



**Chirchir v Republic (Criminal Appeal E014 of 2024)
[2025] KEHC 10923 (KLR) (24 July 2025) (Judgment)**

Neutral citation: [2025] KEHC 10923 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KABARNET
CRIMINAL APPEAL E014 OF 2024
RB NGETICH, J
JULY 24, 2025**

BETWEEN

ROBERT KIPLAGAT CHIRCHIR APPELLANT

AND

REPUBLIC RESPONDENT

(An appeal against the conviction and sentence in Marigat SPM Criminal case No. E064 of 2022 delivered on 21st November, 2024 by Hon. C.T Ateya P.M)

JUDGMENT

1. The appellant herein Robert Kiplagat Chirchir was charged and convicted of the offence of assault causing actual bodily harm contrary to section 251 of the [Penal Code](#) and sentenced to pay a fine of Kshs 10,000 or in default serve a term of 3 months imprisonment.
2. The particulars of the offence were that on the 23rd day of March, 2022 at around 1400Hrs at Kolol Village Kibongro Sub-location, Kimalel Location in Baringo South Sub- County within Baringo County, the appellant unlawfully assaulted one Evans Kimuge Kiptenten thereby occasioning him actual bodily harm.
3. The appellant was aggrieved by the conviction and the sentence. He filed the instant appeal vide a Memorandum of appeal dated 5th December, 2024 on the following grounds:
 - i. The Honourable Learned trial magistrate erred in law and in fact by making a finding that, the evidence presented supported a charge of affray and went on heed to convict the appellant for the offence of assault.
 - ii. The Honourable learned trial magistrate erred in law and in fact by failing to evaluate the evidence in totality hence arriving at an erroneous decision i.e. to convict.



- iii. The Honourable trial magistrate erred in law and in fact by failing to appreciate that the evidence presented did not support the charge of assault causing actual bodily harm.
 - iv. The Honourable trial magistrate erred in law and in fact by failing to appreciate and consider that the complainant was injured by his own brother and not the appellant.
 - v. That the Honourable trial magistrate erred in law and in fact by failing to appreciate that the complainant and his brothers were the aggressors and the ones who attacked the appellant.
 - vi. The Honourable that magistrate erred in law and in fact by fail to appreciate that where a court finds that a lesser charge has been proved then cannot punish for the higher offence i.e. affray and assault causing actual bodily harm.
 - vii. The Honourable trial magistrate erred in law and in fact by failing to appreciate that the ingredients of assault causing actual bodily harm was not proved.
 - viii. The Honourable trial magistrate erred in law and in fact by failing to take into account the defence of the appellant.
 - ix. That the Honourable trial magistrate erred in law and in fact by not considering that there were inconsistencies and contradictions in the evidence of the prosecution witness.
 - x. The Honourable trial magistrate erred in law and in fact by being biased in her judgment and therefore convicting and sentencing the appellant on wrong grounds.
4. The appellant prays that this appeal be allowed and that both the conviction and sentence be quashed and he be acquitted.
5. On the 29th April,2025, the appeal was admitted to hearing and the court directed that the appeal to proceed by way of written submissions.

Appellant's Submissions

6. The Appellants submits on grounds 1, 3, 6, and 7 together and grounds 2, 4, 5 and 9 together, on ground No.3 and finally on ground No.10.
7. In respect to grounds 1, 3, 6 and 7 they submit that, the trial magistrate stated at paragraph 19 of the judgment as follows:-
- “.... what is clear from the evidence is that there was an altercation between the complainant and the accused. It also involved other people who were not party to this suit. The most appropriate charge would have been affray as this was a fight that took place in a public place. But that is not what was presented in court...”
8. That from the above excerpt of the judgment, it is clear that the learned trial magistrate appreciated that, from the evidence presented, it pointed to a charge of affray and not assault. The court confirmed that the charge of affray was not presented in court.
9. The appellant submit that, it is trial law that, where a court finds that a lesser charge has been proved, it should proceed to convict and punish for the lesser charge and not for the major or main charge. That however, the learned trial magistrate made an error of judgement by proceeding to convict the appellant for the offence of assault causing actual bodily harm. They rely in the case of; *Republic v George Onyango Anyang & another* 2016 eKLR.



