

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MACHAKOS**  
**CRIMINAL APPEAL NO. E064 OF 2024**

**JOHN MUTHAMA MUSILA .....**  
**APPELLANT**

**VERSUS**

**REPUBLIC.....**  
**RESPONDENT**

***(Being an Appeal against the judgment of Kangundo  
MCCR No. E314 of 2021 by Honourable D. N. Sure in  
Criminal Case No.6725 of 2018 on 16<sup>th</sup> May 2023)***

**JUDGMENT**

**A. Introduction**

1. The Appellant was charged and convicted with the offence of grievous harm contrary to Section 234 of the Penal Code. The particulars of the offence were that on the 25<sup>th</sup> February 2019 at Misyami Village, Kansanvi Location in Kangundo Sub-county within Machakos County, he jointly with Geoffrey Muthini Munyaka (not before this appellate court), unlawfully did grievous harm to Francis Mutume, the complainant.
2. The Appellant pleaded not guilty. After hearing, the trial court found him guilty, convicted him and sentenced him to

pay a fine of Kshs 300, 000/= and in default to serve 4 years imprisonment.

3. Being aggrieved by the decision, the Appellant lodged this appeal on the grounds that the Learned Trial Magistrate erred in law and in fact by: convicting and sentencing him when there was no sufficient evidence to support the charge; by considering the evidence of witnesses that were never disclosed to the accused person; by not appreciating the contradicting evidence adduced by the claimant's wife; by failing to make a finding that the charges levelled against the Appellant were an afterthought as it took over a year before he was summoned by the police and the subsequent charges to be levelled against him hence its findings and consequences are null and void; solely relying on the evidence and testimonies of the relatives of the complainant without appreciating its susceptibility to prejudice and biasness over conflict of interest; by anchoring his judgment on presumptions and assumptions; by convicting and sentencing the Appellant on inconsistent, doubtful and contradictory evidence without appreciating the fact that the complainant fearing for his life had actually sought the company of the Appellant for his safety from the mob that was baying for his blood; convicting and sentencing the Appellant by relying on the evidence presented by the prosecution and disregarding the defence tendered by the Appellant as well as submissions filed by the Appellant and

by holding that the prosecution had proved its case against the Appellants beyond any reasonable doubt.

## **B. Prosecution's Case**

4. Before the trial court, the prosecution case was as follows;

5. **PW1, James Muteti, a painter**, testified that on 25<sup>th</sup> February 2019 at about 7.00 a.m., he was at his home when a person entered his compound and inquired about the residence of Francis Mutuku, a neighbour. PW1 stated that he directed the person accordingly. Shortly thereafter, he observed a group of people riding motorbikes, who were armed, proceed to Francis Mutuku's homestead. He heard noise and commotion emanating from the said homestead and later saw the group assault Francis Mutuku and leave with him. PW1 testified that he followed them towards the chief's office. He stated that Francis Mutuku was badly beaten and that he saw both accused persons among the assailants, armed with hockey sticks. He further testified that he saw John hit Francis Mutuku on the hand. That John took a hockey stick from Geoffrey that he used to hit Francis. That upon witnessing this, he retreated into his house in shock. PW1 stated that all the assailants were armed with pangas and sticks, and that Francis Mutuku later went to hospital for treatment.

6. **PW2, Bright Nzilani**, a Clinical Officer at Kangundo Level Four Hospital, testified that she examined Francis Mutuku

following a history of assault. She produced the P3 Form dated 28<sup>th</sup> February 2019. She stated that upon arrival at the hospital, Francis Mutuku had blood-stained clothes and complained of pain. On examination, he was found to have a deep cut wound on the head, blood clots beneath the skin, a fracture of the hand, and scratches on the legs. He was treated and a plaster cast was applied to the fractured hand.

7. **PW3, Francis Mutuku Mutune**, testified that he was a livestock trader. He stated that on 25<sup>th</sup> February 2019 at about 6.00 a.m., he left his home to purchase milk for his wife from a nearby market. While returning home, approximately 100 metres from his residence, he encountered a group of people whom he described as a criminal gang, among whom were the two accused persons. He stated that the group was armed and upon approaching them, the accused persons (the appellant herein and accused 1) told him that they had killed someone where they had come from and that they had come for him. He stated that they demanded to be shown his homestead and informed him that their chickens had disappeared. PW3 testified that he did not engage them in conversation but attempted to evade them. However, they followed him to his gate. He stated that although other members of the group remained outside the compound, the two accused persons

and one Alex Kwinga, who was not arrested, entered his compound.

