



**Muturi v Republic (Criminal Appeal E034 of 2024)
[2024] KEHC 10477 (KLR) (27 August 2024) (Judgment)**

Neutral citation: [2024] KEHC 10477 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
CRIMINAL APPEAL E034 OF 2024
LM NJUGUNA, J
AUGUST 27, 2024**

BETWEEN

BONIFACE NJUE MUTURI APPELLANT

AND

REPUBLIC RESPONDENT

(Appeal arising from the decision of Hon. N. Kahara (SRM) in the Magistrate's Court at Siakago Criminal Case No. 701 of 2021 delivered on 11th March 2024)

JUDGMENT

1. The appellant was charged with the offence of malicious damage to property contrary to Section 334(1) as read together with section 339(1)(b) of the Penal Code. The particulars of the charge are that on 20th September 2021 at about 1500HRS in Kienire sub-location Ndurumori location in Mbeere North Sub- County within Embu County, the appellant willfully and unlawfully damaged water pipe valued at Kshs.10,000/= the property of Albino H. Kinyua.
2. He also faced the charge of assault causing actual bodily harm contrary to section 251 of the Penal Code, whose particulars are that on 20th September 2021 at about 1500HRS in Kienire sub-location Ndurumori location, in Mbeere North Sub-county within Embu County, the appellant willfully and unlawfully assaulted Albino Kinyua thereby occasioning him actual bodily harm.
3. The appellant pleaded not guilty to the charges and the matter was heard and determined. He has preferred an appeal against the findings of the trial court on the grounds that:
 - a. The learned trial magistrate erred in law and fact when she convicted the appellant on contradicting evidence;
 - b. The learned trial magistrate erred in law and fact when she failed to consider that there were doubts in the prosecution's case as to who in the crowd assaulted the complainant;



- c. The learned trial magistrate erred in law and fact when she failed to consider the appellant's defense;
 - d. The decision of the learned trial magistrate was against the weight of the evidence on record; and
 - e. The sentence by the learned trial magistrate was excessive considering that charges the appellant was facing.
4. At the trial, PW1 was Albino Kinyua Njeru who stated that on the day of the incident, he heard a crowd singing loudly outside his gate and he went to check. That he started recording and photographing the protests using his phone and when the appellant saw him, he alerted the others and they started pelting him with stones, and he fell. That his wife raised alarm and his brother assisted him since the appellant was still sitting on his head while beating him. He stated that the matter was reported at Ishiara Police Station and he was taken to Ishiara Level 4 Hospital for treatment. That the crowd was protesting against the Genesis Water Project which had supplied water to his home and they destroyed the pipes that supply the water to his home. On cross-examination, he stated that the appellant was the leader of the crowd that assaulted him and destroyed the pipes.
 5. PW2, Liberata Wanjue Kinyua, PW1's wife, stated that she heard a crowd of people sing outside their gate and when she checked, she saw the crowd heading towards the water project that is near her home. That PW1 took his phone and started recording when he heard the appellant shouting "ako na simu anapiga picha". That the appellant emerged from the crowd with a stone and hit PW1 with it on the cheek and PW1 fell on the ground and the appellant sat on PW1's chest. That the appellant continued beating PW1 until Amos Njue Njeru separated them and the matter was reported at Ishiara Police Station before PW1 was taken to Ishiara Level 4 Hospital. On cross-examination, he stated that the crowd assaulted her husband in the process of demonstrating against the water project. That on that day, there were about 10 people working on her farm.
 6. PW3 was Amos Njue Njeru who is PW1's brother. He stated that on the day of the incident, he heard a crowd singing traditional songs and when they reached the home of PW1, they entered and cut the water pipes supplying water to his homestead. That he saw PW1 outside his homestead with a phone recording the protests but the protestors, led by the appellant, attacked PW1 with the appellant hitting him with a stone on his head. That he went and rushed his brother back into the house and then the matter was reported at Ishiara Police Station before he took PW1 to Ishiara Level 4 Hospital. He stated that he saw the appellant attacking PW1 and tearing his shirt. On cross-examination, he stated that he watched the ordeal from his home and he saw the appellant with a stone which he used to hit PW1. That the appellant also subdued PW1 and sat on his chest and continued beating him. That he is the one who pulled the appellant from on top of PW1 as he continued to assault him.
 7. PW4, Maria Wanjiku Mburu is the daughter-in-law of PW1. She stated that she also heard a crowd of protestors singing traditional songs heading towards the home of the PW1 and when she checked, she saw PW2 with PW1 outside their compound. That PW1 was taking photographs of the protestors and they attacked and beat him, being led by the appellant. That PW3 helped PW1 to the hospital. On cross-examination, she stated that the crowd was surrounding PW1 and that the appellant was the first person who got hold of PW1. That the people disconnected water pipes supplying water to the home of PW1.
 8. PW5 was Patrick Ithiga Macharia, a clinical officer at Ishiara Level 4 Hospital who produced a P3 form prepared by Dr. Wambui, his colleague. It showed that PW1 had been treated at the facility following assault. He stated that the complainant suffered swelling on the forehead and a 4cm long cut that was



stitched, swelling on both cheeks and scratch marks on the neck, pain in the right shoulder and left arm, redness in the right eye and lacerations on the knees. The injuries were categorized as harm caused by blunt and sharp objects.

