

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT EMBU**  
**CORAM: R. MWONGO, J.**

**CRIMINAL APPEAL NO. E015 OF 2025**

**NICHOLAS MBOGO MAGARA.....APPELLANT**

**-VERSUS-**

**REPUBLIC.....RESPONDENT**

*Appeal arising from the decision of Hon. R. Njoki Kahara in Siakago MCCR Case No. E623 of 2023 delivered on 20<sup>th</sup> March 2025*

**JUDGMENT**

**The Charge**

1. The appellant was charged with the offence of causing grievous harm contrary to section 234 of the Penal Code. The particulars were that on 30<sup>th</sup> June 2023 at Mutuobare Market in Mbeere South sub-county of Embu County, the appellant unlawfully caused grievous harm to Robert Mbogo Nduma.
2. The appellant pleaded not guilty to the charge and the matter proceeded to trial. Eventually, he was convicted and sentenced to 5 years imprisonment.

**Petition of Appeal**

3. Dissatisfied with the decision of the trial court, the appellant, being filed a petition of appeal dated 26<sup>th</sup> March 2025 seeking the following orders:
  - 1) The judgement delivered on 20<sup>th</sup> March 2025 and sentence imposed on 20<sup>th</sup> March 2025 be set aside;
  - 2) The appeal be allowed; and
  - 3) This Honourable court be pleased to make such further and other orders as if may deem just in the circumstances.
4. The appeal is founded on the following grounds:
  - 1) That the learned trial magistrate erred in law and in fact in failing to establish that this was a framed-up case brought purposely out of revenge, malice and grudge by the complainant (Robert Mbogo Nduma) to counter a criminal case no. E186 of 2022 of the charge of Arson of the Appellant's house;
  - 2) That the learned trial magistrate erred in both matter of law and facts by disregarding the appellant's defence without cogent reasons and convicting

- the appellant solely on the prosecution witness 2 (PW 2) picked out from a large crowd the complainant alleged to have been assaulted;
- 3) That the learned trial Magistrate erred in law and in facts by convicting and sentencing the appellant who is now aged 59 years and about to serve 5 years imprisonment without option of a fine on framed case full of hearsay, contradiction, revenge and personal vendetta from the complainant who was facing a serious charge of Arson;
  - 4) That the learned magistrate erred in law and facts by relying on distorted and coached evidence full of falsehood and grudges with sole intentions to fix the appellant;
  - 5) That the learned magistrate erred in law and in fact in disregarding the defence of alibi tendered by the appellant and which was sufficiently corroborated by one independent witness;
  - 6) That the learned magistrate erred in fact and law by shifting the burden of proof to the Appellant and failing to prove the benefit of doubt to the appellant thereby arriving at unjust decision;
  - 7) That the whole trial offended and disregarded the fundamental rights of the appellant regarding fair trial as enshrined under Article 50 of the constitution of Kenya 2010;
  - 8) That the learned magistrate misapplied and /or failed to apply sound sentencing policy as set out in our jurisdiction thereby melting out a sentence that was extremely harsh in the circumstances;
  - 9) That the learned magistrate erred in law and fact in failing to establish a clear-cut relationship between the complainant and his witness (PW2) Nicholas Njeru Juma as the two were related;
  - 10) That the learned magistrate erred in both points of law and facts by passing extremely harsh sentence upon the appellant without taking into consideration that the same is excessive and unconstitutional;
  - 11) That the learned magistrate erred in law and facts by not considering non-custodial sentence or any other punishment available for alleged offence.
  - 12) That the learned trial magistrate failed to consider the appellant's mitigating circumstances hence the sentence was unlawful, harsh and excessive; and
  - 13) That the learned trial magistrate in law and in fact in imposing extremely harsh sentence of 5 years upon the appellant.

