

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NANYUKI
CRIMINAL APPEAL CASE NO. E014 OF 2024

SAMUEL NYONGESA WAFULA.....

.....APPELLANT

VERSUS

REPUBLIC.....

.....RESPONDENT

(From original Conviction and Sentence in Nanyuki CMCR
E788 of 2023 - Hon. B.M. Mararo - SPM)

J U D G M E N T

1. The Accused, **SAMUEL NYONGESA WAFULA**, was charged with **Assault** causing actually bodily harm contrary to section 251 of the Penal Code. The particulars of the offence being that on 28th day of May 2023 at Muthara village of Laikipia Central sub-county, in Laikipia county willfully and unlawfully assaulted Peter Maina Kimotho occasioning him actually bodily harm. The accused also faces another count of Burglary contrary to section 304(2) of the Penal code. The particulars of the offence being that on 28th day of May 2023 at around 0045hours at Mutara village of Laikipia county, Central sub-county in Laikipia county he broke into a kitchen of Peter Maina with intent to steal. After

conviction he was sentenced to serve five (5) years imprisonment.

2. Aggrieved by the judgment, conviction and sentence, the Appellant has filed these mitigation grounds of appeal based on the following grounds;

1. That he is a first offender.
2. That he is a family man with one child aged two years.
3. That he is a sole breadwinner of the family.
4. That he prays this honourable court to grant him non-custodial sentence.
5. That he will comply with court's directive if afforded non-custodial sentence.
6. That he is remorseful.
7. That he prays the period stayed in remand be included in his sentence.
8. That he promises to be a law abiding citizen.
9. That he prays to be present during the hearing of this appeal in order to adduce more grounds and this appeal be given the earliest date possible.
10. That he prays this appeal to succeed, sentence quashed and he be set at liberty.

3. The appeal was canvassed by way of written submissions.
4. In his submissions, I note the Appellant has introduced new grounds of appeal in submissions. These grounds were not raised in the petition of appeal dated 7th March 2024. This flouts Section **350(2) of the Criminal Procedure Act**.
5. The Appellant is thus estopped from relying on the grounds that the offence was not proved to the required degree and that there was no corroboration of the evidence.
6. Nonetheless, noting that the prosecution has addressed the grounds in great details, I see no prejudice and I will admit the grounds purely on ground that the Appellant is a *pro se* litigant who is disadvantaged in appreciation of the law and its procedures.
7. It is the Appellants submission that the prosecution did not provide proof to the required standard in law. He states that at page 5 of the proceedings, the complainant indicated that the incident was on 28/5/25 at 1.30 am yet at the said time the Appellant was already arrested for walking in the night at 10.30pm. It is illogical that he committed the offence when he was in custody.
8. He submits that no evidence establishes his culpability in the commission of the offence. He asserts that the timeliness, inconsistencies in the witness testimonies and

the glorying (sic) accounts of the events of the said night of terror are too disparate for a concise sequence of events that pinpoints him as the culprit.

9. He submits that the conviction and sentence was erroneous and unjust.

10. For the state, it is submitted that the case was proved to the required degree. That the Appellant was properly identified at the scene by PW1 who had a torch and who knew him since the Appellant was a farmhand employed in the locality. Further, that there was medical evidence of the injury on PW1.

11. On sentence, it is submitted that the same was not only lawful but lenient in the circumstances.

12. This being the first appellate court, my duty is well spelt out namely; to re-evaluate the evidence tendered before the trial court and subject it to a fresh analysis so as to reach an independent conclusion as to whether or not to uphold the decision of the trial court. This duty was set out in **Okeno vs. Republic [1972] EA** by the Court of Appeal 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."

- 13.** A recap of the evidence is as follows;
- 14.** PW-1 Peter Maina Kamotho testified afresh that on 28/05/2023 he was asleep at home, he heard noises and thought it was a cat. A flask dropped creating loud noise. PW1 went through the door to the kitchen. He had a torch on. He found the Appellant who cut him with a panga on the head. He called for help. His wife responded and attended to his wounds. Neighbours came to his rescue, and the appellant fled through the shamba. PW1 was then escorted to Ndaragua hospital. He identified the appellant and said the appellant is a casual laborer in a nearby shamba.
- 15.** PW2 Philip Mbugua testified that on 28/05/2023 at around 1.30 a.m., he was called by PW1's wife to escort PW1 to hospital. He escorted PW1 to hospital using a motor vehicle.
- 16.** PW3 Peter Ndungu Ndirangu testified that on 28/05/2023 they were on patrol in Wiyumiririe when they

were called by a villager informing them that PW1 had been cut by the appellant. They proceeded to PW1 's home and found blood. 'They then heard screams at Mama Wahu, they went there and found the bathroom open and later found the appellant had been arrested by members of the public who were trying to lynch. They persuaded them not to lynch the appellant; they recovered a panga from the appellant. PW1 had been cut on the head and was escorted to hospital.

