



**Natembeya & another v Republic (Criminal Appeal E058 of 2020)  
[2025] KEHC 11948 (KLR) (31 July 2025) (Judgment)**

Neutral citation: [2025] KEHC 11948 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT BUNGOMA  
CRIMINAL APPEAL E058 OF 2020  
MS SHARIFF, J  
JULY 31, 2025**

**BETWEEN**

**PHILICHON SIMIYU NATEMBEYA ..... 1<sup>ST</sup> APPELLANT**

**LEONARD MARANGO NATEMBEYA ..... 2<sup>ND</sup> APPELLANT**

**AND**

**REPUBLIC ..... REPUBLIC**

*(Being an appeal from the original conviction of the Principal Magistrate's Court at Sirisia in Criminal Case No. E123 of 2022 delivered on 29th April 2024, by Hon. J.O Manasses, PM)*

**JUDGMENT**

1. Philichon Simiyu Natembeya and Leonard Marango Natembeya were jointly charged with several offences of grievous harm and assault causing actual bodily harm in 3 related counts, as follows:
  - A. Count I: Grievous harm contrary to section 234 of the Penal Code. The particulars were that Philichon Simiyu Natembeya on the 6<sup>th</sup> day of April 2022, at around 1100 hours at Kikai area Namwela Location in Bungoma West Sub-County within, Bungoma County, jointly with others not before Court willfully and unlawfully did grievous harm to Titus Wekesa'
  - B. Count II: Assault causing actual bodily harm contrary to section 251 of the Penal Code. It was alleged that on the same day and place, the Appellant with others not before Court willfully and unlawfully assaulted Sospeter Wanjala thereby occasioning him actual bodily harm.
  - C. Count III: Assault causing actual bodily harm contrary to section 251 of the Penal Code. It was alleged that on the same day and place, the Appellant with others not before Court willfully and unlawfully assaulted Maurice Wangila Timbiti thereby occasioning him actual bodily harm.



2. The Appellants/ Accused Persons denied the charges and after a full trial, they were all convicted for the offence of grievous harm and causing actual bodily harm. The Appellants were sentenced to 3 years imprisonment under Count I; 1-year imprisonment under Count II; 1-year imprisonment under Count III respectively. All the sentences were to run consecutively.
3. Being dissatisfied with the conviction and Sentence meted by the trial Court, the Appellants filed this appeal dated 13<sup>th</sup> May 2024, on the following grounds of appeal: -
  - i. That the learned trial Magistrate erred in law and fact by proceeding to convict the Appellants where the essential ingredients of the charge of causing grievous hard had not been proved by the Prosecution
  - ii. That the learned trial Magistrate erred in law by conviction the 2<sup>nd</sup> Appellant on the charge of causing grievous harm contrary to the evidence adduced.
  - iii. That the learned trial Magistrate erred in law and fact by convicting the 1<sup>st</sup> Appellant on the two counts of assault contrary to the evidence adduced.
  - iv. That the learned trial Magistrate erred by meting an excessive sentence.
4. The Appellants pray that the Honourable Court allows the appeal, quash their conviction and set aside the sentence imposed by the trial Court.
5. The appeal was canvassed by way of written submissions. My perusal of the Court record indicates non-compliance by both parties.
6. This being a first appeal, this Court is invited to look at both questions of fact and of law. The Court is enjoined to analyze the evidence and make its own independent findings bearing in mind that it is the trial Court that had the advantage of seeing the demeanour of the witnesses. See *Okeno v Republic* (1972) EA 32.
7. The 1<sup>st</sup> Appellant was charged with others not before the lower Court but on 7<sup>th</sup> July 2022, the 2<sup>nd</sup> Appellant was arrested and arraigned under file No. MCCR. E269/2022. The Respondent made an application for recall of witness as the files were consolidated. The evidence adduced at the trial Court is reproduced hereunder as follows: -
8. PW1 Titus Wekesa Wakoli testified that he is one of the Directors at Kikai FCS Limited and that on 6<sup>th</sup> April 2022, he received a mandate to proceed and fence a parcel of land belonging to the Kikai FCS Society, South Malakisi/North Central Namwela/1429 measuring approximately 3 ½ acres. On arriving at the site, he was attacked by: Wycliffe Nyongesa, Saul Wekesa, Leonard Marango, Molet Wanjala and Philichon Simiyu. He told the Court that the assaulters were armed with clubs, panga and stones, and that when they started pelting the stones at one of the Directors he tried to run away for safety but the 1<sup>st</sup> Appellant hit him on the right middle finger with a stone until it got fractured. He told the Court that they rushed to Namwela Police Station wherein they were advised to proceed to Chwele Sub-County Hospital for treatment. That after getting the necessary medical assistance they proceeded back to Namwela Police Station to lodge a formal complaint. He told the Court that when they were at the site the boys said that they must look for ways to kill him. He told the Court that they were 8 Directors who were attacked but only 3 got hurt; Titus, Sospeter, and Maurice. He did a dock identification of the Appellants. On cross-examination by the 2<sup>nd</sup> Appellant, he told the Court that the parcel of land they had gone to fence was located in Binyenya village and that Kikai FCS Limited had purchased the same.