## Summary of the Evidence in the Trial Court

5. PW1 was Robert Mbogo Nduma a neighbour of the appellant. He stated that he was walking from the market when he met the appellant. The appellant greeted him and he refused to answer. The appellant asked him whether he was still a witch asking him who he had bewitched. The appellant then threw him to the ground and began beating him by kicking him on his back and sides. He raised alarm and he was rescued by members of the public. He reported the matter at Mutuobare Police Post.
6. PW1 was treated at various medical facilities and was found to have sustained 3 fractures ribs on the left side. The broken ribs had punctured his lungs. He was treated and produced treatment notes as evidence. He stated that he did not have any differences with the appellant until the appellant took him to court for arson in Siakago MCCR 186 of 2022 through which he was convicted and sentenced to 14 years imprisonment.
7. On cross-examination, he stated that there was no reason why the appellant assaulted him. That even though the P3 states that he was assaulted at 7:30pm, the incident in fact occurred at 5:30pm and he reported it to the police at 8.23 pm. That the scene of the incident was about 300 meters from the police station where the matter was reported and the journey there took him 30 minutes. That on the day of the incident, he refused to greet the appellant because of the ongoing arson case against him where the appellant was the complainant.
8. PW2 was Nicholas Njeru Juma, a resident of Mutuobare. He stated that at around 6.50pm, he transported PW1 to the police station to report the incident. He stated that he witnessed the incident and he saw the appellant beating PW1 at the market by kicking and stepping on him on the chest. In cross-examination, he said that when he saw the appellant beating PW1, he did not separate them.
9. PW3 was Cpl. Andrew Nyameri who stated that on 30<sup>th</sup> June 2023, PW1 went to Mutuobare Police Post to report that he had been assaulted by the appellant. A P3 form was issued to him and he was sent to hospital for medical intervention. He recorded PW1's statement and those of other witnesses and then arrested the appellant in connection with the offence. In cross-examination, he stated that he visited the scene on the day when the matter was reported at around 6pm. He did not establish what object was used to inflict injuries upon PW1 nor did he know that PW1 and the appellant had another case in court. Upon his visit to the scene, he could not tell whether the appellant was there on the material day.

10. PW4 was Rosemary Wangari Kamau of Embu Level 5 Hospital who produced a P3 form and treatment notes as evidence. She observed that the injuries inflicted on PW1 were caused by a blunt object. There was swelling on the back of his hand, blunt trauma on the chest with massive hemothorax meaning blood on the left side of the chest. The chest injury endangered the life of the patient, and the injuries were classified as grievous harm.
11. DW1 was the appellant. He stated that on the day of the incident, he went to work at 11.00 am. He then left at 2pm to pick up his colleague Hannah Nyambura and they went to a funeral where they stayed until 5pm. After leaving the funeral, he went to his colleague's house where he stayed until 7pm. When he was leaving, he realized he had a flat tyre and so he sent Peter Musyoki to get him a spare tyre from his home. The spare tyre was brought at 8:30pm and he returned home at 9:30pm. He denied assaulting PW1 and stated that he was framed. He pointed out that he was the complainant in Siakago MCCR E186 of 2022 where PW1 was the accused person. He produced certified copies of the proceedings for that case as evidence.
12. DW2 was Hannah Nyambura who testified that she was with the appellant on the day of the incident. She stated that the appellant picked her up from her home at 2pm and they went to a funeral where they stayed until 5pm. They then returned to her home where they arrived at 6pm and the appellant left at 8:30pm. On cross-examination, she stated that she did not know PW1 and that the funeral they attended was of a former colleague's husband called Njuki. She did not have an eulogy to show that she was at the funeral. She did not know where the appellant went after he left her house.
13. DW3 was Peter Musyoki who stated that on the day of the incident at around 7:15pm, he received a phone call from the appellant who sent him for a spare tyre at his house. He picked the tyre from the appellant's house and brought it to him at a village called Estate. He helped the appellant to change the tyre and they left at around 8:30pm. He said that he escorted the appellant up to his home where they arrived at around 9:30pm. He testified that he stayed with the appellant until 10:30pm.

