



**Elisha v Republic (Criminal Appeal E013 of 2023)  
[2023] KEHC 24416 (KLR) (30 October 2023) (Judgment)**

Neutral citation: [2023] KEHC 24416 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MALINDI  
CRIMINAL APPEAL E013 OF 2023  
DKN MAGARE, J  
OCTOBER 30, 2023**

**BETWEEN**

**CLARIS KUPATA ELISHA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**JUDGMENT**

1. The Appeal is based on events that though unfortunate as the evidence will show, never happened. The Appellant was charged with 2 Counts of assault causing actual bodily harm and using abusive words. The two are set offences are said to have occurred at Bondora area in Bodoni. The person assaulted was the area Chief. This was in the presence of Senior Sub County Officials.
2. The abusive words used were “wewe ni mjinga, mwizi mkumbwa, mtu wa kudhulumu watu. These words were said were meant with interior to provoke breached peace. I will start with the second counts. The words translated mean
  - i. You area a fool.
  - ii. A thief.
  - iii. An oppressor.
3. These are not insulting words. They are descriptive of a character. Insults have no meaning. However, calling someone a land grabber, a thief and an oppressor, is to utter adjectives meant to describe the character of that person. If the words are not true they become libel and slander and are capable of being litigated in a civil court.
4. This being the first Appellate Court, I am duty bound to re-evaluate, re-assess and re-analyze evidence adduced before the trial Court bearing in mind I had no opportunity of seeing and hearing witnesses who testified at trial then come up with my own conclusions. (See Okeno vs. Republic (1972) EA 32).



5. The duty of the first appellate court remains as set out in the Court of Appeal for Eastern Africa in *Pandya -vs- Republic* [1957] EA 336 is as follows:-

“On a first appeal from a conviction by a Judge or magistrate sitting without a jury the appellant is entitled to have the appellate court’s own consideration and views of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the witnesses before the Judge or magistrate with such other material as it may have decided to admit. The appellate court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises which witness is to be believed rather than another and that question turns on manner and demeanor, the appellate court must be guided by the impression made on the Judge or magistrate who saw the witness but there may be other circumstances, quite apart from manner and demeanor which may show whether a statement is credible or not which may warrant a court differing from the Judge or magistrate even on a question of fact turning on the credibility of witnesses whom the appellate court has not seen.”

6. To prove the offence the Appellant faced the Prosecution was required to prove that:

- a. The Appellant was at a public place.
- b. He used abusive words as against the Complainant.
- c. He acted with an intent to provoke a breach of the peace.

7. The Penal Code defines public place as:

“public place” or “public premises” includes any public way and any building, place or conveyance to which, for the time being, the public are entitled or permitted to have access either without any condition or upon condition of making any payment, and any building or place which is for the time being used for any public or religious meetings or assembly or as an open court;”

8. The *Interpretation and General Provisions Act* defines a public place as:

“public place” includes every place to which the public are entitled or permitted to have access whether on payment or otherwise;”

9. It is not necessary to go into whether these words were uttered as they are not insults but defamatory words in nature. The prosecution wasted enormous resources prosecuting what is an essentially civil remedy. Secondly, the offence of breach of peace must be committed in a public place. The charge sheet does not describe whether there were person Public space, who could have been merited.

10. Though this was in a public building, this was in a controlled meeting where a case was being informally handled. This was not a public space where other members of the public could enter. Consequently, I need not say more. The charge offensive conduct was not proved.

11. The conduct was not directed to the public built a single person, who in the estimation of the accused was a fool. This is assessment of character. The person was a thief and an oppressor.



12. The last bit at least has been shown by the use of public resources in vain. Pursuant of a lady who was claiming for her husband's rights. In Phillip Nzaka Watu vs. Republic (2016) Eklr, the Court of Appeal stated that:
 

“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 (2) 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 rendered it believable or otherwise must turn on the circumstances of each case and the nature and extent of the discrepancies and consistencies in question.”
13. I noted that these words were never recollected by anyone else other than the chief, the complainant. It could not have been by coincidence. It never happened.
14. In John Ochieng Ogira v Republic [2022] eKLR, the court, Kiarie Waweru Kiarie stated as doth: -
 