8. PW3 testified that he called out to his wife and informed her that people claiming that their chickens had been stolen were following him. He asked her to open the house so that a search could be conducted, which she did. He stated that no stolen items were recovered during the search. Thereafter, the Appellant took a bottle of milk from him and hit his wife on the chest. That the Appellant then restrained him from behind and held his hands at his back while instructing the first accused to search his pockets. PW3 stated that he had Kshs.10,000/= in his pocket, which the first accused removed and took away. PW3 further testified that Alex Kwinga, who was armed with a slasher, struck him several times on the head. He stated that the Appellant, who was armed with a sharpened panga and a hockey stick, repeatedly assaulted him, resulting in a fracture of his left hand above the wrist. He testified that he was forcibly removed from his compound by the accused persons and Alex and was continuously assaulted as he was frog-marched to Kikambuani Police Station, a distance he estimated to be about three kilometres.

9. PW3 testified that upon arrival at the police station, he was taken to the chief's office where he found two police officers. Shortly thereafter, officers from Kangundo Police Station arrived and re-arrested him. He stated that he spoke

with the Officer Commanding Station (OCS) and was thereafter taken to Kangundo Level Four Hospital, where he received treatment. He testified that he was returned to the police station thereafter, where he expected to be released, but was instead charged with stealing two chickens and arraigned in court on 26th February 2019. He stated that the case was later determined in his favour.

10. PW3 testified that following the incident, an inquiry file was opened at the police station and he was issued with a note to attend hospital, where a P3 Form was completed. He recorded statements together with his witnesses at Kangundo Police Station. He identified the two accused persons and Alex Kwinga as the individuals who assaulted him. He testified that the first accused was his neighbour, living approximately two to three kilometres away, and that he had known the Appellant for over 50 years. He stated that he had no prior dispute with either of them.

11. PW3 reiterated that he encountered the group while returning home and that the Appellant was the one who threatened to kill him. He testified that he attempted to engage the Appellant in conversation and informed him that he was a law-abiding citizen. He maintained that it was only the two accused persons and Alex Kwinga who entered his compound, even though he had attempted to prevent the crowd from doing so.

12. **PW4, Pascaline Mbatha Mutuku**, a farmer and the wife of PW3, testified that on 25<sup>th</sup> February 2019, she was asleep in her house while her husband had gone to buy milk when she heard him call out to her. She stated that she opened the door but did not step outside and three men whom she knew prior to the incident, including the two accused persons, entered the house. She testified that the Appellant was armed with a hockey stick. She stated that she requested to call the chief because she did not understand what was happening, but the Appellant instructed her not to call the chief and instead told her to call the Officer Commanding Station (OCS). She testified that she did not make any call because her mobile phone was taken. That the men then moved outside with her husband and began assaulting him as they pushed him out of the compound. She was confused and did not know what to do. She decided to run to the chief's office to report the matter, but the chief informed her that he was already aware of the incident. She thereafter proceeded to the Administration Police (AP) office. Upon reaching the AP office, she found her husband bleeding, having been made to sit down, and that there were no police officers present at that time. She stated that the Appellant ordered her to leave and that she complied because he was speaking to her in an angry manner. She stated that she later went to the market,

where she again heard that her husband had been assaulted.

13. PW4 testified that she followed up the matter and later found her husband admitted at Kangundo General Hospital, where she observed that he had a plaster cast on his hand and stitches on his head. She stated that her husband subsequently reported the assault at Kangundo Police Station, where she also recorded her statement. She testified that her mobile phone was never recovered. She further stated that the persons who entered her house were the accused persons, both of whom she had known prior to the incident.

14. **PW5, Selina Ndungi Mukulya**, testified that on 25<sup>th</sup> February 2019 at about 7.00 a.m., she was returning from the shop and ordinarily passed by the home of Francis Mutuku on her way home. She testified that upon reaching near his homestead, she heard noises emanating from within the compound and observed a group of people standing outside the gate. PW5 testified that she stopped to observe and saw three men pushing Francis out of the gate. She stated that she recognised one of them as Alex, and upon enquiring from him what was happening, he told her that she would know later. She testified that the three men were assaulting Francis. She stated that Alex was armed with a slasher, while the other two men were armed with rungun and a panga. PW5 further testified that after Francis

was removed from the compound, the men continued assaulting him as they moved away with him. She stated that she then entered the compound and enquired from Francis's wife, who informed her that she was going to report the matter to the chief. PW5 testified that the people who were standing outside the gate were not assaulting Francis. She stated that she recognised two of the persons who were assaulting Francis, namely the accused persons, and that they all came from the same location. She testified that she saw the first accused armed with a panga, while John, the second accused, was armed with a rungu, which they were using to assault Francis. PW5 testified that she thereafter proceeded on her way. She further stated that about one month later, Francis contacted her and she recorded her statement at Kangundo Police Station.

