



REPUBLIC OF KENYA



**Republic v Siliwa & another (Criminal Appeal E009 of 2019)  
[2023] KEHC 27097 (KLR) (19 December 2023) (Judgment)**

Neutral citation: [2023] KEHC 27097 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT BUNGOMA  
CRIMINAL APPEAL E009 OF 2019  
DK KEMEL, J  
DECEMBER 19, 2023**

**BETWEEN**

**REPUBLIC ..... APPELLANT**

**AND**

**MAURICE SILIWA ..... 1<sup>ST</sup> RESPONDENT**

**PIUS SILIWA ..... 2<sup>ND</sup> RESPONDENT**

*(Being an appeal arising from the Judgement delivered on 15th January 2023 in Criminal Case No. E201 of 2020 at Senior Principal Magistrate's Court Webuye by Hon. P.Y. Kulecho-SRM)*

**JUDGMENT**

1. The Respondents were charged with the offence of assault causing actual bodily harm contrary to section 251 of the [Penal Code](#). It is alleged that on 21<sup>st</sup> August 2020, at Kuywa area Khalala Sub-Location, Sitikho Location in Webuye West Sub-County within Bungoma County, they wilfully and unlawfully assaulted Phenixon Wechuli thereby occasioning him actual bodily harm.
2. Vide the lower Court's Judgement dated 15<sup>th</sup> February 2023, the Respondents were acquitted under section 215 of the [Criminal Procedure Code](#) as the offence under section 251 of the [Penal Code](#) was not proved beyond the requisite threshold.
3. Being dissatisfied with the said judgement, the Appellant preferred an appeal as set out in its grounds of appeal as follows:
  - i. That the magistrate erred by failing to properly analyse and assess the entire evidence to reach a proper legal conclusion.



- ii. That the magistrate erred in law and fact by faulting the Complainant for failing to avail two more witnesses yet under section 143 of the Evidence Act it is not mandatory for a particular number of witnesses to prove a fact.
  - iii. That the magistrate erred in law in finding that the Respondents had assaulted the Complainant but their actions were not sanctionable.
  - iv. That the magistrate erred in law and fact by believing the concocted defence testimony that they had filed a criminal complaint against the Complainant without any supporting documentary evidence to prove the same and wholly disregarding the serious injuries sustained by the Complainant.
4. Ultimately, Counsel prayed that the order for acquittal be quashed and/or be set aside and that the Respondents be convicted and sentenced in accordance with the law.
  5. The appeal was canvassed by way of written submissions. Both parties filed and exchanged their submissions.
  6. As a first appellate Court, i should re-evaluate the evidence afresh and arrive at my own 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 Njoroge v Republic (1987) KLR, 19 & Okeno v Republic (1972) E.A, 32
  7. After carefully considering the rival arguments of parties and the record of appeal, the grounds of appeal may be collapsed into one ground namely whether the Appellant proved their case beyond reasonable doubt.
  8. The legal burden of proof in criminal cases rests on the shoulders of the prosecution; to prove the guilt of the accused beyond reasonable doubt. Viscount Sankey L.C H.L.(E)\* Woolmington v DPP [1935] A.C 462 pp 481 puts it more subtly;

“Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner’s guilt subject to what I have already said as to the defence of insanity and subject also to any statutory exception...No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained.”

9. Section 251 of the Penal Code provides for the offence of assault and its penalty thus:
 

“S. 215 Assault causing actual bodily harm: Any person who commits an assault occasioning actual bodily harm is guilty of a misdemeanour and is liable to imprisonment for five years.”

10. The essential elements of the offence assault causing actual bodily harm are;

- i. Assaulting the complainant or victim,
- ii. Occasioning actual bodily harm.

See the case of Ndaa v Republic [1984] KLR

11. I have carefully evaluated the evidence adduced by the prosecution witnesses. The Respondents are known to the Complainant since the 1<sup>st</sup> Respondent is a neighbour while the 2<sup>nd</sup> Respondent is the brother to the 1<sup>st</sup> Respondent; his identification was by recognition. It was done under the evening sunlight as the incident occurred between 5.00-5.30 PM. He was positively identified as the person



who assaulted the Complainant. The Complainant's evidence was corroborated by PW2, PW3, PW4 and PW5 as they were at the scene when the assault was taking place.

