



**Republic v Otieno alias Mama Peace (Criminal Appeal E016 of 2023)
[2024] KEHC 13242 (KLR) (31 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 13242 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT SIAYA
CRIMINAL APPEAL E016 OF 2023
DK KEMEL, J
OCTOBER 31, 2024**

BETWEEN

REPUBLIC APPELLANT

AND

SENTUKA OTIENO ALIAS MAMA PEACE RESPONDENT

JUDGMENT

1. The Respondent herein Sentuka Otieno alias Mama Peace had been charged with an offence of assault contrary to Section 251 of the [Penal Code](#). the particulars were that on 11th day of December 2022 at around 1530 hrs at Ogango B, Village, Rarieda Subcounty within Siaya County unlawfully assaulted Francisca Jura thereby occasioning her actual bodily harm.
2. The Appellant called five witnesses in support of its case and thereafter the Respondent was placed on his defence and that he duly tendered the same and called one witness.
3. The learned trial magistrate vide a judgment dated 13/4/2023 found the Respondent not guilty of the offence and acquitted him under Section 215 of the [Criminal Procedure Code](#).
4. The Appellant was aggrieved by the said judgment and has filed the present appeal wherein it raised the following grounds of appeal:
 - i. That the learned trial magistrate erred in law and fact by finding that the prosecution did not prove its case beyond reasonable doubt.
 - ii. That the learned trial magistrate erred in law and fact by holding that the prosecution did not prove all the ingredients of the charge of assault.
 - iii. That the learned trial magistrate erred in law and fact by holding that the accused person did not intend to injure the complainant when she clearly ought to have known her actions would cause injury.



- iv. That the learned trial magistrate erred in law and fact by holding that the accused could not have overpowered the complainant and PW2 when in fact the accused was the aggressor while PW2 was merely intervening.
- v. That the learned trial magistrate erred in law and fact by finding that the evidence of the eye witness (PW5) was not corroborated yet he was at the scene and was an independent witness.
- vi. That the learned trial magistrate erred in law and fact by finding that the complainant was also assaulted yet she had no injuries and did not report to the police and did not seek treatment.
- vii. That the learned trial magistrate erred in law and fact by holding that although the accused injured the complainant on the head using a stone and that it was not intentional.
- viii. That the learned trial magistrate erred in law and fact by acquitting the Respondent in total disregard of the evidence adduced.

The Appellant thus prayed for setting aside the acquittal of the Respondent.

5. The appeal was canvassed by way of written submissions. Both parties duly filed and exchanged submissions.
6. It was submitted by the Appellant that the ingredients of the offence of assault were duly proved by the appellant since there was actual bodily harm upon the complainant which was duly confirmed by the clinical officer (PW4). It was also submitted that PW1, PW2 and PW5 were at the scene of Crime and saw the Respondent pick a stone and hit PW1 on the head. It was submitted that the Respondent was not defending herself since she was the aggressor. Finally, it was submitted that even though the Respondent had intended to hit PW2 but ended up injuring PW1, there was mens rea as the Respondent had the requisite intention to harm both the complainant and PW2 and that the Respondent ought to have known better that if she threw a stone at another person it would cause injury and hence it does not matter if the stone was aimed at PW2 since the Respondent's action was reckless. It was also submitted that the Respondent's defence claim that she was also assaulted during the incident should be rejected since she did not visit any hospital for treatment or lodge a report to the nearest police station. It was therefore submitted that the appellant proved all the ingredients of assault causing actual bodily harm contrary to section 251 of the [Penal Code](#).
7. It was submitted for the Respondent that the accused did not have the mens rea and she was not part of PW1 and PW2 who were then fighting and that the stone the Respondent threw was actually intended to hit PW2 and thus any injury on PW1 was a collateral damage it was finally submitted that in the act the Respondent was also attacked and injured and that she was acting in self defence. It was finally submitted that the evidence of the eye witness (PW5) did not have a protective value as one could not tell if the stone thrown was in self defence or as an attack.
8. This being the first appellant court, the entry of this court is well spelt out namely to subject the evidence tendered before the trial court to an independent analysis and reach an independent conclusion as to whether or not to uphold the decision of the trial court. This court has also to take into account the fact that it did not hear or see the witnesses testify and therefore must give an allowance for that. See *Okeno v Republic* [1972] EA 32. The evidence tendered before the trial court was as follows:
9. Francisca Akoth Jura (PW1) was the complainant. She testified that on the material date she was relaxing in her house when she was alerted by some noises. That she went out to check and saw the Respondent herein who then approached her and Ishmael Omollo Ogot (PW2) and proceeded to insult PW2 to the effect that he was a useless man who was being sponsored by a woman. That the Respondent grabbed PW2 by the collar of his shirt and that she intervened and beseeched the



