REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARSEN

CRIMINAL APPEAL NO. E059 OF 2024

MOHAMED ALI DULO alias SHEE……APPELLANT

VERSUS

REPUBLIC……..RESPONDENT

(Appeal from original conviction and sentence by Hon. F.M. Mulama, Resident Magistrate, in Lamu Principal Magistrate's Court Criminal Case No. E257 of 2024 delivered on 21/11/2024)

JUDGMENT

1. The Appellant was convicted for the offence of occasioning a person grievous harm contrary to Section 234 of the Penal Code. The particulars of the offence were that on the 5th day of August, 2024 at around 1330hrs at Roka Kibiboni area in Hindi Division in Lamu Central Sub- County within Lamu County with another not before court, he intentionally and unlawfully did grievous harm to one Alfayo Mwanjiwa Daldon (herein referred to as the complainant).
2. The appellant was sentenced to serve life imprisonment. He was aggrieved by the conviction and the sentence and lodged this appeal on the following amended grounds of appeal:

    1) That the learned trial magistrate erred in law and in fact in convicting the Appellant based on evidence that was contradictory, inconsistent and insufficient.

2) **That the learned trial magistrate erred in law and in fact in convicting the appellant on a charge that was not proved by the prosecution to the required threshold.**
3) **That the Learned trial Magistrate erred in law and fact in failing to consider the appellant`s defence evidence which cast doubt on the prosecution case.**
4) **That the learned trial magistrate erred in law and in fact in failing to consider that the evidence tendered by the prosecution did not link the appellant to the commission of the offence.**

Case for prosecution

3. The case for the prosecution is that the complainant, PW2, is a farmer. That on the material day at around 1.30 pm he was at his farm harvesting maize when a person called Omar passed by his farm while riding a bicycle. He asked him why he was passing by his farm and he did not answer him. The person went away and returned by the same route. He was at this time in the company of a woman dressed in a buibui. The appellant flashed out a knife and attempted to stab the complainant on the stomach. A cousin to the complainant, Omar Nyati, overheard the commotion and went to the place. He advised Omar to go away. He went away while threatening to come back with his gang.
4. The complainant went to his home and started to dry his maize. That as he did so he was hit on the back with a panga. He turned and saw the said Omar and another.

They were armed with pangas. They descended on him with the pangas and wanted to cut him on the head. He shielded himself with his hands and he was cut on the hands. He fell down and attackers went away.

5. The complainant thereupon went to the road to seek for help. He found his cousin Omar Nyati. The village elder Awadh Karani, PW3, passed by. He called the chief who went there on a motor cycle and took the complainant to Hindi dispensary where he was attended to by a clinical office, PW1 who found him with deep cut wounds on both hands which were approximately 13cm long on the right hand and 10cm on the left hand. PW1 referred him to King Fahad Hospital where he was admitted for 5 days.

6. The complainant reported the matter to the police on 21/8/2024. He was issued with a P3 form. It was completed by the Clinical Officer PW1. Later, on 30/9/2024 the complainant was called to the police station to identify a suspect. He found one person, the appellant, at the police station. He identified him as the accomplice to Omar when he was attacked.

7. The case was investigated by PC Philip Sikoyo PW4 of Hindi police station who testified that the complainant went to the police station on 21/8/2024 and he recorded his statement. That he told him that he was attacked by two people. That he identified one of the assailants. That he didn`t know the name of the suspect but he was told his name by Omar Nyati who

however had broken into his house when he was in hospital and stolen his maize.

6. The investigating officer, PW4, started to look for the suspect. That on 30/9/2024 he received information that the suspect had been arrested at Mokowe jetty. He picked him and took him to Hindi police station. He called the complainant who positively identified the suspect, the appellant herein. He charged him with the offence.

8. During the hearing of the case in court, the clinical officer PW1 produced the treatment notes that included reports from King Fahad Hospital as exhibits, P.Exh.1. He also produced the P3 form as exhibit, P.Exh.2. The reports from King Fahad Hospital indicated that the patient was taken for tendon repair surgery and at the time the clinical officer testified in court, the patient was still under medication and review as his fingers were yet to recover. The clinical officer assessed the degree of injury as grievous harm.

Defence case

9. When placed to his defence, the appellant stated in a sworn statement that on 5/6/2024 he was at Kiunga in Lamu where he was working with a bread company called Salam bakery. That he had left Hindi for Kiunga on 20th July, 2024 and went back to Hindi on 23rd August, 2024. That while at Kiunga he received information that he was being accused of attacking

the complainant. He was later arrested at Mokowe jetty. It was his evidence that he never knew the complainant before. That he knew PW3 who had a grudge with his family.

