Chelule & another v Republic (Criminal Appeal E027 of 2023)
[2024] KEHC 1866 (KLR) (29 February 2024) (Judgment)

Neutral citation: [2024] KEHC 1866 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAKURU

CRIMINAL APPEAL E027 OF 2023

HM NYAGA, J

FEBRUARY 29, 2024

BETWEEN

SAMUEL CHELULE ..... 1ST APPELLANT

KELVIN KIPRONO BYEGON ALIAS KIMALEL ..... 2ND APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an Appeal against conviction and sentence in Molo Chief Magistrate's Court Criminal Case No. 2853 of 2015 by Hon. Nderitu – Chief Magistrate delivered on 6th July, 2023)

JUDGMENT

1. The Appellants were arraigned before Molo Chief Magistrates Court and faced a charge of Robbery with Violence, Contrary to Section 295 as read with 296(2) of the Penal Code.

2. The particulars of the charge were that on 24th August,2015 at Hotel Bunei Olenguruone in Kuresoi Sub-County within Nakuru County jointly with others not before court while armed with dangerous weapons namely empty bottle and stones they robbed Julius Kipkemboi Ngerechi of his cash of Ksh.50,000/=, coat valued at Ksh.3000/=, blue shirt valued at Ksh.500/=, black shoe valued at Ksh.2000/= and phone make orange Kaduda valued at Ksh.1000/= and at or immediately before or immediately after the time of such robbery used actual violence to the said Julius Kipkemboi Ngerechi.

3. The Appellants denied the charge. After a full trial the learned magistrate found that the evidence adduced by the prosecution pointed to Assault rather than Robbery with Violence. The learned magistrate invoked Section 179 of the Criminal Procedure Code and convicted the Appellants on the offence of Grievous Harm Contrary to Section 234 of the Penal Code. She then proceeded to sentence each Appellant to a term of Seven (7) years imprisonment.

4. The Appellants were dissatisfied and aggrieved with the conviction and sentence and filed their respective Petition/Grounds of Appeal.

5. For the 1st Appellant, he filed his Grounds of Appeal dated 17th July, 2023, sets out the following grounds of Appeal; -

   i. That the learned Magistrate erred both in law and fact by holding that the offence of Robbery with violence was cognate to the offence of assault causing grievous harm yet the two offences are not classified together as such under the Criminal Procedure Code, thus erroneously convicting the Appellant under Section 179 of the CPC.

   ii. That the learned Magistrate erred both in law and fact by convicting the Appellant on account of insufficient evidence laden with glaring contradictions, gaps, inconsistencies, falsehood, uncorroborated evidence and which evidence in totality did not meet the threshold of proof beyond reasonable doubt.

   iii. That the learned Magistrate erred both in law and fact by disregarding the appellants defence in particular the fact that the appellant and the complainant were involved in an affray, resulting in the two of them sustaining injuries, a fact that was confirmed by the prosecution and defence witnesses.

   iv. That the learned Magistrate erred both in law and fact by failing to note the appellant was the first to report to the police regarding the assault, however, the police disregarded his complaint and charged with the current offence after the appellant had raised the issue of police inaction with the Independent Police Oversight Authority (IPOA) and the Police Internal Affairs Unit (IAU)

   v. That the learned Magistrate erred both in law and fact by harshly and unlawfully sentencing the appellant to the minimum sentence provided for under the law, which sentence capture the mitigation adduced by the Appellant, did not reflect the Appellant's previous record and which went against the weight of the evidence adduced.

6. The 2nd Appellant filed his Petition of Appeal on 2nd October 2023. He sets out the following grounds of Appeal; -

   i. That the learned Magistrate erred both in law and fact by holding that the offence of Robbery with violence was cognate to the offence of assault causing grievous harm, yet the two offences are not classified together as such.

   ii. That the learned Magistrate erred both in law and fact by convicting the Appellants on account insufficient evidence laden with glaring contradictions, gaps, inconsistencies and falsehood and which evidence in totality did not meet the threshold of proof beyond reasonable doubt.

   iii. That the learned Magistrate erred both in law and fact by convicting the Appellants on the strength of the prosecution case which was evidently full of glaring gaps.

   iv. That the learned Magistrate erred both in law and fact by convicting the Appellants on the strength of the prosecution case which was evidently full of glaring gaps.

   v. That the learned Magistrate erred both in law and fact by harshly and unlawfully sentencing the Appellant to the minimum sentence provided for under the law, which sentence capture the mitigation adduced by the Appellant's previous record and which went against the weight of the evidence adduced.

vi. That the learned Magistrate erred both in law and fact by failing to enquire from the prosecution regarding the criminal past records.