17. PW4 Samuel Muchemi a colleague of PW3 and corroborated the later's evidence.

18. PW-5 Martha Wachira Mbogo produced the P3 form filled in respect of the injuries to PW1. The degree of' injury was classified as harm.

19. The investigating officer, PC Vincent Indigu (PW6), testified that on 28/05/2023 he was instructed to investigate a case of assault. He established stablished that PW1 had a bandage and issued him with a P3. He further found the appellant had been arrested by NPR officers. He recorded witness statements and recovered as a panga which he produced as exhibit 2.

20. The appellant gave sworn testimony and called no witnesses. It was his testimony that on 27/05/2023 he had

gone to buy food having been sent money by his boss. He met people on the road who started beating him and they took his phone. He was not told what he had done and he was told he would know ahead (sic). He came to know in court (sic). He was asked for sh 5000 but he refused to pay. He was taken to the police station where he stayed for 2 days. The complaint was that he had beaten the complainant. He did not.

21. I have had occasion to consider the evidence at trial. In so doing, I have taken cognisance that I neither saw nor heard the witnesses testify and have given due allowance for that fact. I have had due regard of the submissions made and case law cited. I have taken into account the applicable law. The broad issue for determination is whether the prosecution proved its case to the required degree. To answer this question, the court will have to scrutinize the evidence to find whether each ingredient of the offence was proved.

22. Before I venture into analysis of the evidence and the general merit or lack thereof of the appeal, I note that the Respondent has opposed the introduction of new grounds of appeal which the Appellant has purported to introduce in his submissions. This assertion is confirmed by the record.

- 23.** New grounds of appeal cannot be introduced in submissions without first obtaining the leave of the court. The law emphasizes that parties are bound by their pleadings, and the grounds of objection must be clearly set out in the initial Memorandum of Appeal. The memorandum of appeal must comprehensively list all grounds of objection to the decision being appealed against.
- 24.** This rule is all about procedural Fairness: It ensures fairness to all parties, allowing them to know the case they need to answer and preventing an opponent from being ambushed by new issues during submissions.
- 25.** No leave was sought nor granted allowing the introduction of grounds numbered 3.1.4 to 3.3.4. Those grounds ought to be struck out.
- 26.** The initial grounds of appeal addressed mitigating factors and a reading of the same shows that the Appellant was asking the court to grant him a non-custodial sentence. He asserted thereon that he is a family man with one child aged 2 years and that he is the sole bread winner. That he is remorseful. He further sought that the period in which he was in remand be considered. He vowed to be a law abiding citizen.

27. Suffice to note that the parameters under which this court can interfere with sentence do not include the mitigating factors raised by the Appellant. Such factors are relevant at trial to be placed before the presiding magistrate or judge for consideration in the exercise of the discretion to mete out appropriate sentence.

28. This appeal as initially filed and based on the grounds aforesaid would be one for dismissal.

29. I hasten to add that I have perused the record and noted that the Respondent has addressed all the new grounds raised in submissions by the Appellant and thus would not suffer prejudice by the admission of the same. While this trend should not be encouraged, and noting that the Appellant is a *pro se* litigant, I will in the wider interests of substantive justice admit the grounds and deal with the appeal on its merits.

30. The appellant is charged in count one (1) with the offence of Assault causing actual bodily harm contrary to section 251 of the Penal Code.

The offence of assault causing actual bodily harm is established under **section 251 of the Penal Code** which provides:

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

31. The essential elements of the offence of assault causing actual bodily harm were spelt out in **Ndaa v Republic[1984] KLR** as follows;

1. Assaulted the complainant or victim, which,
2. Occasioned actual bodily harm.

32. The court in **Argut v Republic of Kenya (Criminal Appeal**

33. **205 of 2017) [2023] KEHC 2690 (KLR)** described an assault as follows :

“An assault is any act by which a person intentionally or recklessly causes another to suffer or apprehend immediate unlawful violence. The definition of harm as per Section 2 of the Penal Code is;

“harm” means any bodily hurt, disease or disorder whether permanent or temporary”;

34. The Appellant faced a 2nd charge of Burglary contrary to Section 304 of the Penal Code stipulates. The section reads;

“-304. Housebreaking and burglary

1. *Any person who-*

a). breaks and enters any building, tent or vessel used as a human dwelling with intent to commit a felony therein; or

b). having entered any building, tent or vessel used as a human dwelling with intent to commit a felony therein, or having committed a felony in any such building, tent or vessel, breaks out thereof, is guilty of the felony termed housebreaking and is liable to imprisonment for seven years.

2. If the offence is committed in the night, it is termed burglary, and the offender is liable to imprisonment for ten years."

