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Argut v Republic (Criminal Appeal 205 of 2017) [2023] KEHC 3175 (KLR) (28 March 2023) (Judgment)

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REPUBLIC OF KENYA

IN THE HIGH COURT AT KABARNET

CRIMINAL APPEAL 205 OF 2017

TM MATHEKA, J

MARCH 28, 2023

BETWEEN

FRANCIS KOSGEY ARGUT .... APPELLANT

AND

REPUBLIC .... RESPONDENT

JUDGMENT

1. This is an appeal against the conviction and sentence imposed on the appellant in Kabarnet PMCR No. 117 of 2017 on 18th October, 2017 where he was charged with assault causing actual bodily harm contrary to Section 251 of the *Penal Code*.
2. It was alleged that on the 9th Day of February 2017 at Kabarnet Township within Baringo Central of Baringo County he unlawfully assaulted Veronicah Kimoi Kimitei thereby causing her actual bodily harm.
3. The appellant was convicted and sentenced to pay a fine of Kshs. 20,000/= in default to serve six months imprisonment. His appeal is on the following grounds:-
    1. That the Learned Trial Magistrate erred in law and fact in convicting the appellant for an offence of assault causing actual bodily harm when the ingredients of the offence were not satisfactorily proved against the appellant.
    2. That the Learned Trial Magistrate erred in law and fact by failing to observe that the prosecution did not connect the accused to the offence without a reasonable doubt.
    3. That the Learned Trial Magistrate erred in Law and fact in failing to analyse the evidence as the alleged offence was said to have been committed during the day yet other independent witnesses in the company of the complainant were not called to testify.

4. That the Learned Trial Magistrate erred in law and fact by failing to appreciate the prosecution's case was fraught with glaring contradictions with each witness giving contradictory evidence.

5. That the Learned Trial Magistrate erred in law and fact by failing to appreciate that the P3 Form adduced as evidence did not corroborate the injuries allegedly sustained by the complainant as she had testified to.

6. That the Learned Trial Magistrate erred in Law and fact by disregarding the accused/ Appellant's defence which created a reasonable doubt in the prosecution's case.

7. That the Learned Trial magistrate erred in law and fact in shifting the burden of proof to the accused/appellant.

8. That the learned trial magistrate erred in law and fact by failing to accord the Appellant's case the probative value it deserved and dismissing the Appellant's alibi defense which was not challenged or rebutted by the prosecution.

9. That the learned trial magistrate erred in law and fact by dismissing as inconsequential the existing grudge between the complainant and the appellant as testified to.

10. That the Learned Trial Magistrate erred in Law and fact in failing to appreciate that the Appellant's fundamental and constitutional rights were violated during and after arrest and the learned trial magistrate completely failed to uphold or defend the appellant's rights against violation even after the matter was brought to the attention of the Honourable Court.

4. The Appellant prayed for the following reliefs:

    1. Reversal of the finding and sentence.

    2. Acquittal or discharge of the Appellant

    3. Declaration of rights of the Appellant.

Prosecution's Case

5. PW1 Veronica Kemoi Kimitei, the complainant, testified that on 9.2.2017 she purchased water from Mzee Moja Shop and went outside to talk with some ladies. Thereafter as she crossed the road someone kicked her on the back. She turned back and saw it was the Appellant. She said the appellant kicked her three times and she injured her leg. She ran into the cyber and the Appellant followed her with a stick. She asked the Appellant why he wanted to kill her and he responded that he could kill her. She said she did not have any dispute with the Appellant before and she did not know why he assaulted her.

6. In cross examination, she stated that they had a long standing land dispute with the Appellant but had never met or communicated directly with him before and that she communicated to the Appellant through letters only written by her advocate. She also did not know the Appellant's name. It was her testimony that the women who were standing outside the shop were about five to six in number and they did witness the incident, and that one of them was a witness in this case. She said the incident happened at 1 p.m. and it attracted several members of the public. She said after the incident she procured a taxi which was near city clock and immediately proceeded to the police station where she was issued with a P3 form that she took to Referral Hospital for filing. She denied going to Kaptimbor Health Centre for filing of the P3 form. It was her testimony that she was examined on the back only and given medication. She confirmed the Appellant had reported a fraud and malicious damage case against her and she was summoned by the Police.

