



**Murithi v Republic (Criminal Appeal 4 of 2019)
[2024] KECA 1126 (KLR) (6 September 2024) (Judgment)**

Neutral citation: [2024] KECA 1126 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CRIMINAL APPEAL 4 OF 2019
J MOHAMMED, LK KIMARU & AO MUCHELULE, JJA
SEPTEMBER 6, 2024**

BETWEEN

JAMES MWANDIKI MURITHI APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal against the judgment of the High Court at Chuka (R.K. Limo, J.) dated 17th October, 2017 In High Court Criminal Case No. 16 of 2015)

JUDGMENT

Background

1. The appellant, James Mwandiki Murithi, was charged with two counts of the offence of causing grievous harm contrary to Section 234 of the Penal Code. The particulars of the offence were that on 25th December 2011 at Wiru village, Kianjagi sub-location within Tharaka Nithi County, the appellant did grievous harm to Florence Kanjira (Count 1) and Ezekiel John (Count 11). The appellant pleaded not guilty and the matter was set down for trial whereupon the trial court found him guilty of both counts and sentenced him to life imprisonment in respect to count 1 and suspended sentence in respect to count 11.
2. A brief background of the appeal is that both the complainants in this case were the appellant's grandparents. The prosecution called five (5) witnesses in support of its case. Florence Kajira (PW1) testified that she was the appellant's grandmother and that he used to stay with her. It was her testimony that the appellant attacked her on 24th December, 2011 by beating her and threatening her husband (PW2) who was the appellant's grandfather, with a panga when he tried to rescue her from the beating. PW1 further testified that on 25th December, 2011, the appellant attacked her again, this time more seriously in that he strangled and beat her until she became unconscious. It was her further testimony



- that the appellant claimed that she had stolen his mobile phone. It was her further testimony that as a result of the assault by the appellant, she lost consciousness, which she regained at Chogoria Hospital.
3. Ezekiel John Njiru (PW2) testified that he was the appellant's grandfather. It was his testimony that the appellant attacked both he and PW1 on 24th December, 2011 and that they reported the assault to the police. It was his further evidence that again on 25th December, 2011, the appellant attacked PW1 at night until she became unconscious. That the appellant then turned on PW2 by pouring "changa" on his eyes thereby blinding him and then proceeded to carry him (PW2) outside into a maize field, "so as to kill him". It was PW2's further testimony that the appellant cut him with a panga three times on the head and pierced his ears and the bridge of his nose and left him unconscious in a maize field. It was his testimony that he regained his consciousness at Chogoria Mission Hospital where he was admitted.
 4. Gerald Arithi (PW3) testified that on 25th December, 2011 as the sub- area of Weru village, two people went and reported to him that two complainants had been injured. It was his evidence that he proceeded to the home of the two injured people where he found that PW1 had been badly injured on the head and was lying down. It was his further testimony that PW2 was also badly injured and had cuts on his face, head and ear. PW3 further testified that PW1 and PW2 were unable to talk and that he and others took them to the hospital where they were both admitted. Further, that they also reported the incident to the police station at Chogoria whereupon the appellant was arrested on the same day.
 5. Hillary Kangichu (PW4) was a Clinical Officer from Chuka District Hospital. It was his evidence that by the time PW1 arrived at the hospital she was unconscious. That she presented a history of having been assaulted by someone known to her on 25th December, 2011. It was his testimony that she had blunt head trauma and was unconscious for 10 days by the time he filled the P3 form and that she had right side body weakness. Further, her thorax and abdomen had multiple soft injuries and her upper limbs also had multiple blunt soft tissue injuries. There was also weakness of the right lower limb. In his opinion, the probable weapon used was blunt. PW4 testified that he classified the injuries as grievous harm and filled and produced the P3 form.
 6. It was PW4's further evidence that a person known to PW2 assaulted him, and by the time he arrived at the hospital he was unconscious. It was PW4's testimony that PW2 had multiple scalp wounds on his head and neck. That he had a cut on the right small finger and a proximal phalanx fracture. PW4 testified that the probable weapon used was a sharp object. He classified the injuries as grievous harm and proceeded to sign and produce the P3 form.
 7. Emmanuel Serem (PW5) was the Investigations Officer. It was his evidence that he commenced investigations on 24th December, 2011 when PW1 reported the offence at the police station, which he booked.

It was his evidence that on 25th December, 2011 the appellant attacked PW1 and PW2 and that they sustained serious injuries. He issued PW1 and PW2 with P3 forms and recorded witness statements. It was his further evidence that he established that PW1 was admitted in hospital for 1 month while PW2 was admitted for two weeks. It was his evidence that he charged the appellant with the offences.
 8. When placed on his defence, the appellant gave unsworn evidence and did not call any witness. The appellant raised an alibi defence stating that he had been in police custody from 21st December, 2011. He denied being at the scene of the crime on 25th December, 2011 as he was still being held in police custody. In cross-examination he admitted that PW1 and PW2 were his grandmother and grandfather respectively but denied attacking and injuring them.
 9. Upon analysis of all the evidence, the trial court convicted the appellant of both counts of causing grievous harm.