Respondent to maintain space. That PW2 managed to free himself from the Respondent's grip and ran away only for the Respondent to pick a stone and attempted to hit it on PW2 to which she blocked it thus getting injured on the head. That the Respondent went ahead and hit her with a stick on her hands. That it was then that Isaac Onyango (PW5) arrived at he scene forcing the Respondent to flee from the scene. That PW5 assisted her to hospital for treatment and that she later lodged a report at Madiany Police post. She identified the treatment notes and P3 form.

On cross examination, she stated inter alia; that the accused is her husband's (PW2) cousin; that she was not privy to the genesis of the scuffle between accused and PW2; that she did not join in the assault or scuffle between her husband and accused; that she did not strangle the Respondent and that she did not see a scuffle between the Respondent and PW2.

10. Ismael Omollo Ogor (PW2) testified on the material date, he was seated next to his shop when he was the Respondent walking towards him and that on reaching where he was, she started assaulting him by claiming that he was a useless man. That the Respondent grabbed him and that they scuffled before PW1 came to intervene and that the managed to free himself. That the Respondent went ahead to throw stones at him some of which hit him on the hand and back. That he saw the Respondent take a stone and hit PW1 and further hit her with a stick; that it was then that a friend (PW5) passed by and that the Respondent fled from the scene upon seeing him (PW5).

That the said PW5 assisted him and PW1 to hospital where PW1 received treatment. He added that the Respondent is a wife to his cousin.

On cross examination, he stated inter alia; the Respondent is wife to his cousin; that the Respondent placed a basket of flour she was carrying on the ground and confronted him; that he did not refer to the Respondent as a witch; that he did not attack the Respondent; that the stone which hit PW1 had been aimed at him; that the Respondent turned her anger on PW1 because she had intervened in the scuffle between me and the Respondent; that he sustained injuries from the stones thrown at him; that he did not retaliate against the Respondent; that the Respondent behaved badly and hence the court case. That there was no attempt at reconciliation by the village elder; that PW5 arrested while the Respondent was hitting PW1 with the stone.

11. No 219113 PC Wilson Kipkorir (PW3) testified that he received the complainant at Madiany police station who lodged a report of assault by a person well known to her. That he recorded her statement and learnt that she had already received treatment. He issued her with a P3 form which was later filled. He noticed visible injury on the forehead with a swelling on the hand.

On cross examination he stated that the did not establish the genesis of the scuffle and that he visited the scene. That he did not obtain the assault weapons namely stone and piece of wood.

12. Timothy Asiyo (PW4) a clinical officer attached at Madiany sub county hospital stated that he examined PW1 the same day of the incident who had complaints of an active bleeding on the forehead having been assaulted by a person well known to her and who claimed that she had been hit with a block of a stone on the forehead.

On cross examination, he noted active bleeding on the wound on her head and that the wound was cleaned and dressed. He produced both the treatment notes and P3 form as exhibits. He stated that the age of injuries was same hours and that the classified the injuries as harm with the assault weapon being a blunt object.

On cross examination, he stated that there were injuries on one limb and on the head which were inflicted by a blunt object. That a blunt object can cause a deep cut.



13. Isaac Onyango (PW5) testified that on the material day he had gone to visit PW2 who is his friend and that on arrival he heard noise and saw the Respondent carrying a stone with both hands and who hit PW1 on the head who fell down and picked a piece of wood and hit her on both hands. That the accused then went away but came. That he intervened and requested the Respondent to allow him and PW2 take PW1 to hospital. He adduced that he used his motor cycle to ferry PW1 to hospital.

