



REPUBLIC OF KENYA



**Ndemi v Republic (Criminal Appeal 60 of 2022)
[2024] KEHC 572 (KLR) (31 January 2024) (Judgment)**

Neutral citation: [2024] KEHC 572 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NANYUKI
CRIMINAL APPEAL 60 OF 2022
AK NDUNG’U, J
JANUARY 31, 2024**

BETWEEN

JOSEPH MUTHEE NDEMI APPELLANT

AND

REPUBLIC RESPONDENT

*(Appeal from original Conviction and Sentence in Nanyuki
CM Criminal Case No 509 of 2019 – V. Masivo, SRM)*

JUDGMENT

1. The Appellant herein, Joseph Muthee Ndemi, was convicted after trial of grievous harm contrary to section 234 of the *Penal Code*. The particulars of the offence were that on 23/02/2016 at Likii Village Laikipia East Sub-County Laikipia County unlawfully did grievous harm to John Wachira Ndaguri. On 07/09/2022 he was sentenced to serve fifteen (15) years imprisonment.
2. Being dissatisfied with the conviction and the sentence, the Appellant appealed to this court challenging the conviction and the sentence vide an amended grounds of appeal filed together with his submissions. The conviction and the sentence are being challenged on the following grounds;
 - i. That the learned magistrate erred by not appreciating that the case was not proved beyond reasonable doubt.
 - ii. The learned magistrate erred by failing to note that there was a brewing grudge between PW1 and the Appellant over a farming land issue.
 - iii. The learned magistrate erred by failing to note that the circumstantial aspect of the case was full of contradictory evidence.
 - iv. The learned magistrate erred by failing to note that all allegations advanced by the prosecution were not substantiated by evidence as stipulated under section 107 of the Evidence Act.



- v. The learned magistrate erred by quashing the Appellant's defence without giving cogent reasons.
 - vi. The sentence was manifestly harsh and excessive.
 - vii. Section 78 of the *Evidence Act* was violated.
3. The appeal was canvassed by way of written submissions. In his written submissions, the Appellant argued that PW1's evidence was farfetched from the truth since it is common sense that no one can block a running chain saw with bare hand covering the head. Further, there was no way the power saw could not cut through the four fingers at once as well as the forehead. It is urged that PW1's testimony that the power saw bruised his head was just a mere allegation as a bruise can be caused by a fall and not a cut by chain saw. PW1 testified that he threatened the people who came to PW1's help but the question was why he was not lynched by the said mob despite being known to them and this shows that the charges were trumped up due to a land dispute which issue was raised during examination of PW1.
 4. That there was doubt on who cut PW1's fingers and it was more probable that PW1 cut himself during his usual farming activities with a panga. That PW1 testimony was contradictory as he testified that he did not have his five fingers at the hospital and at another point he testified that he had his five fingers. PW2 did not see the Appellant cutting PW1's fingers and he testified that PW1 had all his five fingers. That PW3 testified that he was in the house at 7:00pm which time was at variance with PW1's stated time being 4:30pm.
 5. Further, the doctors report did not create a nexus to connect the Appellant with the heinous crime since the doctor testified that the probable weapon used was a sharp object whereas a chain saw when not revolving cannot cut an object. Further, the doctor testified that PW1 had bruises on the forehead as well as forearm whereas bruises are not marks left by a cutting object as Oxford Advanced Learners Dictionary defines a bruise as a mark that appears on the skin when somebody falls. Further, no records/treatment notes were produced to show that PW1 was treated at PGH. There was no evidence that he owned a chain saw.
 6. PW6, the chief was not a credible witness since he recorded his statement four years after PW1's attack and in his testimony, he did not mention whether PW1 disclosed to him who had cut his hands. Further, the prosecution failed to prove that he was on the run for four years. Further, the trial court did not advance any reason for quashing his alibi defence and terming his defence as an afterthought was contrary to section 169(1) of the *Criminal Procedure Code*. As for the sentence, he submitted that the same was harsh and excessive and urged this court to review the sentence to accord him a lesser punitive sentence.
 7. As to non-compliance with section 78 of the *Evidence Act*, he submitted that Sergeant Manyara Reuben never visited the scene and he did not take any photographs but the photographs were taken by his colleagues, he did not produce certificate to show he was appointed under section 78(1) of *Evidence Act* and only gave a gazette notice number which he did not produce as a copy and therefore, the photographs could not be used to convict him. Further, PC Kimathi was not a scene of crime personnel to take photographs at the scene. He further submitted that the circumstantial evidence relied on by the trial court did not form a strong basis to establish his guilt.
 8. In rejoinder, the Respondent's counsel submitted that the Respondent proved their case beyond reasonable doubt and satisfied the ingredients of the charge. Further, PW1's testimony was corroborated by PW2 and PW3 who were both present immediately before and after the assault. They both corroborated the chronology of the events as narrated by PW1 and stated that they saw the Appellant with the power saw that was used to assault PW1 prior and after the assault. PW4 also