7. When the Appeal came up for Directions, the two Appeals were consolidated. Mr. Bore Advocate gracefully offered to take up the conduct of the 2nd Appellant's Appeal and he filed an Amended Petition of Appeal dated 12th October, 2023. He set out the following ground of appeal; -

i. That the learned Magistrate erred both in law and fact by holding that the offence of Robbery with violence was cognate to the offence of assault causing grievous harm yet the two offences are not classified together as such under the Criminal Procedure Code, thus erroneously convicting the Appellant under Section 179 of the CPC.

ii. That the learned Magistrate erred both in law and fact by convicting the Appellant on account of insufficient evidence laden with glaring contradictions, gaps, inconsistencies, falsehood, uncorroborated evidence and which evidence in totality did not meet the threshold of proof reasonable doubt.

iii. That the learned Magistrate erred both in law and fact by disregarding the appellants defence in particular the fact that the appellant and the complainant were involved in an affray, resulting in the two of them sustaining injuries, a fact that was confirmed by the prosecution and defence witnesses.

iv. That the learned Magistrate erred both in law and fact by failing to note the appellant was the first to report to the police regarding the assault, however, the police disregarded his complaint and charged with the current offence after the appellant had raised the issue of police inaction with the Independent Police Oversight Authority (IPOA) and the Police Internal Affairs Unit (IAU)

v. That the learned Magistrate erred both in law and fact by harshly and unlawfully sentencing the appellant to the minimum sentence provided for under the law, which sentence capture the mitigation adduced by the Appellant, did not reflect the Appellant's previous record and which went against the weight of the evidence adduced.

8. The Appeal was canvassed by way of Written Submissions.

Appellants' Submissions

9. The Appellants submitted that the trial court erred when it acquitted them on the charge of Robbery with Violence and proceeded to convict them on the offence of Grievous Harm after invoking Section 179 of the Criminal Procedure Code (CPC).

10. The Appellants submit that the offence of Robbery with Violence and that of Grievous Harm are not cognate offences and so the court erred in its Application of 179 of the Criminal Procedure Code.

11. Mr. Bore sought to distinguish the facts and circumstances of this case and those that existed in the case of David Mwangi Njoroge v Republic [2015] eKLR, which the court relied upon in convicting the Appellants with the offence of Grievous Harm. Counsel argued that the offence of Rape was found not to be cognate to the offence of Defilement.

12. To the Appellants, the offence of Grievous Harm is not cognate to that of Robbery with Violence. Counsel cited the case of Magore v Republic [1983] TZHC 48 where it was held that; -

> " So, when a person is tried for robbery, assault and stealing are necessarily the subject of the trial and it shall not be unlawful to substitute conviction of either of them for robbery. But one does not have to cause grievous harm in order to commit robbery. It is not a cognate minor offence to robbery and must be specifically charged. In this case it was not included in the charge and was not the subject of the trial. The appellant was unaware of it and its substitution was bad in law. I set aside the conviction of grievous harm and I substitute hereof the one of assault c/s 240"

13. Counsel further submits that the 1st schedule of the Criminal Procedure Code classifies offences and lists cognate offences under various chapters. That Robbery with Violence is found under Chapter 28 alongside other related offences while the offence of Grievous harm is listed under Chapter 22 under Offences of endangering life and health.

14. On ground two of the Appeal, the Appellants' Counsel submitted that the burden of proof lies with the prosecution to prove guilt of the accused persons beyond reasonable doubt and in doing so; the prosecution must adduce evidence that is consistent, credible, incontrovertible and non-contradictory.

15. As for contradictions in evidence, the following were pointed out by the appellants: -That it was unclear whether the complainant was a victim of Robbery with violence considering the Referral letter from Longisa District Hospital dated 25th August,2015 and Medical Summary from Defence Forces Memorial hospital dated 30th November,2015 that was produced in evidence showed that the complainant's injuries were as a result of a road traffic accident. In addition, PW9 who was a medical officer at Longisa District Hospital and PW12 who was a neurosurgeon at Memorial Hospital in Nairobi, in their testimony stated that PW1 was treated with a history of a Road Traffic Accident.That PW1 stated that he was hit on the head with a bottle of Popov Drink whereas PW2 described the bottle as Mzinga in examination in chief and as Kibao drink in cross examination.That PW1's testimony that the bottle he was hit with at the skull broke into particle pieces was not backed by the treatments records as none mentioned that glass particles were recovered from his head wounds.That PW1 testified that he booked room no. 7 at Bunei Hotel after paying Ksh.500/= whereas PW13 stated that room was not booked by PW1 but by one Julius Kipkemoi Ngeno.That PW1 stated that he was new in Olenguruone yet he asked the Appellant and his accomplices to take him to police station that was 1 km away.

