Ochanda v Republic (Criminal Appeal E045 of 2024)
[2025] KEHC 5027 (KLR) (12 March 2025) (Judgment)

Neutral citation: [2025] KEHC 5027 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT HOMA BAY

CRIMINAL APPEAL E045 OF 2024

OA SEWE, J

MARCH 12, 2025

BETWEEN

PHERISON OTIENO OCHANDA ..... APPELLANT

AND

REPUBLIC ..... DEFENDANT

(Being an appeal from the original conviction and sentence in MCCR No. E037 of 2023 at the Principal Magistrate's Court, Ndhiwa (Hon. B. W. Murangasia, RM) dated 22nd May 2024)

JUDGMENT

1. This appeal arises from the decision of the trial magistrate, Hon. B. W. Murangasia, RM, delivered on 22nd May 2024 in Ndhiwa MCCR No. 037 of 2023. In that matter, the appellant had been charged jointly with Calvince George Ogina alias Owiti Ogina with the offence of assault, causing actual bodily harm, contrary to Section 251 of the *Penal Code*. It was alleged that on the 24th December 2022 at Nyoniang' Village, Ndhiwa Sub County, within Homa Bay County in the Republic of Kenya, jointly with others not before the court they unlawfully assaulted Jeff Okinyi Awuor occasioning him actual bodily harm.

2. The appeal was consolidated with Homa Bay High Court Criminal Appeal No. E037 of 2024: Calvince George Ogina alias Owiti v Republic in which the appellant was the co-accused of the appellant herein.

3. The record of the lower court shows that appellants denied the charge, were taken through the trial process in which the Prosecution called 5 witnesses. The appellants were also given an opportunity to make their defence. They gave a sworn statement and called their spouses, Imelda Atieno Otieno (DW3) and Iscar Achieng Ogina (DW4) as their defence witness. Upon considering the evidence presented and the defence proffered by the appellants, the learned magistrate was satisfied that the charge of assault had been proved beyond reasonable doubt. He accordingly found the appellants

guilty and convicted them of the offence. The learned magistrate called for a pre-sentence report, which he took into consideration before sentencing the appellants to 4 years' imprisonment.

4. Being aggrieved by their conviction and sentence, the appellants filed their respective appeals on grounds which are similar in every sense. They contended that:

   (a) They did not plead guilty to the charge.

   (b) The trial court erred both in law and fact in convicting them without considering that the evidence on record was not only uncorroborated but was also fabricated, malicious, inconsistent, farfetched and was meant to implicate them in the alleged crime.

   (c) The trial magistrate did not consider that two key witnesses who were alleged to have taken the complainant to the hospital did not record their statements if indeed the complainant was assaulted and treated.

   (d) The complainant testified that it was Moi Allan who woke him up and the said Moi Allan was not brought as a witness to confirm his allegations.

   (e) There was no weapon brought to court as an exhibit.

   (f) PW2 in cross-examination said that she was commanded to switch off the security light when opening the door and at the same time she was able to identify the appellant in the dark.

   (g) The trial magistrate did not consider the conflicting evidence between PW1 and PW2 on the weapon used by him to assault the complainant.

   (h) The trial court failed to appreciate the conflicting evidence between PW1 and PW2 on lighting and whether it was on or off.

   (i) The trial court erred both in law and fact by not appreciating that the evidence on record was marred with a lot of contradictions, innuendos and wishful thinking.

   (j) The trial court considered the evidence of the medical officer who relied mostly on rumours and hearsay.

   (k) The trial court did not mention the Probation Report which they believed was favourable to them.

   (l) The trial court rejected their alibi defence and the evidence given by his witnesses which was cogent enough to exonerate them from any wrongdoing.

   (m) The sentence meted by the trial court was harsh in the circumstances.

5.

   (5) Accordingly, the appellants prayed that their conviction be quashed and the sentence set aside.

