REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIBERA

CRIMINAL APPEAL NO. E117 OF 2025

FREDRICK OUMA……..
…..APPELLANT

VERSUS

REPUBLIC……
RESPONDENT

(Being an appeal against the original conviction and sentence delivered on 23rd April 2025 by Hon. Maroro P.M at Kibera Chief Magistrate's Court Criminal Case no. E257 of 2024 Republic vs Fredrick Ouma)

JUDGEMENT

1. The appellant was charged and after a full trial convicted of two counts of offences: Count I grievous harm contrary to section 234 of the Penal Code and Count II, offensive conduct contrary to section 94(1) of the Penal Code. He was sentenced to life imprisonment in count I and Count II held in abeyance.
2. In the petition of appeal and amended grounds of appeal, he raised the following main grounds: The appellant challenged the totality of the prosecution's evidence against which he was convicted; he challenged the sentence imposed as being excessive and urged the court to quash his conviction and set aside the sentence.
3. This is the first appellate court and in **Okeno v. R [1972] EA 32,** the Court of Appeal for East Africa laid down what the duty of the first appellate court is. It is to analyse and re-evaluate the evidence that was before the trial court, and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court but bearing in mind that it never saw the witnesses testify.

4. The prosecution called two witnesses. PW1, Saumu Abdala Muslim, a businesswoman residing in the Olympic area, testified that on 19th January 2024 at about 11.00 am, while on her way to buy breakfast, she heard screams from a corridor. On approaching, she found a man being assaulted by two men and pleading for mercy. When PW1 intervened and asked them to stop, the appellant challenged her intervention. He was armed with a metal bar and struck her twice on the left hand. She raised her hand to shield her head from a further blow and sustained a fracture to the wrist.
5. PW1 testified that she sought treatment at Mbagathi Hospital and reported the incident at Kibra Police Station. She was issued with a P3 form, hospital card, treatment notes, and receipts, which were produced as exhibits. She identified the appellant as her assailant, stating that she had previously seen him at a welding shop.
6. In cross-examination, PW1 stated that she recorded her statement on 3rd February 2024 and that she went to hospital immediately after the incident. She maintained that the appellant, together with another person, was beating the initial victim using kicks and blows. She testified that the appellant abused her, picked a metal bar from the shop, struck her, and fled with the bar. She further stated that she later identified the appellant at Kibra Police Station.
7. PW2, Kamau Mariga Christian, a medical doctor, testified that he examined the complainant and completed a P3 form dated 29th January 2024. The complainant was aged 51 years. PW2 noted that she had sustained a compound fracture of the upper limb, approximately ten days old. He confirmed that she had initially been treated at Nairobi Mbagathi Hospital on 23rd January 2024. In

his opinion, the injuries amounted to grievous harm. He produced the P3 form, treatment card, and receipts as exhibits.

8. PW2 further testified that the injury was sustained on 19th January 2024 and that he examined the complainant ten days later. He stated that he relied on the medical history, treatment notes, X-ray report, and his own physical examination in completing the medical report.
9. In his unsworn defence, the appellant denied the offence. He stated that on 19th January 2024 he was in Oyugis and received a call from one Jackline Moraa, whom he described as the complainant's neighbour. He alleged that she informed him of a dispute over customers and asked whether he could assist her to secure another stall, to which he responded that he was not in the area.
10. The appellant further stated that on 2nd February 2024, after returning to Nairobi and while at his workshop, the complainant approached him demanding Jackline's telephone number. He claimed that upon his refusal, the complainant abused and threatened him. He alleged that two police officers later came to his workshop posing as customers, arrested him, and that he was subsequently charged.
11. The trial court considered the evidence in totality and convicted the appellant on both counts.
12. In count I, the offence charged was 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.**

13. 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 any permanent or serious injury to any external or internal organ, membrane or sense;**

14. Proof of grievous harm in this case was established through consistent medical and lay evidence. PW1 testified that the appellant struck her twice on the left hand with a metal bar, causing a fracture at the wrist. She sought treatment at Mbagathi Hospital and later reported the matter to the police. The nature and extent of the injury were confirmed by PW2, the medical doctor, who examined the complainant and completed the P3 form. He noted a compound fracture of the upper limb, approximately ten days old, and classified the injury as grievous harm. The P3 form, treatment notes, and X-ray report were produced in evidence.

15. Section 234 of the Penal Code defines grievous harm to include any harm which amounts to a maim or serious injury. The medical evidence placed before the court was clear that a compound fracture of the wrist constitutes grievous harm. Further, the evidence established that the injury was inflicted using a metal bar, which is plainly a dangerous weapon. PW1's testimony that the appellant picked the metal bar from the welding shop and used it to assault her was not shaken on cross-examination and was consistent with the medical findings.