16. As to the incredibility of the prosecution witnesses, the appellants pointed out the following: -That PW1 selectively feigned amnesia as he recollected vividly every minor detail of what allegedly happened to him on 24th August, 2015 but couldn't remember how he ended up at Longisa Hospital. They therefore believed PW1 feigned the same so as to escape being charged with assaulting them.That based on evidence of PW2 who stated that on the morning of 25th August, 2015, PW1 stated that if he reaches Longisa he will be fine, and the evidence of PW2 who testified that he met the watchman at around 5.00 am and he told him that PW1 had left with his girlfriend to unknown destination, and the medical summary produced by PW12 indicating that neurological evaluation carried out on PW1 on 27.8.2015 showed that PW1 gave history of a motor cycle accident and added that he lost consciousness for at least 20 minutes waking up to find himself at the hospital , is sufficient evidence that PW1 had not lost consciousness on the morning of 28th August,2015 when he left Bunei Hotel.That the evidence on record shows that DCI, PW1 & PW3 who are both KDF officer, conspired to falsely implicate them for the offence of Robbery with violence in order to cover up the assault committed by PW1 on them considering they were the first ones to report the assault case but their cases were not acted upon.

17. In buttressing their submissions, the Appellants referred this court to two cases: -

1. The Court of Appeal case of Ndungu Kimani v Republic [1979] KLR 282 which held as follows: -

> " The witness upon whose evidence it is proposed to rely should not create an impression on the mind of the court that he is not a straight forward person or raised a suspicion about his trustworthiness or say or do something which indicates that he is a person of doubtful integrity and therefore unreliable witness which makes it unsafe to accept his evidence".

2. Republic v Abdulrahman Hamisi Habo [2021] eKLR where the court stated as follows: -

> " In this case there is evidence that the complainant lied in that the appellant went for her at home. She also lied that he was a stranger to her. Lastly she lied that she had been chased away from home for stealing 20 kshs. These are the lies detectable from other available evidence. We do not know where else she may have lied. She was not entirely honest in her evidence. The lower court having established that she lied in relation to her prior relationship with the accused or her knowledge of him, ought to have been extra careful in relying on her uncorroborated evidence to arrive at a conviction. The Court should as well have recorded with precision reasons in the proceedings which satisfied it that her other evidence is true. Such having not been recorded, there exists possibility where the complainant could have lied about the real culprit. The doubt should have been resolved in his favour. As such I do find that the trial court erred in convicting the appellant of a more severe offence than the one he was charged with, and depended to arrive at a conviction on unreliable and uncorroborated evidence of the complainant. "

18. Regarding the sentence meted out against them, the Appellants submitted that trial court erred by sentencing them to 7 years' imprisonment without calling for a presentence report. In support of their submissions, they relied on the case of Peter Kipsang Koech vs Republic Nakuru Criminal Appeal Number E012 OF 2022(Unreported) where the court in regards to failure to call for the accused's presentence report stated as follows: -

> " It is now good practice to seek a pre-sentence report. The appellant's counsel here has a point. That asking for a social inquiry report would have given the court as idea of the kind of person the court was dealing with, and the alleged victims of the offence would have been given voice. True, the court has a duty to mete out deterrent sentences where an offender is a repeat offender but courts should also look at the reasons for the recidivism on the part of the accused person as sometimes more punishment does not necessarily lead to reform and rehabilitation of the offender. This is because maintenance of law and order has to walk with access to justice which must be more than just locking offenders up in prison. As Courts we are called upon to be vehicles of social transformation by doing things differently as evidenced by Article 159 (2) Of *the Constitution*..."

19. The Appellants therefore submitted that the sentence meted against them was excessive, harsh and an abuse of court's discretion on sentencing.

20. They asserted that their mitigation was disregarded and their past criminal records were not called for.

21. They prayed that the Appeal be allowed and they be acquitted of all charges.

Respondent's Submissions

22. On whether the trial court erred in Application of 179 of the Criminal Procedure Code, the Respondent submitted that the trial magistrate correctly invoked it as it operated downwards and not upwards as is required by the law. To support this proposition, the Respondent cited the case of Kyalo Mwendwa vs Republic [2012] eKLR where the court in reference to section 179 of the Criminal Procedure Act, stated as follows;

> " As it can be readily seen, the trial court has jurisdiction to impose a substituted conviction for a minor cognate offence only. In other words, for the trial court to invoke this section, the substituted conviction must be for an offence which is both minor and cognate to the offence charged ..... Section 179 of the Criminal Procedure Code, as it appears operates downwards as opposed to upwards...."

23. The respondent further cited the case of Evans Odhiambo Anyanga v Republic [2015] eKLR where the court opined that assault is a lesser offence to attempted rape or indeed rape as both offences may be preceded by an assault.

24. The respondent then submitted that borrowing the principles from the above case, the offence of causing grievous harm is minor or lesser to robbery with violence as the two may be preceded by violence which may cause grievous harm as was in this case, while robbery with violence call for death sentence an offence of causing grievous harm calls for a life sentence.

