



REPUBLIC OF KENYA



**Nyaata v Republic (Criminal Appeal E016 of 2023)  
[2024] KEHC 8907 (KLR) (4 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 8907 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NYAMIRA  
CRIMINAL APPEAL E016 OF 2023**

**WA OKWANY, J**

**JULY 4, 2024**

**BETWEEN**

**JOSEPH OBARE NYAATA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an Appeal from the Judgement and Sentence in the Chief  
Magistrate's Court at Nyamira, Criminal Case No. 894 of 2020 delivered  
by Hon. C. W, Waswa, Senior Resident Magistrate on 26th April 2023)*

**JUDGMENT**

1. The Appellant herein faced the following charges before the trial court: -

Count Grievous harm contrary to Section 234 of the *Penal Code*. The particulars of the offence were

I: that on 18<sup>th</sup> March 2020, at Nyaisa Village in Timi Sub-location of Keera location within Nyamira South Sub-County in Nyamira County, unlawfully did grievous harm to David Momanyi Nyamweya.

Count Assault causing actual bodily harm contrary to Section 251 of the *Penal Code*. The particulars

II: of the offence were that on 18<sup>th</sup> March 2020, at Nyaisa Village in Timi Sub-location of Keera location within Nyamira South Sub-County in Nyamira County, unlawfully assaulted Stephen Onyancha thereby occasioning him actual bodily harm.

Count Assault causing actual bodily harm contrary to Section 251 of the *Penal Code*. The particulars

III: of the offence were that on 18<sup>th</sup> March 2020, at Nyaisa Village in Timi Sub-location of Keera location within Nyamira South Sub-County in Nyamira County, unlawfully assaulted Joel Onyancha Ogeto thereby occasioning him actual bodily harm.



2. The Appellant pleaded not guilty to all the counts after which a trial was conducted before the lower court wherein the Prosecution presented the evidence of a total of seven (7) witnesses.
3. A summary of the Prosecution's case was that the complainant's herein, David Momanyi Nyamweya (PW1), Stephen Onyancha (PW2) and Joel Onyancha Ogeto (PW3) alongside Japheth Nyachiro (PW4) were joint owners of a tea farm. The Complainants' case was that they were on the morning of 18<sup>th</sup> March 2020 working in their tea farm when the Appellant appeared and started plucking their tea. They testified that their attempts to enquire, from the Appellant, why he was plucking the tea was met with resistance from the Appellant who blew a whistle to summon people to the scene after which a scuffle ensued in which the Appellant beat them and chased them away. PW1 testified that the Appellant beat him with a stick on the shoulder, leg and back but that the Appellant ran away when he saw the village elder. PW1 stated that he was treated at Nyamira County Hospital and that the matter reported at Nyamira Police Station where he was issued with a P3 form (P.Exh1). He produced his outpatient card as (P.Exh 2).
4. PW2 testified that the Appellant hit his right hand with a *jembe* (hoe). He reported the matter to Nyamira Police Station and was treated at Nyamira County Hospital where he was issued with a P3 form (P.Exh3). He produced his Treatment Notes (P.Exh4).
5. PW3 testified that the Appellant hit him on the head with a stick and that the Appellant whistled to summon people to the scene after which he (PW3) ran away out of fear. He then reported the matter to the clan elder and Nyamira Police Station before going for treatment at Nyamira County Hospital where he was issued with a P3 Form (P.Exh 5) and produced his Outpatient card (P.Exh6).
6. PW4 testified that the Appellant blew a whistle to call people to the scene immediately they asked him why he was plucking their tea. He stated that the people who came to the scene were armed with pangas (machetes) and *jembes* (hoes). He added that the Appellant hit PW2 on the back using the *jembe's* handle.
7. PW5, David Agwata, testified that the Appellant assaulted PW2 and PW3 but that he opted to run away and later reported the incident to Nyamira Police Station.
8. PW6, Joel Ongero, a Clinical Officer at Nyamira County Referral Hospital examined the complainant's and formed the opinion that their injuries had been inflicted by a blunt weapon. He classified the injuries as harm.
9. PW7, No. 114xxxx PC. Jo Kyalo, was the investigating officer. He recorded witness statements and issued the complainants with P3 forms before charging the Appellant with the three counts of assault.
10. At the close of the Prosecution's case, the trial court found that the Prosecution had established a prima facie case against the Appellant who was consequently placed on his defence. The Appellant elected to present a sworn statement in his defence which was supported by the evidence of 2 witnesses.