10. The appellant called 2 witnesses in the case, DW2 and DW3. DW2 testified that he was not with the appellant on 5/8/2024 and did not know what happened on that day. DW3 told the trial court that he did not know what happened on 5/8/2024 but that what he knew was that in the month of August the appellant was in the high seas and came back on 23/8/2024.

Submissions on the appeal

11. The appeal was canvassed by way of written submissions. The appellant submitted that the charge was not proved beyond reasonable doubt. He faulted the trial court for relying on evidence that had inconsistencies, discrepancies and contradictions. He submitted that the prosecution shifted the burden to the appellant and in this respect relied on the case of **Republic -vs-Gachanja (2001) eKLR 425** where the court held as follows;

> **'It is cardinal principle of law that the burden of proof to prove the guilt of an accused lies on the prosecution. An accused person assumed no burden to prove his innocence. Any defence or explanation put forward by an accused person is put to be considered on balance of probability.'**

12. It was submitted that the contradictions and inconsistencies were not explained by the prosecution and the trial court did not take note of them. That in the premises there was doubt whether the appellant was the person who committed the offence.

13. The Respondent on the other hand submitted that the appellant having been charged under Section 234 of the Penal Code, the prosecution was obligated to prove that the victim sustained grievous harm, that the harm was caused unlawfully and that the appellant caused or participated in causing the grievous harm.

14. As to what amounts to grievous harm, the respondent relied on the case of **Pius Mutua Mbuvi vs Republic (2021) eKLR** where it was held that;

> **"the specifics of grievous harm therefore are; in the case of grievous harm, the injury to health must be permanent or likely to be permanent, whereas, to amount to bodily harm, the injury to health need not be permanent, secondly, a mental injury may amount to grievous harm but not to bodily harm and lastly, the injury must be 'of such nature as to cause or likely to cause permanent injury to health"**

15. The respondent submitted that the victim sustained injuries that amounted to grievous harm as per the evidence of the clinical officer, PW1, who found the complainant with cut wounds on both palms that were approximately 13cm on

the right hand and 10cm on the left hand. That the tendons were severed and needed constructive surgery.

16. On whether the appellant participated in harming the victim, the respondent relied on the testimony of PW2 who narrated the events of that fateful day. That PW2 positively identified the appellant as one of the people who attacked him.

17. It was the submission by the respondent that the defence tendered by the appellant was an afterthought. That the appellant was not remorseful for his actions and the attack on the victim left him permanently injured.

18. On the sentence meted upon the appellant, it was submitted that the same was fair. They relied on the case of **Benard Kimani Gacheru -vs- Republic (2002)** eKLR where the court held that sentencing is at the discretion of the trial court and that an appellate court can only interfere if the same is arrived at after considering irrelevant factors or wrong legal principles.

Analysis and determination

19. This being the first appellate court in the case of the appellant, this court is obliged to analyze and evaluate afresh the evidence adduced before the lower court and draw its own conclusions while bearing in mind that it neither saw nor heard any of the witnesses. In **Okeno vs. Republic [1972] EA 32,** the Court of Appeal set out the duties of a first appellate court as follows:

“An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya vs. Republic (1957) EA. (336) and the appellate court’s own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala Vs. 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 finding and conclusion; 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, see Peters vs. Sunday Post [1958] E.A 424.”

20. The appellant was convicted for the offence of causing grievous harm. Section 234 of the Penal Code provides for the offence of grievous harm as follows:

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

21. 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."

22. There is no doubt from the evidence adduced before the trial court that the complainant was attacked by two people who cut him with pangas on both hands. Awadh Karani PW3 found the complainant injured and he called the chief who took the complainant to hospital. The injuries were corroborated by the clinical officer, PW1 who attended to the complainant at Hindi Dispensary before referring him to King Fahad hospital.

23. The clinical officer PW3 classified the degree of injury as grievous harm. It is clear that the cuts inflicted on the complainant severed the tendons of his hands and he was referred for tendon repairs. In view of this, I find that the injuries seriously injured the health of the complainant and they amounted to grievous harm.

24. Having found that the injuries amounted to grievous harm, the question is whether the appellant was one of the people who occasioned the complainant the said injuries.

25. The trial court in its judgment found that the appellant was not at the first encounter where a suspect called Omar threatened to stab the complainant with a knife. The court found that the appellant accompanied Omar to the complainant`s home on the second encounter where they cut the complainant with pangas on his hands. The question

is whether the appellant is the person who accompanied Omar when the complainant was attacked and injured.

