



**Ochieng v Republic (Criminal Appeal E033 of 2023)  
[2024] KEHC 7115 (KLR) (13 June 2024) (Judgment)**

Neutral citation: [2024] KEHC 7115 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT SIAYA  
CRIMINAL APPEAL E033 OF 2023  
DO OGEMBO, J  
JUNE 13, 2024**

**BETWEEN**

**FELIX OCHIENG OCHIENG ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an Appeal against judgment, Conviction and sentence in Bondo PM's Criminal Case No. E698 of 2022, dated 30/5/2023, by Hon. S. N. Mathenge, SRM)*

**JUDGMENT**

1. The appellant herein Felix Ochieng Ochieng was charged with the offence of grievous harm contrary to Section 234 of the *Penal Code*. That on 13/5/2022 at about 20.00 Hrs at Kapolo area in Bondo Sub-county of Siaya County, jointly with others not before the court, he unlawfully did grievous harm to Naphtali Okeyo Mawere. The trial magistrate found the appellant guilty of the offence as charged and sentenced the appellant to serve 10 years imprisonment. This was on 30/5/2023.
2. The appellant has appealed to this court by way of petition of appeal filed herein on 31/7/2023 and raised the following grounds of appeal.
  1. That the trial before the magistrate's court violated the appellant's right to fair trial under Article 50 of the *Constitution* when the trial proceeded in the absence of the appellant and condemn the appellant completely unheard in his defence.
  2. That the trial magistrate erred both in law and fact in closing the defence case in the absence of the appellant and proceeded with the trial in absence of the appellant in complete violation of Section 206 of the *Criminal Procedure Code*.



3. That the trial magistrate erred both in law and in fact in hurriedly closing the defence case barely two months after the case was set down for defence hearing without affording reasonable time for the availability of the appellant to attend court and present his case.
  4. That the trial magistrate erred in both law and fact in failing to appreciate that from the prosecution case as presented, the appellant was not a principal offender rather, he was at the very least an accessory after the fact.
  5. That the sentence meted out on the appellant was manifestly excessive in the circumstances.
  6. That the conviction was without sufficient evidence on record.
  7. That the trial magistrate erred in both law and fact in failing to appreciate that the prosecution had failed to establish their case to the required standards of beyond reasonable doubt.
  8. That the trial magistrate erred in fact and law in relying on circumstantial evidence that was of the weakest kind and convicting the appellant on the basis of mere suspicion.
3. The appellant prays that the judgment conviction and sentence be set aside and be forthwith acquitted. The prosecution, on the other hand, has prayed that the court do order retrial before another magistrate.
  4. I have considered the above grounds of appeal and the plea of the prosecution. The first 3 grounds of appeal to me are related in as far as they all relate to the right to fair trial under Article 50 of the Constitution. In the said grounds, the appellant alleges that the trial court convicted him without according him the opportunity to defend himself and thereby rebut the evidence of the prosecution. If this is so, then the same is a preliminary point of law that the court must decide on before venturing into the merits or otherwise of the prosecution's case against the appellant.
  5. A perusal of the record of proceedings before the trial court would offer a hind set on this issue.
  6. From the record of proceedings, the court made a finding that accused had a case to answer on 3/3/2023, case did not proceed after advocate for accused failed to turn up in court. On the next date fixed for defence on 21/3/2023, case did not proceed after advocate for accused failed to turn up in court. on the next date on 20/4/2023, accused himself was absent. Same as 4/5/2023. The court proceeded to make a finding that accused had rescinded his rights to appear in court, the defence case was ordered closed and the court proceeded to pronounce his judgment on 30/5/2023.
  7. It was not till 31/5/2023 that accused was presented to court having been arrested on warrant of arrest issued by the court. He pleaded with the court that he had been under arrest in Uganda and could not have been present in court. The court however, proceeded to sentence the accused on 17/7/2023.
  8. It is therefore clear that the trial court did not accord the appellant the opportunity to defend himself. Article 50 (2) (K) of the Constitution declares the right of an accused person to adduce and challenge the evidence against him.
  9. Yes the accused had failed to turn up in court for his defence and the court was obviously right in issuing warrant of arrest against him. On his arrest however, the court ought to have considered the reason for his non attendance on merit. He then would have been given the right to adduce evidence in his defence.
  10. The denial of the right to defend himself was clearly in contravention of **Article 50 (2) (K)** and for this reason, I find fault in decision of the trial court. An accused person is entitled to a fair trial entailing being given the opportunity to defend himself.



11. The trial court at the time the accused failed to turn up in court had made a finding that a prima facie case had been established against the accused. It is therefore not prejudicial in any way for this court to order that the conviction and sentence herein be set aside and the accused given the opportunity to offer his defence.
12. I accordingly therefore allow this appeal in part and set aside the judgment, conviction and sentence of the trial court. I order that the defence case be opened to enable the appellant to offer his evidence in defence before a determination can be made in his case. I order that this case be referred for hearing of defence case at Bondo PM's Court before a different magistrate of competent jurisdiction. It is so ordered.

**DATED, SIGNED AND DELIVERED THIS 13<sup>TH</sup> DAY OF JUNE, 2024.**

**D. O. OGEMBO**

**JUDGE**

Judgment read out in court in presence of the appellant, Mr. Okote for the appellant and Ms. Kerubo for State.

