

REPUBLIC OF
KENYA IN THE COURT
OF APPEAL
AT MALINDI
[CORAM: MURGOR, NYAMWEYA & OCHIENG' JJ.A]

CRIMINAL APPEAL NO E086
OF 2023 BETWEEN
SAFARI KAINGU KAHINDI...

.....
APPELLANT
AND
REPUBLIC...
.....

RESPONDENT

*(An appeal from the judgment of the High Court of Kenya at
Malindi (S. M. Githinji J.) delivered on 10th July 2023*

in

*Criminal Appeal no.
62 of 2018 From the
original conviction in*

Malindi Chief Magistrate Criminal Case No 527 of 2014)

JUDGMENT OF THE COURT

1. This judgment is on a second appeal brought by Safari Kaingu Kahindi, the appellant herein, arising from the dismissal of his first appeal by the High Court of Kenya at Malindi (**S. M Githinji J.**) in a judgment delivered on 10th July 2023 in **Criminal Appeal No. 62 of 2018**. The High Court consequently upheld his conviction for the offence of grievous harm contrary to section 234 of the Penal Code, and sentence of 30 years' imprisonment that had been imposed by the Chief Magistrate's Court at Malindi (**Hon. C.**

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O. Nyawiri SRM) in Criminal Case No 527 of 2014.
(hereinafter “the trial Court”). The particulars of the
offence were

that on 10th April 2014 at Mkono wa Jogoo village in Magarini sub county within Kilifi County, the appellant unlawfully did grievous harm to Kazungu Charo Karisa.

2. Briefly, the proceedings leading to the appellant's conviction are as follows. The trial commenced in the trial Court with five prosecution witnesses adducing their evidence between 20th July 2015 and 27th July 2017. Kazungu Charo Karisa (PW 1) was at his home in Mkono wa Jongoo area on 10th April 2014 when three of his goats went to the farm of the appellant who was his neighbour, and damaged his casuarina trees. PW1 went and met the appellant at the boundary of their properties, and inquired about the value of the trees that had been damaged, whereupon the appellant told him that a tree was Kshs 1,000/- and therefore the value of the damaged trees was Kshs 7,000/-. When PW 1 asked the appellant why he had planted trees blocking the boundary, the appellant beat him with a club and stabbed him on the stomach with a knife. PW1 reported the assault at Marereni Police Station and was referred to Malindi District Hospital where he was admitted from 10th April 2014 to 22nd May 2014 for treatment. These events were also witnessed and narrated by Ndzingo Kahindi Kaingu(PW3) who was PW1's wife, and their daughter Mapenzi Kazungu Charo (PW2).
3. P.C. Allan Mohamed (PW4) received the complaint from PW1 on 10th May 2014 and on 17th September 2014, the appellant

was arrested and charged for the offence of grievous harm;
while Ibrahim Abdullahi (PW5), a

clinical officer, examined PW1 on 16th May 2014, and filled the P3 form which indicated that PW1 was admitted at Malindi Sub County Hospital from 11th April 2014 to 22nd May 2014 with a stab wound, and an operation was done on his upper stomach under general anaesthesia. PW5 also produced the discharge summary and categorized the injury as grievous harm.

4. On 27th July 2017 the trial Court and found that the appellant had a case to answer and he was placed on his defence. The appellant failed to attend court and he was arrested and brought to the trial Court on 17th April 2018, his bond was cancelled, he was remanded in custody and a hearing date set for 10th September 2019. When the case came up for mention on 11th May 2018, the appellant sought to change his plea, whereupon the charges were read out to him on 15th May 2018, which the appellant admitted were true, and a plea to guilty was entered by the trial Court. The facts were then read out by the prosecution which the appellant again admitted as being true, and he was consequently convicted and given the opportunity to mitigate, which he did. After considering the mitigation, and the trial Court sentenced the appellant to serve thirty years' imprisonment on the same day, 15th May 2018.
5. The appellant being dissatisfied, filed his first appeal to the High Court at Malindi, and the learned Judge of the High Court found the issues for determination in the appeal to be

whether the plea of guilty by the appellant was equivocal,
and whether the sentence of 30 years

imprisonment was harsh and excessive. The learned Judge having found that the trial Court followed all the required legal procedures when taking the appellant's change of plea and that the plea of guilty was unequivocal, concluded that the appellant was only entitled to an appeal against the sentence. On the sentence, the learned Judge noted that the appellant pleaded guilty at an advanced stage in his case after he had been placed on his defence and absconded leading to cancellation of this bail and forfeiture of cash bail. Therefore, that the appellant deserved no significant discount on the sentence for saving court's time and resources in the said plea of guilty, and the 30 years sentence imposed is within what the law provided. Lastly, that the court could not interfere with the trial court's discretion in sentencing unless it was shown that the sentence in place was either illegal, harsh or excessive, which had been established or demonstrated.

