



REPUBLIC OF KENYA



**KENYA LAW**  
THE NATIONAL COUNCIL FOR LAW REPORTING  
Where Legal Information is Public Knowledge

**Njama & another v Republic (Criminal Appeal E077 of 2023)  
[2024] KEHC 8591 (KLR) (2 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 8591 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NYERI  
CRIMINAL APPEAL E077 OF 2023  
DKN MAGARE, J  
JULY 2, 2024**

**BETWEEN**

**JACKSON GIITA NJAMA ..... 1<sup>ST</sup> APPELLANT**

**PURITY WANJUGU NJAMA ..... 2<sup>ND</sup> APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal from the Judgment and Conviction of the Principal Magistrate's Court at Othaya by Hon. N. W. Wanja, on 27th November, 2023 in Criminal Case No. E218 of 2023)*

**JUDGMENT**

1. The Appellants were charged with counts of assault contrary to Section 251 of the Penal Code, malicious damage to property and offensive conduct. The charges were as follows:-
  - i. That on the 3<sup>rd</sup> day of April, 2023 in Nyeri South sub-county, within Nyeri County, the Appellants jointly and unlawfully assaulted ATM thereby occasioning him actual bodily harm.
  - ii. That on the 3<sup>rd</sup> day of April, 2023 in Nyeri South sub-county, within Nyeri County, the Appellants jointly and unlawfully assaulted CW thereby occasioning her actual bodily harm.
  - iii. That on the 3<sup>rd</sup> day of April, 2023 at Muhito village, Gaturuturu sub location in Nyeri South sub-county, within Nyeri County, the 1<sup>st</sup> Appellant willfully and unlawfully damaged the iron sheet fenced wall structure the property of ATM valued at Kshs.30,000/=.
  - iv. That on the 3<sup>rd</sup> day of April, 2023 in Nyeri South sub-county, within Nyeri County, the 1<sup>st</sup> Appellant used abusive words namely “” – P, “” – a D, and “” – M person towards AWM with intent to provoke breach of peace.



2. The Appellants were charged and went through the trial. The 3<sup>rd</sup> and 4<sup>th</sup> counts were against the 1<sup>st</sup> Appellant only. He was acquitted of that charge. They were released on one year probation.
3. The two are said to have assaulted Andrew Thuita Mwangi and Catherine Wanja.

### **Evidence**

4. PW1 testified that on 3/4/2023 at 8.30 pm he was watching TV when he heard a loud bang at his home fence. He saw a vehicle KBJ 999E putting construction stones. He heard the 1<sup>st</sup> Accused assaulting the 2<sup>nd</sup> complainant. He went to separate them and the 1<sup>st</sup> Accused twisted his arm and the 2<sup>nd</sup> Accused grabbed him by the collar.
5. They threw him to the fence and kicked his private parts. He was saved by a mob. He stated that the 1<sup>st</sup> Accused went to the tea buying centre and insulted or described his wife and daughter as a prostitute.
6. On cross examination he stated that he was a registered retired Lecturer. He stated they have never quarreled.
7. The main issue in this case was whether the fence was in the middle of the road. He stated that the mob did not write a statement. He stated that this was not a fight, though he indicated so in the statement.
8. PW2 testified that she was at home outside the kitchen and heard a loud bang. She went to where the father PW1 was. She saw a Prado pulling away construction stones. The witness gave her second version of the story, totally different from PW1. She stated that the fence was 100m long. There was a dispute over the road. She stated that a fight ensued.

### **Analysis**

9. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand.
10. This was aptly stated in the case of *Peters vs Sunday Post Limited* [1958] EA 424 where, the court of Appeal therein rendered itself as follows:-

“It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion...”

11. The duty of the first Appellate court remains as set out in the *Court of Appeal for Eastern Africa in Pandya -vs- Republic* [1957] EA 336 is as follows:-

“On a first appeal from a conviction by a Judge or magistrate sitting without a jury the appellant is entitled to have the appellate court’s own consideration and views of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the witnesses before the Judge or magistrate with such other material as it may have decided to admit. The appellate court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises which witness is to be believed rather than another and that question turns on manner and demeanor, the appellate court must be guided by the impression made



on the Judge or magistrate who saw the witness but there may be other circumstances, quite apart from manner and demeanor which may show whether a statement is credible or not which may warrant a court differing from the Judge or magistrate even on a question of fact turning on the credibility of witnesses whom the appellate court has not seen.”