7. In re-examination, she stated that she reported the case not because of land dispute but because the Appellant had attacked her.

8. PW2 was Nancy Kiptum. She said on 9.2.2017 at 1pm she left her office for lunch at Sportsline. On reaching there, she witnessed the Appellant kick the complainant while she was crossing the road. She said the complainant entered a cyber and the Appellant followed her with a broom stick and wanted to hit her but people stopped him. That the Appellant left and she inquired what had happened but no one answered. She looked for the complainant who informed her that she had been injured on the leg and she took her to the hospital and left her there.

9. In cross examination she stated that there were many people at the scene. She disputed being summoned by the police to record her statement but stated that she did record the same at the request of the Complainant.

10. PW3 was Benjamin Kendagor a clinical officer attached to Kaptimbor Facility. He testified that on 9.2.2017 he examined the complainant and noted she had pain on the neck upon touch and on the mid lower back. He said the probable weapon which caused the injuries was blunt. He categorised the injuries as harm and produced a treatment card and a P3 form as exhibits no. 1 and 2 respectively.

11. In cross examination, he stated that he is based at Kaptimbor Facility. However, the treatment card did not indicate the complainant was treated there but at Kabarnet County Hospital. He said on the said material date he was at the said Kabarnet County Hospital as part of his line of duty.

12. PW4 was no. 60055 PC Charles Ibutu attached to Kabarnet Police station. He testified that on the material date at 2.25 pm, the complainant reported the incident herein and based on her statement he arrested the Appellant and charged him.

13. In cross examination he said the matter was reported at 2pm and he arrested the accused at 4pm. He stated that there was no need of conducting the identification parade as the complainant knew the Appellant well and that the Complainant gave him the Appellant's name that he indicated in the Occurrence Book. He testified that before they arrested the Appellant they introduced themselves to him. He denied violating the Appellant's rights. He said the Appellant did not have any weapons at the time of arrest.

14. After the testimony of PW4 the prosecution closed its case. On 18.8.2017 the lower court found that the accused had a case to answer and accordingly put him on his defence.

The Defence Case

15. The accused chose to give a sworn testimony and he called three witnesses in support of his case.

16. DW1, was the Appellant. He denied committing the offence and stated that this was a framed up case and a case of mistaken identity as a result of malice and grudge against him and his family. He said on the fateful date he was at work from morning to a few minutes to 3pm then he left the office and drove to town. On the way he met his mother and sister who were going to buy fertilizer at Sports Line and he picked them. When they arrived at Sports line, his mother and sister alighted and he proceeded to park his Motor Vehicle behind Mzee Moja Building. Thereafter he walked to Sports line where he met his Aunt and they conversed while facing their property which was opposite the Governor's office. He said a Probox Motor Vehicle was driven to where they were and three men alighted and arrested him. It was his testimony that he was not told the reasons for arrest even after enquiring the same. He stated that when they reached the Police Station he was put in the Police cells and the 2nd arresting officer came to ask for his name. He told him he thought he knew and the said officer pushed him against a

wall and touched his testicles demanding for his full names. He disclosed the same and he told him it was good he had cooperated then left. He said he was not given food while there and the following day he was presented in court and charged with assault. It was his evidence that he had a land dispute with the complainant which he had reported *vide* OB Numbers 1816/2016;40/22/4/2016 & 16/28/2/27. He believed the complainant was using the court to settle scores.

17. In cross examination, he stated that he did not see the complainant at the scene when he was arrested and that he did not know the stage at which an alibi defence is raised.