25. The Respondent also relied on the case of Joseph Mutua Mutuku, James Muli Kimilu, Paul Mutuku Mutua, Dominic Nyamasyo Mutua & Joseph Kimilu Muendo vs Republic Criminal Appeal 107 & 111/19, 112/19, 113/19 & 114/19 of 2019 (Consolidated) where the court held as follows: -

> " The offence of robbery with violence carries a death sentence. Grievous harm contrary to section 234 of the Penal Code carries a maximum sentence of life imprisonment while assault contrary to section 251 carries maximum sentence of five (5) years. I therefore find that grievous harm contrary to section 234 Penal Code is a cognate and minor offence to robbery with violence contrary to section 296 (2) of the Penal code."

26. The respondent argued that the instant case can be distinguished from the case of Magore vs Republic(Supra) that was cited by the Appellants for reasons that the appellant therein was charged with robbery that did not require proof of grievous harm whereas the Appellants herein were charged with robbery with violence which requires proof of the same.

27. In regards to whether the offence of grievous harm was proved, the respondent submitted that the evidence of PW1, PW11 & PW12 and the medical documents that were produced in evidence confirmed that the complainant had been assaulted and he sustained Grievous harm. Additionally, the respondent asserted that the Appellants did not dispute that PW1 had been grievously injured.

28. On the identity of the perpetrator, the respondent submitted that the Appellants were positively identified as they had spent considerable time with PW1 on the material day. That they sat and conversed at a closer range in a room that was well lit with electricity and that the Appellants took close to 20 minutes assaulting PW1. Further, the Respondent submitted that the appellants did not dispute being at the scene and being involved in altercation with the complainant.

29. On whether the injuries sustained by the complainant were caused by an accident, the respondent submitted that the trial court was right in holding that the same was not caused by a road traffic accident considering PW1 was unconscious when he was taken to the hospital and when he was referred to War Memorial Hospital in Nairobi, and that he never made a statement on how he sustained the injuries until later. The respondent contended that the Good Samaritan who took the complainant to the hospital never witnessed the commission of the crime and her reasonable belief that the injuries were caused by a road accident was rebutted by the investigation which revealed that the report made at the hospital that the injuries were as a result of a road traffic accident was erroneous.

30. In regards to whether there were major contradictions in the prosecution's case, the respondent submitted in the negative. It posited that if there were any discrepancies the same were too minor and did not go to the root of the matter. To buttress its submissions, the respondent cited the case of John Nyaga Njuki & 4 others vs Republic [2002] eKLR where the court observed that 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.

31. On the allegation of selective amnesia by the Appellants, the respondent contended that the complainant had suffered brain injury and had difficulties remembering everything.

32. On sentence, the Respondent submitted that pursuant to Section 354(3) (ii) Criminal Procedure Code, this court has powers to alter the sentence imposed by the trial court as the same was patently lenient as to amount to an error of principle.

33. The respondent submitted that aggravating circumstances in this matter outweighed mitigating circumstances for reasons that the complainant was a visitor at the Appellants' area, he was not armed when he was accosted by the Appellants, the appellants in company of two others beat him aimlessly that he fell into a ditch but they could not sympathize with him as they continued hitting him with stones until he became unconscious. That resultantly, the complainant sustained depressed skull and underwent head surgery. In buttressing its submissions, the respondent relied on the case of Hillary Kipkorir Bii vs Republic [2022] eKLR where the High Court on appeal substituted the sentence of life imprisonment with 15 years' imprisonment for an Appellant who had been charged with causing grievous harm and noted that the lenient sentence will enable the Appellant, upon release to reconcile with this family and heal the wounds inflicted by his heinous act.

Analysis and Determination

34. I have considered the appeal and submissions by both parties. I have also read the record of the trial court and the impugned judgment.

35. As a first appellate court, this court is obligated to revisit and re-evaluate the evidence afresh, assess the same and make its own conclusions, bearing in mind that the trial Court had the advantage of hearing and observing the demeanour of the witnesses. (See Okeno v Republic [1972] E.A 32.)

36. The issues that arise for determination in this appeal are:

    1. Whether the offence with which the appellants were convicted was a cognate offence.

    2. Whether there was sufficient evidence to convict the appellants for the offence of grievous harm.

    3. Whether there were material and irreconcilable contradictions in the prosecution case.

    4. Whether the sentence imposed against the Appellant was excessive and harsh.

37. The gist of the Appellants' argument on the first issue is that the trial magistrate erred in law when she acquitted the Appellants of the offence of Robbery with Violence and then proceeded to convict them on the offence of Grievous Harm. To them Section 179 of the Criminal Procedure Code is only applicable to cognate offences.