On cross examination, he stated that he was not present when the altercation started and does not know the genesis of the same. That he does not know who between PW1 and PW2 the stone was aimed at. He stated that PW2 was standing behind PW1. That PW1 and PW2 lived as wife and husband. That the does not know the relationship between PW1, PW2 and the Respondent.

14. The trial court later established that a prima facie case had been established against the Respondent who was subsequently placed on her defence. The Respondent opted to tender sworn evidence and called one witness.

15. Sentuka Flora Awino (DW1) stated that PW1 is a coo-wife to the wife of her brother in law. That on the material date she had gone to a maize mill and on her return she found PW2 outside his house drinking some soda and who claimed that she was a witch and an adulterous. That she saw PW2 take a stone and then confronted her. That she laced the flour on the ground and that PW1 grabbed her and strangled her while PW2 threw a stone at her which injured her thigh. That she picked up the same stone and threw it and which caught PW1 who started bleeding; that PW1 and PW2 assaulted her with a cooking stick and that she managed to wrest the stick and she got a chance and managed to escape. That she was not the aggressor; that she reported the incident to the village elder; that Pw2 had earlier approached her for a love relationship but that she had declined his advances; that the said PW2 had in the past grazed his cows on her vegetable garden; that PW2 was opposed to the reconciliation as advised by the clan elder.

On cross examination she stated inter alia; that she was attacked and injured on the head, ribs and chest; that she did not seek treatment as she did not have money and so opted to be treated at home by her co-wife; that the area clan elder tried to resolve the matter twice and who advised her to lodge report to the police; that she had known that PW1 had reported the matter to the police when she was arrested; that she did not see PW5 on the date of the incident; that there were no people when the incident happened; that she never reported the matter to the police.

16. Lavender Sirar (DW2) testified that she is the clan elder for Ogambo “B” village and that she received a report from the Respondent, complainant and PW2. That the parties reached an agreement which is contained in her findings which she produced as D-Exhibit 1. She added that the parties have had previous wrangles between themselves and in which she had deliberated upon. She produced proceedings in that regard as D-Exhibit 2.

On cross examination she stated that the Respondent claimed that she had been assaulted; that the Respondent had a swollen wrist; that she was not biased against PW2 as she relates well with him and PW1.

On re-examination, she stated that PW1 and PW2 could not have attended the reconciliation if they were in bad terms with her. That she was not aware that the matter had been reported to the police; that earlier did not shake hands after the conclusion of the arbitration.

17. I have given due consideration to the evidence tendered before the trial court and the submissions in this appeal.

18. It is not in dispute that the Respondent had been charged with an offence of assault causing actual bodily harm contrary to Section 251 of the [Penal Code](#). The essential ingredients for the offence are



that there was an assault causing actual bodily harm. The evidence of the complainant (PW1) and the clinical officer (PW4) left no doubt that indeed the complainant sustained bodily injuries and which were described by PW4 as harm and wo produced the treatment notes and P3 form as exhibits. Further that evidence of PW5 is that he arrived at the scene and managed to assist the complainant to Madiany Subcounty Hospital for treatment. The clinical officer (PW4) further added that the complainant was bleeding from the head which he cleaned and stitched it. Hence, the description of the injuries as harm by the clinical officer is in tenable with the description pursuant to Section 2 of the *Penal Code*. I am satisfied that the Appellant produced this ingredient against the Respondent beyond any reasonable doubt.

