



REPUBLIC OF KENYA



**Odhiambo v Republic (Criminal Appeal E071 of 2023)  
[2024] KEHC 17027 (KLR) (19 June 2024) (Judgment)**

Neutral citation: [2024] KEHC 17027 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MIGORI  
CRIMINAL APPEAL E071 OF 2023  
RPV WENDOH, J  
JUNE 19, 2024**

**BETWEEN**

**POLYCARP OUMA ODHIAMBO ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(From original conviction and sentence by Hon. S.N. Mutava– Resident Magistrate in Rongo Senior Principal Magistrate’s Court Criminal Case No. E318 of 2023 delivered on 28/09/2023)*

**JUDGMENT**

1. Polycarp Ouma Odhiambo has filed this appeal against the judgment of the Resident Magistrate, Rongo in which he was convicted for the offence of Assault Causing Actual bodily harm, contrary to Section 251 of the *Penal Code* in Count I and Malicious Damage to property contrary to Section 339 (1) of the *Penal Code* in Count II.
2. The particulars of the charge in Count I are that on 6<sup>th</sup> September, 2022 at around 1630hrs at Sigiria area, South Kamagambo wilfully and unlawfully assaulted Caren Aluoch Awiti thereby occasioning her actual bodily harm in Count II; he is alleged to have wilfully and unlawfully grazed cows in a sugarcane plantation which was valued at Kshs. 44,121/- the property of Isaiah Oyugi Awiti.
3. The appellant denied the offences and the case proceeded to full hearing with the prosecution calling a total of six witnesses in support of their case, namely PW1 Isaiah Oyugi Awiti; PW2 Joel Osiany Omollo; PW3 Irene Onyinkwa, a Clinical Officer at Awendo Hospital; PW4 Grace Nyokumba from KUJA School for the Deaf; PW5 Dr. Collins Onyango Opiyo from Migori County Referral Hospital PW6 PC Samuel Mbugua, the Investigating Officer attached at Oyora Police Station and lastly, PW7 Dennis Okach, an Agricultural Officer in Migori County.
4. When placed on his defence, the appellant gave a sworn statement and called one witness (DW2).



5. Upon conviction, the appellant was sentenced to serve three (3) years' imprisonment on Count II and two (2) years' imprisonment on respect to Count II. He is aggrieved by both conviction and sentence which has culminated in this appeal. The grounds of appeal filed in court on 30/10/2023 are that: -
  1. The learned trial magistrate disregarded all the open discrepancies in the evidence of the complainants and adopted the evidence of a witness that was never presented before the court.
  2. The trial magistrate misdirected herself when she failed to critically analyse the entire evidence and realize that the inconsistencies could not sustain a conviction.
  3. The sentence meted is illegal.
6. The appellant therefore prays that the Appeal be allowed, conviction quashed and sentence set aside.
7. The Appeal was canvassed by way of written submissions. The appellant filed written submissions on 29/12/2023 while the Prosecution counsel Ms. Ikol - Esaba opposed the appeal through their submissions dated 02/04/2024.
8. This being a first appeal, this court is required to re-examine all the evidence tendered in the trial court, evaluate and analyse it, and arrive to its own conclusion. The court has to however make allowance for the fact that this court neither saw nor heard the witnesses testify, an opportunity which the trial court had. This court is guided by the decision of *Okeno v Republic* (1972) EA 32 where the Court of Appeal said: -

“An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (*Pandya v R.*, [1957] E. A. 336) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (*Shantilal M. Ruwala v R.*, [1957] E.A. 570). 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 conclusions; 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, see *Peters v Sunday Post*, [1958] E. A. 424.”
9. PW1, the complainant told the court that on 06/09/2022, he was at the Centre when his father called him and asked him to go home; when he got home his mother Carren Awiti narrated to him what had happened; that on her way to the shamba, she saw 3 cattle in the sugarcane farm which belonged to the appellant, that she met the appellant and asked him to remove the cows but he refused; that instead he pushed her and started beating her, slapped her with a panga and in the process she lost a tooth. They then reported the matter to the police and took her mother to the hospital for treatment and the P3 form filled. The photographs of the damaged sugarcane, filter card for Caren, P3 Form and a report from the Agricultural Officer were marked as PMFI 1 – 4. That the date the cows destroyed the sugarcane was the same day the appellant assaulted his mother but conceded that he did not find the cows in the shamba.
10. PW2 stated both the appellant and the complainant Carren are his neighbours, that on 6/9/2022, he was herding his cattle when he saw the appellant disappear in the sugarcane plantation. He later heard Caren screaming and she informed him that the appellant had beaten her, her mouth was bleeding; that the appellant had cows in the complainant's shamba.



