



REPUBLIC OF KENYA



**Manyengo v Republic (Criminal Appeal E026 of 2023)
[2024] KEHC 3017 (KLR) (14 March 2024) (Judgment)**

Neutral citation: [2024] KEHC 3017 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CRIMINAL APPEAL E026 OF 2023
SC CHIRCHIR, J
MARCH 14, 2024**

BETWEEN

CALEB INZIANI MANYENGO APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal from the judgment of the Honourable S. wayodi (Resident Magistrate)
delivered on 15.5.2023 in Kakamega chief Magistrates court criminal case no. E 015 of 2022)*

JUDGMENT

1. The Appellant was charged with the offence of grievous harm contrary to section 234 of the penal code. He also faced an alternative charge of committing an indecent act with an Adult contrary to section 11(a) of the *Sexual Offences Act*. On the 2nd count he was charged with Assault causing actual bodily harm contrary to section 251 of the penal code. The main charge and the alternative charge were dismissed, but was convicted of the 2nd count.
2. He was aggrieved by the Judgment and proffered this Appeal setting out the following 10 grounds:
 - a. The honourable magistrate erred in law and in fact in relying on issues which were not before her and quite extraneous as a foundation upon which she based her judgment hence making wrong findings of fact.
 - b. The learned magistrate erred in law and in fact in making findings that are demonstrably contrary to the evidence submitted and contrary to the charge sheet.
 - c. The honourable magistrate erred in law and in fact by failing to comply with the mandatory requirements codified under section 200 of the *Criminal Procedure Code* chapter 75 laws of Kenya.



- d. The learned magistrate erred in law and in fact by failing to take into consideration evidence from the prosecution witnesses which contradicted the claimant's testimony and which demonstrated that she was deviant and prone to telling untruths.
- e. The learned magistrate erred in law and in fact in holding that the offence of committing an indecent Act with an adult as well as the offence of assault were available for judgment.
- f. The honourable magistrate erred in law and in fact in making a finding that the medical evidence and testimony on record established that an assault causing bodily harm had occurred.
- g. The learned magistrate erred in law and in fact by failing to give any consideration the fact that the charges available for judgment and conviction were those contained in the charge sheet dated 13th July 2022.
- h. The honourable magistrate erred in law and in fact by convicting and sentencing on extraneous issues.
- i. The learned magistrate erred by failing to consider any of the authorities cited in support of the appellant's position.
- j. The learned magistrate erred in law and in fact by failing to consider alternative forms of sentence in view of the circumstances of the case.

Appellant's submissions.

- 3. The appellate submits that the Trial court judgment dwelt on extraneous issues and as such it occasioned a miscarriage of justice. Specifically, he argues that the alternative charge of having an indecent act with an Adult had been dropped yet the Magistrate delivered her Judgment as though this particular charge was under consideration.
- 4. The Appellant further argues that the plea taking was not in compliance with section 207 of the *Criminal Procedure Code*.
- 5. They aver that the trial court failed to follow the correct procedure while taking plea as the record did not show whether the plea was in line with section 207 of the *Criminal Procedure Code*. He specifically takes issue the language used and the amendment of the charges which he argues may not have been read back to him once they were amended
- 6. On whether the assault causing actual bodily harm was proved he claimed that the complainant asserts that it was not.
- 7. The Appellant further submits that the evidence on record supports a charge of grievous harm and not assault casing actual body harm, yet he was convicted of the later charge.
- 8. He submits that the case was not proved beyond reasonable doubt. He questions for instance why the complainant took 6 months to record a statement; that the arresting officer never visited the scene: that no weapons of the assault were recovered; no torn clothes as would be expected , and that the couple's children who allegedly witnessed the attack were never called as witnesses.
- 9. The Respondent did not file any submissions

Summary of the Evidence

- 10. PW1 testified that on 18/7/2021 at around 4.a.m , her husband the accused, ordered her to stand up and not to sleep. She testified that he started hitting her, stepped on her chest and burnt her head. She



