



REPUBLIC OF KENYA



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**Murungi v Republic (Criminal Appeal E178 of 2022)
[2024] KEHC 6563 (KLR) (24 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 6563 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CRIMINAL APPEAL E178 OF 2022**

LW GITARI, J

MAY 24, 2024

BETWEEN

JASPER GITUMA MURUNGI APPELLANT

AND

REPUBLIC RESPONDENT

JUDGMENT

1. The appellant was convicted of the offence of grievous harm contrary to section 234 of the Penal code and sentenced to serve 15 years imprisonment. The appellant was aggrieved by the conviction and the sentence and filed the instant appeal dated 24.11.2022.
2. The particulars of the offence being that on 28.11.2018 at around 2300 hrs in Kinoro Sub location, Kinoro Location, Imenti South Sub County of the Meru County unlawfully did Grievous harm to Albert Murungi.
3. The grounds of appeal are that:
 1. The learned trial magistrate erred in matters of Law and fact by failing to note that the evidence adduced was not sufficient to sustain the conviction.
 2. That the learned trial magistrate erred in matters of Law and fact by failing to note that the prosecution failed to prove their case beyond reasonable doubts.
 3. That the learned trial magistrate erred in Law and facts by failing to note that the key witnesses were not called.
 4. That the learned trial magistrate erred in law and fact by not observing that the evidence adduced by the prosecution witness were uncollaborating (sic) and inconsistent.



5. That the learned trial magistrate erred in Law and fact by rejecting the appellant defence without giving any cogent reason.
6. That since he could not recall all what transpired during the trial, he wished to be availed with the trial proceedings and judgement to draft more cogent grounds.

He prays that the conviction be quashed, the sentence be set aside and he be set at liberty.

Submissions

4. The appeal was canvassed by way of written submissions and wherein the appellant while relying on his undated submissions.
5. The Appellant adduced different grounds of appeal in the submission namely that:
 - i. That the learned trial magistrate faulted in law and fact by founding a conviction on the appellant without considering that the initial case the appellant facing was withdrawn out of the court after they had reconciliation thereof.
 - ii. That the learned trial magistrate faulted in law and fact, by relying on the evidence adduced by the witnesses of the same family without cautioning himself on the dangers of the same
 - iii. That the learned trial Magistrate erred in law and fact by dismissing the appellant's defense of alibi with no cogent reasons.
 - iv. That the learned trial magistrate faulted in law and fact by allowing the testimony of PW3(the clinical officer) on the basis of hearsay and not facts well established.
6. The Appellant contended that his rights were prejudiced because he was alive to the charges and weight of the sentence provided by the Law to the appellants and it was an imperative for the prosecution to charge the appellant with an offence which was later withdrawn out of the court by the complainant after they had reconciled.
7. It is the Appellant's submission that as per evidence tendered by PW1 the complainant herein it was concise that his father withdrew the charges a fact that was confirmed by PW2 who is the uncle to the accused. That the same was further confirmed by PW3 who is the daughter of the complainant.
8. The Appellant submitted that he had another different dispute with his father that occurred on 5th July 2021 and therefore he was supposed to be charged with the offence of creating disturbance. The Appellant relied on article 50 (2) of *the Constitution* which in his opinion is the legal protection against double jeopardy.
9. The appellant submitted that the reasoning behind that principle is quite clear and there must be finality in legal processes and further the accused person must be protected from the prejudice he would suffer by going through a second trial after the state had seen his entire defence who should be protected from oppression by the state. The Appellant relied on section 82 of the criminal procedure code.
10. The Appellant further relied on section 204 of the Criminal Procedure Code and submitted that the learned trial court relied on the case which was once withdrawn out of the court by the complainant after they reconciled.
11. The Appellant submitted that PW3 was not a credible witness in totality. That his statement was full of lies without capturing any element of truth in it. That he failed to note that the instant case was not a fresh witness.



