



REPUBLIC OF KENYA



**KENYA LAW**  
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**Chemengu v Republic (Criminal Appeal E072 of 2023)  
[2025] KEHC 1923 (KLR) (7 February 2025) (Judgment)**

Neutral citation: [2025] KEHC 1923 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT BUNGOMA  
CRIMINAL APPEAL E072 OF 2023**

**DK KEMEL, J**

**FEBRUARY 7, 2025**

**BETWEEN**

**BEATRICE NAMACH CHEMENGU ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**JUDGMENT**

1. The Appellant herein Beatrice Namachi, was charged with the offence of assault causing actual bodily harm contrary to Section 251 of the *Penal Code* under Count I. It was alleged that on 22<sup>nd</sup> July 2021, at about 9.30 A.M. at Cheptais open-air market, in Cheptais Sub-County within Bungoma County, she willfully and unlawfully assaulted Sandra Khadija, thereby occasioning her actual bodily harm.
2. Under Count II, the Appellant was charged with the offence of threatening breach of peace contrary to Section 95 (1) (b) of the *Penal Code*. It was alleged that on 22<sup>nd</sup> July 2021, at about 9.30 A.M. at Njeri's Saloon at Cheptais open-air market, in Cheptais Sub-County within Bungoma County, created a disturbance in a manner likely to cause a breach of peace by fighting the salonist and scaring away customers.
3. Under Count III, the Appellant was charged with the offence of malicious damage to property contrary to Section 339 (1) of the *Penal Code*. It was alleged that on 22<sup>nd</sup> July 2021, at about 1300hrs at Cheptais Police Station, in Cheptais Sub-County within Bungoma County, she willfully and unlawfully damaged window panes at the office of the O.C.S Cheptais Police Station by breaking them into pieces.
4. The Appellant pleaded not guilty to the charge and a full trial was conducted. The Prosecution called four witnesses in support of its case and that at the close of the Prosecution's case, the trial magistrate found that the Respondent had established a prima facie case against her to warrant her to be placed on her own defence. She was duly placed on her defence.



5. The Appellant gave a sworn statement wherein she vehemently denied the charges. In its judgement delivered on 30<sup>th</sup> October 2023, the trial Court convicted her on Count One but acquitted her on the rest of the counts. Upon receipt of the Appellant's mitigation, the trial Court sentenced her to serve ONE (1) year probation under the supervision of the Probation Officer, Sirisia.
6. The Appellant moved this Court vide a petition of appeal dated 14<sup>th</sup> November 2023, citing eleven (11) grounds of appeal and prayed that the conviction and sentence be set aside.
7. Vide Court directions dated 13<sup>th</sup> February 2024, the appeal was canvassed by way of written submissions.
8. The Appellant submits that the Respondent failed to challenge her appeal as their case was full of false evidence, imaginary exhibits, defamation and that the trial was unlawful and lacked any evidentiary and legal backing. She submits that the Court ought to draw its attention to the evidence as rendered by PW1 and PW2; the OB/NO.11/14/08/2021 on the police charge sheet; PEXH.1-PW1 treatment notes; PW2- PW1's P3 form.
9. She submits that on receipt of a complaint, the investigating officer (PW3) did not visit the scene of crime to record the statements of eye witnesses and failed to involve the CID officers for purposes of drawing a sketch plan, photograph taking and recording of statements of independent eye witnesses.
10. The Respondent submits that as per the availed evidence before the trial Court, the Complainant herein was assaulted while at her place of work by the Appellant herein. According to the Complainant, the Appellant accused the Complainant of infidelity with her husband. The Prosecution produced in Court as Exhibit 1, treatment notes and a P3 form as exhibits to prove the assault and the sustained injuries.
11. Counsel submits that the Appellant was no stranger to the Complainant herein as she accosted her during the day while she was at her place of work and that she was able to see the Appellant very well. It was further submitted that the complainant was able to identify the Appellant to the investigating officer and also in Court. Learned counsel relied on the case of Ogeto vs Republic (20024) KLR 19.
12. Counsel finally submits that the prosecution proved its case against the Appellant under Count One beyond reasonable doubt and that the sentence of one year probation by the lower Court deviated from the dictates of the law which provide for a sentence of five years imprisonment and thus Counsel sought for an enhancement of the sentence.
13. On 9<sup>th</sup> April 2024, Miss. Kibet, for the Respondent notified the Court of the State's intention to file a Notice of Enhancement of Sentence dated 28<sup>th</sup> February 2024 to which the Appellant did not oppose the same.
14. This Court directed the parties to the appeal to file and serve their respective written submissions on the said Notice of Enhancement dated 28<sup>th</sup> February 2024.
15. On the Notice of Enhancement of Sentence by the Respondent, the Appellant submitted that on the preserve of justice and fairness, this Court ought to dismiss the Respondent's Notice of Enhancement of sentence and allow her appeal. She argues that she was convicted and sentenced on an unlawful trial and is set to suffer injustice and irreparable dangers of depression if forced to serve the one year probation sentence.
16. The Respondent on the Notice of Enhancement of sentence, submits that the Appellant herein is an aggressor with a history of picking fights and quarrels within her community and that a non-custodial sentence of one year is inappropriate in this case. Counsel argues that the said sentence is too lenient