10. The prosecution stated as follows before the appellant was sentenced:

“...the accused’s aim was to kill the two. One of the complainants is in court and is walking on crashes (sic) as a result of the attack. The grandfather also has turned blind and sustained spinal injuries and cannot walk. I produce some medical evidence though we don’t have previous record.”

11. Prior to sentencing the appellant, the trial court stated as follows:

“I note the seriousness of the offence. I also note the way the accused person attacked the two complainants, who are his grandparents mercilessly and brutally. If the accused was to be given a non-custodial sentence, I am not even guaranteed that the two complainants will live. I therefore find that a different action is most necessary under this circumstance. I also take into account that the permanent injuries and agony the two complainants will have to undergo for the rest of their lives. It is for this reason that I do direct the accused person to serve life sentence in count I. Sentence for count II would be life sentence which is hereby suspended due to the confence (sic) in count I.”

12. Dissatisfied by the conviction and sentence, the appellant filed an appeal to the High Court at Chuka. The High Court (R.K. Limo, J.) found that there was overwhelming evidence against the appellant and dismissed the appeal on both conviction and sentence. The learned Judge found as follows:

“This court finds that the learned trial magistrate in meting out the life sentence took into account all the relevant factors he ought to have been considered. I am not persuaded that the trial court was influenced by external factors or extraneous matters. I have considered what the appellant said in mitigation and in my view, he did not show any remorsefulness for the agony he caused to his grandparents who had been taking care of him. I did at the hearing of this appeal put questions to the appellant albeit off the record to see if he had changed his stand but he appeared defiant showing no remorse at all. He infact denounced them that they were not his grandparents despite evidence to the contrary tendered at the trial. So in situations where an accused person has been convicted and show (sic) no remorsefulness about the offence he is charged with, a court cannot be faulted for handing a maximum sentence provided by law. That situation obtains in this case and on the basis of that I do not find any reason to interfere with the trial court’s discretion to hand life sentence to the appellant. The complainants who are grandparents to the appellant are certainly safer without him and that played in the mind of the learned trial magistrate when sentencing the appellant.

In the premises, I find no merit in this appeal. I find no option but to uphold both the conviction and the sentence meted out against the appellant. The appeal is therefore dismissed.”

13. Undeterred, the appellant filed an appeal to this Court raising the following grounds of appeal to wit that the learned Judge erred in law: by failing to note that the prosecution case was not proved beyond reasonable doubt as required by law; by failing to note that the evidence was inconsistent, contradictory and not corroborated; and by convicting the appellant to life imprisonment hence failed to note that there was no independent witness called to clear doubt. The appellant urged that the appeal succeeds, conviction quashed, sentence set aside and he be set at liberty.



Submissions

14. At the hearing of the appeal, the appellant was acting in person. Ms. Nandwa, the learned Prosecution Counsel was on record for the State.

15. The appellant submitted that his appeal is only against sentence. He abandoned his appeal against conviction. He urged this Court to consider the time that he has spent in remand custody.

16. Ms. Nandwa submitted that the sentence imposed by the trial court and upheld by the 1st appellate court was lawful. Counsel submitted that the sentence of life imprisonment was proper and well within the law considering the manner in which PW1 and PW2 were brutally attacked and left for dead by the appellant. Counsel emphasized that PW1 was in a coma for a period of 10 days and was admitted in hospital for one month due to the injuries that she sustained from the assault by the appellant. Counsel further emphasized that PW1 began using crutches as a result of the attack. Counsel submitted that on the other hand, PW2 became blind after the appellant poured changaa into his eyes.

Counsel stressed that the injuries caused by the appellant upon PW1 and PW2 are permanent in nature and the same have caused agony in their lives.

17. Counsel further stressed that the appellant was extremely brutal when he attacked PW1 and PW2. In counsel's opinion, the appellant was merciless in his attack and was never at any one point provoked by PW1 and PW2. Counsel emphasized that there was no reason at all for the appellant to attack PW1 and PW2 who had taken care of him most of his life. Counsel highlighted that in mitigation, the appellant was not remorseful of the pain and suffering that he had caused his grandparents. Counsel stressed that if the appellant were to be given a non-custodial sentence or probation he may have gone back to further harm his grandparents, which in her view is the reason that he was sentenced to life imprisonment. In counsel's opinion, the life sentence imposed on the appellant also served the purpose of re-assuring PW1 and PW2 that they would be safer without him.

18. Counsel urged this Court to find that in the circumstances, the sentence of life imprisonment was not at all harsh and excessive but was proper, taking into consideration a number of factors such as: the gravity of the offence; that the degree of harm was grievous; that the victims were two and were both elderly; that the appellant used a sharp weapon when he attacked the victims; and that the offence is prevalent in the community.