12. The Appellant submitted that the prosecution failed to prove their case against the accused and he relied in the cases of Sekitoliko vs Uganda (1967) EA 533 and also the case of Philip Muiruri Ndaruga vs Republic cr.Appeal No.76 of 2012/2016.
13. It is the Appellant submission that no commendable investigation was carried out in regards to the incident and PW5 the investigation officer, just relied on unfounded fallacy with no basis borne by the witnesses. That he did not visit the scene of crime and no information was attached to the real issues that tendered to the trial court. That the witness was not credible and did not at all support the prosecution's case to found a just conviction. That he made the trial court to unjustifiably convict him.
14. The Appellant submitted that since his arrest on 5th July 2021 the appellant remained in custody until his conviction and sentence on 23rd November 2022. That pursuant to the provisions of the law as enshrined in section 33(2) of the criminal procedure code, Chapter 75 laws of Kenya, the amount of time spent in custody ought to be deducted while sentencing the accused person. The Appellant relied in the case of Ahamad Abolfathi Mohammed & Another vs Republic ('2018)eKLR.
15. The Appellant prayed that his sentence of imprisonment to run from the date of their arrest on 19th June 2019. The Appellant relied in the case of Bethwel Wilson Kibor vs Republic (2009)eKLR.
16. It is the Appellant submission that the trial magistrate rejected the appellant defence of which contained some reasonable facts to support his acquittal.
17. The Appellant submitted that his appeal be allowed and his conviction quashed and the sentence be set aside and he be set at liberty in the interest of justice.
18. Mr. Gitonga Mutuma, the prosecution counsel on the other hand submitted while relying on his submissions dated 25.04.2023 submitted on a brief synopsis of the facts of the case.
19. It is the respondent's submission that the conviction and sentence should be upheld and the said petition of Appeal and the grounds of Appeal as outlined by the appellant be dismissed.
20. The respondent submitted that on the first, second and third grounds of appeal that the prosecution proved its case beyond reasonable doubt and the witnesses gave consistent evidence that was corroborated. The respondent relied on section 4 of the Penal code which defines grievous harm.
21. The respondent submitted that PW1 suffered serious injuries as shown on PEXH1 which led to him being admitted at St Anne's hospital for a number of days before being discharged as shown by PEXB2. That he had a deep cut on the right shoulder and on the elbow, joint is an injury that from the evidence produced by PW3 the injuries sustained by PW1 fall within the definition of grievous harm.
22. The respondent submitted that the Appellant had submitted that key witnesses were not called but he submitted to the contrary that the prosecution called 5 witnesses who were pertinent to the case. That PW1 gave his evidence of how the accused injured him unprovoked. That he is the father of the Appellant and no ill motive was established during cross examination by the accused and more so he had previously withdrawn a case against him.
23. The respondent further submitted that PW2 placed the accused at the scene of crime and how he was able to identify him, that the appellant fled and only came back to their homestead after 2 years.
24. It is the respondent submission that PW1 immediately reported to the police on 45th July 2021 when he was again confronted by the Appellant who threatened to cut him again.



25. The respondent submitted that the prosecution has the discretion on which the witnesses to call and the court if satisfied would have invoked section 150 of the CPC and the same may be invoked by either parties and which the Appellant failed to invoke to call any key witness as he alleges.
26. The respondent relied on the case of *Bukenya v Uganda (1972)E.A 549*
27. The respondent submitted on the fourth ground that the appellant submitted has not stated where the inconsistencies that he alleges were made yet he failed to cross examine the prosecution witnesses when given the opportunity.
28. It is the respondent's submission that if there were inconsistencies by the prosecution witnesses, the court would have seen and rightly acquitted the appellant. The respondent relied on the case of *Erick Onyango Ondeng v republic (2014)eKLR*.
29. The Respondent submitted on the fifth ground that where the appellant alleges that the court failed to consider his defence. He submits that the defence was a mere denial and declined to call witnesses when he was given an opportunity to do so.
30. It is the respondent's submission that the Appellants' submission was a mere denial and when he was given the opportunity to call any more witnesses he declined to do so. That the court equally noted that the appellants defence was an afterthought and the same was considered by the trial court.
31. The respondent submitted that they proved their case beyond reasonable doubt by ensuring the ingredients of the offence were established. The respondent further submitted that the appellant's grounds of Appeal are unmerited and the same should be dismissed and the conviction be upheld.

