



**Republic v Asiachi (Criminal Appeal E005 of 2023)  
[2024] KEHC 6361 (KLR) (4 June 2024) (Judgment)**

Neutral citation: [2024] KEHC 6361 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KIBERA  
CRIMINAL APPEAL E005 OF 2023  
DR KAVEDZA, J  
JUNE 4, 2024**

**BETWEEN**

**REPUBLIC ..... APPELLANT**

**AND**

**FREDRICK ASIACHI ..... RESPONDENT**

*(Being an appeal against an acquittal by Hon. M. Murage (P.M) delivered on 23rd October 2023 at Kibera Chief Magistrate’s Court Criminal Case no. 47 of 2016 Republic vs Fredrick Asiachi)*

**JUDGMENT**

1. The respondent was charged with assault causing actual bodily harm contrary to section 251 of the Penal Code. The particulars of the offence are that on April 3, 2015 and April 4, 2015, at Kibera Anyany area in Kibera Sub-County, within Nairobi County wilfully and unlawfully assaulted Maureen Muhatia thereby occasioning actual bodily harm. After a full trial, the respondent was acquitted.
2. Being aggrieved, the state filed an appeal challenging the acquittal. In the petition of appeal dated November 2, 2023, the appellant raised six (6) grounds which have been coalized as follows. The appellant contended that in acquitting the respondent the trial court failed to; properly consider the weight of the prosecution’s evidence, and consider the provisions of section 107 of the Evidence Act and section 214(2) of the Criminal Procedure Code.
3. The respondent did not file a response to the appeal. The appeal was canvassed by way of written submissions which have been considered.
4. As this is a first appeal, I am required to conduct a fresh evaluation of all the evidence and come to an independent conclusion as to whether or not to uphold the conviction and sentence. This task must have regard to the fact that I never saw or heard the witnesses testify (see *Okeno v Republic* [1973] EA 32).



5. The prosecution's case was as follows: PW1, Maureen Muhatia Oyala, testified that the appellant was her husband of seven years. On April 3, 2015, the appellant left the house in the morning, claiming he was going to work. However, he returned at night, threw her phone, and began assaulting her. He hit her chest and caused the baby to fall. He also struck her on the right side of the neck and cheek. The house help alerted neighbours, but the appellant locked the door from the inside. When neighbours arrived, he continued to beat her, threatening to kill her. She managed to escape and sought treatment at Tumaini Hospital.
6. The following day, April 4, 2015, the appellant attacked her again, causing her nose to bleed. He locked the door in the presence of the house help. Neighbours heard the commotion. The appellant called his brother and left for his brother's place, leaving her with 200 Kenyan Shillings for hospital expenses. She went to Kenyatta Hospital due to swelling on her cheek. The appellant disappeared from the house on April 4, 2015, and the police began searching for him. He was arrested at his workplace and took a plea on January 6, 2016. PW1 told the court that the accused beat her due to suspicions of infidelity.
7. During cross-examination, Maureen confirmed that the assaults occurred on April 3 and 4, 2015. She reported the incident, receiving an Occurrence Book (OB) on April 6, 2015, although the charge sheet indicated April 26, 2016, as the OB date. She did not receive treatment on April 3, and the P3 form was filled on April 6. Neighbours witnessed the assaults.
8. PW2, Dalmas Odero, testified that on April 4, 2015, he heard a commotion in the neighborhood and saw neighbours gathering. He witnessed the appellant assaulting PW1, causing her to bleed from the nose. He recorded a statement on April 15, 2016 a year later.
9. PW3, Moses Odhiambo Awiti, testified that on April 3, 2015, he heard screams from Ayany estate and went to investigate. He witnessed the appellant beating PW1 on a sofa. During cross-examination, he confirmed seeing the appellant assaulting PW1 and witnessing her bleeding from the nose.
10. PW4 CPL Carolyne Naliaka told the court that she was the investigating officer. The case was minuted to her on 6/4/2015. She met the complainant who told her that she was assaulted twice. The first was on 3/4/2015 at 9 pm and the second time on 4/4/2015. A P3 form was issued to her.
11. PW5 Sgt Joram Karani, the investigating officer who took over the matter produced a P3 form and treatment notes.
12. After the close of the prosecution's case, the appellant was found to have a case to answer and was put on his defence. In his defence, he gave sworn evidence and did not call any witnesses. He told the court that PW1 was his wife and they were living together. On 4/4/2015 they had a misunderstanding at night. PW1 turned violent and attacked him. She jumped at him and wanted to hold his organs. His shorts came off in the presence of his children. She threw a remote control and a cup. It was around 9.00pm. She was alleging that the appellant was unfaithful. He opted to leave the house because she was violent. He pushed her aside to get his way out. No people gathered throughout the incident. She asked the appellant to facilitate her getting medication from the chemist. Since then she has been accusing him and has caused numerous cases to be filed against him. He filed a divorce case No 368/2019 at Milimani (family division) which is yet to be determined.
13. In their submissions in support of the appeal, the appellant submitted that the elements of the charge of assault causing actual bodily harm proved beyond reasonable doubt that it was the respondent who assaulted the complainant.



