



REPUBLIC OF KENYA



KENYA LAW
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**Mwarashu v Republic (Criminal Appeal E056 of 2024)
[2025] KEHC 7158 (KLR) (30 May 2025) (Judgment)**

Neutral citation: [2025] KEHC 7158 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VOI
CRIMINAL APPEAL E056 OF 2024
AN ONGERI, J
MAY 30, 2025**

BETWEEN

DAVID GIFT MWARASHU APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal from the conviction and sentence by Hon. C. K. Kithinji
(PM) in Voi CMCC Case No. E743 of 2023 delivered on 10th December 2024)*

JUDGMENT

1. The Appellant David Gift Mwarashu was convicted with the offence of grievous harm contrary to Section 234 of the [Penal Code](#) and he was sentenced to serve 9 (nine) years imprisonment.
2. The particulars of the offence were that on 20th August 2023 at Kirumbi Area in Voi Sub-County within Taita Taveta County the Appellant willfully and unlawfully caused grievous harm to one Jason Mazai Mwakibola.
3. The Appellant denied the charge and the prosecution called 6 witnesses.
4. The prosecution evidence in summary was that the Appellant went to the complainant's place of work where the complainant was working as a bouncer with his father who was the owner of the premises doing the business of a pub.
5. At 9p.m, the waiter told the complainant that the Appellant wanted to leave the premises and he had not cleared the bill.
6. The Appellant was about to leave and he stood at a dark corner of the pub. The complainant followed the Appellant with a waiter by name Caroline.



7. The Appellant had a catapult which he aimed at the complainant and hit him on the right eye with a stone and the complainant fell down.
8. The waiter called the complainant's father (PW3) and the complainant was rushed to hospital.
9. The members of the public chased the Appellant and arrested him at Rabai Area. He was taken back to the pub where Ronald Mwandeghu, (PW5) a community policing officer arrested him and took him to the police station.
10. The Appellant in his statement of deference said he went to Mnazi Pub at Kirumbi to see a friend called Sonko. He said he did not drink anything at the pub. He went to see a customer to buy charcoal.
11. When he finished talking with the customer, he left to go home. Four steps later he was called by name and told to go back.
12. He told the person to go over and he slapped him. The person put sand in his eyes.
13. The Appellant said he was assaulted by the people who were drunk at the pub and he could not see anything.
14. The following day, he found himself at the police station and he was charged in court.
15. The doctor who testified as PW1 told the court that the complainant lost sight on his right eye.
16. The trial court found the Appellant guilty as charged and sentenced him to 9 years imprisonment.
17. The Appellant has appealed against both conviction and sentence on the following grounds:-
 - i. The learned trial Magistrate erred in both law and fact when she misdirected herself.
 - ii. The learned trial Magistrate erred in both law and facts when she shifted the burden of proof from prosecution to the Appellant.
 - iii. The learned Magistrate erred in law when she considered the evidence adduced by prosecution full of massive contradiction.
 - iv. The learned trial Magistrate erred in law in convicting the Appellant on poor investigation adduced by prosecution.
 - v. That the learned trial court Magistrate erred in law and fact by convicting the Appellant to 9 years imprisonment without considering that the sentence meted on the Appellant was harsh and excessive.
 - vi. That the learned trial court Magistrate erred in law and fact by convicting the Appellant to 9 years imprisonment without considering his reasonable defence.
 - vii. That the learned trial court Magistrate erred in law and fact by convicting the Appellant to 9 years imprisonment without considering the period spent in remand prison.
18. The parties filed written submissions as follows:- the appellant submitted that the offence he was charged with was not proven to the required standard.
19. The appellant indicated that he was not properly identified. He argued PW1 was not clear in his testimony on how he identified the appellant in the dark and saw him holding a catapult and a stone having aimed at his right eye.