12. In the case of *Okeno v Republic* [1972] EA 32 at 36 the East Africa Court of Appeal stated on the duty of the Court on a first appeal:

“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.”

13. The issue in this case is whether the prosecution proved its case to the required standards. Most oft quoted English decision of by Viscount Sankey L.C in the case of *H.L. (E) Woolmington vs. DPP* [1935] A.C 462 pp 481 , comes in handy in describing the legal burden of proof in criminal matters, that;

“Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt subject to what I have already said as to the defence of insanity and subject also to any statutory exception. If at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given either by the prosecution or the prisoner, as to whether [the offence was committed by him], the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained.”

14. In the case of *R vs. Lifchus* {1997}3 SCR 320 the Supreme court of Canada explained the standard of proof as doth:-

“The accused enters these proceedings presumed to be innocent. That presumption of innocence remains throughout the case until such time as the crown has on evidence put before you satisfied you beyond a reasonable doubt that the accused is guilty...the term beyond a reasonable doubt has been used for a very long time and is a part of our history and traditions of justice. It is so engrained in our criminal law that some think it needs no explanation, yet something must be said regarding its meaning. A reasonable doubt is not imaginary or frivolous doubt. It must not be based upon sympathy or prejudice. Rather, it is based on reason and common sense. It is logically derived from the evidence or absence of evidence. Even if you believe the accused is guilty or likely guilty, that is not sufficient. In those circumstances you must give the benefit of the doubt to the accused and acquit because the crown has failed to satisfy you of the guilty of the accused beyond a reasonable doubt. On the other hand you must remember that it is virtually impossible to prove anything to an absolute certainty and the crown is not required to do so. Such a standard of



proof is impossibly high. In short if, based upon the evidence before the court, you are sure that the accused committed the offence you should convict since this demonstrates that you are satisfied of his guilty beyond reasonable doubt.”

15. According to Halsbury’s Laws of England, 4<sup>th</sup> Edition, Volume 17, paras 13 and 14:

“The legal burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party’s case. If at the conclusion of the trial he has failed to establish these to the appropriate standard, he will lose. The legal burden of proof normally rests upon the party desiring the court to take action; thus a claimant must satisfy the court or tribunal that the conditions which entitle him to an award have been satisfied. In respect of a particular allegation, the burden lies upon the party for whom substantiation of that particular allegation is an essential of his case. There may therefore be separate burdens in a case of with separate issues.”

16. The standard of proof required in such cases was addressed by Brennan, J in the United States Supreme Court decision in *Re Winship* 397 US 358 {1970}, at pages 361-64 stated that:-

“The accused during a criminal prosecution has at stake interests of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatised by the conviction...Moreover use of the reasonable doubt standard is indispensable to command the respect and confidence of the community. It is critical that the moral force of criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned.”

17. The evidence on the ground was that there was affray. The parties fought in a public space. The victims were the aggressors. The PW1 was watching TV. He followed a car which was being driven. The driver insulted the young man for speaking to PW1 and not PW1. The owner entered the prado and left. The complainant went to inspect the area destroyed. He found a fight and joined in and as a result he was hurt. This was no assault.

18. The complainants agree that from PW2’s evidence parties were on a road to or from a buying centre, a public place. The evidence disclosed affray. It was public display of disaffection. The state had no right to pursue the accused with assault when it was affray. The charge of affray, Section 92 of the Penal Code states that “Any person who takes part in a fight in a public place is guilty of a misdemeanor and is liable to imprisonment for one year.”

19. It is irrelevant on why the parties were fighting. In the case of *Janet Nyoroka v Republic* [2014] eKLR, the court stated as follows: -

“ 12. The offence of affray is a totally different offence falling under Part 2 Chapter IX of the Penal Code. These are offences relating to unlawful assemblies, riots and other offences against public tranquility. The ingredients for the offence of affray are that the person must have taken part in a fight, which means that it is more than one person involved. That fight must have taken place in a public place and should have threatened public tranquility. Section 92 of the Penal code provides as follows:

92. Any person who takes part in a fight in a public place is guilty of a misdemeanour and is liable to imprisonment for one year.