38. Section 179 of the Criminal Procedure Code provides as follows; -

> " 179.
>
> (1) When a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence, and the combination is proved but remaining particulars are not proved, he may be convicted of the minor offence although he was not charged with it.
>
> (2) When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence although he was not charged with it".

39. The Application of the said section requires that; -

i. The offence charged constituted several particulars.

ii. The proved combination of some only constitutes a minor offence.

40. The Appellants submit that the offence of Grievous Harm is not cognate to that of Robbery with Violence in that they fall under different categories of the 1st schedule of the Criminal Procedure Code.

41. It is not in dispute that for the court to apply Section 179 of the Criminal Procedure Code the two offences must be cognate. In addition, the offence that the accused is convicted of must be a lesser offence.

42. In Robert Mutungi Muumbi v Republic 2015 eKLR the Court of Appeal states as follows; -

> " As is apparently clear, section 179 of the Criminal Procedure Code empowers a court, in some particular special circumstances, to convict an accused person of an offence, even though he was not charged with that offence. The court contemplated by section 179 can be either the trial court or the appellate court."

43. So what is a cognate offence?

44. Black's Law Dictionary 9th Edition describes a cognate offence as;

> " A lesser offence that is related to the greater offence because it shares several of the elements of the greater offence and is of the same class or category."

45. So, what does the same class and category refer to? Mr. Bore submits the same can be derived from a look at the 1st Schedule in the Criminal Procedure Code.

46. The Explanatory Note to the First Schedule of the Criminal Procedure Code states as follows; -

> " The entries in the second and fourth columns headed respectively "offence" and "punishment under the Penal Code" are not intended as definitions of the offences and punishments described in the several corresponding sections of the Penal Code or even as

abstracts of those sections, but merely as references to the subject of the section, the number of which it is given in the first column"

47. Clearly the explanatory note itself states that the schedule is not intended as a definition of the offences and punishments described in the corresponding sections of the Penal Code. As such the said schedule cannot be used to assess whether one offence is cognate to another.

48. With all due respect to Mr. Bore, the question is whether two offences are cognate is not where they fall under the schedule, but the combination of the constituent ingredients of the said offences.

49. The offence of Robbery with Violence constitutes two ingredients found under Section 295 and 296 (2) respectively. The elements are; stealing and any of the following ingredients;

    i. The offender is armed with any dangerous weapons or instrument; or

    ii. Is in company of one or more other person or persons or

    iii. Immediately before or immediately after the time of robbery, he wounds, beats, strikes or uses any personal violence to any person (emphasis mine).

50. The ingredients of the offence of Grievous Harm are described at Section 2 of the Penal Code to mean;

> " 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 and internal organ, membrane or sense."

51. Clearly, the 2 offences constitute an element of the occasioning of an injury to a person. In my opinion the two offences share some similar constituent ingredients.

52. The offence of grievous harm carried a maximum sentence of life imprisonment while that of Robbery with Violence carries a death sentence. Clearly the sentence for the offence of Grievous Harm is lesser than that of Robbery with Violence.

53. I am therefore of the finding that the offence of Grievous Harm is cognate and a minor offence to that of Robbery with Violence.

54. To buttress this point, I will cite a few decided cases. In Joseph Mutua Mutuku and 4 Others vs Republic [supra], the court faced a similar question. The court found that the offence of Grievous Harm Contrary to Section 234 of the Penal Code was cognate to the offence of Robbery with Violence Contrary to Section 296(2) of the Penal Code.

55. Similarly, in Jeremiah Auma Odongo vs Republic [2021] eKLR the Appellant was charged with the offence of Robbery with Violence and Malicious Damage to Property. The trial court, on the first count, invoked Section 179 of the Criminal Procedure Code and convicted him on the offence of Grievous Harm.

56. On Appeal the High Court found that the offence of Grievous Harm was cognate and lesser to the offence of Robbery with Violence and upheld the conviction thereon.

57. I think I have said enough on this issue. I will now move on to the next one.

58. The Appellants herein were convicted of the offence of causing grievous harm.

59. The Appellants submitted that there was insufficient evidence to find them guilty of the offence.

60. On whether the prosecution sufficiently proved that the Appellant sustained grievous harm, I find this issue has not been contested in this appeal. PW1 testified that the 1st Appellant hit him with a bottle on the chest and in company of the 2nd Appellant and another pulled him outside the hotel and he fell into a ditch. As he was trying to get out, they beat him and stabbed him with a broken bottle on his face and the left hand. He got hold of the 1st Appellant's hand while the 2nd Appellant and the other person were hitting him with stones, kicks and blows. He tripped and fell and someone hit him with a stone on the head. He said as a result he suffered a depressed skull.