20. The appellant further argued that there were contradictions in the testimonies of the witnesses. PW2 informed the court that he was attacked at a club known as Two friends while PW3 testifies that the complainant was attacked at two flames. PW2 also testified that he used to see the appellant regularly at the club but during cross examination he indicated that it was the first time he met the appellant.
21. The appellant submitted that the sentence that was imposed by the trial court was severe and excessive considering the appellant was a first offender. The appellant further asked this court to consider that he has children who rely on him for sustenance. The appellant has been in remand since the beginning of this matter.
22. The prosecution submitted that PW2 testified that on the material date he was manning the bar owned and managed by PW3 upon which one of the bar attendants sought his intervention in having the appellant settle the bill of the alcohol he had consumed but declined to honor the same.
23. That upon approaching the appellant and subsequently requesting him to settle the subject bill he became aggressive and assaulted PW2's eye via a catapult that was loaded with a stone.
24. The prosecution indicated that it was PW3 who rescued PW2 rushing him to the nearest medical facility for emergency treatment. PW2 lost an eye and his injury was classified as grievous harm. At trial PW6 produced the catapult, stone and cigarette packet that the appellant used in storing the subject stone on the material date. The summary of the evidence provided was that the appellant was placed at the crime scene on the material date, properly identified by the victim and other corroborative prosecution witnesses and established that he committed the subject offence on the material date.
25. This being a first appeal, the duty of the first appellate court is as set out in the case of *Okeno v Republic* which 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 (*Pandya v Republic* [1957] EA. (336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (*Shantilal M Ruwala v R* [1957] EA 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 finding and conclusion; 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] EA 424.”
26. The issues for determination in this appeal are as follows:-
 - i. Whether the Appellant was identified as the perpetrator.
 - ii. Whether the prosecution proved its case against the Appellant to the required standard.
 - iii. Whether the sentence meted is appropriate.
27. I have carefully considered the appeal, the evidence adduced before the trial court, the submissions by both parties, and the applicable legal principles, I find as follows:
28. On the issue of identification, the prosecution evidence established that the Appellant was positively identified as the perpetrator of the offence.



29. The complainant (PW2) and the waiter Caroline interacted with the Appellant at close range before the incident, and the lighting conditions, though described as dim, were sufficient for recognition.
30. The Appellant was known to frequent the establishment, which further bolstered the reliability of the identification.
31. I find that the alleged contradictions in the testimonies regarding the name of the pub were minor and did not go to the root of the case, as the location and sequence of events remained consistent across all witnesses.
32. The medical evidence (PW1) corroborated the prosecution's account, confirming that the complainant suffered grievous harm through the loss of sight in one eye, consistent with an attack using a catapult and stone.
33. Regarding the burden of proof, the trial magistrate correctly placed it on the prosecution and did not shift it to the Appellant.
34. The prosecution discharged this burden by presenting cogent and consistent evidence linking the Appellant to the crime.
35. The Appellant's defence, which alleged mistaken identity and a subsequent mob attack, was unsupported by evidence and contradicted by the prosecution witnesses. The trial court rightly dismissed it as an afterthought.
36. On sentencing, the nine-year imprisonment term for grievous harm under Section 234 of the *Penal Code* was lawful and proportionate.
37. The offence carries a maximum sentence of life imprisonment, and the trial court exercised its discretion judiciously, considering the gravity of the harm caused—permanent loss of an eye—and the need for deterrence.
38. While the Appellant pleaded for leniency based on his status as a first offender and family responsibilities, these factors do not outweigh the severity of the offence.
39. However, in fairness, the period spent in remand should be accounted for in the sentence under Section 333(2) of the *Criminal Procedure Code*.
40. In conclusion, the conviction was sound, and the sentence, though stern, was justified.
41. The appeal against conviction is dismissed. The appeal against sentence is partially allowed to the extent that the nine-year term shall be deemed to include the period already spent in remand.
42. The Appellant shall serve the remainder of the sentence accordingly.

DATED, SIGNED AND DELIVERED THIS 30TH DAY OF MAY, 2025 IN OPEN COURT AT VOI.

ASENATH ONGERI

JUDGE

In the presence of:-

Court Assistant: Millicent