18. DW2, was Nancy Kaputei. He testified that on the material date she was at the office with the Appellant from 9 am to 3 pm then she left for late lunch.

19. DW3 was Elma Argut, mother of the accused. She stated that on the material day the accused picked them at Post Office and they proceeded to Sportsline for lunch. They alighted and the accused Appellant went to park his car. That a Probox Motor vehicle was driven to where the accused was and three men alighted and arrested him and took him to the police station.

20. DW4 was Sakon Chepchumba Argut, Appellant's brother. His evidence was similar to that of DW3.

21. DW5 was Nyaga Mwaniki. He said on the material day he was with the Accused at work up to 3 pm.

22. After the testimony of DW5 the defence case was closed.

The Appeal

23. This Appeal was canvassed through written submissions.

Appellant's Submissions

24. The Appellant filed his submissions on 4th May, 2022.

25. On the first ground of Appeal, the appellant submitted that it is trite law that the ingredients of the offence include malice aforethought and the prohibited wrongful act. he cited *Black's law Dictionary*,9th Ed, definition of defines malice aforethought to mean the intent, without justification or excuse, to commit a wrongful act or reckless disregard of the law or person's legal right.

26. He argued that the prosecution did not at any material time prove that he had the necessary mens rea to commit the alleged offence. He relied on *Ndaa v Republic*[1985] eKLR where the court listed the ingredients of assault causing bodily harm as: assaulting the complainant; and occasioning actual bodily harm. He also cited *Alex Kinyua Murakaru v Republic* [2015] eKLR where the court stated that actual bodily injury is any physical injury to a person (which is not permanent), or psychiatric injury that is not merely emotions, fear or panic and that to make out the offence, the prosecution must show that there has been an assault, and that the assault has resulted in actual bodily harm. There must be an intention to assault (mens rea) and the assault must have taken place (actus reus).

27. The appellant argued that the prosecution failed to prove beyond reasonable doubt that he was the one who inflicted the injuries on the complainant and thus the ingredients of assault were not satisfactorily proved.

28. On the second ground the appellant submitted that the complainant testified that she did not know him and denied ever meeting him and that she only communicated with him via letters by her advocate in a land dispute pitting him and her. In view of this, the appellant argued that there was need for an identification parade to be conducted so as to ascertain that he was the perpetrator of the instant crime in line with the Force Standing Orders. He submitted that the alleged crime scene is a busy

public road with many members of the public present at the alleged time of the offence. He relied on *David Karanja & Others v Republic*CA No.117 of 2005 where the Court of Appeal observed that the evidence after a well conducted identification parade is of great value.

29. He also relied on *Gabriel Kamau Njoroge v Republic*[1982-88] I KAR 1134 where the Court held: "A dock identification is generally worthless and the court should not place much reliance on it unless this has been preceded by a properly conducted identification parade..".

30. On the 3rd ground, the appellant submitted that the complainant stated that prior to assault she was chatting with 5 or 6 women and after the attack she ran into a cyber café for rescue yet none of the said women or cyber attendants were called as witnesses in this case. That this court should draw adverse inference to the prosecution case for failure to call the crucial potential witness to testify. To buttress this position, he referred this court to *Halkano Mata Bagaja v Republic* [2015] eKLR where the court restated this position in CRA 257/09, *Benson Mbugua v Republic*(ELD) that generally, the prosecution has a duty to call all witnesses relevant to their case whether or not the evidence is adverse to their case, provided the witness will assist in the just resolution of the case.

31. Reliance was also placed on *Bukenya & Others v Republic* [1972] EA 549, where the court said at Page 551:

> " While the Director is not required to call a superfluity of witnesses, if he calls evidence which is barely adequate and it appears that there were other witnesses available, who were not called, the court is entitled under the general law of evidence, to draw an inference that the evidence of these witnesses, if called would have been tended to be adverse to the prosecution case".