“The evidence of these two witnesses is contradictory as to where, the complained of incident took place and what transpired just before the alleged incident. The Court of Appeal in the case of Ndungu Kimanyi vs. Republic [1979] KLR 283(Madan, Miller and Potter JJA) held:  
The witness in a criminal case upon whose evidence it is proposed to rely should not create an impression in the mind of the court that he is not a straightforward person, or raise a suspicion about his trustworthiness, or do (or say) something which indicates that he is a person of doubtful integrity, and therefore an unreliable witness which makes it unsafe to accept his evidence.
15. I, abhor the tendency to use criminal justice system to deal with matters essentially defamatory. A man must be able to protect his character, if any without the aid of state power. then allow the appeal on Count 2. The court should have dismissed the Court under Section 89 (5).
16. The 1<sup>st</sup> Count is that on 4/6/2021 the appellant assaulted the Chief Carlos Matsaki Mtsong cautionary have actual bodily harm. I note that the evidence of the chief at page 5, he was already based and found opinion that he hands belonged to Lucy Nyaki, the person who was pitied against the Appellants husband. He introduced the parties but failed to introduce the appellant despite knowing that she was a stakeholder.
17. He stated that he was boxed on the left thigh and left shoulder. He stated that having took away the stock. however, in chief he intended that the appellant gave him a blow and kick at the back of the thigh and boxed on the left shoulder.
18. In her submission the Appellant called this a cock and bull story. From the narrative, the words used by the plaintiff have started ringing something. The complainant took us for a ride. He wanted the court to believe, and the court did do so that a civilian came, that the chief, with a kick, without using a stick she had had and he just did nothing, thus the land officer called off the meeting?
19. PW2 gave a different story. In the strong by Salim Konde, it is not Hamisi who took away the stick but the Appellant threw his away. The true intention was that PW1, the complainant appeared to have been hedging of against the Appellant and is fair of the recently widowed Luck Nyaki. It turned out that PW1 did not in fact introduced Juma, the Appellants husband to the national Land Commission



officials, effectively setting stage for ex parte proceedings and eventual award of land to Lucy Nyake with attendant at Joy of the complaint.

20. The report by PW3 appeared more real except the Kick story. The appellant was simply descending that the complainant being ceased should be kicked.
21. The clinical officer indicated that the plaintiff had a taller shoulder and hip. The accused was allegedly treated on 4/6/2021. There were 2 neutral people in the scene who could have said the truth, the Land officer and the 2 police officers, who are not affiliated to either side. They were not called. Though there is no number of witnesses required to prove a fact there two officers reportedly witnessed an assault.
22. Instead of being called, the prosecution opted to call witnesses who were parties, working in the chief's office. They are not expected to contradict the chief, though they did.
23. The appellant gave her version of the story. She agreed that she was not introduced in a dispute she was involved in. They had been on the land for 37 years. The matter was later taken to court. The prosecutor objected to the issue of questioning. The prosecutor has no right to direct what evidence the defence leads in support of their case. She denied assault. She admitted complaining that the chief had left her. The chief told her to shut up. She did not get close to the chief because of security. She did not use abusive words. The parties had been in a land dispute for over a year. The same prosecutor who objected to the issue of land ownership cross examined on – pray land ownership. DW2 testified.
24. He recalled the events of the day and the chief introduced everyone except the applicant. The Chief appeared to have been under a false sense of self-importance and sabotaged a meeting and fixed the Appellant.
25. I do not for a moment believe that the chief was assaulted in presence of police officers and nothing was done. The chief waited to bulldoze the meeting and probably harass the appellant because he was seen as helpless. It was malicious on part of the chief to condone a story of this nature. I pity officers who are used to write P3 for nonexistent injuries. The court was wrong in finding the charge as proved.
26. This was basically a case of trumped up charges after the appellant had her way in the lands meeting. There was no evidence of the assault. I am surprised that doctors could write anything they wish to write and hope the courts will swallow the same.
27. In *Maina Thiongo v Republic* [2017] eKLR, Justice Ngũgũ Julius stated as follows: -

“It follows that failure to call an expert whose report was not only the foundation of the charge against the appellant but was also the basis of the appellant's conviction was a blatant and serious miscarriage of justice; it was a miscarriage of justice because first, by concluding the trial without the evidence of the expert the court deprived itself of the opportunity to interrogate and satisfy itself of his opinion and, second, the appellant was also denied the opportunity to test the accuracy of the expert's opinion by way of cross-examination.

Section 48 of the *Evidence Act*, Cap 80 under which opinion of experts is catered for contemplates that the expert must testify; that section provides as follows:

48. Opinions of experts

- (1) When the court has to form an opinion upon a point of foreign law, or of science or art, or as to identity or genuineness of handwriting or finger or other impressions, opinions upon that point are admissible if made by persons specially skilled in such foreign law, science or art, or in questions as to identity, or genuineness of handwriting or fingerprint or other impressions.