- corroborated PW1's testimony as he stated that the Appellant passed by his home with a rumbling power saw and entered PW1's compound and after a few minutes he heard screams emanating from PW1's compound and when he got to the complainant's compound, he saw the Appellant leaving with the power saw still on and the complainant was at his gate with his two fingers cut off.
9. PW5, the medical doctor testified that the complainant's two middle fingers were missing as they had been traumatically amputated and decided that the degree of injury was grievous harm. PW6 also stated that when the complainant went to his office to make a report, he noted that the complainant's fingers were cut and two of them were hanging. Therefore, the evidence on record was corroborative, consistent and reliable to secure a conviction.
 10. As to inconsistencies and contradictions, she submitted that no two people remember the exact set of facts in the same exact way hence, contradictions in the prosecution's case is a sign of forthrightness and not insincerity. Reliance was placed on the case of *MTG v Republic* (Criminal Appeal E067 of 2021) 2022 KEHC 189(KLR). There were no contradictions as to whom caused the grievous harm and there was no contradiction as to the degree of injuries and therefore, other contradictions would be peripheral and hence inconsequential. As to the Appellant's defence, counsel submitted that the Appellant only denied committing the offence but did not give an explanation that would cast doubts on the set of facts set by the prosecution.
 11. As to the sentence, it was submitted that sentence is a discretion of the trial court and the Appellant did not advance any reason to warrant interference with the said discretion. Further, the offence attracts a life imprisonment and as such, the sentence was appropriate in the circumstances as the trial court considered the aggravating circumstances and mitigating factors.
 12. This being a first appellate court, my duty is well spelt out namely; to re-evaluate the evidence tendered before the trial court and subject it to a fresh analysis so as to reach an independent conclusion as to whether or not to uphold the decision of the trial court. See *Okeno v Republic* [1972] EA 32.
 13. I have in that regard read, considered and re-evaluated the evidence as recorded by the trial court to enable this court appreciate the veracity and the weight of the evidence against and for the Appellant. I take cognizance that I never saw nor heard the witnesses testify and have given due allowance in that regard. Further, I have taken into account the submissions on record.
 14. In summary, the evidence before the trial court was as follows. The complainant testified as PW1, he stated that on 23/02/2016 he was with Mr. Mwangi on the road when the Appellant who was his neighbor accompanied by another appeared. The Appellant asked him whether he was still reporting him for farming on the riparian section of which he denied. The Appellant also started quarrelling Mr. Mwangi. To avoid confrontation with the Appellant, PW1 and Mwangi entered PW1's compound and closed the gate and the Appellant said that he will return and the complainant will know the purpose of the Appellant buying a rifle. At around 6:45 pm, the Appellant returned armed with a running power saw and gained access to the complainant's compound by hitting the gate open. By then, PW1 and Mwangi were outside the house and PW1's son was in the house.
 15. The Appellant attacked Mr. Mwangi with the power saw but Mr. Mwangi used a piece of wood which the Appellant cut into two using the power saw. Mr. Mwangi ran to seek help and the Appellant locked the gate. The Appellant then charged on the complainant and was intending to cut his head but he used his left hand to shield himself but the Appellant cut his four middle fingers on his left hand and the two middle fingers were left hanging and fell off when he reached the hospital. He testified that the power saw also bruised his forehead. His son who heard the commotion rushed to the scene and chased the Appellant with a piece of wood. The Appellant also threatened the people who had come