11. PW3, the clinical officer stated that she examined Carren Awiti on 7/9/2022. She had sustained injuries to her teeth, swollen left upper gum, two loose teeth and shoulder had a swelling and tenderness; that Carren was deaf, the injury was as a result of an assault and was classified as harm. She produced the treatment notes and P3 Form as Pexh. 2 and 3 respectively.
12. PW4 stated that she assessed Carren Aluoch on 25/10/2022 having been referred from Rongo Sub County; Carren was deaf on both ears and did not use sign language, she only read lips. She produced the report as Pexh. 5
13. PW5, an ENT doctor at Migori County Referral Hospital confirmed that he examined Carren Aluoch Awiti and prepared a report and she was consequently issued with a disability card from the national council department.
14. PW6, the Investigating Officer, stated that on 6/9/2022, two complainants reported a case of assault and crop damage. They visited the scene at Dek village accompanied by the complainants. The sugarcane was damaged there were hoof marks. They booked what they had observed and Karen Aluoch was issued with a P3 Form. He later recorded witness statements and arrested the appellant after a positive identification by the complainant. He produced the photographs as Pexh. 1a – f and the Certificate of photographic print out as Pexh. 7, Disability care as Pexh. 6, Karen Aluoch's statement as Pexh. 8.
15. PW7, the Agricultural Officer Migori County that he visited the farm Kamagambo/ Kanyawanga/ 617 on 12/9/2022. The crop was sugarcane, the damage was caused by grazing cows and as a result caused stunted growth on the crops. The affected area measured 0.375Ha and the affected cane was 945. The harvest to be expected was 30 tonnes valued at Kshs. 4,010/- per ton; that the area affected was equivalent to 11 tonnes valued at Kshs. 44,121/-. He produced the cane report as Pexh. 4.
16. The appellant denied committing the offence and maintained that the case was fabricated. It was his testimony that on 6/9/2022, he was grazing his cows on his side of the boundary between himself and the Karen Aluoch; that he heard Karen screaming, abusing him and she started chasing him. She then ran to an old man. Later on 15/10/2022, at around 12.00 noon, someone hit his head with a stick, when he regained consciousness, he found himself at the police station. He was tied to a mango tree, being beaten and thereafter taken to Kamagambo Police Station. He maintained that the complainant Karen is not disabled and that she can hear and speak.
17. DW2 Melda Achieng stated that on 15/10/2022, she had gone to church and when she went back home, the appellant took the cows to the river but he never returned. She was later informed that he had been arrested.
18. In addition to the grounds of the appeal, the appellant mainly submitted that the offences were not proved to the standard required by law that is beyond reasonable doubt; that the evidence tendered by the prosecution witnesses was mainly hearsay.
19. On Count I, it was his submission that the ingredients of the offence were not proved; that the incident happened at a sugarcane plantation and there was no eye witness who testified before the court that he was the perpetrator; that the complainant did not testify in court despite her testimony and evidence being crucial to the case, that there was neither an application to allow her testify through an intermediary nor a ruling regarding the same; that PW1, the complainant's son testified in his own capacity as a complainant and not as an intermediary. He maintained that the said omission amounted to a miscarriage of justice. On material discrepancies, he stated that the testimonies of PW1 – 5 were inconsistent, uncorroborated and contradictory, which makes it impossible to establish whether indeed he was responsible for the offence. He also took issue with the testimony of PW2 which he