- claimed that he covered her mouth with a piece of cloth and even closed the door to stop her from running away.
11. She stated that the accused took her phone and started deleting the messages claiming that they were from other men , and at the same time demanding for sex. She claimed that the accused assaulted her from 4.a.m up to 11.a.m while her children cried from outside.
That the accused finally opened the door at 11.a.m. and she was able to escape and went to Shisasari police station . she wrote the statement and filled the P3 form. She then proceeded to Mukumu hospital and later to Kakamega general hospital as her condition worsened.
 12. The complainant proceeded to produce photos to prove her injuries and the treatment notes from Kakamega general hospital
 13. On cross examination. She admitted that she deleted the messages that were on her phone as the phone “belonged to her after all”
 14. PW2 the clinical officer from kakamega General Hospital testified that the complainant came to the hospital on 19/01/2021 and reported to have been assaulted by her husband on 18/07/2021 at 9 p.m.
 15. On examination, he found that the complainant had a swollen eye and face, tenderness on the left shoulder, her upper limbs were numb and scars on her thighs. He concluded that the weapon used was a blunt object and the injury was grievous harm. He produced the signed p3 form.
 16. During cross examination, he refuted the suggestion that the injuries could have resulted from a fall. He further stated that the injuries did not disfigure her body.
 17. Pw3 was the investigation officer. She told the court that the incident was reported on 18/07/2021 and she issued the P3 form to the complainant and sent her to hospital. She further stated that the accused was arrested on 5/1/2022. She alleged that the complainant was living in fear of the Accused ,and that was why she did not do a follow up of the case.
 18. In his defence the Appellant told the court that on the material day the complainant came home with her face covered; that she did not talk to him: that he later went to bed at about 10pm. He further stated that at about 4am he tried having sex with her but she refused; that he later saw that the complainant had a swollen face; on trying to inquire as to the cause, she refused to tell him. He further stated that the complainant left their home on 18/7/2021 and came back on 21/07/2021. On the day of her return his in- law called him on telephone and asked him for Kshs 2000 so that he could bring back his wife, which money he paid. They stayed on until the wife went back to college , but thereafter did not go back home .
 19. He was later called to the police station and charged. He denied having assaulted the complainant and asserted , without elaboration, that the charges he was facing were connected to the divorce proceeding that the complainant had initiated.
 20. On cross examination, he stated that he no longer lived with the wife as she cheating on him

Determination

21. This being a first Appeal, the mandate of this court is to review the evidence afresh, evaluate it and arrive at its own conclusions without ignoring the conclusions arrived at by the trial court. (Ref: *Oneko v Republic* (1972) EA 132) This court must also make allowance to the fact that the trial court had the benefit of seeing and hearing the witnesses first- hand.
22. In my view the following issues lend themselves for determination.



- i. Whether the manner of the plea-taking compromised fair trial
- ii. Whether the ingredients of assault causing bodily harm were proved beyond reasonable doubt

Whether the manner of plea – taking compromised fair trial.

23. The Appellant has taken issue with amendments in the charge sheet, and casts doubts on whether the charge was read over to him upon every change. He contends that section 207 of the [Criminal Procedure Code](#) was not complied with .
24. The record shows that there were two amendments in the course of trial. On 26.4.2022 the prosecutor sought an amendment to include a sexual offence. The record indicates that the amended charges were read out and the Appellant was called upon to respond to the charges. To all the three, he responded “ false”
25. On 12.7.2022, the prosecutor sought for another amendment which was allowed. The charges were read out to the Accused and again he pleaded “ it is not true” and the hearing proceeded. The record does not disclose the nature of amendment.
26. Thus there is evidence that on the two instances the charges were amended, the charges were read afresh and the Appellant was given a chance to respond. His submission that the charges may not have been read whenever there was an amendment is not true.
27. The Appellant has not demonstrated how the trial court failed to comply with section 207 of the [Criminal Procedure Code](#). The relevant part of section 207 in this regard is section 207(3), which provides that “ if the accused person does not admit the truth of the charge, the court shall proceed to hear the case as hereafter provided.”
28. This ground of Appeal is without any merit and the same is hereby dismissed.

Whether the charge of assault causing bodily harm were proved beyond reasonable doubt

29. According to the appellant’s, the trial magistrate based her judgment on evidence that was not produced in court as none of the prosecution witness testified on the charge of actual bodily harm.
30. Section 251 of the [Penal Code](#) provides as follows: -

Any person who commits an assault occasioning actual bodily harm is guilty of a misdemeanour and is liable to imprisonment for five years.”
31. Thus the essential elements of the offence assault causing actual bodily harm are;
 - i. Assaulting the complainant or victim,
 - ii. Occasioning actual bodily harm (Also see [Ndaa v Republic](#) [1984] KLR
32. In [R v Chan-Fook](#), [1994] 2 ALL ER 557 Lord Hobhouse LJ said of the expression “actual bodily harm,” should be given its ordinary meaning: -

“We consider that the same is true of the phrase “actual bodily harm.” These are three words of the English language that receive no elaboration and in the ordinary course should not receive any. The word “harm” is a synonym for injury. The word “actual” indicates that the injury (although there is no need for it to be permanent) should not be so trivial as to be wholly insignificant.”



