Ombeva v Republic (Criminal Appeal 30 of 2019)
[2022] KEHC 10406 (KLR) (13 May 2022) (Judgment)

Neutral citation: [2022] KEHC 10406 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KAKAMEGA

CRIMINAL APPEAL 30 OF 2019

WM MUSYOKA, J

MAY 13, 2022

BETWEEN

GEOFFREY AMWAI OMBEVA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal from judgment and decree of Hon. WK Cheruiyot, Senior Resident Magistrate, in Vihiga PMCCRC No. 314 of 2016, of 6th March 2019)

JUDGMENT

1. The appellant had been charged, before the primary court, of the offence of maim, contrary to section 234 of the Penal Code, Cap 63, Laws of Kenya. The particulars were, that on 21st May 2016, in Chepkoya Sub-Location, within Vihiga County, he unlawfully maimed FOA.

2. He pleaded not guilty to the charge, and a trial was conducted. Eight prosecution witnesses testified. The complainant, PW1, FOA, a Form One, student at [Particulars Withheld] Secondary School, testified that, on 21st May 2016, at 2.00 PM, he was at Tigoi market, standing outside an eatery belonging to the appellant, when the appellant came to where he was and told him that he did not want idlers there. PW1 informed him that he was not an idler, whereupon the appellant slapped him, and hit him with a piece of firewood at the back of his head twice. PW1 went home and reported the matter to his father, PW2. Soon thereafter he lost consciousness, which he regained at the Jaramogi Oginga Odinga Teaching and Referral Hospital, where he had been admitted. The matter was reported at the Tigoi AP Camp and Vihiga Police Station. He denied suffering an injury at home which could have led to his loss of consciousness. He also stated that he did not stone the appellant. PW2, James Agwano, testified that PW1 came home on 21st May 2016, at 2.15 PM, and reported to him that he had been assaulted by the appellant. Shortly thereafter he fainted. He rushed him to Tigoi Health Centre, on a hired motorcycle. He was vomiting blood. They were referred to Mbale Hospital, and afterwards

to Jaramogi Oginga Odinga Teaching and Referral Hospital. He was admitted, and blood clots were removed from his brain. He made a report of the incident to the police. He said that he had not grudge with the appellant.

3. PW3, Clifford Oilo, was working for the appellant, on 21st May 2016, splitting firewood. At about 2.00 PM, the PW1 sat outside the eatery belonging to the appellant, and the appellant came out and told him that he did not want idlers at his shop. He held PW1 by the shirt, slapped him, took a stick, being a piece of the firewood he was splitting, and hit him with it on the head. After he was released by the appellant, PW1 went away. He stated that he was nearby when the appellant assaulted PW1. He stated that the appellant was alleging that PW1 had stolen his computer. He said he was the one who picked out the stick that was used and gave it to the police, after he suspected that it may be required as evidence. PW4, Ruth Bwamula, testified that she passed by the business premises of the appellant on 21st May 2016 at 2.00 PM, when she found him beating PW1 with a stick. When she enquired, the appellant told her that boys used to come to his shop to steal, and she advised the appellant to report PW1 to his father. She said that she saw him hit PW1 with a stick on the head. She said that she also saw another boy splitting wood.

4. PW5, Sammy Chelule, was the clinical officer who presented the P3 Form and treatment notes in respect of PW1 in court. He stated that PW1 was attended at the health centre ten minutes after he sustained the injury. He said that he was brought unconscious. He had a cut wound near his right ear. An operation was done on his brain, to ease pressure on his brain. He was in hospital for eight weeks, and his injury was classified as maim, because of its effect to the brain, the fact that it caused unconsciousness. He opined that the swelling on the head was dangerous, explaining that the loss of consciousness was indicative of an injury to the brain. PW6, No. 2006054934, APC Emmanuel Wangaro, was the arresting officer. He received a report of the assault on 21st November 2016, from PW2. He, and his colleagues, went to Tigoi shopping centre, and arrested the appellant. They went with him to the Tigoi Health Centre, where PW1 was lying unconscious. PW1 was taken to hospital, while the appellant was escorted to Vihiga Police Station. PW7, No. 62215 Corporal Edwin Nyongesa, was the investigating officer. He received the appellant after he had been arrested by PW6, and re-arrested him. He visited PW1 in hospital, and also visited the scene. He issued PW1 with the P3 form and charged the appellant in court. PW8, Dr. Joyce Omari, worked at Jaramogi Oginga Odinga Teaching and Referral Hospital. She produced a discharge summary in respect of PW1. She said that PW1 had a severe head injury. A head CT-scan was done, which revealed acute epidural hematoma right sided with pressure effects. The hematoma was drained, to ease the pressure. She said that there was marked pressure affecting the brain caused by blood clot.

