



**Republic v Mkenya & another (Criminal Appeal E023 of 2023)
[2024] KEHC 16389 (KLR) (20 December 2024) (Judgment)**

Neutral citation: [2024] KEHC 16389 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
CRIMINAL APPEAL E023 OF 2023
REA OUGO, J
DECEMBER 20, 2024**

BETWEEN

REPUBLIC APPELLANT

AND

ALFRED WANJALA MKENYA 1ST RESPONDENT

MUSA BAHATI WANJALA 2ND RESPONDENT

(An appeal from the acquittal on a charge of grievous harm by Hon. P. Y. Kulecho (SRM) in Webuye CR NO 493 of 2019 in the judgment dated 15th February 2023)

JUDGMENT

1. The respondents herein, Alfred Wanjala Mkenye and Musa Bahati Wanjala, were charged at the subordinate court with the offence of causing grievous harm contrary to section 234 of the Penal Code. The particulars of the charge are that; on the 12th day of May 2019 at Sitabicha sub-location Ndivisi Location in Bungoma East sub-county within Bungoma County caused grievous harm to Sinoya Nyukuri.
2. The trial magistrate after conducting a full hearing held that the charge of grievous harm was not proved and acquitted the respondents under section 215 of the Criminal Procedure Code.
3. The appellant dissatisfied with the finding of the lower court has filed an appeal on the following grounds:
 1. That the learned trial magistrate erred in law and fact by failing to convict the respondents when the evidence on record was cogent and credible.



2. That the learned trial magistrate misdirected herself in law and fact when she failed to appreciate that the respondents' criminal conduct was criminal and punishable by law.
 3. That the trial magistrate failed to critically analyse the evidence and thus arrived at an erroneous decision.
 4. That the learned magistrate erred in law and in fact by failing to appreciate that the offence of grievous harm was proved beyond reasonable doubt.
 5. That the learned magistrate erred in law and fact by placing more weight on the afterthought defence placed by the respondent who had not lodged any complaint against the complainant while failing to appreciate the weight of the complainant's testimony and his witnesses and the gravity of the injuries sustained.
 6. That the trial magistrate erred in law and fact by invoking a defence of self-defence on behalf of the respondents when the same was not supported by evidence at the trial.
4. The appellant submitted that the evidence of Pw1, Pw2, Pw3 and Pw4 reveals that the complainant sustained grievous harm. It is submitted that Pw1 was grazing cattle on his land and therefore the actions of the respondents were intentional and unprovoked. The trial court misdirected itself in its evaluation of the evidence and hence reached an undesired verdict of an acquittal. They faulted the trial court for considering the false defence testimony by the respondents. The prosecution witnesses placed the 2nd appellant at the scene and therefore it was not possible that he was in school.
 5. It is settled law that a first appellate court must evaluate afresh the evidence adduced before the trial court to arrive at its own independent conclusion but bear in mind that it neither saw nor heard the witnesses testify. (See *Selle & Another vs. Associated Motor Boat Co Ltd & Others* [1968] EA 123).
 6. The evidence before the lower court was as follows:
 7. Dr Simiyu Nyakuri (Pw1) testified that on 12/7/2019 he was herding cattle on his farmland. The respondents were also herding cattle 200m from the boundary. Pw1 testified that he heard the 1st respondent requesting that a "fimbo" be brought and then pointed at him, saying that Pw1 was grazing on his land. The 2nd respondent emerged from the sugarcane plantation and began herding the cattle. The 1st respondent held him by the collar and the 2nd respondent hit him on the head, shoulder, abdomen, chest, and right eye. Xavier Kakai (Pw3) came to his rescue.
 8. Jackson Rugut Mkenya (Pw2) testified that he was weeding when he heard the 1st respondent angrily calling the 2nd respondent. He began driving the cattle home. He then heard her sister-in-law call the 2nd respondent. He saw the 2nd respondent hit Pw1 with a fimbo and he fell. The 1st respondent's wife collected 3 fimbos from the scene.
 9. On cross-examination, Pw2 testified that he is the 1st respondent's younger brother and that they have a land dispute. Pw2 in cross-examination also confirmed that there is a land dispute between himself and the 1st respondent. He also testified that he was charged with a criminal charge against the respondent who were the complainant in that case. He testified that he did not know the circumstances in which the case was withdrawn.