Analysis And Determination

32. This being a first appeal the duty of the court is to analyze and re-evaluate afresh the evidence adduced at the lower court and draw its own independent conclusions while bearing in mind that the trial court had the advantage of seeing and hearing the witnesses testify. [See *Okeno v Republic (1972) EA 32*].
33. PW1, Albert Murungi, testified that he is a farmer and he is the complainant. That on 28th November,2020 the accused came at night and cut him on his head. That he then fled and he screamed. That Stanley Kinyua heard him and he called people and he was taken to hospital.
34. PW1 testified that he was unconscious for 4 days. That further the accused came back on 4th June 2021 and he chased him with a panga and he reported and he was arrested. That the appellant even attempted to present himself at the police station.
35. PW1 stated that he was treated at St.Ann Mission Hospital where he was admitted for 2 months. He produced P3 form dated 28th May 2021 marked P.MF1-1 and a discharge Summary of St Ann Mission Hospital DOA dated 29th November,2018 and DOD is 18th December 2018.
36. PW1 further stated that the appellant cut him with a panga and he was with his brother Charles Gikunda. That the appellant then threw him to the ground and cut him on the right hand.
37. PW1 further testified that the appellant had assaulted him before and he was charged in court but he withdrew the case and forgave him. That since 2018 the accuses went hiding up to when he was arrested. That he heard the accused voice and he recognized him and also there was clear moonlight and he saw the appellant and his brother.



38. PW1 was cross examined by the appellant and he reiterated that the Appellant pushed the door and forced it open and he was with his brother when he attacked him. That he initially assaulted him and damaged his properties and his brother persuaded him to withdraw the case.
39. PW2 testified as Stanley Kinyua . He stated that he stays at Kinoro and he is a farmer. That on 28th November 2018 he was asleep about 1.00 am when he heard screams and he responded. He went to the complainant's home and he met the accused and his brother Charles. That they are sons to the complainant.
40. PW2 testified further that he met them at the complainant's gate and the appellant had a panga and they threatened him and he went and called Luciano. That Luciano went and saw the complainant being cut by the accused.
41. PW2 testified that he called Charity Karim who is a sister to the complainant. That the incident was reported at Kinoro police post. That thereafter police came and on seeing them the appellant fled. That they took the complainant to St Anne hospital.
42. PW2 stated that the accused went into hiding and he came back in 2019. That in 2021 he again heard the complainant raise an alarm and it was about 11.00 pm. That the appellant was hitting the complainant's house with a panga and he damaged it. That he heard the accused talk to his mother.
43. PW2 testified that the incident was reported at the police post and he recorded a witness statement. That further the appellant attempted to hand himself to the police.
44. PW2 testified further that the appellant is his nephew and his father is his brother.
45. PW2 stated that the appellant had cut his father on the head and the case was later withdrawn by the complainant. PW2 further stated that he met the accused face to face and he flashed his torch and they also had a torch which they flashed.
46. PW2 was cross examined by the appellant and he stated that he had told the court the truth and further he reiterated he heard the complainant scream and her aunt was not at home but her mother fled.
47. PW2 was re examined and he reiterated that the appellant went into hiding after the incident and he stayed away for a whole year.
48. PW3 testified as Charity Karimi. She testified that on 28th November 2018 he was called by his uncle (PW2) and told that his father had been cut. That it was at about 12.00 am and he went to the police station and reported at kinoro police post. That they proceeded home and took the complainant to hospital
49. PW3 stated that his father was at home and he was injured on the hand-over the shoulder and they took him to hospital at St Anne where he was admitted for almost a month. That the complainant told him that he had been attacked by the appellant and then the appellant went into hiding. That he came back after 6 months and the complainant forgave him. That in 2021 the accused then attacked the complainant and the case was reported to the police.
50. PW3 testified that the appellant is her brother and as he took the complainant to hospital PW1 stated that it is the appellant who attacked him.
51. PW4 testified as Seberina Kaimatheri. She testified that she is a clinical officer at Kanyakine Sub County Hospital. She further testified that she had medical documents for the complainant who was their patient and a treatment card from St. Anne Mission Hospital and a P3 form she filled at the facility on 5th July 2021.



