



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MOMBASA**  
**CRIMINAL APPLICATION NO. 12 OF 2015**

STEPHEN CHARO MAVUO .....APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

*(An appeal against the conviction and sentence of the Principal Magistrate, Hon. S Wewa's judgment dated 5.9.2014 in the Kwale Principal Magistrate's case No. 79 of 2013)*

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

The Appellant, STEPHEN CHARO MAVUO, was charged with assault causing actual bodily harm contrary to Section 251 of the penal code.

Its alleged that on Friday of April, 2013 at Mikomani village in Rabai District within Kilifi county the appellant assaulted GRACE CHIZI KOMBO thereby occasioning her actual bodily harm.

The appellant denied the charge and the case proceeded for trial whereby Stephen Charo Mavuo ( herein referred to as the appellant) , was convicted and sentenced to a fine of Ksh 5000 or serve five (5) months imprisonment in default.

To determine this appeal, the court will briefly consider the evidence that was tendered by the prosecution and defence.

**Prosecution's Evidence**

Pw1, who is the complainant in this Case, GRACE CHIZI testified that on 1.4.2013 at 1.00am, she was at home where they had talks between her husband and another woman, Fatuma kazungu, whose husband was not there. That the complainant then said that she could not talk in the absence of this lady's husband but Stephen Charo the accused said that he would stand in for the husband. Pw1 said she told them that she could not answer and the accused person told her that the wazee had decided that she goes back to her home and gave names of three people. Pw 1 told court that none of these people had paid dowry for her. That the accused person slapped her. Pw1 went to the chief and was referred to St Luke. She was given a P3 form at the police station which she identified together with the treatment notes.

In cross examination, Pw1 said that it was two slaps. She said that the accused was an elder. She said that she went for burial and returned to find the minutes already been written. She gave the names of Kapanga, Mehonji and Kenga was Maitha as the people who had said she goes home. She said she was slapped on the neck and cheek. She also said that her husband is a witness.

Pw2, Mjeni Emmanuel Mwatsima told court that on 1.4.2013 at 1.00pm he was at home when he was called by Grace, the complainant who told him that there were discussions at her home. He went there and found the accused, the complainant and others because it concerned the complainant having an affair with another woman. He said they were disrupted when the accused beat the complainant. That he used his hands on her neck twice. He took the complaint to the house and asked her to leave the matter.

When cross examined, he said that Stephen, the accused was in the meeting as a mzee of the home, as they are of the same clan. He said that he saw they were two slaps but was not asked in his statement. He also said he was close to the complainant, and that he held him while one Christopher held the accused.

Pw3, No 51430 P.C Joseph Ndungu of Kaloleni police station testified that on 4.4.2013, the complainant reported an assault case which he investigated and issued a P3 form. He said that he recorded statements and summoned the accused. He established there had been a quarrel between the complainant and the accused over domestic matters where the accused beat the complainant. That the complaint stated that her head was twisted and she sustained other injuries. He charged the accused person. He identified the treatment notes serial No 1002888 dated 4.4.2013 from St Lukes hospital and the P3 form he received after it was filled on 5.4.2013 where the degree of injury was classified as harm.

In cross examination, Pw3 said that he did not know the accused was a pastor. That the complainant complained that her husband had an affair with another girl and the accused told her to go back to her home. He also said that the accused twisted her head and other areas of the body that he injured her neck. He further said that his statement shows 3 slaps on the cheek as this is what he was told.

Pw4. PATRICK BASHISHI is a clinical officer at St Lukes having qualified from Port Reitz medical training college in medicine and surgery in 1996. He identified the handwriting on the P3 as that of a person he had worked with for five years. He stated that the complainant, Grace Chizi Kombo had gone to their hospital complaining that she had been beaten and injured by a person known to her and had sustained injuries on 1.4.2013. That she was examined and found to have injuries on the neck and chest which were three days old. He assessed the weapon which was used to inflict the said injuries to be blunt. He confirmed that the treatment notes issued showed that the complainant was treated on 4.4.2013. He produced the P3 form and treatment notes as exhibit P1 and 2.

