REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL APPEAL NUMBER E103 OF 2024

GERALD KAUME KIIYA……1ST APPELLANT

JAPHET MUTEMBEI KIIYA …… 2ND APPELLANT

VERSUS

REPUBLIC……

….RESPONDENT

(Being an appeal against the judgment on conviction and sentence delivered on 30th September, 2024 by Hon. J. Macharia (SPM) in Tigania Criminal Case No. E269 of 2020).

JUDGMENT

1. The appellants were charged before Tigania Magistrate's court with the offence of grievous harm contrary to section 234 of the Penal Code. The particulars of the charge was that on 30/4/2020 at Thubuku location in Tigania East sub-county within Meru County jointly with another not before court unlawfully did grievous harm to Margaret Mwonjiru.

2. The appellants denied the charge. After a full trial, each appellant was found guilty of the offence, convicted and sentenced to serve seven (7) years imprisonment.

3. Aggrieved by the said conviction and sentence, the appellant filed a joint petition of appeal dated 11th October 2024, which raised the following grounds:

    a) That the trial magistrate erred in law and in fact by not properly analysing the evidence adduced and hence arrived at a wrong finding.

    b) That the learned trial magistrate erred in law and in fact by not properly analysing the evidence adduced and hence arrived at an erroneous conviction not supported by evidence and law.

    c) That the learned trial magistrate erred in fact and law by failing to consider the mitigation of the appellants herein and arrived at a very harsh sentence.

    d) That the learned trial magistrate meted out a sentence that was too harsh in view of the entire circumstances of the case.

e) That the learned trial court erred in law and in fact by failing to grant the accused persons herein an alternative of a fine.

4. In their submissions, the appellants averred that PW1's own evidence was unreliable, contradictory and uncorroborated. That none of the witnesses as mentioned, namely Agnes Kinila and Susan were called by the prosecution. Citing **Bukenya -vs- Uganda (1972) E.A 549** it was submitted that this court is entitled to draw an inference that their evidence would have been adverse to the prosecution case.

5. It was further submitted that the identification of the appellants was unsafe, since PW1 was clear that the attack was sudden and she fell unconscious. The appellants urged the court to warn itself of such evidence as was set out in **Wamunga vs- Republic (1989) KLR 424.**

6. Further inconsistencies, according to the appellants, was in the evidence of the weapons allegedly used. That the complainant did not identify what the 2nd appellant was armed with and that an act committed by another person

could not be deemed to have been committed by the 2nd appellant.

7. The appellants also submitted that the trial court introduced new facts not stated in the evidence in reference to a rungu allegedly held by the 2nd appellant.

8. It was further submitted that the trial court failed to consider the defence raised by the appellants that it was PW1 and other people who hurled stones at them, leading to a commotion and as a result PW1 may have suffered injuries. That the defence adduced was not only plausible but raised a reasonable explanation as to how the complainant was injured.

9. On the sentence, the appellants submitted that the seven (7) years were manifestly excessive, given that the injuries sustained by the complainant were not life-threatening and did not result in permanent disability. That the trial court also failed to take account of the fact that the appellants were first time offenders.

10. Although the State (DPP) was given time, to respond, I did not see their submissions.

11. The onus on this court as a first appellate court is to re-evaluate the evidence afresh and arrive at its own independent conclusion. This principle was reiterated in **Okeno -Vs- Republic (1972) EA 32** where it was held that:

> ***"An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion."***

12. Similarly, in **Kamau Njoroge vs Republic [1987] eKLR**, the Court of Appeal stated:

> ***"As this court has constantly explained, it is the duty of the first appellate court to remember that the parties to the court are entitled, as well on the questions of fact as on questions of law, to demand a decision of the court of first appeal, and that court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and to make due allowance in this respect."***

13. In evaluating the evidence, I will refer to the relevant parts. As such, I need not rehash the entire evidence herein.