10. Xavier Kakai (Pw3) testified that he saw Pw1 and the 1st respondent holding each other and the 2nd respondent came and hit Pw1 with his fist in the eye. He separated them. He then saw the 1st respondent's wife holding fimbo for Pw1. Pw1 was bleeding from his mouth when he arrived at the scene.
11. Pw1 testified that after the incident, he sought treatment at Sinoko and was referred to the Webuye eye unit. He was later referred to Kitale and reported the matter at Misikhu police station. Festus Ng'etich (Pw4), a clinical officer, testified that the P3 form was filled by Dr Vilembwa whom he worked with for 4 years and was therefore familiar with his handwriting. The patient, Pw1, complained that he had been assaulted by persons well known to him. He sustained bruises on the left Parietal area of the head and left forearm, suffered a cataract of the right eye and could not see. The throat, abdomen and shoulder were tender. The degree of injury was assessed as grievous harm likely to have been caused by a blunt object. Antibiotics, analgesics and tetanus toxoids were administered. They recommended surgery for the right eye owing to the cataract/traumatic eye injury. The patient was treated at Sinoko sub-county Hospital, Webuye County Hospital, and Kitale County Hospital.
12. The investigating officer, No. 240701 PC Enoch Serem (Pw5), testified that the matter was reported on 13/05/2019. Pw1 made a complaint that the respondents assaulted him. He was issued with a P3 form and the appellants were charged in court.
13. The respondents were placed on their defense. The 1st respondent testified that his neighbor, Pw1, left his cattle on his land and he asked him why he had trespassed onto his land. As he drove the cattle off the land, the complainant hit him with a stick on the shoulder. He called the complainant's brother, Mike to help him. People responded to his distress call. He grabbed Pw1's collar and he also grabbed his collar. Pw3 beat them using a piece of sugar cane, pushed them and they fell. They both went home. He sought treatment at Sinoko Health Centre and then reported the case to Misikhu Police Station. He was issued with a P3 form. He was arrested on 31/7/2019. However, the complainant was also arrested and charged vide CRC 512/2019 and the case was withdrawn under section 87 of the Criminal Procedure Code.
14. Musa Bahati Wanjala (Dw2) testified that he was in form 3 at the time of the incident. He produced two letters from Ndivisi Boys' High School as Dexh1 and 2 confirming that he was in school.
15. Mark Khakame (Dw3) testified that on the material day, he heard a noise right behind the 1st appellant's house. The 1st respondent uttered the words "Why do you want to kill me on my land/Why are you beating me?". He saw the 1st appellant and Pw1 struggling and a man hit both of them with a piece of sugar cane. They refused to let go of each other and the man violently pushed them and they both fell.

Analysis And Determination

16. The only issue raised in the appeal is whether the prosecution proved its case to the required standard, beyond reasonable doubt.
17. Section 234 of the Penal Code provides for the offence of Grievous Harm as follows:
 234. Grievous Harm

Any person who unlawfully does grievous harm to another is guilty of a felony and is liable to imprisonment for life.
18. In this case, the two versions of the events by the prosecution and defence witnesses were very different. According to Pw1, Pw2, and Pw3, the complainant was assaulted by the 2nd respondent and the 1st respondent held the complainant by the collar during the assault. However, Pw2 gave a contrary



- testimony to that of Pw1 and Pw3. He testified that the 2nd respondent beat the complainant with a fimbo while Pw1 and Pw3 testified that the 2nd respondent beat him with his fist.
19. The defence offered by the respondent was that the complainant attacked the 1st respondent and he raised an alarm. Dw1 and Dw3 testified that Pw3 came with sugar cane and beat both of them in an attempt to separate them as they held each other's collars. Dw1 testified that he reported the matter to the police and was issued with a P3 form and a criminal case instituted against the complainant. The complainant did not dispute the existence of the criminal suit that was filed against him following the incident.
 20. While the prosecution proved that indeed the complainant was injured as a result of the assault, the 1st respondent also raised the defence of self-defence. There was no evidence challenging the fact that the 1st respondent had been injured by Pw1 and that criminal charges were brought against the complainant. The case was withdrawn under section 87(a) of the Criminal Procedure Code before a determination was made on the assault charge.
 21. From the prosecution and defence evidence, it is clear that the 1st respondent and the complainant were fighting. The 1st respondent's defence was that he hit the complainant in self-defence. Dw3 testified that he did not see the 2nd respondent at the scene. The 2nd respondent testified that he was in school and produced letters from Ndivisi Boys' High School that he was in boarding school at the time of the offence and that he was arrested while in school.
 22. The trial magistrate therefore cannot be faulted for finding that the assault against the complainant was lawful, inflicted by the appellant when the complainant attacked him.
 23. It is also evident that there was a land dispute between the complainant and the 1st respondent. Pw1, Pw2, Pw3, and Dw1 all acknowledged the existence of the land dispute. Pw2 testified that it was the cause of the fight that ensued between the complainant and 1st appellant. Pw2 and Pw3 believed that the disputed land belonged to the complainant and in my view, this could lead to them giving biased testimony in favor of the perceived owner of the land. On the other hand, the 1st respondent believed the disputed land to be his.
 24. The evidence of Pw1, Pw2, and Pw3 was contradictory with Pw2 testifying that the injuries sustained by the complainant were because the 2nd respondent hit the complainant with his fist. The evidence of Pw1, Pw2 and Pw3 on how the injuries were sustained needed to be consistent as they were direct witnesses and there should be only one version of how the injuries were inflicted.
 25. Consequently, I find that the appeal lacks merit and it is hereby dismissed.

DATED, SIGNED AND DELIVERED AT BUNGOMA THIS 20TH DAY OF DECEMBER 2024.

R.E. OUGO

JUDGE

In the presence of:

Mr. Ayekha - For ODDP/ Appellant

Alfred Wanjala Mkenya/ 1st Respondent - Present

Musa Bahati Wanjala/ 2nd Respondent -Present

Wilkister -C/A