19. The Respondent in her defence evidence has maintained that she was also assaulted. However, she did not go for treatment and also failed to report to the police so that a P3 form could be issued to her and which could have enabled the police to decide whether or not to prefer charges of affray against her and the complainant. The complainant merely claimed that her co-wife assisted her with medication. It is instructive that even her said co-wife was not called to corroborate this assertion. I find that (PW1) who was injured during the incident.
20. That Respondent has also introduced some minutes which were taken by the defence witness (DW2) who is the area clan elder in which she deliberated on the wrangles between the complainant and other relatives wherein the parties are alleged to have reconciled. However, a perusal of these minutes and deliberations indicates that none of the participants have signed the minutes or given details of their national identity cards. It is only the clan elder who is the author of the minutes who has supplied the documents. I find the documents do not have any probative value in the Respondent's defence evidence and that the complainant was not bound by the clan elders' deliberations and that she had a legitimate right to pursue her grievances with the court.
21. As regards the identity of the Respondent as the perpetrator. It is noted that the incident took place during the day and which was witnessed by PW2 and PW5. The two key witnesses saw the Respondent pick up a stone and hit the complainant on the head. They also saw her using a stick to hit the complainant on the hand. The two witnesses assisted the complainant to hospital for treatment. The said witnesses were quite forethought in their testimonies and were not shaken on cross examination. The Respondent in her sworn defence evidence admitted that she was at the scene and that she participated in the scuffle or fight. She confirmed picking up a stone and threw it which caught PW1 who started bleeding. The Respondent has condoned that she was intending to hit PW2 since she had an altercation with PW2 at the time. Further, the Respondent has condoned that she had no intention to injure PW2 since her target was PW1 and hence it was accidental.
22. Learned counsel for the Respondent has condoned that the Respondent did not have the requisite mens rea. Reliance was placed in the case of *Mkirani v R* [2021] KLR to the effect that under common law a crime cannot be imperiled to a man without mens rea. It was counsel's view that since the Respondent was targeting PW2, the injury on PW1 was accidental and that there was no mens rea on the part of the Respondent and was further persuaded by the evidence of the clan elder (DW2) who availed minutes of deliberations conducted, regarding the incident and prevention of others.
23. A critical analysis of the Appellant's evidence clearly show that the Respondent was placed squarely at the scene of crime and she had visited the home of PW2 who had grazed his cows on her vegetable garden. After an altercation, the Respondent fetched a stone and threw it at PW2 but however hit PW1, who is wife to PW2 causing her to sustain bodily injuries. at the time the Respondent arrived at the scene, she had the mens rea to teach PW2 a lesson for grazing his cows on her vegetable garden. It also transpired that the Respondent and PW2 had previous squabbles which had been deliberated upon by the clan elder (DW2). It was therefore obvious that the Respondent had the requisite intention to



harm PW2 and that when PW1 came to the rescue of her husband (PW2) she did not hesitate to harm her as well. Hence the Respondent's defence claim that the injuries on PW1 were accidental in any event, the minutes availed by DW2 revealed that the Respondent and PW1 plus other family members had squabbles in the past and thus the relationship was strained. Further, it must be pointed out that it matters not that the stone meant to hit PW2 ended up hitting PW1 since the Respondent ought to have known that the said weapon could injure other persons not necessarily the intended target. As long as the Respondent had the intention to harm PW2, that intention still subsists all the way to the point where the weapon injures a different target. The Respondent cannot run away from responsibility for her actions. I find that the Respondent's action were reckless and that she had the requisite mens rea. Consequently, the finding by the learned trial magistrate was in event of and must be interfered with.

24. Finally, and as observed above, the Respondent's claim of having been injured must be rejected because she did not lodge report to the police or sought treatment in hospital. Her claim that she was treated by her co-wife is neither here nor there and cannot be believed. The same is an afterthought. Further the minutes produced by DW2 were not signed by any of the parties except the clan, elder and thus they have no probative value to the defence case. I find the defence evidence did not cast any doubt upon that of the Appellant which is quite overwhelming against the Respondent's defence evidence ought to have been reflected by the learned trial magistrate. Further, it was erroneous for the learned magistrate to rely heavily on the evidence of DW2 yet the minutes provided were not signed by any of the parties.

The signature of the clan elder (DW2) on the minutes did not legitimize the minutes in the absence of signatures of the parties.

25. In view of the foregoing observations it is my finding that the Appellant's case had been proved beyond any reasonable doubt. The Appellant's appeal has merit. The judgment of the trial court dated 13/4/2023 acquitting the Respondent of the charge is hereby set aside and substituted with an order convicting the Respondent for the offence of assault causing actual bodily harm contrary to Section 251 of the *Penal Code*. the Respondent is ordered to appear before the Principal Magistrate's court at Madiany forthwith for mitigation and sentence.

DATED AND DELIVERED AT SIAYA THIS 31ST DAY OF OCTOBER 2024

D. KEMEI

JUDGE

In the presence of:

Sentuka Respondent

Lawi Oguto for Respondent

M/s Kerubo for Appellant

Ogendo Court Assistant

