

**THE REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT GARISSA**  
**CRIMINAL APPEAL NO. E029 OF 2025**

**YUSSUF MOHAMUD AHMED.....**  
**APPELLANT**

**VERSUS**

**REPUBLIC.....**  
**RESPONDENT**

**JUDGMENT**

1. The appellant was charged with the offence of assault causing actual bodily harm contrary to section 251 of the Penal Code. That Yussuf Mohamud Ahmed on 14.11.2024 at around 0200hrs at Bulla ADC in Garissa Township, Garissa Sub County within Garissa County he unlawfully assaulted one Mohamud Ahmed Hadun thereby occasioning him actual bodily harm.
2. He was convicted and sentenced to 42 months (3 ½ years) in prison.
3. It is the said conviction and sentence that has elicited the appeal herein on the grounds as follows:
  - i. **That the learned trial magistrate erred in law and fact by convicting him yet the prosecution did not prove its case beyond any reasonable doubt.**
  - ii. **That the learned trial magistrate erred in law and fact when he failed to consider his mitigation and defence hence arriving at an unsupported determination.**

- iii. That the learned trial magistrate erred in law and fact by meting a harsh sentence upon him.**
  - iv. That the learned trial magistrate erred in law and fact by not factoring section 333 of the Criminal Procedure Code when meting out sentence.**
4. The appeal was canvassed by way of written submissions.
  5. The appellant in his submissions urged that the prosecution did not prove its case beyond reasonable doubt. That the prosecution's evidence was marred with inconsistencies in regards to the manner, date and time when the alleged offence was committed. That PW1 narrated that that he was assaulted on 14.11.2024, at around 2a.m. but during cross examination, he stated that he could not remember the date he suffered the injuries. On the other hand, that PW2 stated that the complainant reported to the hospital on 14<sup>th</sup> November, 2024 when he narrated that the injury took place at 9.30 p.m. In the same breadth, that PW1 testified that he was hit with a piece of timber while PW2 stated that the complainant was hit by a sharp object. According to him, the inconsistencies were material to the prosecution's case hence the need for this court's intervention.
  6. He faulted the trial magistrate for failing to inform him of his right to legal representation urging that he failed to comprehensively comprehend the need to appoint one. He urged that noting that this was a family issue, the same could have been handled differently hence the prayer for this court to allow his appeal.

7. The respondent in opposing the appeal filed submissions dated 05.11.2025 urging that the requisite elements to prove the offence were met. While relying on the case of **William Kiprotich Cheruiyot vs Republic [2021] KEHC 6899(KLR)**, the prosecution counsel reiterated that the essential elements of the offence of assault causing actual bodily harm are: assaulting the complainant or victim and occasioning actual bodily harm.
8. Counsel urged that it was evident that the complainant was assaulted by the appellant, who is also his son and further, that PW2 confirmed and additionally produced a P3 Form showing the injuries suffered by the complainant. According to counsel, the defence offered by the appellant could not drown the immense evidence by the appellant and therefore, this court was urged to uphold the finding of the trial court.
9. PW1, Mohamud Ahmed Adan stated that on the night of 14.11.2024, at around 2 a.m., he was at the ADC slaughterhouse area when the appellant, his son who had been released from jail two days earlier, returned home from town after consuming alcohol and *miraa*. He explained that when he asked his son not to make noise, the appellant picked up a piece of timber and struck him above the right eye and below the left eye. He fell to the ground as the appellant continued to kick him; That he saw the appellant clearly under the security lighting near the door. According to him, the appellant threatened to fetch a *panga* and cut his neck. He said that although there were young boys in the house—named Abdinoor, Abdirhaman, and Yusuff Omar—they did not come out because they were afraid.

10. He recounted that he went to his brother's nearby plot, where his brother opened the door and saw him bleeding from the face. His brother telephoned other people and together, they returned to the scene before he was taken to hospital. He reported the matter at Garissa Police Station, where he was issued with a P3 form and treatment notes. He emphasized that the person who attacked him was his son, the appellant herein.
11. During cross-examination, he clarified that his name was Mohamud Ahmed Adan and that although he had an identity card, it got lost and the loss was reported to police. He confirmed that he had married in Somalia and had four biological children, three of whom had died, leaving the appellant as his only surviving child. He admitted that he could not recall the exact date of the assault but maintained that it happened at 2 a.m. outside his brother's house, near the toilet, when the appellant arrived home making noise.
12. He further stated that he lived with two people in his house, but on that particular night there were five people in the house, including a man and his wife, and that three of them recorded witness statements. He acknowledged that he and the appellant had engaged in verbal disputes before but had never fought physically. That although the appellant had not stolen from him, he had stolen from others, which caused him problems.
13. He added that the family had once raised Kes. 20,000 for the accused to travel to Somalia to visit his mother, but he failed to go. He recalled that on the night of the incident, the accused was

wearing yellowish trousers. He insisted that whether his statement recorded the weapon as a club or timber, it made no difference, since he had been struck with a wooden object. He denied suggestions that he had approached the accused outside the house, maintaining instead that nobody came to assist him during the attack.

