



**Republic v Okumu & another (Criminal Appeal E063 of 2023)
[2025] KEHC 8603 (KLR) (20 June 2025) (Judgment)**

Neutral citation: [2025] KEHC 8603 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT SIAYA
CRIMINAL APPEAL E063 OF 2023**

**DK KEMEL, J
JUNE 20, 2025**

BETWEEN

REPUBLIC APPELLANT

AND

SAMUEL OCHIENG OKUMU 1ST RESPONDENT

TOM MANYALA OKUMU 2ND RESPONDENT

*(Being an appeal from the Judgment of Hon. P.J. Nandi (SPM)
delivered on 7th December 2023 in Bondo SPMC CR No. E044 of 2022)*

JUDGMENT

1. The Appellant herein through the office of the Director of Public Prosecution (ODPP) had filed criminal charges against the Respondents herein in the lower court for the offence of assault causing actual bodily harm contrary to section 251 of the [Penal Code](#). The particulars were that on the 2nd day of October 2021 at Komungu village, in Pala Sub location, Bondo Sub County within Siaya County, jointly with another not before the court assaulted Judith Akoth thereby occasioning her actual bodily harm.
2. After a full trial, the trial court established that the Appellant had not proved its case against the Respondents beyond any reasonable doubt and acquitted them under section 215 of the [Criminal Procedure Code](#).
3. Aggrieved by the said acquittal, the Appellant has appealed to this Honorable court vide a Petition of Appeal dated 18/12/2023 wherein it raised the following grounds of appeal:
 - i. That the trial magistrate erred in law and in fact by holding that the prosecution relied on medical evidence that did not prove the charge.



- ii. That the trial magistrate erred in law and in fact by holding that the medical evidence was not water proof.
 - iii. That the trial magistrate erred in law and in fact by holding that the clinical officer who filled the P3 form did not treat the complainant and therefore could not confirm the injuries.
 - iv. That the trial magistrate erred in law and in fact by holding that the P3 form had two different dates and therefore created doubt in the P3 form.
 - v. That the trial magistrate erred in law and fact by holding that the prosecution failed to prove that the complainant sustained any injuries whose degree was classified as harm in the P3 form.
 - vi. That the trial magistrate erred in law and in fact by acquitting the Respondents under section 215 of the *Criminal Procedure Code* in total disregard of the evidence on record.
4. This being a first appeal, this Court must re-consider and re-evaluate the evidence adduced before the trial Court in order to arrive at its independent findings and conclusion as to whether or not to uphold the decision of the trial court. (See *Okeno vs. Republic* [1972] EA 32). In doing so, this Court is required to take cognizance of the fact that it neither saw nor heard the witnesses as they testified before the trial Court and, therefore, it ought to give due allowance in that regard as was held in *Ajode v. Republic* [2004] KLR 81.
 5. The prosecution called a total of six witnesses in support of its case.
 6. Judith Akoth Okumu (PW1) testified that on the 2/10/2021 at about 4.00 pm, she was at her home in Nyamonye when she was assaulted by the Respondents herein Samuel Ochieng Okumu (DW1) and Tom Manyalla Okumu (DW2) jointly and severally. That she was badly injured and had to be rushed to hospital by her sister Christine Achieng Kevin(PW3) who took her to Avenue Hospital in Bondo town as she was unable to sit, bend or stand up. That at the hospital, she was examined and treated overnight then discharged and given medication. She reported the case at Nyamonye police station and was issued with a P3 form which was filled at Bondo Sub County Hospital. The same is dated 3/10/2021 and marked PMFI 1. She then went to Avenue hospital for X-rays and other checkups. She identified the chest radiography report dated 3/10/2021 which was marked as PMFI-2. That on 4/10/2021 she proceeded to Nairobi and went to Karen Hospital for management. She identified the treatment chits from Karen Hospital which were marked as PMFI 3(a-c). She stated that she was bedridden for six weeks.
 7. Joshua Osana Ong'ong'o (PW2) testified that he is a farmer and that on 2/10/2021he was at the home of the 2nd Respondent at about 1600hrs where they had gone to construct a cow shed. That a scuffle occurred between PW1 and the 2nd Respondent. That the 2nd Respondent called his brother (1st Respondent) and his mother. That the 1st Respondent arrived and together with the 2nd Respondent they assaulted the Complainant (PW1). That they assaulted her badly with fists and slapping her as well as ripping off her hair. That the Complainant fell on the ground and that her husband (2nd Respondent) stamped on her. That the mother to both Respondents shouted that they should not kill her and that they left her. That PW1 went to her house and at about 7.00 PM she was taken to hospital by her sister Christine Achieng Kevin (PW3).
 8. Christine Achieng Kevin (PW3) stated that she is a business woman from Barkowino and that the complainant is her cousin. She stated that on 2/10/2021at 6.00PM she received a call from the complainant that she had been injured and that she should go to her place. That she rushed there and indeed confirmed that she had been battered. That She boiled hot water to give her first aid and then



