



**Republic v Kiboiwo & another (Criminal Appeal E036 of 2022)  
[2024] KEHC 6630 (KLR) (6 June 2024) (Judgment)**

Neutral citation: [2024] KEHC 6630 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KABARNET  
CRIMINAL APPEAL E036 OF 2022  
RB NGETICH, J  
JUNE 6, 2024**

**BETWEEN**

**REPUBLIC ..... APPELLANT**

**AND**

**AMOS KIBOIWO ..... 1<sup>ST</sup> RESPONDENT**

**ELIJAH BARKWANY KIBOIWO ..... 2<sup>ND</sup> RESPONDENT**

*(Being an appeal from the decision of the Honourable Senior Resident  
Magistrate V.O Amboko in Kabarnet CMCR case No. E660 of 2020)*

**JUDGMENT**

1. The Respondents were charged with the offence of grievous harm contrary to section 234 of the Penal Code. The particulars were that the Respondents on the 15<sup>th</sup> day of November, 2020 at around 1020hours at Akorian village Bartum Sub-location Bartum Location in Baringo South Sub-County within Baringo County jointly with others not before court, unlawfully did grievous harm to Joel Kipyegon Kimosop.
2. When called upon to plead to the charge, the Respondents denied the charge hence the matter was set down for hearing. The prosecution availed 6 witnesses to prove the charge against the Respondents. Upon the close of the prosecution’s case the accused persons were placed on their defence where they gave sworn testimony and called 5 witnesses in support of their case.
3. By judgment delivered on the 30<sup>th</sup> August, 2022 the trial court found that the prosecution did not prove their case beyond any reasonable doubt and acquitted the Appellant’s of the charge of grievous harm under section 215 of the CPC.
4. Dissatisfied with the decision of the trial court, the state who is the appellant herein filed this petition of appeal on the grounds that:-



- i. The learned Magistrate erred in law and fact by holding that the prosecution had not proved its case against the accused persons beyond reasonable doubt, while there was evidence to the contrary.
  - ii. The learned trial Magistrate erred in law and in fact by discrediting and disbelieving medical evidence on record for the prosecution without assigning any proper reason for that finding.
  - iii. The learned trial Magistrate erred in law and in fact by failing to observe that the evidence of the six defence witnesses was contradictory in material sense, hence the same could not be relied upon.
  - iv. The learned trial magistrate erred in law and in fact by failing to observe and make a finding that the evidence of the prosecution witnesses was consistent, corroborative and uncontradictory, sufficient to secure a conviction against the accused persons.
  - v. The learned trial Magistrate erred in law and in fact by giving credit and believing in medical evidence tendered on behalf of the defence, while not conclusively proved that such evidence existed.
  - vi. The learned trial magistrate erred in law and fact by failing to observe that evidence tendered by the prosecution witnesses squarely placed the Respondents/ accused persons at the scene of crime, hence a finding of guilty should have been rendered.
  - vii. The learned trial magistrate erred in law and fact by failing to properly analyze evidence on record and consider evidence for the prosecution and instead gave credit to the defence witnesses whose credibility was seriously watered down.
5. The appellants pray that this appeal be allowed entirely, and the learned trial Magistrate's judgement dated 30<sup>th</sup> August, 2022 be set aside and the same be replaced with a finding of guilty against the Respondents and convict them accordingly.
  6. The Appeal proceeded by way of written submissions.

### **Appellant's Submissions**

7. On whether the Prosecution proved their case beyond reasonable doubt, the appellant argued that the prosecution proved their case beyond reasonable doubt. That the prosecution called the clinical officer Langat Chirchir who testified as Pw4 and confirmed to the court that indeed the complainant was injured and produced treatment notes and classified the degree of injury sustained by Pw1 as grievous harm and there is no doubt that the complainant sustained grievous harm.
8. On the second issue, the appellant submit that the incident occurred during the day and the complainant was able to identify his perpetrators and he gave a detailed account on what transpired on the said date; that the three persons who injured him were armed and it was witnessed by PW3.
9. The appellant submit that it was confirmed during the defence hearing that indeed the respondents herein were at the scene at the time of the incident; that the witnesses indicated that they saw the complainant and respondents on the scene.
10. On whether the accused persons were assaulted by the complainant, the appellant submit that complainant's right hand was injured/dislocated and he would not have managed to injure the accused and the OCS said he did not issue P3 to the accused and no OB extract was produced to show that any report of assault was made against the complainant. That one also wonders why the respondents



herein paid the complainant KShs 10,000 to withdraw the case if they did not injure the complainant and submit that it was an admission on their part.