In cross examination, Pw4 said that the complainant had no marks but had pains on the neck and front of the chest.

### **Defence Evidence**

The appellant, STEPHEN CHARO MAVUO was placed on defence after the prosecution was found to have established a prima facie case against him. He opted to give a sworn statement and called two witnesses.

Dw1, STEPHEN CHARO MAVUO told court that he is a pastor of World Victory Centre Church. He said that on 25.3.2013 he received a call from Christopher that he tells Grace, the complainant that he would not send her money to go to Malindi due to financial constraints. Dw1 passed on the message on phone whereby the complainant talked about the domestic issues with Fatuma, that she had no conjugal relationship with Christopher. She said that the Kenga decided there should be a meeting and they organized for one to discuss the issue. And on Sunday they met at Christopher's to discuss Grace and Fatuma whereby Fatuma refused she had a relationship with Christopher because her husband is the uncle to Christopher. They booked for another meeting on 1.4.2013, which day he had prayers at his house. The visitors arrived at 8.00am and the prayers began at 10.00am and ended at 3.20 pm. He escorted the visitors at 4.00pm and at 4.14 pm Christopher who had been checking on him called him to go to his house. He apologized since it was late and decided the meeting should not go on. She said that the complainant Grace said that the meeting should be adjourned since Fatuma's husband Kazungu was not there. The meeting was done at 10.00am at Kazungu's and the complainant was forgiven for it was found that were allegations.

Dw1 said that the following day he received a report that there had been an assault. He produced copies of the minutes.

In cross examination, Dw1 said that Grace, the complainant relates well with him and had no grudge with him.

Dw2 Christopher Maitha told court that the accused was his paternal uncle. He confirmed that there was a family meeting. He said that the meeting was to discuss about an affair between him and another neighbor but her husband was not there. The discussion ended and he left.

In cross examination, he said no one said that he can stand in for Fatuma's husband. He denied that the complaint is not wanted in the family.

Dw3, ERNEST MKANE said he was a teacher of Kubano Kitale primary school and also a member of Harvest Truth Church. He confirmed to court that the accused was bereaved and they went to his house for fellowship as pastors. They prayed, had lunch and at 3.30 pm the ladies sat alone. They again prayed after that and left at 4.00-4.30pm.

When cross examined, Dw3 said he did not know the relationship between the accused and Grace. He also did not know that there was a family meeting. He did not know that someone was assaulted.

The appellant was found guilty and convicted by the trial magistrate. He was aggrieved and through his advocates, Mrs Munyithya Mutigi Umara & Muzna & Co. advocates, filed a petition of appeal. He advanced with (9) grounds as follows:

1. That the learned magistrate erred and misdirected herself in law and fact by convicting the accused and disregarding his defence and physical evidence adduced in proof of his defence.
2. The learned magistrate erred in fact and law of finding the prosecutor had proven its case beyond reasonable doubt despite physical and oral evidence to the contrary.
3. The learned magistrate erred in fact and law by finding that the accused was in attendance at the family meeting at the time of the alleged assault despite physical evidence to the contrary.
4. The learned magistrate erred in fact and law by misdirecting herself that the accused as the eldest family member had to attend the family meeting wherein the alleged assault took place despite physical evidence produced to the contrary.
5. The learned magistrate erred in fact and law by misdirecting herself that no evidence was adduced of the prayer meeting at the accused's home on 1.4.2013 despite physical evidence to the contrary.
6. The learned magistrate erred in law by passing a judgment that is contrary to section 169 (1) of the Criminal Procedure Code that fails to show facts of determination or reasons for decision.
7. The learned magistrate erred in law and fact by allowing the production of the P3 form (prosecution exhibit 1) and treatment notes (prosecution exhibit 2) by a person other than the maker despite the accused's protest.
8. The learned magistrate erred in fact and law by convicting and sentencing the accused despite physical evidence and corroboration of Dw2, Christopher Maitha and Dw3, Ezekiel Makale Mokaya.