52. PW4 stated that the patient gave a history of being Assaulted by someone known to him and he did not carry his blood-stained clothes they were lost at hospital. PW4 testified that the complainant stated that the assailant was his son who attacked him on 28th November 2018 at about 11.00 pm without any cause. That the appellant had fled home aged 12 and he returned and that's when he attacked the complainant, threatening to kill him. That he was assaulted to a point of losing consciousness for 4 days.
53. PW4 relied on the history, physical exam and treatment notes from St. Ann M. Hospital and stated that there was a head scar of deep cut wound over the right shoulder, joint, a healed scar of wound on the left elbow joint and the approximate age was 2 years 1 month and the object used was sharp.
54. PW4 testified that the complainant was admitted for 19 days where he was managed and she assessed the injury as grievous harm. She produced documents P. exhibit 1 a P3 form and P. exhibit 2 a discharge summary.
55. PW4 was cross examined and she testified that the patient stated that he had been attacked by his son and she examined the patient and filed up a P3 form.
56. PW5 was PC James Kiura of Kinoro police post. He is the investigating officer. He testified that on 28th November 2018 at about 11.30 pm the daughter of the complainant Charity reported that her father had been attacked and cut by her brothers. That they proceeded to the scene and they found the complainant in the house. That he was cut on the right shoulder and he was swollen on the face and he had bled so much and there was a lot of blood in the house.
57. PW5 stated that the complainant testified that he had been attacked by his 2 sons who cut him with a panga and hit him on the face with stones. That they did not find the assailants and the complainant was escorted to hospital.
58. PW5 testified that on 5th July 2021 at 8.00 am the complainant came back to the police post and told them that the appellant had come back home and the night of 4th July 2021 he had threatened to cut him again.
59. PW5 stated that suddenly they saw members of the public bringing in the appellant. That he was under arrest but he insisted that he would kill the complainant.
60. PW5 further stated that they issued the complainant with a P3 form which was filled by PW4. PW5 testified that they recorded the witness statements and as they prepared to charge him he kept threatening them and on checking in the cells the appellant
61. had hung himself on the door by his shirt which PW5 cut and he fell down and he did first aid on him. He recovered but still threatened to kill himself.
62. Via a ruling delivered on 05.10.2022, the trial court found that a prima facie case had been established against the appellant thus placing him on his defence.
63. DW1, Jasper Gituma in his sworn defence stated that on the material day earlier in the morning he heard a confrontation between the complainant and his step brother. That it emerged that his father did not want the step brother to stay at home. That he returned in the evening by a boda boda while he was drunk. That the next morning he met their mother who told him that the previous night the complainant had come back home drunk and that he threw stones on the roof of his brother. That they had attacked him and that he was at St Anne's hospital. That the complainant denounced him since he was a child.



64. DW1 testified that he went to work at Limuru and came back in 2019. That on 26th June 2021 his uncle and his father called him that they wanted to sell some land. That on 29th June 2021 he disputed the sale and that is when his uncle threatened him. That thereafter at the market he met the complainant, his uncle and a police officer and he was thereafter arrested and he was taken to Kinoro police post.

