



REPUBLIC OF KENYA



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**Odongo v Republic (Criminal Appeal E001 of 2024)  
[2025] KEHC 352 (KLR) (22 January 2025) (Judgment)**

Neutral citation: [2025] KEHC 352 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT SIAYA  
CRIMINAL APPEAL E001 OF 2024**

**DK KEMEL, J  
JANUARY 22, 2025**

**BETWEEN**

**HABIL OCHIENG ODONGO ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal against the conviction and sentence of Hon. Erick Malesi (PM) in Madiany Principal Magistrate's Court Cr. Case No. E172 of 2023 delivered on 18<sup>th</sup> January 2024)*

**JUDGMENT**

1. The appeal herein arose from the conviction and sentence by Hon. Erick Malesi (PM) in Madiany PM Cr. No. E172 of 2023 dated 18/1/2024 wherein the Appellant was ordered to pay fines of Kshs 100,000/= each on counts I, II, III or in default serve 12 months imprisonment and a further Ksh20,000/= or in default to serve 4 months on Count IV and that the sentences were ordered to run concurrently. The specific offences the Appellant faced were as follows:
  - i. Assault causing actual bodily harm contrary to Section 251 of the Penal Code with the particulars being that on 2<sup>nd</sup> day of July 2023 at around 2000 hours in Akon Sub Location in Rarieda Sub County within Siaya County, he assaulted one Desmond Midigo Abidha thereby occasioning him actual bodily harm.
  - ii. Assault causing actual bodily harm contrary to Section 251 of the Penal Code with the particulars being that on 2<sup>nd</sup> day of July 2023 at around 2000 hours at Akon Sub - Location in Rarieda Sub County within Siaya County he assaulted one Edwin Abidha thereby occasioning him actual bodily harm.
  - iii. Assault causing actual bodily harm contrary to Section 251 of the Penal Code with the particulars being that on 2<sup>nd</sup> day of July, 2023 at around 2000 hours in Akon Sub Location in



Rarieda Sub County within Siaya County he assaulted one Samson Ochieng Ochieng thereby occasioning him actual bodily harm.

- iv. Giving false information to a person employed in Public Service contrary to Section 129 (a) of the Penal Code with the particulars being that on 2<sup>nd</sup> July 2023 at around 1997 hours at Aram Police Station in Rarieda Sub County within Siaya County he informed Service No. 257446 Pc Ali Said Ganzala a person employed in the Public Service as a police officer that he (accused) got a call from his house worker/manager namely Kevin Waudi that there were two suspects in his house and who had been locked in, information he knew to be false knowing it to be likely that he would thereby cause the said service No. 257446 Pc Ali Said Ganzala to arrest and charge the said two suspects which he ought not to have done if the true state of the facts respecting which true information was given had been known to him.
2. Being aggrieved by the said conviction and sentence, the Appellant lodged his memorandum of Appeal dated 5/2/2024 wherein he raised the following grounds of appeal:
    1. That the learned trial magistrate erred in law and fact by convicting the Appellant against the weight of the prosecution's case.
    2. That the learned trial magistrate erred in fact and in law by finding that the prosecution proved its case against the Appellant beyond reasonable doubt.
    3. That the learned trial magistrate erred in fact and in law by convicting the Appellant despite the glaring inconsistencies in the prosecution's case which went to the root of the case.
    4. That the learned trial magistrate erred in fact and in law by failing to consider the Appellant's evidence in reaching his decision on conviction.
    5. That the learned trial magistrate erred in fact and in law by meting out harsh sentences against the Appellant contrary to the settled principles on sentencing.
  3. This being the first appellate court, its duty is well settled namely to subject the evidence tendered before the trial court to a fresh examination and thereafter reach its own independent conclusion on whether or not to uphold the decision of the trial court. In carrying out this task, the appellate court must consider that the trial court had the advantage of hearing and seeing the witnesses while they testified. See OKENO VS. R (1972) EA 32.
  4. The prosecution called nine witnesses in support of its case. PW1 Desmond Midigo testified that the Appellant was his super- imposed surrogate father. That his mother informed him of a meeting they were to have at the home of the appellant which was to discuss about some land the appellant was to purchase and have it registered in his name and his brother as the purchase money had been provided by their mother. That while at the appellant's compound, the appellant and some goons he had hired viciously attacked them. That the police arrived after about thirty minutes when the assailant took off. That they were assisted to Aram Police Station where they were issued with P3 forms and then escorted to Madiany Sub County Hospital for treatment.