9. PW6 was PC Michael Koror of Siakago Police Station who stated that the incident was reported at Ishiara Police Station. That the complainant reported that the appellant, was among a crowd of demonstrators, who destroyed water pipes supplying water to his home and in the process, they assaulted him. That the appellant was charged with the offences of malicious damage to property and assault. He produced exhibits, being items collected at the scene and they included broken water pipes, as evidence.
10. At the close of the prosecution's case, the appellant was placed on his defense.
11. DW1, the appellant, stated that he was among a group of people who were fixing water pipes near PW1's home when he was attacked and hit on his left hand. That he was treated for the injury at Ishiara Level 4 Hospital and then when he returned the P3 form to the police, he was arrested for assaulting PW1. DW2, Lydia Gachoni stated that she was also among a number of people who had been hired to repair water pipes that had burst and that they were digging trenches to lay pipes. That the appellant was hit by a stone on the left hand and she saw the complainant with stones and they took him to hospital. DW3, Salome Ngugi, stated that she was also among a group of people that had been hired to repair water pipes when PW1 threw a stone and it hit the appellant on the left cheek. That they took him to hospital and reported the incident at the police station but they later heard that the appellant had been arrested.
12. The trial court convicted the appellant of the assault charge and he was sentenced to pay a fine of Kshs.50,000/= in default to serve Three (3) years imprisonment. He acquitted him of the charge of malicious damage to property.
13. This appeal was canvassed by way of written submissions.
14. The appellant submitted with regards to the offence of assault and he stated that he is a first offender hence the sentence passed by the trial court was harsh and excessive in the circumstances. He rehashed his mitigation, stating that he is the sole breadwinner in his family and he has a child with special needs. He urged the court to consider the fact that the assault incident involved a mob and that he fell victim of the circumstances. That the appellant does not dispute the sentence meted out to him but he seeks leniency of the court through this appeal. It was his prayer that the court grants him a non-custodial sentence to enable him to continue taking care of his family.
15. The respondent submitted that the offence of assault was proved beyond reasonable doubt and that the sentence imposed was fair in the circumstances. It relied on the cases of *Chelangat v. Republic* (2021) eKLR, *Johnson Silvano Mkirani v. Republic* (2021) eKLR and the definition of harm according to section 2 of the Penal Code. It relied on the case of *Shadrack Kipkoech Kogo v. Republic Eldoret Criminal Appeal No.253 of 2003* and stated that the trial court had already exercised leniency during sentencing since it did not apply the statutory prescribed sentence.
16. From the grounds of appeal, the issue for determination is whether the trial court erred in its judgment delivered on 11th March 2024.
17. This court is duty-bound to consider the evidence adduced at the trial in order to make a finding. In the case of *Okeno vs. Republic* [1972] EA 32 where the Court of Appeal stated as follows:

“ An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (*Pandya vs. Republic* (1957) EA. (336) and the appellate



court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala Vs. R. (1957) EA. 570). 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 finding and conclusion; it must make its own findings and draw its own 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, see *Peters vs. Sunday Post* [1958] E.A 424."

18. Noting that the appellant was acquitted of the charge of malicious damage to property, this court will focus on the findings of the trial court regarding the charge of assault. Section 251 of the Penal Code provides that:

"Any person who commits an assault occasioning actual bodily harm is guilty of a misdemeanour and is liable to imprisonment for five years."

19. The prosecution has to prove that the appellant: (1) assaulted the complainant, and (2) caused him bodily harm through his actions. In the case of *Rex v. Donovan* CCA 1934, the court stated:

"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."

20. PW1-4 stated that they saw the appellant with a stone which he used to hit the complainant and he fell down. That the appellant went and sat on the complainant's chest and continued to beat him until PW3 removed him and rescued the complainant. PW5 detailed the injuries sustained by the complainant and stated that they were caused by both sharp and blunt objects, classifying the injuries as harm. PW1-4 placed the appellant at the scene of the crime, committing the offence.

21. In his defense, the appellant does not deny being at the scene but instead, he claims that he himself was assaulted by the complainant. DW2 and DW3 stated that the appellant was attacked by the complainant who hit his right hand but DW3 clarified that it was the right cheek, not the hand. The appellant also faulted the trial court for failing to consider his defense. However, from a re-examination of the evidence, I am persuaded that the same is not believable and it does not displace the prosecution's water-tight evidence. In his defence, he stated that he was assaulted by the complainant. Though he stated that he reported the matter to the police, he did not give the Court the O.B number nor did he produce any P3 form as evidence of the injury that he sustained after he was allegedly hit by the complainant. Additionally, appellant raised the issue of contradictory evidence, which, according to the evidence, is not arguable herein. In the case of *Erick Onyango Ondeng' v. Republic* (2014) eKLR, the Court reasoned that:

"The hearing before the trial court invariably entails consideration of often contradictory, inconsistent and hotly contested facts. The primary duty of the trial court is to carefully analyze that contradictory evidence and determine which version of the evidence, on the basis of judicial reason, it prefers."

22. In his submissions, the appellant conceded to the conviction and sentence and urged this court to consider leniency and preferably a non-custodial sentence. From a reading of section 251 of the Penal Code, the offence of assault attracts a sentence of 5 years imprisonment. The sentence passed by the



trial court only gives a 3-years imprisonment term in default of payment of a fine of Kshs.50,000/=. In the circumstances, I do not think that the sentence is excessive.

23. Therefore, the appeal lacks merit and it is hereby dismissed.

24. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 27TH DAY OF AUGUST, 2024.

L. NJUGUNA

JUDGE

..... for the Appellant

..... for the Respondent