### **Parties' Submissions on the Appeal**

14. The appellant relied on the case of **Okeno v Republic (1972) EA 32** and urged the court to re-examine the evidence adduced before the trial court. He discredited the evidence by the prosecution witnesses as to the time when the

incident occurred, when it was reported at the police post which is a few minutes away from the scene and the fact that even though it was observed that the incident was witnessed by a crowd, none of the onlookers were called as witnesses.

15. Further reliance was placed on the cases of **Joseph Ndungu Kimanyi v Republic [1979] KECA 5 (KLR)**, **Victor Mwendwa Mulinge v Republic [2014] KECA 710 (KLR)** and section 143 of the Evidence Act. He also urged the court to consider that PW1 is also an aggressor who was convicted in Siakago MCCR E186 of 2022 and he is serving an imprisonment sentence. That in that case, he was the complainant and it was proved beyond reasonable doubt that PW1 burned his house down in a case of arson. He submitted that his conviction is unsafe and it should be held as such.
16. In its submissions, the respondent relied on sections 4 and 234 of the Penal Code and the case of **Pius Mutua Mbuvi v Republic [2021] KEHC 9695 (KLR)**. It argued that from the evidence adduced, the elements of the offence had been proved beyond reasonable doubt. It also relied on the cases of **Republic v Mili [2024] KEHC 14858 (KLR)** and **Bernard Kimani Gacheru V Republic [2002] KECA 94 (KLR)**.

#### **Issues for Determination**

17. The issue for determination is whether the conviction and sentence should be upheld.

#### **Analysis and Determination**

18. It is necessary that the trial court's record be re-examined in order to determine the issue. In **Kiilu & Another vs. Republic [2005]1 KLR 174**, the Court of Appeal stated thus:

***“An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate Court’s own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusions. 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 findings and 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.”***

19. Section 234 of the Penal Code provides:

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

20. PW1 stated that he was on his way when the appellant greeted him and asked whether he was still bewitching people but he refused to answer. That for that reason, the appellant threw him to the ground and beat him on his side and back by kicking him. He said that the incident occurred at 5:30pm. PW2 stated that he witnessed the offence and he transported PW1 to the police station at around 6:50pm where the matter was reported.

21. Both PW1 and PW2 stated that the police station was 300m or 500m respectively, away from the scene. PW1 stated that it took him 30 minutes to reach the police station after being assaulted at 5.30 pm yet he reported the matter at a few minutes past 8pm 2½ hours later. PW3 Corporal Nyameri stated that the matter was reported at around 1730 hours, and at 6pm and he visited the scene. When asked in cross examination whether he was aware that the appellant was not around the scene that day, he answered in the negative. This question raised the issue of alibi.

22. DW1, the appellant, stated that on the day of the incident, he picked his colleague DW2 at her home at 2pm and together, they went to attend a funeral. They stayed at the funeral until 5pm when they headed back and he dropped DW2 off at her home by 6pm. He then stayed at the home of DW2 until 8:30pm when he left to go home. According to DW1 and DW3, DW1 got home at about 9:30pm because he had to fix a flat tyre while he was still at the home of DW2.

23. The evidence of PW1 and PW2 contradict one another. Both stated that PW1 was beaten at around 6.20 p.m or 6.50 p.m. in their evidence in chief. In cross examination, PW1 said he couldn't understand why the P3 indicated the assault was at 5.30 p.m. Further, he stated he reported the incident at 8.23 pm yet the police station was a mere 300 meters away.

24. PW2 on his part, said he took PW1 to report to the Police Station after the alleged beating at 6.30 p.m. He was on his bodaboda, and the police station was only 500 m away. PW3 asserted that the report was made at 5.35 pm, a very precise time when the complainant attended the Police Station and that he then went to the scene at 6.00 p.m. These are grave contradictions. They suggest a cooked-up story that simply doesn't add up and is unreasonable.