on cross examination, he stated inter alia; that there were about twenty men at the scene; that the Appellant was wild and shouting as he descended on his victims; that they had not informed the police over the meeting at the home of the Appellant; that he did not have an invitation to the Appellant's home; that the Appellant assaulted him and that they were blocked from escaping from the compound of the Appellant.
  5. PW2 Edwin Abidha testified that the Appellant is his step- father. That they had been having issues over the place they were to reside and that their mother had given the Appellant money with which



to purchase land for him and his brother Desmond Midigo (PW1). That they decided to visit the Appellant's home to discuss the said issue of land and that they engaged one Samson, a cousin to act as a mediator in the discussion. That on arrival at the Appellant's compound, his wife became hostile and locked them in the compound. That the Appellant arrived and started assaulting the mediator (Samson) and then turned on them as well. That he was hit on the head. That the Appellant and his group fled the scene upon the arrival of the police. That they went to Aram Police Station where they were issued with P3 forms and then escorted to Madiany Sub County Hospital for treatment. He identified the treatment note and P3 form.

On cross examination, he stated inter alia; that his cousin Samson had called the Appellant to alert him of the visit to discuss on the land issue; that they did not involve the area chief or land registry; that the Appellant hit him with a hammer. That the Appellant brought from the house a jerrycan containing flammable liquid which he doused their vehicle and called for a match box from his wife with the intention to set the vehicle ablaze while they were inside; that the Appellant was armed with a hammer, whip and rope.

6. PW3 Mary Obondo Nyunja testified that the appellant is her husband and that PW1 and PW2 are her sons. That on the material date, she and her cousin had earlier engaged the Appellant over a land issue and who had agreed that they visit him at his house to discuss the same. That they arrived at the home of the Appellant and were ushered into the compound only for the Appellant to arrive afterwards while in company of goons and who blocked them. That the appellant attacked her sons plus her cousins. That police arrived forcing the Appellant and his goons to escape from the scene. That they went to Aram Police Station to report the incident and later went to hospital over the treatment of those who were injured.

On cross examination, she stated inter alia; that she divorced her first husband Abidha Midigo and married the Appellant; that she had signed part of the sale agreement over land parcel Number 2888; that the Appellant did not assault her; that they did not alert the chief or police about the meeting with the Appellant; that the appellant ran away upon the arrival of the police.

7. PW4 Samson Ochieng Ochieng testified that PW3 is his sister. That on the material date, they had agreed to meet the Appellant at his house to discuss some land matters. That they arrived at the Appellant's home but he was not present. That the Appellant later arrived while in company of goons and that he first tied him up and whipped him severally. That the Appellant later bought out some petrol and sought to torch a vehicle belonging to his sister (PW3). That he saw the Appellant struggling with the other complainants as he managed to sneak out of the scene after untying himself. That he later found the other victims at Aram Police Station and they then went to Madiany Sub County Hospital. He identified the treatment note and P3 form.

On cross examination, he stated inter alia; that he did not inform the area chief of the visit to Appellant's home; that Appellant's wife asked them to leave but they declined; that the person who assaulted him is the Appellant and that his goons were holding him as the Appellant whipped him; that about eight goons emerged from the Appellant's vehicle.

8. PW5 Rodgers Ochieng Opiyo stated that on the material date, he was on his way to Aram when the Appellant stopped his vehicle and requested him to enter his vehicle and join others already inside as there was some job to be done. That on arrival at the Appellant's home, the Appellant started assaulting one of the men already in the compound as others were still inside their vehicle. That the Appellant entered his house and came out with a jerrycan containing some fluid and which he poured on the vehicle that was in the compound forcing the occupants to come out. That he recognized the said occupants as people he had known. That he managed to alert the police as he sneaked out of the compound.



