



**Makasu v Republic (Criminal Appeal 128 of 2019)  
[2023] KEHC 23099 (KLR) (29 September 2023) (Judgment)**

Neutral citation: [2023] KEHC 23099 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAKAMEGA  
CRIMINAL APPEAL 128 OF 2019  
SC CHIRCHIR, J  
SEPTEMBER 29, 2023**

**BETWEEN**

**FELIX MAKASU ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**JUDGMENT**

1. On 29/10/2018, Felix Makaso (Appellant) was charged with assault causing actual bodily harm contrary to Section 251 of the penal code. The particulars were that on the 22nd day of October 2018, at Ilesi centre Mutonye sub-location Kesi location in Kakamega East sub-county withing Kakamega county, jointly with others not before court unlawfully assaulted Francis Mikavale thereby occasioning him actual bodily harm. After a full trial, he was convicted and fined Ksh.20,000, and in default, imprisonment of 6 months.

**The Appeal**

2. Aggrieved by the outcome, the Appellant proffered this Appeal on both the conviction and sentence and set out the following grounds:
  1. That the learned Trial Magistrate erred in fact and law in convicting the Appellant when the prosecution evidence was characterized by material contradictions.
  2. That the learned Magistrate erred in law and fact in convicting the Appellant when the prosecution had not proved their case on the required standards.
  3. That the learned Magistrate erred in law and fact in failing to properly analyze the evidence as adduced in court thereby convicting the Appellant hence prejudicing the Appellant’s Rights
  4. That the learned magistrate erred in fact and in law in convicting the Appellant against the weight of evidence on record.



5. That the learned magistrate erred in fact and law in convicting the Appellant without due regard and addressing itself to the whereabouts of the other suspects that are mentioned on record.
6. That the learned magistrate erred in fact and law in rejecting the evidence of the Appellant.
3. The Appeal proceeded by way of written submissions.

#### **Appellant's submissions:**

4. It is the Appellant's submission that there was no proof that the complainant was assaulted as there was no mention as to what part of the complainant's body was injured; that the evidence of PW3, the clinical officer, did not indicate where the complainant was injured.
5. It is further submitted that there was contradiction on the complainant's testimony as to the number of people who assaulted him.
6. The Appellant further contends that the complainant's testimony to the effect that the Appellant used a stick and not a panga which he allegedly had was not plausible, as the alleged stick could not have been necessary when he already had a more a "serious" weapon; that it would have been more natural of him to use the panga than going around looking for a stick.
7. The Appellant further submits that as regards PW2, this witness's own admission that his testimony in court was at variance with his statement to the police, should have sufficed for purposes of establishing that fact, and that the trial court's insistence that the said statement should have been introduced in evidence as proof of the alleged variance, was erroneous.
8. The Appellant further submits that the weapon of assault was not produced, and this omission, he contends, was fatal.
9. It is finally submitted that the charges against the appellant were motivated by a feud between the complainant and the Appellant's father.

#### **Respondent's submissions**

10. The Respondent while citing the various arguments on what constitutes assault submits that, the charge was proved.
11. It is further submitted that the P3 form produced indicated the injuries suffered by the complainant.
12. That there was positive identification of the Appellant as the perpetrator.
13. It is further argued that the prosecution's evidence was consistent, cogent and corroborated and that the Appellant's defence was a mere denial.
14. It is the Respondent's final submission that the sentence passed by the trial was lenient and this court should not interfere with it therefore.

#### **Summary of the Evidence**

15. PW1 was the complainant. He told the court that on his way to a shop, he met the Appellant cutting a tree which he, the complainant, had planted. The Appellant confronted and threatened to kill him. He used the panga to cut a stick, which stick he used to beat the complainant. The Appellant was then joined by others. The complainant screamed and the screams attracted the complainant's wife and one other person. The attackers fled on seeing the two people.