rushed her to a hospital in Bondo. That at the hospital, the complainant informed her that she had been assaulted by her husband.

9. NO. 81287 CPL Benson Obuya (PW4) stated that he was formerly at Nyamonge police post. That he was the investigating officer in that case. He stated that on 30/10/2021 the Complainant went to the station and reported having been beaten by two people namely Tom Manyalla Okumu and Samuel Ochieng. He booked the report and commenced investigations. He issued a P3 form and proceeded to the compound of the Complainant and the 2nd Accused (now 2nd Respondent Respondent). The Complainant was treated at Avenue hospital in Bondo. He recorded witness statements and forwarded the file to the ODPP. He arrested the 1st and 2nd Respondents and charged them accordingly with the offence before court. He found out that the Complainant and the 2nd Respondent were a couple and the 1st Respondent was PW1's brother in-law.
10. Dr. Ankit Dave (PW5) an orthopedic surgeon based at Karen Hospital stated that she had a medical report for the Complainant. The complainant had multiple fractures on the ribs on the left side. That the complainant alleged to have been assaulted by two persons well known to her. X-ray showed multiple rib fractures. On producing the report however, the Respondents counsel objected that the report was not signed. The prosecution submitted that the witness was the maker and his name and hospital stamp were on the report. The trial magistrate rejected the said production, and the witness was stood down.
11. Steven Okwiri Okumu (PW6) testified that he is a clinical officer from Bondo sub-county Hospital and that he filled the P3 form, dated and signed it on 3/10/2021.

On detailed examination, the complainant reported having a headache, chest pain, abdominal pain, trauma, had difficulty in breathing and was unable to sit upright. She had pain on both hands and both lower limbs. Age of pain was 24 hrs. The degree of injury was classified as harm. P3 form produced as Exhibit 1.

On cross-examination, he stated that the chest x-ray showed soft tissue injuries and that there was no fracture on the ribs. He examined the complainant from head to toe, professionally. He filed the treatment notes.

That marked the close of the prosecution's case. The court ruled that a prima facie case had been established and the Respondents were put on their defense.
12. Samuel Ochieng Okumu (DW1) stated on oath that Tom Manyala Okumu (DW2) is his young brother and that the complainant was the wife to DW2. He stated that he passed by his brother's house (DW2) and found the wife/ complainant quarreling her husband (DW2). That he tried to calm her down and take her to her house but she refused and after about 30-40 minutes in the compound, he drove away with his mother and sisters who were in his car. That her husband tried to lead her to the house but she resisted and later tripped and fell down. That he too tried to lift her up but she refused. He denied assaulting the complainant. On cross-examination, he stated inter alia; that the complainant had been a former wife of his brother (DW2); that the complainant's husband (DW2) was not happy about the conduct of the complainant; that he went to assist the complainant's husband (DW2) to take her to the house; that the two of them (DW1 and DW2) pulled the complainant up and was later called by his mother and thus he went away; that
13. Tom Manyalla Okumu (DW2) stated that the complainant was his wife of thirty years and that DW1 is his elder brother. That he drove from Nairobi to Bondo on 2/10/2021 while in the company of Juliana, his 2nd wife and so he called his mother to pass by his home for some stuff. That at his home, his workers were planting grass and constructing a cow shed, and that they entered the house of his



