



**Otieno v Republic (Criminal Appeal E012 of 2023)
[2023] KEHC 27151 (KLR) (21 December 2023) (Judgment)**

Neutral citation: [2023] KEHC 27151 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CRIMINAL APPEAL E012 OF 2023
RE ABURILI, J
DECEMBER 21, 2023**

BETWEEN

NIXON SAMBA OMUMBO OTIENO APPELLANT

AND

REPUBLIC RESPONDENT

*(An appeal against the conviction and sentence by the Hon. R.M. Oanda on the 28.3.2023
in the Principal Magistrate's Court in Winam in Criminal Case No. 989 of 2022)*

JUDGMENT

Introduction

1. The appellant herein Nixon Samba Omumbo Otieno was charged and convicted of the offence of assault causing actual bodily harm contrary to section 251 of the [Penal Code](#) and sentenced to pay a fine of Kshs 15,000 or in default serve a term of one-year imprisonment.
2. The particulars of the offence were that on the 5th day of November 2019 at Mamboleo Market in Kajulu West location in Kisumu East sub county within Kisumu County, the appellant unlawfully assaulted one Stephen Omondi Pande thereby occasioning him actual bodily harm.
3. The appellant was aggrieved by the conviction and the sentence. He filed the instant appeal vide a petition of appeal dated 3rd April 2023 on the following grounds:
 - i. That the trial court recorded the findings and observations in the impugned judgement and order contrary and against the principles laid down by statutory provisions and by the Apex courts and thus erred by misrepresenting facts presented before it.
 - ii. The trial court relied solely on the evidence submitted by the prosecution witnesses who were compromised and deliberately provided misleading information.



- iii. The trial court denied the appellant justice and a fair hearing and contravened his constitutional rights.
 - iv. That the inferences drawn, reasons assigned and conclusions arrived at by the trial magistrate were not only bad in law and improper on facts but were not sustainable on the principles of equity and good conscience and thus impugned the judgement of conviction and sentence.
4. The parties agreed to dispose of the appeal by way of written submissions.

The Appellant's Submissions

5. The appellant submitted that the prosecution failed to prove its case beyond reasonable doubt.
6. It was further submitted that the complainants through evidence was unable to explain why he decided to come and collect rent on the 5/11/2019 at 6. 30p.m when there was in existent a Short Term Lease Agreement which not only provided in explicitly terms, for payment and collection of the lease fee on the 31st March 2019 but also provided that in the event of a default, notice in writing would be issued by the landowner to the Appellant requiring him to remedy the default in payment. That No such written notice was however presented by the prosecution and that it was more than likely that the Complainant was impaired by alcohol at the time of the incident as he had rightfully submitted before the trial court, a fact that the Police and the trial magistrate, intentionally failed to document so as to muddy the water around the issue of actual assault and harm.
7. The appellant submitted that under section 26(1) of the Kisumu County *Alcoholic Drinks Control Act*, No. 5 of 2014 and section 22(1) of the *Alcoholic Drinks Control Act* No. 4 of 2010 Laws of Kenya as a licensee of an alcoholic establishment, he was allowed to chase away, as he rightfully did under the law, the complainant, from his bar, as he was completely drunk and disorderly.
8. It was submitted that no medical evidence in form of a medical report, receipts, x-rays or other forms of imaging, to establish the extent of the injuries and the nexus between the appellant and the injuries was ever presented to justify the charge of assault causing harm. Reliance was placed on the Court of Appeal case of *Stephen Maina Kiama v Republic* Mombasa Criminal Appeal No. 215 of 1986, where it was held that in a criminal case, the obligation is to establish by evidence the ingredients of an offence beyond reasonable doubt.
9. It was submitted that only in the rare case of public interest litigation can the offence of assault be prosecuted without medical evidence and that this was not one of the said cases as the P3 form as presented did not show any causal link between the appellant and the alleged injuries sustained. The appellant submitted that the injuries, if any, and assault were more than likely, occasioned to the Complainant while in his drunken state, somewhere else.
10. The appellant thus submitted that the gross mis-conduct and misdemeanor of the PW1, PW2 and PW3 eroded their personal integrity and honesty and that any testimony and evidence provided thereof lacks merit and credibility and must be dismissed in entirety. That the trial magistrate conveniently chose to ignore these abnormalities.
11. He urged the court to quash the conviction and set aside the sentence imposed on him.

The Respondent's Submissions

12. The respondent submitted that it proved its case that the complainant was assaulted by the appellant, which assault resulted in actual bodily harm as was evident from the P3 form adduced as PEX1.



13. It was submitted that the evidence tendered by the prosecution that the appellant assaulted and caused actual bodily harm or injury to the complainant was not controverted by the appellant as the defence was a mere denial.
14. The respondent submitted that the conviction was well founded on evidence and as such this court ought to uphold the appellant's conviction and sentence.

Role of the Court

15. As first appellate court; I am obliged to re-evaluate the evidence afresh and arrive at own my independent conclusions. I am however reminded to bear in mind that I neither saw nor heard the witnesses and give due regard for that. See *Okeno v R.* (1972) EA 32.

