



REPUBLIC OF KENYA



**Republic v Oundo (Criminal Appeal E030 of 2021)
[2023] KEHC 19253 (KLR) (30 June 2023) (Judgment)**

Neutral citation: [2023] KEHC 19253 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUSIA
CRIMINAL APPEAL E030 OF 2021
WM MUSYOKA, J
JUNE 30, 2023**

BETWEEN

REPUBLIC APPELLANT

AND

CHARLES WANDERA OUNDO RESPONDENT

*(Appeal from acquittal by Hon. Lucy Ambasi, Chief Magistrate,
CM, in Busia CMCCRC No. 755 of 2018, of 14th July 2021)*

JUDGMENT

1. The appellant, the Office of the Director of Public Prosecutions, had charged the respondent before the primary court, of the offence of grievous harm, contrary to section 234 of the Penal Code, Cap 63, Laws of Kenya, and of malicious damage to property, contrary to section 339(1) of the *Penal Code*. The particulars of the grievous harm charge were that on May 12, 2018, at Mabale Village, Township Location, within Busia County, he unlawfully did grievous harm to Esther Ombajo. The particulars of the malicious damage charge were that, at the same place and same time, he intentionally and unlawfully damaged a mobile telephone belonging to Esther Ombajo. The respondent denied the charges, on May 15, 2018, and a trial ensued, where 5 witnesses testified.
2. PW1, Esther Ombajo, was the complainant. She described how she visited the respondent, to resolve a land dispute. The 2 exchanged words. The respondent then tried to hit an elder with a rungu, and she raised her hand to block the blow, when her phone, held in that hand, was hit. Thereafter, the respondent hit her with the rungu on her head. PW2, Maxwell Buluma, had accompanied PW1 to the home of the respondent. He explained to the respondent what the issue was. PW1 and the respondent disagreed, and exchanged words. PW1 rose to take a picture of the respondent using her phone, and the respondent hit the phone with a rungu, and thereafter hit PW1 with the rungu. He said that the respondent and PW1 fought. PW3, Dr Edward Kibochi, was the doctor who attended to PW1. He noted a deep cut wound on the scalp, multiple cut wounds on both hands and a fracture of one of



the fingers. He opined that the hit on the head was with a blunt object. He described the injuries on the hands as defensive. He stated that the weapon was probably sharp. PW4, Silvester Awuori Makenya, had been hired by PW1 to plant beacons, but was sent away by the respondent. He said he did not witness the respondent beat PW1. PW5, No 62928 Police Corporal Janarius Abwao, was the investigating officer. He visited PW1 in hospital after the incident, and she gave him a history of assault with a rungu. One of the officers took pictures of PW1 at hospital. The respondent was arrested on orders from the County Commissioner. He said the P3 Form talked of panga cuts. He added that no weapons were recovered from the scene. He stated that he did not investigate the ownership of the damaged phone.

3. The appellant was put on his defence, vide a ruling that was delivered on November 25, 2020. He made a sworn statement, as DW1, and called witnesses. He denied the charges. He said that PW1 stormed his home, and started insulting him. She hit him on the head, and his hat fell off. She then threw herself on him, and he pushed her off, and she fell. When she rose up she tried to hit him with her phone, but he ducked, and the phone fell off and smashed on a wall. He said that she got injured after she hit a wall. DW2, George Otenyo Odeda. He was at the home of the respondent when PW1 and PW2 arrived. PW1 exchanged words with the respondent, then she attacked the respondent. The hat of the respondent fell off, and PW1 sat on him, they struggled, and she attempted to hit the respondent with her phone, but missed and the phone smashed on the wall. He asserted that he did not witness the respondent beat PW1. He said the 2 fought, and PW1 was the one who was beating the respondent. He said that he did not see any injuries on her. DW3, Lydia Isabella Nekesa, was the spouse of the respondent. She saw PW1 come to their home, insult the respondent, and when the hat of the respondent fell, PW1 pushed him to the ground, and fell on him, and the respondent shoved her off, and she hit the wall. She said that her phone was damaged when she tried to hit the respondent with it, and he ducked. She asserted that the respondent did not beat her. PW4, Lucas Okumu, a nephew of the respondent, was within the compound, when PW1 arrived. She insulted the respondent, and slapped him on the face, whereupon his hat fell, and when he bent to pick it up, PW1 jumped on him, and they fell, and the respondent shoved her off, and she hit a wall and fell on stones. When she got up she threw her phone at the respondent, who ducked and the phone hit a wall. He stated that the respondent did not assault PW1.
4. In its judgment, the trial court found the respondent not guilty. It found and held that the respondent and PW1 fought, and should have been charged with affray.
5. The appellant was aggrieved, and brought the instant appeal, founded on several grounds. 3 grounds are listed: the acquittal of the respondent was contrary to the evidence tendered; the defence of self-defence was improperly applied; and extraneous factors were taken into account.
6. The appeal was canvassed by way of written submissions.
7. I have carefully gone through the trial record. What emerges is that it was PW1 who stormed the home of the respondent, there was an exchange of words, and they got into a physical confrontation. What exactly happened is not clear, for both sides gave very divergent narratives. PW1 was saying she was attacked with a rungu, the respondent said PW1 attacked him, and she got injured, when he threw her off. What I find intriguing are the very serious injuries that the P3 Form, supported by the pictures, placed on record, reflected as suffered by her. Are they consistent with hitting or falling on a wall? There are cut wounds. She was said to have also fallen on stones. No one described the wall that she hit, nor the stones on which she fell, to assess whether they could have caused the injuries reflected in the P3 Form and the pictures. No one described the rungu that was allegedly used to hit her. Could it have inflicted cut wound injuries?



8. I am not satisfied that the prosecution presented a coherent case. The weapon that PW1 and PW2 alleged was used, could not have caused the injuries indicated in the P3 Form. Indeed, the details of the report made to the police, according to the P3 Form, is that PW1 was assaulted and sustained panga cuts. PW2 suggested that the respondent and PW1 fought. Although PW1 talked of getting injured while blocking a rungu blow aimed at PW2, PW2 did not allude to any attempt by the respondent to attack him. His testimony only focused on the altercation between the respondent and PW1. Secondly, it is curious that the respondent would seek to attack an elder with whom he had no dispute. I understand that piece of evidence as an attempt by PW1 to deflate focus away from her as the trouble-maker. The evidence on how PW1 sustained her injuries was not handled well. Given that background, I would understand why the trial court found it hard to convict. Indeed, it would have been more prudent to charge the respondent and PW1 of affray, rather than charging only one of the 2 combatants. It would appear that PW1 emerged the worst of wear between the 2, but that of itself was not adequate to sustain a charge of causing grievous harm, when the material on record pointed more towards affray. It is not a matter of who sustained the more serious injuries, in the course of an affray, that should guide the prosecution in deciding which offence to charge, between affray and causing grievous harm, where the evidence points to a fight, rather than an assault.
9. The appeal appears to be limited to the matter of the acquittal on the grievous harm charge, and is silent on the acquittal on the charge of malicious damage to property. I shall, therefore, not dwell on it.
10. Overall, I find no merit in the appeal. I accordingly dismiss it. I hereby affirm the acquittal. Orders accordingly.

JUDGMENT DELIVERED, DATED AND SIGNED IN OPEN COURT AT BUSIA THIS 30TH DAY OF JUNE 2023

W MUSYOKA

JUDGE

Mr. Arthur Etyang, Court Assistant.

Appearances

Mr. Mayaba, instructed by the Director of Public Prosecutions, for the appellant.

Mr. Okeyo, instructed by Okeyo Ochiel & Company, Advocates for the respondent.