26. The complainant told the trial court that the appellant was from the same locality with him. That he knew him physically and not by name and that it is his cousin, Omar Nyati, who told him that the appellant is called Mohamed Ali Dulo also known as Shee Ali Dulo. That the name he gave to the police is Shee Ali Dulo.

27. The investigating officer PW4 testified that the complainant told him that he did not know the name of the appellant and that he was told his name by Omar Nyati. That he later arrested the appellant and called the complainant to the police station and he positively identified the appellant. In court the complainant said that the appellant was at the time of assault on him having the same hair style that he was having in court.

28. The entire case rested on the identification of the appellant by the complainant. It is trite that the court before basing a conviction on evidence of identification should examine the evidence carefully and satisfy itself that the circumstances of identification were favourable and free from the possibility of error. This position was re-stated by the Court of Appeal in the case of **Kariuki Njiru and 7 others v. Republic CR. Appeal No. 6 of 2001** that;

> **The law on identification is well settled, and this Court has from time to time said that the evidence**

> **relating to identification must be scrutinized carefully, and should only be accepted and acted upon if the court is satisfied that the identification is positive and free from the possibility of error.**

29. The same was stated in **Wamunga v Republic** [1989] KLR 424 where the Court of Appeal stated thus:

> **It is trite law that where the only evidence against a defendant is evidence on identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of a conviction.**

30. Though the incident occurred during the day it was still important for the trial court to satisfy itself that the identification on the appellant was free from the possibility of error. The complainant was not there when the appellant was arrested and he therefore did not lead to his arrest. The person who knew the appellant, Omar Nyati, did not testify in the case. After the arrest the investigating officer did not conduct an identification parade to test whether the complainant could identify the appellant.

31. The purpose of an identification parade is to test the ability and accuracy of a witness in identifying the person he/she claims to have seen. Though the complainant told the trial court that he knew the appellant before as he was from his locality, he

did not tell the investigating officer that he knew the appellant before the date of the incident. The officer said that the complainant told him that he did not know his name. The officer never mentioned that the complainant told him that he knew the complainant before the date of the attack. Neither did the officer say that the complainant gave him the description of the appellant nor did he say that the complainant told him how he identified the appellant during the attack. It was therefore not clear whether the complainant knew the appellant before the date of the incident. If at all it happened that he knew him before, he did not tell the court where he used to see him, how many times he had seen him, the way the appellant was dressed at the time of the attack, the duration of time the incident took, etc, all of which were relevant in proving identification. It was imperative to test this by way of an identification parade.

32. The complainant was the only identifying witness in the case. Though a conviction may be based on the evidence of a single witness, it is desirable for the court to warn itself of the danger of convicting on such evidence and only convict where it is satisfied that the evidence is free from the possibility of error. The Court of Appeal for Eastern Africa in **Abdalla Wendo v Republic [1953] 20 E.A.C.A 166** held the following on the issue:

> **"Subject to certain exceptions, it is trite law that a fact may be proved by the testimony of a single witness but this does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification, were difficult. In such circumstances what is needed is other evidence whether it be circumstantial or / direct, pointing to guilt, from which a judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from the possibility of error."**

33. The same court in **Roria v Republic [1967] EA 573,** also held that:

> **"A conviction resting entirely on identity invariably causes a degree of uneasiness that danger is of course greater when the evidence against an accused person is identification by one witness and although no one would suggest that a conviction based on such identification should never be upheld. It is the duty of this court to satisfy itself that in all the circumstances it is safe to act on such identification."**

34. The trial court did not warn itself on the danger of convicting on the evidence as adduced by the complainant. In view of the fact that it was not clear whether the complainant knew the appellant before the date of the incident and an identification parade was not conducted, the evidence of the complainant on identification was not water tight. There is a possibility of him being mistaken on the appellant. It has

been recognized that a witness may be convincing but mistaken, see **R v Turnbull and others [1976] 3 All ER 549.**

35. In view of the foregoing, I am not satisfied that the evidence of the complainant was sufficient to sustain the conviction on the appellant. The trial court did not consider the evidence on identification with the necessary care so as to satisfy itself that the conviction was free from the possibility of error. The appellant was in the circumstances of the case entitled to the benefit of doubt.

36. Consequently, it is my finding that the case against the appellant was not proved beyond reasonable doubt. The conviction is thereby quashed and the sentence set aside. I order the appellant be set at liberty forthwith unless lawfully held.

Delivered, dated and signed at GARSEN this 19th day of November 2025

J. N. NJAGI

JUDGE

In the presence of:

Ms Mkongo for Respondent

Appellant – Present virtually at GK Prison Malindi

Court Assistant - Ms Rahma