15. , PW5 testified that she was familiar with the Appellant, whom she used to see within the village. She stated that the Appellant was holding Francis in a manner similar to how a police officer would restrain a suspect. She reiterated that when she enquired from Alex what was happening, he informed her that she would know later.

16. **PW6, Alexander Mbatha Mutunga**, an electrician, testified that on 25<sup>th</sup> February 2019 at about 7.00 a.m., he was preparing to go to work when he heard noise emanating from the road approximately 30 metres from his house. He stated that he went to check what was happening

and found a group of people assaulting his neighbour, Francis Mutuku, who was bleeding from the head. That upon enquiring from one of the assailants, whom he identified as John, he was informed that Francis was alleged to be a chicken thief and had allegedly been stealing chickens since December 2018. He testified that the group comprised about twenty (20) people, and that he was able to identify John, Alex Kwinga, and Kawewa among them. PW6 further testified that Francis was being hit on the head with a rungu. He stated that as he was on his way to work, and upon being informed that the group was taking Francis to the police station, he left the scene. He testified that he attempted to talk to the group but they were furious and he was unable to restrain them.

17. PW6 testified that he saw the Appellant armed with a rungu and that he engaged him in conversation because he had seen him striking Francis on the head with it.

18. **PW7, Corporal Allan Changwony**, testified that he was stationed at Kikambuani Police Post. He stated that on 25<sup>th</sup> February 2019 at about 4.00 a.m., while asleep, he received a call from the area Assistant Chief, Dorothy Mutava, who informed him that suspected chicken thieves had been apprehended and were at risk of being lynched. PW7 testified that he alerted his colleague and they rushed to the scene, where they found one suspect, Ndhoki, who had been seriously injured. He stated that the Assistant

Chief was attempting to dissuade members of the public from lynching the suspect. He further testified that a second suspect, Josephat Muinde, was later brought to the scene, and that members of the public began assaulting him as well. PW7 testified that they sought assistance from the Officer Commanding Station (OCS), Kangundo Police Station, who dispatched officers that rescued the two suspects. He stated that after the suspects were taken away, he and his colleague returned to the police post. He further testified that about an hour later, a third suspect, Francis Mutuku, was brought to the post by members of the public. He stated that Francis had sustained a cut on the head from a sharp object and had a swollen hand.

19. PW7 testified that they rescued Francis and alerted the OCS, who again dispatched officers that transported him to Kangundo Police Station. He stated that on 19th March 2019, he was summoned to record his statement. He further testified that the suspects had been assaulted by members of the public and that one of them later succumbed to the injuries. PW7 testified that he was attempting to assist the suspects and explained that he did not arrest the members of the mob because they were only two officers at the post at the time. He stated that he did not know the accused persons in the dock.

20. **PW8, Police Constable Jackson Mwangangi**, testified that on 25<sup>th</sup> February 2019, he was on duty together with

Corporal Allan Changwony when they were alerted by the area Assistant Chief about suspected arrests by members of the public. He testified that they proceeded to the scene, where they found a suspect who had been assaulted and was injured. They alerted the Officer Commanding Station (OCS), Kangundo Police Station, to request assistance. He stated that while they were awaiting the arrival of officers from Kangundo Police Station, another suspect was brought to the scene by members of the public, whom they rescued. The suspects were subsequently re-arrested by officers from Kangundo Police Station. That after the suspects were taken away, they returned to the police post. He stated that about one hour later, a third suspect was brought to the police post by members of the public. The third suspect had visible injuries on the head and the hand. They again alerted the OCS, and the suspect was re-arrested and taken away by officers from Kangundo Police Station. He testified that due to the large number of people involved, they did not identify or arrest any members of the mob.

21. **PW9, Sergeant Modister Kashuru**, testified that she was stationed at Mwatate Police Station in Taita Taveta County at the time of her testimony. She stated that on 25<sup>th</sup> February 2019 at about 6.00 a.m., she was at the office when the Officer Commanding Station (OCS) telephoned her and informed her that she had received a call from the

area Assistant Chief, Dorothy Mutava, regarding suspects who had been arrested by members of the public. PW9 testified that she alerted PC Ibrahim and PC Raphael, and together they proceeded to Kikambuani to investigate the report. Upon arrival, they found two police officers from Kikambuani Police Post, the Assistant Chief, and approximately twenty (20) members of the public. She testified that at the scene there was a person, later identified as Muema, who appeared to have been seriously assaulted and was bleeding, and who was crying in pain. She further testified that about twenty metres away, there was another person, Mwanzia, who had also been assaulted but not as seriously.