- and does not serve to deter the Appellant from any future incidences which might go beyond assault. Counsel urged this Court to rather issue a custodial sentence given the history of the Appellant herein, which according to her was not rebutted.
17. This being a first appeal, it is the obligation of the Court to reconsider and re-evaluate the evidence afresh and come to its own conclusion. (see Okeno –vs- Republic [1972] E A 32).
  18. It was the evidence of PW1, Khadija Sandra, that she works at a saloon where she is employed by one Njeri Esther. According to her, on 22<sup>nd</sup> July 2021 while at work at around 7.30 A.M. she was informed by her boss that her name was being mentioned outside and that allegations were that she had snatched the husband of the Appellant herein. Later in the day, the Appellant passed by the salon and when she inquired as to why she was tainting her name, the Appellant threatened to burn her in her house; dragged her by her hand and biting her hand in the process. She rushed to the hospital and later lodged a police report. She told the Court that she was treated at Cheptais Health Centre and identified the Appellant in Court as the person who bit her.
  19. PW2 was Esther Njeri, who testified that she is the complainant under Count II and that she owns the salon that had employed PW1 herein. According to her, on 22<sup>nd</sup> July 2021, while at work, she heard the Appellant stating that PW1 had stolen her husband and on enquiring from PW1, she sounded surprised. PW1 requested to talk to the Appellant who refused to engage her and who then proceeded to attack PW1 and biting her on the hand. That they rushed PW1 to Cheptais Health Center. She told the Court that she knows the Appellant herein.
  20. PW3 was No. 260832 PC Pius Mwenda, who testified that he is stationed at Cheptais Police Station and was the investigating officer herein. According to him, on 22<sup>nd</sup> July 2021, he received a report of assault and biting from PW1 herein. He observed that PW1 had bite marks on her hand and after booking the case they advised her to seek treatment. As he was investigating this matter, PW2 came in the following day to lodge a complainant against the same Appellant. He recorded her statement and then made arrangements to arrest the Appellant. When he went to arrest the Appellant, he was informed that she was unwell and admitted in hospital and so he decided to summon her to visit the station after her release from hospital. While at the station, the Appellant caused a fracas by issuing threats and that she took a piece of glass wanting to cut herself. He told the Court that they were able to get hold of her physically, arrest and later charged her. He told the Court that he was the investigating officer in all the three counts. He produced in Court PW1's treatment notes and filled P3 form as PEXH. 1 and 2 respectively.
  21. PW4 was Esther Wepukhulu, who testified that she is a clinical officer stationed at Cheptais Hospital and was in Court to produce the P3 form of the complainant (PW1) herein. According to her, PW1 visited the facility on 22<sup>nd</sup> July 2021 with a history of a human bite on her left hand and a bruise on her neck. She treated her and administered antibiotics and pain killers. According to her, on the examination of PW1 she noted that she sustained pain on her neck and a human bite on the left hand. She classified the injuries as harm. She produced in Court the P3 form as -PEXH.2.
  22. At the close of the prosecution's case, the Appellant was put on her defence. She tendered her evidence on 5<sup>th</sup> October, 2023 as Beatrice Chemengu (DW1). According to her, she did not assault PW1 herein nor did she cause any chaos as alleged. She refuted the claims that she damaged the office of the OCS and insisted that she was being framed as she had differed with the OCS at some point over the payment of Kshs. 38,000/= for exhibits they had sold to her. She insisted that she was the complainant herein and not PW1 as she was the one who had been assaulted. She produced in Court DEXH. 1-discharge summary, DEXH. 2-medical report and DEXH.3-treatment notes. She told the Court that she reported the assault to the police but that nothing was done. She told the Court that on her



discharge from Bungoma Referral Hospital, she proceeded to answer the summons issued against her and on arrival at the Police Station, PW3 attacked her with the OCS demanding a bribe of Kshs. 5000/= so that the case against her could be dropped. She told the Court that her refusal to pay the requested amount made her to be arrested and held in remand.

