Genge v Republic (Criminal Appeal E060 of 2025)
[2026] KEHC 3061 (KLR) (5 March 2026) (Judgment)

Neutral citation: [2026] KEHC 3061 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MIGORI

CRIMINAL APPEAL E060 OF 2025

DKN MAGARE, J

MARCH 5, 2026

BETWEEN

KELVIN CHACHA GENGE ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

1. This is an appeal from the Judgment of the trial court, Hon. J.P. Nandi (SPM) in Kehancha SPMCR No. E115 of 2025.

2. The Appellant was jointly charged with causing grievous harm contrary to Section 234 of the Penal Code. The particulars of the offence were that the Appellant, on 25.02.2025, around 1300 hours in Tebesi village in Kuria East Sub-County within Migori County, unlawfully did grievous harm to Julius Chacha Genge.

3. The appellant was convicted and sentenced to 30 years' imprisonment. He appealed and set forth the following grounds of appeal:

    a. That the learned trial court erred in both law and fact by meting out a mandatory sentence despite the weak circumstances of the case.

    b. That the learned trial court erred in both law and fact by meting out a very harsh and excessive sentence not proportionate to the circumstances of the case.

    c. That the learned trial court erred in both law and fact by failing to consider both the defence and the mitigations of the appellant (sic).

    d. That the learned trial court erred in both law and fact by convicting and sentencing the appellant by acting on wrong principles.

Evidence

4. The appellant pleaded not guilty, and the appellant was given supporting documents. The hearing was set for 24.04.2025. The complainant, Julius Chacha Genge, a 52-year-old retired police officer and farmer, testified that the appellant is his firstborn son. The complainant was taking a nap at 1300hrs, awaiting lunch. The appellant insulted the sister as an uncircumcised girl. This is not an insult in view of the provisions of the *Prohibition of Female Genital Mutilation Act*, 2011 (No. 32 of 2011). It should not be a topic to be raised against a woman. The complainant stated that the appellant's mother had passed on.

5. The complainant stated that the insults persisted, making him wake up and go to the sitting room to enquire what was wrong. The complainant requested the appellant to forgive the sister and the complainant, but the appellant persisted. The appellant went to the store to cook his own food, then returned and continued insulting the children, who started crying, and the complainant came out of the bedroom. The appellant went outside, where the complainant followed him. The appellant went to his house and took a panga. The appellant aimed at the complainant's head, but the complainant blocked with a hand. The hand and bone were cut and started dangling and bleeding.

6. Julius Chacha Genge followed the appellant to his house, enquiring why he had cut him. The appellant escaped while the complainant was crying in pain. Stephen Chacha got hold of the appellant, but when he saw the complainant's hand, he left the appellant and went to carry out first aid. An old man advised the use of a T-shirt as first aid. The complainant went to Mother Solbrit Health Centre for first aid and thereafter to Oasis Hospital. He was not treated as he had no money and was taken to Kehancha sub-county hospital. He was discharged and left the hospital on 9.03.2025. He had a P3 form filled. All the documents were marked for identification.

7. The appellant raised only one question, where the complainant stated that the appellant was arrested for cutting the complainant.

8. PW2 was Stephen Marwa Chacha, a son of PW1 and a brother of the appellant. The witness stated that the appellant started quarrelling with their younger sister, alleging that the said Melody had insulted him. The child ran into the house. He went to the house when he heard the appellant saying that I can even cut your neck. He stated that PW1 blocked a blow with his left hand, which was cut. The witness moved in and restrained the appellant, who was running away with a blood-stained machete. The appellant tried to cut the witness, so the witness let him go. The appellant escaped. He went and tied his father's hand with a t-shirt and took him to the hospital. He reported the case at Nyamutiro and recorded his statement. On cross-examination, he stated that he witnessed the incident.

9. PW3 was PC Wycliffe Mabwa, of Nyamutiro Police Post. He stated that Collins Chacha went to the police station, stating that the appellant had cut his father, Julius Chacha Genge. The complainant was rushed to the hospital. Members of the public arrested the appellant and took him to the police post. The witness produced all the medical documents. He was not cross-examined.