- maintained was not cogent and unreliable; that at one point the witness stated that he saw the appellant assaulting the complainant and in cross-examination admitted that he did not see him beating her.
20. The appellant denied grazing his cows in the complainant's sugarcane plantation, and relied on the testimony of the Agricultural Officer at page 8 line 21 when he stated that, "it was a continuous grazing and not a one-off incident" and that the sugarcane were stunted. It was his submission therefore that the damage was as a result of a continuous grazing spree and not a one-off incident.
  21. He further submitted that the sentence was harsh, excessive and unlawful in the circumstances, considering he was a first offender with no previous criminal records.
  22. In her submissions, Ms. Ikol - Esaba the Prosecution, urged that the appellant, who is a neighbour to the complainant and PW3 was positively identified, PW3 saw him immediately after he heard the complainant screaming, it was the testimony of PW1 that the appellant slapped the complainant with a panga and she lost a tooth.
  23. On Count II; she submitted that the testimony of PW1 and PW3 confirmed that the cows that were grazing in the complainant's sugarcane plantation belonged to the appellant. PW6, produced photographs to prove the destruction of the sugarcane by the appellant's cows; that the Agricultural Officer also testified that cows grazed on the sugarcane and caused stunted growth. Further, PW1 testified that the complainant asked the appellant to remove his cows but he refused; that this clearly shows that the appellant intentionally, wilfully and maliciously grazed his cattle in the complainant's sugarcane farm
  24. She maintained that the prosecution proved all the ingredients of the two offences beyond reasonable doubt; that the complainant was allowed to testify through an intermediary, who was both an intermediary and a witness and his evidence cannot amount to hearsay. On the inconsistencies alluded to the appellant, it was her submission that the said inconsistency, of whether the appellant was in the company of one child or two children is not material and it does not affect the substance of the case. She thus submitted that the conviction and sentence by the trial court was safe and proper and urged the court to dismiss the appeal.
  25. I have carefully read and understood the grounds of appeal, record of appeal and the rival submissions. I will therefore proceed to analyse two main issues in determining whether the trial magistrate made a proper finding in finding the appellant guilty for the offences as charged.
  26. The first issue is whether the prosecution proved the ingredients of the offence of assault causing actual bodily harm to the required standard.
  27. The essential ingredients for the offence of assault causing bodily harm were outlined in the case of *Ndaa v Republic* [1984] KLR as follows: -
    - i. Injured the complainant or victim, which
    - ii. Occasioned actual bodily harm.
  28. Before delving into the merits of the offence and whether the ingredients of the offence were proved to the required standard, it is not in dispute that the complainant was deaf and dumb. It is important to first consider the issue of the intermediary and whether the proper procedure was complied with. Article 50(7) of *the Constitution* which protects fair trial provides thus:

"In the interest of justice, a court may allow an intermediary to assist a complainant or an accused person to communicate with the court."



29. The Court of Appeal in the case of *M. M. v Republic* [2014] eKLR extensively expressed itself on the law of intermediary and stated in part as hereunder:

“It is clear from sections 31 (2) and 32 that, first and foremost it is the duty of the prosecution to ascertain the vulnerability of the witness and to apply to the court to make that declaration before appointing an intermediary. In addition, the court, as we have earlier observed, can on its own motion, through *voire dire* examination, declare a witness vulnerable and proceed to appoint an intermediary. Any witness (other than the one to be declared vulnerable) can likewise apply to the court for the declaration. The application must not be granted merely because the victim is young or too old or appears to be suffering from mental disorder. The court itself must be satisfied that the victim or the witness would be exposed to undue mental stress and suffering before an intermediary can be appointed. It is clear from what we have said so far that the procedure of appointing an intermediary preceeds the testimony of the intended vulnerable witness even where the court does so *suo motu*. It is also clear that an intermediary can be an expert in a specified field or a person, who through experience, possesses special knowledge in an area or a social worker, or a relative, a parent or a guardian of the witness.

The expertise, possession of special knowledge or relationship with the witness must be ascertained by the trial court through examination of the prospective intermediary before the court appoints him or her. It goes without saying, in view of that role, that an intermediary must subscribe to an appropriate oath ahead of the witness’ testimony, undertaking to convey correctly and to the best of his/her ability the general purport of the evidence. The trial court must then give directions to delineate the extent of the intermediary’s participation in the proceedings”.

30. It was clear in the mind of the Court that the evidence presented by the intermediary to the court is that of the witness and not the intermediary’s.

“The intermediary’s role is to communicate to the witness the questions put to the witness and to communicate to the court the answers from the victim to the person asking the questions, and to explain such questions or answers, so far as necessary for them to be understood by the witness or person asking questions in a manner understandable to the victim, while at the same time according the victim protection from unfamiliar environment and hostile cross- examination; to monitor the witness’ emotional and psychological state and concentration, and to alert the trial court of any difficulties”.

31. For the above reasons, the Court concluded with the passage cited out of context by the High Court in this matter, thus:-

“From what we have said, we conclude that it was in error for the two courts below to treat the evidence of the complainant’s mother as that of an intermediary, the steps leading to such appointment having not been followed. It was sufficient to rely on her direct evidence as an independent eye witness.

32. In light of the statutory provisions on intermediary and guided by the Court of Appeal decision above in *M.M.’s case* (*Supra*), the question that begs is whether the said procedure was strictly complied with and whether the consequences of non-compliance are fatal.