### **SUBMISSIONS BY APPELLANT**

The appellant through Mr Matugi his counsel argued the nine (9) grounds together and condensed them into two points.

1 The defence raised by the accused person was not considered at all by the trial magistrate.

2 The trial magistrate relied on a theory that is not reflected by any evidence at all.

According to the appellant's counsel, the appellant gave evidence as to how he was not in attendance in the meeting of 1.4.2013 and explained what was going on, on that day. That he produced minutes

of the meeting that was held in his house on the same day, as exhibit Dw1. That he also called two witnesses Christopher Mahigi ( DW2) and Ernest Mkale (Dw3) who corroborated his evidence. Mr Mutugi submitted that the trial magistrate did not evaluate the appellant's defence and determine whether it was reliable or not. He also noted that he did not say anything about the defence exhibit D1 to indicate whether it was authentic or reliable.

On the second point, where the appellant's counsel say that the trial magistrate came up with a theory that is not supported by evidence, he cited the following at page 21 line 4 to 6 of the judgment:

***“That being the eldest in the family he knew the prayer arrangements he should have rescheduled either the meeting or the prayers. I do find that it is a defence.”***

Mr Mutugi submitted that there is nowhere in the entire evidence where it is indicated that the appellant was the eldest in the family and should have rescheduled the meeting.

Further, Mr Mutugi submitted that the judgment written by the trial magistrate is contrary to the provisions of section 169 (1) of the criminal procedure code. He stated that the trial magistrate in the judgment posed questions instead of giving findings grounded on facts. He also noted that the judgment did not show points of determination and reason for the decision.

Finally, Mr Mutugi submitted that the P3 form and treatment notes were produced as defence exhibits 1 and 2 by a person other than their maker despite protest by the appellant. He said that the trial magistrate ought to have explained why another person was being allowed to produce these documents other than the maker since the appellant was a layman and unrepresented.

He summed up by submitting that appellant was not accorded a fair trial and urged the court to allow the appeal and set aside the judgment.

### **SUBMISSIONS BY THE STATE.**

M/s Ogweno, learned counsel for the state opposed the appeal. She submitted that the trial magistrate complied with the provisions of section 169 (1) of the criminal procedure code in writing her judgment. She said that the appellant's side has not demonstrated the prejudice that has been occasioned by the manner in which the judgment was written.

She submitted that the offence of assault after the offence was proved beyond reasonable doubt. She stated that complainant alleged that she was slapped twice on the head and that evidence was corroborated by the evidence of Pw2 the P3 form and treatment notes which were produced by pw4.

She also submitted that from the evidence of pw1 and 2, it clearly came out that the appellant attended the family meeting and was well known to the complainant who had been married in the family for many years.

She submitted that the trial magistrate did not rely on any theory in the judgment and said the ground lacks merit.

As for the production of P3 form and treatment notes (defence exhibit P1 and 2) M/s Ogweno submitted that it was confirmed to the appellant that the person who filled the P3 form had retired and they had to call an officer who has worked with him to produce the said evidence in compliance with the rules of evidence which provide production of evidence by a person other than the maker who maybe found without unnecessary delay. She said that the appellant even cross examined this witness, (Dw2)

She further submitted that the evidence of Dw2 should be expunged from evidence since has been shown that he already had domestic issues with the complainant and had sided with his own, the appellant herein.

M/s Ogweno urged the court to find the appeal has no merit and confirm the sentence which she felt was lenient.

In response Mr Mutugi submitted that section 169 of the CPC is a statutory provision that mandates a trial magistrate to write a judgment in a certain way and there must be reason for this.

As for Dw2 having testified against this wife, the complainant, Mr Mutugi cited the provision of section 147 (3) of the criminal procedure code on competence and compellability of evidence of a spouse. He pointed out that the witness was allowed to go on and testify in support of the appellant by the prosecution who was representing the complainant.