11. That in light of the foregoing, the prosecution's case was proved during trial and there were no inconsistencies in the evidence adduced and urged this court to find that the appeal herein has merit.

### **Respondent's Submissions**

12. On whether the prosecution proved its case as against the Respondents beyond any reasonable doubt, the respondent submit that the burden lies on the prosecution to prove that what is alleged to have happened indeed happened in the manner so claimed; that from the evidence of the 6 witnesses called by the prosecution, it is not in dispute that the Respondents were at the scene but what was in dispute is whether they caused grievous harm to the Complainant; that the trial court had the privilege of observing the demeanour of the witnesses and hear their testimony and rightly held that their testimonies were contradicting which contradictions were substantial and went to the credibility of the prosecution witnesses.
13. On whether the Prosecution's case was marred with Contradictions, discrepancies and inconsistencies and whether those contradictions went to the core of prosecution's case, the respondents submit that the Complainant testified as PW1 and stated that the accused person hit him with a stone on his right hand and he fell down while the 1<sup>st</sup> Respondent injured him on the right shoulder. That PW2 on the other hand testified that when he arrived at the scene, he found the complainant on the ground and 3 men were hitting him using a Rungu.
14. They submit that in his evidence in chief, PW1 did not mention that he was attacked by using Rungus. That PW2's testimony was that PW1 was attacked using something like a Rungu. He testified that he arrived at the scene together with Jonathan Kiplagat who testified as PW3. He testified that he arrived at the scene and found PW1 being surrounded by 3 people who were harmed. That he however did not state that PW1 was being attacked when they arrived at the scene; and on cross examination, he testified that PW1 was attacked using a cane and it is evident that there were inconsistencies in the testimonies of the Prosecution witnesses.
15. They argue that in any criminal trial where several witnesses testify and there are inconsistencies and or contradictions which go to the root of the prosecution case, such inconsistencies and or contradictions should be resolved in favor of the accused and relied on the case of Richard Munene v Republic [2018] eKLR and in the case of Dickson Ella Nsamba Shapwata & Another Vs The Republic, (Criminal. Appeal. No. 92 of 2007).
16. That it was the finding of the trial court, and rightly so, that the inconsistencies in prosecution case went to the root of the Prosecution's case and therefore cast doubt on the testimony of the witnesses.
17. On whether the Respondent admitted guilt by giving the Complainant KShs. 10,000/-, the respondents submit that it is trite that once the accused person pleads not guilty to the charge, in all criminal cases, the prosecution bears the burden of proving the crime against each of the set ingredients beyond reasonable doubt which is expressly stated under Section 107(1), 108 and 109 of the [Evidence Act](#) on prove of existence or non-existence of particular facts to the commission of crime in order to obtain Judgment in its favor.
18. And submit that that burden never shifts to any of the accused charged and it therefore remains that his or her conviction is to be based on the strength of the prosecution evidence and an accused person bears no responsibility to prove his or her innocence.



19. The respondents further submit that DW3 testified that indeed the family of the Respondent gave honey and a goat to the Complainant who confirmed that under their culture, that was a requirement even before a sitting is held between parties to determine who was at fault. He testified that the Complainant asked for Kshs. 10,000/= as fare and lunch to be able to travel to Kabarnet to withdraw the case and at no point did the Respondents admit having assaulted the Complainant and in any event, the rules of confession are clearly provided for in law.
20. In conclusion, the respondents submit that the Prosecution failed to discharge its burden of proof and the acquittal of the Respondent is as justified and urged this court to dismiss this appeal.