6. The appeal was urged by way of written submissions. Accordingly, the appellants relied on their undated written submissions in which they contended that the evidence on record was not sufficient to warrant a conviction. They pointed out that it was the evidence of the complainant that he did not see his assailants; and that there were about 100 people at the scene of the incident. The appellants also contended that, according to PW2, she was in the house and did not see the assailants. They urged the Court to note what they considered to be contradictions and inconsistencies in the evidence of the Prosecution witnesses. On that basis, the appellants prayed for their appeals to be allowed, contending that their prosecution was motivated by a grudge between them and the complainant.

7. The respondent relied on the written submissions dated 30th January 2025. Counsel for the respondent reiterated the evidence adduced by their witnesses before the lower court and submitted that the evidence proved their case beyond reasonable doubt. In particular, counsel submitted that identification was properly done, and the injuries suffered noted and vouched for by the Clinical Officer, PW4. Counsel also added that the sentence was lawful and drew the attention of the Court to the factors taken into consideration by the trial magistrate. Accordingly, the respondent prayed for the dismissal of the appeal.

8. This is a first appeal. Therefore, it is expected of this Court to subject the evidence presented before the lower court to a fresh analysis and evaluation, so as to come to its own conclusions thereon. In Okeno v Republic [1972] EA 32 by the Court of Appeal for East Africa made this point thus:

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

9. The Prosecution called 5 witnesses before the lower court. The complainant, Jeff Okinyi Awuor (PW1) told the lower court that he was sleeping in his house at about 0200 Hours when someone knocked on the door, whose voice he identified to be Moi Alai, his neighbor. He instructed him to get out and help him. On going outside his house, he found Moi with a big crown of people who were armed with pangas, rungus and torches. He recognized Ojiji, the 1st appellant who ordered him to lie down. They proceeded to assault him viciously with the 2nd appellant, asking him why he was sleeping and others were working. He further stated that after the assault the 1st appellant carried him back to his house as he was unable to walk on his own. He was thereafter taken to Ndhiwa Sub-County Hospital where he was treated and discharged.

10. PW1 further told the lower court that he reported the incident to Ndhiwa Police Station and was issued with a P3 which was later filled by a Clinical Officer at Ndhiwa Sub-County Hospital.

11. The complainant's wife, Cynthia Anyango Okinyi (PW2) told corroborated the evidence of PW1 and told the lower court that they were sleeping on the night of 24th December 2022 when they heard knocks on the door and the voice of their neighbor, Moi Alal, asking PW1 to get out of the house and assist him. She explained that their solar security light, also referred to a D-light was on and she was able to see the 1st appellant standing by the door when PW1 opened the door. She further stated that the 1st appellant carried a panga and a rungu and that he immediately ordered her to switch off the security lights and she complied. She also mentioned that she heard the 1st appellant ask PW1 why he was sleeping while others were working; after which the 2nd appellant started beating PW1 as they took him outside the gate.

12. PW2 further confirmed that PW1 was carried back and left at the door. He was bleeding from a cut wound on his forehead. She thereafter made arrangements with her brothers in law to take him to hospital for treatment.

13. The complainant's neighbor, Dickson Ochieng Alal (PW3), also testified before the lower court. He confirmed that he is also known as Arap Moi in their village. He further testified that on the night

of 24th December 2022, he was sleeping at around 2.00 am when the 1st appellant woke him up. He switched on the security lights before opening the door. He found the 1st appellant standing by the door and was with the 2nd appellant. On going outside, he found a large crowd of people numbering about 100. The 1st appellant asked him why he was sleeping. They then tied him up assaulted him before frog-matching him to the home of PW1 who is his neighbor. He was ordered to wake up PW1. He therefore testified that he witnessed the two appellants and others in the crowd with them beat up the complainant.

14. Nancy Muga (PW4) was a Clinical Officer attached to Ndhiwa Sub-County Hospital. Her evidence was that she examined and filled the P3 Form in respect of the complainant (PW1). She further confirmed that PW1 presented a history of assault and had bruises on his forehead and other injuries which he classified to be "Harm". She produced the P3 Form as an exhibit before the lower court.