6. Being aggrieved by the findings of the learned Judge of the High Court, the appellant has raised three grounds in the Memorandum of Appeal that he has lodged in this Court, namely:

- 1) The two lower courts erred in law by failing to take into account his mitigation submissions pursuant to section 216 and 329 of the Criminal Procedure Code.*
- 2) The two lower Court erred in law by failing to observe the objectives of sentencing as required by the sentencing policy guidelines*
- 3) The two lower courts erred in law by failing to take*

into account his pre-trial custody period in his sentence as provided for by section 333 (2) of the Criminal Procedure Code and paragraph 7.10 and 7.11 of the Kenya Judiciary Sentencing Policy Guidelines.

7. The appellant also filed supplementary grounds of appeal in which he stated that the High Court erred in law by failing to consider his age in view of the latest report by the World Health Organization on human life expectancy, and prayed that the appeal be allowed and the sentence of 30 years imprisonment be adjusted considering his mitigating factors. We heard the appeal on this Court's virtual platform on 11th March 2025. The appellant, **Mr. Safari Kaingu Kahindi** was present appearing in person virtually from Shimo La Tewa Maximum prison, while learned counsel, **Ms. Nyawinda** and **Mr. Gichana**, appeared for the respondent.
8. The appellant submitted that the mitigation contemplated in section 216 and 329 of the Criminal Procedure Code, and as defined in the **Black's Law Dictionary, 2nd Edition** is the act of lessening the intensity of something unpleasant or a condition or consequence which is less severe, and the alleviation, abatement or diminution of a penalty or punishment imposed by law. The appellant listed the guidelines to be followed in sentencing as, the age of the offender; being a first time offender; whether the offender pleaded guilty; character and record of the offender; remorsefulness of the offender; the possibility of reforms and social re-adaptation of the offender and any other factor that the Court may consider relevant. It was his submission that this Court was clothed with jurisdiction to entertain this appeal in terms of section 361 of the Criminal Procedure

Code. He urged us to treat his grounds of appeal as one of law particularly considering that the trial Magistrate failed to take into account the fact of his age in light of

the recent report by the World Health Organisation on human life expectancy.

9. Reliance was placed on the decisions by this Court in **Macharia vs Republic (2003) EA 559** that this Court would only alter a sentence on if it is evident that the judge acted upon some wrong principles or overlooked some material factors or the sentence is manifestly excessive in view of circumstances of the case; and in **Ali Abdalla Mwanza vs Rep Criminal Appeal No. 259 of 2012 where the Court when** considering whether a sentence of 40 years was manifestly excessive, had taken note of the latest health profile for Kenya compiled by the World Health Organization (WHO) on life expectancy of about 67 years. The appellant urged us to review his sentence considering that he was 55 years old, which implied that he had a “paltry” nine (9) years to live, his health status and the plight of his family.
10. Learned counsel for the respondent submitted that the appellant’s guilty plea was unequivocal as the charges were read and explained to the appellant and his response was unambiguous, therefore the Court proceeded to convict and sentence the appellant procedurally and gave him sufficient opportunity to dispute any fact at mitigation; that the appellant in mitigation, indicated his challenges at home with his wife and mother-in-law and the Judge noted that the trial Magistrate had taken note of the appellant’s mitigation

before sentencing him and was also cognizant that the appellant pleaded guilty but had not saved the Court's

time and resources; that the appellant was not remorseful; and upon evaluating the extent of the injuries suffered by the victim, the Judge found the sentence meted by the trial Court to be lawful and reasonable.

11. In addition, the learned Judge took into account that the appellant was in custody for less than 2 months before he was released on bond, and was later arrested on 16th April 2018 after absconding and detained on 15th May 2018 for another 1 month totalling to custody of 3 months, and found that the period is not sufficient to warrant a reversal of a proper conviction. Lastly, that the appellant was sentenced to 30 years imprisonment whereas the offence of grievous harm attracted life imprisonment. Therefore, that the learned Judge did not find any ground upon which to interfere with the sentence as it was evident that no material factor was overlooked nor immaterial factor taken into account neither did the Judge acted on a wrong principle and the sentence is not manifestly excessive.
12. It is notable that the appellant's appeal is essentially one against his sentence, and he has not challenged his conviction. The main issue for determination is whether there is any justification for this Court to interfere with the sentence of thirty years' imprisonment that was imposed upon the appellant. The role of this Court on a second appeal in this regard was set out in **Karani vs R (2010) 1 KLR 73** as follows:

“...By dint of the provision of section 361 of the Criminal Procedure Code, we are enjoined to consider only matters of law. We cannot interfere with decision of the superior Court on fact unless it is demonstrated that the trial court and the first appellate Court considered matters, they ought not

to have considered or that they failed to consider matter they should have considered or that looking at the evidence as a whole they were plainly wrong decision, in which case such omission or commission would be treated as a matter of law.”