10. That from the above cited authority and the sections of the statute, the appellant submit that the learned trial magistrate made an error of judgment by proceeding to convict and punish the appellant for a major offence whereas a lesser charge of affray, according to the honourable court, has been proved.
11. They submit that, once the honourable court found that a lesser charge of affray has been proved, the court should have acquitted the appellant simply because, he could not be convicted and punished alone for an offence of affray. That in a charge of affray, at least two accused persons must be involved but in this case, he was charged alone.
12. That the fact that the appellant brought a case against one Edward for assault from the same course of events and the said Edward was convicted is irrelevant herein because, the said Edward was not enjoined with the appellant in this case and secondly, the said case was not done by the same learned trial magistrate and thirdly, the appellant herein was not enjoined with Edward in that other case.
13. The appellant further submit that when the learned trial magistrate concluded that the proper charge should have been affray, it meant that, the evidence presented did not support the charge of assault causing actual bodily harm and relied on the case of *Ali v Republic* (Criminal Appeal 10 of 2022)(2023) KEHC 23608(KLR) and *Wanyingi v Republic* (Criminal Appeal E014 Of 2023)(2024)KEHC 9127 (KLR) where the court held as follows:-

“...their plans to kill or maim the appellant and his family failed and it resulted in affray... whatever happened between the recommendation of affray and charging of appellant one year later remains a mystery. The evidence showed a fight where it was everyone against all. The parties did not realize that the fight did not have to increase an inch of their land...”.
14. That further to the above, they submit that the ingredients of assault causing actual bodily harm was not proved by the prosecution and the trial court ought not to have convicted the appellant. That for instance, on whether the assault was unlawful, they submit that, the appellant had no intention to attack nor injure the complainant at all. That he acted in self defence after being attacked by the complainant and his brothers and cousins.
15. That as stated in their record of appeal at page 91, which was not considered by the learned trial magistrate, the complainant was not assaulted and if he was ever assaulted, which is denied, he was the author of his own misfortune since he was the aggressor.
16. They submit that he is the one who started the fracas by attacking the accused whereby he grabbed him and threw him down on the ground and while on the ground, and with the help of his other brothers and or cousins, started to attack the appellant.
17. Further that the complainant hit him (appellant) on the chin while Edward Kiptai hit him with a stick and Wilson alias Victor squeezed his testicles. That at that point, the appellant was totally helpless and in self defence, had to bit the complainant on the nose. That it was the complainant who started the fracas and not the appellant and it was therefore an error for the prosecution to charge the appellant instead of charging the complainant alone.
18. That the complainant was therefore, the author of his own misfortune and hence, the second ingredient i.e. whether the assault was unlawful was never proved by the prosecution. That it is trite that all the ingredients for assault causing actual bodily harm must be proved and in the event that one of it is not proved, the charge fails. That the second ingredient having not been proved should have been resolved in favour of the appellant and have him acquitted.



19. The appellant cited the case of *Wanyingi v Republic* (criminal Appeal E014 Of 2023) (2024) KEHC 9127 (KLR) and submit that, the learned trial magistrate failed to take into account the defence of the appellant. That the defence is contained in pages 59 – 75 in the record of appeal and apart from the above, the learned trial magistrate failed to evaluate the entire defence viz – a – viz the submissions presented at pages 83 and 97.
20. That further to the above, the learned trial magistrate failed to give reasons as to why, she arrived at the conclusion to convict the appellant and the only evaluation done by the learned trial magistrate which in their view with due respect is very shallow is contained in paragraph 19 in her judgement which is attached to the Memorandum of Appeal dated 5th December, 2024.
21. That apart from the above, the learned trial magistrate failed to consider the appellant’s 14 pages written submissions provided at pages 83 - 97 of their record of appeal.
22. That in their submissions, they identified three (3) issues for determination namely;
 - i. Who is to prove the charge herein?
 - ii. Has the prosecution proved the charge against the accused?
 - iii. Whether this case is just a cover up?
23. The appellant further submit that the learned trial magistrate acknowledged in paragraph 16 of the judgement that it is the duty of the prosecution to prove that there was an assault that occasioned actual bodily harm. That however, for the second and third issues for determination, the learned trial magistrate failed to consider, analyse/evaluate and eventually give her conclusion /decision and the reasons.
24. That at the end of her judgement, she did not identify the issues for determination, evaluate/analyse them, make the conclusion or give the reasons for each of the issues viz – a – viz the evidence presented by the prosecution and the defence and also, consider the appellants submissions. That in summary, the learned trial magistrate failed to observe the laid down criteria of judgement writing as provided for under Section 169 (1) of the *Criminal Procedure Code*. They rely on the case of; *Republic v George Onyango Anyang & another* 2016 eKLR.
25. The appellant submit that the learned trial magistrate failed to consider that there were many inconsistencies and contradictions in the evidence of the prosecution witnesses as provided in detail in their written submissions contained at pages 91 - 94 of the record of appeal. That those inconsistencies or falsehoods were not considered and they submit that, such goes into the root of the entire charge hence, were they to be considered, the trial court would found the appellant guilty.
26. In conclusion, the Appellant submit that the learned trial magistrate was biased in her judgement against the appellant for the following reasons;
 - i. She failed to consider the defence of the appellant and his witnesses.
 - ii. She failed to consider the written submissions of the appellant.
 - iii. She failed to acquit the appellant even after finding that the proper charge ought to have been affray and not assault causing actual bodily harm.