22. PW9 testified that near the two suspects, there was a white sack containing two chickens, which were alleged to have been stolen from Peter Kalonzo. She stated that the officers assisted Muema into the police vehicle and that Mwanzia also boarded the vehicle. She testified that they recovered the chickens as exhibits. She further testified that Muema mentioned Mwanzia during interrogation by members of the public. PW9 stated that the suspects were being taken to hospital when Muema succumbed to his injuries on the way. She testified that Mwanzia was treated and later remanded.

23. PW9 further testified that they later received information regarding the arrest of a third suspect, Francis Mutuku,

who had been assaulted and had injuries on the head and a swollen hand. She stated that they took custody of him while members of the public were observing from a distance. PW9 testified that Francis was taken to hospital for treatment, where it was established that his hand had been fractured.

24. PW9 testified that on 26<sup>th</sup> February 2019, Francis Mutuku and Mwanzia were charged with the offence of theft and were released on bond. She further testified that Francis later returned to the police station and reported an assault, prompting investigations. She stated that an inquiry file No. 3 of 2019 was opened and witnesses recorded their statements. PW9 testified that the file was forwarded to the Office of the Director of Public Prosecutions (ODPP), which recommended that the two accused persons and Alex Kwinga be charged with the offence of grievous harm.

25. PW9 testified that the complainant (Francis) informed them that on the material day at about 7.00 a.m., he had gone to the shop to buy milk and, while returning home, encountered a group of people including the accused persons and Alex Kwinga, who requested him to take them to his home. She stated that the complainant told them that he was prevented from entering his house while a search was conducted because he was suspected of stealing chickens. That the complainant further stated that John took the milk he had bought and threw it at his wife, struck

him on the back with a rungu, while Munyaka searched his pockets and took Kshs. 10,000/= from his back pocket. She testified that Alex Kwinga, who was armed with a slasher, cut the complainant on the head.

26. PW9 further testified that the complainant stated that no stolen chickens were recovered from his house, and that thereafter he was taken out of the compound and escorted to Kikambuani Police Post while being assaulted, which resulted in his hand being fractured. She stated that the complainant further reported that John took an Itel mobile phone belonging to his wife. PW9 testified that John was arrested on 28<sup>th</sup> February 2019 and charged, while Geoffrey was arrested on 10<sup>th</sup> February 2020 at Kikambuani Market after being identified by the complainant and recording his statement. She testified that she was present during the arrest of the first accused, and she identified the accused persons in the dock.

27. Upon close of the prosecution case, the accused persons were placed on their defenses.

### **C. Defence Case**

28. **DW1, Geoffrey Muthini Mwaniki**, a jua kali worker, testified that he could not recall the exact date of the incident. He stated that on the material morning, he had travelled from Utawala and, upon reaching Kikambuani Market, he found a crowd of people gathered. He testified

that he alighted from a motorcycle and went to see what was happening. DW1 testified that as he approached the crowd, he saw police officers, the area chief, and a person who was seated. Upon making enquiries, he was informed that the person had been apprehended on suspicion of stealing chickens. He testified that he possessed a certificate in first aid and would have offered assistance, but upon noting that the police were already present and had taken charge of the situation, he left the scene.

29. DW1 further testified that after several months, the Assistant Chief of Kikambuani summoned him to her office and requested him to avail himself at a later time. He stated that he later went to record a statement with the Directorate of Criminal Investigations (DCI) at Kangundo Police Station. He testified that sometime thereafter, the chief called him and informed him that the complainant had alleged that he had gone into hiding. He stated that he returned to the chief's office, whereupon he was arrested.

30. **DW2, John Muthama Musila**, a farmer, testified that he is a member of the village security initiative (Nyumba Kumi). He stated that on 25<sup>th</sup> February 2019, at about 5.30 a.m., he was on his way to take food to his sick sister when he noticed a group of people ahead of him. Upon reaching a junction, he heard the group say, "It is the one." He moved closer and was informed that the person they had apprehended was a suspected chicken thief. The person

was the complainant, whom he knew. He stated that he spoke to him and urged him to explain to the members of the public that he was not a thief. He further testified that he encouraged the group to accompany the complainant to his homestead to verify the allegations. He stated that although he initially intended to leave, the complainant requested him to accompany them as he feared being assaulted.

31. That they proceeded to the complainant's homestead, where no stolen chickens were recovered. Despite this, the members of the public insisted on leaving with the complainant. He stated that he remained behind with the complainant's wife, who was seeking help. He testified that they discussed calling the OCS, but four men from the crowd returned and began accusing him, insisting that he accompany them. He stated that during the commotion, the complainant's wife struck him with her phone. He testified that as they proceeded and reached near a church, he suggested that they go to the chief's office, to which the crowd agreed. Upon reaching the chief's office and finding police officers present, he left.

