



REPUBLIC OF KENYA



**KENYA LAW**  
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**Kilonzo v Republic (Criminal Appeal E079 of 2021)  
[2022] KEHC 12638 (KLR) (11 August 2022) (Judgment)**

Neutral citation: [2022] KEHC 12638 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MAKUENI  
CRIMINAL APPEAL E079 OF 2021  
GMA DULU, J  
AUGUST 11, 2022**

**BETWEEN**

**JONES KILONZO ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal from the original conviction and sentence of Hon. Sagero in Makueni Chief Magistrate's Court (CR) Case No.E41 of 2021 pronounced on 12th August, 2021)*

**JUDGMENT**

1. The appellant was charged in the magistrate's court with assault causing actual bodily harm contrary to section 251 of the *Penal Code*. The particulars of offence were that on January 16, 2021 near Kilili Trading Centre Wote location in Makueni county unlawfully assaulted Joseph Muema thereby causing him actual bodily harm.
2. He pleaded not guilty. After trial, he was convicted of the offence and sentenced to serve two (2) years imprisonment.
3. Dissatisfied with the conviction and sentence, the appellant has come to this court on appeal through the counsel on the following grounds;
  - i. The learned magistrate erred in law and fact in convicting the appellant to serve two years imprisonment without option of a fine.
  - ii. The magistrate erred in failing to record the reasons for not meting a sentence of fine for the appellant.
  - iii. The magistrate erred in relying on uncorroborated evidence of the complainant.



- iv. The magistrate erred in failing to take into account the defence case as both the appellant and complainant were drunk when the offence occurred.
  - v. The sentence meted out against the appellant was harsh and excessive in the circumstances of the case.
  - vi. The magistrate erred in holding that the appellant was the perpetrator of the offence herein whereas it was difficult to identify the perpetrator of the offence at night.
  - vii. The prosecution case was not sufficiently proved to the required standards beyond reasonable doubt.
4. At the hearing of appeal, the appellant acted in person. The appeal was canvassed through filing of written submissions. In this regard, I have perused and considered the submissions filed by the appellant in person and the submissions filed by the Director of Public Prosecutions.
  5. I have to start by restating the legal principle that being a first appellate court, I am enjoined to consider the evidence on record afresh and come to my own independent conclusions and inferences, but bear in mind that I did not have the opportunity to see witnesses testify to determine their demeanor.
  6. In proving their case, the prosecution called 4 witnesses. On this part, the appellant tendered sworn defence testimony and did not call any other witness.
  7. The evidence of PW1 the complainant and PW2 Benjamin Musyoki, was that on 16/1/2021 at around 8.00pm the said Benjamin Musyoki a motor cycle rider, gave a lift to the appellant and the complainant, dropped them at his home and left them to walk to their respective homes, which were in the same direction. The appellant also agrees that he was carried by the motor cycle rider PW2 with complainant that night.
  8. According to the complainant , after walking together for a distance, the appellant assaulted him , he became unconscious and gained consciousness next morning at 5am, when and he noticed his trousers torn, and his Kshs 15,000/= proceeds for sale the of mangos missing. He therefore, reported the incident to the police, was sent to hospital for medical treatment, and the appellant was then arrested and charged.
  9. The appellant on his part, stated in his defence, that if the complainant was indeed assaulted, then it was not by him. He stated that immediately the two of them were dropped by the motorcycle rider, he walked in a different direction with a third person who had just joined them, called Mangulu.
  10. Considering all the evidence on record, herein and the medical evidence that PW1 the complainant had suffered injuries classified as “harm”, I find that the prosecution proved beyond any reasonable doubt, that the appellant assaulted the complainant, and caused him actual bodily harm. In my view, the appellant’s defence that he parted with left the complainant and walked away with a third person, is an afterthought, as the motor cycle rider PW2 only carried two people and there is no evidence on record that a third person joined the appellant and the complainant at the point of dropping them.
  11. I thus concur with the learned magistrate’s finding that the prosecution proved beyond any reasonable doubt that the appellant assaulted the complainant occasioning him actual bodily harm.
  12. With regard to sentence, I will state that sentencing is an exercise of discretionary power by a trial court, taking into account relevant factors, including the nature and gravity of offence and the mitigation of the accused. I note that in the present case, the injury suffered by the complainant was mild and that



the appellant was a first offender and asked for forgiveness. In my view, therefore, the trial magistrate should have also considered imposing the option of a fine.

13. Now that the appellant was sentenced to serve two (2) years imprisonment on 12/8/2021 about one(1) year now, in my view, the prison sentence he has already served is adequate punishment.
14. I thus dismiss the appeal on conviction, and uphold the conviction of the appellant for assault causing actual bodily harm.
15. With regard to sentence, I set aside the sentence of 2 years imprisonment imposed by the trial court, and order that instead, the appellant will serve the prison sentence that he has already served up to the date of this judgment. The appellant will thus be released from prison custody unless otherwise lawfully held.

**DATED, SIGNED AND DELIVERED THIS 11TH AUGUST, 2022 IN OPEN COURT AT MAKUENI**

**GEORGE DULU**

**JUDGE**