23. Having conducted its duty as a first appellate court and this Court being guided by the principles set out in the case of David Njuguna Wairimu v Republic [2010] eKLR, I have considered the appeal before me, the written submissions, the proceedings and the judgment of the trial Court. I find the issues for determination in this appeal are:
- a. Whether the Prosecution adduced sufficient evidence to prove the three counts against the Appellant.
  - b. Whether this Court should consider the Respondent's Notice of Enhancement of sentence dated 28<sup>th</sup> February 2024.
24. 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 puts it more succinctly;

“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....”

#### **Count I**

25. The Appellant was charged with the offence of assault causing actual bodily harm contrary to Section 251 of the Penal code which provides;
- “Any person who commits an assault occasioning actual bodily harm is guilty of a misdemeanor and is liable to imprisonment for five years.”
26. Accordingly, to secure a conviction on the offence of assault, the Prosecution must prove beyond reasonable doubt:
- i. Assaulting the complainant.
  - ii. Occasioning actual bodily harm.
27. On actual bodily hurt or injury, in Rex vs Donovan CCA 1934, 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.”
28. I have carefully evaluated the evidence adduced by the Prosecution witnesses. The Prosecution must, therefore, show that the assault resulted in actual bodily harm. There must be an intention to assault (mens rea) and the assault must have taken place (actus reus). PW4, a clinical officer adduced medical evidence to corroborate the evidence of the complainant (PW1) that she sustained actual bodily harm or injury as a result of the assault by the Appellant.
29. In the same breath, it is alleged that there was material contradiction in the evidence adduced by the Prosecution witnesses. According to the evidence by the prosecution witnesses, PW2 and PW4, was that the bite injury was on her left hand but the availed treatment notes by PW4 indicated that she



noted the bite injury on the Complainant's right hand. In the case of Erick Onyango Ondeng' vs. R [2014] eKLR, the Court reasoned that:

“The hearing before the trial court invariably entails consideration of often contradictory, inconsistent and hotly contested facts. The primary duty of the trial court is to carefully analyze that contradictory evidence and determine which version of the evidence, on the basis of judicial reason, it prefers.”

30. The evidence of PW1 does tally with PW2's testimony. Further, the evidence of PW2 who even confirms that she was present when the Appellant bit the complainant on the hand. The treatment notes were produced before the trial Court and they made the situation very clear that the complainant was indeed assaulted despite not mentioning the biting aspect, it is certain the injuries incurred were gauged as harm as per the P3 form and that the treatment notes indicated the injuries PW1 sustained as : injuries on the head, neck and right elbow with bruises on her face-fore head and right cheek, and bruises on the right elbow with no swelling.
31. In my view, any thread of evidence that may have connected the Appellant to the crime was not dismantled by the contradictions as to the location of the bite marks as the same was not material contradictions. It also imperative to note that the P3 form as filled by PW4 indicated the positions of the injuries noted and sustained to be at the head and neck areas with the approximate age of the injuries placed at one day as the incident occurred on 22<sup>nd</sup> July 2021 while the P3 form was filled on 23<sup>rd</sup> July 2021. With that kind of evidence, it is clear that indeed the Appellant had assaulted the complainant since the incident took place in broad daylight and was witnessed by the complainant's employer. The Appellant's defence was properly rejected by the trial court. I therefore uphold the trial Court's conviction of the Appellant under Count 1.

## Count II

32. The Appellant was also charged with the offence of creating a disturbance in a manner likely to cause a breach of peace contrary to Section 95 (1) (b) of the Penal Code. Section 95 (1) (b) of the Penal Code provides:

“(1) Any person who –  
(b) brawls or in any other manner creates a disturbance in such a manner as is likely to cause a breach of the peace, is guilty of a misdemeanor and is liable to imprisonment for six months.”

33. For the offence to be proved, the Prosecution must establish that there was a brawl caused by the accused or that the accused created a disturbance in a manner that is likely to cause a breach of peace. A brawl is defined as a rough or a noisy quarrel or fight. In the case of Muler -vs- Republic Criminal Appeal No.873 of 1982 the offence of creating a disturbance was described as follows:

- “1. The offence of creating disturbance likely to cause a breach of the peace constitutes incitement to physical violence and the breach of the peace contemplating physical violence....  
2. It is not enough to constitute the offence of creating a disturbance likely to cause a breach of peace to show that the accused merely created a disturbance, that disturbance should have been likely to cause a breach of peace. Peace



would for instance refer to the right of wanainchi to go about their daily activities without interference....”

