REPUBLIC OF KENYA

IN THE HIGH COURT AT MIGORI

CRIMINAL APPEAL NO. E047 OF 2025

SUNDAY MARWA MOROGA ……

APPELLANT

VERSUS

REPUBLIC ……

RESPONDENT

JUDGMENT

1. This is an appeal from the Judgment of the trial court, Hon. J.P. Nandi (SPM) in Kehancha MCCR No. E123 of 2025. The Appellant was charged with causing grievous harm contrary to Section 234 of the Penal Code. The particulars of the offence were that the Appellant, on 04.03.2025, around 1300 hours in Igena in Kuria West Sub-County within Migori County, unlawfully did grievous harm to Maria Gati Chacha.

2. The appellant was convicted and sentenced to 30 years imprisonment. He appealed on both sentence and conviction and set forth the following grounds of appeal:

    a) I did not plead guilty to the charge.

b) The trial court erred in law and in fact in not complying with Article 50(2) (h) of the Constitution.

c) That the learned trial court erred in both law and fact by not observing the ingredients of the offense was not proved to the required standard in law and in fact.

Evidence

3. The appellant pleaded guilty and was warned about the consequences. The plea was deferred to 11.03.2025. He pleaded not guilty. He was supplied with three witness statements and granted Ksh.100,000/= bond, which he never took up.

4. PW1 testified that the appellant is a vegetable vendor. She stated that she asked the grandchild COM whether anyone had come home. The said minor told her that it was her son, the appellant. PW1 asked the appellant for a flash drive. The appellant went out and came armed with a stone and hit her. She showed the court a healed scar. She fell down, and the appellant continued beating her. She screamed, alerting people who came to her rescue. The appellant ran away.

5. She was taken to Kehancha Sub-County Hospital, and she reported the matter, where she was given a P3 and produced treatment notes. She was not cross-examined.

6. PW2 was Valentine Boke, the appellant's sister-in-law. She stated that she was sorting silver cyprinid, also known as *Rastrineobola argentea* (omena), for cooking. PW1 entered the house and asked where her flash disk was. The appellant told PW1 not to quarrel with him. PW1 went out, and after 5 minutes, she heard PW1 screaming and found PW1 on the ground being beaten by the appellant using a stick on the upper arms and legs. She was bleeding from the head. On cross-examination, she stated that she did not call the police.

7. PW3 was PC Benjamin Buya Sharia of Kehancha Police Station. He stated that PW1 came on 5.3.2025 and reported that her son beat her on 4.3.2025 at 6.00 pm. She had a bandage on her hand and swellings and bruises on her hands. He booked the case and was instructed to investigate the same. The appellant was arrested on 9.3.2025 and taken to the station, where he was arrested and charged with the offence. PW1 brought treatment notes where the injury was classified as grievous harm. On cross-examination, he stated that the appellant was arrested by members of the public.

8. 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 would give evidence on oath and would not call witnesses.

9. The appellant testified that he admitted the charge, and that is all. He was not cross-examined.

Submissions

10. By submissions he posited that the case was not proved beyond a reasonable doubt. Reliance was placed on a Nigerian case **Bakare V. State** (1987) CLR 3(i) (SC)(references re-checked). The case is referred to in the case of **David Wafula Wangila V Republic 2020 KEHC10160 (KLR**) by E.C. Mwita J, as he then was as follows:

> 54. In criminal trials, the prosecution is required to prove its case beyond reasonable doubt. In Stephen Nguli Mulili v Republic [2014] eKLR, the Court of Appeal observed that:
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> > "[I]t is not in doubt that the burden of proof lies with the prosecution. The *locus classicus* on this is the case of DPP V WOOLMINGTON, (1935) UKHL 1 where the court eloquently stated that the "golden thread" in the "web of English common law" is that it is the duty of the prosecution to prove its case. The Kenyan Courts have upheld this position in numerous cases…."
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> 55. In Bakare v State (1987) 1 NWLR (PT 52) 579, the Supreme Court of Nigeria amplified on that principle, stating:
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> > "Proof beyond a reasonable doubt stems out of the compelling presumption of innocence inherent in our adversary system of criminal justice. To displace the presumption, the evidence of the prosecution must prove beyond reasonable doubt that the person accused is

guilty of the offence charged. Absolute certainty is impossible in any human adventure, including the administration of criminal justice. Proof beyond reasonable doubt means just what it says it does not admit of plausible possibilities but does admit of a high degree of cogency consistent with an equally high degree of probability."

