



REPUBLIC OF KENYA



**Bora v Republic (Criminal Appeal E029 of 2022)
[2024] KEHC 1199 (KLR) (31 January 2024) (Judgment)**

Neutral citation: [2024] KEHC 1199 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT GARISSA
CRIMINAL APPEAL E029 OF 2022
JN ONYIEGO, J
JANUARY 31, 2024**

BETWEEN

HILLOW ABDI BORA APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from the original conviction and sentence delivered on 22-4-22 by Hon. Mugendi N. in Criminal Case No. E121 of 2022 Wajir Principal Magistrate's Court)

JUDGMENT

1. The Appellant herein was charged with the offence of grievous harm contrary to Section 234 of the Penal Code. Particulars were that on the 16th day of Marcy, 2022 at Kumbi location in Wajir East Sub-county within Wajir County together with others not before Court jointly and unlawfully did grievous harm to Yussuf Guyo Abdullahi.
2. Having entered a plea of not guilty, the matter proceeded to full trial. Upon conclusion of the trial, the trial court convicted and sentenced the appellant to serve 5 years' imprisonment.
3. Aggrieved by both the conviction and sentence, the appellant filed an undated grounds of appeal stating that; the whole judgment was a sham; he was not supplied with evidence the prosecution intended to use; the court convicted him based on incompetent evidence.
4. When the matter came up for directions, the court directed parties to file their submissions.
5. On his part, the appellant filed what he referred to as humble mitigation filed on 21/11/2023. He basically pleaded for mercy and lenient sentence or in the alternative be set free.
6. Mr. Kihara for the State basically recited the evidence of the prosecution and urged the court to uphold the conviction and sentence.



7. As the first appellate court, its duty bound to re-evaluate, re-assess and reconsider afresh the evidence tendered before the trial court and make or arrive at an independent determination bearing in mind that it did not have the opportunity to listen to nor see the witnesses testify so as to assess their general demeanor. See *Odhiambo v Republic* Cr. App No. 230/2004 [2005] eKLR.
8. Brief facts of this case are that on 16/3/22 at around 11.00 am, Yussuf Alio Abdullahi (PW1) was at Kumbi quarry when a man known as Rasta approached him offering to buy his ballast he had crushed. That he declined the offer and Rasta left.
9. He told the Court that after Rasta left, a lorry seeking to carry his ballast on instructions from Rasta arrived. While talking with the motor vehicle driver, some 20 people arrived and claimed that the ballast was theirs and forcefully started loading the motor vehicle.
10. Aggrieved by the forceful loading of his ballast, he called a police officer who proceeded to call out on Rasta and instructed him to go to the police station. That he was however able to sell the ballast to Mr. Omar. That after police left, the 20 people demanded to know who had called out the police. As he started leaving, Rasta punched him on the back. That one Guracha joined as well and punched and kicked him. As a consequence, he fell down and one Adan caught up with him and hit him as well. That he knew and identified them very well. He stated that he sustained injuries on the left jaw and broken teeth. He later reported to the police where he recorded a statement and proceeded to hospital for treatment.
11. PW2, Thomas Nyagaka a Clinical Officer who filled the P3 form in respect of the complainant, confirmed upon examination that the complainant had sustained head injuries, his trousers were stained with blood, he was in severe pain with a swollen jaw, painful neck and back and broken incisor teeth on the left lower side. That the injuries were two days old and the degree of injury was grievous harm.
12. PW3, PC David Mutua of Wajir Police Station told the Court that on 16/3/22 at 11.00 am he received a call from PW1 who informed him of chaos at the quarry following attempts by some people who wanted to sell his ballast. That he, PC Ochieng and Otieno proceeded to the scene at the quarry where they found several men among them Rasta, Adan and Guracha surrounding Yussuf (PW3). That after talking to those people, they agreed to leave Yussuf alone.
13. He further stated that, 30 minutes after leaving the scene, PW1 appeared escorted by members of the public while covered with blood all over. They referred him to Camel hospital for treatment where he was admitted. He confirmed that, the complainant had a swollen jaw and was complaining of severe body pains.
14. He was informed that the people they had found surrounding Yussuf at the quarry were the ones who had assaulted him among them Guracha, Rasta and Adan. He later on 10/3/22 arrested the appellant herein and his co-accused whom he jointly charged.
15. On his response, DW1 the Appellant (1st accused) denied the offence. He told the Court that it was the complainant and one Rasta who quarreled over the ballast and threw stones at each other. He basically expressed his innocence.
16. On his part, DW2 (Accused 2) also denied the offence. He stated that, it was Rasta who quarreled with the complainant as they threw stones at each other. He blamed Rasta for insulting the complainant.
17. I have considered the record of appeal herein, grounds of appeal and submissions by both parties. The issues that arise for determination are;



- a. Whether the complainant ever sustained injuries on the material day.
 - b. Whether the appellant was one of the people who assaulted him.
18. According to PW1, on the material day, he was attacked by people he knew after differing over ownership of ballast at Kumbi quarry. After the attack, he sustained injuries on his left jaw, mouth, legs and head.
 19. The existence of these injuries was confirmed by Nyagaka Clinical Officer (PW2) who filled the P3 form confirming that the complainant had laceration on the head, swollen left jaw and broken incisor teeth which he classified as grievous harm.
 20. PW3 Mutua a Police Officer also testified that, on the material day, he received a call from PW1 over some altercation by one Rasta over ownership of ballast. That he visited the scene and calmed down the quarrelling parties. That after 30 minutes, PW1 reported to the station with his clothes full of blood stains. He confirmed that the complainant had sustained injuries.
 21. The appellant admitted that he was at the scene at the material day and that there were differences between Rasta and the complainant. From the evidence of all the three witnesses, there is no doubt that the complainant sustained injuries. Who occasioned the same. PW1 stated that, it was the appellant, Rasta and the 2nd Respondent who attacked him after accusing him of calling the police.
 22. The offence was committed during the day. The appellant was very well known to the complainant. He named them as Rasta, the appellant and the 2nd accused. PW3 confirmed that, earlier he had visited the quarry after PW1 called him to intervene over ballast dispute. That when he visited there, he found the appellant and accused 2 among a group of 7 people surrounding the complainant after differing in respect to ballast.
 23. From the testimony of PW3 and that of PW1, it is apparent that the appellant was among the perpetrators of assault against the complainant. I have no doubt, there was positive identification of the appellant as one of the attackers. I do agree with the trial court that it was the appellant among others who attacked the complainant and that there was no mistaken identity. Accordingly, I do uphold the conviction by the trial court.
 24. Regarding sentence, the same is at the discretion of the court unless found to be excessive or that the trial court applied wrong legal principals or considered irrelevant factors. See *MMI v Republic* [2022] eKLR.
 25. Considering that the maximum sentence provided by the law is life imprisonment, a sentence of 5 years is not excessive. To that extent, I do agree with the prosecution that the sentence was reasonable and appropriate in the circumstances.
 26. Accordingly, the appeal is hereby dismissed for lack of merit. Right of appeal 14 days.

DATED, SIGNED DELIVERED VIRTUALLY THIS 31ST DAY OF JANUARY 2024

J. N. ONYIEGO

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JUDGE