32. DW2 testified that he and the complainant had known each other since childhood, having started school together in Class One. He stated that he was surprised that the complainant implicated him in the assault despite the fact that he had been trying to assist and rescue him.

**33.DW3, Geraldine Ndina Muinde**, testified that she is a milk vendor at Kikambuani and resides in Kiliku Village. She stated that on 25<sup>th</sup> February 2019, at about 5.30 a.m., she left her home to go to a dairy shop. Upon reaching AIC Misiani, she encountered a crowd of approximately 20 to 25 people making noise and debating whether to release a person they had apprehended or to take a particular route. DW3 testified that she heard a voice which she associated with John, urging the crowd to go to the chief's office. She stated that out of fear, she stopped and observed John attempting to caution the crowd, but the crowd refused to release the person they had arrested. She testified that she thereafter proceeded to her place of work. She further testified that John was known within the village as a person who often assisted in resolving disputes.

**34.DW4, Felix Nzioka Mweu**, a farmer and businessman selling milk and farm produce in Joska and live in Kikambuani. He testified that on 25<sup>th</sup> February 2019, he woke at 4a.m and found her vehicle had a puncture. That he arrived in Kikambuani some few minutes to 6a.m. and met a crowd of people at a junction. He testified that he stopped to see what was happening and saw John Musial and he called out to him. That he told him of chicken theft and a person was arrested. That the crowd wanted to take them to Silanga but he wanted them to go to the chief's office and he went back to the crowd. He testified that

there were fracas, the crowd turned towards the chief's direction and he then left for his business. That he did not see John with any assault weapon. He further testified that he has known John for more than 15 years and he has never been associated with offences.

35. On cross examination, he testified that he did not recognize other people and there were riders at the scene. That it was around 20 minutes to 6a.m and the crowd was for about 25 to 30 people. That he talked to John because he is the one he talked with and that there were other people who were trying to talk with the crowd other than John. He testified that he knew the suspect who is a chicken farmer and does not know if he is a liar.

36. Upon close of the defence case, the trial court evaluated the entire evidence on record. It found that the prosecution had proved its case as against the appellant herein and found him guilty of causing grievous harm to one, Francis Mutume. He was convicted and sentenced to pay a fine of Kshs.300, 000/= or in default to serve 4 years imprisonment. The first accused person Geoffrey Muthini Munyaka was also convicted and sentenced to pay a fine of kshs.300,000/- or 4 years imprisonment in count one and to pay a fine of kshs.20,000/- or 3 months imprisonment on count two. It is this decision that aggrieved the Appellant, hence this appeal.

## **D. The Appeal**

37. The appeal is as set out in the earlier paragraphs of this judgment. The appeal was disposed by way of written submissions.

### **a. Appellant's Submissions**

38. It was submitted that the Appellant was the 2<sup>nd</sup> accused person before the trial court where he was convicted and sentenced to pay a fine of Kshs. 300,000/= or serve four (4) years' imprisonment, a decision he contends was erroneous in law and fact.

39. The Appellant's summarized grounds of appeal are that: the conviction was not supported by sufficient evidence; the trial court relied on inconsistent, doubtful and contradictory testimony; and failed to properly evaluate the defence case and ultimately reached a finding that the prosecution had proved its case beyond reasonable doubt when the evidence did not so demonstrate. He prayed that the conviction be quashed and the sentence set aside.

40. While relying on the principles set out in the case of **Okeno versus Republic** and the case of **Kiilu & Another versus Republic [2005] 1KLR 174**, the Appellant emphasized that this being a first appeal, the Court is obligated to re-evaluate and re-analyse the entire evidence afresh and arrive at its own independent conclusions.

41. On the sufficiency of evidence and in relying on the case of **Ronald Nyaga Kiura versus Republic [2018] eKLR**, the Appellant submitted that the prosecution failed to establish a prima facie case that warranted him being put on his defence. He argued that although the complainant (PW3) alleged that he was assaulted by the Appellant and escorted to Kikambuani Police Station, this evidence was contradicted by PW7 and PW8, police officers stationed at the said police station, who testified that PW3 was brought in by members of the public and that they could not identify the Appellant as one of the assailants. The Appellant contended that the trial court selectively relied on the evidence of the complainant's wife and other prosecution witnesses while disregarding the testimony of PW7, PW8 and PW9, thereby arriving at an erroneous finding.

42. The Appellant further submitted that the trial court failed to properly consider the contradictions in the prosecution's case, particularly the evidence surrounding how the complainant arrived at the police station and who if anyone, assaulted him. He argues that the circumstances prevailing on the material morning where members of the public were apprehending suspected thieves were not holistically evaluated. It is also the Appellant's case that the complainant and the Appellant had known each other for decades as neighbours and former classmates and that on the material day, the complainant sought the Appellant's

assistance for protection from an angry mob. The Appellant maintains that rather than assaulting the complainant, he attempted to rescue him by urging the crowd to take him to the chief's office. He contends that it was therefore implausible and unjust for the complainant to later implicate him.