11. The appellant relied on section 107 of the Evidence Act on the issue of proof. Further reliance was placed on the case **Pius Arap Maina v Republic [2013] KEHC 1762 (KLR),** where G.K. Kimondo J held as follows:

> *It is gainsaid that the prosecution must prove a criminal charge beyond reasonable doubt. As a corollary, any evidential gaps in the prosecution's case raising material doubts must be interpreted in favour of the accused*

12. He submitted that the prosecution's case was full of contradictions. The evidence of PW1 was that the appellant was armed with a stone outside, while PW2 testified that the appellant went out, came back, and entered the kitchen, and she heard screaming.

13. He stated that the appeal was on sentence and not conviction only. These submissions were not factual as not all grounds are convincing, and none of the sentences. He said he did a stupid thing and only took a flash, not drugs. He stated

that there was peer pressure and drug abuse. He prayed that the court be a conciliator and mediator between him and the mother. He submitted that he was repentant. He noted that once bitten, twice shy. He prayed for a non-custodial or less severe sentence. He stated that he should be grateful to have a mother alive.

14. The state did not file submissions.

Analysis

15. 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.

16. 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.

17. The legal burden of proof is on the prosecution and remains constant throughout. According to established principles, the burden of proof rests upon the prosecution to prove the guilt of an accused person beyond a 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.

18. 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.

19. 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.**

20. 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.

21. The appeal is on conviction. The appellant cannot, by submissions, amend the grounds of appeal. The court cannot deal with grounds of appeal not before the court. However, in a sentence, the court has supervisory jurisdiction over excessive sentences.

22. Before dealing with the issues raised, it is important to interrogate the first ground, that the appellant did not plead guilty. The court proceed as if he did.

23. The victim suffered injuries but not life-threatening ones. This was done in a scuffle in a dysfunctional family when the appellant was drunk. The same was done in a fit of anger and not premeditated.

24. The appellant pleaded guilty on the first day but was warned of the consequences of so pleading. He changed plea. However, he admitted the charge on his defence. Consequently, he has maintained his guilt from the first day.

25. This must count for something. It is not lost that the victim is the mother of the appellant. She is both the victim and the mother. Taking away the appellant from her will not serve any useful purpose. She is still bleeding in for her son. The victim knowing the appellant was drunk, relied on the information of a brother and confronted the appellant resulting in a clearly uneven match.

26. The court noted healed scars on the victim's face. This means there was no maim. This rules out grievous harm. The court shall therefore reduce the charge to assault, causing actual bodily harm. The court proceeded on a wrong premise that, having admitted the charge under oath, he needed not belabour the point. Unfortunately, that was an error. The

court ought to have proceeded either to deal with the admission as a plea of guilt and read the facts, or to analyse the ingredients of the offence.

27. He needed to recap the evidence given for the accused to confirm whether that was what he was admitting to. If he took it as a belated plea of guilty, then he should have proceeded as usual to recap the evidence given so far.

28. Simply saying I admit the charge is not evidence. An admission must also be in the language it was given. This was not done. Therefore, the court ought to have analyzed the evidence notwithstanding the defence evidence. Indeed, there was a golden chance for the prosecutor to cross-examine the appellant and elicit the ingredients of the charge that he was admitting. Section 207 of the Criminal Procedure Code provides as follows:

> (1) The substance of the charge shall be stated to the accused person by the court, and he shall be asked whether he pleads not guilty, guilty or guilty subject to a plea agreement.
>
> (2) If the accused person admits the truth of the charge otherwise than by a plea agreement his admission shall be recorded as nearly as possible in the words used by him, and the court shall convict him and pass sentence upon or make an order against him, unless there appears to it

sufficient cause to the contrary:

Provided that after conviction and before passing sentence or making any order the court may permit or require the complainant to outline to the court the facts upon which the charge is founded.

(3) ....

(4) If the accused person refuses to plead, the court shall order a plea of "not guilty" to be entered for him.

(5) If the accused pleads-

(a) that he has been previously convicted or acquitted on the same facts of the same offence; or

(b) that he has obtained the President's pardon for his offence, the court shall first try whether the plea is true or not, and if the court holds that the evidence adduced in support of the plea does not sustain it, or if it finds that the plea is false, the accused shall be required to plead.