9. PW2 Sospeter Wanjala Wakoba testified that he is a Director and Board Member of Kikai FCS Limited and that on 6<sup>th</sup> April 2022, they proceeded to a parcel of land that Kikai FCS Limited had purchased for fencing purposes and on arriving at the site, he was attacked by: Wycliffe Nyongesa, Saul Wekesa, Leonard Marango, Molet Wanjala and Philichon Simiyu. He told the Court that he was injured with a panga on his head and that the men pelted stones at them. He told the Court that they reported the incident at Namwela Police Station after seeking medical assistance at Chwele Sub-County Hospital. He did a dock identification of the 2<sup>nd</sup> Appellant as the person who attacked him as the 1<sup>st</sup> Appellant and noted that 4 are still at large. On cross-examination by the 2<sup>nd</sup> Appellant, he told the Court that they were Directors, Committee Members and other members who were at the site for the fencing activity but only the Directors were attacked.
10. PW3 Maurice Wangila Timbiti testified that he is a Director and Board Member of Kikai FCS Limited and that on 6<sup>th</sup> April 2022, they proceeded to a parcel of land that Kikai FCS Limited had purchased for fencing purposes and on arrival they were attacked by 5 men, Wycliffe Nyongesa, Saul Wekesa, Leonard Marango, Molet Wanjala and Philichon Simiyu, who came at them with clubs, pangas and clubs. He told the Court that the sustained injuries with him bearing cuts on both his hands. After medical assistance they proceeded to Namwela Police Station wherein they reported the matter. He identified the 2<sup>nd</sup> Appellant as one of those who attacked him. On cross-examination by the 2<sup>nd</sup> Appellant, he insisted that the Committee Members were targeted and that he was cut on both hands.
11. PW4 Alice Okada Nasiebanda testified that she is the vice chair of Kikai FCS Limited and that on that on 6<sup>th</sup> April 2022, they proceeded to a parcel of land that Kikai FCS Limited had purchased for fencing purposes and on arrival they were attacked by 5 men well known to her by face and name. She told the Court that they pelted them with stones and attacked them with pangas and that the 5 men were: Wycliffe Nyongesa, Saul Wekesa, Leonard Marango, Molet Wanjala and Philichon Simiyu. She told the Court that Titus, Sospeter and Maurice were injured by all the 5 men. She did a dock identification of the Appellants as the men who injured her. On cross-examination by the 1<sup>st</sup> Appellant, she told the Court that during the attack she ran and crossed the river and that they were 40 people who came to fence the land that they had purchased. On cross-examination by the 2<sup>nd</sup> Appellant, she told the Court that PW2 was cut on the forehead while PW3 was injured on his middle finger.
12. PW5 No. 113320 PC Nyang'au Nyarangi Douglas testified that he is attacked to Namwela Police Post and that on 6<sup>th</sup> April 2022, one Wamalwa Sindi, Chairman of Kikai Farmers' Co-operative Society Limited alleged that on the very day while at their recently purchased plot of land in Namwela, they were attacked by 5 men well known to them as that they were sons of the late Natembeya. He told the Court that the complainant alleged that the men were armed with pangas and rungas and they violently attacked them. He recorded the complainant's report, took statements of the complainants. Later on, at 3.00 P.M, Sospeter, Maurice and Titus came to the station to lodge their complainants. He recorded the statements too and identified their attackers as: Wycliffe Nyongesa, Saul Wekesa, Leonard Marango, Molet Wanjala and Philichon Simiyu. He proceeded to arrest the Appellants. On cross-examination by the 1<sup>st</sup> Appellant, he told the Court that he only arrested the 1<sup>st</sup> Appellant as he was identified as one of the perpetrators. On the 2<sup>nd</sup> Appellant, he told the Court that one of the complainant's had a visible injury at the finger.
13. PW6 Joshua Snagura Khisa testified that he is a Clinical Officer attached at Kimaeti Health Centre but was previously stationed at Chwele Sub-County Hospital. He recalled on 6<sup>th</sup> April 2022 he attended to Titus, Sospeter and Maurice all bearing injuries from an assault. He noted that Titus sustained a fracture on his third right middle finger, Sospeter sustained superficial cuts on his forehead and Maurice sustained superficial cuts on his right palm and his left upper limb. He produced the Medical