14. PW2, John Wambugu, a clinical officer working at the police lines stated that on 14.11.2024, he examined Mohamed Ahmed, a sixty-one-year-old patient who alleged that he had been assaulted by someone he knew. Wambugu observed that the complainant's clothes were dirty and stained with blood. On examination, he found injuries on the top of the complainant's right eye, which was bleeding. He further noted that the complainant reported suffering a headache on the left side below the eye where he had a cut wound.
15. That the complainant also complained of scrotal pain, claiming that he had been kicked there. He also observed bruises on both knees. The complainant further reported pain in both palms, alleging that he had been struck with a blunt object. He classified the injuries as soft tissue injuries and noted that he treated the patient nine hours after the incident. He concluded that the cause of injury was both blunt and sharp objects. He stitched and dressed the wounds, administered antibiotics, and completed the P3 form and treatment notes, marked as Pex 1 and 2.
16. On cross-examination, Mr. Wambugu confirmed that he had treated the patient at the first point in time and that both medical

documents bore his name. He reiterated that the complainant had come to him nine hours after the injury, explaining that the offence had occurred at about 9.30 p.m. and the complainant presented himself the following morning. He clarified that since the complainant had a cut wound, it must have been caused by a sharp object, though he could not comment on the complainant's evidence in which he claimed to have been injured using a rungu. He added that Omar and Abdi were the ones who brought the complainant for treatment. He admitted that he had not taken any x-rays of the injuries and stated that he was seeing the accused for the first time in court.

17. PW3, Police Constable Osman Barre, No. 115009, attached to Garissa Police Station, stated that on 14.11.2024, a man went to him and made a report. He explained that the complainant met him in his office and was in fair condition but bleeding from the top of his right eye. He stated that he sent the complainant to hospital for treatment and issued him with a P3 Form. The complainant was treated at the police line clinic where the P3 Form was filled and afterwards returned to him with both the treatment notes and the P3 Form, which were identified as PEX 1 and 2.
18. It was his evidence that he recorded the complainant's witness statement, in which the complainant told him that he had been struck on the eye by his son Yusuf as he was leaving the toilet. Barre explained that he went for Yusuf, arrested and took him to the station. He added that the complainant told him Yusuf had injured him on the top of his right eye and on his left cheek, and

that he had used a piece of timber to attack him. He noted, however, that the complainant did not tell him that he had identified his son at 2 a.m. during the attack.

19. On cross-examination, the officer explained that he had not previously handled the appellant at the police station, as a prior case had been dealt with by his colleague. He confirmed that the offence took place on 14.11.2024, with the report being made the following morning. He stated that he did not record a statement from the appellant and further clarified that the offence had occurred at the homestead of the complainant's younger brother and that he had recorded witness statements both from the home and at the police station.
20. He denied framing the case against the appellant explaining that he had searched for the piece of timber at the homestead but had not found it, nor had he found the appellant in possession of anything. Finally, he stated that he had arrested the accused in a previous case, but in that matter he was the investigating officer.
21. DW1, Yusuf Mohamud Ahmed from Garissa stated that he was a student in class six at Garissa Prison. He stated that on 14.11.2024, he was at his home with his family, though not at either his father's or mother's place. He said that the family had been in dispute since the year 2022 over the disappearance of his brother, and on that day, they were gathered at the home of a family member to discuss the matter. According to him, they disagreed during the discussions and he swore to report the case to the police. He added that he and his siblings were

brought up by their mother and that on that day he had arrived at the homestead from Saretho, where he had been living with his grandmother.

22. He went on to state that after the disagreement, he remained at the homestead and later took dinner. His father then went to the place where he was sleeping and told him to leave the matter of his brother's death to the elders. He stated that he knew that his father had been given one camel to agree to reconciliation talks over the death of his brother. He explained that this happened at about 10 p.m., and that he and his father exchanged words before his uncle intervened and resolved the disagreement. He insisted that nothing happened that night or in the early morning hours of the following day, and denied his father's claim that he had assaulted him.
23. Yusuf further stated that at 1 p.m. that day, he was arrested by a police officer and taken to the police station without a cause. He testified that the police declined his request to record his statement. He explained that his father had separated from his mother twenty-five years earlier and that his mother lived in Somalia. On cross-examination, he admitted that it was true that he was in the same compound that day with his father and uncle, but in a different house. He said that in the compound there were eight people in total, but none of the seven others would give evidence for the defence.
24. I have considered evidence presented before the trial court, the grounds of appeal and the submissions of the parties. The key

issue for determination is whether the prosecution proved its case beyond reasonable doubt.

25. Section 251 of the Penal Code describes the offence of assault causing actual body harm as follows:

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

26. From the above, it follows that the essential elements of the offence of assault causing actual bodily harm are: assaulting the complainant or victim and occasioning actual bodily harm. [Also See the decision by the Court of Appeal in the case of **Ndaa vs Republic (Criminal Appeal 146 of 1983) [1984] KECA 19 (KLR) (24 January 1984)**].
27. In this case both the complainant and the appellant are people who were known to each other as they are father and son hence, identification is by way of recognition. [See the case of **Republic vs Turnbull [1976] 3 ALL ER 549 at page 552**].
28. The complainant stated how the appellant, his son assaulted him when he asked him not to make noise. He recounted how the appellant picked up a piece of timber and struck him above the right eye and below the left eye. That upon falling down, he continued to kick him. His evidence was corroborated by the evidence of the medical officer together with that of the investigating officer.