### **The Defence/Appellant's Case**

11. The Appellant (DW1) testified that he was plucking tea on his land in the company of his wife, Margaret Kemunto (DW2) when they were accosted by about 10 people who threatened to beat him up. He blew a whistle to alert people of his distress. He denied the allegation that he assaulted the complainants.
12. DW2 testified that she screamed when she saw many people coming to their farm and that members of the public came to the scene. She stated that the tea belonged to her husband.



13. DW3, David Nyambane, the Appellant's cousin testified that the tea belonged to the Appellant.

### **Judgment and Sentence**

14. At the conclusion of the case, the trial court found that the prosecution had proved all the charges against the Appellant, beyond reasonable doubt. The Appellant was consequently convicted on all the counts and sentenced as follows: -

Count Appellant to compensate the complainant in the sum of Kshs. 150,000/- or in default to serve I: three (3) years' imprisonment.

Count Appellant to compensate the complainant in the sum of Kshs. 100,000/- or in default to serve II: one (1) year's imprisonment.

Count Appellant to compensate the complainant in the sum of Kshs. 100,000/- or in default to serve III: one (1) year's imprisonment.

The sentences were to run concurrently.

### **The Appeal**

15. Aggrieved by both the conviction and sentence, the Appellant filed the instant appeal and listed the following grounds of appeal in the Petition of Appeal: -

1. That the Learned Trial Magistrate erred in law and facts in convicting the Appellant of the offence of grievous harm and assault notwithstanding that the evidence before the trial court when properly analysed and evaluated did not support the conviction.
2. That the Learned Trial Magistrate erred in law and facts by failing to afford the Appellant a fair trial.
3. That the Learned Trial Magistrate erred in law and facts in convicting the Appellant without considering his submission and status.
4. That the Learned Trial Magistrate erred in law and facts in not finding that the Prosecution had not proved its case beyond reasonable doubt with the Accused defence and his submissions that the dispute generated from the land dispute vide ELC case No. 29 of 2019 where the 1<sup>st</sup> and 3<sup>rd</sup> complainant were the defendants.
5. That the Learned Trial Magistrate erred in law and facts in convicting and sentencing the Appellant on insufficient evidence.
6. That the conviction and sentence by the Learned Trial Magistrate was unfair and unjust to the Appellant.
7. That the Learned Trial Magistrate erred in law and facts in putting the Appellant on his defence without good investigation from the arresting or investigating officer.
8. That the Learned Trial Magistrate erred in law and facts by giving a sentence which was harsh, excessive and hard in law given that he never committed the alleged offence which was done by mob justice on the subject ELC case in Nyamira Chief Magistrate's Court No. 28 of 2019 filed by the Appellant herein.
9. That the Learned Trial Magistrate failed to appreciate that the Prosecution case was riddled with contradictions.



10. That the Learned Trial Magistrate erred in law and facts by failing to evaluate, analyse and appreciate that the evidence was not enough to sustain a conviction.
11. That the Learned Trial Magistrate erred in law and facts by failing to consider the history summary of the Appellant and ascertain the evidence from the Appellant.
16. The Appeal was canvassed by way of written submissions which I have considered.
17. The duty of a first appellate court was discussed by the Court of Appeal of East Africa in the case of *Okeno v. R* [1972] EA. 32 as follows:-

“The duty of the first appellate court is to analyse the re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decisions.”

