



**Republic v Obewa & 2 others (Criminal Appeal E041 of 2024)
[2024] KEHC 13130 (KLR) (30 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 13130 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT HOMA BAY
CRIMINAL APPEAL E041 OF 2024
KW KIARIE, J
OCTOBER 30, 2024**

BETWEEN

REPUBLIC APPELLANT

AND

JOSHUA KITOTO OBEWA 1ST RESPONDENT

OMONDI OWUOR OBEWA 2ND RESPONDENT

MAXWELL APIYO KITOTO 3RD RESPONDENT

(From the original conviction and sentence in Criminal Case No. E0516 of 2021 of the Chief Magistrate's Court at Homa Bay by Hon. C.A.S. Mutai–Senior Principal Magistrate)

JUDGMENT

1. Joshua Kitoto Obewa, Omondi Owuor Obewa and Maxwell Apiyo Kitoto, the respondents herein, were acquitted after trial for the offence of attempted murder contrary to section 220 (c) of the [Penal Code](#).
2. The particulars of the offences were that on the 20th day of May 2021, at Lala village, Homa Bay sub-county in Homa Bay County, jointly with others not before the Court, attempted to unlawfully cause the death of Shem Ramogi Owuor by beating him with stones and clubs.
3. The appellant was dissatisfied and filed this appeal and raised the following grounds:
 - a. The learned magistrate erred by failing to appreciate the uncontroverted evidence of identification of the accused person tendered before the court.
 - b. The learned trial magistrate failed to find that the prosecution had tendered uncontroverted evidence establishing the offence charged beyond a reasonable doubt.



- c. The judgment of the learned trial magistrate was against the weight of evidence tendered by the prosecution.
4. The firm of Oluoch Ammon & Company Advocates represented the 2nd respondent, who opposed the appeal on the following grounds:
 - a. That the prosecution case was rife with material contradictions.
 - b. That the alibi defence of the second respondent was not displaced.
5. The first and third respondents opposed the appeal, arguing that the appellant did not prove its case to the required standards.
6. This is the first appellate court. As expected, I have analysed and evaluated all the evidence adduced before the lower court afresh, drawing my conclusions while bearing in mind that I neither saw nor heard any of the witnesses. I will, therefore, be guided by the celebrated case of *Okeno v Republic* [1972] EA 32.
7. While acquitting the respondents, the learned trial magistrate made a finding that the complainant was assaulted by other people other than the respondents.
8. Shem Ramogi Owuor (PW1) is the complainant. He testified that on the 20th day of May 2021 at about 5 p.m., he was going to his father's home. He met with Joshua Kitoto and Omondi Owuor Obewa. Joshua asked him why he had reported Omondi Owuor Obewa to the police. This is when Omondi Obewa hit him on the left side of the head with a stone. Joshua Kitoto hit him with a hoe handle he had on the right ribs. Maxwell Apiyo and Ishmael Ongoto joined the two. Each was armed with a stick. When he saw the two approaching, he started running away but fell. Omondi Owuor Obewa ran away. Maxwell Apiyo and Ishmael Ongoto beat him with the sticks they had, and he became unconscious. He regained consciousness at the hospital while undergoing treatment.
9. Gabriel Oteba (PW2) testified that he was attracted to the scene by some noises. He went and found the complainant and Joshua Kitoto quarrelling. Joshua asked why Omondi had been reported to the police. While this happened, Ongucho hit the complainant on the back with a club. He said Ongucho is a son of Joshua Kitoto. Kitoto picked stones and hit the complainant on the mouth and the head. The complainant fell, and Ishmael fetched water from their home and wanted to pour it on the complainant, but he prevented him from doing so. He escorted the complainant to the hospital. From the evidence of this witness, the complainant was attacked by Joshua Kitoto and his two sons.
10. In his defence, Joshua Kitoto Obewa contended that the complainant insulted him at home. He called him his mother's vagina severally and a dog. He (the complainant) then held him and beat him. He was taken to the hospital for treatment and later issued with a P3 form.
11. Omondi Owuor Obewa, the second respondent, contended that he was not present at the time of the incident. Maxwell Apiyo Kitoto (the third respondent) denied meeting the complainant on the material day.
12. There are two versions of the incident: one by the prosecution, which contends that the complainant was attacked on allegations that he had complained with the police, and the other by the first respondent, who claimed that the complainant went to his home insulted and battered him.
13. At the trial, the first respondent produced a P3 form showing that he sustained injuries on the 20th day of May 2021. Since the prosecution did not provide evidence that the two fought, the first respondent's version explains how he suffered the injuries.



14. Secondly, there are glaring contradictions about the incident. The complainant testified that he was attacked and injured by the respondents and Ishmael Ongoto Kitoto. However, Gabriel Oteba (PW2) testified that while the complainant quarrelled with Joshua Kitoto, Ongucho, a son of Kitoto, hit the complainant on the back. Kitoto threw stones at the complainant and hit him on the head and mouth. This contradicted the complainant, who testified that Joshua Kitoto hit him on the ribs with a hoe stick. Though the complainant testified that he ran from his attackers and fell before they caught up with him, PW2 did not testify anything to that effect.
15. PW2 testified that Omondi Obewa was not at the scene. This contradicted the complainant, who said that he hit him with a stone.
16. The second and the third respondents pleaded an alibi. When an accused raises an alibi defence, they do not assume any burden to prove that it is the truth. This was stated in the case of *Kiarie v Republic* [1984] KLR, where the Court of Appeal held:

An alibi raises a specific defence and an accused person who puts forward an alibi as an answer to a charge does not in law thereby assume any burden of proving that answer and it is sufficient if an alibi introduces into the mind of a court a doubt that is not unreasonable.

The evidence PW2 supported Omondi Obewa's defence. I consider this witness truthful. He also did not place the third respondent at the scene, so the defences of these witnesses were not displaced.

17. The upshot of the preceding analysis is that the appeal lacks merit and is hereby dismissed.

DELIVERED AND SIGNED AT HOMA BAY ON THIS 30TH DAY OF OCTOBER 2024

KIARIE WAWERU KIARIE

JUDGE

