



**Republic v Omwono & another (Criminal Appeal E031 of 2022)
[2023] KEHC 2392 (KLR) (28 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 2392 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT HOMA BAY
CRIMINAL APPEAL E031 OF 2022
KW KIARIE, J
MARCH 28, 2023**

BETWEEN

REPUBLIC APPELLANT

AND

JOHN OTIENO OMWONO 1ST RESPONDENT

MONICA AUMA OTIENO 2ND RESPONDENT

(From the original conviction and sentence in Criminal case No. 221 of 2020 of the Principal Magistrate's Court at Ndhiwa by Hon. B.W Murangasia – Principal Magistrate))

JUDGMENT

1. John Otieno Omwono and Monica Auma Otieno, the respondents herein, were acquitted in two counts of grievous harm contrary to section 234 of the [Penal code](#).
2. The particulars of the offence were that on June 23, 2020 in North Kanyamwa location Ndhiwa Sub County of Homa Bay County, jointly, unlawfully did grievous harm to Rose Adhiambo Ogutu.
3. In count two the particulars of the offence were that on June 23, 2020 in North Kanyamwa location Ndhiwa Sub County of Homa Bay County, jointly, unlawfully did grievous harm to Moses Ogutu Omwono.
4. The prosecution was aggrieved and appealed against the acquittal order. The following grounds of appeal were raised:
 - a. That the learned trial magistrate erred in law and fact in disregarding the prosecution's evidence.
 - b. That the learned magistrate erred in law and fact in acquitting the respondents on the basis of minor contradictions.



- c. That the learned magistrate erred in law and fact in failing to make a determination on whether the complainants sustained injuries and whether the same were inflicted by the respondents.
 - d. That the learned magistrate erred in law and fact by acquitting the respondents on the basis of unsubstantiated denials.
5. The respondents opposed the appeal through the firm of Everlyne Kuke & Company Advocates. Their grounds of opposition were as follows:
 - a. That the trial court properly evaluated the evidence.
 - b. That the trial court took cognizance of the fact that the parties were involved in criminal case E039 of 2020 where their roles were reversed.
6. This is a first appellate court. As expected, I have analyzed and evaluated afresh all the evidence adduced before the lower court and I have drawn my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses. I will be guided by the celebrated case of *Okeno vs Republic* [1972] EA 32.
7. In order to arrive at a fair decision, the trial magistrate ought to have framed the issues for determination and evaluate them using the evidence on record. His approach of rehashing the evidence may, in some cases lead to hazy appreciation of the facts in issue.
8. The issue for determination before the trial court ought to have been:
 - a. Whether or not the incident complained of took place;
 - b. If it did, who was the aggressor;
 - c. Whether the complainant's were injured as complained; and
 - d. Whether the involvement of the accused was provoked by the action of the complainant's.
9. In this appeal I will attempt to address the above issues as well as the role of the criminal case number E039 of 2020 in this case.
10. There are two versions of the incident. One version was by the prosecution and the other was by the defence.
11. According to the evidence of Rose Adhiambo Ogutu (PW1) the incident's genesis was the throwing of stones on the roof of their house by the children of the accused. After her husband had reported to his brother Richard, he went to the toilet. This is when she saw the first respondent walk towards him with a hoe and a stone. She raised an alarm and her husband walked towards the house. The first respondent hit her husband on the forehead with a stone. The first respondent then hit her with the hoe. She was cut with the hoe and lost a tooth.
12. When the first respondent was attacking them, Monica, the second respondent joined the fray while armed with a piece of wood from a chair. Monica took the hoe and cut her on the head with it twice and she lost consciousness. This evidence was corroborated by Moses Ogutu (PW2)
13. Hillary Omondi (PW3) in his evidence said that the first respondent was the aggressor following an incident of stone throwing on their roof.
14. The second version of the incident was by the respondents. John Otieno Omwono testified that Moses Ogutu, his brother, wanted to beat up his children with a cane. When he enquired what the matter was, Moses pounced on him and knocked him down. He was joined by Rose who held his private



parts. Rose then went to Monica. Their brother Richard went to the scene and he managed to escape and went to hospital.

15. Monica Otieno, the second respondent, testified that she found her husband on the ground where Musa sat on his chest strangling him.
16. Certainly one of the versions was not true. Whereas the respondents portrayed themselves as victims, their version did not offer any explanations to the injuries complained of by the complainants. They had no duty to do so but their defence was displaced by the prosecution evidence on record.
17. The complainants' version that the incident was at their home was supported by the evidence by Kenneth Oluoch (PW5) their neighbour. He was attracted by noises from their neighbour and when he went there, he found Rose lying down while bleeding from the head.
18. From the foregoing analysis of the evidence on record, the prosecution adduced sufficient evidence to prove that the respondents were the aggressors.
19. It was contended that the prosecution failed to call material witnesses. The Court of Appeal in the case of *Bukenya vs Uganda* [1972] EA 549, (Lutta Ag Vice President) held:

"The prosecution must make available all witnesses necessary to establish the truth even if their evidence may be inconsistent.

Where the evidence called is barely adequate, the Court may infer that the evidence of uncalled witnesses would have tended to be adverse to the prosecution."

My perusal of the record does not disclose any material witness who was not called.

20. The medical evidence adduced by Lazarus Okoth (PW4) supported the complainants' evidence on where they received injuries and the gravity of the same.
21. There were minor discrepancies in the prosecution evidence about the incident. No one would expect clinical precision of events in a setting where a criminal activity is taking place. However, if the contradictions go to the core of credibility of witnesses, this becomes material to the case at hand. In the instant case the contradictions were immaterial.
22. The respondents contended that both parties were involved in criminal case number E039 of 2020. This case was merely mentioned in passing and no effort was made to draw a nexus between the two cases. The learned trial magistrate did not have adequate facts about this case so as to reach a conclusion about its role in this case. Equally I do not have sufficient facts to make a finding on it.
23. From the foregoing analysis of the evidence on record is that the acquittal of the respondents was not supported by evidence on record. The evidence on the contrary proved beyond any reasonable doubts that the two respondents committed the offences they are charged with. I therefore set aside the judgment of the trial court and the finding thereof. I substitute it with a finding guilty of on both counts and accordingly convict each one of them of the offences charged therein.

DELIVERED AND SIGNED AT HOMA BAY THIS 28TH DAY OF MARCH, 2023

KIARIE WAWERU KIARIE

JUDGE