On cross examination, he stated inter alia; that the Appellant did not explain to him the role he was to play at his compound; that he is not a goon but a businessman at Aram market; that he was later arrested over the matter; that he knew PW1 who was his school mate; that the Appellant whipped one Samson who had introduced himself as a pastor; that he approached the occupants of the other vehicle and requested them to come out for peaceful resolution of what was going on.

9. PW6 Abigail Usagi testified that she is a clinical officer attached at Madiany Sub County Hospital. She stated that she attended to PW1 and PW2 who had a history of having been assaulted the previous day. She stated that she also attended a third patient named Samson. She produced the respective treatment notes and P3 forms for the said three witnesses. On cross examination, she stated that the injuries were minor.
10. PW7 No. 217342 Cpl Malaki Ojwang testified that he visited the scene and on arrival, the Appellant escaped upon seeing them. That he arrested the wife of the Appellant who was booked in the cells at Aram Police Station while those injured were referred to hospital for treatment. On cross examination, he stated inter alia; that he was alerted by the OCS at 9.30 pm and reached the Appellant's house at 10.00 pm; that they found five people at the scene; that he did not witness the incident and did not see any weapon.
11. PW8 Dr. Michael Owino stated that PW3 is his aunt while PW1 and PW2 are his cousins. That on the material date, he was enjoying a drink at Linkers Club when he saw the Appellant at the club and who appeared restless and who later left in haste. That he later received a report about the distress call raised by PW4. That he alerted the OCS who was then at the club who directed police officers to rush to the scene. That on arrival, the Appellant fled from the scene while his goons jumped over the fence.  
On cross examination, he stated that he was related to the complainants. That he does not know the relationship between PW3 and the Appellant. That he did not witness the incident but he found one of the victims namely Reagan bleeding profusely. That the Applicant's wife was then issuing insults.  
PW9 No. 222737, Senior Sergeant Kevin Otieno Wandai testified that he took over the case and recorded witness statements. That he established that the Appellant was married to PW3 and that the said PW3 had given money to him in order to purchase land for her sons (PW1 and PW2) and that the Appellant had become evasive forcing her to engage a mediator and visited his home for discussions over the matter. That the Appellant later lodged a report that there were strangers in his compound and later took goons to his home and assaulted the complainants. That he visited the scene and recovered logs which had been used to barricade PW3's vehicle and that he also organized for taking of photographs and which he produced as exhibit 7,9 and 10.  
On cross examination, he stated inter alia; that he did not accompany the officers who first responded to the distress; that he did not obtain a marriage certificate between Appellant and PW3; that the dispute related to a piece of land reference North/Sakwa/Maranda/2888; that he did not recover any weapons; that one of the hired goons was turned into a prosecution witness; that he is the one who took the photographs using his mobile phone.
12. That marked the close of the prosecution's case. The trial court later established that the prosecution had established a prima facie case against the Appellant who was subsequently placed on his defence. He opted to tender sworn testimony and called two witnesses.
13. DW1 Habil Ochieng Odongo, testified that he is the Appellant. He stated that he had a relationship with PW3 and lived as husband and wife for about three years. That he had opened businesses for PW1 and PW2 and later bought land for them as per the sale agreement produced as exhibit DEX-1 and 2. That land parcel North/Sakwa/Maranda/2888 had been bought by him way back in 2016 prior to



meeting PW3. That he also bought land for PW3 near Bondo Technical Institute. That despite buying them the lands, they still want to occupy parcel 2888 by force to which he is not ready to accept. That he had earlier received phone call threats from PW3 and her sons to which he had reported to the police. That on the material date, he was away when his houseboy alerted him of some strangers in his compound and that he lodged a report to the police. That he proceeded to his home in company of PW5 and that his car had only two occupants and that on arrival he found the strangers assaulting his wife. That he did not have any weapon on him. That he was injured on the hand as per the treatment notes (DEX4) and that he lodged a complaint with the regional DCI Nyanza as per the letter marked D exh 5. That he did not assault anyone but that he is the one who was assaulted.

