



**Atieno v Republic (Criminal Appeal E019 of 2023)
[2024] KEHC 8126 (KLR) (28 June 2024) (Judgment)**

Neutral citation: [2024] KEHC 8126 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CRIMINAL APPEAL E019 OF 2023
MS SHARIFF, J
JUNE 28, 2024**

BETWEEN

FREDRICK JUMA ATIENO APPELLANT

AND

REPUBLIC RESPONDENT

(Being an Appeal from the original conviction and sentence in Tamu Senior Principal Magistrate Criminal Case No. 313 of 2022 delivered on 12th April 2023 by Hon. A.K. Mokeross SPM)

JUDGMENT

A. Case Background

1. The Appellant was charged of the offence of causing grievous harm contrary to Section 234 of the *Penal Code*. The particulars of the offence were that on 30th November 2022 at Achengo Village, Tamu location in Muhoroni North Sub County within Kisumu County the appellant unlawfully caused grievous harm to Benard Okoyo Amala by cutting off his left hand above the wrist.

B. Evidence

2. The appellant pleaded not guilty to the charge and thereafter the case proceeded for hearing. The respondent called 8 witnesses while the appellant did not call any witness but gave sworn testimony.
3. The survivor, PW1 testified that on the material day, 30/11/2022 at around 7:00- 8:00 p.m he had been in his house with his daughter who had been drawing a portrait of him when he had noises emanating from outside his house and when he got out to investigate he found the appellant holding a 2litre bottle of *chang'aa* while insulting and demanding with menaces that the victim's mother do provide him with a cup to enable him imbibe the illicit brew. This witness stated that he then managed to take away the bottle of *chang'aa* from the appellant, poured the contents on the ground, reprimanded the appellant and escorted him out of their compound and left him outside the gate. PW1 further testified



that whilst he was busy taking his supper in the company of his child, the appellant barged into his house and started to chop him up with a machete and the appellant inflicted injuries on his head and eventually when he targeted his neck, PW1 used his left hand to block the strike whereat his hand was severed. The appellant then escaped whilst still carrying the machete. Pw1 was then taken to Awasi Catholic hospital whereat he was referred to Jaramogi Oginga Odinga Teaching and Referral Hospital (JOOTRH). PW1 stated that his house was at the material time well lit by an electric bulb and that the appellant was his neighbour wherefore he recognized him. This evidence was not dislodged by the appellant upon cross examination.

4. PW2, Dismas Omang Amala testimony was that on the material night he was in his house when he had some noise emanating from his brother's (PW1) house wherefore he went out to go and establish the cause of the noise and he then saw the appellant emerging from PW1's house and started fleeing while carrying a panga and they bypassed each other. This witness stated that he had a torch and he directed it's light to the appellant and started to pursue the appellant who continued running but after a short distance the latter threw the panga to this witness and then ran into a sugarcane plantation belonging to a neighbour, one Vitalis Odongo. This witness then retrieved the machete and then went to his brother's house but found that he had already been taken to hospital and he then went to console his mother. The next day he took the panga to Achego. This witness remained consistent upon cross examination.
5. PW3 Mercy Okoyo a minor daughter of the deceased then aged 7 was subjected to voire dire examination whereafter she gave unsworn testimony. She stated that on the material night the appellant her father PW1 and herself were seated in their living room when the appellant, who is their neighbour forcefully entered the house inflicted cuts on the back and hands of her father using a panga and then ran off. On cross examination this witness maintained that PW1 had earlier on told the appellant to stop making noise in their compound and that the appellant returned later on while PW1 was taking his supper and he attacked PW1, who did not strike back the appellant at all.
6. PW4 Sarah Atieno Ouko the wife of the survivor was in her house when she heard Fredrick making some noise and demanding for a glass from her mother-in-law and PW1 then went out to quieten the appellant. Later on while she was in the kitchen, which is a separate structure from the main house, she heard a bang on the door of the main house and when she rushed to that house she encountered Fredrick fleeing from the house while carrying a panga. Upon making entry into her house she found her husband laying down and he had cut wounds on the left hand at the elbow, wrist and the back. On cross examination this witness revealed that her husband's left hand was traumatically amputated and was hanging by the skin and the left hand was completely severed from the rest of the body from the elbow region, at JOOTRH.
7. PW5 a neighbour of PW1 was among the first people to respond to the screams that emanated from PW1's house. He went out and found the victim laying down in a pool of blood. He organized for transport and escorted the PW1 to hospital. He heard people saying that the appellant was the assailant and that he had fled into a sugarcane plantation. He later realized that the survivor's left hand had been amputated when he saw him after he had been discharged from hospital.
8. PW6 one Charles Oriedi Guya, a neighbour of both the appellant and the survivor stated that he was taking a bathe at around 7.30 p.m when he heard some noise emanating from Bernard's house and that at 8-8.30 p.m he yet again heard screams from Bernard's house and upon responding thereto he saw the appellant escaping from Bernard's house while carrying a panga. It was the testimony of this witness that upon gaining entry into Bernard's house, he saw that he had cuts on his shoulder, back and hand which was hanging loosely close to the wrist. This witness then called another neighbour and they then arranged for a vehicle that took the survivor to hospital. He maintained that Bernard's