5. The appellant was put on his defence. He made an unsworn statement. He stated that on the material day he was at his food kiosk, when he was told that one of the youths, who usually sat on a bench outside his kiosk, had fallen down. When he checked he saw a person lying down, and when he enquired, he was told that he had fainted. They took him away. The police later came and arrested him, saying that he had assaulted the young man.

6. In its judgment, the trial court framed three issues: whether PW1 was injured, who inflicted his injuries, and whether the appellant was culpable. The court found that PW1 suffered maim, the injury was inflicted by the appellant, and that the appellant was culpable. The trial court found the appellant guilty as charged, and convicted him. He was subsequently, sentenced to serve ten years in jail.

7. The appellant was aggrieved, and brought the instant appeal, founded on several grounds. He states that the respondent did not prove the case beyond reasonable doubt, the evidence and exhibits were not analyzed, and the court erred in finding the appellant was guilty of the offence charged. The Advocates for the appellant subsequently amended the petition of appeal filed by the appellant in person. The

new grounds are that the conviction was against the weight of the evidence, burden of proof was shifted to the appellant, Article 50 of *the Constitution* was violated as the appellant was denied legal representation, Article 49 of *the Constitution* was violated for the appellant was held in custody for a long time before arraignment, the medical evidence relied on was presented by incompetent witnesses or was inadmissible, the trial court was biased, the sentence was harsh , and the trial court did not address the correct principles of law.

8. Directions were taken on 23rd July 2020, for the disposal of the appeal by way of written submissions. The appellant has filed his written submissions. He has submitted around evidence on record being insufficient to found a conviction, burden of proof being shifted to him, his being denied legal representation, pre-arraignment detention, admission of inadmissible evidence, the trial court being biased against him, the sentence being harsh, and the court misapprehending the correct principles of the law and occasioning injustice. The written submissions are aligned to the grounds of appeal set out in the amended petition of appeal. I will deal with the grounds one by one.

9. On the evidence on record being insufficient to found a conviction, the appellant points at the testimonies of PW1 and PW4, relating to the exact spot on the head of PW1 that was allegedly hit. He also points at the testimony of PW3, who had said he saw PW1 bleeding, but none of the other witnesses talked about bleeding. He points at the testimony of PW5, the clinical officer who referred to a cut on the right ear, which none of the other witnesses noted. He has also raised issue with the timings, especially in the testimony of PW5, that he attended to PW1 ten minutes after the incident. He also points at the testimony of PW2, that PW1 was vomiting blood, which no other witness talked about. There is also reference to the testimony of PW8, and it is submitted that she was not the doctor who treated PW1, and, therefore, the court relied on secondary medical evidence. There are two general issues with regard to the first ground; inconsistencies and contradictions, and the medical evidence presented.

10. On the inconsistencies and contradictions, I note that they are minor. The bottom-line is that PW1 sustained a head injury, which had an effect on his brain, causing loss of consciousness. The most critical evidence is the technical one from PW5 and PW8. What the lay witnesses observed of the injuries was not trained, but it is critical that they all talked of injuries to the head. In the chaos at and following the incident, the said witnesses had no time to make detailed note of the nature of injuries. In my view, the appellant has not demonstrated that the inconsistencies and contradictions that he has pointed at go to the core of the matter. He has cited no case law nor statutory provisions to support his contentions.

11. The Criminal Procedure Code, Cap 75, Laws of Kenya, has not dealt directly with the question of inconsistencies and contradictions, but the courts have interpreted section 382 thereof, on revision, to say that whether discrepancies are to affect the decision will depend on whether they are so fundamental as to cause prejudice to the appellant or they are so inconsequential to have no effect to the conviction and sentence. In *Joseph Maina Mwangi vs. Republic* [2000] eKLR (Tunoi, Lakha & Bosire JJA), it was said:

> "In any trial there are bound to be discrepancies. An appellate court in considering those discrepancies must be guided by the working of Section 382 of the Criminal Procedure Code, viz whether such discrepancies are so fundamental as to cause prejudice to the Appellant or they are inconsequential to the conviction and sentence."

12. Similar sentiments were expressed in *Twehangane Alfred vs. Uganda* [2003] UGCA, 6, (Mukasa-Kikonyogo DCJ.

Engwau and Byamugisha JJA) where it was said:

> "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."

13. And in *Dickson Elia Nsamba Shapwata & Another vs. The Republic*, Cr. App. No. 92 of 2007(unreported), the Court of Appeal of Tanzania addressed the issue of discrepancies in evidence and concluded as follows:

> "In evaluating discrepancies, contradictions and omissions, it is undesirable for a court to pick out sentences and consider them in isolation from the rest of the statements. The Court has to decide whether inconsistencies and contradictions are minor, or whether they go to the root of the matter."