On cross examination, he stated inter alia; that he received a call from PW4 who wanted to purchase a casket and who did not mention anything to do with an intended meeting; that he carried two people to his home where he found his wife being beaten by PW4; that he raised alarm attracting the villagers; that the vehicle in his compound belonged to PW3; that he did not send the villagers away upon recognizing that the vehicle belonged to his wife(PW3); that during his plea taking, he was not in a bandage and that he sought treatment about one month later.

On re-examination, he stated that he did not invite anyone to his home.

14. DW2 Beatrice Achieng, testified that the Appellant is her husband. That the dispute relates to land parcel 2888 which she and the Appellant bought in 2016 and completed payment in 2017. That PW3 currently occupies the said land. That on the material date, a certain vehicle arrived in her compound and that a certain person came forward and claimed that he had come to resolve a land dispute. That she ordered them to leave but became adamant forcing her to order the gate to be closed. That PW1 and PW2 attacked the Appellant. That PW4 also attacked the Appellant. That she had proposed that the land be shared between the children and wives.

On cross examination, she stated inter alia; that she did not identify the vehicle and did not call the Appellant; that it is the houseboy who called the Appellant; that PW4 slapped her twice; she does not know from where PW1 and PW2 got their injuries as they were not beaten; that the vehicle was not barricaded. On re-examination, she maintained that she was assaulted.

15. DW3 George Onyango, testified that he is aware of the relationship between Appellant and PW3. That he received threatening calls from PW2 over the issue of the Appellant's land. That he warned PW2 not to involve him in their family issues. That PW2 had threatened to take the Appellant to court and to ensure that he rots in jail. That he reported to the police over the said threats. That he suggested to the Appellant to sub divide the land but it seems PW3 wanted the entire land to herself. That the Appellant was injured during the incident.
16. The Appellant's defence was closed at that juncture.
17. The appeal was canvassed by way of written submissions. The Appellant's submissions are dated 6<sup>th</sup> May 2024 while those of the Respondent are dated 10<sup>th</sup> December 2024.
18. I have given due consideration to the record of appeal and the submissions filed herein. I find the only issue for determination is whether the Respondent proved its case against the Appellant beyond any reasonable doubt.
19. It is trite that the duty to prove the guilt of the accused rests squarely upon the shoulders of the prosecution. The said burden does not shift to the defence since the Appellant upon denying the charges, he was deemed innocent until proved guilty. See *Woolmington Vs. DPP (1935) AC 462*.



20. The Respondent's first three counts related to offences of assault causing actual bodily harm contrary to section 251 of the Penal Code. The Respondent was thus under obligation to prove that indeed an assault took place and that the three complainants (PW1, PW2 and PW4) sustained actual bodily harm. In all criminal cases, the ingredients of mens rea and actus reus must be established. All the three complainants testified that it was the Appellant who kicked off the assaults when he started with PW4 when he tied him with a rope and whipped him thoroughly with a whip. The Appellant later fetched some flammable liquid from his house and doused a vehicle belonging to PW3 and sought to set it ablaze whereupon PW1, PW2 and PW3 who were inside came out only for the Appellant to assault PW1 and PW2. The evidence of the clinical officer (PW6) confirmed that the three victims (PW1, PW2 and PW4) sustained injuries. She produced the respective treatment notes and P3 forms as exhibits. Again, the evidence of Rodgers Ochieng Opiyo (PW5) who was an eye witness left no doubt that indeed the three had been assaulted. The said PW5 confirmed that he had earlier been recruited to be part of the hired goons by the Appellant but that on arrival at the scene, he realized that the persons alleged to be strangers were indeed members of Appellant's family and that he opted to leave the scene and alerted the police who came to the scene and rescued the victims. The Appellant and his witnesses claimed that none of the complainants were assaulted and that instead it was the Appellant who was assaulted. I am unable to believe the version of the Appellant and his witnesses since the eye witness (PW5) was not a family member so as to suggest that he was an outsider. His evidence was therefore independent and without any bias whatsoever. I find the claim by the Appellant and his wife (DW2) that they were injured to be unworthy of belief. First and foremost, the Appellant on cross examination admitted that at the time of taking plea, he had no bandages and that he sought treatment about one month later. Again, there were no documents indicating that the Appellant's wife (DW2) sought for treatment from any medical facility. I am therefore satisfied that the Appellant together with his hired goons had assaulted the three complainants on the material date. The evidence of the victims and PW5 clearly placed the Appellant at the scene of crime.