house as well as his mother's house were well lit by electric bulbs hence visibility was clear. On cross examination PW6 stated that he had seen the appellant exiting Bernard's house as he fled towards the house of Bernard's mother.

9. PW7 Corporal Peter Chacha, the Investigating Officer, told the court that a report of assault was made at the station by the complainant's wife one Sarah. He then commenced investigation by visiting the victim in hospital and he thereafter went to the scene whereat he found that the appellant had been attacked by members of the public. He recovered a blood soiled machete, which he produced as P Exhibit 5 and took photographs using his cellular handset which later got lost. PW7 then requested the appellant's brother to take him to hospital but the brother was reluctant due to the fact that the appellant had previously cut him up and thus causing him to move away from their home. This witness later arrested the appellant who was then charged.
10. PW8 one Tilel Ouma, a clinical officer from JOOTRH filed in the P3 form of the survivor which he produced as P Exhibit No 4 and noted the following injuries; Cut wound lower back with 6 stitches measuring 15centimeters long Healing cut wound left deltoid 22cm long secured with suture Healing cut wound on left elbow 12 cm long, secured with suture Missing left hand from the wrist joint (amputation from above the wrist joint) stump secured.
11. PW8 opined that the injuries suffered by the survivor were inflicted by a sharp object. He categorized the degree of injury as grievous harm. He also produced the discharge summary prepared by Dr Eugen whom he had worked with and was familiar with his handwriting, as P Exhibit 2. Per the said discharge summary, the survivor had undergone traumatic amputation of left hand, stump fashioning, surgical toileting and bleeding control.
12. Upon being put on his defence the appellant gave sworn testimony to the effect that on the material night he was alone in his home when he was attack by people who cut him up and left him for the dead. That he regained consciousness at midnight and noticed that he had multiple injuries on his head and hand. He stated that he could not recall how he sustained the injuries and that the next day he heard people saying that he had injured Ben. A police officer went to his house and took photographs of him. He then went to hospital for treatment at Nyayo and was then referred to Kisumu District Hospital whereat he was treated. He had been accompanied by his brother and sister.
13. The appellant testified that after getting treatment, he returned to his house only to find that it had been broken into and his electronics stolen. He then went to make a report at Achengo Police station and whilst at the said police station, police officers from Chemelil arrived in a land cruiser vehicle and arrested him. He was later charged with attempted murder but the charge was later amended to grievous harm. The appellant denied the offence and maintained that he was the one who had been attacked. Further that his sister had his O.B.
14. At the conclusion of the trial the court found the appellant guilty of the offence that he faced and sentenced him to life imprisonment.