14. It was said in *John Cancio De SA vs. VN Amin* [1934] 1 EACA 13 (Abrahams CJ & Ag P, Sir Joseph Sheridan CJ and Lucie-Smith Ag CJ):

> "Probably every judge has had occasion at some time or other to regard discrepancies as showing veracity, and to regard uniformity as showing fabrication, but it depends upon the nature of the discrepancies and the uniformity. If two people allege that they made a journey together from Kampala to Nairobi and they differ on such details as the time the train stopped at Eldoret, what they had for lunch and dinner, and whether it rained on the journey and where, it would be more reasonable to argue a difference in memory than that the journey was never undertaken. But if one says they made the whole of the journey by rail, and the other says they went to Entebbe by car and thence by air to Nairobi, it would be more reasonable to argue that the journey never took place than that one or both suffered from a defective memory."

15. And in *Philip Nzaka Watu vs. Republic* [2016] eKLR (Makhandia, Ouko & M'Inoti JJA) , it was said that:

> "The first question in this appeal is whether the prosecution case was riddled with contradictions and inconsistencies of the magnitude that would make the conviction of the appellant unsafe. It cannot be gainsaid that to found a conviction in a criminal case, where the trial court has to be satisfied of the accused person's guilt beyond reasonable doubt, the prosecution evidence must be cogent, credible and trustworthy. Evidence that is obviously self-contradictory in material particulars or which is a mere amalgam of inconsistent versions of the same event, differing fundamentally from one purported eyewitness to another, cannot give the assurance that a court needs to be satisfied beyond reasonable doubt. 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 recognised 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."

16. On the medical evidence presented, the appellant argues that PW8 was not the doctor who treated PW1, and, therefore, the court relied on secondary evidence, to the extent that she produced medical records that she did not herself make. It is true that PW8 did not treat PW1. She was called to produce a discharge summary, prepared by another doctor, who she claimed she had worked with, and was familiar with his handwriting and signature. The appellant did not, however, cite any statute or case law to support his contention.

17. The law on production of medical and other technical evidence is section 77 of the *Evidence Act*, Cap 80, Laws of Kenya, which provides as follows:

> "Reports by Government analysts and geologists
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> (1) In criminal proceedings any document purporting to be a report under the hand of a Government analyst, medical practitioner or of any ballistics expert, document examiner or geologist upon any person, matter or thing submitted to him for examination or analysis may be used in evidence.
>
> (2) The court may presume that the signature to any such document is genuine and that the person signing it held the office and qualifications which he professed to hold at the time when he signed it.
>
> (3) When any report is so used the court may, if it thinks fit, summon the analyst, ballistics expert, document examiner, medical practitioner, or geologist, as the case may be, and examine him as to the subject matter thereof."

18. Section 33(b) of the *Evidence Act* is also relevant. It states:

> "Statement by deceased person, etc., when Statements, written or oral or electronically recorded, of admissible facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence or whose attendance cannot be procured, or whose attendance cannot be procured, without an amount of delay or expense which in the circumstances of the case appears to the court unreasonable, are themselves admissible in the following cases—
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> (a) ...
>
> (b) made in the course of business when the statement was made by such person in the ordinary course of business, and in particular when it consists of an entry or memorandum made by him in books or records kept in the ordinary course of business or in the discharge of professional duty; or of an acknowledgement written or signed by him of the receipt of money, goods, securities or property of any kind; or of a document used in commerce, written or signed by him, or of the date of a letter or other document usually dated, written or signed by him;
>
> (c) ...
>
> (d) ...
>
> (e) ...

(f) ...

(g) ...

(h) ..."

19. What these two provisions deal with are situations where documents are to be produced in court by a person other than their maker. The starting point is that a technical document, such a medical report, need not be produced in court by the maker. The principle, of course, is that that would be proper person to produce such documents, so that he can own it and bespeak its contents. He would be the most qualified person to present. However, situations do arise where the maker of the document would be unavailable, for one reason or other, to produce the document and to be subjected to cross-examination over it. His unavailability should not spell doom for the prosecution or the party relying on the document, for the law, at section 33 of the *Evidence Act*, allows for production of the document by another person. Under section 77 of the *Evidence Act*, the court may presume that the signature on the document is genuine, and that the person signing it held the office and the qualifications which he professed to hold at the time he signed it. There is no requirement that the witness who produces the document on behalf of another, under section 77 of the *Evidence Act*, should be conversant with the handwriting and signature of the maker. Familiarity with the handwriting and signature of the maker of the document, by the witnesses who produce official reports on behalf of others, is, of course, a good practice, which guarantees authenticity or genuineness of the document or report, but it is not a requirement of the law, by dint of the presumption, stated in section 77 of the *Evidence Act*, as to genuineness of the signature on the document and the qualifications of the person signing it. See *Republic vs. Teresia Wairimu Thuo* [2019] eKLR (Mureithi J).