### **Analysis and Determination**

18. The issues for my determination are: -
  - i. Whether the Prosecution proved each charge against the Appellant to the required standard.
  - ii. Whether the sentences meted were just and legal.

#### **i. Whether The Prosecution Proved Each Charge Against The Appellant To The Required Standard.**

19. The offence of grievous harm is defined under Section 234 of the [Penal Code](#) as follows: -
  234. Grievous Harm  
Any person who unlawfully does grievous harm to another is guilty of a felony and is liable to imprisonment for life.
20. Grievous harm is defined under Section 4 of the [Penal Code](#) as follows:-

“grievous harm means 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.”
21. The Prosecution was therefore required to prove the following in order to secure a conviction for the offence of grievous harm: -
  - a. That the victim sustained grievous harm.
  - b. The harm was caused unlawfully.
  - c. The accused caused or participated in causing the grievous harm.



22. Section 251 of the *Penal Code* 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.”

23. Section 4 of the *Penal Code* defines harm as follows: -

“harm” means any bodily hurt, disease or disorder whether permanent or temporary”

24. *Archbold's Criminal Pleading, Evidence and Practice*, 32<sup>nd</sup> Edition at Page 959 states as follows: -

“Actual bodily harm includes any hurt or injury calculated to interfere with the health or comfort of the prosecutor”

25. It was not disputed that complainants sustained injuries in the scuffle or incident that gave rise to the instant case. Indeed all the complainants presented treatment notes and P3 forms to confirm that they were injured during the scuffle. The issue that this court has to grapple with is whether the Appellant caused or participated in causing the harm. PW1 testified as follows on the incident: -

“The Accused came and started plucking tea. We asked him why he was plucking tea. The accused started calling people. We started fighting. We were chased from the land and I fell into a river.”

26. PW2, on his part, testified as follows: -

“We asked the accused why he was plucking our tea. The accused slapped me on my back and took my *jembe*. He hit me with the *jembe* on my right hand and below the elbow.”

27. PW3, on the other hand, testified as follows: -

“The accused had a stick which he wanted to use to hit my head and I blocked using my hands. The accused hit me once with the stick.”

28. My analysis of the evidence presented by the complainants, in its totality, paints a picture of neighbours who had a long-standing dispute over the land on which tea was growing which dispute degenerated into a physical confrontation on the date in question. This court finds it hard to believe that the Appellant, who was allegedly accosted by the complainants while plucking tea, could single-handedly assault all the three complainants at the same time without getting any resistance from them. Doubts on the prosecution's case are further raised by the fact that none of the members of the public who allegedly came to the scene and witnessed the incident were called to testify in the matter as all the eye witnesses were members of the complainants' alleged land company. Furthermore, the complainants did not present any proof of ownership of the tea farm in question so as to confirm the claim that the Appellant had trespassed into their tea farm.

29. It also emerged, from the evidence of the prosecution witnesses, that the Appellant blew a whistle in a bid to call for help from the members of the public when he was accosted by the complainants. Indeed, PW4 testified that he ran away when he saw members of the public coming to the scene. My finding is that the action taken by the Appellant, to call for help when accosted by the complainants, is not consistent with the actions of a guilty party. This court cannot help but find that if indeed the complainants' sustained any injuries in the scuffle, then the same was caused by the irate and armed mob who came to the Appellant's aid when he raised the alarm.



30. In sum, I am not satisfied that the prosecution proved its case against the Appellant to the required standards based on the inconsistencies that I have noted in their evidence.
31. For the reasons that I have stated in this judgment, I find that the instant appeal is merited and I therefore allow it. Consequently, I quash the conviction and set aside the sentence on all the three counts. I direct that the Appellant be set at liberty forthwith unless he is otherwise lawfully held.
32. It is so ordered.

**JUDGMENT DATED, SIGNED AND DELIVERED AT NYAMIRA VIRTUALLY VIA MICROSOFT TEAMS THIS 4<sup>TH</sup> DAY OF JULY 2024.**

**W. A. OKWANY**

**JUDGE**