C. Appeal

15. The Appellant was aggrieved by both the conviction and sentence and thus filed this appeal which he premised on the following grounds:
 - i. The trial magistrate erred in law and fact by failing to warn himself against the danger of convicting and sentencing him to life imprisonment on uncorroborated evidence of the complainant.
 - ii. That the prosecution case was not proved beyond reasonable doubt.



- iii. That his arrest was both improper and an afterthought.
 - iv. That his treatment exhibits were not considered during conviction and sentencing.
 - v. That the prosecution evidence was admitted on face value.
 - vi. That He was not accorded fair trial contrary to Article 50 (2) of the Constitution.
 - vii. That the sentence of life imprisonment is unconstitutional and lacks the element of Article 25 and 28 of the Constitution in mandatory nature.
16. On 13.6.2023 the appellant filed supplementary grounds of appeal without leave of court. The same are thus hereby struck out for want of compliance with the provisions of section 350 (2) (iv) of the Criminal Procedure Code Cap 75 Laws of Kenya which provide that :
- “(iv) save as provided in paragraph (i), a petition of appeal may only be amended with the leave of the High Court and on such terms and conditions, whether as to costs or otherwise, as the High Court may see fit to impose;
17. The Respondent has resisted this appeal and supports both the conviction and sentence.

D. Submissions

D i) Appellant’s submissions

- 18. The Appellant submits that the charge sheet was amended on numerous occasions thus rendering it defective.
- 19. The Appellant posits that the first doctor who attended to the complainant chopped his hand and that this doctor was never availed thus occasioning injustice and unfair trial to the Appellant. Further that he was not supplied with the investigation diary and exhibit memo.
- 20. The Appellant posits that given that the offence is said to have been committed at night there was no enough light to enable positive identification of the perpetrator. He also submits that the panga recovered from him was not taken for DNA profiling.
- 21. The Appellant submits that he has an O.B report, treatment notes, x-ray reports and P3 form to prove that the survivor and his family had attacked him.
- 22. It is submitted by the Appellant that following the decision in *Bukenya -vs- Uganda* (1972) EA 549, the failure by the Respondent to call the doctor who treated the survivor first, should attract an adverse inference against the Respondent’s case in favour of the Appellant.
- 23. The Appellant submits that the sentence meted upon him was unconstitutional due to its mandatory nature as it prevents the trial court from exercising its judicial discretion. Further that the trial court failed to consider his pre trial term contrary to the provisions of Section 333 (2) of the Criminal Procedure Code.
- 24. It is the Appellant’s position that the pre-sentencing report was biased and one sided as his relatives were never interviewed.

D ii) Respondent’s Submissions:

- 25. The Respondent submits that the P3 form produced by PW8 as P. exhibit 4 indicated that the survivor had multiple injuries including a missing left hand, due to traumatic amputation above the wrist,



which injuries disfigured the survivor permanently and were categorized as maim and grievous harm. Reliance is placed on the case of *Rex -vs- Donovan* (1934) 2KB 498, where Swift J. delivered the judgment of the Court of Appeal thus:-

“For this purpose, we think that ‘bodily harm’ has its ordinary meaning and includes any hurt or injury calculated to interfere with the health or comfort of the complainant. Such hurt or injury need not be permanent but must no doubt be more than merely transient and trifling....”.

(Also see *Archbold’s Criminal Pleadings, Evidence and Drafting* 32nd Edition page 95).

26. The Respondent submits that identification of the Appellant was by way of recognition and it invites this court to be guided by the case of *Musau Mwanzia vs Republic* (2008) eKLR where the court held that:

“..... we do agree that for evidence of recognition to be relied upon, the witness claiming to recognize a suspect must establish circumstances that would prove that the suspect is not a stranger to him and thus to put a difference between recognition and identification of a stranger. He must show for example that the suspect has been known to him for some time, is a relative, a friend or somebody within the same vicinity as himself and so he had been in contact with the suspect before the incident in question....”

27. The Respondent maintains that the Appellant was well known to PW1, PW2, PW3, PW4 and PW6 as he was their neighbour. PW1 also recalls that he had prior to the attack escorted the Appellant outside their compound when he had found him verbally attacking the survivor’s mother. PW3 was present during the attack and she recognized the appellant.