### **Analysis And Determination**

21. This being the first appellate court, I am expected to subject the entire evidence adduced before the trial court to fresh evaluation and analysis. This I do while bearing in mind the fact that unlike the trial court I did not have the opportunity to hear the witnesses and observe their demeanour. The principles that apply in the first appellate court are set out in the case of Okeno Vs Republic [1972] EA 32 where it was stated as follows:-

“The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala v. Republic [1957] EA 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] EA 424.)”

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22. Further in Mark Oiruri Mose –Vs- Republic [2013] e KLR Criminal Appeal No.295 of 2012 the Court of Appeal stated as follows:-

“It has been said over and over again that the first appellate Court has the duty to revisit the evidence tendered before the trial Court afresh, analyze it, evaluate it and come to its own independent conclusion on the matter but always bearing in mind that the trial Court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and to give allowance for that.”

23. In view of the above, I have perused and considered the proceedings before the trial court. I have also considered submissions filed and wish to consider whether the prosecution proved the charge against the accused persons beyond reasonable doubt.
24. Record show that on 15<sup>th</sup> of November 2020 at 10.20 a.m, PW1 Joel Kipyegon Kimosop was at his shamba at 10:20 a.m mending his fence when the two accused persons and one Richard went there and asked him what he was doing. He said the 4<sup>th</sup> person Esther who is a sister to Accused 2 was outside the fence. The complainant asked the three to leave but instead the 2<sup>nd</sup> accused went to where he was and hit his right hand with a stone and when he fell down the other injured his right shoulder. The complainant called his son who arrived with Pw3 and found the accused persons assaulting the complainant. The complainant’s son called his mother who went and took the complainant. They reported the incident at Marigat police station. The complainant sought further treatment at Mediheal hospital where a metal plate was fixed. On cross examination he stated that the 2 accused persons were armed with a



- rungu while Richard who was not armed with a panga and Rungu; and their sister Esther was at the fence at the time.
25. PW2 Evans Kipyego who is pw1's son confirmed that he received a call from pw1 and went to the scene with Jonathan Pw3 herein and found his father on the ground. He said 3 men were hitting him using a rungu while the lady outside the fence was shouting telling them they should kill the complainant. He testified that one of them hit Jonathan with a stone and started chasing them. He confirmed that the two Respondents /accused are the ones who attacked PW1.
  26. PW3 Jonathan Kiplagat corroborated PW2's testimony; he stated that when he arrived at the scene in the company of PW2, they found PW 1 surrounded by 3 people who were armed. He stated that one of them threw a stone at him injuring his finger. The men moved away and they were able to help PW1 who was bleeding on his right hand. He said the 3 men were the 2 accused persons and one Richard Chepkalum who was not arrested.
  27. PW4 Langat Chirchir the chief clinical officer at Marigat subcounty hospital testified that the complainant sustained a fracture of the left ulna and radius, dislocation of the shoulder left arm and the probable type of weapon used was blunt; x-rays were taken and he was referred to an orthopedic specialist in mediheal hospital. He filled the P3 form on the 16/ 11/2020. He produced the P3 form, treatment notes and x-rays as evidence. On cross-examination, he stated that there was a cut wound along the fractured area which he had not recorded in the P3 form and X-rays were done on the 15/ 11/2020.
  28. Pw5 Pc Sammy Kebaso the investigating officer stated that PW1 reported that he had been assaulted while at his farm by the accused persons, Richard Chepkalach and Esther Kiboiwo. He recorded statements of witnesses and issued PW1 with a P3 Form, which was filled at Marigat district hospital and Mediheal hospital. PW5 sent an arrest warrant to Kambi ya samaki police post and the accused persons were arrested. He visited the scene and found blood at the scene. He produced complainant's blood-stained clothes.
  29. PW6 Caroline Wangechi Njuguna a medical records officer at Nakuru Mediheal confirmed that PW 1 was first seen at the hospital on the 13<sup>th</sup> of August 2018 and discharged on the 15<sup>th</sup> of August 2018. Later he was admitted on the 22<sup>nd</sup> December,2020 and discharged on the 24<sup>th</sup> December,2020. She confirmed that the complainant had commuted fracture of the right ulna. She produced the discharge summary and x-rays as exhibits.
  30. On his defence, accused 1 Amos Kiboiwo testified that they had land dispute with the complainant and on the date of the incident, he went to the shamba in the company of the 2<sup>nd</sup> accused person and Richard Chepkalum and found the complainant who asked them what they wanted and asked them to leave the shamba. He said the complainant had a panga and tarimbo and as they were about to leave, he started beating up Richard Chepkalaum with a stick and also hit him using a tarimbo on his knee. The complainant's sons arrived and their sister Esther Bosire asked them to leave the shamba. Him and Richard Chepkalum sought treatment at the Marigat sub county hospital. He later made a report at the Marigat police station and was referred to Loruk police station where he was issued with a P3 form which was filled. The appellants were arrested and charged with the offence. On cross examination he said they compensated the complainant after meetings with elders because their culture required compensation to someone who was injured. He denied committing the offence.
  31. Accused 2 Elijah Barkwang Kiboiwo said while in the shamba, the complainant asked them to leave and attacked Richard using sticks. Shortly, the complainant's sons arrived and he asked his sons to eject them from the shamba. He said the complainant hit his hand using a metal bar while his sons threw