2nd wife. That when he left Nairobi that morning, Judith, the Complainant had not informed him that she had travelled home and that the same compound had the house of the complainant as the 1st wife and the 2nd wife. That later, the complainant came with a pick up carrying two cows. That upon alighting from her saloon car, she started quarrelling. That his brother (DW1) and his mother came and tried to calm her down in vain and so they drove away. That it was the complainant who issued insults to him in the presence of his second wife and mother and that she tripped and fell down in a ditch. That the complainant appeared to be one out to fix him in that as soon as the case was lodged with the police, she filed for divorce and child maintenance. He denied ever assaulting the complainant. On cross-examination, he stated inter alia; that he was annoyed by the conduct of the complainant and that he got hold of her and led her to the house but that she tripped and fell down; that the complainant had been troublesome in the marriage.

14. Juliana Katiyua (DW3) and Peter Chimwani Shihunza (DW4) likewise testified being present during the scuffle but that both DW1 and DW2 did not assault the Complainant. That it was the complainant who was creating a scene and hurling insults and that DW1 and DW2 tried to escort her to her house and in the process a scuffle ensued leading to the complainant tripping and falling into a small trench.
15. That marked the close of the defense case.
16. The appeal was canvassed by way of written submissions.
17. The Appellant submitted that their case was proved beyond reasonable doubt as evidenced from the P3 form produced as Exhibit 1. That the acquittal was unlawful, improper and unjust and that the same should be set aside. The Appellant relied on the case of Ndaa vs. Republic [1984]KLR where the ingredients of the offence of assault causing actual bodily harm were stated as: a) assaulting the complainant or victim; and b) occasioning actual bodily harm. The Appellant submitted thus that the evidence they tendered that the respondents assaulted and caused actual bodily harm to the complainant was watertight and was never shaken even during cross examination. In conclusion the Appellant submitted that the acquittal of the Respondents was unlawful and it ought to be set aside.
18. The Respondents submitted that the Appellant did not prove its case against the Respondents beyond any reasonable doubt. That the Appellant did not discharge its burden of proof. Learned counsel pointed out that the Appellant failed to avail the requisite medical evidence such as treatment notes despite the complainant claiming to have visited hospitals in Bondo and Nairobi. It was submitted that the failure to avail the initial treatment notes must be taken against the Appellant. Reliance was placed in the case of Josephat Chesire & Kipkorir Kipkurui V. R [2019] eKLR where it was held that failure to produce treatment notes is a clear indication that it would have been unfavourable to the prosecution's case as they are not certain to be those captured in the P3 form. It was argued that if a party fails to produce certain evidence, a presumption arises that the evidence if produced would be unfavourable to that party. Learned counsel for the Respondents further submitted on the issue of burden of proof and maintained that where there are doubts, the accused persons should be acquitted of the charges. It was the view of counsel that the P3 form must have been filled with the aid of the initial treatment notes but which were not produced by the Appellant. It was finally submitted that the Appellant did not discharge its burden of proof and thus the acquittal of the Respondents was within the law and that the appeal should be dismissed and the acquittal upheld.
19. Learned counsel watching brief for the complainant also filed his submissions after this court allowed them to do so. Their submissions are dated 8/5/2025 which are a reiteration of the Appellant's submissions wherein they submitted that the Appellant had proved its case against the Respondents beyond any reasonable doubt and that this court should allow the appeal and set aside the order on the



Respondents' acquittal and substitute it with an order convicting the Respondents for the offence of Assault causing actual bodily harm contrary to section 251 of the *Penal Code*.