33. It must be proved that the assault occasioned or caused the bodily harm. Bodily harm has its ordinary meaning and includes any hurt calculated to interfere with the health or comfort of the victim, such hurt need not be permanent, but must be more than transient and trifling.(Ref: *Rex v Donovan* (1934)2 KB498
34. According to PW2, the clinical officer, the complainant came to the hospital with a swollen face, tenderness on the left shoulder, her upper limbs were numb and scars on her thighs.
35. He concluded that the weapon used could be a blunt object and the injury was grievous harm although there was no permanent disfigurement on the body.
36. The testimonies of the complainant and PW2 clearly show that the complainant suffered an Assault and suffered injuries as a result. . In line with the above cited decisions the evidence of the two witnesses proved the charge of Assault.
37. The Appellant went on to state that whereas the evidence did not prove assault causing actual body harm, it proved grievous harm. But what is grievous harm?
38. Section 234 of the *Penal Code* defines grievous harm as follows: -

“grievous harm” means any harm which amounts to a maim or dangerous harm, or seriously or permanently injures health, or which is likely so to injure health, or which extends to permanent disfigurement, or to any permanent or serious injury to any external or internal organ, membrane or sense;
39. Section 4 of the *Penal Code* further defines ‘maim’ as the destruction or permanent disabling of any external or internal organ, member or sense.
40. PW2 stated in his testimony that there was grievous harm but there was no permanent disability occasioned to the complainant. It is apparent that this is what the Appellant is taking an issue with, the reference to grievous harm, by this particular witness. However, the witness went on to state that there was no permanent disability. With this qualification, the trial court was correct in concluding that the injuries were not permanent and thus could not fit into the category of grievous harm. The mere fact that PW2 used the term grievous harm could not estopped the court from interrogating whether the harm was grievous or ordinary assault.
41. I have considered the defence. The Appellant’s defence is that the complainant came home with a swollen face. However, the swollen face was not the only injury. Further he admitted that the complainant left home after that. His “ in – law” later brought the complainant back, but the cost of travel had to be met by the Appellant. The circumstances surrounding the wife taking off and the fact that the Appellant agreed to meet the cost of bringing her back make his defence implausible.
42. The appellant raised issues with how the investigation was conducted claiming that the arresting officer never visited the scene of the crime , that the clothes or weapon used were never submitted in evidence and that the couple’s children never testified.
43. Section 143 of the *Evidence Act* provides as follows: - “No particular number of witnesses shall in absence of any provision of the law to the contrary be required for proof of any fact.”
44. The Court of Appeal in *Julius Kalewa Mutunga v Republic* Criminal Appeal No 31 of 2005 stated: -

“...As a general principle of law, whether a witness should be called by the prosecution is a matter within their discretion and an appeal court will not interfere with the exercise of



that discretion unless, for example, it is shown that the prosecution was influenced by some oblique motive.”

45. In this case, the prosecution witnesses comprised of the complainant, the clinical officer and the investigating officer. The three witnesses’ testimonies were enough to prove the offence.
46. The Appellant also faulted the trial court for making a determination in respect to the Alternative charge of indecent Assault which had been reportedly deleted. I have perused the record and I did not find this particular Amendment. The record only shows that there was an amendment done on 12.7.2022, the nature of which was not recorded. It ca not be said with certainty therefore that the charge of indecent assault had been removed from the charge sheet. Thus since the there was no evidence of removal of the aforesaid charge, the trial court had the duty to make a determination on it. The court considered this offence and found that it had not been proved and dismissed it. At the end of the day , the Appellant did not suffer any prejudice. I therefore do not find any merit on this complain.
47. On the sentence , the offence in question attracts a sentence of up to 5 years. The Appellant herein was sentenced to 3 months. In my view the Appellant escaped with a very lenient sentence. His complain in this regard is devoid of merit.
48. In conclusion, the conviction and sentence is hereby upheld and this Appeal is dismissed.

DATED SIGNED AND DELIVERED AT KAKAMEGA THIS 14TH DAY OF MARCH, 2024

S. CHIRCHIR

JUDGE .

In the presence of:

Godwin- Court Assistant

Mr. Adek for Ms Welunda for the Appellant

Appellant.