32. With respect to the 4th ground of the appeal, the appellant submitted that the prosecution case was marred with contradictions and inconsistencies for the below reasons:The complainant reported at the police station that she was attacked by a person known to her while during the hearing she stated that she did not know him.PW1 testified that the attacker was in possession of a wooden broom stick while PW4 stated that the appellant was not armed at the time of arrest and/or did not possess any weapon.PW1 stated that she immediately reported the incident to the police station yet the report was booked at 2. 25p.m that was close to one and a half hours later and no explanation was given for the unreasonable delay.PW1 stated that she was treated at Baringo County Referral Hospitalwhile the medical reports show that she was treated atKaptimbor Health CenterPW2 stated in her written statement that she was summoned to record her statement while during the hearing she denied being summoned.PW2 testified that she took PW1 to hospital after the alleged incident and left her there while in her written statement she stated that PW1 fled away in a taxi after the incident.PW1 stated that she was injured on the leg while the P3 form and the evidence of PW3 indicated that she was injured on the neck and back.PW4 testified that he arrested the Appellant at about 4p.m at City Clock while PW1 testified that the appellant was arrested at 3. 15p.m outside sport line Hotel in company of two family members.

33. On the 6th ,7th ,8th & 9th of the grounds, the Appellant submitted that it is trite that the burden of proof in criminal cases lies with the prosecution. For this proposition reliance was placed on the case of *Republic v Derrick Waswa Kuloba* [2005] eKLR where the court stated that the burden of prosecution is to establish its case beyond reasonable doubt and that the burden never shifts.

34. The appellant submitted in his case the burden of proof was shifted to him.

35. He argued that his alibi defence were corroborated by his witnesses and the same was never challenged by the prosecution. The appellant submitted that the holding of the court that "the said office is about

a few meters from the site where the assault happened since sports line is only separated from county office by road so anything could have happened" is mere speculation as it is not based on the evidence adduced.

36. He contended that the trial court erred in dismissing his alibi defence.

37. The appellant submitted that the trial magistrate believed the evidence of PW1 who had a clear and manifest grudge against him and had every motive to frame him. He asserted that the trial magistrate conflated issues, introduced new facts not testified to by PW1, misdirected himself and hence reached the wrong conclusion altogether. He referred this court *Victor Mwendwa Mulinge v Republic* [2014] eKLR where it was held that even if the appellant raised the defence of alibi for the first time while in court pursuant to section 309 of the CPC the prosecution could have sought to adduce further evidence in reply to the appellant's defence and *Republic v Philip Ondara Onyancha* [2021] eKLR where it was held that the law on alibi defence is that the accused need not prove his defence. All he needed to do was raise doubt as to the veracity of the prosecution evidence.

38. On the 10th ground, the appellant submitted that he was never informed promptly of the reason for arrest contrary to Article 49 (1)(a)(i) of the *Constitution* 2010 that requires an accused person to be informed promptly in language he/she understands the reason for the arrest.

39. He submitted that contrary to Article 29 he was detained after arrest and denied food throughout the night prior to being arranged in court and that also contrary to Article 28 he was physically and indecently pushed against the wall, squeezed and his genitals fondled in order to extract information by the arresting officer. He cited *Albanus Mutua Lemba v Republic* [2004] eKLR where it was stated that the court must ensure the protection of the society and equally it is the duty of the court to uphold the rights of persons charged with criminal offences, particularly the human rights guaranteed to them under the *constitution*.

40. He also relied on *Republic v Philip Ondara Onyancha*(*supra*) where Lessit J stated that "..we should give every human being their rights as guaranteed in the *constitution* whomever they may be whatever is believed they may have done..."

41. The appellant urged this court to find that he was wrongly accused, charged and convicted.

Respondent's Submissions

42. On the 1st ground the respondent concurred with the judgement of the trial court and submitted that the treatment notes and P3 form confirmed the Complainant sustained lower back and chest pains.

43. On the second ground of the Appeal, the respondent submitted that PW2 evidence squarely placed the Appellant at the scene of the crime and that she was a crucial witness and there was no reason to doubt her credibility.