29. Immediately the appellant pleaded that he admits the charges under oath, the court should have proceeded to comply with the requirements set out in **Adan Inshair Hassan v. Republic** (1973) EA:

> "The courts have always been concerned that an accused person should not be convicted on his plea unless it was certain that he really understood the charge and had no defence to it. The danger of a conviction on an equivocal plea is obviously greatest

where the accused is unrepresented, is of limited education and does not speak the language of the court. For this reason, it has long been a rule of practice that where a plea appears to be one of guilty, it must be recorded in the words of the accused. The word “guilty” is one to be treated with the greatest caution: it is a technical expression and it was said in Byarufu Gafa V. R. [1950] 17 E.A.CA. 125, and M’Mwenda V. Republic [1957] EA 429 that there is no word exactly corresponding to it in any of the languages of Uganda or Kenya respectively. It might be added that while the idea of stealing is one universally known, it does not follow that every language has a word corresponding to the English word “steal” which excludes a taking under a bona fide claim of right.

When a person is charged, the charge and the particulars should be read out to him, so far as possible in his own language, but if that is not possible, then in a language which he can speak and understand. The magistrate should then explain to the accused person all the essential ingredients of the offence charged. If the accused then admits all those essential elements, the magistrate should record what the accused has said, as nearly as possible in his own words, and then formally enter a plea of guilty. The magistrate should next ask the prosecutor to state the facts of the alleged offence and when the statement is complete, should give the accused an opportunity to dispute or explain the facts or to add any relevant facts. If the accused does not agree with the statement of facts or asserts additional facts which, if true, might raise a question

as to his guilt, the magistrate should record a change of plea to "not guilty" and proceed to hold a trial. If the accused does not deny the alleged facts in any material respect, the magistrate should record a conviction and proceed to hear any further facts relevant to sentence. The statement of facts and the accused's reply must, of course, be recorded."

30. The court therefore erred in proceeding on the basis that the appellant did not challenge the evidence. It is not known to what he admitted.

31. The first question relates to Article 50 (2) (h) of the Constitution, which provides as follows:

> *"(2) Every accused person has the right to a fair trial, which includes the right-*
> *(a)...*
> *(h) to have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly."*

32. The Court of Appeal in **Manyeso v Republic [2023] KECA 827 (KLR)** held thus:

> The appellant did not raise the issue of legal representation either in the trial court and the High Court. The appellant participated in the trial and cross-examined the witnesses, and it was not evident that he suffered any or any substantial injustice. The appellant's rights to a fair

trial on under articles 50(2)(g) and 50(2)(h) of the Constitution were not violated.

33. In this matter, the appellant was informed of the right. He cannot complain now. However, this does not preclude the court from addressing legal lacunae in the proceedings.

34. The second issue is whether the offence was proved beyond a reasonable doubt. The offence charged was that of grievous harm. This 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."*

35. *Section 234 of the Penal Code* creates the offence and punishment. The said section provides as follows:

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

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

    1. Assault of the complainant.
    2. Harm which amounts to a maim or dangerous harm, or seriously or permanently injures health.
    3. Involvement of the appellant in the assault.
    4. Unlawfully.

37. The assault by the appellant was confirmed. However, the weapon was not consistent. On one part, it is said to be a stone, while PW2 stated it was a stone or a stick. Neither weapon was produced nor accounted for. However, some injuries were suffered as a result of assault.

38. However, determining the injuries was an imbroglio. First, they did not determine the injuries suffered. Secondly the court did not make a fundamental decision as to whether there was harm and if so, whether the *harm amounted 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. This was a serious misdiagnosis. The court wished not to belabor the other issues in the case. Those were the issues the court was specifically tasked with finding.

39. The trial court further fell into error by taking the view that there had been an admission in the case. This position led the court down the wrong path and ultimately resulted in a conviction without properly addressing or analyzing the essential ingredients of the offence.

40. The court finds as a fact that from the evidence of PW1 and PW2, the complainant suffered some injuries. The injuries were bruises, which the complainant stated she suffered from a fall after being hit by the appellant. The appellant also beat PW1. The question of stick raised by PW2 is not borne out by PW1's evidence.