- to PW1's aid with the power saw. He testified that he reported to the chief and to police station and he was referred to hospital. He identified the P3 form and the photographs.
16. On cross examination by the Appellant's counsel, he testified that when his son went to his rescue, he was already cut and the Appellant was about to cut him the second time. He testified that the doctor did not cut his two fingers but the two middle fingers fell off when the piece of cloth that was supporting his fingers was removed.
 17. PW2, SIMON MWANGI testified that he went to meet the complainant and while on the road, the Appellant who was accompanied by another person appeared and started arguing with the complainant over a land issue. They entered the complainant's compound and the Appellant followed them and threatened the complainant. While at the complainant's compound, they heard the sound of a power saw and the Appellant entered the complainant's compound with a power saw. He took a piece of wood to defend himself and hit the power saw but the wood was cut. The Appellant followed him and was about to cut his leg but he was able to get outside the gate which the Appellant locked. He went to call a neighbor called Watheng'u but the neighbours refused to respond and after a few minutes, the Appellant came outside the gate. The complainant also came out asking that the Appellant be arrested but the Appellant went to his home. He testified that the complainant's middle fingers were hanging.
 18. On cross examination, he testified that when he ran, the Appellant closed the gate behind him and he was unable to tell what transpired after he escaped. A number of people responded to his aid but they did not enter the compound as the Appellant had locked the gate but they could hear the sound of the power saw. That the Appellant left the complainant's compound with the power saw running and nobody followed him to his home.
 19. PW3. JOHN WACHIRA testified that he was at home when he heard sound of a power saw emerging from the compound. He went outside and found his father, the complainant lying down and the Appellant armed with a power saw aiming his father's head. When the Appellant saw him, he started moving backward and went outside the gate. He lifted up his father who was soaked in blood and his left hand fingers were cut. He could not tell the extent of the injury due to blood but his fingers were hanging.
 20. On cross examination, he testified that he was in the house when he heard the sound of the power saw. The Appellant was pointing a power saw at the complainant. The complainant had all his fingers but some were hanging.
 21. PW4 Nathan Kathengu testified that on the material day he was at his home when he saw the Appellant passing by with a rumbling power saw. He entered the complainant's house who was his neighbour. He then heard screams emanating from the complainant's home. He heard PW2 calling him for help. Upon arriving at the complainant's home, he met the Appellant leaving with a power saw which was still rumbling. He also saw the complainant whose two fingers were cut off hanging slightly. He testified on cross examination that he did not see the Appellant cut the complainant's hand.
 22. PW5 was the Clinical Officer. He stated that on examination, the complainant had bruises on the forehead and on upper limb, two middle fingers were missing. The two middle fingers were traumatically amputated. There were also bruises on the forearm and the probable weapon was a sharp object and the degree of harm was grievous harm. He produced the P3 Form as Pexhibit1. On cross examination, he testified that the complainant was treated prior to filling the P3 Form and that he relied on the treatment notes in filing the P3 Form.
 23. PW6, Joseph Runyenje testified that he was the area Chief at the material time. He was in his office when he received the complainant whose hand was cut and was bleeding profusely. Three fingers were



cut and two of them were hanging. He referred him to police station, and, on the following day, he was called by the police to arrest the Appellant. He went to his home but he did not find the Appellant there. He visited the Appellant's home severally but he could not find him. On April 2017, he was alerted that the Appellant was seen at Nanyuki town and he alerted the police and the Appellant was arrested. He further stated that the complainant informed him that the Appellant visited the complainant's home with a power saw and intended to cut his head and he blocked his head with his hand leading to the injuries sustained.

24. On cross examination, he testified that he recorded his statement three years after the incident because the Appellant escaped and he requested to record his statement after the Appellant's arrest.
25. PW7 was the Investigating Officer, he testified that he received an assault complaint from the complainant. Two fingers were already amputated and he referred him to hospital. He visited the scene and took photographs of the scene and the amputated fingers and forwarded the same to the Scene of Crime Officer. He visited the Appellant's home many times but could not find him for over 3 years. In 2019 while on leave, he received information on the location of the Appellant. He instructed PC Kirui who proceeded to the said location and arrested the Appellant. He testified on cross examination that the dispute arose from a piece of land and he saw the amputated fingers since the complainant carried them to the station.
26. PW8 was the Scene of Crime Officer. He stated that he received a CD of photographs taken from the scene sent by PW7. He was requested to prepare photographic prints. The said CD was prepared under his supervision and he prepared the photographic prints. He produced the five photographs as Pexhibit1-5 and the Exhibit Memo and Certificate as Pexhibit6.
27. PW9 was the Arresting Officer. He stated that he received a phone call from PW7 of a suspect who was on the run for 3 years. He had been seen at Kungumaitu Hotel. With PC sang and the complainant, they proceeded to the hotel and the complainant identified the Appellant but while moving out, the Appellant managed to escape with the help of members of the public. He was however re-arrested. He produced the Appellant's ID as Pexhibit7.
28. The Appellant in his unsworn testimony denied committing the offence. He stated that he was working in his farm during the day on the material day and later slept after taking a bath. On 11.04.2019, the police officer visited him and searched his house claiming that he was owning a rifle and he was arrested. He denied meeting the complainant on the material day and did not cut the complainant's finger with the power saw. He denied hitting the complainant on the forehead. He stated that the power saw would have cut the complainant's entire head and fingers. He denied escaping and stated that he was never contacted by the Sub Area and the Chief used to call him.
29. DW2 Hassan Galgalo testified that he was a neighbour to both the complainant and the Appellant and on the material day at around 7:00pm, the Appellant went to his house and they agreed on the work for the next day. He did not hear of any occurrences. After some years, the Appellant was arrested for injuring someone with a power saw. He testified on cross examination that the Appellant never left his house, he did not own a power saw and, in the morning, they went to work together.
30. That was the totality of evidence before the trial court. The Appellant was charged under section 234 of the [Penal Code](#) which states that;