44. On the third ground of the Appeal, the respondent argued that there is no hard fastened rule as to the number of witnesses the prosecution has to call in order to prove its case against the accused person and it is sufficient for the prosecution to call particular number of witnesses which it may consider material and relevant to the case. The respondent contended that the appellant had not demonstrated that if any specific witness were called, their evidence could alter the trial court's decision.

45. On the fourth ground, the respondent contended that if there were any contradictions as alleged the honourable court ought to make a finding that the same were minor and did not go to the core of the prosecution's case and watered down the credibility of the prosecution case.

46. On the 5th ground, the respondent submitted that the complainant categorically stated that she was kicked by the appellant who was armed with a stick on her back and also on the leg three times. The clinical officer found that the complainant sustained injuries to the neck and back. That whether other injuries were noted by the medical officer is a question of fact dependent on the extent of injuries. Appellant cross examination of the medical officer did not in any way dislodge or discredit the latter's evidence.

47. On the sixth ground, the respondent argued that the trial court considered the evidence of the appellant and his witnesses and found that the same did not discredit the prosecution evidence.

48. On the seventh ground the respondent argued that the appellant was never at any given time put in such a position as to be required to proof innocence.

49. On the 8th ground, the respondent contended that the Appellant's alibi defence was properly dismissed after due consideration. He submitted that the appellant raised his plea of alibi belatedly at an advanced stage of defence hearing. Consequently, the prosecution had no opportunity of going back to reopen its case, with a view of making inquiry and calling evidence in rebuttal of the same. He argued that the general rule is that an alibi should be raised at the earliest opportune time to enable the prosecution to prepare an adequate response to it, otherwise the same ought to be considered as an afterthought.

50. On the 9th ground, the respondent argued that the appellant did not adduce any evidence to prove that there existed a previous grudge between him and the complainant that had a direct bearing on the incident of assault.

51. On the last ground, the respondent argued that the appellant did not demonstrate to the trial court the particular fundamental and constitutional rights which were violated against him and in what material sense the same were violated. It was submitted that the trial against the appellant was regular and he was given all vital information pertaining to his trial in terms of the requirement of the provisions of the *Criminal Procedure Act* and the *Constitution* of Kenya.

Analysis & Determination.

52. As the first appellate court I am guided by the principles laid down in the case of *Okeno v Republic* [1972] EA 32 where the court of Appeal for Eastern Africa stated that:

> " An appellant on a first appeal is entitled to expect the evidence as a whole to be subjected to a fresh and exhaustive examination (*Pandya v R* 1975) E.A. 336 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 (*Shantilal M. Ruwala v R* [1957] E.A. 570). It is not the junction of a first appellate Court merely to scrutinise the evidence to see if there was some evidence to support the lower court's findings and conclusions; 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 v Sunday Post* [1978] E.A. 424)."

53. The issues for determination are:-

    1. Whether the rights of the Appellant provided for under Article 28, 29 & 49 and of the *Constitution* were violated.

2. Whether the prosecution did not connect the Appellant to the offence.

3. Whether there were material and irreconcilable contradictions in the prosecution case.

4. Whether the complainant sustained injuries as a result of the assault

5. Whether the prosecution failed to call crucial witnesses to testify

6. Whether the trial court failed to consider the Appellant's Alibi defence & whether the same created a reasonable doubt in the prosecution's case

7. whether the offence of assault causing actual bodily harm was proved beyond reasonable doubt.

Issue No.1- Whether the rights of the Appellant provided for under Article, 28, 29 & 49 of the *Constitution* were violated

54. The Appellant argued that following his arrest the respondent blatantly violated his rights enshrined under Article 49 (1) (a) (I) of the *Constitution*,2010. This Article expressly provides that an arrested person has a right to be informed promptly, in a language that the person understands of the reason for the arrest.