25. Further, the appellant raised the defense of alibi; that he was not at the scene that day. When the defense of alibi is raised, it is not the duty of the accused person to prove it. The burden of proof remains on the prosecution. This was the sentiment of the court in the case of **Wilson Kyalo Mwendwa v Republic [2018] KEHC 3891 (KLR)** where the court relied on **Ssentale vs. Uganda (1968) EA 36**.
26. The former Eastern Africa Court of Appeal case of **Republic v Sukha Singh s/o Wazir Singh & Others (1939) 6 EACA, 145** guided on alibi defense as follows:
- “If a person is accused of anything and his defence is an alibi, he should bring forward that alibi as soon as he can because, firstly, if he does not bring it forward until months afterwards there is naturally a doubt as to whether he has not been preparing in the interval, and secondly, if he brings it forward at the earliest possible moment it will give prosecution an opportunity of inquiring into that alibi and if they are satisfied as to its genuineness proceedings will be stopped.”*
- (see also **Mercy Chelangat v Republic [2022] KEHC 1827 (KLR)**)
27. When the appellant cross-examined PW3, he (PW3) stated that he did not know that the appellant was not present at the scene at the time of the incident or even on that day. As earlier noted, this defense of alibi was raised while the prosecution’s case was ongoing. The appellant also called witnesses who corroborated his testimony that he was at a different place altogether at the time of the incident.
28. According to the **9<sup>th</sup> Edition Black’s Law Dictionary (page 1380)**, reasonable doubt means: “The doubt that prevents one from being firmly convinced of a defendant’s guilt, or the belief that there is a real possibility that a defendant is not guilty”. In **Duhaime’s Criminal Law Dictionary**, “reasonable doubt is not mere possible doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence leaves the mind of the court in that condition that it cannot say it feels an abiding conviction to a moral certainty of the truth of the charge.”
29. The defense case raised reasonable doubt as to whether the appellant committed the offence. This is said minding the fact that the standard of proof in criminal cases is very high; that is, beyond reasonable doubt. It is trite that once reasonable doubt is found, it is adjudged in favour of the accused person. To this end, the trial court erred in finding that the alibi defense could not hold. It was raised early enough and eventually it punched holes into the prosecution’s case.

30. Taken together with the evidential contradictions noted, the defence of alibi in this case is strengthened and appears more reasonable than the story related by the prosecution witnesses. The result is that a cloud of doubt is cast on the veracity of the prosecution case.

31. The court also takes judicial notice of the fact that in Siakago MCCR E186 of 2022, PW1 was convicted of the offence of conspiracy to commit a felony contrary to section 393 of the Penal Code for which he was sentenced to 3 years and arson contrary to section 332(a) of the Penal Code for which he was sentenced to 14 years. He appealed against the trial court's findings and the appeal was dismissed. This notwithstanding, the arguments made in this case surrounding PW1's guilt in that case and possible grudge with the appellant, cannot be entertained at this point. Moreover, no grudge between them was proved in the present case beyond reasonable doubt.

### **Conclusions and Disposition**

32. Ultimately, I conclude that the doubts raised by the evidence of PW1, PW2 and PW3 narrated above, together with the defense alibi evidence, lead me to the conclusion that the defence case is more persuasive than the prosecution. I therefore find that the offence was not proved beyond reasonable doubt.

33. Accordingly, the appeal succeeds and I make the following orders:

- 1) The order of the trial court convicting and sentencing the appellant is hereby set aside;
- 2) The appellant is hereby set free forthwith unless otherwise lawfully held.

34. Orders accordingly.

**Delivered, dated and signed at Embu High Court this 28<sup>th</sup> day of January, 2026.**

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**R. MWONGO  
JUDGE**

**Delivered in the presence of:**

1. Appellant Present in Court
2. Ms. Achola for Appellant
3. Francis Munyao - Court Assistant