19. In conclusion, counsel submitted that the prosecution proved its case beyond reasonable doubt against the appellant for the offence of causing grievous harm which he was found guilty of and convicted accordingly.

Counsel reiterated that the prosecution evidence was clear, concise and consistent and urged this Court to uphold the sentence of life imprisonment.

Determination

20. We have considered the record of appeal, the submissions, the authorities cited and the law. This is a second appeal and as such we are limited to consideration of matters of law only. Accordingly, we are generally bound by concurrent findings of fact by the two courts below departing therefrom only in the rarest of cases where they are not based on any evidence or proceed from a misapprehension of the evidence or are plainly untenable. See *Karingo v Republic* [1982] KLR 219 and Section 361 of the Criminal Procedure Code.



21. We have been urged to interfere with the sentence imposed by the trial court, which was upheld by the 1st appellate court. The appellant was charged with two counts for the offence of grievous harm contrary to Section 234 of the Penal Code which provides as follows:

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

22. Grievous harm is defined under Section 4 of the Penal Code to mean:

‘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.’”

23. In *Pius Mutua Mbuvi v Republic* [2021] eKLR the High Court stated that from the definition of grievous harm under Section 4 of the Penal Code the ingredients of the offence of grievous harm are:

- “1) Victim sustained grievous harm
2. Harm was caused unlawfully
3. Accused caused/participated in causing the grievous harm.”

Further, the same court went on to state the specificities of grievous harm as follows:

“In the case of grievous harm, the injury to health must be permanent or likely to be permanent, whereas, to amount to bodily harm, the injury to health need not be permanent

- (2) a mental injury may amount to grievous harm but not to bodily harm (3) the injury must be ‘of such a nature as to cause or be likely to cause’ permanent injury to health.”

24. The maximum sentence for an accused person found guilty of the offence of causing grievous harm is, therefore, life imprisonment. The trial court stated as follows:

“It is clear from the testimony on record that the accused brutally attacked the two complainants who are his grandparents, he attacked them mercilessly, in fact from the nature of the attack and injuries suffered by the two, the intention of the accused was probably to kill them, and it is by God’s grace that the two survived.”

In so finding, the trial court imposed the sentence of life imprisonment. The 1st appellate court upheld the sentence.

25. Can we, as the 2nd appellate court in the circumstances interfere with the sentence upheld by the 1st appellate court? This Court in *Bernard Kimani Gacheru V Republic* [2002] eKLR stated as follows:-

“It is now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account some wrong material, or acted on a wrong principle. Even if, the Appellate Court feels that the sentence is heavy and that the Appellate Court might itself not have passed that sentence, these alone are not



sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already states is shown to exist.”

26. In the circumstances, for us to interfere with the sentence upheld by the 1st appellate court, we must be satisfied that the sentence was manifestly excessive in the circumstances of the case; the 1st appellate court overlooked some material factors, took into account some wrong material or acted on wrong material, or acted on a wrong principle of law.
27. In considering whether to interfere with the sentence of life imprisonment imposed by the trial court, the 1st appellate court stated as follows:

“The denial by the accused that he attacked the two, and his allegation that on 25th December, 2011 he was in police custody is a total lie. It is clear from the testimony on record that the accused brutally attacked the two complainants who are his grandparents, he attacked them mercilessly, infact, from the nature of the attack and injuries suffered by the two, the intention of the accused was probably to kill them, and it is by God’s grace that the two survived.

Medical evidence on record shows that the two were taken to hospital unconscious as a result of the attack, the first complainant was in a comma for ten days.

The clinical officer classified the injuries suffered by the two as grievous harm, he produced the two P3 forms. For these reasons stated here above, I am convinced beyond a reasonable doubt that the accused did grievous harm to the two and I find him guilty in both counts as charged.

Criminal Procedure Code.”

His defence is a sham, full of lies and I dismiss the same, and for the reasons I have stated herein-above, do convict him in the two counts as charged under Section 215

28. In the circumstances, we find that the 1st appellate court took into account proper considerations when upholding the sentence of life imprisonment. We find that the 1st appellate court made no misdirection in upholding the sentence imposed by the trial court
29. The appellant brutally assaulted his elderly grandparents who both sustained serious and life-changing injuries which include causing physical impairment to PW1 who has to use crutches to aid in her mobility and blindness to PW2. We find that the sentence imposed by the trial court and upheld by the 1st appellate court was lawful and was neither harsh nor manifestly excessive. The appellant does not deserve clemency from us. Accordingly, we have no reason to interfere with the sentence imposed on the appellant and upheld by the 1st appellate court.
30. The upshot is that this appeal against sentence has no merit and it is hereby dismissed.

DATED AND DELIVERED AT NYERI THIS 6TH DAY OF SEPTEMBER, 2024.

JAMILA MOHAMMED

.....

JUDGE OF APPEAL

L. KIMARU

.....

JUDGE OF APPEAL



A. O. MUCHELULE

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