43. On the standard of proof and while citing the case of **Elizabeth Waithiegeni Gatimu versus Republic [2015] eKLR** for the proposition that any reasonable doubt must be resolved in favour of an accused person, the Appellant submitted that the prosecution failed to prove its case beyond reasonable doubt. He argued that the contradictions in the prosecution's evidence, coupled with the failure by key witnesses to identify him as an assailant, raised serious doubts that ought to have been resolved in his favour.

44. In conclusion, the Appellant submits that the learned trial magistrate erred in law and fact in convicting and sentencing him, and urges this Court to allow the appeal, quash the conviction and set aside the sentence.

### ***b. Respondent's submissions***

45. The Respondent submitted that the Appellant was jointly charged and tried for the offence of causing grievous harm contrary to the Penal Code, arising from an incident that occurred on 25<sup>th</sup> February 2019. That upon hearing the

evidence, the trial court convicted and sentenced him to pay a fine of Kshs.300,000/= or in default, to serve four (4) years' imprisonment. The Respondent noted that although the Appellant raised nine grounds of appeal, three were subsequently abandoned.

46.The Respondent acknowledged that this is a first appeal and reiterated the duty of the appellate court to re-evaluate the evidence afresh while bearing in mind that the trial court had the advantage of seeing and hearing the witnesses as established in the case of **Okeno v Republic [1972] E.A 32.**

47.On the merits of the appeal, the Respondent submitted that the conviction was founded on overwhelming and consistent evidence. It was urged that the prosecution called several eyewitnesses, namely PW1, PW3, PW4, PW5 and PW6 all of whom testified that they saw the Appellant assault the complainant. The Respondent emphasized that all these witnesses knew the Appellant prior to the incident, the assault occurred in broad daylight and the evidence of the assault was corroborated by medical evidence in the P3 form which confirmed that the complainant sustained grievous harm.

48.The Respondent further submitted that the complainant's testimony was detailed and consistent, describing how the Appellant and his accomplices assaulted him within his compound and continued to assault him while escorting

him to Kikambuani Police Post. That this evidence was corroborated by the complainant's wife (PW4) and independent witnesses (PW5 and PW6), who also placed the Appellant at the scene and described his active participation in the assault.

49. Regarding the alleged contradictions and inconsistencies raised by the Appellant, the Respondent submitted that any discrepancies were minor and did not go to the root of the case. It was argued that differences in the description of the weapons used were immaterial, as they were all blunt objects capable of causing the injuries sustained. The Respondent relied on the cases of **Phillip Nzaka Watu versus Republic [2016] eKLR** and **Khisa versus Republic [2025] KECA 486 (KLR)** to submit that minor inconsistencies are expected in human recollection and may in fact, enhance credibility, as opposed to rendering the prosecution case unreliable.

50. The Respondent further contended that the evidence of PW7 and PW8, police officers who testified that they did not identify the assailants from the crowd, did not weaken the prosecution's case. On the contrary, their testimony was consistent with the fact that the complainant was brought to the police post by members of the public, and their inability to identify specific individuals from the crowd did not negate the direct and positive identification by the eye witnesses.

51. On the Appellant's argument that the charges were an afterthought, the Respondent submitted that criminal offences are not subject to limitation periods under the Limitation of Actions Act and that this ground is therefore legally untenable. As regards allegations of bias arising from the complainant's relationship with some witnesses, the Respondent submitted that no such bias was established during cross-examination and that the trial court correctly found that independent witnesses had testified in support of the prosecution's case.
52. The Respondent also submitted that the trial court properly considered and rejected the Appellant's defence after weighing it against the prosecution evidence, finding that the Appellant was not an innocent bystander but an active participant in the assault.
53. In conclusion, the Respondent urged the Court to find that the prosecution proved its case beyond reasonable doubt that the conviction was sound and that the sentence imposed was lawful and lenient in light of the fact that the offence of grievous harm attracts a maximum sentence of life imprisonment. The Respondent prayed that the appeal be dismissed in its entirety.