41. PW1 confirmed that there was a cut on the forehead and the right shoulder had blunt injuries. The exhibit number has no authentication whatsoever. Its author is unknown and has no qualifications of a person who filed. It has no date. It is short and bogus. One of the fundamental errors in it is that the person who signed does not indicate qualifications.

42. The P3 has only one injury, a cut wound on the left parietal region. This is a specific area on the upper left side of the scalp and skull, located behind the frontal bone and above the temporal bone. The court was shown a healed scar on the head. Can this then be said to be grievous harm?

43. The extent of application of an expert opinion in judicial proceedings, and the general trend is that such evidence is not necessarily conclusive and binding. As was held in **Shah and Another vs. Shah and Others [2003] 1 EA 290**:

> *"The opinion of the expert witness is not binding on the court, but is considered together with other relevant facts in reaching a final decision in the case and the court is not bound to accept the evidence of an expert if it finds good reasons for not doing so."*

44. Further, the Court of Appeal, on its part in **Kimatu Mbuvi T/A Kimatu Mbuvi & Bros vs. Augustine Munyao Kioko Civil Appeal No. 203 of 2001 [2007] 1 EA 139** held that:

> **"... such opinions are not binding on the Court although they will be given proper respect, particularly where there is no contrary opinion and the expert is properly qualified although a Court is perfectly entitled to reject the opinion if upon consideration alongside all other available evidence there is proper and cogent basis for doing so."**

45. Courts must give proper respect to the opinions of experts, but such opinions are not, as it were, binding on the courts and the courts must accept them as stated in **Parvin Singh Dhalay vs. Republic [1997] eKLR; [1995-1998] 1 EA 29,** it was held that:

> **“While the courts must give proper respect to the opinions of experts, such opinions are not, as it were, binding on the courts and the courts must accept them. Such evidence must be considered along with all other available evidence and if there is proper and cogent basis for rejecting the expert opinion, a court would be perfectly entitled to do so. We will repeat what this Court said in the case of** *Elizabeth Kamene Ndolo vs. George Matata Ndolo*, **Civil Appeal No. 128 of 1995. There the Court said with regard to the evidence of experts:-**
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> "*The evidence of PW1 and the report of Munga were, we agree, entitled to proper and careful consideration, the evidence being that of experts but as has been repeatedly held the evidence of experts must be considered along with all other available evidence and it is still the duty of the trial court to decide whether or not it believes the expert and give reasons for its decision. A court cannot simply say:- "Because this is the evidence of an expert, I believe it.*"

46. He did not prove his expertise. In the circumstances, he did not prove that he was qualified to conclude that there was grievous harm.

47. PW4 stated that he was a clinical officer working with Kehancha Sub-county Hospital. He did not show his qualifications and years of experience. PW4 is of an unknown qualification. The injury suffered had healed less than a month

after the date of infliction. The court, therefore, disbelieves the evidence as it is of doubtful origin.

48. The conclusion that there was grievous harm was false and could not be relied on. Section 4 of the Penal Code defines dangerous harm as endangering life. There was no evidence that the complainant's life was endangered.

49. It is not enough that a clinical officer says that it is grievous harm. This is more so when a clinical officer has a doubtful professional background or has not shown his qualifications to the satisfaction of the court. I therefore find that the aspect of *harm* which amounts to a maim or dangerous harm, or seriously or permanently injures health, was not proved.

50. The last issue was whether the injuries were inflicted unlawfully. The complainant was assaulted. This was done by the appellant, who admitted the charge. However, he did not raise self-defence. 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.

51. The fourth element is thus proved. The question then is whether to acquit the appellant or otherwise. The main felony was not proved.

52. Refuge is therefore sought in section 179 of the Criminal Procedure Code as follows:

> a. When a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence, and the combination is proved but the remaining particulars are not proved, he may be convicted of the minor offence although he was not charged with it.
>
> b. When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence although he was not charged with it.

53. The particulars proved are as follows:

1. Assault of the complainant

2. Involvement of the appellant in the assault

3. Unlawfully

4. There was actual harm not amounting to grievous harm

54. These particulars for an offence of assault causing actual bodily harm under section 251 of the Penal Code. The evidence showed that there was actual. Assault causing actual bodily harm is set out in section 251 of the Penal Code as follows:

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

55. Consequently, the conviction of the offence of grievous harm is set aside. Pursuant to section 179 of the Criminal Procedure Code, the charge is substituted with a charge of Assault causing actual bodily harm. Having found that the appellant committed the minor offence of Assault causing actual bodily harm, he is accordingly convicted of the said minor offence.

