



REPUBLIC OF KENYA



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**Leparkeri v Republic (Criminal Appeal E011 of 2025)
[2025] KEHC 12377 (KLR) (28 August 2025) (Judgment)**

Neutral citation: [2025] KEHC 12377 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MARSABIT
CRIMINAL APPEAL E011 OF 2025
FR OLEL, J
AUGUST 28, 2025**

BETWEEN

MATHEW LEPARKERI APPELLANT

AND

REPUBLIC RESPONDENT

*(From Original Conviction and Sentence by Hon. S. K. Arome
(PM) at Marsabit Law Court in Criminal Case No.E012 of 2024)*

JUDGMENT

A. Introduction

1. This appeal arises from the conviction and sentencing of the Appellant by Hon. S.K. Arome, Principal Magistrate in the Marsabit Senior Principal Magistrate's Court, Criminal Case No. E012 of 2024, where he had been found guilty of the offence of Causing Grievous Harm contrary to Section 234 of the Penal Code and accordingly was sentenced to serve a term of three (3) years imprisonment.
2. The Appellant, being dissatisfied by the said conviction and sentence, filed his petition of appeal dated 11th April, 2025, where he raised the following grounds of appeal, namely that:-
 - a. The learned Magistrate erred in law and fact in failing to note that the prosecution had failed to prove their case beyond reasonable doubt.
 - b. The learned Magistrate erred in law and fact by failing to note that the sentence passed is harsh and excessive in the circumstances of this case.
 - c. The learned trial Magistrate failed to consider my mitigation.
 - d. That the Appeal has overwhelming chances of success.



B. Background facts

3. PW1 - Lmeikai Leparkeri testified that on 12th February, 2024 at about 2.30 pm, he was at Merile Market and was accompanied by PW2 Matiyar Lolngojin. He had finished his business and was tying items he had bought on his motorcycle, when his brother, the appellant, confronted him, while armed with a panga and rungu and proceeded to cut him on the right cheek, numerous times on the right hand and used his rungu to hit him on the back of his head just next to the neck.
4. Luckily, he was rescued by members of the public who intervened and was rushed to Consentious Medical clinic, where he received first Aid and was later referred to Isiolo County Hospital, where his fractured right hand was fixed and plaster of Paris Applied. He reported this incident at Laisamis Police Station and was issued with a P3 form, which was later filled at Laisamis Sub-county Hospital. He further identified the Appellant as his assailant and confirmed that he was a person well known to him.
5. Under cross-examination, PW1 denied meeting the Appellant at Mulwas bar, nor was it true that he had attacked him and got injured in the process of the Appellant defending himself. He also denied the Appellant's suggestion that he fell off his motorcycle and injured himself.
6. PW2 - Matiyar Lolngojin confirmed that on the material day, he was with PW1 at the market and witnessed as the Appellant approached them and, on reaching, started to assault PW1. He hit PW1 on the head using the rungu and further cut his wrist and cheek using a panga. PW1 fell down unconscious, and he helped to rush him to hospital where he received medical attention Under cross-examination, he confirmed the incident particulars and confirmed that PW1 was not drunk at the time of the attack.
7. PW3 - PC. Alfred Cheruto, confirmed that on 13.02.2024 at about 2.00 pm, he was on duty at Merilee Police Post, when PW1 was brought to the station by good samaritans and he booked a report of having been assaulted by a person known to him. He referred PW1 for Medical treatment at Merile Hospital, where he was attended to and later referred to Isiolo County Hospital for further Medical treatment.
8. He visited the scene of crime, recorded witness statements, and once investigations were complete, he arrested the accused, whom he identified before court. Under cross-examination, PW3 confirmed that he did not witness the incident but had relied on information obtained during his investigations and medical report to arrive at his decision to charge the Appellant with the offence before court.
9. PW4 - Dr Imbusi Mark confirmed that he was based at Laisamis Sub-county Hospital and had over 20 years of experience. On 13th February, 2024, he had examined and treated PW1, who was wearing a black and white Kikoi that was blood-stained. He confirmed that he was not drunk and had multiple injuries on the head and neck region. He had a scar above the right eye (Orbital region) which was 1cm in diameter.
10. On the head (occipital region), he had a scar measuring 2 cm long and 1 cm deep, which was actively bleeding and had to be stitched. His right-hand forearm too, was swollen, and X-ray film revealed that it was fractured. He did fill in the P3 form, which he produced as evidence, together with the initial treatment notes. Under cross-examination, PW4 confirmed that he treated PW1 as an outpatient, and he did not know who had assaulted him.
11. The Appellant was placed on his defence and denied assaulting the Complainant (PW1). He urged the court to note that PW1 was not a trustworthy witness as he had not brought the X Ray report before the court to prove his injury, nor had he satisfactorily answered the questions he had put forth to him. Similarly, PW2's evidence ought to have been taken with a pinch of salt, as he was an underage child who had been coached on what to tell the court.