20. I may need to say something about the contents or substance of the report or document sought to be produced. It may be necessary to call a person, who is sufficiently qualified with knowledge or expertise in the same field as the maker, to interpret the contents of the report or document, and respond to any questions that may be posed at cross-examination. The court can admit a document to evidence without requiring the maker or other expert to produce it, and it would only be necessary to insist on the maker of the document or any other expert in that field, being called, where the findings are seriously contested, and expert interpretation or construction is necessary, and it would be in that respect that the discretion given to the court, through section 77(3) of the *Evidence Act*, may be exercised.

21. The issue was framed by the appellant as affecting his rights, in the sense that he was convicted based on evidence that was not properly presented. It should be stated that expert reports are essentially opinion evidence, and their contents are not binding on the court, for the ultimate decision on the facts, as established, is made by the court, based on the evidence available, including the expert evidence. The right of an accused person to a fair trial, with regard to production of expert evidence, is secured under Article 50(2) (k) of *the Constitution*, which states the right to adduce and challenge evidence. Under that provision, the accused person is entitled to cross-examine expert witnesses, whether makers of the documents in question or not, on the contents of the said documents, and the court would then form its opinion on the credibility of the report and the credibility off the expert, based on, among others, that challenge of the evidence or cross-examination of the witness. See *R. vs. Hussen* (1990) KLR 407 (Abdullah J). During cross-examination, the defence is entitled to object to production of documents on various grounds, or to production of documents by certain persons, particularly where there is a contest on the contents or substance of the report or document. Secondly, the court is expected to examine and weigh the entirety of the evidence presented before it, and not just the expert evidence, before determining whether or not a case has been established beyond reasonable doubt. In any case,

the failure to call the maker of the report or another expert, to bespeak its contents or to be questioned on them, does not render the production of the report irregular or the evidence inadmissible. The effect would be that such evidence is rendered inconclusive and requiring closer examination. See *R. vs. Hussen* (1990) KLR 407 (Abdullah J).

22. I will conclude by citing *Ogeto vs. R* (2004) 2 KLR 14 (Omolo, Githinji & Onyango Otieno, JJA), where it was said on the matter:

> " The postmortem on the body of the deceased was done by Dr. Ondingo Steven. The postmortem report was produced as exhibit at the trial by corporal Ambani under section 77 of the *Evidence Act*. One of the grounds of appeal is that the trial Court erred in receiving the postmortem report which was inadmissible. Mr. Gichaba, learned counsel for appellant, submitted before us that postmortem report does not have probative value as it is hearsay evidence since Dr Ondingo Steven was not called as a witness. Section 77 (1) of the *Evidence Act* allows such document under the hand of a medical practitioner to be used in evidence. By section 77 (2) of the *Evidence Act*, the Court is allowed to presume that the signature to any such document is genuine and the person signing it held the office and qualification which he professes to hold at the time he signed it. The appellant was represented by counsel at the trial who did not object to the Act and the Court did not see it fit to summon Dr Ondingo Steven for examination. Nor did the appellant's counsel ask for the calling of the doctor for cross-examination. In our view the postmortem report was properly admitted as evidence in accordance with the law."

23. Similar sentiments were expressed in *Soki vs. R* (2004) 2 KLR 21 (Omolo, Githinji & Onyango Otieno, JJA), where it was said:

> " Before we allow this appeal, as we must do, we need to comment on the manner PW3 (Exh 1) was produced and the way it was dealt with by the trial Court and the superior Court. Section 77 (1) allows any document purporting to be report under hand of a government analyst, medical practitioner or any ballistics expert, document examiner or geologist upon any person, matter or thing submitted to him for examination or analysis to be used in evidence. The same could be produced by a police officer as was done in this case provided the accused does not object. It is however necessary that in a case such as this where an accused person is not represented by a counsel, that the accused be made aware of the consequences of the P3 or such other documents being produced by the police in the absence of the maker of such a document. The Court should explain to the accused his right to insist on seeking to cross-examine the maker if he so wishes. In this case, the appellant, should have been made aware that he could seek to cross examine the maker of P3 if he so wished. That was not done but we make haste to add that in our view, nothing turns on that omission as in any case the ingredients of the offence of robbery were satisfied even if injuries were not proved."