27. And it is trite law that, where a lesser charge has been proved, a court should convict for the lesser charge and not for the major charge and relied on the case of Kyalo Mwendwa v Republic (2012) eKLR where the court stated as follows:-

“That even after the learned trial magistrate established in paragraph 18 of the judgement that, the appellant and his 4 witnesses confirmed that Evans attacked the appellant herein, she failed to hold that, Evans (the complainant) was the author of his own misfortune or alternatively, did not given reasons as to why she ignored this piece of defence evidence and went ahead to find the appellant guilty of assault causing actual bodily harm.”

28. That in view of the above, the learned trial magistrate convicted and sentenced the appellant on wrong grounds and or unsubstantiated grounds hence, the conviction and sentence should be quashed and the appellant be acquitted and upon acquittal, the fine of Kshs.10,000/= be refunded to him.

Respondent’s Submissions

29. The state opposed this appeal and pray that the conviction and sentence be upheld by this honorable court. On argument that the prosecution did not prove the charge, the respondent submit that PW1 laid the foundation of the case against the appellant by stating that he was in the company of PW4 among several other people when the appellant jumped on him and bit his nose and that he suffered injuries and was rushed to hospital where he received treatment that included stitching of the wound and his evidence was corroborated by PW2 and PW4.

30. Further that PW2 testified that she saw PW1 being attacked by the appellant and confirmed that the appellant bit the complainant on his nose which was further supported by the evidence of PW4 who testified that he saw the appellant grab the complainant, threw him down and bit his nose whereby he sustained injuries.

31. The respondent submitted that the ingredients for the offence of assault as held in the case of Ndaa v Republic [1984] KLR are as follows: -

- i. It was the appellant that assaulted the complainant and
- ii. The assault occasioned actual bodily harm.

32. It is the respondent’s submission that based on the evidence of PW1, PW2 and PW4, the prosecution proved the first element that the appellant assaulted the complainant and the allegation by the appellant that the complainant was injured by his brother, a fact which was not alluded to by all the defense witnesses is baseless and outright lies.

33. On the second limb, they rely on the case of Rex v Donovan [1934] 2KB 498 Swift J, defined bodily harm to include,

“Any hurt or injury calculated to interfere with the health or comfort of the complainant.
Such hurt or injury need not be permanent”

34. The respondent submits that the P3 form produced as Pexh 1 and the treatment notes, Pexh 2 corroborated by evidence of PW3, the clinical officer, confirmed that indeed the complainant suffered harm due to the assault.

35. On Whether there was affray, they submit that as argued above, the case that was proved before the trial court was that of assault and not affray. That PW1’s evidence was that he was attacked by the appellant without prior confrontation or argument. That the attack happened in a private land, at DW 5’s land.



It is submitted that the Elements of affray were set out in the case of *Janet Nyoroka v Republic* (2014) eKLR where the court stated;

“The ingredients for the offence of affray are that the person must have taken part in a fight meaning it is more than one person involved. Secondly, the fight must have taken place in a public place and should have threatened public tranquility.”

36. The Respondent submit that there was no fight that involved other members of the public other than the attack on PW1 by the appellant.
37. On the issue that the trial court failed to take into account the defense case, it is submitted that the trial court was convinced that the defense case was marred with falsehoods, inconsistencies and an attempt to distort the facts. That DW1 outrightly denied assaulting the complainant instead claimed to have been assaulted by other people. That he did not associate the complainant with the injury he sustained on the chin.
38. That DW2 claimed to have witnessed the complainant grab the appellant and throw him down but that was not stated by the appellant in his testimony before the trial court.
39. That DW3 introduces a strange issue of a gunshot which he heard but did not witness the fight. Surprisingly no one else throughout the trial talked of a gunshot, this they submit was a blatant lie and exaggeration aimed at distorting the facts.
40. That DW4's evidence was that he saw the complainant beat the appellant below the mouth, on cross examination he stated he saw the complainant hit the appellant on the shoulder, a fact not stated by either the appellant or other defense witnesses. That DW5 never witnessed anything as the 'fight' happened when he had already left.
41. It is the respondent's submission that the defence case was full of contradictions, exaggerations and lies and the trial court rightful reached that conclusion.
42. On sentence, they submit that the sentence meted out was very lenient. Section 251 of the *Penal Code* provides;

