



**Mogwasi & another v Republic (Criminal Appeal E058 & E046 of 2024
(Consolidated)) [2026] KEHC 2728 (KLR) (5 February 2026) (Judgment)**

Neutral citation: [2026] KEHC 2728 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAMIRA
CRIMINAL APPEAL E058 & E046 OF 2024 (CONSOLIDATED)**

TW CHERERE, J

FEBRUARY 5, 2026

BETWEEN

DAVID GOTA NYAMOTI 1ST APPELLANT

ELIUD GESORE MOGWASI 2ND APPELLANT

AND

REPUBLIC RESPONDENT

JUDGMENT

Introduction

1. This judgment determines High Court Criminal Appeal No. E058 of 2024, consolidated with High Court Criminal Appeal No. E046 of 2024. The two appeals arise from the same judgment of the Nyamira MCCR E1184 of 2022, delivered on 07th August 2024.
2. The appellants, David Gota Nyamoti and Eliud Gesore Mogwasi, were jointly charged with the offence of grievous harm contrary to section 234 of the Penal Code. Following a full trial, they were both convicted and sentenced to seven (7) years' imprisonment.
3. Each appellant lodged an appeal challenging both conviction and sentence. Given that the appeals arose from a joint trial, were grounded on the same evidence, and raised substantially similar complaints, they were consolidated by order of the Court and heard together.
4. The offence with which the appellants were charged is a serious felony, attracting a maximum sentence of life imprisonment. It involved allegations of violence resulting in grave bodily injury. It is therefore incumbent upon this Court, sitting as a first appellate court, to demonstrate with clarity that each ground raised by the appellants has been fully considered and determined.
5. This being a first appeal, this Court is under a duty to re- evaluate the evidence, assess and weigh it as a whole, in order to arrive at its own findings and independent conclusion. In doing so, the Court has



to take into consideration that it neither saw nor heard the witnesses testify. This duty was well set out by the predecessor of this Court in *Okeno v Republic* [1972] EA 32 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 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.”

6. The Court has re-evaluated and re-analysed the entire evidence on record afresh, bearing in mind that it neither saw nor heard the witnesses testify. In doing so, the Court has remained alive to the gravity of the offence and the attendant liberty interests of each appellant.
7. In determining the consolidated appeals, the Court has carefully considered the charge sheet dated 14th December 2022; the full record of the proceedings before the trial court, including the testimony of all prosecution witnesses and the sworn defences tendered by each appellant; the judgment delivered on 07th August 2024; the P3 Form dated 21st November 2022; the treatment notes from Nyamira Sub-County Referral Hospital of the same date; the CT scan report produced in evidence and the written submissions filed by the appellants and the respondent.
8. From the respective petitions of appeal and submissions, the appellants raised the following complaints:
 1. That the offence of grievous harm was not proved beyond reasonable doubt
 2. That the prosecution evidence was unreliable, contradictory, and insufficient
 3. That the learned trial magistrate failed to properly consider the defence evidence
 4. That the sentence imposed was harsh and excessive.
9. Although the appellants filed separate appeals, the substance of their complaints was substantially similar. The Court has nonetheless borne in mind that each appellant is entitled to an individualised consideration of his appeal, even where the evidence overlaps.

Issues for Determination

10. The issues that arise for determination are:
 1. Whether the offence of grievous harm was proved beyond reasonable doubt
 2. Whether Appellants’ defences were considered
 3. Whether the conviction of each appellant was safe
 4. Whether the sentence imposed was excessive in the circumstances.



1. Whether the offence of grievous harm was proved

11. Section 234 of the Penal Code criminalises the unlawful causing of grievous harm. Grievous harm is defined under section 4 of the Penal Code to include harm that seriously or permanently injures health, or causes serious injury to an internal organ.
12. On the nature of the injuries sustained, the complainant testified that on 8th November 2022 he was assaulted at his house and sustained deep cut wounds, lost consciousness, and required specialised medical treatment. His evidence on the injuries was not materially challenged.
13. The medical evidence was tendered through PW5, a clinical officer, who testified that the complainant was initially treated at Nyamira Sub-County Referral Hospital and thereafter referred to Moi Teaching and Referral Hospital for further management. PW5 produced the P3 form and treatment notes.
14. PW5 testified that a CT scan of the head was conducted at Moi Teaching and Referral Hospital to assess the extent of the head injury. The scan revealed deep cut wounds on the temporal aspect and occipital region of the head, internal bleeding within the head, and an anterior wound on the lower limb.
15. These medical findings were consistent with trauma caused by a sharp and blunt object and corroborated the complainant's account of having been cut and struck during the assault. The injuries were classified as grievous harm.
16. The trial court analysed the medical evidence alongside the complainant's testimony and was satisfied that the injuries met the statutory threshold of grievous harm. Upon re-evaluation, this Court similarly finds that the medical evidence was cogent, uncontroverted, and clearly demonstrated serious injury within the meaning of sections 4 and 234 of the Penal Code.
17. In considering whether the offence of grievous harm was proved beyond reasonable doubt, the Court is guided by appellate jurisprudence that medical and witness evidence must objectively demonstrate the seriousness of the injury as defined in section 4 of the Penal Code. In *Onyango v Republic (Criminal Appeal E147 of 2023) [2025] KECA 1165 (KLR)*, the Court of Appeal upheld a conviction for grievous harm where the prosecution evidence demonstrated clear and serious injury consistent with the complainant's account and corroborated by independent evidence, establishing the first essential element of the offence.