24. I believe I have said enough to demonstrate that a report by a medical practitioner, in this case a discharge summary, may be produced by a person other than the maker of the document, and if an accused person wishes, and the court finds it fit, the maker may be called for cross-examination. It was not improper nor irregular for PW5 and PW8 to produce documents on the medical treatment of PW1, when they were not the persons who treated him. If the appellant had intended to cross-examine the makers of the documents relied on and produced by PW5 and PW8, he should have applied to have the makers of the documents availed as witnesses. PW5 testified on 31st August 2016, and produced a P3 Form. That is a document to which section 77 of the *Evidence Act* applies. It can

be produced by a person other than its maker. The record reflects that the Advocate for the appellant attended court when PW5. He did not object to the witness referring to the P3 Form, and he did not apply to have the maker of the P3 Form availed for cross-examination on its contents. The P3 Form can even be produced by a police officer or an investigating officer. It need not be produced by a person with medical background. See *Joshua Otieno Oguga vs. Republic Kisimu* CRA No. 183 of 2009. PW8 testified on 24th October 2018. She produced a discharge summary from the Jaramogi Oginga Odinga Teaching and Referral Hospital. A discharge summary is a document that would be subject to section 77 of the *Evidence Act*. It could be produced by a person other than the maker, and the court could presume that the handwriting and signature on it were by a person qualified to make the document. The Advocate for the appellant was not in court when PW8 testified, the record does not have a minute of any objection by the appellant to the production of the document, neither is there any by his Advocate applying to have the maker of that document called to testify thereafter. I note from the record that the matter was adjourned severally, to allow attendance by the Medical Superintendent of Jaramogi Oginga Odinga Teaching and Referral Hospital to produce that document, even an arrest warrant was issued against him. Eventually, and upon a last adjournment, the prosecution presented another person to produce the document on his behalf.

25. There is also the bit on the first ground, that the prosecution had presented a case, which showed that the incident happened within the premises of the appellant, and PW1 prompted it. It is submitted that the appellant had complained that PW1, and other youths, had been stealing his wares, and upon the appellant confronting PW1 and asking him to leave, PW1 was rude. He refused to move, retorting that the appellant did not own the land where PW1 was standing. It is not clear to me what the appellant is seeking to achieve by this. Probably to show that PW1 authored his own misfortune by provoking him, and that the appellant had a defence, probably of provocation. This submission is not articulated beyond what I have recited. If the appellant was raising the defence of provocation, he has not said so. He has cited no statutory provisions or case law on provocation. In his defence statement, he did not allude to any theft, and to any confrontation with PW1, he did not even mention the name of PW1. All he said was that there were young men sitting on a bench outside his shop, one fainted, he peeped out and saw someone lying down, who was subsequently taken away. He did not offer any defence of provocation. In any case, provocation is not a complete defence that can lead to acquittal, where established. See *Republic vs. Chivatsi and another* [1989] KLR (Bosire J). Then again the defence of provocation is only available in murder cases. Where it arises in other cases, it is not considered to be a defence, but part of the extenuating or mitigating circumstances that ought to be taken into account in determining sentence. From the facts, no provocation is demonstrated. The incident happened at a public thoroughfare. At a market place. The appellant had no right to ask a member of the public to leave a public place. If PW1 responded in the manner alluded, he did no wrong, for he was perfectly within his rights to stand his ground, against a person who had no right or justification to limit his right to be where he was.

26. The second general ground submitted on relates to the trial court shifting the burden of proof to the appellant. The appellant points at page 4 of the judgment, where the court concluded that the motive of the attack was that the appellant suspected that PW1 had stolen foodstuffs from his kiosk before, as proof that the court shifted burden of proof to the appellant. PW1 testified that he did not know why the appellant attacked him. PW3 was an eyewitness, he did allude to the appellant accusing PW1 of stealing a computer from him. The appellant himself did not make any such claim, in his unsworn statement in defence. PW4 said that, after she enquired from the appellant as to why he was beating PW1, that boys had been stealing his waves. However, the statement attributed to PW4 did not indicate that PW1 had stolen anything from him, but rather that boys used to come to his shop to steal. To that extent, that statement cannot be used as a basis for concluding that the motive of the assault was

the fact that PW1 had stolen from the appellant previously. That was never said by the appellant, and that conclusion by the trial court was unfortunate. However, the same does not go to the core of the matter, and it does not in any way affect the conviction.

27. The third general ground is on denial of legal representation. The alleged denial is not general, for the appellant was represented by an Advocate right from the date of his arraignment in court on 6th June 2016 to 12th October 2016, which is the last time the defence Advocate attended court. The complaint is with respect to the proceedings that were conducted in the absence of his Advocate, and in particular on 22nd August 2017, when evidence was taken from PW6, in the absence of the Advocate. It is submitted that it was not recorded why the advocate was not in court on 22nd August 2017, and the trial court did not afford the appellant an opportunity to instruct another Advocate.