15. The investigating Officer, PC Nakhulo, testified as PW5 and confirmed that the complainant made a report of assault at Ndhiwa Police Station. They conducted their investigations and caused the two appellants to be arrested and prosecuted accordingly.

16. The appellants denied the allegations against them. The 1st appellant told the lower court that at 2.00 a.m. on the night of 24th December 2022, he was sleeping in his house; and that he spent the whole night at home. He denied the allegations of assault against him. He explained that the complainant is his neighbor and that he had a grudge with the complainant over a piece of land. His alibi was supported by his wife, Imelda Atieno Otieno (DW3).

17. The 2nd appellant likewise raised an alibi and contended that on the night of 24th December 2022, he was in church preparing to celebrate Christmas. He testified that he left home on 23rd December 2022 with his wife and on 25th December 2022 after Christmas service. He called his wife, Iscar Achieng Ogina to back up his alibi defence.

18. Having considered the evidence adduced before the lower court, the Grounds of Appeal raised by the two appellants as well as the written submissions filed herein. The offence was laid under Section 251 of the *Penal Code*, and its elements were well set out by the learned trial magistrate in his judgment dated 22nd May 2024 to be actual bodily harm to the complainant and identification of the culprit. (see Ndaa v Republic [1985] eKLR)

19. There was credible evidence to prove that the complainant was assaulted on the night of 24th December 2022 so much so that he was unable to walk on his own. Both PW1 and PW2 told the lower court that had to be carried back to his house. He was taken to Ndhiwa Sub-County Hospital for treatment and later had his P3 filled by PW4. PW4 gave uncontroverted evidence that the complainant suffered actual bodily harm. Although in their Grounds of Appeal the appellants contended that PW4 relied on rumours and hearsay, the record of the lower court shows otherwise. It is in the evidence of PW1 that she personally attended to and examined the complainant. If indeed the appellants were not at the scene as alleged by them before the lower court, they would not be in a position to dispute the evidence by PW1, PW2 and PW3 that the assault took place. In particular, PW3 was at the scene and witnessed the assault. I am therefore satisfied that that ingredient was proved.

20. On whether the offence was committed by the appellants, the evidence presented before the lower court shows that the incident occurred at night, at about 2.00 a.m. The appellant therefore rightly raised the issue of identification granted the circumstances in which the incident took place and the number of people present. The evidence of identification was adduced by PW1, PW2 and PW3 and it was their contention that the 1st appellant was the one leading the activities of that night; that he first woke up PW3, beat him up and tied him before compelling him to wake up the complainant.

21. It is now settled that the evidence of identification at night must be thoroughly tested and the trial court must warn itself of the dangers of basing a conviction on such evidence. Hence, in Paul Etole & Another v Republic [2001] eKLR, the Court of Appeal held:

> " ...Such evidence can bring about miscarriages of justice. But such miscarriages of justice occurring can be much reduced if whenever the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused, the Court should warn itself of the special need for caution before convicting the accused. Secondly, it ought to examine closely the circumstances in which the identification by each witness came to be made. Finally, it should remind itself of any specific weakness which had appeared in the identification evidence. It is true that recognition may be more reliable than identification of a stranger; but, even when the witness is purporting to recognize someone whom he knows, the Court should remind itself that mistakes in recognition of close relatives and friends are sometimes made.
>
> All these matters go to the quality of the identification evidence. When the quality is good and remains good at the close of the accused's case, the danger of mistaken identification is lessened; but the poorer the quality, the greater the danger..."

22. The complainant testified that on being woken up by his neighbor Moi, he went to his sitting room, switched on the solar powered security light and went outside; and that he saw the appellant standing next to the door and that the appellant spoke to him asking him why he was sleeping while others were working. He said the appellant was the first to hit him before he was taken outside his gate for more thorough beating with rungus, and pangas.

23. It was further the testimony of the complainant that it was the appellant who carried him back to his door because he could not walk on his own after the assault. He explained that he had known the appellant since they were children because they are village-mates.