“Any person who commits an assault occasioning actual bodily harm is guilty of a misdemeanor and is liable to imprisonment for five years’
43. That the sentence of 3 months or fine of 10,000/- was sufficient, the trial court having considered the circumstances of the case and the appellant's mitigation. In conclusion, they urged this honorable court to find that this appeal is unmerited, dismiss it in its entirety and uphold the conviction and sentence.

Analysis and Determination

56. This being a first appeal, the duty of the court is to re-evaluate the evidence adduced before the trial court apply the law and arrive at its own independent conclusion. However, due regard must be given to the fact that the trial court had the advantage of taking evidence first hand and observing demeanour of witnesses.
57. In *Peters v Sunday Post Ltd* [1958] EA 424, the Court emphasized the cautious approach appellate courts must take when differing from the findings of the trial court, particularly where demeanor plays a role. Similarly, in *Pandya v Republic* [1957] EA 336, the court underscored that a first appellate court is obligated to reassess the entire evidence and form its own conclusions, without merely rubber-stamping the lower court's decision.



58. The guiding principle was further echoed in *Okeno v Republic* [1972] EA 32, where the Court held that a first appellate court must subject the entire evidence to a fresh and exhaustive analysis and draw its own inferences, bearing in mind the trial court's advantage of observing witnesses.
59. In view of the above, I have perused and considered evidence adduced before the trial court and find that the issue for consideration are
- a. Whether the evidence on record supports the charge of assault or whether it discloses a different offence.
 - b. If the answer to the above is offence of assault, whether the ingredients for the offence of assault were proved beyond reasonable

(a) Whether the Evidence Supported Assault or Affray

60. PW1 testified that on the material day, while demarcating land at Kolol Village, the appellant bit him on the nose after an argument involving the appellant and the complainant's brother. The complainant sustained injury and was treated in hospital.
61. The appellant, in his defence, stated that he was attacked by the complainant and his relatives, and that he acted in self-defence. He alleged that Edward struck him and Wilson squeezed his scrotum. He stated that Edward was separately arrested and charged for assault.
62. The trial court, in paragraph 19 of its judgment, observed that the facts disclosed a public altercation involving several persons and suggested that the appropriate charge should have been affray.
63. Section 92 of the *Penal Code* defines affray as taking part in a fight in a public place. In *Janet Nyoroka v Republic* [2014] eKLR, the court outlined the key elements:-
- i. A fight involving more than one person,
 - ii. Occurring in a public place,
 - iii. Threatening public tranquility.
64. Based on the evidence, the incident involved multiple participants and mutual aggression in a public setting. The facts fit the definition of affray rather than assault.
65. The offence of affray requires more than one person to be charged jointly. The appellant was charged alone. In such circumstances, the conviction for assault causing actual bodily harm cannot therefore stand.

Disposition

66. From the foregoing, it is evident that the evidence adduced did not support the offence of assault causing actual bodily harm. Rather, it disclosed a public altercation involving several parties, consistent with the offence of affray under Section 92 of the *Penal Code*.
67. However, the appellant was charged and tried alone. As affray is a joint offence requiring participation by multiple persons, it cannot be sustained against the appellant singly.
68. Accordingly, it is unnecessary to make a further determination as to whether the elements of assault were proved, as the evidence points clearly to the offence of Affray.
69. ...



Final orders:-

1. The conviction is quashed and the sentence set aside. The appellant is hereby acquitted.
2. In light of the court's finding that the appropriate offence disclosed is affray, the matter is referred to the Office of the Director of Public Prosecutions to consider preferring appropriate joint charges of affray against all persons involved in the incident, should the evidence support such prosecution.
3. The fine of Kshs. 10,000/= paid by the appellant to be refunded.

JUDGMENT DELIVERED, DATED AND SIGNED VIRTUALLY AT KABARNET THIS 24TH DAY OF JULY, 2025.

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RACHEL NGETICH

JUDGE

In the presence of:

- Mr. Nganga for State.
- Ms. Barasa for Appellant present.
- Appellant present.
- CA, Elvis.