13. The appellant challenges the sentence imposed upon him on the ground that the two courts below did not consider his mitigation, the objectives of sentencing, his pre-trial custody period and his age. We need to reiterate at this point that under section 361(1)(b) of the Criminal Procedure Code, this Court can only interfere with sentencing when a question about the legality of a sentence has been raised, and our jurisdiction does not allow us to consider matters of fact unless it is shown that the two courts below considered matters of fact that should not have been considered or failed to consider matters that they should have considered, or that looking at the evidence they were plainly wrong. Further, by dint of Section 361(1) of the Criminal Procedure Code, the appellant is precluded from raising the complaint on the severity of sentence on a second appeal as severity of the sentence is a matter of fact.

14. This position has now been clarified by the Supreme Court of Kenya in **Republic vs. Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 Others (amicus curiae) [2024] KESC 34 (KLR)** where it was held that:

“Before further delving into the question of constitutionality or otherwise of the sentence, we must take cognizance of provisions of Section 361(1) of the Criminal Procedure Code

which, in cases of appeals from subordinate courts, explicitly bars the Court of Appeal from hearing issues relating to matters of fact. This section also elaborates that the severity of sentence is a matter of fact and

not of law and the Court of Appeal is barred from determining questions relating to sentences meted out, except where such sentence has been enhanced by the High Court.”

15. It is notable that the issue of the appellant’s age and the factors he asks us to take into account in his sentencing are matters of fact that we are precluded from addressing on a second appeal, quite apart from the fact that they were not raised in his mitigation in the trial Court. On whether the trial Court and High Court failed to consider the appellant’s mitigation, we will reproduce verbatim the proceedings in the trial Court to guide our determination. The proceedings on the appellant’s sentencing started with his mitigation in which he stated as follows:

“Accused in Mitigation

The complainant is my wife. My grandmother had died on that day and my mother-in-law helped me with timber for making a coffin. Later my mother-in-law came his son (sic) and removed the coffin from the ground seeking his timber. No, it is my wife the complainant who removed the coffin and started to remove the timber used to make the coffin.

Prosecutor: No previous records of conviction of accused.:”

16. The trial Magistrate thereupon during the sentencing held as follows:

“Court:

I have considered the mitigation by the accused, the submission of the prosecution, the offences

with which the accused has been charged and the circumstances under which it was committed. I have also looked at the P3 form dated 10.5.2014 and signed on 16.5.2014 by the clinician (Exhibit 1), the treatment notes form Marereni dispensary (exhibit 2) in respect of the complainant.

I have noted that the complainant suffered very serious injuries and had to be admitted for 11 days.

Consequently, the accused is hereby sentenced to serve thirty (30) years imprisonment. Right of appeal 14 days.

***C.O. Nyawiri,
SRM***

15.5.2018”

17. Upon appeal, the High Court after considering the circumstances of the offence and the proceedings before the trial Court found that there were no grounds established to interfere with the trial Court’s exercise of discretion. It is notable that the trial Court and High Court did expressly take into account the appellant’s mitigation, and it is notable that he expressed no remorse on the injuries he caused and that he had absconded during trial, which were relevant factors taken into account by the trial Court and High Court.
18. On the issue of whether his pre-trial custody period was taken into account, this is a matter of law and the proviso to section 333(2) of the Criminal Procedure Code provides that where a person has been held in custody prior to sentencing, the sentence shall take account of the period spent in custody. We note from the record that before the appellant was released on bond pending trial, he had spent some time in custody, and that after he absconded, he was again remanded in custody before his conviction and sentence. He is legally entitled to have the period spent in custody

factored in the period of his sentence of 30 year's imprisonment,

and we accordingly direct that this be done in tandem with the proviso to section 333(2) of the Criminal Procedure Code.

19. We therefore find that the appellant has not established any grounds on which the Court can interfere with the sentence of 30 year's imprisonment save for the direction we have given with respect to the factoring of the time he spent in custody before his sentencing in the computation of the sentence. Consequently, we hold that the appeal against the sentence is only partially allowed to this extent. All other grounds lack merit and are dismissed.
20. Lastly, this judgment is delivered and signed under Rule 34(3) of the Court of Appeal Rules (2022), following the untimely death of the **Hon. Mr. Justice Fred Ochieng JA** prior to its delivery.
21. Orders accordingly.

Dated and Delivered at Mombasa this 19th day of December, 2025

A.K. MURGOR

.....
JUDGE OF APPEAL

P. NYAMWEYA

.....
JUDGE OF APPEAL

I certify that this is the true copy of the original

signed
DEPUTY REGISTRAR