



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT BUSIA**  
**CRIMINAL APPEAL NO. 82 OF 2013**

**(An Appeal arising out of the judgment of C.M.CR.Case No.651 of 2012 delivered by C.I. Agutu  
RM on 7<sup>th</sup> November 2013)**

**DANIEL KIRUI OKORO.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**J U D G M E N T**

1) The relationship between Daniel Kirui Okoro (“**The Appellant**”) and Calistus Crinis Aleri (“**The Complainant**”) is less than cordial. On 7<sup>th</sup> November 2013, the Resident Magistrate sitting at Busia convicted the Appellant on the offence of Assault Occasioning Actual Bodily Harm on the complainant contrary to Section 251 of Penal Code.

2) It had been alleged that the assault took place on 6<sup>th</sup> April 2012 at Nambale Township in Busia County. Upon conviction, The learned Trial Magistrate ordered the Appellant to compensate the Complainant in the sum of Kshs.20,000/= and in default he be “remanded in custody for 6 months.” This Appeal is against both conviction and sentence.

3) The Complainant, Joseph Wabwire Owino (PW2), David Oluoch Ochieng (PW3), Thomas Ndege (PW4) and Cpl Joseph Njoroge (PW5) were the Prosecution witnesses. On behalf of The Defence, the Appellant Collins Wafula Wandera (PW2) and Peter Ariga Omaiko (PW3) testified.

4) The Complainant is a businessman both at Nambale and Nairobi. At Nambale, he owns Business premises which houses a business popularly known as Nambale Hotel and Apartments. Part of the Premises is occupied by the Appellant who according to the Complainant ceased being a tenant and is now a trespasser. It was the testimony of the Complainant that at about 11.00am on 6<sup>th</sup> April 2012 he showed the premises to a Contractor by the name of “William” as he intended to make some improvements on it. Also within the vicinity were PW2 and PW3. These two testified that they had gone to collect some money owed to them separately by the Complainant on account of some work.

5) As the Complainant conducted the Contractor around the building, the Appellant emerged from the hotel and menacingly asked the Complainant in Kiswahili “**Mzee unafanya nini hapa? Toka hapa mara moja au nitakupiga vibaya.**” The Appellant then assaulted him. PW2 and PW3 say that they witnessed the assault.

6) It was the testimony of the Complainant that the attack left him injured, with torn trousers (PEXh 2) and broken spectacles (P Exh 4). He reported the incident to Busia Police Station where he was attended

to by PW5. This would be at about 11.40am on the very day (6/4/2012) of the assault. When PW5 saw him, the Complainant's face was swollen and he had visible bruises to his leg. That the Complainant also showed him a pair of trousers that were torn on the left side and some broken spectacles. He later issued the Complainant with a P3 Form.

7) PW4 treated the Complainant at Busia District Hospital. His patient complained of assault by a known person. The patient was in pain and had a blunt injury on the front of his head. He also had a painful left thigh in its mid region. But there was neither a bruise nor swelling at the site of injury. The Clinical Officer assessed the degree of injury as harm and formed the opinion that it was caused by a blunt object.

8) When invited to make his defence, at the close of the Prosecution case, the Appellant made an unsworn statement while DW2 gave a sworn evidence. The third witness (DW 3) was a formal witness who produced the file to Busia criminal case No.559/2012.

9) The Appellant explained to Court how he is a Tenant of the Complainant. That on 6<sup>th</sup> April 2012 at about 12.30p.m his Manager informed him that the Landlord was causing chaos and chasing his employees. When he reached the scene he found the Complainant who became aggressive and began to abuse him. The Appellant telephoned the Police and when the Complainant heard this, he disappeared only to return 2 hours later with a contingent of 12 Police officers. That although the Complainant complained that the Appellant had assaulted him, the Police believed the explanation given by the Appellant. They then arrested the Complainant. Later on the following day he was summoned to Busia Police Station where he was formally informed that he would be charged. The Appellant denied assaulting the Complainant. This version was supported by DW2 who works for DW1 and is presumably the Manager who informed him of the chaos that the Complainant was causing.