Evidence at the Trial Court

16. The case for the prosecution was as follows; PW1, the complainant testified that on the 5.11.2019 at around 1830 hrs he was in Mamboleo and went to look for his tenant the appellant herein to collect rent, and that upon the appellant herein seeing the complainant, the appellant punched the complainant's mouth and chest and pushed him out of the gate thus causing him injuries. PW1 testified that he reported the matter at Mamboleo Police Station then he went to hospital.
17. In cross-examination, PW1 stated that he was not drunk and that the appellant was the only one who beat him up. He denied trying to extort the appellant and stated that prior to the incident, he never had a problem with him.
18. PW2, No 67282 Corporal Mohamed Kipkorir a police officer at Mamboleo Police Station testified that on the material day at 1930 hrs, the complainant made a report that he had been assaulted by a person known to him so they issued the complainant with a P3 form. He testified that he called the appellant to avail himself and the appellant complied and they booked him.
19. In cross-examination, PW2 stated that the complainant had injuries on the face which was swollen, chest and right hip. He testified that the complainant was not drunk at the time.
20. PW3, Philip Kilimo, the clinical officer who examined the complainant on the 6.11.2019 and filled the P3 form testified that the complainant sustained injuries of tenderness on the right cheek, swollen upper lips with a bruise, tenderness on the right chest. He testified that the injuries were a day old and seemed to be caused by a blunt object. It was his testimony that on the day of the examination, the complainant was sober. PW3 produced the P3 form as PEX1. In cross-examination, PW3 stated that the complainant was hit severally.
21. The appellant testified as DW1 that he owned a bar in Mamboleo and that on the material day, he was called by his employees that the complainant was drunk and being abusive to the staff and so when he arrived at the bar, he found the complainant drunk and escorted him out of the bar and out of the gate. He denied fighting or assaulting the complainant.
22. DW2, Yasmin Mutuku testified that on the material day, the complainant arrived at the bar while drunk and was served with liquor worth Kshs 150 but refused to pay saying that the same should be recovered from the rent. He testified that he called his boss who came and released him. In cross-examination, DW2 stated that the appellant pushed out the complainant.



Analysis and Determination

23. I have considered the grounds of appeal and the submissions by the appellant and the prosecution counsel against, as well as the evidence adduced before the trial court. The issue is whether the prosecution proved its case against the appellant beyond reasonable doubt and whether the sentence imposed was lawful or was manifestly excessive and harsh.
24. The offence of assault causing actual bodily harm is created under Section 251 of the [Penal Code](#) as follows:
- Any person who commits an assault occasioning actual bodily harm is guilty of a misdemeanour and is liable to imprisonment for five years.
25. The essential elements of the offence assault causing actual bodily harm are;
- i. Assaulting the complainant or victim,
 - ii. Occasioning actual bodily harm.
26. See the case of [Ndaa v Republic](#) [1984] KLR
27. I have carefully evaluated the evidence adduced by the prosecution witnesses. The appellant was known to the complainant; his identification was by recognition. He was positively identified as the person who assaulted the complainant. This was at 6.30pm.
28. Of actual bodily hurt or injury, in *Rex v Donovan* [1934] 2KB 498, Swift J stated:-
- “For this purpose, we think that "bodily harm" has its ordinary meaning and includes any hurt or injury calculated to interfere with the health or comfort of the complainant. Such hurt or injury need not be permanent, but must, no doubt, be more than merely transient and trifling.”
29. See also *R v Chan-Fook* [1994] 2 ALL ER 557 paragraph D Lord Hobhouse LJ stated that:
- “We consider that the same is true of the phrase "actual bodily harm". These are three words of the English language that receive no elaboration and in the ordinary course should not receive any. The word "harm" is a synonym for injury. The word "actual" indicates that the injury (although there is no need for it to be permanent) should not be so trivial as to be wholly insignificant.”
30. Also relevant is a passage in [Archbold's Criminal Pleading, Evidence and Practice](#) 32nd Edition, Page 959 where it is stated as follows: -
- “Actual bodily harm includes any hurt or injury calculated to interfere with the health or comfort of the prosecutor” (i.e. complainant)
31. The prosecution must, therefore, show 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 resus).
32. The complainant testified that the appellant punched him leading to the injuries he sustained. PW2 similarly testified that he saw the complainant with injuries when he went to make the report of the assault.



33. The defence offered by the appellant was that he only escorted the complainant out of the gate. The appellant denied assaulting the complainant or attacking him and instead stated that he escorted him out of the gate when he found him disturbing staff at the bar. However, DW2, his employee contradicted the appellant and stated that the complainant was pushed out of the premises by the appellant. The appellant claimed that the complainant was drunk and unruly but there was no evidence of the complainant being intoxicated. the complainant went straight to the police station to report the incident and the police saw him with injuries involving swollen face. They issued him with the P3 form which he took to hospital.
34. The appellant herein made many claims that there was some collusion between the complainant, PW2, Clinical Officer who originally testified as PW3 and the trial magistrate however he has not provided any proof of the same.
35. The appellant further raised issue, in his petition of appeal, with the instant case being handled by two different courts. However, the trial court record reveals that it was upon the appellant's own instigation via his application for the initial magistrate to recuse himself that the matter was transferred to Court 2.
36. The evidence tendered by the prosecution that the appellant assaulted and caused actual bodily harm or injury to the complainant was watertight and was never shaken even during cross examination. I find that the evidence tendered by the prosecution witnesses proved beyond reasonable doubt that the appellant is the person who assaulted the complainant and occasioned him actual bodily harm.
37. I find and hold that the conviction of the appellant was sound I uphold it and dismiss his appeal against conviction.
38. There was no ground of appeal against sentence, which was lenient. The appellant paid the fine of Kshs 8,000 out of the Kshs 15,000 imposed, taking into account the number of days he was in prison after conviction and sentence. I shall not interfere with the same.
39. The conviction of the appellant and the sentence imposed are upheld.
40. The lower court to be returned forthwith.
41. This file is closed.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 21ST DAY OF DECEMBER, 2023

R.E. ABURILI

JUDGE