32. The ingredients of the offence of burglary are similar to those of housebreaking save for the fact that burglary occurs at night.

33. In ***Anthony Kilonzo Mutuku v Republic [2019] eKLR, Odunga J.*** (as he then was) outlined the ingredients of the offence as follows: -

"In my view, section 304(1)(a) deals with three scenarios. The first scenario is where a person breaks and enters into a building, tent or vessel used as a human dwelling with intent to commit a felony therein. The ingredients here are that the person must break and enter into a building, tent or vessel. That building, tent or vessel must be one that is used as a human dwelling and the entry therein must be with the intention of committing a felony therein. Therefore, even without committing any offence therein, the offence thereunder is complete as long as the intent is proved.

However, section 304(1)(b) applies where the person, being already inside the building, tent or vessel used as a human dwelling with intent to commit a felony therein, breaks out thereof. Therefore, once it is proved that a person was inside the building, tent or vessel used as a human dwelling and harbouring the intention of committing a felony, breaks out thereof, the offence is complete without necessarily committing an offence.

The last scenario is still under section 304(1)(b) but here, the person, being already inside the building, tent or vessel used as a human dwelling with or without intent to commit a felony therein, does commit a felony therein and breaks..."

out thereof. So under Section 304(1)(a), the breaking is for purposes of gaining ingress while section 304(1)(b), the breaking is for purposes of egress.

35. Has the prosecution proven the ingredients of the offences to the required degree? I have reviewed the evidence as obligated in law to do in order to reach my own findings on the facts.

36. PW1 testified that he was at home asleep when he heard noises and thought it was a cat, he heard a loud bang that dropped a flask, in the kitchen, he flashed his torch, he called his wife and at that point the appellant cut him with a panga. He tried to lock the door from outside, the appellant however managed to escape through the shamba. He was able to identify the appellant as he flashed on him using the torch. He is well known to the appellant as he is a casual laborer in a nearby shamba.

37. The injuries on the complainant were confirmed by eye witnesses and given credence by medical evidence as recorded in the P3 form produced. The Appellant was properly identified by PW1 who knew him before and used light from a torch to pick him out. As regards the count of

burglary, there is ample evidence that the Appellant had already gained entry into the house of PW1. It is quite clear that the Appellant was able to break into PW1's house in order to commit an offence. He was able to gain entry and managed to assault the appellant. The breakage occurred at night hence the charges preferred.

38. Further, PW3 and PW4, while responding to a distress call, came to the scene and indeed found the appellant who had been caught by members of the public in the vicinity and the said panga (Pexhibit 2) was also recovered. The Appellant was arrested within the vicinity by the public. His assertion that he was in police custody at the material time cannot possibly be true.

39. The defence put up by the Appellant is a mere denial. The prosecution bore the duty to prove its case beyond reasonable doubt and the Appellant shouldered no burden to prove his innocence. Where an accused denies an offence and the prosecution has laid out cogent evidence on his culpability, the accused must lay a factual basis which would displace an otherwise cogent prosecution case. The defence put up by the Appellant is a mere denial.

40. The Court of Appeal in ***Kiarie v Republic [1984] KLR 739*** held that **an accused person's defence must be**

weighed against the prosecution evidence, and where the defence raises allegations such as fabrication, malice, or grudges, there must be some evidence to support such claims. A defence based on mere allegations, unsupported by evidence, does not raise a reasonable doubt.

41. Similarly, in ***Muiruri v Republic* [1980] KLR 70**, the court stated that where an accused alleges a frame-up or personal grudge, he must demonstrate circumstances showing motive, conduct, or prior hostility on the part of the complainant or investigators sufficient to suggest fabrication of charges.

42. Our courts have further held that the prosecution is not required to disprove speculative claims of malice or grudges. In ***Joseph Maina Mwangi v Republic* [2000] eKLR**, the Court of Appeal emphasized that bare allegations of ill-will or grudges, without evidential backing, cannot be a basis for rejecting credible prosecution evidence.

43. I would, for good measure, add that, a bare denial like in the present case where the Appellant states he was just arrested with no reasons given and he was charged cannot amount to an effective defence in light of the evidence on record. Without shifting the burden of proof, the Appellant ought to have explained why the complainant and all the witnesses would just pick on him among so many other people in the locality and

frame him. With no rebuttal to the evidence on record, the prosecution evidence remains watertight.

44. Thus the 2 counts that the Appellant faced were proved to the required degree.

45. As regards sentence, no basis is laid for this court's interference with the sentences meted out. Both are legal and neither are they harsh or excessive. The exercise of discretion by the trial court in sentencing cannot be faulted.

46. In the end I must find and hold that there is no merit in the present appeal. The same is dismissed in its entirety.

Dated signed and delivered virtually this 16th day of January 2026.

A.K. NDUNG'U

JUDGE