notes and P3 form dated 6<sup>th</sup> April 2024, of the 3 patients as PEXH. 1,2,3,4,5 & 6 respectively. On cross-examination by the 1<sup>st</sup> Appellant, he told the Court that all the patients had sustained injuries; that Titus, bore injuries that he was not born with and that the injuries sustained by patient 2, Sospeter, were superficial and he treated them by administering anti-tetanus after cleaning the wounds. On cross-examination by the 2<sup>nd</sup> Appellant, he told the Court that patient 1, Titus, had no blood on his clothes.

14. From the evidence adduced at the trial Court and contents of the Petition of Appeal, the following issue arises for determination:
  - i. Whether the Respondent proved its case beyond reasonable doubt.

**Whether the Respondent proved its case beyond reasonable doubt.**

15. Section 234 of the Penal Code provides for the offence of Grievous Harm as follows:

234. Grievous Harm

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

16. Section 4 of the Penal Code defines grievous harm 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 so 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;”

17. The Court finds that the testimonies of the Prosecution witnesses corroboratively and consistently placed the Appellants at the scene of the crime. It thus follows that the Prosecution proved beyond reasonable doubt that it was the Appellants who caused grievous harm to PW1 and his injuries were confirmed by the clinical officer PW6.

18. On Counts II and III, Assault causing actual bodily harm, section 4 of the Penal Code defines harm to mean “any bodily hurt, disease or disorder whether permanent or temporary.” This Court respectfully agrees with the definition of actual bodily harm in *Alex Kinyua Murakaru v Republic* [2015] eKLR (John M. Mativo J) as follows:

“Thus, actual bodily injury is any physical injury to a person (which is not permanent), or psychiatric injury that is not merely emotions, fear or panic. To make out the offence, the prosecution must show that there has been an assault, and that the assault has resulted in actual bodily harm. There must be an intention to assault (mens rea) and the assault must have taken place (actus reus).”

19. PW6 testified that when he examined PW2 and PW3, they had sustained superficial cuts on the forehead and superficial cuts on the right palm and his left upper limb respectively and she classified the degree of injury as harm. The Court notes that from the evidence, the admitted facts are that the Appellants are from the same home and the ownership of land the Directors had gone to fence was under contention. It was the evidence of PW4 that at their arrival, the 5 assaulters started shouting at them telling them that they could not fence the said land as their parents had been killed because of the same property. The 1<sup>st</sup> Appellant had alleged that the said land had an inhibition but the trial Court established that there was no inhibition of the said parcel.



20. It was clear that the attack upon the directors of M/s Kikai FCS was actuated by animosity based on a land dispute between the Kakai Farmers Co-operative Society and the Appellants. That notwithstanding, the existence of the land dispute cannot be a justification for the assault and infliction of grievous harm upon the victims by the Appellants.
21. The Appellants are not alleging self-defence nor have they denied being at the scene when the assaults allegedly took place.
22. The evidence of PW2 and PW3 was corroborated by that of PW1, PW4 and PW6. The Court, therefore, finds that the PW1, PW2 and PW3 suffered grievous harm and assault at the hands of the Appellants.
23. On the sentence meted out, it is the Appellant's contention is that the sentence meted out by the trial Court was excessive in the circumstances and urges this Court to set aside the same. The Appellants were sentenced to 3 years imprisonment under Count I; 1-year imprisonment under Count II; 1-year imprisonment under Count III respectively. All the sentences to run consecutively.
24. I am alive to the general principle that the appellate Court should only intervene in the sentence where the subordinate Court disregarded a material fact, or considered irrelevant factor or that the sentence was manifestly harsh or excessive as to constitute an error of principle (see *Ogolla s/o Owuora v R* [1954] EA 270 and *Macharia v R* [2003] 2 EA 559). I do find that the trial Court magistrate in his judgment considered all the aspects of the case and the evidence tendered before him and having done so came to a proper and inevitable conclusion. The Appellants were found guilty and were sentenced in accordance with the law.
25. I find no merit in this appeal. The same is dismissed. The conviction and the sentences are upheld.  
Orders accordingly.

**DATED AND DELIVERED AT BUNGOMA THIS 31<sup>ST</sup> DAY OF JULY 2025.**

**M.S.SHARIFF**

**JUDGE**

In the presence of:

Mr Masiga Holding Brief For Ms Lunani For Appellants

Ms Kibet For The Respondent

Peter Machoni Court Assistant