33. I have carefully looked at the record. It is not in dispute that the complainant Karen Aluoch is deaf, does not use sign language and only reads lips.
34. It is evident from the record of appeal that the procedure preceding the appointment of an intermediary was not complied with. There was no application from the prosecution outlining the vulnerability of the complainant and the circumstances which makes it necessary to testify through an intermediary. Further, the said intermediary was not present in court during the testimony of PW1 and PW1 did not indicate that his testimony in court was that of an intermediary. It is therefore means that the evidence of PW1 did not meet the threshold of an intermediary and the procedure was not strictly complied with. The evidence of PW1 was therefore hearsay of what he had been told by the complainant. Further, I have noted that the witness statement of the complaint was adduced evidence as Pexh. 8 by PW6, the Investigating Officer, way after PW1 had testified.
35. The relationship between PW1 and the complainant ought to have been ascertained by the trial court through the examination of PW1 as a prospective intermediary before the court appointed him as an intermediary. Therefore, it is my considered opinion that failure to strictly comply with the said procedure was fatal and it therefore means that the evidence of the complainant was not tendered.
36. In determining the first ingredient, it is also important to establish whether the appellant was the actual perpetrator of the said offence. In the absence of the evidence/ testimony of the complainant, there is no evidence or eye witness who saw the appellant committing the offence. PW3 in his testimony stated that he saw the appellant disappear into the sugarcane plantation and later heard the complainant screaming. This court is not certain that it was indeed the appellant who assaulted the complainant. There is no mention of how tall the sugarcane crop was and whether PW3 could see what was happening in the plantation from where he was standing.
37. Even though the second ingredient of causing actual "bodily harm" which includes any hurt or injury calculated to interfere with the health or comfort of the complainant was proved by the production of the treatment notes and P3 Form into evidence as PEXH. 2 and 3 respectively, there is no proof that the appellant was the actual perpetrator.
38. It is therefore my finding that the prosecution failed to prove the ingredients of the offence in Count I to the required standard. Consequently, the conviction in Count I was unsafe.
39. The second issue is whether the prosecution proved the offence of malicious damage to property to the required standard to warrant a conviction. The appellant denied grazing his cattle on the complainant's farm. It was also his assertion that from the testimony of PW7, the Agricultural Officer, the damage on the sugarcane "it was a continuous grazing and not a one – off". He thus maintained that the damage caused on the sugarcane crops cannot be attributed to him. The Respondent on her part relied on the testimony of PW1, 3, 6 and 7 in support of their case. that PW1 and 3 confirmed that the cows seen on the farm belonged to the appellant, PW6 the Investigating Officer went took photographs to prove the destruction caused on the sugarcane and lastly, PW7 in his report stated that cows grazed on the sugarcane and as a result caused the stunted growth.
40. In the case of *Simon Kiama Ndiagui v Republic* [2017] eKLR Ngaah J. in discussing the essential elements in a case of malicious damage to property held that: -
  - "In order to convict the court must be satisfied that, first, some property was destroyed; second, that a person destroyed the property; third, that the destruction was wilfull and therefore there must be proof of intent; and fourth, the court must also be satisfied that the destruction was unlawful".



41. The appellant denied grazing his cows on the complainant's shamba. However, in his defence, he stated that he was grazing his cows on the boundary between him and the complainant, since they are neighbours. He further stated that the cows in the sugarcane farm belonged to the complainant. PW3 testified that the cows in the complainant's farm belonged to the appellant. PW6 stated in his testimony said that he visited the scene; that there were visible hoof marks, that the sugarcane was damaged by cows. He took photographs of the scene which were produced as Pexh. 1 (a) – (f) and the Certificate of Photographic print as PEXH. 7. The Agricultural Officer testified as PW7 and stated that he visited the farm and assessed the damage caused to the crops. He outlined the affected as 0.375Ha with 945 canes which was equivalent to 11 tonnes valued at Kshs. 44,121/-. He produced the cane report.
42. From the above evidence, it is clear that the complainant's sugarcane crop was destroyed by the appellant's cows which were wilfully left to graze in the farm and which as a result caused unlawful destruction to the same.
43. For the above reasons, I find the conviction to be safe with regards to the Count II only. The appellant is hereby acquitted with regards to the offence of assault in Count I. As regards court II, I hereby set aside the sentence of two years and substitute it with a fine of Kshs. 100,000/= in default 15 months imprisonment Sentence to commence on 19/10/2023. The Appeal only succeeds to that extent.

**DELIVERED, DATED AND SIGNED AT MIGORI THIS 19<sup>TH</sup> DAY OF JUNE, 2024.**

**R. WENDOH**

**JUDGE**

In presence of; -

Ms. Ikol for the state

Appellant Present

Ms. Emma/ Phelix –Court Assistants