### **E. Analysis and Determination**

54. This being a first appeal, this Court has a duty to reconsider and re-evaluate the evidence adduced before

the trial court and make its own independent conclusion. It should however give regard to the fact that it has neither heard nor seen the witnesses testify. This Court agrees with both parties' appreciation of the caselaw on the powers of this Court as captured in their respective submissions. See also the cases of **Pandya v R {1957} EA 336; Ruwalla v R {1957} EA 570** and **Kisumu Criminal Appeal No. 28 of 2009 David Njuguna Wairimu v. Republic [2010] eKLR** where the Court of Appeal held that:

**“The duty of the first appellate court is to analyse and reevaluate the evidence which was before the trial court and itself come to its own conclusion on that evidence without overlooking the conclusion of the trial court. There are instances where the first appellate court may depending on the facts and circumstances of the case, come to the same conclusion as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decisions.”**

55. Having considered the record of the trial court, the petition of appeal and the grounds of appeal therein, and

the submissions filed by the parties herein I discern the following issues for determination: -

- a.) *Whether the prosecution proved the charge of grievous harm against the Appellant beyond reasonable doubt;*
- b.) *Whether the evidence relied upon by the trial court was inconsistent, contradictory or unreliable;*
- c.) *Whether the trial court properly evaluated and considered the Appellant's defence; and*
- d.) *Whether the conviction and sentence were safe and lawful.*

**(a) Whether the prosecution proved the charge of grievous harm against the Appellant beyond reasonable doubt.**

56. The Appellant was convicted of the offence of grievous harm contrary to section 234 of the Penal Code. To sustain a conviction under that section, the prosecution was required to prove beyond reasonable doubt:

- a. that the complainant sustained grievous harm;
- b. that the harm was unlawfully caused; and
- c. that it was the Appellant who caused or participated in causing that harm.

57. On the nature and extent of the injuries, the evidence is not in dispute. PW2, the clinical officer, produced the P3 form

which confirmed that the complainant sustained a deep cut to the head, blood clots beneath the skin and a fracture to the hand which required immobilization by plaster. These injuries clearly fall within the definition of grievous harm under section 4 of the Penal Code. The defence did not contest the fact or severity of the injuries. This element was therefore conclusively proved. There is also no contention that the complainant's injuries were unlawfully inflicted having been assault upon accusation of being a chicken thief.

58. The principal contest in this appeal revolves around identification of the perpetrator(s) of the complainant's injuries. The question for determination being whether the Appellant was one of the persons who assaulted the complainant. The Appellant maintained that he was not an active part of the crowd that assaulted the complainant, but that in fact he tried to rescue the complainant from the mob that was assaulting him.

59. The prosecution relied on the evidence of five eye witnesses, namely PW1, PW3, PW4, PW5 and PW6. A careful re-evaluation of their testimonies shows that:

- a. The assault occurred in broad daylight, between approximately 6.00 a.m. and 7.00 a.m.
- b. All the eye witnesses testified that they knew the Appellant prior to the incident, some having known

him for decades as a neighbour and former schoolmate.

c. The Appellant was, thus, positively identified by recognition.

60. PW3, the complainant, gave a detailed account of how the Appellant, together with his co-accused and another person, entered his homestead, restrained him and assaulted him using blunt objects, resulting in a fractured arm and head injuries. His testimony was corroborated in material respects by PW4, his wife, who confirmed that the Appellant entered their house, was armed with a hockey stick, and participated in the assault. Further corroboration came from PW1, PW5 and PW6, who independently placed the Appellant at the scene and described seeing him assault the complainant. These witnesses were not shown to have any motive to falsely implicate the Appellant. Their evidence was consistent on the core issue that the Appellant was not a mere bystander but an active participant in the assault. PW6 in fact stated that he spoke to the Appellant as to why they were assaulting the complainant.

61. This Court finds that there was overwhelming evidence that the Appellant was indeed an active member of the mob that assaulted the complainant and he is thus culpable by virtue of the doctrine of common intention. That notwithstanding, there is direct evidence from PW1 and

PW6 who saw the Appellant strike the complainant on the hand and head respectively.

62. The Appellant argued that PW7 and PW8, the police officers at Kikambuani Police Post, did not identify him as one of the assailants. However, this Court agrees with the Respondent that PW7 and PW8 arrived after the assault had already occurred and encountered a crowd of many people. Their not being able to identify individual assailants does not displace the direct testimony of eye witnesses who knew the Appellant well and observed him at a close range during the assault. The fact that they did not identify the Appellant as the assailant adds more credence to their testimonies since, they never witnessed the incident. They only re-arrested the complainant and two other persons after they had been assaulted and arrested by members of the public.

63. Accordingly, upon re-evaluation, this Court is satisfied that the prosecution proved beyond reasonable doubt that the Appellant participated in unlawfully causing grievous harm to the complainant. This ground fails for lack of merit.