55. The PW4 denied violating the Appellant's rights. He stated that they introduced themselves to the Appellant and took him to the Police station and that the Appellant did not resist arrest. During the hearing the Appellant told the court that he was arrested when he was talking with his aunt without any explanation. He did not call his aunt who was the only one with him at that particular point as a witness to corroborate this position. It is trite law that he who alleges must prove. (See section 107-109 of the *Evidence Act*). The Appellant did not adduce any evidence to prove that his rights under the above Article were violated.

56. The Appellant also submitted that his rights under Article 29 were violated as he was detained after arrest and denied food throughout the night and that contrary to Article 28 he was physically pushed against the wall and his genitals fondled. No evidence was led in support of this contention.

57. Hence I found that there was no proof that the Appellants rights enshrined under the above articles were infringed.

Issue No.2- Whether the prosecution connected the Appellant to the offence

58. It is the Appellant's position that the prosecution did not connect him to the offence because the Complainant testified that she did not know him and as such the identification parade ought to have been conducted.

59. Identification of the offender is paramount in every offence. It is a fundamental part of the criminal process.

60. It is true that the complainant testified on oath that she did not know the appellant before the incident. She stated 'I did not know the accused before this date' How then could she in the same breath state that when she was kicked she turned round to see it was the accused person? This contradiction could only have been resolved by testimony as to how she had connected her attacker to the accused person whom she said she did not know before the incident.

61. In addition there was no evidence as to how the arresting officers were able to identify the appellant as the person who had attacked the complainant. This is because the complainant did not identify him

for the arrest nor did PW2 who alleged to have seen him beating the complainant. PW4 the police officer told the court that the complainant reported that she had been assaulted by a known person. That the complainant knew him well hence there was no need for an identity parade.

62. Clearly this evidence is contradictory as the complainant is the one who told the court she did not know the accused before the incident. The arresting officer did not state how he identified the appellant for the arrest. It is evident that the trial magistrate did not consider these contradictions when he determined this issue otherwise his decision would have been different.

Issue No.3- Whether there were material and irreconcilable contradictions in the prosecution case

63. It was the Appellant's case that the learned trial magistrate erred in both law and fact in failing to appreciate the glaring contradictions in the evidence by the Prosecution witnesses.

64. Indeed, the record reflects that the prosecution witnesses gave different evidence on the number of issues. PW1 testified that she did not know the accused person while PW3 and PW4 stated that the complainant told them that she knew the accused person well. The appellant submitted that PW1 and PW2 testified that he had a stick which he wanted to hit the complainant with while PW4 confirmed that he was not in possession of any weapon. According to the appellant, PW1 also stated that she reported the incident immediately yet the report was booked at 2.25 p.m. and that there was no explanation for the unreasonable delay. PW1 contradicted herself by stating that she was treated at Kabarnet Referral Hospital and that the P3 was completed there yet the P3 was completed at Kaptimbor Health Centre and the Clinical Officer who testified stated that he filled the P3 at Kaptimbor Health Centre.

65. It is noteworthy that these contradictions were not explained by the prosecution. If the complainant never went to Kaptimbor Health Centre for the filling of the P3 then why did the prosecution call the clinical officer from there to come and testify and produce medical evidence that was already rejected and denied by the complainant? The totality of this is that the prosecution did not have credible evidence to support the alleged injuries inflicted on the complainant.

66. These contradictions further stand out by the fact that the injuries the complainant alleged to have suffered- to back and leg were not the same as those testified to by the Clinical Officer who stated that the person he examined had injuries to lower back and Neck.

67. These contradictions are material as they go to the root of the charge, the ingredients of the offence and the identification of the alleged offender. In *Philip Nzaka Watu v Republic* [2016] eKLR the court stated as follows:

> "However, it must be remembered that when it comes to human recollection, no two witnesses recall exactly the same thing to the minutest detail. Some discrepancies must be expected because human recollection is not infallible and no two people perceive the same phenomena exactly the same way. Indeed as has been recognized in many decisions of this Court, some inconsistency in evidence may signify veracity and honesty, just as unusual uniformity may signal fabrication and coaching of witnesses. Ultimately, whether discrepancies in evidence render it believable or otherwise must turn on the circumstances of each case and the nature and extent of the discrepancies and inconsistencies in question."