20. I have given due consideration to the record of appeal and the submissions filed by counsels for the parties. I find the issue for determination is whether the Appellant had proved its case against the Respondents beyond the threshold of proof.
21. It is trite law that in criminal cases the burden of proof is always upon the prosecution and that the burden does not shift. In the case of *Sekitoliko Vs Uganda* [1967] EA 53 the court held that the prosecution has a duty to prove all the elements of the offence beyond reasonable doubt and that the conviction of the accused is dependent upon the strength of the prosecution's case and not the weakness of the defence case. This holding emanates from the celebrated case of *Woolmington Vs Dpp* [1935] AC 462. Again, in the case of *Miller vs Minister of Pensions* [1947] 2ALL ER 372 Lord Denning held as follows:

“That degree is well settled. It need not reach certainty, but it must carry a big degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence of course it is possible but not in the least probable, the case is proved beyond reasonable doubt, but nothing short of that will suffice.”
22. It is noted that the Respondents had been charged with an offence of assault causing actual bodily harm contrary to section 251 of the *Penal Code*. Section 251 of the *Penal Code* provides that any person who commits an assault occasioning actual bodily harm is guilty of a misdemeanor and is liable to imprisonment for five years. The Appellant was thus under obligation to prove the essential ingredients of the offence which comprise of physical assault on the victim and evidence that the said assault caused actual bodily harm on the said victim.
23. Actual bodily harm has been described in Archbold's *Criminal Pleadings and Practice* 32nd Edition, page 959 as actual bodily harm that includes any hurt or injury calculated to interfere with the health or comfort of the complainant.
24. The Appellant was under obligation to prove that the complainant suffered bodily injury and that the Respondents were her assailants.
25. The complainant (PW1) testified that she was assaulted and that she sustained injuries and that she called her sister (PW3) who assisted her to a hospital in Bondo town where she was treated overnight and discharged. It transpired from the evidence of both the prosecution and defence that there was an encounter between the complainant and the Respondents on the material date at the compound of both the complainant and her husband (2nd Respondent herein). The two Respondents confirmed in their testimonies and that of their witness (DW3) that they got hold of the complainant and attempted to take her to her house within the compound. The complainant maintains that the two attacked her while they maintain that they only escorted her only for her to trip and fall in a low trench and that they pulled her up and took her to her house. In order for the Respondents to be found guilty and convicted, it was necessary for the Appellant to marshal sufficient evidence proving that indeed the complainant was attacked and that she sustained bodily injuries on the material date.
26. The issue of whether the complainant suffered bodily injury is a question of fact to be proved. The court is required to consider the medical evidence presented before it before it can decide whether the



same can be accepted. The court ordinarily will be guided by the findings and opinions in the medical evidence. See John Oketch Abongo Vs Republic [2000] eKLR