12. Finally, the Appellant also urged the court to note that PW1 was a habitual drunkard, a traditional healer, who would get alcohol from members of the community. He reiterated that he (PW1) was not a honest and/or a reliable person and urged the court to dismiss the charge he faced.
13. The trial Court considered the evidence adduced by both parties
and did find that the Appellant was guilty of the offence he was charged with. After mitigation, he was sentenced to serve three (3) years imprisonment, hence this Appeal.

C. Analysis and Determination

14. This being the first appeal, this Court is under a duty to reappraise the evidence, subject it to exhaustive scrutiny, and draw its own inference of facts so as to come to its own independent conclusion as to whether or not the decision of the trial Court can be sustained. An appellant on first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination. (See Padya – vs- Republic [1957] EA. 336 and the appellate court’s own decision on the evidence. The first court must also itself weigh conflicting evidence and draw its own conclusion (see Shantilal M. Ruwala –vs- Rep [1957] EA. 570.)
15. It is also not the function of the 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 finding 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 –vs- Sunday Post [1958] E.A 424).
16. I have exhaustively gone through and examined the entire proceedings/Judgment of the trial Court, and both written and oral legal submissions made by the parties before court. The issues that arise is whether the prosecution established the burden of proof to the required standard and secondly, whether the sentence passed was harsh and excessive.

i. Burden of Proof

17. The conceptual framework for burden of proof to be discharged by the prosecutor is beyond reasonable doubt. In Viscount Sankey LC in the case of H. L. Woolmington –vs- DPP [1935] A.C. 462 pp 481, did describe burden of proof in criminal matters as:-

“ Throughout the web of the English criminal law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoners guilt subject to what I have already said as to the defendant’s insanity and subject also to any statutory exception. If at the end and on the whole of the case, there is reasonable doubt, created by the evidence given either by the prosecution or the prisoner, as to whether {the offence was committed by him} the prosecution has not made out the case and the prisoner is entitled to be acquitted. No matter what the charge or where the trial, the principal that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained.

18. Lord Denning in the case of Miller –vs- Ministry of Pensions [1947] 2 All ER, 372, while discussing the same concept, also stated as follows:-

“ That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities



to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence of course it is possible, but not in the least probable, the case is beyond reasonable doubt, but nothing short of that will suffice.”

19. The Appellant was charged with the offence of causing grievous harm contrary to Section 234 of the Penal Code, which is the punishment section. The charge sheet should have indicated Section 231 as read with Section 234 of the Penal Code. Though not raised by either party, the question that arises is whether the Appellant was prejudiced by the lacuna caused by the lack of clarity in the charge sheet.
20. Applying the provisions of Section 134 of the Criminal Procedure Act, and having reviewed all the proceedings, I do find that the Appellant fully participated in the proceedings and cross-examined all the witnesses and put in robust submissions. This denotes that he understood the particulars of the charge he faced and thus was not prejudiced in any manner by the defect noted in the charge sheet.
21. To sustain, the charge of causing grievous harm, the prosecution had to prove each of the following essential ingredients beyond reasonable doubt:-
 - a. The victim sustained grievous harm.
 - b. The harm was caused unlawfully.
 - c. The accused caused or participated in causing the grievous harm.
22. Concerning the first element, bodily “harm” means any bodily hurt, disease or disorder, whether permanent or temporary. The nature of grievous harm is defined by Section 4 of the Penal Code as any harm which amounts to a main or dangerous harm or seriously or permanent injuries to health or which are likely so to injure health, or which extends to permanent disfigurement or to a permanent or serious injury to any external or internal organ, membrane or sense.
23. The specificities of “grievous harm” therefore are:-
 1. In the case of grievous harm, the injury to health must be permanent or likely to be permanent, whereas, the 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. From the evidence presented, there is doubt that the Appellant was a person well known to PW1 and PW2, and, in fact, as per the evidence of PW1, the assailant was his brother. PW2 witnessed this incident as it occurred, and his evidence was corroborated by PW3 who was on duty at the Police Station, where the incident was reported, and PW4, who examined and treated PW1. PW4 also produced into evidence the P3 form and treatment notes, which confirmed the “grievous nature of injury” sustained by PW1.
25. The evidence adduced did prove beyond doubt that it was the Appellant who assaulted his brother, his action was unlawful, and as a result, PW1 did sustain grievous injury to his person, for which he had to seek medical intervention.
26. The Appellant in his submissions averred that the charge was at variance with the particulars provided in the Charge Sheet and that this was prejudicial to him and had caused a miscarriage of justice. He further averred that the trial magistrate erred in convicting him based on contradictory and inconsistent evidence and thus his conviction was unsafe.