28. It is submitted by the Respondent that per the provisions of Section 143 of the *Evidence Act*, it needed not call a superfluity of witnesses (See *Keter-vs-R* (2007) EA 135).

29. The Respondent supports the sentence as being commensurate to the gravity of the offence. Reliance was placed on the case of *Musyimi Ndava -vs- R* (2019) eKLR.

E. Analysis and Determination:

30. I am duty bound as a first appellate court to re-evaluate, analyze and scrutinize the evidence afresh and make my own conclusions while taking into account the fact that I did not have the benefit enjoyed by the trial court of seeing and hearing witnesses first hand. I cannot therefore make any assessment of their demeanor. (See *Okeno vs Republic* (1972) EA 32).

31. I have perused the charge sheet and I have noted that contrary to the Appellant’s submissions the date of the offence is clearly stated to be 30th November 2022 and the particulars of the offence are expressly stated therein. Furthermore an amendment of a charge sheet does not render it defective. The charge sheet was amended once and not on numerous occasions as submitted by the appellant. The challenge on the charge sheet as being defective must fail.

32. PW8 Tilel Ouma produced the medical evidence on his own behalf and on behalf of Dr. Lugene. The Appellant duly cross-examined him. This witness was acquainted to Dr. Eugene and was familiar with his handwriting wherefore his production of the discharge summary P. exhibit 2 was proper and



regular. In any event I do agree with the Respondent that under the provision of Section 143 of the Evidence Act, it needed not overwhelm the trial court with witnesses. That Section provides thus:

“...143. No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact...”

33. Whereas the appellant submits that he was never supplied with the investigation diary and exhibit memo I do note that he neither requested for the same nor did he raise that issue during cross examination. Furthermore he did not challenge the evidence of PW7 the Investigating Officer on the recovery of the panga.

34. The Appellant herein attacked the survivor inside the latter house which was well lit with an electric bulb. The survivor was in the company of his daughter PW3. PW2, PW4 and PW6 encountered the Appellant whilst he was taking flight and they all recognized him. I am thus persuaded that the Appellant was positively identified through recognition.

35. The evidence of PW1, PW2, PW3, PW4 and PW6 was corroborated by the medical evidence of PW8 produced and P. exhibit No. 2 (discharge summary and P. exhibit No. 4 (P3 form). The nature of injuries are expressly described in paragraph 10 hereinabove. I do find that indeed the appellant caused the survivor grievous harm as defined under Section 4 of the Penal Code which provides thus:

“Grievous harm” means 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 or internal organ, membrane or sense”.

36. Turning to the appellant’s defence I do note that save for maintaining his innocence and stating that he had been attacked by unknown people, the same does not shake the respondent’s case. The appellant’s allegation that he was attacked by some people, when he did not bother to identify, does not water down the fact that he occasioned the survivor grievous harm. The Appellant was at liberty to pursue his own complaint as lodged at Achege Police Station. Given that there is no limitation to criminal liability, the appellant still can follow up on his complaint. His complaint does not detract from the overwhelming evidence adduced by the Respondent’s witnesses.

37. On the issue of sentencing, I do find that the sentence meted was the statutory prescribed sentence which was made after consideration of an unfavourable pre-sentence report, the Appellant’s mitigation, the aggravating circumstances under which the offence was committed, and the prevalence of the offence in the appellant’s community. I however agree with the Appellant that the 4 months pre-trial term that he spent in custody was not factored in during sentencing.

38. On the balance this appeal on conviction is disallowed for want of merit. I will however allow the appeal on sentence and I will set aside the life sentence and substitute the same with a definite custodial term of 35 years. This reduced sentence has, pursuant to the provisions of 333 (2) of the Criminal Procedure Code duly taken into account the 4 months pre-trial term served by the appellant.

39. It is so ordered.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 28TH DAY OF JUNE, 2024.

MWANAISHA S. SHARIFF

JUDGE