29. The medical officer classified the injuries as soft tissue injuries and noted that the cause of injury was both blunt and sharp objects. He stitched and dressed the wounds, administered antibiotics and completed the P3 form and treatment notes which were marked as Pex 1 and 2.
30. In the case of **R vs Morris (1998) CR. App R.336 at 393 cited in Alex Mukurakura vs Republic (2016) KEHC 7013(KLR) the court** stated as follows:  
**"What constitutes "actual bodily harm" for purposes of this Section ...is succinctly and accurately set out in Archibold (1997(ed) at para 19-197: - "Bodily harm has its ordinary meaning and includes any hurt or injury calculated to interfere with the health or comfort of the victim: such hurt or injury need not be permanent, but must be more than merely transient or trifling..."**
31. In his defence the appellant contended that the case herein was merely a family wrangle and the same ought to have been dealt with differently. Despite him conceding to the fact that he was present at the scene at the material time and that he had disagreed with his father, he denied assaulting his father.
32. Although, there was no other corroborative evidence from an independent eye witness, the trial court after cautioning itself was satisfied that the evidence was credible. See **Abdulla Bin Wendo & Another vs Reg (1953) 20 EACA 166 and Roria vs Rep (1967) EA 583** where the court held that a court can safely

convict based on the evidence of a single witness after cautioning himself of the dangers. I have no doubt the testimony of Pw1 was not shaken. It was consistent hence credible. The same is corroborated by the medical evidence. I have no doubt the appellant was responsible. There is no reason for the father to have inflicted injuries upon himself.

33. Appellant's defence was mere denial. There is no material contradiction on the type of weapon used to assault him. On the claim that the appellant was not informed of his right to legal representation, I do not find any prejudice suffered considering that he extensively cross examined the witnesses.
34. Accordingly, I do not find merit in the appeal. The conviction is thus upheld.
35. On sentence, it is trite that sentencing is a discretion of the trial court and being so it must be done judiciously. Guidance on the subject can be derived from the Court of Appeal decision in the case of **Shadrack Kipkoech Kogo vs R Eldoret Criminal Appeal No.253 of 2003** where it was held that:  
**"Sentence is essentially an exercise of discretion by the trial court and for this court to interfere it must be shown that in passing the sentence, the sentencing court took into account an irrelevant factor or that a wrong principle was applied or that short of these, the sentence itself is so excessive and therefore an error of principle must be interfered.**  
(Also see also **Sayeka vs R (1989 KLR 306]**.

36. 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 it might itself not have passed that sentence, these alone is not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the factors already stated is shown to exist.
37. The appellant was sentenced to 42 months (3 ½ years) in prison while the law 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. Noting the circumstances of the case herein, it is my considered view that it was not demonstrated that the sentence by the trial court was based on wrong principles. To the contrary, it is my view that the appellant requires more time to be rehabilitated and that the sentence meted by the trial magistrate was based on sound principles.
38. On whether the court failed to take in consideration the time spent in remand during the hearing of the matter, I note from the record that the appellant was arrested on 14.11.2024 but was arraigned before court on 18.11.2024 and sentenced on 26-8-2025 translating to 9 months and 12 days. During this time, he was in lawful custody hence the need to consider the said days. The foregoing is fortified under Section 333(2) of the Criminal Procedure Code which provides: -

**“Subject to the provisions of Section 38 of the Penal Code, every sentence shall be deemed to commence from and to include the whole of the day of, the date on which it was pronounced, except where otherwise provided in this Code.**

**Provided that where the person sentenced under subsection (1) has prior, to such sentence shall take account of the period spent in custody.”**

39. It is clear from the above provision that the law requires courts to take into account the period the convict spent in custody.
40. The provisions of **section 333(2) of the Criminal Procedure Code** was the subject of the decision in **Ahamad Abolfathi Mohammed & Another vs Republic [2018] eKLR** where the Court of Appeal held that: -

**“The second is the failure by the court to take into account in a meaningful way, the period that the appellants had spent in custody as required by section 333(2) of the Criminal Procedure Code. By dint of section 333(2) of the Criminal Procedure Code, the court was obliged to take into account the period that they had spent in custody before they were sentenced.**

**Although the learned judge stated that he had taken into account the period the appellants had been in custody, he ordered that their sentence shall take effect from the date of their conviction by the trial court. With respect, there is no evidence that the**

**court took into account the period already spent by the appellants in custody. “Taking into account” the period spent in custody must mean considering that period so that the imposed sentence is reduced proportionately by the period already spent in custody...**

41. As such, the sentence by the trial court shall commence from the time when the appellant was arraigned before the court which is 18.11.2024 less the period spent in custody which is 9 months and 12 days.  
ROA 14 days.

Dated, signed and delivered this 16<sup>th</sup> day of December 2025

.....  
**J. N. ONYIEGO**  
**JUDGE**