10) Let me now set out the Grounds of Appeal and the arguments made for and against it. The Memorandum of Appeal dated 8<sup>th</sup> November 2013 raises the following 6 grounds of Appeal:-

**1. THAT the learned Trial Magistrate erred in law and in fact in her failure to identify issues for determination in Criminal Case No.651 OF 2012.**

**2. THAT the Learned Trial Magistrate erred in law and in fact in not finding that the appellant was at the police station recording a statement in a matter in which he was the complainant at the time that the alleged incident relevant to this appeal happened and that the allegations against him were false, trumped up and designed to derail the appellant's original complainant against that of the complainant in the lower court case.**

**3. THAT the Learned Trial Magistrate erred in law and in fact in failing to find that the lower court case was a culmination of the long standing court battles between the parties in which the complainant in the lower court case was bent on using all means unlawful and otherwise, in order to cause the appellant move away from his premises.**

**4. THAT the Learned Trial Magistrate erred in law and in fact in failing to make an analysis of the evidence over the two counts against the appellant and making a finding on each of the two.**

**5. THAT the Learned Trial Magistrate erred in law and in fact by abandoning her duty to make a finding on the 2<sup>nd</sup> count, hence rendering the whole judgment incomplete and worth of setting aside.**

**6. THAT the Learned Trial Magistrate erred in law and in fact in failing to consider the defence case, and highlight the numerous discrepancies in the prosecution case.**

11) Mr. Ashioya for the Appellant urged the Court to find that the Prosecution evidence was insufficient to establish the alleged assault. He particularly pointed out the contradiction of the nature of injuries suffered by the Complainant as testified by PW4 and PW5. That the Clinical Officer never saw the

visible injuries that were allegedly seen by the Police Officer (PW5).

12) This Court was asked to pay attention to the fact that a grudge and bad blood existed between the Complainant and the Appellant that could have motivated the Complainant to frame the Appellant. That the Learned Trial Magistrate ought to have directed her mind to this.

13) The form of the judgment was the subject of attack. The Learned Trial Magistrate was criticized for failing to identify issues for determination. Further that although, the Appellant faced two counts, the Learned Trial Magistrate failed to make a finding on each count. That would be a failure to comply with the provisions of Section 14 of The Criminal Procedure Code.

14) On the form of the judgement, the State Counsel pointed out that no prejudice was caused on the Appellant. That from the reading of the Decision it was clear that the conviction was on the offence of assault.

15) On that conviction, the Court was asked to find that it was correctly reached as there was overwhelming witnesses by PW1, PW2 and PW3 who were all eye witnesses. On the observations by the Clinical Officer, the State Counsel argued that absence of bruises did not mean an absence of an assault.

16) Turning to the grudges, this Court was asked to find that the bad blood between the Complainant and the Appellant was the motivation of the Appellant to assault the Complainant. That the existence of bad blood should not be used to advantage the Defence.

17) On the Sentence, The State urged me to find that the Sentence was not ambiguous as it was in respect to the offence upon which a verdict of guilty had been returned and that was an assault. The Court was, lastly, asked to read the word "prison term" for the word "remand" used to in the default Sentence.

18) This being a first Appeal, this Court is obliged to evaluate that entire evidence with a view to drawing its own conclusion. Minded, however that unlike the Trial Court, this Court did not have the advantage of seeing or hearing the witnesses testify first hand. (**Okeno -vs- Republic** [1932] EA 32).

19) The Complainant gave an account of how he was assaulted. He stated,

**"A man called Daniel Kirui Okoro and who was my tenant, emerged from the hotel through the back door. He started shouting at me in Kiswahili. He asked me, "Mzee unafanya nini hapa? Toka hapa mara moja au nitakupiga vibaya," he uttered the same words twice. He jumped and tried to kick me with his right foot. On the third trial, he hit me on the left thigh and punched me on the head."**

This account was not debunked in cross-examination.

20) The version of things by the Complainant was supported in material particular by the evidence of PW2 and PW3. Both witnesses say how Appellant emerged from the Hotel, told the Complainant to leave and threw several kicks at him. One kick eventually landed on the Complainant's left leg. The Appellant is also said to have punched the Complainant on the head. That the incident left the Complainant with a broken pair of spectacles and a torn trouser.

21) Up to that point the Prosecution evidence would be corroborative and strong. But the evidence of PW4 and PW5 seems to cast a shadow of doubt on that evidence. The evidence of the Complainant is that after the assault, he left straight for Busia Police Station. There PW5 attended to him. The Complainant then testified that:-

**"I was referred to Busia Hospital where I was treated. I was later given a Police Officer who accompanied me to Nambale."**

That evidence does not seat comfortably with PW5's evidence that:-

**“The Complainant had a treatment book when he came to the Police Station at 11.40a.m he said he was assaulted at about 11.00a.m.”**

This Court has looked at the original treatment book (P Exhibit 1) issued by Busia District Hospital. The first entry in that book is of 6<sup>th</sup> April 2012 and is on the history given by the patient. It is an allegation that the patient had been beaten up by a person known to him at around 11.00a.m. On my assessment the book was issued on the same day (6<sup>th</sup> April 2012) as the incident. So given the variation of the accounts of the Complainant and PW5, what was the sequence of events, did the Complainant visit the Hospital before the Busia Police Station or vice versa? That of course, can be treated as a minor disparity if that was all to the matter.