Analysis & Determination

65. I have considered the grounds of appeal, the evidence, the submissions and authorities relied upon by the respective parties.

66. This being a first appellate court and as expected, the court has to analyse and evaluate afresh all the evidence adduced before the lower court and thereafter, draw its own conclusions while bearing in mind that the court neither saw nor heard any of the witnesses. [See *Okeno v Republic* [1972] EA 32].

67. Similarly, the Court of Appeal in *Kiilu & Another v Republic* [2005]1 KLR 174, that:

1. An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusions.
2. It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's findings and conclusions; Only then can it decide whether the Magistrate's findings 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.

68. The issues for determination as I can deduce are:

- i. Whether the trial Magistrate erred in law and fact by founding a conviction on the Appellant without considering the initial case that the complainant had withdrawn the matter out of court.
- ii. Whether the prosecution proved their case beyond reasonable doubts
- iii. Whether key witnesses were not called.
- iv. Whether the trial court erred in rejecting the Appellant's defence without giving any cogent reason.
- v. Whether the sentence was excessive.

Whether the trial Magistrate erred in law and fact by founding a conviction on the Appellant without considering the initial case that the complainant had withdrawn the matter out of court.

69. It is not in dispute that the Appellant had assaulted his father before and his father who is the complainant withdraw the charges. That thereafter the Appellant still assaulted his father on 28th November 2018 and caused grievous harm to him. The doctrine of double jeopardy does not arise and the fact that the charges were withdrawn then does not affect his further action of causing grievous harm to the complainant.



Whether the prosecution proved their case beyond reasonable doubts

70. Evidence was led by the 5 prosecution witnesses that the appellant caused grievous harm to the complainant who is his father. The prosecution evidence was firm and consistent in their testimonies. PW1 testified that the Appellant had assaulted him earlier and he withdrew the charges after persuasion from his uncle and further on 28th November, 2018 at 2300 hrs the Appellant attacked the complainant using a panga where he cut him causing severe injuries on his right shoulder joint and the elbow joint and was hospitalized for about 19 days as per the evidence of PW4.
71. PW1 was emphatic that the appellant was in the company of his brother Charles Gikunda when he attacked him. That the accused threw him to the ground and cut him on the right hand. That the Appellant thereafter fled and went into hiding and resurfaced later. The complainant further testified that he heard the appellant's voice and he recognized him and he also saw him since there was moonlight hence putting him at the crime scene.
72. PW 2 testified that at the gate they found the appellant with his brother armed with a panga and he identified them with the light of a torch. Further the evidence of PW4 who was a clinical officer testified that the Appellant had caused severe injuries to the complainant hence causing him severe grievous injuries consistent to the charge. PW4 produced medical documents marked as P.Exb-1 P3 form and Pexb 2 a discharge summary.
73. PW3 also gave evidence that when she arrived home, her father told her the appellant had attacked him and cut him.
74. The Appellant has cited new grounds in his submission that the trial court erred on relying on evidence adduced by witnesses of the same family. I humbly opine that his observation does not shake the credibility of the evidence adduced. It matters not whether they belong in the same family as long as they testified what is credible and truthful. They were competent witnesses.
75. I am convinced that the prosecution has proved its case beyond reasonable doubt.

Whether key witnesses were not called.

76. The Appellant has raised an issue that key witnesses were not called in the matter of which I do not agree with. The prosecution tendered evidence of 5 witnesses whose evidence was corroborated and was consistent while the Appellant testified as a sole witness. Section 143 of the *Evidence Act* provides that no particular number of witnesses are required to prove a fact.
77. I also observe that the Appellant faulted the evidence of PW3 on the basis of hearsay. Do note that PW4 (the clinical officer) narrated some facts in court as they had been narrated to her in my opinion that would amount to hearsay but only to the extent of what transpired on the material day but not on her examination of the complainant.