10. PW4 was Dr. Caleb John Marwa of BNM Hospital. He stated that the complainant, Julius Chacha Genge, was seen at their hospital with a history of a deep cut wound on the hand. On examination, they found the complaint was bleeding from the forearm and had an inability to use the arm. The patient was put in the ward. Open reduction and internal fixation was done. He produced treatment documents, medical reports, and discharge summaries. He was not cross-examined.

11. PW5 was Fanuel Otieno, a Clinical Officer at Chinato Hospital. He produced the P3 and treatment notes. On examination, he found the complainant had severe pain, bleeding of the left arm, and a

fracture. The tool used was a sharp object. The injuries were said to be one week old. He produced the P3 and treatment notes.

12. The appellant was found to have a case to answer, and provisions of section 211 of the Criminal Procedure Code were complied with. The appellant indicated that he was to give evidence on oath and call 2 witnesses.

13. The appellant testified that the complainant was asleep on the material day. Melody insulted him. The complainant came out of the house with a panga and chased the appellant. The appellant went into his house. While they were struggling at the door, the appellant cut the complainant. The appellant managed to escape.

14. On cross-examination, he stated that the complainant was outside the appellant's door while the appellant was inside the house. He stated that he was just framed. He stated that he called his sister musagane, meaning young girl. He said he cut his father as he struggled to close the door.

15. The court convicted him. The appellant mitigated his sentence by praying for leniency. There were no previous records. The court did not call for a pre-sentence report.

Submissions

16. By submissions dated 17.11.2025, the appellant admitted wrongdoing, asked for forgiveness and a chance for rehabilitation, earlier reintegration, and to be out when he is still in a productive age, given that he is only 26 years. He prayed for a chance for restorative justice, family reintegration, and hoped for a healthier relationship with his father, who needs him as much as he also needs his father. He stated that he has had time to give his life to Jesus as his personal Saviour and Lord of his life.

17. He had made peace with himself and with God and hoped for a physical chance to seek the same from the Father on earth, having reconciled himself with the Father in heaven, and having been counselled. He expresses his remorse and is aware of the harm, pain, agony, and embarrassment he caused to his father. He had forgiven himself and asked God for forgiveness as he is aware that what he did was unacceptable. He wished he could turn the clock back, but hoped that he could re-correct to the future. He stated that he lacked direction in life and needed to rediscover himself and his lost soul.

18. The state supported the sentence as apt.

Analysis

19. This being a first appeal, this court is under a duty to reevaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence firsthand. The Court of Appeal for Eastern Africa in Pandya vs Republic [1957] EA 336 held as follows:

> On a first appeal from a conviction by a Judge or magistrate sitting without a jury the appellant is entitled to have the appellate court's own consideration and views of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the witnesses before the Judge or magistrate with such other material as it may have decided to admit. The appellate court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises which witness is to be believed rather than another and that question turns on manner and demeanor, the appellate court must be guided by the impression made on the judge or magistrate who saw the witness but there may be other circumstances, quite

apart from manner and demeanor which may show whether a statement is credible or not which may warrant a court different.

20. On a first appeal, the appellant is entitled to a fresh and exhaustive reevaluation of the evidence on record, with the appellate court drawing its own conclusions, while bearing in mind that it did not have the advantage of seeing and hearing the witnesses. In the case of Okeno v Republic [supra], the East Africa Court of Appeal stated on the duty of the court on a first appeal:

> 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 v. R., [1957] E. A. 336) 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. (Shantilal M. Ruwala v. R., [1957] E.A. 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 findings and conclusions; 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 v. Sunday Post, [1958] E. A. 424.

21. The legal burden is the burden of proof is on the prosecution and remains constant throughout. According to established principles, burden of proof rests upon the prosecution to prove the guilt of an accused person beyond reasonable doubt. This burden does not shift to the accused, save in a few exceptional statutory instances where the law expressly provides otherwise. According to Halsbury's Laws of England, 4th Edition, Volume 17, paras 13 and 14:

> The legal burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party's case. If at the conclusion of the trial he has failed to establish these to the appropriate standard, he will lose. The legal burden of proof normally rests upon the party desiring the court to take action; thus a claimant must satisfy the court or tribunal that the conditions which entitle him to an award have been satisfied. In respect of a particular allegation, the burden lies upon the party for whom substantiation of that particular allegation is an essential of his case. There may therefore be separate burdens in a case of with separate issues.