61. PW9 who was medical officer from Longisa District Hospital corroborated the testimony of the complainant as regards the injuries. He stated that on 25th August,2015, the complainant was taken to their facility. An X- ray was conducted and it established that he had sustained a depressed skull fracture and he was referred to Forces Memorial Hospital for further management.

62. PW12, DR. Charles Mwangi Kingori, a neurosurgeon from Nairobi Memorial Hospital, confirmed that the complainant was referred to their facility on 26th August, 2015 from Longisa District Hospital and he had suffered a depressed fracture of the skull and soft tissue injuries. He said they performed CT scan of the brain to ascertain how far the fragments had gone and it was confirmed that the fragments were significantly depressed and that the complainant needed an operation to elevate them to relieve the pressure on the brain and remove any foreign material on the brain. He said the complainant was then admitted for surgery and was treated until 3rd September,2015 when he was discharged. The discharge summary from Longisa County Referral Hospital and the Medical Report summary by PW12 that were produced in evidence established the aforesaid injuries.

63. PW11, the clinical officer from Olenguruone District Hospital who filled the complainant's P3 form confirmed the injuries sustained were grievous and they were caused by a sharp weapon.

64. Section 4 of the Penal Code defines grievous harm as I had set out earlier.

65. In John Oketch Abongo v Republic [2000] eKLR , the court of Appeal stated as follows:

> " 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."

66. The injuries therefore as indicated in the discharge/referral form from Longisa County Referral Hospital, P3 form, the medical report by PW12 and Head CT Scan produced as exhibits no.1, 14,15 and 16 respectively resonate with the definition of grievous harm at Section 4 of the Penal Code above.

67. On whether the appellants were positively identified to be the complainant's assailants, from the evidence, there were several people in the bar that night. The lights were on. Therefore, there was sufficient light, time and opportunity for the witnesses to observe what transpired that night.

68. The complainant's evidence was duly corroborated by that of PW2, who was a watchman at the bar. He confirmed he knew both Appellants well. PW3, who knew the complainants and the appellants, also confirmed the presence of the appellants in the bar that night. The Appellants in their testimony confirmed that they were in the same bar with the complainant on that fateful day.

69. The issue of identification has not been challenged in this Appeal. What the Appellants have raised in their appeal is that the trial court erred by disregarding their defence particularly that they were involved in an affray with the Complainant resulting into them sustaining injuries.

70. I have perused the proceedings before the trial court. The Appellants in their testimony never raised the issue herein before the trial court for determination. The 1st Appellant's testimony was that on the material date he was in the restaurant, watching football when a KDF officer one Weldon Kirui whom he had loaned money came. He stated that he asked him for his money but he abused him, and foreseeing a commotion, he decided to leave. As he was leaving he heard someone say "unatisha nani" and immediately he was hit with a bottle and got injured on the face. Thereafter, he was taken to Olenguruone Hospital.

71. The 2nd Appellant on his part testified that he went to the bar where he found a confrontation between the 1st Appellant and one Weldon over Ksh.1000/= that the 1st appellant had loaned him. He said the confrontation led to a fight in which Weldon tried hitting the 1st Appellant with a bottle but hit the wall. He said the 1st appellant was pulled outside by the watchman and afterwards they heard screams and went outside where they found the 1st Appellant lying down bleeding.

72. Elijah Kipkurui (PW2) who worked in the bar, said that the lady by the name Chepkurui was seated with the complainant. The complainant exchanged words with Sammy, the 1st Appellant, who then rose and went to table where the complainant was seated. After a further exchange of words, Sammy hit the complainant. This evidence was reiterated by Bernard Mutai (PW3) who was drinking in the bar that night. Winnie Chepkemoi (PW7) who was the one serving customers in the bar that night, also corroborated the evidence of the complainant. Janet Chepurui (PW8) who was the lady seated with the complainant that day also corroborated the testimony of the complainant.

73. In light of the above, it is clear the alleged fight with one Weldon that the appellants were referring to never occurred at the scene that day. Also, from other witnesses at the scene, there was no physical fight between the Appellants and the complainant. The evidence was to the effect that the appellants were the ones who attacked the complainant.

74. The evidence of PW 11 was to the effect that he saw the 1st Appellant at the District Hospital. He had injuries. In my view even if the 1st Appellant had injuries, there is no evidence that the same came from the complainant. In the circumstances, ground 3 of their Appeal is baseless and I entirely disregard it.

75. On whether the injuries sustained by the complainant were as a result of a road traffic accident, the appellants referred the court to the evidence of the PW9 who was a medical officer from Longisa District Hospital, PW12 a neurosurgeon from Memorial Hospital, the contents in the referral letter from Longisa Hospital and the Medical summary by PW12. This position is true. However the notes by the hospital were based on the information given by a good Samaritan who was not an eye witness of the incident. The testimonies of PW2, PW3, PW6, PW7 and PW8 who witnessed the incident show that the complainant suffered injuries as a result of assault. Additionally, PW12 stated that during review the complainant apprised him that the history given at the hospital was untrue as he had been assaulted by the people known to him.