2. Whether the Appellants' defences were considered

18. The appellants contended that the learned trial magistrate failed to properly consider their respective defences and thereby arrived at an unsafe conviction.
19. Each appellant gave sworn evidence denying involvement in the assault and suggesting that the complainant may have been injured by other persons. The defences raised were essentially denials of participation.
20. The duty of a trial court when faced with defence evidence is well settled. The court is required to consider the defence, weigh it against the prosecution evidence, and determine whether it raises a reasonable doubt. The court is not obliged to accept the defence, but it must demonstrate, on the record, that it has been considered.
21. In the present case, the judgment of the trial court shows that the learned magistrate expressly considered the appellants' defences and found that they did not displace the consistent and corroborated prosecution evidence. The court found that the defences were bare denials and did not explain the appellants' presence at or near the scene as established by the prosecution witnesses.



22. Upon re-evaluation of the record, this Court is satisfied that the trial court did not shift the burden of proof to the appellants. Rather, the court weighed the defence evidence against the prosecution case and rejected it for cogent reasons.
23. This Court similarly finds that the defence evidence, when tested against the direct testimony of the complainant, the corroborative evidence of PW2, PW3 and PW4, and the medical evidence, did not raise any reasonable doubt as to the appellants' participation in the offence.
24. The complaint that the trial court failed to consider the defence evidence is therefore without merit.

3. Whether the conviction of each appellant was safe

25. The safety of the conviction turns on whether the prosecution proved, beyond reasonable doubt, that it was the appellants who jointly participated in the assault that caused the grievous harm.
26. The complainant gave direct evidence that the appellants assaulted him at his homestead using a panga and a wooden stick. He testified that he knew both appellants prior to the incident and had no difficulty recognising them.
27. The complainant's evidence on identity and participation was materially corroborated by other prosecution witnesses. PW2, a neighbour, testified that upon hearing screams from the complainant's homestead, he went there and found the complainant injured. PW2 placed both appellants at the scene and confirmed that the complainant had been assaulted.
28. PW3 testified that he knew both appellants prior to the incident and saw them at or near the complainant's residence shortly before and after the assault. He observed that the complainant had visible injuries and was in distress.
29. PW4, who also knew the appellants, testified that he responded to the incident and found the complainant bleeding from the head and leg. Information received at the scene implicated the appellants as the assailants.
30. The trial court evaluated this evidence and found that, taken together, it consistently placed both appellants at the locus in quo at the material time and established their participation in the assault. The witnesses were consistent on the fact of the assault and the presence of the appellants, and their evidence was not shaken on cross-examination.
31. Upon re-evaluation, this Court agrees with the trial court. The prosecution case was supported by direct testimony corroborated by independent witnesses who knew the appellants and placed them at the scene, and medical evidence consistent with the manner of assault described.
32. The evidence further demonstrated joint participation in the assault, sufficient to attract criminal responsibility under section 21 of the Penal Code. The conviction of each appellant was therefore properly founded.

4. Whether the sentence imposed was harsh and excessive.

33. The appellants contended that the sentence of seven (7) years' imprisonment with an alternative fine of KES 500,000 each imposed by the trial court was harsh and excessive in the circumstances. They urged this Court to interfere with the sentence on that basis.
34. The appellants were convicted of the offence of grievous harm contrary to section 234 of the Penal Code, which provision creates a felony and prescribes a maximum sentence of life imprisonment. The charge reflects the gravity with which the law views the unlawful infliction of serious bodily injury.



35. It follows that the sentence of seven (7) years' imprisonment imposed by the trial court was lawful and well within the statutory limits provided for the offence of grievous harm.
36. The principles governing appellate interference with sentence were laid down in *Wanjema v Republic* [1971] EA 493, where the Court held that an appellate court may only interfere with sentence if it is shown that the trial court took into account an irrelevant factor, failed to consider a relevant factor, or that the sentence is manifestly harsh and excessive in the circumstances. The appellate court must nonetheless bear in mind that sentencing is a matter of judicial discretion, and interference is only warranted where that discretion was not exercised judiciously.
37. The record shows that the trial court considered the appellants' mitigation before passing sentence. The court also took into account the nature of the charge, the seriousness of the offence, and the gravity of the injuries inflicted upon the complainant.
38. The injuries sustained by the complainant were not minor. As already noted, the medical evidence confirmed deep cut wounds and internal head injury, injuries properly classified as grievous harm. The offence involved the use of weapons and resulted in serious bodily injury.
39. In those circumstances, the trial court was entitled to regard the offence as serious and deserving of a custodial sentence. Having regard to the statutory maximum of life imprisonment, a sentence of seven (7) years' imprisonment cannot be said to be disproportionate or excessive in the circumstances of this case.
40. The appellants did not demonstrate that the trial court overlooked any relevant mitigating factor or took into account any irrelevant consideration. Neither was it shown that the sentence imposed was so severe as to amount to an erroneous exercise of discretion.
41. Having independently considered the charge of grievous harm, the circumstances under which the offence was committed, the nature of the injuries sustained, and the applicable legal principles, this Court finds that the sentence imposed was neither harsh nor excessive, and there is therefore no basis for appellate interference.

Determination

42. In the final analysis, the Court finds as follows:
 1. These consolidated appeals have no merit and are hereby dismissed in their entirety.
 2. The convictions and sentences imposed upon The Appellants are affirmed.

DELIVERED AT NYAMIRA THIS 05TH DAY OF FEBRUARY 2026

WAMAE.T. W. CHERERE

JUDGE

Appearances

Court Assistant - Hilda

Appellant 1 - Present

Appellant 2 - Present

For the DPP - Ms. Mochama