28. The record reflects that Mr. Musiega, Advocate, acted for the appellant. He placed himself on record on 6th June 2016. He attended court on 27th June 2016, when evidence was recorded from PW1, PW2, PW3 and PW4. He was also in court on 31st August 2016, when PW5 testified. The matter came up for hearing on 12th October 2016, when it was adjourned for lack of witnesses. Mr. Musiega was in attendance. That was the last time he attended court in the matter. When the matter came up on 9th May 2017, he was absent, and the appellant informed the court that he was not available, and asked for another date. The adjournment was allowed, and the matter was fixed for hearing on 20th June 2017. On 20th June 2017, Mr. Musiega was not in court, but the matter was adjourned for other reasons. The next hearing was on 22nd August 2017. Mr. Musiega was not in attendance. The prosecution had one witness, and the appellant is reflected as telling the court that he was ready for the matter. PW6 testified, and the appellant cross-examined him. The next hearing was on 10th October 2017. Mr. Musiega was not in attendance. The prosecution said the investigating officer was available, and the accused informed the court that he was ready, PW7 was placed on the stand, and the appellant cross-examined him. PW8 testified on 24th October 2018. Mr. Musiega did not attend court. The prosecution stated that it had a doctor from Jaramogi Oginga Odinga Teaching and Referral Hospital, and the appellant said he was ready for the matter. She took to the witness stand, testified and was cross-examined by the appellant. Defence hearing was on 21st January 2019, Mr. Musiega was absent, and the appellant gave an unsworn statement.

29. The appellant frames his complaint as a denial of a right. He had exercised the right to legal representation by procuring Mr. Musiega, Advocate, to appear for him. The record reflects that Mr. Musiega attended court on the two occasions when the first five witnesses testified. When he did not attend court at the next hearing, the appellant asked the court to adjourn the matter as his Advocate was absent, that plea was granted and the matter was adjourned. In the sessions that followed, Mr. Musiega did not attend court, and the appellant did not ask for adjournment on account of that absence. Instead, whenever the prosecution indicated that it had a witness, he stated that he was ready to take on the witness. The record does not reflect that he ever asked to be given time to instruct another advocate. If he had the presence of mind, on 9th May 2017, to ask for adjournment on account of absence of his Advocate, I presume that the same should have applied in subsequent appearances, and if he wanted time to instruct another Advocate, nothing prevented him from asking the court to afford him that chance. He never raised it and the court never denied him any such request. He cannot, therefore, claim that there was a denial as there was no request in the first place. The court did not prompt him to appoint Mr. Musiega, and it did not need to prompt him to appoint another advocate to replace him. I do not find any merit in this ground. *Thomas Alugha Ndegwa vs. Republic* [2016] eKLR (Koome, Azangalala & Mohammed JJA) was cited in support. However, Thomas Alugha Ndegwa vs. Republic [2016] eKLR (Koome, Azangalala & Mohammed JJA) is irrelevant, for it turned, not on denial of

legal representation, but, on an application to be assigned an Advocate, to represent an appellant in the appeal, on grounds of his being indigent.

30. The fourth ground relates to pre-arraignment detention, that is the period that the appellant was held in custody before he was presented in court. He relied on Article 49(1)(f)(i)(ii) of *the Constitution*, on the rights of an arrested person, which states that such a person should be presented to court as soon as is reasonably possible, but not later than twenty-four hours. His case was that he was arrested on 21st May 2016 and was presented to court on 6th May 2016, some sixteen or so days thereafter. It is submitted that that detention was unlawful and unconstitutional, and was fatal to the prosecution, the trial, conviction and sentence. He cites *Samuel Chepasa vs. Republic* [2011] eKLR (Azangalala J), where the court ordered that an ongoing trial, of the applicant in that case, be terminated, after it was established that he had been in pre-arraignment detention for over twenty-four hours, the applicant having been arrested on 4th December 2009 and arraigned in court on 6th December 2006.

31. The date of arrest of the appellant, indicated on the charge sheet, in Vihiga PMCCRC No. 314 of 2016, was 21st May 2016, and the date arraignment was 6th May 2016, and that the appellant was presented to court while he was in police custody, and was not out on bail or bond. The court proceedings indicate that he was presented in court on 6th June 2016. PW6, the arresting officer, put the date of arrest as 22nd November 2016, which I believe is either a typing error or an error in the process of transcription. PW7, the investigating officer, said the arrest was effected on 22nd May 2016.

32. The question for me to determine is whether a violation of Article 49(f) (i) (ii) of *the Constitution* is fatal to a prosecution, and should be justification for acquittal of an accused person. The authority placed before me, Samuel Chepasa vs. Republic [2011] eKLR (Azangalala J), was founded on jurisprudence under the old Constitution, and the position stated in that matter was overruled in *Albanus Mwasia Mutua vs. Republic* Criminal Appeal No. 120 of 2004 (UR) (RSC Omolo, EM Githinji & Deverell JJA), which was decided under the regime of the old Constitution. In Albanus Mwasia Mutua vs. Republic Criminal Appeal No. 120 of 2004 (UR) (RSC Omolo, EM Githinji & Deverell JJA), it was stated that the mere fact that a suspect had been held in police custody in excess of the twenty-four-hour rule did not mean that a criminal trial based on it was illegal or was vitiated. In that case, the pre-arraignment custody period was eight months, and the court concluded that that detention was unreasonable, and had made a farce of the criminal trial, by undermining its integrity.