68. Further the Court of Appeal of Kenya also addressed itself on the issues of contradictions in *Erick Onyango Ondeng' v Republic* [2014] eKLR held;

> "With regard to contradictions in the prosecution's case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution's case."

69. The Court of Appeal in the case of *Richard Munene v Republic* [2018] eKLR stated as follows;

> "It is a settled principle of law however, that it is not every trifling contradiction or inconsistency in the evidence of the prosecution witness that will be fatal to its case. It is only when such inconsistencies or contradictions are substantial and fundamental to the main issues in question and thus necessarily creates some doubt in the mind of the trial court that an accused person will be entitled to benefit from it."

70. On the strength of the foregoing it is evident that the contradictions as inconsistencies were material to the case for the prosecution and can will be resolved to the benefit of the appellant.

Issue No.4- Issue No.5- Whether the prosecution failed to call crucial witnesses to testify

71. It was the Appellant's case that crucial witnesses who were present at the scene were not availed by the prosecution. According to the Appellant the women who were purportedly at the scene and the cyber attendants where the Complainant purportedly rushed for rescue after the alleged incident ought to have been availed in this case. Indeed these were crucial witnesses who saw the complainant take refuge in their cybercafe and whose broom the appellant is alleged to have picked as a weapon. These are among those allegedly who restrained the appellant from beating the complaint with the weapon. The failure by the police /prosecution to avail these witnesses can only be resolved in favour of the appellant because the court is entitled to draw that conclusion that it is because they would not have supported the case for the prosecution. I say this while alive to the decision in *Sahali Omar vs. Republic* [2017] eKLR [and others] where the Court of Appeal held:

> "The prosecution reserves the right to decide which witness to call. Should it fail to call witnesses otherwise crucial to the case, then the court has the mandate to summon those witnesses. But should the said witnesses fail to testify and the hitherto adduced evidence turns out to be insufficient, only then shall the court draw an adverse inference against the prosecution. This is because the prosecution is not obliged to call a superfluity of witnesses, but only such witnesses as are sufficient to establish the charge beyond any reasonable doubt (see. *Keter v Republic* [2007] 1 EA 135).

Issue No.6- Whether the trial court failed to consider the Appellant's Alibi defence and whether the same created a reasonable doubt in the prosecution's case

72. The appellants raised an alibi defence. In *Kiarie v Republic* [1984] KLR 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 sufficient if an alibi introduces into the mind of a court a doubt that is not unreasonable.

73. In *Athuman Salim Athuman v Republic* [2016] eKLR the Court of Appeal stated as follows:

> " The principle has long been accepted that an accused person who wishes to rely on a defence of alibi must raise it at the earliest opportunity to afford the prosecution an opportunity to investigate the truth or otherwise of the alibi. Way back in 1939 in *R v Sukha Singh S/o Wazir Singh & Others* [1939] 6 EACA 145, the former Court of Appeal for Eastern Africa upheld a decision of the High Court in which it was stated:
>
> "If a person is accused of anything and his defence is an alibi, he should bring forward that alibi as soon as he can because, firstly, if he does not bring it forward until months afterwards there is naturally a doubt as to whether he has not been preparing it in the interval, and secondly, if he brings it forward at the earliest possible moment it will give prosecution an opportunity of inquiring into that alibi and if they are satisfied as to its genuineness proceedings will be stopped".

74. It is evident that the Appellant first raised his alibi defence during defence hearing. However, it is manifest that at no time did the Prosecution seek to avail itself of the benefits of Section 309 of the *Criminal Procedure Code*, which provides that:

> If the accused person adduces evidence in his defence introducing new matter which the advocate for the prosecution could not by the exercise of reasonable diligence have foreseen, the court may allow the advocate for the prosecution to adduce evidence in reply to rebut it.