24. PW2 also testified that they were sleeping when she had somebody calling the complainant's name. The complainant woke up and went outside, having switched on the external security lights. She told the lower court that she peeped through the door and saw the appellant standing by the door carrying a panga and a rungu. She added that the appellant commanded her to go back to sleep. She added that, although she closed the door, she could hear the complainant crying from the beating he received before the assailants took him out of their compound.

25. The evidence of PW1 and PW2 was corroborated by the evidence of PW3. It was PW3 who woke up the complainant on the instructions of the appellant. He said he too was beaten up by the appellant and some individuals among the crowd that accompanied him, before being frog-matched to the home of the complainant. He told the lower court that he witnessed the assault of the complainant and identified the two appellants as some of the people who committed the offence.

26. The appellants were well known to the complainant, as well as PW3 and the complainant's wife as they are village-mates. This was therefore not a case of identification of a stranger in difficult circumstances but that of recognition under the glare of security lights.

27. It is noteworthy that the appellants raised the defence of alibi. An "alibi" is defined in Black's Law Dictionary, Tenth Edition, to mean:

> " A defence based on the physical impossibility of a defendant's guilt by placing the defendant in a location other than the scene of the crime at the relevant time."

28. It is trite law that the burden to prove the authenticity of the appellants' alibi rested with the prosecution. In Kiarie v Republic [1984] eKLR, the Court of Appeal held:

> " An alibi raises a specific defence and an accused person who puts forward an alibi as an answer to a charge does not in law thereby assume any burden of proving that answer and it is sufficient if an alibi introduces into the mind of the court a doubt that is not unreasonable..."

29. Similarly, in Athuman Salim Athuman v Republic [2016] eKLR, the Court of Appeal held that:

> " It is trite that by setting up an alibi defence, the appellant did not assume the burden of proving its truth, so as to raise a doubt in the prosecution case...The burden to disprove the alibi and prove the appellant's guilt lay throughout on the prosecution...the purpose of the defence of alibi is to account for so much of the time of the transaction in question as to render it impossible for the accused person to have committed the imputed act..."

30. Although the trial court did not specifically make reference to the appellants' respective evidence of alibi, he took into consideration the appellant's defence and the evidence availed by them and weighed the same against the prosecution case. He was satisfied that the evidence presented by the prosecution placed the appellants at the scene of crime. In my independent re-evaluation thereof, I am satisfied that the learned trial magistrate came to the correct conclusion in the circumstances and that the Prosecution evidence in effect displaced the appellants' alibi defence.

31. In particular, the trial court took into account that PW3 was himself an eye witness to the occurrence; and although at paragraph 4 of the 1st appellant's Petition of Appeal and paragraph 5 of the 2nd appellant's Petition of Appeal the appellants stated that Moi was not called to testify, that is not an accurate statement, granted that Moi testified as PW3. In addition to PW3, PW1 and PW2 also testified to having seen the two appellants at the scene of crime and explained that they were all well known to each other as village-mates and/or relatives.

32. In Anjononi & 2 Others v. Republic [1980] eKLR held:

> " ...recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other..."

33. The appellants also raised the issue of inconsistencies in the evidence of the 3 witnesses in relation to the lighting and the exact weapon used to assault the complainant. The 1st appellant took issue with the fact that in PW1's version of the events, the 1st appellant assaulted him using a panga while PW2 said she saw him assaulting PW1 using a rungu. In the same vein, the 1st appellant contended that the evidence of the two witnesses was inconsistent as to whether the security light was on or not. The lower court addressed all these issues and from the evidence presented it is clear that although PW2 was ordered to switch off the security lights and she complied, this occurred after the witnesses had seen and recognized the appellants. The alleged inconsistencies were therefore not of any significance. Indeed, in John Nyaga Njuki & 4 Others v Republic, Cr. App. No. 160 of 2000, the Court of Appeal explained that:

> " In certain criminal cases, particularly those which involve many witnesses, discrepancies are in many instances inevitable. But what is important is whether the discrepancies are of such a nature as would create a doubt as to the guilt of the accused. If so, then the prosecution would not have discharged the burden squarely on it to prove the case beyond any reasonable

doubt. However, where discrepancies in the evidence do not affect an otherwise proved case against the accused, a court is entitled to overlook those discrepancies and proceed to convict the accused. The discrepancies in the evidence in the matter before us are in our view, of a minor nature considering the facts and circumstances of the case."

