



**Republic v Mwaura (Criminal Appeal E037 of 2024)
[2024] KEHC 15074 (KLR) (27 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 15074 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
CRIMINAL APPEAL E037 OF 2024
LM NJUGUNA, J
NOVEMBER 27, 2024**

BETWEEN

REPUBLIC APPELLANT

AND

PETER MBURU MWAURA RESPONDENT

(Appeal arising from the decision of Hon. J. Otieno SRM in Embu Chief Magistrate’s Court Criminal Case No. E519 of 2022 delivered on 21st March 2024)

JUDGMENT

1. The appellant has filed a petition of appeal dated 26th March 2024, seeking orders that the appeal be allowed and the respondent be convicted and sentenced accordingly, or in the alternative, the court be pleased to order a retrial. The appeal is premised on grounds that the trial magistrate erred in law and fact by:
 - a. By finding that the complainant did not identify the respondent yet he was properly recognized by the complainant;
 - b. By finding that the entire case was based on suspicion that it was the respondent who attacked the complainant despite clear, credible and corroborated eye witness testimony by the prosecution witnesses that it was the respondent who committed the offence;
 - c. By finding that the respondent’s case offered sufficient rebuttal to the prosecution’s case yet it did not since it was a mere denial of committing the offence; and
 - d. By focusing on an active dispute over business competition between the complainant and the respondent as the reason for the respondent being charged despite clear and corroborative evidence from the prosecution witnesses of an unprovoked attack by the respondent and others on the complainant.



2. The respondent was charged with the offence of causing grievous harm contrary to section 234 of the Penal Code. The particulars of the offence are that on 09th May 2022 at unknown time at Karurina village Gaturi location within Embu County, the respondent willfully and unlawfully did grievous harm to Josphat Mugambi. To this charge, the respondent pleaded not guilty and a plea of not guilty was duly entered. The prosecution called witnesses in support of its case.
3. PW1, Dr. Dennis Mwenda testified that he examined the complainant after the assault. He noted that the complainant had slurred speech and a left facial palsy. There were scars on the left side of his face and head measuring 2cm×2cm and his skull was depressed at the area of the injury. The injury on the skull was seen on a CT scan and there was a healed cut wound on the left hand which caused reduced muscle power. On the left leg, there was a fractured tibia-fibula bone and it had been fitted with external metal plates hence he was walking with crutches.
4. At the time of examination, the injuries were about 10 weeks old and the complainant had medical documents from Embu Level 5 Hospital showing that he had been referred to Kenyatta National Hospital for the depressed skull to be elevated. The injuries were caused by sharp force trauma and they were classified as grievous harm. On cross-examination, he stated that the injuries were offensive wounds. That he referred to the medical notes, scans and examination with his ordinary eyes.
5. PW2 was Josphat Mugambi who stated that on the day of the incident, at 9PM, the respondent and 5 others found him at the slaughter house and they attacked him with the intention of removing his eyes. That the respondent was armed with a knife which he used to stab him on the head and he used his hands to defend himself by shielding his face to protect the eyes. That he lost consciousness and when he regained it, he crawled to his brother's house and found himself at Kenyatta National Hospital with injuries on his head, hands and legs. That his slurred speech began after the incident. That the respondent started having problems with him 2 days after he constructed his own slaughter house.
6. On cross-examination, he stated that he was in the house when the respondent poured water, drawing his attention. That he saw the respondent and he physically identified him. That he told the police that he was cut with a slasher around his eye but the knife cut him on the head. He stated that he didn't know how he got leg injuries. He was aware that the respondent had reported that he had gone to his house with a panga because the respondent's mother had attacked him but it is not true. He stated that there is an active ongoing dispute about the respondent's slaughterhouse and that night he saw the respondent.
7. PW3 was Joseph Muthee who stated that on the night of the incident, he woke up to light a fire and he saw blood stains. That he saw PW2, his brother, lying on the ground with injuries on the head and limbs and he screamed causing the neighbors to gather. That PW2 was taken to Mugoya dispensary and after that his mother took over his nursing care as he was hospitalized for a long time. That the next time he saw PW2, he had slurred speech, his walking had changed and since then he is unable to do anything for himself. He stated that his relationship with the respondent was cordial until his brother was attacked after the respondent opened his own slaughterhouse. On cross-examination, he stated that earlier that day, the respondent had gone to look for PW2 with his goons because PW2 had been beaten by the respondent's mother. That he believed the respondent was among the goons because he had come looking for PW2 earlier that day.
8. PW4 was Inspector Oliver Mwandonyi who stated that the incident was reported at Itabua Police Station and he immediately referred the complainant to hospital. That the complainant had been working for the respondent at his slaughterhouse but he later opened his own slaughterhouse therefore creating competition between their businesses. That 3 or 4 days prior to this report, there had been