### **ANALYSIS AND DETERMINATION**

In considering the grounds of the appeal and submissions by both counsel, I have analyzed and reevaluated the evidence afresh in line with the celebrated case of **OKENO VRS REPUBLIC ( 1972) E.A 32** in which the duty of the first appeal court is set out.

On the issue of whether the trial magistrate failed to consider the appellants defence.

I read through the judgment as well as the entire evidence that was adduced before that court.

The appellant was charged with the offence of assault causing actual bodily harm.

According to the evidence of Pw1, the complainant, the appellant slapped her. When cross examined, she told court at page 3 line 9 of the proceedings;

“ It was 2 slaps”.

She went on to state on same page at lines 15 to 16 of the proceeding during cross examination.

***“The slaps were on the neck areas. One was on the cheek and another on the neck”.***

Pw 2 in his evidence in chief at page 4 lines 8 to 9 of the proceedings is said to have said

***“:.....when Stephen Charo beat Grace he used his hands on the neck areas it was twice....”***

In cross examination the same page at line 15 of the proceedings pw2 said:

***“It was 2 slaps. I didn't cheat. I saw 2 slaps...”***

Pw3. Pc Joseph Ndirangu, the investigating officer has this to say at page 6 lines 8 and 9 of the proceedings.

***” .....accused beat complainant who stated the head was bruised and sustained other injuries .***

When cross examined, Pw3 at page 6 lines 22 to 23 said:

***“ you twisted his head and other areas of body you injured the neck . My statement shows 3 slaps on the cheek...”***

Pw4 the clinical officer produced the treatment notes and P3 form as defence exhibits. And at lines 11 to 12 of page 11 of the proceedings pw4 said.

***“ We examined injuries on neck and chest no other injuries seen...”***

In cross examination at line 22 of page 11, Pw4 stated:

***“ she had no marks she had pains on the neck and front of the chest...this was from the examination.***

From the evidence of these prosecution witnesses, it is clear that there is inconsistency as to where the complainant was injured after being assaulted. It is not clear whether it was the cheek and neck as stated by the complainant in cross examination or neck areas as put by pw2 in his evidence in chief or the head which was twisted and other areas of the body and neck as put by the investigating or neck and chest as indicated in the P3 form and treatment notes(Defence exhibit D1 and 2).

It also came out at that while Pw1 and 2 said that the complainant was slapped, hence the injuries, the investigating officer told court that the appellant twisted the complainants head and other areas of the body. This again makes one question what caused or how the complainant sustained the injuries she is said to have suffered.

It is worth noting that in an assault case as the one the appellant was charged with, it is important to prove the injury sustained, how it was caused or what caused it, where it was caused on the victim and who caused it.

In this case it is not clear whether the injury the complainant alleges to have sustained was caused by being slapped or by her head and other parts of the body being twisted.

It is also not clear whether she sustained the injury on the neck, cheek and the chest. The complainant is the one who suffered the injury but her evidence as to where it was caused is contrary to the findings in the P3 form and treatment notes which were made when she went for medical examination after the alleged assault.

With such evidence, a doubt was clearly created in the evidence of the prosecutions witness, whose benefit, I believe, should have case gone to the appellant.

From the judgment of the trial magistrate, I agree with the appellants counsel that the trial magistrate did not take into consideration the appellant's defence in line with the prosecution's evidence to arrive at the conclusion she did. Her analysis of the evidence on record was quite scanty and wanting. From the decision in the judgment it is clear that she disregarded the appellant's defence. But she did not give reason why she believed the prosecution's evidence, which is inconsistent in so far as how and where the complainant sustained the alleged injury and disbelieved the appellant's defence. She did not even make reference to the appellants defence exhibit D1 so that it is known why she disregarded it especially when she was admitted it in evidence.

