainant and he flashed a torch on him and recognized him. That there was no chance of mistaken identity. That the injuries on the complainant were corroborated by the doctor, PW3. It was submitted that the appellant did not offer any defence in the case.

13. On sentence, it was submitted that the pre-sentence report indicated that the Appellant was not remorseful. That a deterrent sentence was deserved.

Analysis and determination

14. The role of this court as the first appellate court is well settled. It was held in the case of Okeno vs. Republic (1972) EA 32 that a first appellate court is duty bound to revisit afresh the evidence tendered before the trial court, evaluate, analyze it and come to its own independent conclusion but always bearing in mind that the trial court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and give allowance for that.

15. The appellant was charged under section 251 of the Penal Code that provides that:

> " Any person who commits an assault occasioning actual bodily harm is guilty of a misdemeanor and is liable to imprisonment for five years."

16. The elements of the offence are assault on the body of a person and evidence of occasioning actual bodily harm on that person.

17. The complainant in this case testified that the appellant hit him with a stick on the hand and on the back of the head. That the accused`s colleague called Famau cut him with a panga on the left shoulder. The cuts on the left shoulder and on the back of the head were confirmed by the doctor who examined the complainant at King Fahd Hospital. The one on the shoulder was found to be 10 cm deep. The degree of injury was classified as harm. From this evidence there was no doubt that the complainant was assaulted and injured. The injuries inflicted on him were classified by the doctor who completed the P3 form as actual bodily harm. There was no justification to the assault and as such the assault was unlawful. The question was whether the appellant is the one who occasioned the complainant the injuries.

18. Though the complainant did not tell the trial how he knew the appellant, it was clear from the evidence of the complainant`s father PW1 that they were from the same village with the appellant. It was the evidence of the complainant`s father that after the complainant was injured he went to the father of the appellant and informed him of the assault. It was clear from the evidence that the appellant and the complainant were well known to each other. The complainant said that he had no differences with the appellant but that the appellant had a grudge with his brother called Matandoni. That the appellant had beaten up his said brother. The complainant testified that he flashed a torch on the appellant and recognized him. There was no doubt that the complainant identified the appellant as the person who assaulted him.

19. The appellant argued that the prosecution failed to call a crucial witness in the name of the mother to the complainant. However, the evidence of the complainant`s mother would have been that she informed the complainant`s father PW2 of the assault on the complainant. The issue of assault was well proved by the evidence of other prosecution witnesses. The mother to the complainant was not a crucial witness in the case.

20. The appellant argued that the prosecution case was full of contradictions. He however did not point out a single contradiction. I find the charge against the appellant to have been proved beyond reasonable doubt. The conviction is thereby upheld.

Sentence

21. The sentence for the offence of assault occasioning actual bodily harm contrary to section 251 of the Penal Code is imprisonment for a period of 5 years. The appellant was sentenced to 4 years imprisonment. In sentencing the appellant to that prison term, the trial magistrate stated that the appellant failed to mitigate when he was given a chance in court to do so. That he did not appear to be genuinely remorseful, something that was also noted in the pre-sentencing report.

22. This court is alive to the fact that sentencing rests at the discretion of the trial court. In Bernard Kimani Gacheru v Republic (2002) e KLR the Court of Appeal held as follows:

> " It is now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must

depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account, some wrong material, or acted on a wrong principle. Even if, the Appellate Court feels that the sentence is heavy and that the Appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exist."

23. I have considered that the appellant and his colleague occasioned the complainant a deep cut wound on the head by cutting him with a panga. However, the appellant was aged 22 years at he time that he was sentenced. He was a first offender. In my view a sentence of 4 years to a first offender was excessive. I consider a sentence of 2 years to be sufficient. The sentence of 4 years imprisonment is thereby set aside and substituted with one of TWO years imprisonment.

    Orders accordingly.

DELIVERED, DATED AND SIGNED AT GARSEN THIS 24TH DAY OF OCTOBER 2025.

J.N. NJAGI

JUDGE

In the presence of:

Ms Mkongo for Respondent

Appellant - present in person at GK Prison Malindi

Court Assistant - Jumaa