76. Having examined and re-evaluated all the evidence adduced by both the prosecution and defence witnesses. I find no probative evidence that the complainant's injuries arose out of a road traffic accident.

77. It was also the Appellants' case that the learned trial magistrate erred in both law and fact by convicting the Appellant on account of insufficient evidence laden with glaring contradictions, gaps,

inconsistencies, falsehood, uncorroborated evidence. I have considered the Appellant's submissions in this regard.

78. Indeed, the record reflects that the prosecution witnesses gave different evidence on the number of issues as pointed out by the Appellants. However, it is my opinion that the contradictions pinpointed by the Appellants were not material to the main issues in question.

79. In Philip Nzaka Watu v Republic [2016] eKLR the Court stated as follows:

> "However, it must be remembered that when it comes to human recollection, no two witnesses recall exactly the same thing to the minutest detail. Some discrepancies must be expected because human recollection is not infallible and no two people perceive the same phenomena exactly the same way. Indeed, as has been recognized in many decisions of this Court, some inconsistency in evidence may signify veracity and honesty, just as unusual uniformity may signal fabrication and coaching of witnesses. Ultimately, whether discrepancies in evidence render it believable or otherwise must turn on the circumstances of each case and the nature and extent of the discrepancies and inconsistencies in question."

80. The Court of Appeal of Kenya in addressed itself on the issues of contradictions in the case of Erick Onyango Ondeng' vs Republic [2014] eKLR held;

> "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."

81. The Court of Appeal in the case of Richard Munene vs Republic [2018] eKLR stated as follows:

> "It is a settled principle of law however, that it is not every trifling contradiction or inconsistency in the evidence of the prosecution witness that will be fatal to its case. It is only when such inconsistencies or contradictions are substantial and fundamental to the main issues in question and thus necessarily creates some doubt in the mind of the trial Court that an accused person will be entitled to benefit from it."

82. Having examined all the evidence adduced, I find that the trial magistrate properly directed herself in reaching the conviction. The evidence of the prosecution was sufficient to warrant that conviction.

83. For all the above reasons, I find and hold that the prosecution proved the charge of grievous harm against the appellants beyond reasonable doubt and therefore the convictions of the appellants were sound and safe. I uphold it and dismiss the appellants' appeal against the same.

84. I will now deal with the last issue, that of the sentence.

85. It is well established that sentencing is at the discretion of the trial court and an appellate court can only interfere with the sentence under very specific circumstances as was emphasized by the Court of Appeal in Benard Kimani Gacheru vs Republic [2002] eKLR where it stated that: -

> "It is now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that

the trial court overlooked some material factor, or took into account some wrong material, or acted on a wrong principle. Even if, the Appellate Court feels that the sentence is heavy and that the Appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, any one of the matters already stated is shown to exist."

86. The Supreme Court in Francis Karioko Muruatetu & Another vs Republic, Petition No. 15 of 2015, as a guide in sentencing held that:

> "(71) ...the following guidelines with regard to mitigating factors are applicable in a re-hearing sentence for the conviction of a murder charge:
>
> a. age of the offender
>
> b. being a first offender;
>
> c. whether the offender pleaded guilty;
>
> d. character and record of the offender;
>
> e. commission of the offence in response to gender-based violence;
>
> f. remorsefulness of the offender;
>
> g. the possibility of reform and social re-adaptation of the offender;
>
> h. any other factor that the Court considers relevant."

87. The Supreme Court in Muruatetu Case (supra) appreciated that:

> "In Kenya, many courts have highlighted the principles of sentencing. One such case is the High Court criminal appeal decision in Dahir Hussein v Republic Criminal Appeal No. 1 of 2015; [2015] eKLR, where the High Court held that the objectives include: "deterrence, rehabilitation, accountability for one's actions, society protection, retribution and denouncing the conduct by the offender on the harm done to the victim." The 2016 Judiciary of Kenya Sentencing Policy Guidelines lists the objectives of sentencing at page 15, paragraph 4.1 as follows:
>
> "Sentences are imposed to meet the following objectives:
>
> 1. Retribution: To punish the offender for his/her criminal conduct in a just manner.
>
> 2. Deterrence: To deter the offender from committing a similar offence subsequently as well as to discourage other people from committing similar offences.
>
> 3. Rehabilitation: To enable the offender reform from his criminal disposition and become a law abiding person.
>
> 4. Restorative justice: To address the needs arising from the criminal conduct such as loss and damages. Criminal conduct ordinarily occasions victims', communities' and offenders' needs and justice demands that these are met. Further, to promote a sense of responsibility through the offender's contribution towards meeting the victims' needs.