27. Learned counsel for the defence has contended that the Appellant made a fatal omission when it failed to avail the treatment notes regarding the complainant's initial treatment at Bondo and which must have been used by the clinical officer who filled the P3 form.
28. The Appellant attempted to present one of the doctors at Karen Hospital as its witness (PW5) but the same did not succeed due to issues to do with the medical report and was subsequently stood down but was never recalled. The Appellant thus called Stephen Okwiri Okumu (PW6) who testified that he is a clinical officer at Bondo Sub County Hospital and that he had received the complainant who had come with a history of having been assaulted by someone known to her. That he ordered for an X-ray and later treated the complainant and classified the degree of injury as harm. That the complainant requested to visit another medical facility of her own choice. He produced the P3 form as exhibit one. On cross-examination, he stated inter alia; that the X-ray showed no fracture but soft tissue injuries; that the patient claimed that she had been assaulted by her husband; that he read the treatment notes but which were not shown to him in court. On re-examination, he stated that he had filed the treatment notes.
29. It would appear to me that the only medical document presented to the court by the Appellant was a P3 form. I find that even though the treatment notes were not availed to the court as exhibits, the fact that the clinical officer (PW6) who had attended to the complainant at Bondo Sub County Hospital and later filled the P3 form and testified herein, is sufficient to prove the existence of bodily injuries sustained by the complainant. I find that the said witness stated to the court his findings upon examining the complainant and later filling the P3 form and was also cross-examined at length by the Respondents' counsel. The witness testified to what he had indicated on the treatment notes and therefore the court was given the requisite details in the said treatment notes and whose details were duly captured in the P3 form. The witness was the author of both documents and who had attended the victim and hence his evidence was sufficient. I find the absence of the treatment notes did not water down the evidence of the Appellant in any way. The circumstances would have been different if the treatment notes were the only documents in support of the prosecution's case and further if the maker of those documents had not been called to testify. I am satisfied that the Appellant proved the ingredient of bodily injury beyond any reasonable doubt.
30. The remaining ingredient to be proved is the identity of the assailants. The complainant stated that the 2nd Respondent is her husband while the 1st Respondent is her brother-in-law. It was her evidence that the two Respondents attacked her within the compound after she had confronted the 2nd Respondent over his conduct in sneaking in a second woman into the home. She further stated that the two teamed up and assaulted her inflicting injuries on her body. That she called her sister (PW3) who rushed her to Bondo Sub-County Hospital for treatment. The Respondents in their defence denied having assaulted the complainant. However, they admitted that they got hold of the Complainant in a bid to escort her to her house as she was then creating a scene and forcing the villagers to rush to the compound and in the process she tripped and fell into a trench whereupon they lifted her up but that the Complainant completely refused to enter her house. From that evidence, it is not in doubt that there was an encounter between the Complainant and the Respondents on the material date and that the Complainant sustained injuries which were classified by the Clinical Officer (PW6) as harm. It is instructive that it came out clearly that the relationship between the Complainant and her husband (2nd Respondent) was at that time quite low in view of the fact that they had had some marital disputes. This was confirmed by both the Complainant and the 2nd Respondent that they had separated and that they later filed divorce. It is also not in dispute that at the time of the incident the 2nd Respondent



had brought in a new woman whom he described as his 2nd wife. The situation therefore was very toxic at the time of the incident wherein the emotions of the two spouses were in turmoil. It is clear that both the Complainant and the 2nd Respondent were in angry mood in that the 2nd Respondent felt that the Complainant was invading his space and ruining his company with his new woman while the Complainant felt that the 2nd Respondent had no right to bring in a new woman into her matrimonial home. That state of affairs was a recipe for a conflict or a fight. I am unable to believe the assertions of the Respondents that they did not assault the Complainant. The 2nd Respondent obviously was not amused to bump into the Complainant yet he knew that she was in Nairobi and in that angry mood assaulted her after she confronted him for having brought a woman into her matrimonial home. It transpired from the evidence that the Complainant hit the roof upon noticing the 2nd Respondent's new companion whom she confronted and that a nasty war of words laced with expletives. Under those circumstances and in view of the fact that the villagers had started thronging into the compound to see for themselves, the 2nd Respondent decided to assault the Complainant for the mess that she had brought. I am satisfied that the 2nd Respondent is the first one to assault the Complainant before the 1st Respondent arrived to give a hand. I find the Respondents' defence did not shake the evidence of the prosecution which was quite overwhelming against them. I find that the Respondents were positively identified as the perpetrators.

31. The sum total of the foregoing analysis leads me to conclusion that the Appellant had proved its case against the Respondents beyond reasonable doubt and hence the finding by the learned trial magistrate was in error and must be interfered with.
32. In the result, it is my finding that the Appellant's appeal has merit. The same is allowed. The judgment of the trial court dated 7th December 2023 is hereby set aside. The acquittal of the Respondents herein is hereby set aside and substituted with an order of conviction against both the two accused persons (Respondents). The Respondents are hereby ordered to appear before the Honourable Chief Magistrate Bondo Law Courts on 23rd June 2025 for mitigation, sentencing and further orders.

DATED AND DELIVERED AT SIAYA THIS 20TH DAY OF JUNE, 2025.

D. KEMEI

JUDGE

In the presence of:

Mocha.....for Appellant

Onsongo.....for Respondents

Achieng.....Court Assistant