16. At cross-examination, the witness told the court that there had been a long-standing dispute between him and the Appellant's father, who is his brother. That Japheth (PW2) was at his house at the time of the attack. that the Appellant and his co-attackers left some items at the scene.
17. PW2 told the court that he was in the complainant's house on the material day. That the complainant's left the house to go to the market. Shortly after the complainant left, he heard screams. He ran towards where the direction of the screams. He found the complainant was on the ground and the accused was one of those who were beating him. That the accused and the others ran away.
18. At cross-examination, he stated that he was at PW1's home and not ilesi centre.
19. PW3, was the clinical officer from Shinyalu model health Centre. He told the court that on examination, the complainant was found to have sustained a swelling on the lower lip, pain on both cheeks and pain on the abdomen.
20. On being put on his defence, the Appellant opted to give a sworn testimony. He denied assaulting the Appellant. He told the court that on the material day, his father instructed him to cut down a tree and while doing so, the complainant and another person came by. The complainant accused him of cutting down the tree; That his father and the complainant have had disagreement. On cross-examination he told the court that the complainant was his uncle and that the complainant is the one who assaulted him first.

### **Determination**

21. I have considered the evidence on record, the memorandum of appeal and the rival submissions. This is a first Appeal, and the role of this court is to relook at the evidence afresh, re-evaluate it and make its own conclusion in respect thereof. This court must also bear in mind, that the trial court had the benefit of hearing and seeing the witnesses first-hand ( see Abok James Odera & Associates vs John patrick Majira t/a Machira & Co Advocates)
22. The only issue for determination is whether the offence of an assault causing actual bodily harm was proved.
23. In the case of Ndaa .vs. Republic (1985) eKLR the offence of assault causing bodily harm carries two ingredients, namely:
  - a. Assaulting the complainant or victim and
  - b. Secondly, causing actual bodily harm.
24. It is the Appellant's case that there was no assault as there was no evidence of any bodily injury. However, the evidence of PW3 and the p3 from (P Exb 2) show that the complainant had swollen lower lip, tenderness on both cheeks and tenderness on the abdomen. In paragraph 3 of page 2 of the P3 form, the probable type of weapon are described as "kicks and fists".

Thus, there is evidence that the complainant suffered some bodily injury.
25. The Appellant also placed himself on the scene. He admitted that he was in confrontation with the complainant. Indeed, despite his earlier denials he indirectly admitted to the offence by stating that "he was the one who assaulted me first". There would have been no "first assault" if it was not followed by a "second". In other words, there would only have been an "assault "without the qualification offered by the Appellant.



26. The Appellant also faulted the trial court for convicting the Appellant without addressing itself to the whereabouts of the other suspects. The presence or absence of other suspects was immaterial to the Appellant's conviction. There is no requirement that all the suspects must be charged to sustain a conviction. This complain is without any legal basis and I reject it outrightly.
27. As to the identity of the perpetrator, from their testimonies the Appellant and the complainant are relatives, hence they knew each other well
28. The Appellant has raised the issue of contradiction in the complainant's testimony, regarding the number of attackers. Contradictions and inconsistencies are of no consequence unless they materially affect the prosecution's case or point to a deliberately act of untruthfulness on the part of the witness. ( See Eric Onyango vs Republic (2014)e KLR)  
  
As to whether there were 2,3, or 4 other persons in the company of the Appellant in my view does not go into the core of the assault, and there was nothing to indicate that the complainant was a deliberate liar.
29. The final complain by the Appellant is that his defence was not considered His defence was that he did not assault the complainant and that he is the one who was the victim. As earlier printed out, the Appellant told the court that he was assaulted first (emphasis added), meaning that the "2nd" was by way of retaliation, if he is to be believed. However, if he was a victim of assault too, there was no medical evidence. There is evidence that the complainant was injured, and by the Appellant's own admission, he was in confrontation with the complainant.
30. The Appellant was properly convicted, and the Appeal is devoid of merit.
31. There was no appeal against the sentence. It suffices however to state that as pointed out by the Respondent, the Appellant escaped with a lenient sentence. I have no reason to disturb it.
32. In a nutshell, the entire appeal fails and it is hereby dismissed.

**DATED, SIGNED AND DELIVERED IN AN OPEN COURT AT KAKAMEGA THIS 29TH DAY OF SEPTEMBER 2023.**

**S.CHIRCHIR**

**JUDGE**

In the presence of:

E. Zalo- Court Assistant.

Mr. Mukavale for the Appellant

Ms Osoro for the Respondent