5. Community protection: To protect the community by incapacitating the offender.

6. Denunciation: To communicate the community's condemnation of the criminal conduct."

88. 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."

89. I note contrary to appellants' assertion, the trial court called for their previous records and considered their respective mitigation.

90. In mitigation, the Appellants stated as follows: -

1st Appellant – "I have five children. They all depend on me. My parents also depend on me. I seek forgiveness

2nd Appellant- "I am an orphan. I have a family and siblings who depend on me. I seek forgiveness"

91. The court in its ruling stated as follows: -

> " I have duly considered the fact that each accused person is a first offender. Their mitigation too is considered. The victim impact statement offered by the prosecutor in submission is also considered. It is sad that accused willfully and intentionally almost took away the complainant's life. The very serious injuries occasioned on him by accused persons is a testimony to this brutality. Deterrent action is called for. Each accused person is hereby sentenced to seven (7) years imprisonment."

92. I have considered the circumstances of the case, the submissions by the State Counsel and the defence counsel.

93. The respondent herein submitted that aggravating factors outweighed the mitigating circumstances. I have considered its submissions in that regard.

94. In Pius Njeru Nyaga v Republic [2020] eKLR, the court stated that:

> " The Judiciary Sentencing Guidelines provide that the effect of mitigating factors is to lessen the term of the custodial sentence whereas that of aggravating circumstances has the effect of enhancing the term of the custodial sentence. Where both aggravating and mitigating circumstances exist, the court should weigh the aggravating and mitigating circumstances and where mitigating circumstances outweigh the aggravating ones, then the court should proceed as if there is a single mitigating circumstance."

95. On the material date, complainant herein sustained depressed skull fracture as a result of the assault. On 25th August, 2015 he was treated at Longisa County Referral Hospital and referred to Defence Forces Memorial Hospital for further treatment on 26th August, 2015. At the time of referral, he was in a stable condition. At Defence Forces Memorial hospital, he was admitted from the date of referral to 3rd September 2015. At the time of discharge, he was in a fair condition.

96. In Peter Kalunge M'mukira vs Republic [2013] eKLR the Appellant was convicted of causing grievous harm contrary to section 234 of the Penal Code. After a full trial the court found him guilty of the offence and sentenced him to 15 years' imprisonment. He appealed. Dismissing the appeal, the court upheld the 15 years' imprisonment and stated:

> " I have considered this appeal. I have perused the proceedings of the lower court. Regarding the motive of the attack it is clear from the record that the issue was not land but the fact that the Appellant was annoyed that the complainant had reported him to the police after the Appellant stole his cow. I noted that the motive for this attack was to silence the complainant so that he does not pursue the case he reported to the police. The Appellant was found guilty of chopping off the complainant's hand at the wrist joint. From the testimony of the complainant and eye witnesses that amputation was as a result of the accused cutting the complainant on the hand three times. It is clear from the circumstances that the reason for the attack was not provocation that the Appellant submitted before me but it was in execution of a premeditated attack to cause grievous harm to the complainant.
>
> .....Given the circumstances of the case I am satisfied that the imprisonment of 15 years imprisonment is neither excessive nor harsh. I therefore find no merit in this appeal and dismiss it accordingly."

97. In Ali Gababa Dabasa v Republic [2015] eKLR, Kiarie J allowed an appeal against maximum life imprisonment where the appellant severed the hand of the victim from the wrist and substituted the sentence to fifteen years' imprisonment. The learned Judge stated as follows and I concur:

> " Section 234 of the Penal Code provides as follows:
>
> "Any person who unlawfully does grievous harm to another is guilty of a felony and is liable to imprisonment for life."
>
> The complainant's hand was completely severed at the wrist. The record is scanty as to the cause of such a brutal act, except that it was done after the Appellant went to the home of the complainant.
>
> The Appellant indicated to this court that he is 23 years old. He indeed looks young. He is a first offender. These two facts ought to have persuaded the trial court not to mete out the maximum sentence.
>
> After considering that the complainant lost his hand and that the Appellant is a first offender and that he is only 23 years, I set aside the life sentence meted out by the trial court and substitute it with 15 years' imprisonment to run from when he was sentenced by the trial court."

98. Guided by the above cases I find the injuries that sustained by the Complainant were not severe compared to the complainants therein. The complainant had healed well and fully recovered his memory. In the circumstances I find that the sentence imposed by the trial court was neither excessive nor lenient and I affirm it.

99. In the upshot, the appeal herein is found without merit and it is hereby dismissed.

100. Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 29TH DAY OF FEBRUARY, 2024.

H. M. NYAGA,

JUDGE.

In the presence of;

C/A Oleperon

State counsel Ms Okok

Appelant both present

Mr. Bore for Appellants