16. As to mens rea, it is settled law that an intentional and unlawful assault resulting in grievous harm satisfies the mental element of the offence. The appellant deliberately struck PW1 with a metal bar when she intervened to stop an assault. There was no suggestion of accident, provocation, insanity under section 12 of the Penal Code, or intoxication within the meaning of section 13 thereof. The appellant's unsworn defence was a bare denial and did not displace the prosecution evidence on intention.
17. I am satisfied that the prosecution proved, beyond reasonable doubt, that the appellant unlawfully and intentionally assaulted the complainant and caused her grievous harm. All the ingredients of the offence were established. The conviction in count I is therefore upheld.
18. In count II, the appellant was charged and convicted for the offence of offensive conduct contrary to section 94(1) of the Penal Code. The particulars are that the appellant in a public place namely Olympic used abusive words namely 'Malaya' to the complainant with intent to provoke a breach of peace. The section provides as follows:

> **"Any person who in a public place or at a public gathering uses threatening, abusive or insulting words or behaviour with intent to provoke a breach of the peace, or whereby a breach of the peace is likely to be occasioned, is guilty of a misdemeanour."**

19. From the statutory wording, the prosecution was required to prove, beyond reasonable doubt, four essential elements. First, that the words complained of were used in a public place. Second, that the words were threatening, abusive or insulting. Third, that

they were directed at the complainant. Fourth, that they were uttered with intent to provoke a breach of the peace, or in circumstances where a breach of the peace was likely to occur.

20. The prosecution relied solely on the testimony of PW1, who alleged that the appellant abused her using the word “Malaya”. No other witness testified to having heard the alleged words. Although PW1 stated that the incident occurred in a public place, there was no independent evidence from any member of the public, the alleged victim of the initial assault, or any other bystander to corroborate the utterance of the words or the surrounding circumstances.
21. The evidence on record shows that the incident took place in a corridor near a welding shop. While this may amount to a public place, the prosecution did not call any witness to confirm the presence of other persons, the reaction of the public, or that the alleged words caused or were likely to cause a breach of the peace. The alleged offensive words were not recorded contemporaneously, nor was any explanation given as to why no independent witness was availed, despite the incident occurring in broad daylight at about 11.00 am.
22. Further, intent to provoke a breach of the peace cannot be inferred merely from the use of an insulting word. The prosecution was required to demonstrate, through evidence, that the appellant intended to provoke violence or disorder, or that such breach was likely to occur. No evidence was led to show that the complainant reacted violently, that a crowd gathered, or that the situation escalated due to the alleged words. The evidence

instead shows that the physical assault immediately followed, which was the subject of a separate and distinct charge.

23. In the absence of corroboration, and given the existence of an ongoing physical confrontation, the court is left with the uncorroborated assertion of PW1 against the denial by the appellant. In criminal proceedings, such evidence must be approached with caution, particularly where the alleged words form the sole basis of the charge.

24. I find that the prosecution failed to prove the offence under section 94(1) of the Penal Code beyond reasonable doubt. The conviction on count II was therefore unsafe and cannot stand. The appellant is accordingly acquitted on that count.

25. On sentence, the appellant was sentenced to serve life imprisonment in count I. Section 234 of the Penal Code provides that any person who unlawfully does grievous harm to another is guilty of a felony and is liable to imprisonment for life. During sentencing, the trial court considered the appellant's mitigation and that he was a first offender.

26. Section 329 of the Criminal Procedure Code, gives judges and magistrates, in appropriate cases to consider mitigation and mete out a sentence that fits the offence committed despite another sentence being provided for under the Act in which the offence is prescribed. In that regard, I find the sentence-imposed shatters all hopes of the appellant for rehabilitation or having another chance to start afresh.

27. I also take into consideration, as highlighted by the trial court, the appellant deserved a deterrent sentence considering the nature of the offence committed and the harm inflicted on the

victim. However, the appellant needs rehabilitation and the sentence-imposed shatters all hope of that.

28. In the premises, I hereby make the following orders:

    I. The conviction imposed by the trial court in Count I upheld while the conviction in Count II is quashed.

    II. The sentence of life imprisonment imposed in Count I, is hereby substituted with a sentence of ten (10) years imprisonment to run from 4th February 2024 the date of his arrest pursuant to section 333(2) of the Criminal Procedure Code, Cap 75 Laws of Kenya.

Orders accordingly.

Judgement dated and delivered virtually this 12th day of February 2026

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D. KAVEDZA
JUDGE

In the presence of:
Appellant Present

Mr. Mutuma for the Respondent

Karimi Court Assistant.