



**Etemesi v Republic (Criminal Appeal E057 of 2022)
[2025] KEHC 3839 (KLR) (20 March 2025) (Judgment)**

Neutral citation: [2025] KEHC 3839 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CRIMINAL APPEAL E057 OF 2022
SC CHIRCHIR, J
MARCH 20, 2025**

BETWEEN

MALEA ETEMESI APPELLANT

AND

REPUBLIC RESPONDENT

JUDGMENT

1. The appellant herein was charged alongside one Richard Etemesi of the offence of assault causing actual bodily harm contrary to Section 251 of the penal code. The particulars of the charge were that on 27th February, 2021 at Bulovi Sub-location, Kambiri location within Kakamega East County, unlawfully and willfully assaulted Ruth Muhanji occasioning her actual bodily harm.
2. The appellant denied the charge and the prosecution called 5 witnesses in support of its case. The appellant was convicted and sentenced to serve 2 years' probation supervision.
3. Dissatisfied with the outcome, the appellant lodged this appeal setting out the following grounds;
 - a. That the magistrate failed to apply the degree of prove in criminal cases to the detriment of the appellant's case
 - b. The magistrate failed to consider the appellant's defence to the prejudice of the appellant
 - c. The magistrate failed to analyze the prosecution's evidence which had a lot of lapse and contradictions to the prosecution's evidence.
4. The prosecution called a total of 5 witnesses while 4 testified on the side of the defence.
5. The appeal was canvassed by way of written submissions.



Appellant's submissions

6. It is the Appellant's submissions that it was clear from the evidence on record that the confrontation on the material day was between the complainant and one Felix who was never charged of any offence, and that she did not have any reason to attack the complainant. It is further submitted that there were contradictions in the evidence adduced by the prosecution. That PW3 failure to give the names of the appellant and her son to the police raised doubts on the truthfulness of his testimony.
7. The appellant further submits that the medical evidence raises reasonable doubt as the P3 does not prove that the injuries were caused on 27/2/2021.
8. The respondent did not file any submissions.

Analysis and determination

9. This is the first appellate court, and its duty has been the subject of numerous past decisions of the superior courts. In *Okeno – Vs – Republic* (1972) EA 32 the duty was stated as follows:-

“An appellant is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellant's court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. It is not the function of the first appellate court to merely scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions. Only then can it decide whether the magistrate's findings can be supported. In doing so, it should make an allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses”.

10. I have considered evidence presented before the trial court, the grounds of appeal and the submissions of the appellant. The key issue for determination is whether the Prosecution case was proved beyond reasonable doubt.
11. Section 251 of the *Penal Code* describes the offence of Assault causing actual body harm as follows:

Any person who commits an assault occasioning actual bodily harm is guilty of a misdemeanor and is liable to imprisonment for five years.”
12. In *Ndaa v Republic* (Criminal Appeal 146 of 1983) [1984] KECA 19 (KLR) (24 January 1984) (Judgment) the court of Appeal identified the ingredients of the offence as
 - a) assaulting the complainant or victim;
 - (b) occasioning actual bodily harm
13. My understanding of the above definition is that there must be evidence that the accused is the one who assaulted the complainant and the complainant sustained injuries as a result. I will proceed to determine the issue of proof by ascertaining whether the above two ingredients were established.
14. In this case both the complainant and the accused acknowledged that they hailed from the same village and knew each other well. The complainant was the 1st witness and a village elder. She was on her way to work when she stumbled upon the Accused's son one Felix Etemesi assaulting his wife on the road near their home. The complainant went to where they were and told him to stop the beating. Felix was not happy and he approached the complainant . The complainant pushed Felix away. The Accused herein had been in the crowd and was among those who had tried separating the couple. When the



Accused saw the complainant pushing Felix, she slapped the her and ran towards the road crying that her son had been attacked. Another son, Richard, and the then co- accused of the Appellant herein, also stepped forward and boxed the complainant 3 times and scratched her. Some people in the crowd intervened . She named two people went to her rescue, as Boaz and Nyumbile

15. The other witness who testified to have witnessed the assault was Justus Mambi. He stated that he was in the nearby kambiri trading center, when he saw the commotion . He moved nearer to check what was going on . He saw the 2nd Accused assaulting the complainant. On re-examination he stated he also saw the 1st Accused assaulting the complainant . He and Boaz helped in separating the two and the complainant
16. The other witness who witnessed the incident was Boaz Miyakuku (PW3). He was also at the kambiri shopping centre . He saw the saw the 1st and 2nd Accused fighting with village elder Ruth; the first accused was saying that the complainant was killing her son.
17. In her defence the Appellant told the court that she was informed about the fight between her son Felix and his wife, and on going to check ,she found the complainant fighting her son. She further stated that her son Felix fell down and became unconscious after the complainant slapped him. on cross- examination she stated that felix and the complainant were fighting while felix's wife was on the ground, crying . She denied assaulting the complainant.
18. The other defence witness was felix . He stated that he was fighting with his wife when the complainant intervened . He was not happy with the intrusion.He fought the complainant but she was too strong for him. The complainant hit him on a raw wound and he started to bleed . On cross- examination, he stated that he had seen his mother coming he was fighting with the complainant.
19. Thus apart from the complainant, there were two other prosecution witnesses who witnessed the attack. Further , the 2nd Accused denied being in the scene; . Felix told the court that he found the complainant too heavy for him and therefore he could not fight her. There was also consensus on the fact that Felix had a pre- existing raw wound. Apart from Felix 's testimony to the effect that he saw his mother coming, the Appellant also placed herself on the scene. There is evidence that the complainant was injured. Who then attacked the complainant in the light of the 2nd accused's defence of alibi Felix injury . In the circumstances I find the two prosecution's witnesses accounts more plausible, and I find that the prosecution indeed proved that the Appellant is the one who assaulted the complainant.

Whether the complainant suffered Actual body harm

20. In R vs Morris (1998) CR. App R.336 at 393 cited in Alex Mukurakura vs Republic (2016) KEHC 7013(KLR)stated as follows:- "What constitutes "actual bodily harm" for purposes of this Sectionis succinctly and accurately set out in Archibold (1997(ed) at para 19-197:- "Bodily harm has its ordinary meaning and includes any hurt or injury calculated to interfere with the health or comfort of the victim: such hurt or injury need not be permanent, but must be more than merely transient or trifling...
21. In Rex vs Donovan (1934) 2KB 498 the court 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.
22. According to the clinical officer (PW4) the complainant suffered pain on her neck , back and she also " had scratch marks on her body". She could not turn her head because of the pain , he stated. . I find that the said injuries fit the definition of actual body harm.



23. The Appellant has taken issue with the then age of the injuries at the time of examination. The issue was whether the injuries were one hour or days- old at the time of examination. I consider this a minor discrepancy that could not have displaced the prosecution's case in this regard. I have further noticed that the defence own exhibit 1 , being the P3 form for Felix , the alleged victim of the attack on the same date ,has the same error. It indicate the age of the injury as one hour , yet there is common ground that the fight or attack took place the same time , that was on 27th February 2004. What is significant is that there is evidence that the complainant was injured as a result of the assault.
24. Am satisfied that the Prosecution proved, beyond a reasonable doubt that the Appellant herein assaulted the Complainant, and that she suffered injuries as a result. I find no merit in this Appeal. It is hereby dismissed.

DATED , SIGNED AND DELIVERED VIRTUALLY AT ISIOLO THIS 20TH DAY OF MARCH ,2025.

S.CHIRCHIR

JUDGE

In the presence of:

Godwin Luyundi – Court Assistant

Ms. Kagai for the Respondent.