As regards the aspect the mens rea, it is noted that there had been a land dispute involving the Appellant and his estranged wife (PW3) and her children (PW1 and PW2) and that on the material date, they were to discuss the same at his place. I am not persuaded by the Appellant's claim that the third victim (PW4) had earlier called him over the purchase of a casket. If that was the case, then there was no need for PW4 to visit the Appellant's home over the issue of a casket which ordinarily would be discussed at the casket making workshop, if any existed. It was the evidence of PW8 that the Appellant was at Linkers club while making calls and looked restless and who hurriedly left with one Agogo and that after a few minutes, a distress call was made by one of the victims and he together with two police officers rushed to the scene and found the Appellant armed with a whip and who sneaked out of his compound. It is clear in my mind that the Appellant upon being called by PW4 over the meeting to resolve the land dispute, put into motion plans to assault the visitors. Indeed, the Appellant hired some goons for the sole purpose of assaulting the visitors and that he lay in wait and then pounced once the said visitors had entered the compound and been locked therein. I find that he had the requisite mens rea regarding the three counts of assault. The defence evidence did not shake that of the prosecution which was quite overwhelming against the Appellant. Hence, the finding on conviction by the trial magistrate on the three counts of assault was quite sound.

21. As regards the fourth count of giving false information contrary to Section 129 (a) of the Penal Code, it is noted that the prosecution failed to call the relevant police officer No. 257446 Pc Ali Said Ganzala as a witness. It was crucial to call him so that he could tender evidence regarding the information filed by the Appellant which is alleged to be false. The other officers called could not establish the charge in any way without the specific officer who received the report from the Appellant. Hence, the finding



on conviction on the 4<sup>th</sup> count by the learned trial magistrate was in error and must be interfered with by this court.

22. As regards the issue of sentence, it is noted that the Appellant was ordered to pay a fine of Ksh100,000/= in default to serve 12 months imprisonment on each of the three counts of assault. Under Section 251 of the Penal Code, a person found guilty thereof is liable to serve five year's imprisonment. The pre-sentence report dated 30<sup>th</sup> January, 2024 indicated that the Appellant and his family had no apologies over the incident as they were repelling intruders. It indicated that the two families are not conciliatory and hence the need for deterrence. It is noted that the Appellant has taken issue with the trial court in failing to heed to the recommendation by the probation officer that the Appellant performs community service order at the office of the District Commissioner. However, the trial court was entitled to exercise its discretion. I find the sentences imposed were neither harsh nor excessive. It is instructive that the Appellant had plotted to eliminate members of his estranged wife over their persistence for allocation of the family land. The circumstances could have turned tragic had the police not arrived in the nick of time. The complainants actually survived by the skin of their teeth. It is noted that the Respondent has not sought for enhancement of sentence and hence, I will not interfere with the same. I find the sentences imposed were more like a slap on the wrist.
23. In view of the foregoing observations, it is my finding that the Appellant's appeal partly succeeds. The appeal on counts I, II and III lacks merit and are dismissed. The appeal on count IV has merit and is allowed with an order that the trial court's conviction be and is hereby quashed and that the sentence imposed is set aside and further that the fine of Ksh20,000/= be refunded to the depositor upon proof of identification.

**DATED AND DELIVERED AT SIAYA THIS 22<sup>ND</sup> DAY OF JANUARY 2025**

**D. KEMEI**

**JUDGE**

In the presence of:

Habil Ochieng Odongo.....Appellant

Ofor Appellant

.....for Respondent

.....Court Assistant