22. Brennan J, addressed the standard of proof required in criminal cases in the case of Re Winship 397 US 358 {1970}, at page 36164 that:

> The accused, during a criminal prosecution, has at stake interests of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatized by the conviction...Moreover use of the reasonable doubt standard is indispensable to command the respect and confidence of the community. It is critical that the moral force of criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned.

23. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. Lord Denning in Miller vs. Ministry of Pensions, [1947] 2 ALL ER 372 had this to say:

> That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to

deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence of course it is possible, but not in the least probable, the case is proved beyond reasonable doubt, but nothing short of that will suffice.

24. The powers of this Court are circumscribed by Section 382 of the Criminal Procedure Code, which permits a first appellate court to confirm, reverse, or vary any finding, sentence, or order of the trial court. The section reads as follows:

> 382: subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice:
>
> Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings.

25. Within these boundaries, the court is obliged to conduct a fresh and thorough examination of the evidence, reassess the credibility of witnesses, and evaluate any conflicting testimony to reach its own independent conclusions. Throughout this exercise, the legal burden of proof remains unchanged, resting entirely on the prosecution to establish the appellant's guilt beyond reasonable doubt. Only by meticulously scrutinizing all the evidence, while adhering strictly to the statutory framework, can the Court ensure that the appellant is afforded a full and fair reevaluation of the case.

26. The appellant, by his submissions, was challenging only the sentence. However, there is one ground on conviction, which has not been withdrawn. He however, filed amended grounds on sentence only.

27. Grievous harm is defined under Section 4 of the Penal Code 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 to injure health, or which extends to permanent disfigurement, or to any permanent or serious injury to any external or internal organ, membrane, or sense."

28. Section 234 of the Penal Code creates the offence for which the Appellant was charged and convicted as follows:

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

29. The offence of grievous harm requires 4 ingredients, which are:

    a. Assault of the complainant.

    b. Harm which amounts to a maim or dangerous harm, or seriously or permanently injures health.

    c. Involvement of the appellant in the assault.

    d. Unlawfully.

30. The injuries suffered by the complainant injured one of his organs, that is, the left hand. The injuries, therefore, fit the description of grievous harm. The next question is whether they were inflicted by the appellant. All the witnesses, including the appellant, testified that the injuries were inflicted by the appellant. The last issue was whether the injuries were inflicted unlawfully.

31. The complainant was assaulted. This was done by the appellant. There was no self-defence involved. The appellant did not cross-examine any of the witnesses; hence, their statements regarding the actus reus were conclusive. It is presumed that the assault, being non-medical, was unlawful. The burden then was on the appellant to show that he had a medical reason or self-defense for the infliction. No such evidence was tendered.

32. Consequently, the appeal on conviction is dismissed for lack of merit. The upshot of the foregoing is that the appeal on conviction is affirmed as it was safe.

33. On sentence, the Appellant submitted that the sentence of 30 years was harsh and excessive. On sentence, the principles upon which an appellate Court will act in exercising its discretion to interfere with a sentence imposed by the trial court are now settled. The Court of Appeal in the case of Ogolla s/o Owuor vs Republic, [1954] EACA 270, pronounced itself on this issue as follows:

> " The Court does not alter a sentence unless the trial Judge has acted upon wrong principles or overlooked some material factors". To this, we would add a third criterion namely, "that the sentence is manifestly excessive in view of the circumstances of the case (R - v- Shershowsky (1912) CCA 28TLR 263)." See also Omuse - v- R (supra) while in the case of Shadrack Kipkoech Kogo - vs - R., Eldoret Criminal Appeal No.253 of 2003 the Court of Appeal stated thus:-
>
> 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 (see also Sayeka – vs- R. (1989 KLR 306)"

34. It follows that the law does not disclose a mandatory maximum or minimum sentence for the offence. The complainant was a retired police officer and the appellant's father. There was no justification whatsoever. The appellant indicated in his submissions that he was remorseful; however, in court, he was not as repentant as in his papers. This made his submissions a poem for the court, far from his heart.

35. The injuries meted out were life-threatening and disfigured a 52-year-old police veteran and his own father over mundane issues. He did not question PW2's evidence that he had threatened to cut off the appellant's neck. I do not doubt that that could have occurred.

36. However, the court notes that the court was in a rush to convict. The appellant had a whole life ahead of him; there was no reason to rush him. He must be guided slowly to the hangman's noose. The court did not consider mitigation by the appellant; it just noted the same.