33. Article 49(f) (i) (ii) provides for pre-arraignment detention. The rights stated in that provision relate to those of an arrested person, and not an accused person who is standing trial. Fair trial rights are set out in Article 50 of *the Constitution*. It is violation of the Article 50 rights that ought to have an impact or effect on the trial, but not those under Article 49. A trial does not commence with the arrest of the suspect by the police, but with his arraignment in court. See Kimani vs. Kahara [1983] eKLR (Simpson & Sachdeva JJ). Whatever happens before the arraignment of the suspect has no effect on the trial itself, and any violations or infringements of *the Constitution* by the police or other persons or agencies handling the suspect, before he is presented in court, should have no effect whatsoever to the trial process and its outcome, except perhaps in consideration of sentence. It would not render the trial illegal or improper or unconstitutional. The remedy available for a violation under Article 49(f) (i) (ii) is compensation by way of damages for wrongful arrest and detention or false imprisonment. *See Kuria & 3 Others vs. Attorney General [2002] 2 KLR 69* (Mulwa J) , *Julius Kamau Mbugua vs. Republic* (2010) eKLR (EM Githinji, Waki & Visram JJ), *Salim Kofia Chivui vs. Resident Magistrate Butali Law Courts & another* [2012] eKLR (Majanja J), *Fappyton Mutuku Ngui vs. Republic* [2014] eKLR (Kihara Kariuki (PCA), Maraga & J. Mohammed JJA), *Hussein Khalid and 16 others vs. Attorney General & 2 others* [2019] eKLR (Maraga CJ, Ibrahim, Ojwang, Wanjala & Njoki SCJJ) and *Joseph Kipkembio*

Ariambe vs. Officer Commanding Police Station, (O.C.S) Kisii Police Station & 7 others [2021] eKLR (Ougo J).

34. The fifth ground is with respect to the wrongful admission of the evidence upon which the conviction was based. I am referring to the testimonies of PW5 and PW8. The argument is that they two never treated PW1, they never presented the treatment notes or patient file when they testified, and they presented documents authored by other persons. I had occasion to deal extensively with the testimonies of PW5 and PW8, and held that the evidence they presented was properly admitted, and if the appellant desired to cross-examine the makers of the documents that were presented in evidence, he should have raised his objections to the production of those documents, and sought an order that the makers of the documents be availed so that he could cross-examine them. He did not do so, and cannot be heard at this stage to complain on how those documents were admitted. The only issue that is availabe for determination here is as to whether the two witnesses or either of them should have produced treatment notes and patient files. In criminal cases, the medical document usually produced as proof of injuries sustained is the Police Form 3, popularly known as the P3. It is a summary from the treatment notes or patient files of the nature of injuries sustained, the treatment given, the prognosis and the classification of the injury. Once a P3 form is produced, there would be no need to produce anything else. If the appellant strongly desired to have the other treatment materials produced, then he should have caused a subpoena to issue for production of those medical records, otherwise their production was not mandatory.

35. The sixth ground is with respect to bias against the appellant. The ground is anchored on Article 50(2) (e) of *the Constitution*, with respect to the trial being concluded within reasonable time. It is submitted that the trial lasted two years and nine months. It is argued that the matter was adjourned severally at the behest of the prosecution, and that it was only once that the appellant occasioned an adjournment. It is argued that these adjournments rendered the trial null and void. Section 205 of the Criminal Procedure Code, which provides or adjournments for not more than thirty days, argues that that provision was disregarded, as some of the adjournments lasted 41, 49 and 54 days. Bias suggests that favouratism. It has not been demonstrated that the adjournments were designed to favour the prosecution. Indeed, most of them were intended to allow prosecution time to avail a doctor. I have scrupulously perused through the trial record, and I have not seen any evidence of bias against the appellant or in favour of the prosecution. On section 205 of the Criminal Procedure Code, the timelines set in there are not cast in stone. They are no so strict that failure to comply with them would render the trial null and void. The duration of adjournment depends on, among other things the workload of the court at any given time, and the scheduling of other official activities that the court may be engaged in.

36. The seventh ground is on the sentence being too harsh. It is submitted that the trial court should have considered a lesser sentence, even non-custodial. It is submitted that the court noted that the incident was occasioned by differences between the parties, it occurred within the business premises of the appellant and there was no malice aforethought. The charge that the appellant faced, was convicted of and sentenced in respect of was brought under section 234 of the Penal Code. The penalty for that offence is life imprisonment. The court awarded ten years imprisonment. Section 234 defines grievous harm, which, according to section 2 of the Penal Code, is a harm which amounts to maim or a dangerous harm, or seriously or permanently injures health or which is likely to injure health, etc. In short, it is a dangerous harm, in the sense of being life-threatening. The offence charged in the charge sheet is maim. Maim is not defined in section 234, but the definition of grievous harm in section 2 of the penal Code, includes maim. In sentencing what is considered is the seriousness of the harm or danger caused. Section 234 ids about injury. The injury inflicted on PW1 affected his brain. He lost consciousness. He was in hospital for about twelve days. A head injury which causes loss of consciousness and hospitalization for nearly two weeks would be a serious one.