- reports that the complainant had barricaded roads by cutting trees and when he asked him, he said it was a business issue. That there was nothing at the scene to connect the accused to the crime.
9. On cross-examination, he stated that the complainant's house is near the slaughterhouse and there was no electricity and the incident occurred at around 3am. That there was some blood at the scene and the complainant said that he identified the respondent because the assailants were close to him. That the report of the barricaded road was made by the people of Karurina village and they were looking for the complainant.
 10. The prosecution closed its case and the court found that a prima facie case had been established. The respondent was placed on his defense.
 11. DW1, the respondent, testified that his mother opened a pig slaughterhouse which he was running. That PW2 went to the slaughterhouse and demanded to know why customers were not going to his slaughterhouse but were going to the respondent's slaughterhouse. That the veterinary who was there told him to go back to his business and he did not take it kindly, threatening to cut the respondent and his children with a panga. That they reported the matter to the police and PW2 fled and could not be found and he remained apprehensive that PW2 would attack him. That he was later informed that PW2 had been attacked but he had nothing to do with that incident since he was at home at the alleged time of the incident. On cross-examination, he stated that PW2 is his friend and they even share meals.
 12. DW2 was Veronica Mutave Mwaura, DW1's mother who stated that her slaughterhouse opened on 07th May 2022. That PW2 went to his slaughterhouse asking the veterinary why he had not slaughtered pigs at his slaughterhouse but he was told to be patient. That PW2 became confrontational and he refused to leave demanding for Kshs.50/= and then he barricaded the road leading to the slaughterhouse with logs. That they informed the police who went and reopened the road. That she advised DW1 to stay at her house on that Saturday and Sunday and the police called him the following Monday regarding the assault on the complainant. On cross-examination, she stated that PW2 also owned a slaughterhouse and the respondent was a butcher in her slaughterhouse.
 13. DW3, Paul Mwaura Waweru is the respondent's brother. He stated that DW1 called to tell him to call the OCS because PW2 had wreaked havoc at the slaughterhouse. That the OCS arrived but by that time, PW2 had already blocked the road and had disappeared. They searched for him in nearby towns but they did not find him.
 14. The appeal herein was canvassed by way of written submissions.
 15. Through its written submissions, the appellant relied on sections 4 and 234 of the Penal code and the case of Pius Mutua Mbuvi v. Republic (2021) eKLR. it argued that the elements of the offence had been proved beyond reasonable doubt.
 16. The respondent submitted that he was not properly identified since the incident occurred under the cover of darkness and there was no source of light at the scene. For this argument, he relied on the cases of Cleophas Otieno Wamunga v. Republic (1989) KLR, Omar Hussein Baya v. Republic (2009) eKLR, Moses Odongo Odinga v. Republic (2011) eKLR and Peter Oyugi Mokaya, Erick Ondiek Andrea & Rodgers Ondieki Nyakundi v Republic [2011] KECA 143 (KLR). He argued that the business feud between the respondent and the complainant was the only thing that the trial court needed to focus on in making its finding. That he gave an alibi and stated that he was at the house of DW2 the whole night and he was nowhere near the scene. That there were doubts as to the truthfulness of the complainant's testimony thus the offence was not proved to the required standard.
 17. The issue for determination is whether the trial court's finding acquitting the respondent should be overturned.



18. The role of the first appellate court is cut out and this court will thus endeavour to revisit all the evidence at trial and make its own findings. In the case of *Kiilu & Another vs. Republic* [2005]1 KLR 174, the Court of Appeal stated thus:

“An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate Court’s own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusions. 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 findings and 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.”

19. In determining the first issue, the respondent was charged under section 234 of the Penal Code which provides:

Any person who unlawfully does grievous harm to another is guilty of a felony and is liable to imprisonment for life.

According to section 4 of the Penal Code, “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.” (emphasis mine)

20. According to these provisions of the Penal Code, for the offence of grievous harm to be proved, the court must satisfy itself that:

- a. There was an unlawful act;
- b. Grievous harm resulted from the unlawful act; and
- c. The appellants (accused persons) participated in causing the grievous harm to the victim.

21. As a rule of thumb, and per section 109 of the *Evidence Act*, it is incumbent that he who alleges a fact, must prove it and the standard of proof is beyond reasonable doubt. The testimony of PW1 went to prove that there was indeed an unlawful act that resulted in grievous harm against the complainant. He testified about the various injuries sustained by the complainant. PW2 testified that he opened a slaughterhouse next to the respondent’s slaughterhouse and within 2 days, the respondent attacked him while within a mob and caused him grievous harm. It was his testimony that a few days before the incident, DW2, the respondent’s mother, had attacked him but out of respect, he did not retaliate.

22. DW1 also testified that PW2 had caused unrest and had blocked the road leading to his mother’s slaughterhouse so that customers buying pork from them wouldn’t have access to the facility. He testified that they reported the incident to the police and the police visited the scene, by which time PW2 was nowhere to be found. According to DW1, he was at his mother’s house on the night of the incident, a fact that was corroborated by DW2. The respondent contended that the complainant couldn’t have identified him on the night of the incident because PW4 testified that there was no electricity at the scene or in the neighbouring structures.



- 23. Considering the available evidence, the court cannot satisfy the standard of proof as to identification of the respondent that night. Even though there was business rivalry, that alone is not enough to prove that the respondent was the attacked that night without the availability of light. The respondent is not said to have said anything during the attack such that the complainant could recognize his voice. In my view, there is a flaw in identification of the respondent as the assailant, leaving the case to rely on a suspicion, which is not enough to impose criminal liability in law. (see the case of Republic v. Jason Makokha Odongo [2010] KEHC 2392 (KLR))
- 24. Therefore, I find that the appeal lacks merit and the same is hereby dismissed.
- 25. It is so ordered.

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

L. NJUGUNA
JUDGE

.....for the Appellant
.....for the Respondent