Whether the trial court erred in rejecting the Appellant's defence without giving any cogent reason.

78. The trial court held:

The accused's contention on defence implying that the case is a frame up because he objected to his father 'the complainant, selling land is neither here nor there. I find the same to be a side show, a mere denial and an afterthought. The accused did not and never raised the issue of the complainant and his accused uncle intending to sell land and or objections thereto



during the prosecution case, and specifically when the complainant and PW2 testified before court.

79. The trial court gave cogent reasonings for rejecting the appellant's defence which in my opinion is well reasoned and the defence is a mere afterthought.
80. The Appellant raised the issue that he was seeking redress on both the conviction and sentence in his submissions.
81. Reviewing the record herein, it is clear that the appellant was charged with the offence of grievous harm contrary to section 234 of the Penal Code which stipulates as: Any person who unlawfully does grievous harm to another is guilty of a felony and is liable to imprisonment for life.
82. The question therefore is, was the sentence harsh or highly excessive. The sentence in question is 15 years.
83. In my considered view, an appropriate sentence depends on the facts and circumstances of each case, and inter alia, the court must consider the gravity of the crime, motive for the crime, nature of the offence, manner of commission of the crime, and other attendant circumstances. (State of M.P. v Bablu Natt {2009}2S.C.C 272 Para 13).
84. See also Alister Anthony Pareira v State of Maharashtra, [2012] 2 S.C.C 648 Para 69 that: -

“Sentencing is an important task in the matters of crime. One of the prime objectives of the criminal law is imposition of an appropriate, adequate, just and proportionate sentence commensurate with the nature and gravity of the crime and the manner in which the crime is done. There is no straightjacket formula for sentencing an accused on proof of crime. What sentence would meet the ends of justice depends on the facts and circumstances of each case and the court must keep the gravity of the crime, motive for the crime, nature of the offence and all other attendant circumstances.”
85. In the case herein, the complainant narrated how the appellant attacked him with a panga and he sustained severe injuries on his right shoulder joint and the elbow joint.
86. From the record, the degree of injury was assessed as grievous harm and the same was evidenced by the medical report particularizing the nature of harm. In response, the appellant did not controvert the said allegations.
87. Owing to the circumstances under which the offence was committed, there was a need for a deterrence sentence for the reason that the appellant's actions were clear indication of intention to kill considering also it was not his first time to assault the complainant.
88. In the case of Musyimi Ndava v Republic [2019] eKLR, the appellant was sentenced for 35 years having been charged and convicted with the offence of causing grievous bodily harm contrary to section 234 of the Penal Code; the Court of Appeal in upholding the sentence stated that: there is nothing on record to show the trial court erred in the exercise of its discretion in meting out the 35-year term of imprisonment. There is also nothing on record to show the learned judge erred in upholding the sentence.
89. Having considered the facts herein, it is outright that the appellant attacked an innocent helpless parent thus causing her unnecessary injuries. In regards to the alleged harsh sentence, the appellant did not contend that the sentence meted out was illegal or unlawful [See Wanjema v Republic [1979] EA 493].



90. The Appellant submitted that since his arrest on 5th July, 2021 he had remained in custody until his conviction and sentence on 23rd November, 2022 and he merely wanted his sentence of imprisonment to run from his date of arrest on 19th June 2019 which should be the case as outlined in section 333 (2) of the Criminal Procedure code, Chapter 75 laws of Kenya.
91. Having noted that the appellant did not prove that the sentence by the trial court was unlawful or illegal, it is my humble finding that the appeal herein lacks merit and the same is hereby dismissed.
92. In compliance with Section 333(2) of the Criminal Procedure Code, the sentence to run from 6/7/2021 the date he was placed in custody.

DATED, SIGNED AND DELIVERED AT MERU THIS 24th DAY OF MAY 2024.

L.W. GITARI

JUDGE