Having gone through the entire evidence, I established that the appellant's defence was in line with what he cross examined the witnesses on. For instance, when he cross examined Pw2, the response at page 4 line 22 of the proceedings, he said:

***“ It was about 1.00pm for you had pastors meeting which ended at 12.00 noon.”***

This is a confirmation indeed the meeting referred to by the appellant, Dw2 and Dw3 happened.

The appellant also faulted the court for convicting him from a judgment that posed questions than findings and did not set out issues for determination and give reasons for the decision made.

Section 169 of the criminal procedure code provides:

***169 (1) Every such judgment shall, except as otherwise expressly provided by this court, be written by or under the direction of the presiding officer of the court, in the language of the court and shall contain the point or points for determination, the decision thereon and the reason for the decisions and shall be dated and signed by the presiding officer in the open court at the trial of pronouncing it.***

**(2) In the case of conviction, the judgment shall specify the offence of which, and the section of the penal code or other law under which, the accused person is convicted, and the punishment which he is sentenced.**

**(3) In the case of an acquittal the judgment shall state the offence of which the accused person is acquitted and shall direct that he be set at liberty.**

I have perused the lower court's judgment and confirm that indeed there questions posed in the same which were unanswered.

For instance, on page 1 lines 15 to 16 of the judgment, she posed:

***"Pw2 confirms that the accused beat the complainant. Why should he implicate the accused he had been called to listen to the discussion.***

At line 17 to 18 of the judgment, he posed another question:

***'Pw3 was investigating officer. The issue was domestic differences could this be a reason?***

One will realize, upon going through the judgment that these questions remained unanswered meaning no findings were made on them.

Also I identified only one issue which the trial magistrate was to consider at page 1 lines 11 to 12 of the judgment.

***"The issues to consider are whether there was an injury which was unlawfully inflicted."***

Again, a reading of the judgment does not clearly bring out how this issue was determined by the trial magistrate and what her findings were.

The judgment also does not contain the reason why the trial magistrate found the appellant guilty and convicted him.

I also found that the trial magistrate did not specify the offence for which and the section of the penal code under which the appellant was convicted in her judgment.

All in all, I find that section 169 of the Criminal Procedure Code was not complied with and this ground has merit.

The appellant also had issues with the manner in which the p3 form (prosecution exhibit P1) and treatment notes (prosecution exhibit 2) were produced. According to the appellant's advocate in his submissions, these documents were admitted in evidence having been produced by a person who was not their maker despite protest by the appellant.

I read through the proceedings and found that on the day these documents were produced, that is 19.2.2014, the appellant objected to their production by a medical officer who did not examine the complainant but the trial magistrate in allowing this witness proceed, ruled out the that the matter had been dealt with on 28.11.2013. I checked the proceedings to confirm if this happened but established that it did not.

It is clear from the records that a basis for pw4, Patrick Bashishi, to produce their documents was not laid down as per the requirements of section 72 of the Evidence Act which requires that it be demonstrated to court that it will take unnecessary delay to call the intended witness.

A trial court is obligated to look at the case as a whole to see whether the prosecution's case is credible and evidence reasonable, sufficient to discharge the burden squarely on it to prove a charge beyond

reasonable doubt. In the case before me, the trial magistrate failed to appreciate the inconsistencies, discrepancies and anomalies in the prosecution evidence vis a viz the defence case. She also failed to observe the procedure duly required to be followed in a criminal trial and judgment writing.

For these reasons, I find that the appeal has merit and allow it.

I hence quash the conviction and set aside the sentence which was imposed against the appellant by the learned trial magistrate.

The appellant to be released forthwith, if still held unless lawfully held and be refunded any fine paid, if at all.

Judgment dated, signed and delivered this 25<sup>th</sup> day of November 2015.

D.O. CHEPKWONY

JUDGE

In the presence of

M/s Ocholla for the state

Mr Mushelle for Mr Mutugi for the appellant

C/Assistance – Mr. Kiarie.

D. O. CHEPKWONY

JUDGE