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



31. As to what constitute grievous harm is defined under section 4 of the [Penal Code](#) which reads as follows:
- “grievous harm means any harm which amounts to maim or dangerous harm or seriously and permanently injures health, or which is likely so to injure health, or which extends to the permanent disfigurement, or to any permanent or serious injury to any external or internal organ, membrane or sense.”
32. The Court of Appeal in [John Oketch Abongo v Republic](#) [2000] eKLR stated that;
- “We are satisfied that the complainant's injury amounted to grievous harm as defined in the Penal Code. The definition contains several ingredients of what constitutes grievous harm. We are of the opinion that the presence of any one of these ingredients would suffice to disclose grievous harm. Here, we are satisfied that the complainant's injury did amount to dangerous or serious injury to health both of which are ingredients contained in the definition.”
33. From the above, what needs to be proved is any of the ingredients contained under section 4 of the [Penal Code](#). In determining whether the offence was proved, the court in [John Oketch Case](#) (supra) further held that;
- “Whether or not grievous harm or any other form of harm is disclosed must be a matter for the court to find from the evidence led and guided by the definition in the Penal Code. A court will be assisted by medical evidence given in coming to the conclusion on the nature and classification of the injury. In many cases the courts have accepted and gone by the findings and opinions in the medical evidence. But, in appropriate circumstances, the court is at liberty to form its own opinion, having regard to the evidence before it as to the nature and classification of the injury.”
34. It now remains to consider the evidence on record to see whether that evidence disclosed grievous harm as defined or otherwise. The onus lay with the prosecution to prove that the complainant was attacked and sustained grievous harm; the attack was unlawful and that it was the accused who attacked him. In this case, there is no dispute that the complainant sustained injuries that were classified as grievous harm. From the P3 Form and testimony of the Doctor (PW5) and that of the complainant (PW1), the injuries were so severe to the extent that the complainant lost two middle fingers. According to PW1, the injuries were unlawfully inflicted by the Appellant who attacked him at his home.
35. PW1's evidence was corroborated by PW2, PW3, PW4 PW5 PW6 and PW7. PW2 confirmed that the Appellant attacked them while at the complainant's home. He was able to escape but left the complainant under the mercy of the Appellant. He confirmed that when the complainant stepped outside the gate, his two fingers were hanging. PW3 was within the compound and he heard the rumbling of the power saw. He stepped out of his house and found his father lying down while the Appellant was about to cut his head. He used a piece of wood to chase the Appellant away. He confirmed that the complainant was bleeding profusely and his two fingers were hanging.
36. PW4, a neighbor told the trial court that the Appellant passed him with a rumbling power saw and entered the complainant's compound. Shortly, he heard screams emanating from the complainant's compound. PW2 also called him out for help. He met the Appellant at the complainant's gate with a power saw which was still running. The complainant also stepped out his gate and his two fingers were cut and they were hanging.