34. In creating a disturbance likely to cause a breach of peace, there is no requirement that the incident must take place in a public place for the offence under Section 95(1) (b) of the *Penal Code* to be proved. In the persuasive case of Felix Muthoni Nganga –vs- Republic HCCRA No.131 of 2010 at Machakos, it was held that:

“Clearly the offence can be committed in a private place for the simple reason that a breach of the peace can occur in such a place, there is absolutely no necessity to impute restriction that is absent from the wording of the statute.”

35. It was the evidence of PW2, the complainant under this count, that the Appellant herein assaulted PW1 herein biting PW1’s left hand and this commotion occurred in her saloon where there were other people in the morning. No evidence was availed by the Prosecution to indicate that there were any other persons at the scene to indicate a disturbance but that disturbance likely caused a breach of peace apart from PW1 and PW2 who were both Complainants and in each other’s company. PW2 alluded to the presence of other customers when the Appellant assaulted PW1 but failed to indicate before the Court if the said acts of the Appellant lead to her scaring away those customers. In any event, none of those customers were called to corroborate the assertions.
36. From, the foregoing, i find it proper to uphold the holding of the trial Court under this count. It is clear that the Respondent did not prove beyond reasonable doubt that the Appellant’s conduct of attacking and biting PW1 was likely to create a breach of peace.

### Count III

37. Further, the Appellant was also charged under Section 339 (1) of the *Penal Code*. Section 339(1) of the *Penal Code* states as follows:

“Any person who willfully and unlawfully destroys or damages any property is guilty of an offence, which, unless otherwise stated, is a misdemeanor, and is liable, if no other punishment is provided, to imprisonment for five years.”

38. It is clear from a critical analysis of the evidence as tendered by the Prosecution witnesses that none of them gave tangible evidence on this Count. PW3 testified that the Appellant herein caused chaos while at the station answering to a summon issued against her. He alluded to the fact that the Appellant held a piece of glass threatening to harm herself and even proceeded to produce pieces of glass in Court as exhibits but failed to walk the Court as to how the damage occurred. PW3 failed to elaborate to the Court how the window panes were broken and who broke the said window panes. This evidence offers no link between the broken glasses and the Appellant herein. I concur with the holding of the lower Court that the Prosecution failed to prove this Count beyond reasonable doubt.
39. The facts and evidence therefore supported only Count I.

### Sentence

40. With regard to sentence, Section 251 of the *Penal Code* provides that a person who is guilty of the offence of assault occasioning actual bodily harm commits a misdemeanor and is liable to imprisonment for five years. The Appellant was sentenced to one-year probation for Count I.



41. There is no specific formula of attaining appropriate sentence (Alister Anthony Pereira vs State of Maharashtra, [ 2012] 2 S.C.C 648 Para 69). Appropriate sentence depends on the facts and circumstances of the case (State of M.P. vs Bablu Natt {2009}2S.C.C 272 Para 13).

42. Bearing in mind the Notice for Enhancement of sentence application by the Respondent, it is imperative to note that pursuant to Section 354(3) states:-

“(3) The court may then, if it considers that there is no sufficient ground for interfering, dismiss the appeal or may:-

(a) in an appeal from a conviction: -

(i) reverse the finding and sentence, and acquit or discharge the accused or order him to be tried by a court of competent jurisdiction: or

(ii) alter the finding, maintaining the sentence, or with or without altering the finding, reduce or increase the sentence.”

43. I have considered the nature, the manner of commission of the offence, the principles of sentencing, the mitigation by the Appellant and the amount of sentence imposed. The offence was characterized by bodily injuries to PW1 and that the manner it was committed was of barbaric kind: bites on PW1’s hand and the bruises on PW1’s forehead and cheek. The unlawful conduct of the Appellant requires deterrent punishment for others. The Respondent’s request for enhancement of sentence based on the circumstances of the case is not warranted in the circumstances. I find the sentence imposed by the trial court to be reasonable, legal and appropriate for the offence. I find no reason to interfere with the sentence imposed by the learned Magistrate. Hence, the appeal on sentence lacks merit.

44. In the result, the appellant’s appeal on both conviction and sentence lacks merit. The same is dismissed. Orders accordingly.

**DATED AND DELIVERED AT SIAYA THIS 7<sup>TH</sup> DAY OF FEBRUARY 2025.**

**D. KEMEI**

**JUDGE**

In the presence of:

N/A Beatrice Namachi.....Appellant

M/s Kibet.....for Respondent

Kizito/Ogendo.....Court Assistant