(2) Such persons are called experts.

The application of this provision of the law was explained by the Court of Appeal in *Mutonyi versus Republic* (1982) KLR 203 at 210 where Potter JA said:

Expert evidence is evidence given by a person skilled and experienced in some professional or special sphere of knowledge of the conclusions he has reached on the basis of his knowledge, from facts reported to him or discovered by him by tests, measurements and the like.

Section 48 of the *Evidence Act* (Cap 80) provides that where, inter alia, the court has to form an opinion upon a point “of science, art, or as to identity or genuineness of handwriting or finger or other impressions”, opinions on that point are admissible if made by persons “specialist skilled” in such matters.

In *Cross on Evidence* 5<sup>th</sup> edition at page 446, the following passage from the judgement of President Cooper in *Davie versus Edinburgh magistrates* (1933) SC 34,40, as scenting the functions of expert witnesses:

“Their duty is to furnish the judge or jury with the necessary scientific criteria for testing the accuracy of their conclusions, so as to enable the judge or jury to form their own independent judgement by the application of these criteria to the facts put in evidence.”

So, an expert witness who hopes to carry weight in a court of law, must, before giving his expert opinion:

1. Establish by evidence that he is specially skilled in his science or art.
2. Instruct the court in the criteria of his science or art, so that the court may itself test the accuracy of his opinion and also form its own independent opinion by applying these criteria to the facts proved.
3. Give evidence of the facts on which may be facts ascertained by him or facts reported to him by another witness.”

28. In other words, expert evidence is to be seen from the context of all the other evidence. It is not enough to turn up and say this is what I find. Is there a scientific way or evidential way, we can triangulate and establish the evidence?

29. In the case of *Kagina v Kagina & 2 others* (Civil Appeal 21 of 2017) [2021] KECA 242 (KLR) (3 December 2021) (Judgment), the court of Appeal, RN NAMBUYE, W KARANJA & AK MURGOR, JJA, stated as doth: -

“Also taken into consideration among numerous others is the case of *Stephen Kinini Wang'ondu vs. The Ark Limited* [2016] eKLR from which the Judge drew out four tests to be applied by a court when considering admission and acting on expert evidence as more particularly set out in the ruling and which we also find prudent not to rehash and expressed himself thereon, inter alia, as follows: “In my view its correct to state that a court may find that an expert’s opinion is based on illogical or even irrational reasoning and reject it. A judge may give little weight to an expert’s testimony where he finds the expert’s reasoning speculative or manifestly illogical. Where a court finds that the evidence of an expert witness is so internally contradictory as to be unreliable, the court may reject that evidence and make its decision on the remainder of the evidence.



The expert's process of reasoning must therefore be clearly identified so as to enable a court to choose which of competing hypotheses is the more probable. It is a trite principle of evidence that the opinion of an expert, whatever the field of expertise, is worthless unless founded upon a sub-stratum of facts which are proved, exclusive of the evidence of the expert, to the satisfaction of the court according to the appropriate standard of proof. The importance of proving the facts underlying an opinion is that the absence of such evidence deprives the court "of an important opportunity of testing the validity of process by which the opinion was formed, and substantially reduces the value and cogency of the opinion evidence." An expert report is therefore only as good as the assumptions on which it is based.

An expert gives an opinion based on facts. Because of that, the expert must either prove by admissible means the facts on which the opinion is based, or state explicitly the assumptions as to fact on which the opinion is based. "

30. The more I read the record the more, I find that the so called medical evidence was nothing more than jot lines from a person with dubious qualifications. It is surprising for someone to go to hospital just to do a report and not to be treated.
31. The charge of assault was equally not proved. The surrounding circumstances are hazy and there is no explanation why the neutral witnesses who were there never testified. In the absence of such witnesses, the trial was a sham choreographed by the complainant to throw around his weight.
32. Consequently, I find and hold that the conviction ought to be set aside as it is not based on found evidence.

#### **Determination**

33. In the circumstances I make the following orders: -
  - i. I allow the appeal wholly. I therefore set aside both the conviction and sentence. On both counts and set her free unless lawfully held.
  - ii. Given that Appellant has already paid time, she should be refunded her fine in full.

**DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 30<sup>TH</sup> DAY OF OCTOBER, 2023.  
JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

**KIZITO MAGARE**

**JUDGE\_**

**In the presence of:-**

Miss Mutua for ODPP

Accused absent

Court Assistant - Brian