- stones at them. They went to Marigat hospital where they were treated and reported the incident at Marigat hospital but were referred to Loruk police station where they reported the incident and were issued with P3 forms. On cross examination he stated that Accused 1 did not see him being injured. He was given medication at the Marigat sub county hospital.
32. DW3 Chief Inspector Julius Kiruki the OCS Loruk Police station stated that the 1<sup>st</sup> accused person made a report of an assault vide OB 10 at the station. He reported to have been assaulted by PW1, PW2 and PW3. Pc Hussein was assigned to investigate the case and stated that the 1<sup>st</sup> accused was issued with P3 form but it was not filled. He said the P3 form in court was not stamped by Loruk Police station and he could not therefore certify that the P3 form was issued at the Loruk Police station.
  33. DW4 Kenda Yatich testified that there was a dispute over the land where the incident occurred and the dispute was being handled by the chief. He further confirmed that the complainant was compensated after meetings with elders and the complainant was given Kshs. 10,000/= as transport to withdraw the court case. He said he did not witness the incident.
  34. DW5 Lina Sote Kiprop stated that the accused persons and the complainant were to meet the area chief on the 14/1/2020 but the complainant did not attend the meeting. She was later informed that the accused persons had been arrested following an incident. She said she did not witness the incident.
  35. DW6 Esther Talai Bosire stated that she was at her farm in Kambi ya samaki on the date of the incident. She heard noise from 3 people in the adjacent farm, she saw her brother, the 2 accused persons and the complainant. She said the complainant hit her brother Richard using a stick from behind and also hit both accused person's from behind. On cross examination she stated that she saw them fighting but did not see whether the complainant was injured.
  36. DW7 Kiplagat Bargoge stated that he was a clinical officer from Marigat sub county hospital. It was his testimony that he examined Accused 1 on the 15/11/2020. He said Accused 1 gave a history of being hit by a metallic object on her knee, he approximated age of injury as hours. He said he also treated one Richard Kiboiwo who sustained an injury on his left upper arm. He produced P3 forms and treatment notes as evidence. On cross examination he stated that he treated the patients on the 15/11/2020 and filled P3 forms on the 16/ 11/2020. He could not clarify whether the patient was hit from the back or front.
  37. It is the appellant's case that the court misdirected itself by holding that the prosecution had not proved its case beyond reasonable doubt hence the acquittal was erroneous; that the prosecution discharged its burden of proof as required in law; that the prosecution's case was well proven during trial and there were no inconsistencies in the evidence adduced and urged this court to find that this appeal is merited.
  38. It is trite that throughout a criminal trial, the burden of proof always lies with the prosecution and the same does not shift. This position was succinctly captured in the case of *Okethi Okale vs Republic* (1985)EA 555.
  39. Indeed, it was the duty of the prosecution to prove beyond reasonable doubt that the respondents caused grievous harm on the complainant. However, proof beyond reasonable doubt is not synonymous to proving a case with mathematical precision at 100%. See *Miller –VS- Minister of Pensions* (1947) 2ALL ER 372-373 where Lord Denning had this to say about proof of a case beyond reasonable doubt that;