12. 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.”

13. See also *R v Chan-Fook* [1994] 2 ALL ER 557, paragraph D Lord Hobhouse LJ said:-

“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.”

14. Also relevant is a passage in *Archbold's Criminal Pleading, Evidence and Practice* 32<sup>nd</sup> 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).

15. 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).

16. PW6-Dr. Edward Vilembwa a medical doctor based at Webuye County Hospital adduced medical evidence to corroborate the evidence of the Complainant that he sustained actual bodily harm or injury as a result of the assault by the Respondents. He produced the Complainant's P3 form as P. Exhibit 3 and a treatment chit as P. Exhibit 2 dated 24<sup>th</sup> August 2020.

17. The defence offered by the Respondents is a mere denial and a make-up story that the Complainant was the one who hit and injured the 1<sup>st</sup> Respondent and that they even made a complaint at Sitikho Police Station. The evidence tendered by the Prosecution that the Respondents assaulted and caused actual bodily harm or injury to the Complainant has not been controverted in any way. No evidence of an OB number indicating a report was made and P3 forms indicating the injuries of the 1<sup>st</sup> Respondent was filed before the trial Court. I find that the evidence tendered by the Prosecution proved beyond reasonable doubt that the Respondents are guilty of the offence of assault causing actual bodily injury. The incident took place in broad day light and that all the eyewitnesses gave a full account of what happened. The cock and bull story fronted by the Respondents that the complainant had fallen while assaulting one of them must be rejected. The witnesses stated that after the Respondents attacked the complainant who fell down, they went ahead to assault him until he lost consciousness. The defence claim that they had lodged a report with the police over an alleged assault on one of them was made up since no evidence such as an OB or medical document showing that they were even treated for injuries were availed for the court's consideration. I find the same was a blatant attempt at muscling the true position. Accordingly, their acquittal was ill founded as no evidence was availed to dispute that of the Prosecution which I find was proved beyond reasonable doubt against the Respondents. Consequently, I find it appropriate to fault the findings of the learned magistrate. The eventual acquittal was arrived at in error and must be interfered with.



18. As regards the sentence, it is noted that sentencing is the discretion of the trial court. Except, however, the discretion must be exercised judiciously and not capriciously. The Court must be guided by the evidence and sound legal principles. It must take into account all relevant factors and eschew all extraneous or irrelevant factors.
19. Section 251 of the *Penal Code* provides that a person who is guilty of the offence of assault occasioning actual bodily harm is guilty of a misdemeanour and is liable to imprisonment for five years.
20. I am guided by the Supreme Court of India in *State of M.P. v Bablu Natt* {2009}2S.C.C 272 Para 13 that  

“the principle governing imposition of punishment would depend upon the facts and circumstances of each case.”
21. Also the case of *Alister Anthony Parreira v State of Maharashtra*, [ 2012] 2 S.C.C 648 Para 69 that:-  

“Sentencing is an important task in the matters of crime. One of the prime objectives of the criminal law is imposition of an appropriate, adequate, just and proportionate sentence commensurate with the nature and gravity of the crime and the manner in which the crime is done. There is no straightjacket formula for sentencing an accused on proof of crime. What sentence would meet the ends of justice depends on the facts and circumstances of each case and the court must keep the gravity of the crime, motive for the crime, nature of the of the offence and all other attendant circumstances”
22. I have considered the nature of the offence and the principles of sentencing. It is noted that the Respondents are first offenders. And that they are neighbours. I find a sentence of a fine of Kenya shillings fifty (50,000/) or in default to serve one-year imprisonment would be appropriate in the circumstances.
23. The upshot of the foregoing observation is that the appeal has merit. The same is allowed. The order of acquittal is set aside and substituted with an order for conviction against both Respondents who are each ordered to pay a fine of Kshs 50,000/ and in default to serve one-year imprisonment from the date hereof and/or from the date of their apprehension.

**DATED AND DELIVERED AT BUNGOMA THIS 19<sup>TH</sup> DAY OF DECEMBER 2023**

**D. KEMEI**

**JUDGE**

In the presence of:

Mwaniki for Appellant

Masiga for Respondents

Kizito Court Assistant