**(b) Whether the evidence relied upon by the trial court was inconsistent, contradictory or unreliable.**

64. The Appellant submitted that the prosecution case was riddled with contradictions, particularly regarding who escorted the complainant to the police station and the

specific weapons used during the assault. This Court has carefully examined the alleged inconsistencies. It is settled law that not every inconsistency is fatal to the prosecution case. Only contradictions that go to the root of the case and create doubt as to the guilt of the accused are material. This principle was well articulated in **Philip Nzaka Watu v Republic [2016] eKLR** where the Court of Appeal stated that;

**“It cannot be gainsaid that to found a conviction in a criminal case, where the trial court has to be satisfied of the accused person’s guilt beyond reasonable doubt, the prosecution evidence must be cogent, credible and trustworthy. Evidence that is obviously self contradictory in material particulars or which is a mere amalgam of inconsistent versions of the same event, differing fundamentally from one purported eyewitness to another, cannot give the assurance that a court needs to be satisfied beyond reasonable doubt.**

**However, it must be remembered that when it comes to human recollection, no two witnesses recall exactly the same thing to the minutest detail. Some discrepancies must be expected because human recollection is not infallible and no two people perceive the same phenomena exactly the same way. Indeed as has been**

**recognised in many decisions of this Court, some inconsistency in evidence may signify veracity and honesty, just as unusual uniformity may signal fabrication and coaching of witnesses. Ultimately, whether discrepancies in evidence render it believable or otherwise must turn on the circumstances of each case and the nature and extent of the discrepancies and inconsistencies in question.”**

65. In the present case, the core facts remained consistent: the complainant was assaulted by the Appellant and others, sustained serious injuries, and was thereafter taken to the police. Minor differences as to whether the weapon was described as a rungu or a hockey stick are inconsequential, as both are blunt objects capable of causing the injuries proved. Such differences are to be expected in honest human recollection and do not detract from the credibility of the witnesses. Similarly, whether the complainant was escorted to the police station by the Appellant specifically or by members of the public does not negate the overwhelming evidence that he had already been assaulted by the Appellant earlier.

66. Further, the alleged contradictions in the evidence of PW7 and PW8 on the one hand and that of PW3 on the other hand, as to who escorted the complainant to the police station, are no contradictions at all, as already discussed

above. PW3 testified to what he witnessed at the scene and home of the complainant, while Pw7 and PW8 testified to what they witnessed at the police station. Ultimately, I find no material contradictions in the prosecution's evidence and the remote discrepancies do not create reasonable or material doubt in the Court's mind.

67. I therefore find that the prosecution evidence was substantially consistent and reliable. This ground equally fails.

**(c) Whether the trial court properly evaluated and considered the Appellant's defence**

68. The Appellant's defence was that he was a rescuer who attempted to shield the complainant from an angry mob and urged that the matter be referred to the chief. He called witnesses who generally testified to seeing him among the crowd urging restraint.

69. Despite the defence narrative portraying the Appellant as a peacemaker, it does not dislodge the direct evidence of multiple prosecution witnesses who saw him assault the complainant. The trial court expressly evaluated the defence and weighed it against the prosecution case before rejecting it. This court has similarly reconsidered that defence and finds that it was inconsistent with the weight of the prosecution evidence.

70. His assertion that he was merely in the crowd, coupled with alleged attempts to calm the situation does not explain away the consistent testimony that he entered the complainant's homestead, restrained him and inflicted injuries. Pw1 saw the Appellant hit the complainant with a hockey stick. PW3, the complainant gave an account on how the Appellant assaulted him and he even talked to him. PW4, the complainant's wife equally saw the Appellant and spoke to him at the scene. Lastly, PW5 and PW6 saw the Appellant and spoke to him. All these accounts dislodge the Appellant's assertion that he tried to help the complainant. The witnesses called by the Appellant did not help his case much. While they were to support his defence, the Appellant never mentioned them in his defence, that he saw them or that they were at the scene. DW3 stated that he heard voice, that he associated with that of the Appellant. He never testified seeing the Appellant for him to state what the Appellant was doing. While DW4 stated that he called out the Appellant, the Appellant never mentioned him in his defence. I fail to imagine how the Appellant would have failed to mention his encounter with DW4 if indeed they spoke. The Appellant's defence was not credible. I find that the defence was considered and correctly rejected.

71. Ultimately, I found that the conviction was supported by cogent evidence and that the prosecution proved its case beyond reasonable doubt, the conviction was safe.

72. On sentence, the offence of grievous harm under section 234 of the Penal Code attracts a maximum sentence of life imprisonment. The trial court imposed a fine of Kshs.300,000/= with a default sentence of four (4) years' imprisonment. This sentence was lawful, lenient and proportionate in the circumstances. There is no basis for appellate interference.  
Orders accordingly.

Dated, signed and delivered at Machakos this 16<sup>th</sup> day of March, 2026

**RHODA RUTTO**  
**JUDGE**

**In the presence of;**

.....Appellant

.....Respondent

Selina Court Assistant

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