37. Am told the sentence was excessive. As indicated above, the maximum penalty is life in jail. The appellant got ten years. The injury inflicted was serious, life threatening, and the sentence imposed was not unreasonable. Should the trial court have considered the matters raised by the appellant as extenuating circumstances? The prosecution described him as a first offender. The appellant mitigated that he was employed, had a wife who was in hospital, and children depending on him. The court noted that the appellant was a first offender, the offence was serious, PW1 was a minor, he suffered life threatening injuries, the appellant was an adult who should have known how to settle any differences, and the court had an obligation to protect minors. The appellant did not raise any of the issues, that he is now raising, in his mitigation.

38. Let me now consider those issues. Firstly, he cites that the incident was occasioned by differences between the parties. There were no differences. The appellant did not allude to any in his defence statement. PW1 said there were none. His father, PW2, said he was not aware of any. PW3, the eyewitness did not mention any. PW4 did not mention any either. She only said that the appellant complained that some boys stole stuff from his kiosk, but he did not say PW1 was one of them. There were no differences to be taken into account in assessing sentence. I note that the trial court cited the matter of the thefts to find motive or justification for the conduct of the appellant, but even that conclusion by the court was faulty, to the extent that neither PW1 nor the appellant himself talked of any accusations of theft. Nevertheless, the court had that matter of differences, as misplaced as it was, upmost in its mind, when, in the sentencing ruling, said that the appellant was an adult, who should have known how to settle differences with minors. The issue of differences is, therefore, a non-factor.

39. The second issue is the claim that the incident happened within the premises of the appellant. Again, that is not factual. The appellant described his business as a kiosk, while PW1, PW3 and PW4 described it as a hotel. I believe it was an eatery of sorts. PW1 and PW2 described a scene that happened outside the eatery. They said PW1 was outside the eatery, when the appellant came out and told him to go away since he did not entertain idlers. PW4 described a scene that was outside a shop and the eatery. None of these three witnesses talked of an altercation inside or within the eatery. The appellant himself, did not place PW1 within his kiosk. He said he was sitting outside with other boys, when he fainted. So, there was no incident within the premises of the appellant. PW1 was outside, and the appellant confronted him there, and asked him to leave. The kiosk was at a market place. That made it a place public, and what the appellant was doing was to ask PW1 to leave a public space. I doubt whether he had any power or right to do so. That made him the aggressor. If it had happened within his premises, then he would have had a right to ask PW1 to leave, which was not the case.

40. The third issue is that there was no malice aforethought. I do not know what the appellant means by this submission. This was a case of assault, not murder. Malice aforethought is defined in section 206 of the Penal Code, and defines the mens rea for murder, not assault. There would have been no need for the court to consider malice aforethought as it is of no application in this case.

41. Overall, I am not persuaded that the trial court mishandled the sentencing process. It took into account all what needed to be taken into account in assessing sentence. The offence was serious. It was not justified. The victim was a minor. The seriousness of it militated against consideration of any non-custodial sentence.

42. The last ground is that the trial court got itself into a bind, by getting the terms grievous harm and maim mixed up. I see no mix up. The definition of grievous harm in section 2 of their Penal Code, says that grievous harm includes maim, which is to mean that maim is a form of grievous harm, although maim is more specifically defined as destruction or permanent disabling of any external or internal organs, member or sense. A person can be charged under section 234 of the offence of previous harm or maim,

depending on the particulars of the offence. Of course, section 234 does not refer to maim, but section 2 puts maim and grievous harm together. As maim is a grievous harm that leads to disablement, the charge for maim should be limited to cases where the allegation is that the victim suffered permanent disablement. In this case there was no permanent disablement, but PW1 sustained life-threatening injuries, which still brought the matter under grievous harm, and section 234 of the *Penal Code*. Consequently, it would have been preferable to charge for grievous harm rather than maim. The failure to do so, however, is not fatal, for the two classes of injuries are in the same cluster of grievous harm, and the anomaly is curable under section 179 of the *Criminal Procedure Code*.

43. In the end, I find that there is no merit in the appeal herein, save for what I have stated in paragraph 42 above. I accordingly vary the conviction to be for grievous harm and not maim. I shall confirm the sentence. The appeal is otherwise dismissed.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 13TH DAY OF MAY 2022

W MUSYOKA

JUDGE

Mr. Erick Zalo, Court Assistant.

Mr. Musiega, instructed by ABL Musiega & Company, Advocates for the appellant.

Mr. Mwangi, instructed by the Director of Public Prosecutions, for the respondent.