“That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of 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, the case is proved beyond reasonable doubt, but nothing short of that will suffice.”

40. The Respondents were charged with the offence of causing grievous harm under Section 234 of the penal code which provides as follows: -

“Any person who unlawfully does grievous harm to another is guilty of a felony and is liable to imprisonment for life”

41. Grievous harm is defined as any harm which amounts to maim or dangerous harm or seriously and permanently injures health, or which is likely so to injure health, or which extends to the permanent disfigurement, or to any permanent or serious injury to any external or internal organ, membrane or sense.

42. The onus lay with the prosecution to prove that, the complainant was attacked and sustained grievous harm; that the attack was unlawful and that it was the accused persons who attacked him. In this case, there is no dispute that the complainant sustained serious injuries which the clinical officer classified as grievous harm. He produced the P3 form, treatment notes and x-rays as evidence.

43. According to PW1, the injuries were unlawfully inflicted by the Respondents who attacked him while at the farm. Upon Pw2 and pw3 responding to the complainant’s distress call, they found pw1 while being attacked by the accused persons. PW2 and PW3 found Respondents at the scene attacking the complainant. The accused persons did not deny being at the scene. In fact, they placed themselves at the scene in their defence but instead said the complainant attacked and injured the 1<sup>st</sup> appellant and one Richard who was not arrested. Accused 1 however said in his testimony in chief that he had not made any complaint concerning the injury. Their witness Pw3 who is a police officer disowned the P3 shown to him by defence counsel. He said it did not have police stamp. He said the 1<sup>st</sup> appellant did not return the P3 form and it was not therefore concluded. He confirmed that the complainant herein was assaulted.

44. I also note that pw6 said the complainant hit the 1<sup>st</sup> accused/Respondent at the back while the clinical officer who was called by defence and adduced evidence as DW7 stated on cross examination that the 1<sup>st</sup> appellant had no injuries on the back and the injury was on the front right knee. Besides the 1<sup>st</sup> appellant’s investigation on injury not being concluded, his two witnesses contradicted themselves in respect to the alleged injury.

45. Upon considering evidence adduced in totality, I am of the view that the prosecution proved beyond reasonable doubt that the accused persons together with one Richard attacked the complainant in broad daylight inflicting serious injuries and evidence adduced by the appellants and their witnesses did not in any way shake the prosecution case.

46. In a nutshell, it is clear in my mind that the prosecution evidence adduced was overwhelming and that the trial court erred in finding that the prosecution had not proved its case beyond reasonable doubt hence the appeal on conviction is hereby allowed. The finding on acquittal is hereby quashed/set aside and the Respondents are hereby jointly found guilty and convicted of the offence of grievous harm under section 215 of the CPC.

**Final Orders: -**

1. Trial court’s order acquitting the respondent’s herein is hereby quashed.



2. The respondents are jointly convicted of the offence of grievous harm.
3. Presentence report to be prepared by probation officer.
4. Date to be fixed for record and mitigation before sentencing.
5. Presentence report to be filed before the mention date.

**JUDGMENT DELIVERED, DATED AND SIGNED IN VIRTUALLY AT KABARNET THIS 6<sup>TH</sup> DAY OF JUNE 2024.**

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**RACHEL NGETICH**

**JUDGE**

In the presence of:

CA Elvis.

Ms. Ratemo for state/Appellant

Mr. Kenda counsel for Respondents