75. Although the appellant in this case put forth his alibi defence rather late in the trial, the trial court weighed the defence of alibi against the prosecution evidence. It discredited the Appellant's alibi defence on grounds that DW3 & DW4 who stated that the appellant had gone to park the car when he was arrested did not disclose that indeed they were discussing the plot which was at that point and in dispute. However the issue was where the appellant was at 1:00pm when the offence is alleged to have been committed. The appellant clearly stated where he was and two of his witnesses confirmed that they were together at that time.

76. Yes, there are authorities about the time an accused person can raise an alibi. However the letter of the law states that the moment an accused person raises an alibi the prosecution can seek an adjournment to go and bring evidence to challenge it. That is what the law says. My view is that it is upon the prosecution to take advantage of that provision of the law and seek to dislodge the alibi. Whether it is too late in the say can only emerge when the prosecution has sought to dislodge the alibi as provided for by the law. The law recognises that until an accused person is put to his defence he does not have to say anything about his case. So did the Appellant's alibi defence create doubt in the prosecution's case? I say so. The Appellant testified that he was not at the scene at the time the assault allegedly happened. He said he was at the office from morning till 3 p.m. DW2 and DW5 who were his co-employees corroborated this position. The complainant stated that she was assaulted at around 1 pm and her witness PW2 confirmed she witnessed the same.

77. PW4 arrested the Appellant based on the reports made by PW1 and PW2. There were no investigations done.

78. The trial court shifted the burden of proof to the Appellant by holding that "DW3 & DW4 who stated that the appellant had gone to park the car when he was arrested did not disclose that indeed they were discussing about the plot which was at that point and in dispute That this was clearly a contradiction as the issue of the plot was the cause of the fracas. DW3 and DW4 did not tell the court the truth why

they were at the sports line where the land in dispute was." Further this issue had not been raised by the prosecution.

79. There was evidence that the appellant and the complainant were embroiled in a land dispute. The appellant believed that this was a framed up case because of this dispute. The complainant was disingenuous by denying that she knew the Appellant. Noting that there was evidence of previous dispute and said dishonesty by the Complainant, the trial court ought to have found that there was plausible possibility that bad blood between the Appellant and the Complainant was the basis of the prosecution.

80. The alibi defence on record was not challenged by the prosecution. It was cogent and in my view did cast doubt on the prosecution's case.

Issue No. 7- Whether the prosecution proved its case beyond reasonable doubt

81. Section 251 of the *Penal Code* provides that a person who is guilty of the offence of assault occasioning actual bodily harm commits a misdemeanour and is liable to imprisonment for five years.

82. Section 2 of the *Penal Code* defines: -

> " harm" means any bodily hurt, disease or disorder whether permanent or temporary;

83. The essential elements of the offence of assault causing actual bodily harm are;

    i. Assaulted the complainant or victim, which

    ii. Occasioned actual bodily harm. (See the case of *Ndaa v Republic* (*supra*)

84. An assault is any act by which a person intentionally or recklessly causes another to suffer or apprehend immediate unlawful violence. From the circumstances as described by the complainant there is sufficient doubt that things happened as described. There is doubt that the complainant sustained the injuries she claimed. The appellant's alibi was not dislodged. The possibility that he was not the one at that place at that time hangs over the case for the prosecution and that shadow casts sufficient doubt on the case for the prosecution.

85. From the foregoing the appeal succeeds. The conviction is quashed. The sentence is set aside.

86. Right of Appeal 14 days.

87. The appellant's fine be refunded to him if already paid at the expiry of the 14 days.

88. Orders Accordingly

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 28TH MARCH 2023

....

Mumbua T Matheka

Judge

CA Kemboi

For Prosecution Ms Ratemo

For the appellant N/A

Appellant Absent