56. On sentence, the Appellant submitted that the sentence of 30 years was harsh and excessive. The conviction has, however, been set aside, and a new sentence ought to be imposed. On the sentence for 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)"

57. Even if the offence had been proved, the 30-year sentence was excessive for a family scuffle that the complainant started. 5 years could have been sufficient. However, the same is water under the Kuja River bridge. It has since been set aside.

58. The law does provide for a mandatory or minimum sentence for the offence of assault causing actual bodily harm. It provides that the appellant is liable to imprisonment for a term of five years. 'Liable to' means that the sentence of imprisonment for five years is the maximum. A lesser sentence can be provided. 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.

59. The complainant was the mother of the appellant. The imprisonment is stigmatizing and punishing. The appellant wasted his goodwill with the mother. The appellant was, however, a 24-year-old illiterate mine worker in Kehancha. He was said to be abusing alcohol and drugs. The court indicated that he had considered the presentence review. However, there is no consideration on record. It is important to have the consideration on the record and not in the mind of the court.

60. The main report was from family members, who obviously are the victims herein and had nothing positive to say. However, the court should have noted the primary victim's request. She wanted the appellant to be imprisoned for some years. The court did not bother to note the deep-rooted familial discord that would be exacerbated by a long imprisonment of three decades. The report indicated that the family needed rebuilding.

61. The allegations of previous assaults do not add value as there is no previous conviction. The appellant was remorseful and gave a background of being attacked by his brothers and threw a stone that hit the mother. He acknowledged the strain with the mother and said he learnt valuable lessons. The report indicated that the appellant required impunity. A senior probation and aftercare services officer, Mr. Calvin Njiri Juma,

strongly recommended custodial rehabilitation, life skills, and the opportunity to overcome substance abuse.

38. This is to be balanced with the two minor children that the appellant must take care of and a young wife he recently separated from. It is also to be counterbalanced with the family protection, public safety, offender's safety, skill set, and potential for change. He must therefore get a sentence that is enough to train him and to rehabilitate him. This brings the court to the Sentencing Policy Guidelines, 2023. 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.**

39. The Sentencing Policy 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.

40. Having noted that there was no previous conviction, the Appellant is deserving of a more lenient sentence. The court considers the severity of the injuries, which have healed. The appellant's age and the relationship between the parties are paramount. This is a young offender who can be rehabilitated rather than thrown into the dungeons. There was thus medium harm and low culpability. The other issue is the need for rehabilitation; a very short sentence will not rehabilitate the appellant. A very long one will make him a jailbird.

41. 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 a one-cut wound that healed quickly.

42. In the circumstances, a term of 3 years imprisonment and one year probation will suffice, to run from 09.03.2025, the date of arrest.
43. Instead of sentencing the appellant to a strict term, he may need to reintegrate into society after serving his three-year sentence. The appellant requested reunification with the mother and siblings. This can only be done under the careful supervision of a trained hand. A probation officer will be best placed to deal with the reunification. Therefore, in addition to the three years imprisonment, there will be one year's probation to ensure the offender understands the harm he caused to his mother.

Determination

44. In the circumstances, I make the following orders:

a) The conviction on the offence of grievous harm and sentence of 30 years for the offence of grievous harm is set aside.

b) Pursuant to section 179 of the Criminal Procedure Code, the charge is substituted with a charge of Assault causing actual bodily harm. Having proved that the appellant committed the minor offence of Assault causing actual

bodily harm, he is accordingly convicted of the lesser offence.

c) He will serve the sentence of 3 years imprisonment and 1 year probation after serving the sentence. The appellant shall undergo anger management training while in prison.

d) The sentence will commence from 09.03.2025, the date of arrest.

e) 14 days right of appeal.

f) The file is closed.

DELIVERED, DATED, and **SIGNED** at **NYERI** on this **17th** day of **March, 2026**. Judgment delivered through Microsoft Teams Online Platform.

KIZITO MAGARE

JUDGE

In the presence of: -

Ms. Elizabeth Kogos for the State

Appellant in person

PC Ondimu present

Court Assistant – Michael/Martin