37. PW5 as seen earlier stated that the complainant had bruises on the forehead and on upper limb, two middle fingers were missing. The two middle fingers were traumatically amputated. There were also bruises on the forehead and the probable weapon was a sharp object. He classified the degree of harm as grievous harm. His findings were well elaborated in the P3 Form which he produced as Pexhibit1.
38. PW6, the Chief confirmed that when the complainant went to report the matter, he was bleeding profusely and his three fingers were cut with two hanging. PW7 also told the court that when the complainant went to report, he saw the amputated fingers since the complainant carried them with him.
39. It therefore follows that the complainant sustained injuries that led to the loss of his two fingers. As to whether the injuries sustained could be classified as grievous harm, I am satisfied from the evidence that the injuries were severe to the extent that the complainant lost his two fingers making him to have a permanent disfigurement on his left hand as defined under section 4 of the Penal Code. PW5, the Clinical Officer also classified the degree of harm as grievous harm.
40. On the aspect of participation of the Appellant, there is credible direct evidence of PW1, PW2, PW3 and PW4 placing the Appellant at the scene of the crime armed with a power saw. In addition, as the trial court noted, the Appellant's evidence did not controvert the evidence that he was at the scene at the material time. His witness did not explain whether the Appellant was the scene at the material time.
41. From entirety of the evidence, I am satisfied beyond any shadow of doubt that the Appellant was at the scene and attacked the complainant with a power saw leading to the injuries sustained.
42. In his submissions, the Appellant attacked the credibility of the evidence of PW6 who recorded his statement three years after the commissions of the crime. It is noted from the evidence on the record that the Appellant disappeared after commission of the crime and he was at large for about 3 years. PW6 explained to court that he requested to record his statement after the arrest of the Appellant since he had escaped.
43. As to the contradictions he highlighted in his submissions. It is my view that the contradictions noted do no amount to anything as they do not negate the fact that he attacked the complainant with a power saw and the complainant was injured as a result. The Court of Appeal in John Nyaga Njuki & 4 others -v- R [2002] eKLR stated:
- “But what is important is whether the discrepancies are of such a nature as would create a doubt as to the guilt of the accused. If so, then the prosecution would not have discharged the burden squarely on it to prove the case beyond any reasonable doubt. However, where discrepancies in the evidence do not affect an otherwise proved case against the accused, a court is entitled to overlook those discrepancies and proceed to convict the accused.”
44. As to discrepancy on time of the commission of the offence, the Court of Appeal in Erick Onyango Ondeng' v Republic [2014] eKLR stated thus;
- “...Nor do we think much turns on the alleged contradictions on the time of commission of the offence. The trial court, after hearing all the evidence accepted that the offence was committed at “about 7 pm” in accordance with the evidence of PW2. As noted by the Uganda Court of Appeal in TWEHANGANE ALFRED VS UGANDA, Crim. App.



No 139 of 2001, [2003] UGCA, 6 it is not very contradiction that warrants rejection of evidence. As the court put it:

“With regard to contradictions in the prosecution’s case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution’s case.”

45. On the issue on non-compliance with section 78 of the *Evidence Act*, the section states that;

- “(1) In criminal proceedings a certificate in the form in the schedule to this Act, given under the hand of an officer appointed by order of the Director of Public Prosecutions for the purpose, who shall have prepared a photographic print or a photographic enlargement from exposed film submitted to him, shall be admissible, together with any photographic prints, photographic enlargements and any other annex referred to therein, and shall be evidence of all facts stated therein.
- (2) The court may presume that the signature to any such certificate is genuine.
- (3) When a certificate is received in evidence under this section the court may, if it thinks fit, summon and examine the person who gave it.”

46. My understanding of the above provision is that photographic evidence may be admissible in criminal cases on condition that the photographic prints or enlargement have been prepared by an officer appointed by the Director of Public Prosecutions. The officer shall then be required to prepare a certificate to the effect that he produced the prints and enlargements from the exact film or any other annex where they were exposed. The certificate shall accompany the photographs at the time of production.

47. PW8 was a Scene of Crime Officer who produced the photographic prints. He stated that he received a CD from PW7 and he was requested to prepare photographic prints. He testified that he was an appointed scene of Crime Officer and gave the Gazette Number as 4562 of 7.7.2003. He produced the Certificate authenticating the photographic prints as provided under section 78. The section does not talk about how the photographs should be taken but preparation of the photographic prints which in this case, was complied with. The fact that the photos were taken by the Investigating Officer was a non- issue. In any event, there exists on the record sufficient other evidence to base the conviction on any disparity on the photographs notwithstanding.

48. I reach the inescapable conclusion that the charge was proved against the Appellant to the standard established by law.

49. As regards the sentence, the Appellant argued that the same was excessive and pleaded for a lenient sentence. The offence carries a sentence of life imprisonment. The Appellant was however sentenced to fifteen (15) years imprisonment.

50. It is trite law that sentencing is a discretion of the trial court and an appellate court will not easily interfere with the discretion of the trial court on sentence unless it is shown that in exercising its discretion, the court acted on a wrong principle; failed to take into account relevant matters; took into



account irrelevant considerations; imposed an illegal sentence; acted capriciously or that the sentence imposed was harsh and excessive. (*Ogolla S/o Owuor v R* {1954} EACA 270).

51. As submitted by the Respondent's counsel, the Appellant did not demonstrate any of the above factors. The trial court while sentencing the Appellant considered his mitigating factors, the gravity of the offence as well as the aggravating circumstances. The court was satisfied that the Appellant was aiming the complainant's head. No basis is laid at all to invite my interfering with the sentence imposed against the Appellant.
52. With the result that the appeal herein fails in its entirety and is dismissed.

DATED SIGNED AND DELIVERED AT NANYUKI THIS 31ST DAY OF JANUARY 2024

A.K. NDUNG'U

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JUDGE

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