34. Likewise, in Philip Nzaka Watu v R [2016] eKLR the Court of Appeal acknowledged that human recollection is not infallible. Here is what it had to say in this regard:

> " ...it must be remembered that when it comes to human recollection, no two witnesses recall exactly the same thing to the minutest detail. Some discrepancies must be expected because human recollection is not infallible and no two people perceive the same phenomena exactly the same way. Indeed as has been recognized in many decisions of this Court, some inconsistency in evidence may signify veracity and honesty, just as unusual uniformity may signal fabrication and coaching of witnesses. Ultimately, whether discrepancies in evidence render it believable or otherwise must turn on the circumstances of each case and the nature and extent of the discrepancies and inconsistencies in question."

35. It is equally inconsequential that the two brothers of the complainant who took him to hospital were not called to testify before the lower court. They were not at the scene when the assault took place and therefore would not have added value to the Prosecution case. In Sahali Omar vs. Republic [2017] eKLR it was pointed out that:

> " The prosecution reserves the right to decide which witness to call...This is because the prosecution is not obliged to call a superfluity of witnesses, but only such witnesses as are sufficient to establish the charge beyond any reasonable doubt."

36. In the premises, having found that the Prosecution has presented credible evidence linking the accused with the offence in question, I take the view that the failure to call the aforementioned witnesses has no adverse effect on the Prosecution case. The same goes for the non-production of the weapons used to commit this crime. It is not in every case that the weapon is recovered by the police. Such failure does not at all detract from an otherwise proved case. In Karani vs. Republic [2010] 1 KLR 73 thus:

> " The offence as charged could have been proved even if the dangerous weapon was not produced as exhibit as indeed happens in several cases where the weapon is not recovered. So long as the court believes, on evidence before it, that such a weapon existed at the time of the offence, the court may still enter and has been entering convictions without the weapon being produced as an exhibit."

37. It is therefore my finding that the appellant's conviction was premised on sound basis.

38. On sentence, it is trite law that an appellate court will only interfere with a sentence if certain factors, clearly spelt out in the case of Ogalo s/o Owuora v Republic [1954] 21 EACA 270, exist. In the stated case the court held:

> " The principles upon which an appellate court will act in exercising its jurisdiction to review sentence are fairly established. The court does not alter a sentence on the mere ground than if the member of the court had been trying the appellant, they might have passed a somewhat different sentence and it will not ordinarily interfere with the discretion exercised by a trial judge unless, as was said in James v Republic [1950] 18 EACA 147, it is evident that the judge has acted upon some wrong principle or overlooked some material factor. To this we

would also add a third criterion namely that the sentence is manifestly excessive in view of the circumstances of the case."

39. Section 251 of the *Penal Code* stipulates that:

> "Any person who commits an assault occasioning actual bodily harm is guilty of a misdemenour and is liable to imprisonment for five years.

40. The appellant was sentenced to 4 years' imprisonment. The sentence was therefore lawful. It is also noteworthy that the learned magistrate took into account the mitigation offered by the appellant as well as his antecedents. He also had the benefit of a Pre-Sentence Report which he considered. Roundly considered I find no reason to interfere with the sentence imposed by the lower court granted the circumstances in which the offence was committed.

41. In the result, it is my finding that the appeal lacks merit. The same is hereby dismissed.

It is so ordered.

DATED, SIGNED AND DELIVERED AT HOMA BAY THIS 12TH MARCH, 2025.

OLGA SEWE

JUDGE