14. The complainant's testimony was that she was planting maize in her farm when the appellants arrived. The 1st appellant had a panga, while the 2nd appellant had a rungu. Both appellants attempted to attack her. She fled from the scene, with the appellants in hot pursuit. They caught up with her attacked her, after which they walked away. Her brother (Muthama) arrived shortly thereafter. He said that he saw the appellants at the scene while armed. He assisted his sister get away from the scene and took her to hospital.

15. The appellants point to alleged contradictions in the victim's evidence. I have analysed the same and I don't see any material contradiction. She was categorical that it was the appellants who attacked her. There are people she knew well as their lands bordered each other. The offence took place during the day. There were no conditions that could raise any doubt as to the identification or recognition of the appellants.

16. The complainant told the trial court that when she was threatened by Gerald, she ran towards the road but the appellants caught up with her. The attack was therefore not sudden as submitted by the appellants.

17. It is true that the prosecution has a duty to call their crucial witnesses. The complainant mentioned that she was with Agnes and Susan. Both did not attend court. It is not clear if they were asked to record statements with the police. Failure by the police to avail them to record statements may in certain circumstances lead to an adverse inference being drawn as submitted but, in this case, there was evidence of Geoffrey (PW3) who found the appellants at the scene. He noted that the first appellant had a rungu and a panga while the 2nd appellant had a panga.

18. In my view, the failure to call the stated witnesses does not water down the evidence already adduced. The evidence of Geoffrey sufficiently corroborated that of the complainant.

19. As to the act committed by each appellant, the complainant was categorical. She narrated that Gerald cut her with the panga while Mutembei hit her with the rungu. It is not logical

to separate individual acts in such circumstances. By application of the doctrine of common intention, each appellant is ultimately liable for the end result of their collective acts.

20. The doctrine is set out in section 21 of the Penal Code and it states as follows:

> **"When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose, an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence."**

21. The ingredients of the doctrine of common intention were enunciated in **Eunice Musenya Ndui versus Republic, Criminal Appeal No. 534 of 2010 (2011) eKLR.** In a nutshell, they are;

a) There must be two or more persons;

b) The persons must form a common intention;

c) The common intention must be towards prosecuting an unlawful purpose in conjunction with one another;

d) An offence must be committed in the process;

e) The offence must be of such a nature that its commission was a probable consequence of the prosecution of the unlawful purpose.

22. In applying the doctrine, that the prosecution needs to show is that even though each accused may have committed an individual and different act, then each act considered alongside each other caused the death of the deceased.
23. I am satisfied that by application of the doctrine the appellants are deemed to have jointly carried out the attack on the complainant.
24. The appellants further argue that the trial court did not consider their defence.
25. A court is bound to consider any evidence adduced in defence, however weak or improbable it is.
26. Looking at the trial court record, I find that the court duly noted the defence adduced and dismissed it as an

afterthought on the ground that it was not raised during cross-examination.

27. The question for this court to answer is whether that defence was plausible enough to cast reasonable doubt on the prosecution case.

28. The 1st appellant stated that it was Geoffrey and other people who hurled stones at them and he fled from the scene. He did not mention the complainant. The evidence of the complainant was that Geoffrey arrived after she had already been attacked.

29. The 2nd appellant claimed that the complainant was also among the people who went to where they were. He was not injured at all.

30. Clearly, the defence of the appellants did not raise any circumstances that could have led to a reasonable presumption that the injuries on the complainant were sustained when the group went to where they were, and hurled stones at them. The P3 form indicates that the complainant's injuries were caused by a sharp object. The only reference to a sharp object was in respect to the

weapons that the appellants had. It is not feasible that the same people who were with the complainant would be the ones who inflicted such severe injuries on her.

31. As such, just like the trial court, I find that the defence did not raise any reasonable doubt.

32. On sentence, the offence of grievous harm has a maximum sentence of life imprisonment. I cannot fault the court for the sentence it meted out. This was an unprovoked act, arising out of an apparent land dispute. Violence cannot be a solution.

33. I find no reason to disturb the sentence.

34. I find that both the conviction and sentence were proper and uphold them.

35. The appeal is hereby dismissed.

Dated, Signed & Delivered at Meru this 23rd day of April, 2026.

H. M. NYAGA
JUDGE