37. Secondly, the court did not call the pre-sentence report. This will have helped the court not only problematize the imbroglio between the parties but also conceptualize and contextualize it for proper sentencing. The court failed to call for the said report. It is thus not known what the psycho-socio and economic setting of the dispute herein is. The views of the victim, who is the father, ought to have been considered. The court did not consider any ameliorating or aggravating circumstances.

38. Failure to call for and consider the pre-sentence report meant the court lacked crucial details to impose a balanced sentence. The sentence provided under section 234 is as follows:

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

38. The sentencing policy guidelines, 2023 at paragraph 2.3.2 provides as follows:

> The wording used by the Penal Code in most cases is "...liable to...imprisonment" or in some cases using the words "not exceeding..."37 - thus setting out the maximum sentence in most cases. Section 26 (2) of the Penal Code gives the court discretion to impose a sentence shorter than prescribed by the relevant provision except where mandatory minimum sentences are prescribed.

38. Section 26 (2) of the Penal Code provides as follows:

> Save as may be expressly provided by the law under which the offence concerned is punishable, a person liable to imprisonment for life or any other period may be sentenced to any shorter term.

38. That was a misdirection in the sentence. The sentencing guidelines 2023 provide as follows:

4.5.1 In determining the appropriate sentence, courts must assess a number of issues starting with the degree of both culpability and harm.

4.5.2 The assessment of culpability will be based on evidence of the crime provided through testimony where a trial has been conducted, or, where a plea is entered, through the prosecution summary of facts. Aggravating and mitigating features surrounding the offence may be advanced by the prosecution and the accused person (or his/her representative).

4.5.3 Where an offence is committed by more than one offender a court shall ascertain the culpability of each of the offenders involved and render individual sentences commensurate to their involvement in the offence.

4.5.4 The assessment of harm may be based on testimony, or the summary of facts presented and also by a victim impact statement where that has been obtained.

4.5.5 Mitigating factors refers to any fact or circumstance that lessens the severity or culpability of a criminal act and can also include the personal circumstances of the offender.

4.5.8 Having heard all relevant submissions and considered any reports advanced by either prosecution or defence, or the probation or children's officer (where applicable), and any victim impact statement, the court should:

i. Decide as to whether a custodial or a non-custodial sentence should be imposed in line with these guidelines.

ii. In the case of sexual offences, before the terms of a custodial sentence are determined, the court must have recourse to relevant probation reports as required in sections 39 (2) and (4) of the *Sexual Offences Act* No.3 of 2006 that contain provisions about post-penal supervision of dangerous sexual offenders

4.5.6 Convicted offenders should be expressly provided with the opportunity to present submissions in mitigation.

4.5.7 A list of aggravating and mitigating circumstances – which is not exhaustive – is contained within the GATS along with those specific to murder, manslaughter, and wildlife cases, in Part V.

38. Having noted that there was no adverse report and no previous conviction, the Appellant was deserving of a more lenient sentence. The court considered the severity of the injuries. This was its discretion. The court thus considered some relevant factors and left out others.

38. The age of the appellant and the relationship between the parties were not considered. The complainant sustained serious injuries, but these were not life-threatening. Balancing these factors, I find the 30-year sentence excessive. The same is therefore set aside.

38. A proper sentence must reflect the fact that there is a need to restore relationships between the parties, and a need to have reintegration at the earliest opportunity. It is noted that there is no pre-sentence report; hence, no aggravating factor is shown. There appears to be bad blood between the parties. The whole truth will never come out. It is also noted that these were not excessively heinous acts or several cuts. It was one severe cut that was not repeated.

38. In the circumstances, a term of 12 years' imprisonment will suffice, to run from 27.02.2025, the date of arrest.

Determination

38. In the circumstances, I make the following orders: -

a. The appeal on conviction is dismissed.

b. The sentence of 30 years is set aside and substituted with a sentence of 12 years imprisonment, commencing from 27.02.2025, the date of arrest.

c. 14 days right of appeal.

d. The file is closed.

DELIVERED, DATED, AND SIGNED AT NYERI ON THIS 5TH DAY OF MARCH, 2026. JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of: -

Mr. Kihara for the State

Appellant in person

PC Ondimu present

Court Assistant – Michael