22) PW5 who attended to the Complainant at the Police Station testified that the Complainant had a swollen face and a swollen thigh. In addition **“the leg had some bruises that were visible.”** This injured person was allegedly treated and examined by PW4 at 1.30p.m. This would be about two (2) hours after PW5 saw him. And in PW5’s own words,

**“The Complainants injuries were examined by the Doctor. I send the Complainant to Doctor on the same day I saw him. I would expect the injuries I saw on the Complainant to be reflected on the P3 Form.”**

But what does the Clinical Officer (PW4) say he saw. This was his testimony,

**“There were no bruises. There was inflammation on the thigh. This is not captured on the P3 Form. There was no swelling as well. I elisted the pain from the reaction from the patient. Visible injuries would give us the best position. Palpation is not an easy way to deceive a doctor.”**

From these two accounts begs the question, did the visible bruises somehow heal completely and disappear in two hours?

23) PW5 accompanied the Complainant back to the scene on that day at about 2.00pm. The Complainants account is that,

**“We collected some officers from the Patrol Base for the scene. The Accused was summoned by the officer-in-charge of the Patrol Base. The Accused came and followed us in (sic) the scene. When we passed by the Patrol Base I was grabbed and placed in custody by the officer-in-charge of the Patrol Base.”**

As to PW5, he narrated how he visited the scene where the Complainant identified the suspect. He then asked the Complainant and the suspect to report to Busia Police Station on the following day. And they did in fact do so. About the arrest of the Complainant, PW5 said,

**“I heard the Complainant was arrested after I had left Nambale.”**

24) When the Appellant gave his Defence he denied assaulting the Complainant. That on that day he was forced to call the Police Officers of Nambale Police post because the Complainant was causing chaos and behaving aggressively. When the Complainant heard this, he left the scene in a huff and returned 2 (two) hours later with a contingent of 12 Police officers. After both gave their accounts to the Police Officers, the Complainant was arrested. On the following day, he received a telephone call to report to the Busia Police Station and he obliged. Although this unsworn statement by the Appellant is not evidence in the sense that the expression evidence is generally understood and is therefore of no probative value, it should be taken into consideration in relation to the rest of the evidence (**May v Republic** [1981] KLR 129). The unsworn statement of the Appellant was substantially supported by DW2 who gave a sworn statement. His evidence was not challenged as the state chose not to cross-examine him.

25) The statement of the Appellant and the evidence of his witness as to what transpired when the police

visited the scene is congruent to the evidence of PW5. PW5 says that at the scene,

**“The complainant alleged that he had reported several cases there which had not been attended. The complainant alleged that he had been assaulted by police.”**

The two were making counter-accusations to the Police Officers. Thereafter the Complainant was arrested. By this time, it would seem, PW5 had left the scene.

26) The strength of the Prosecution case was weakened by inconsistencies on the nature of injuries, if any, that the Complainant sustained and the sequence of his visit to the hospital and the Police Station. Secondly the version of the Appellant seems more aligned to the evidence of PW5 as to what may have happened upon the visit of the Police to the scene at 2.00 pm on the same day. The short judgement of the Learned Trial Magistrate did not evaluate these important aspects of the evidence. Had the Learned Trial Magistrate done so, then she may well have reached a decision that these were grey areas in the Prosecution case.

27) On my part, the veracity of the Prosecution case was shaken by the evidence of the Complainant, PW4 and PW5 taken together. The inconsistencies pointed out earlier casts a doubt as to whether the Prosecution theory is entirely true. The Court cannot, with any degree of certainty, believe the Prosecution and not the Defence or vice versa. In circumstances like this any doubt must be resolved in favour of the Appellant. For this reason, I am unable to uphold the Appellants conviction.

28) The upshot is that I do hereby quash the Appellants’ conviction and hereby set aside the Sentence. Any compensation paid to the Complainant shall be refunded immediately and at any rate within 60 (sixty) days hereof. Should the State be of the view that the period for refund is unreasonable, then I grant it liberty to seek its Review by way of Application.

29) Otherwise the Appeal succeeds, even without this Court considering other Grounds raised.

**DATED, SIGNED AND DELIVERED AT BUSIA THIS 29<sup>th</sup> DAY OF APRIL 2015.**

**F. TUIYOTT**

**J U D G E**

**IN THE PRESENCE OF:**

**KADENYI.....COURT CLERK**

**.....FOR THE APPELLANT**

**.....FOR THE RESPONDENT**