27. The Appellant was initially charged with the offence of Causing Actual Bodily Harm contrary to Section 251 of the Penal Code, which charge was later amended to causing grievous harm once all the medical documents were in possession of the prosecution. I have had the occasion to examine the amended charge sheet and find that the amended charge and particulars stated therein are not at variance as alleged by the Appellant.
28. On issue of contradictory evidence, the law as regards the issue of contradiction and discrepancies is very clear. It is trite law that inconsistencies unless satisfactorily explained would usually, but not necessarily result in the evidence of a witness being rejected. (See Uganda –vs- Rutaro (1976) HCB ; Uganda –vs- George W.Yiga (1979) HCB 217).
29. In trying to shade light as to why there might be minor discrepancies between two witnesses testifying on the same case, the High Court of Kenya in the case of Philip Nzaka Watu –vs- Republic [2016] CR APP 29 OF 2015, had this to say:-

“The first question in this appeal is whether the prosecution case was riddled with contradiction and inconsistencies of the magnitude that would make the conviction of the appellant unsafe. It cannot be gain said that 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 version 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.

30. In this case, I have myself subjected the evidence adduced to fresh scrutiny and though it is true that there were minor inconsistencies in the evidence of PW2, as to whether the Appellant used a panga or knife to harm the complainant, I am unable to find that the same were material enough to warrant interference with the decision arrived at by the trial Magistrate. The Appellants’ conviction is therefore safe, and his Appeal on this limb fails.

ii. Sentence.

31. The Appellant submitted the trial Magistrate erred in law and misdirected himself by in failing to take into account relevant consideration thus passed a sentence that was excessive in the circumstances.
32. Sentencing is a discretion of the court. The principles guiding interference with sentencing by the appellate court were properly set out in the case of S. –vs- Malgas (1) SACR 469(SCA) at Para 12, where it was held that:-

“A court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court, approach the question of sentence as if it were the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would usurp the sentencing discretion of the trial court.....however, even in the absence of material misdirection, an appellate court may yet be justified in interfering with the sentence imposed by the trial court. It may do so when the disparity between the sentence of the trial court and the sentence which the appellate court would have imposed had it been the trial court is marked that it can properly be described as “shocking”, “startling” or “disturbingly inappropriate”.



33. Similarly in the case of Mokela –vs- The State (135/11)(2011) ZASCA 166, the Supreme Court of South Africa held that:-

“It is well established that sentencing remains pre eminently within the discretion of the sentencing court. The salutary principle that the appeal court does not enjoy carte blanche to interfere with sentences which have been properly imposed by the sentencing court. In my view, this includes the terms and conditions imposed by the sentencing court on how or when the sentence is to be served.”

34. Also in the case of Shadrack Kipkoech Kogo –vs- Republic Eldoret Criminal Appeal No. 253 of 2003, the Court of Appeal stated that:-

“Sentencing is essentially an exercise of discretion by the trial court and for this court to interfere it must be shown that in passing the sentence, the sentencing court took into account an irrelevant factor or that a wrong principle was applied or that short of these, the sentence itself is so excessive and therefore an error of principle must be interfered with(Also see Sayaka –vs- Republic [1989]KLR 306.

35. Under Section 231 of the Penal Code, the offence of causing grievous harm attracts a sentence of life imprisonment. The trial Court did consider the circumstances of the case, the Appellants mitigation and the nature of injuries suffered by PW1 before proceeding to sentence the appellant to serve three (3) year’s imprisonment. It has not been shown that the trial Court overlooked some mutual factors or acted upon a wrong principle in sentencing the Appellant. There is therefore no basis upon which to interfere with trial courts finding on the same.

D. Disposition

36. In conclusion I do find that this Appeal has no merit and proceed to dismiss the same.

37. Right of Appeal 14 days.

38. It is so ordered.

READ, SIGNED, AND DELIVERED VIRTUALLY AT MARSABIT ON THIS 28TH DAY OF AUGUST, 2025.

FRANCIS RAYOLA OLEL

JUDGE

DELIVERED VIA THE VIRTUAL PLATFORM, TEAMS THIS 28TH DAY OF AUGUST, 2025.

In the presence of:-

PresentAppellant

Mr. OtienoFor O.D.P.P

Julie.....Court Assistant