14. After considering the grounds of appeal, submissions thereon, and evidence adduced in the trial Court, I find that the main issue is whether the respondent was rightly acquitted of the offence of assault causing actual bodily harm.
15. According to section 251 of the [Penal Code](#): -

“Any person who commits an assault occasioning actual bodily harm is guilty of a misdemeanour and is liable to imprisonment for five years.”
16. The essential elements of the offence of assault causing actual bodily harm are;
  - i. Assaulting the complainant or victim
  - ii. Occasioning actual bodily harm
17. I have re-evaluated the evidence adduced by the prosecution witnesses. I find that Maureen Muhatia Oyala's (PW1) testimony regarding the assault is substantiated by multiple sources. Neighbors PW2 and PW3, residing near the couple, testified to hearing a disturbance and observed the respondent physically assaulting PW1. PW3 testified to have seen PW1 nose bleeding.
18. Firstly, PW1 was unequivocally able to identify the respondent. Secondly, the evidence convincingly establishes the respondent's presence at the scene during the alleged incident. Thirdly, the evidence strongly indicates that the respondent perpetrated the assault against PW1. Fourthly, medical evidence documented injuries, encompassing nose, eye, chest, and neck, which leaves no ambiguity that the complainant was indeed assaulted. Fifthly, PW1's account is corroborated by the testimonies of PW2 and PW3, who witnessed the respondent striking the complainant. PW3 specifically observed PW1 nose bleeding after the assault.
19. Furthermore, despite considering the respondent's defense, characterized primarily by denial, it fails to undermine the prosecution's evidence. Medical records confirm the assault, and the testimonies of PW2 and PW3 support the incident's occurrence.
20. The trial court, in acquitting the respondent, cited major discrepancies in the prosecution's case regarding the timing of the alleged offense. The court noted that the evidence of PW2, who purportedly went to the scene, did not align with the complainant's testimony. Additionally, that the P3 form, stamped on April 9, 2015, indicated that the injuries were four days old, suggesting the incident occurred on April 5, 2015, rather than the alleged dates of April 4<sup>th</sup> 2015.
21. I consider this discrepancy insignificant. The crucial issue is whether the assault indeed occurred within that timeframe. As stated in paragraph 18 and 19 above, the evidence of PW1 was corroborated by PW2 and PW3 as well as medical evidence. The primary concern is whether the assault occurred within the stated timeframe, which is evident from the evidence on record. Accordingly, the discrepancy of one day in respect to the injuries sustained by PW1 is immaterial.
22. From the foregoing, I find that the prosecution proved its case beyond reasonable doubt and the trial court erred in acquitting the respondent. The upshot is that the appeal has merit and the same is hereby allowed in the following terms:
  - I. The respondent is hereby found guilty of the offence of assault causing actual bodily harm contrary to section 251 of the Penal Code and is hereby convicted for the same;
  - II. The acquittal of the respondent is hereby set aside;
  - III. The matter is referred back to the trial court for mitigation and sentencing.



IV. The trial magistrate to issue summons to the respondent through the investigating officer to attend court on or before 4<sup>th</sup> July 2024.

It is so ordered.

Judgement dated and delivered virtually this 4<sup>th</sup> day of June 2024

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**D. KAVEDZA**

**JUDGE**

**In the presence of:**

Ms. Tumaini Wafula for the Appellant

Ms. Murugi for the Respondent

Joy Court Assistant

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