13. The learned trial magistrate misdirected himself when he came to the conclusion that the offence of affray contrary to section 92 of the Penal Code was a minor and cognate offence to that of assault contrary to section 251 of the Penal Code. The offence of assault does not in itself consist of any particulars that would constitute affray as a complete minor offence. There was no way in which the learned trial magistrate would have found the offence of affray a minor offence to the offence of assault. Consequently, the court correctly directing itself could not have substituted the offence of assault to that of affray as was done in this case. That substitution was misguided and cannot stand.”
20. In the absence of the counter party, affray could not stand. On the other hand assault involves initiative of one person calculated to cause harm. In the case of *Vicky Chelangat v Republic* [2022] eKLR, Justice F. Gikonyo posited that: -
- “Of actual bodily harm, or hurt or injury, in *Rex vs Donovan*, Swift J, stated:-
- “For this purpose, we think that "bodily harm" has its ordinary meaning and includes any hurt or injury calculated to interfere with the health or comfort of the complainant. Such hurt or injury need not be permanent, but must, no doubt, be more than merely transient and trifling.”
- [36]. See also *R vs Chan-Fook*[6], paragraph D Lord Hobhouse LJ said:-
- “We consider that the same is true of the phrase "actual bodily harm". These are three words of the English language that receive no elaboration and in the ordinary course should not receive any. The word "harm" is a synonym for injury. The word "actual" indicates that the injury (although there is no need for it to be permanent) should not be so trivial as to be wholly insignificant.”
21. Section 251 of the Penal Code provides:
- “Any person who commits an assault occasioning actual bodily harm is guilty of a misdemeanour and is liable to imprisonment for five years. “
22. Indeed evidence of PW5 gave a more clear picture. There was a fight which the complainant was overwhelmed. PW5 was involved. PW1 came to help and was put in the mix. The court ignored the defence evidence that the damage was not caused intentionally but through a Prado which hit the iron sheet structure. From the photos, it is clear that the damage was not intentional but caused by the load that was being carried. He was steady on cross examination. It is clear from the two stories that the complainants’ story was well edited to suit the situation.
23. He stated that the 1<sup>st</sup> complainant jumped on him while they were arguing. The workers were called to rescue the appellants.
24. The 2<sup>nd</sup> Appellant was either absent minded but state did not hear anyone being insulted immediately after stating the 2<sup>nd</sup> complainant insulted the 1<sup>st</sup> Appellant. She however confirmed there was a fight which had just ended. She stated she was insulted but did not think of going to the police.



25. From the evidence, the appellant form part of the justice, constituting about 19% of Kenyans who eschew going to court and would rather leave it to GOD. They cannot be blamed for not reporting as not every insult is worth the hassle and bustle of reporting.
26. The core evidence was that this was a fight. The fight was instigated by the complainants whose properties had been destroyed.
27. The evidence from PW2 was self-serving. The parties were involved in affray. She confirmed that she had never been involved in a physical fight prior to this one.
28. This was an admission that it was a fight. In a fight, it is not enough to listen to one affraier over another. Definitely, there was no assault. It is laughable that affray in a public space did not attract independent witnesses. The story by PW1 and PW2 are false. The complainants should have reported the destruction of the mabati wall instead of taking the law into their own hands.
29. Malicious damage to property is provided in section 339(1) of the Penal Code as follows: -
  - “(1) Any person who wilfully and unlawfully destroys or damages any property is guilty of an offence, which, unless otherwise stated, is a misdemeanour, and is liable, if no other punishment is provided, to imprisonment for five years.
  - (2) If the property in question is a dwelling-house or a vessel, and the injury is caused by the explosion of any explosive substance, and if-
    - (a) any person is in the dwelling-house or vessel; or
    - (b) the destruction or damage actually endangers the life of any person, the offender is guilty of a felony and is liable to imprisonment for life.
  - (3) If the property in question-
    - (a) is a bank or wall of a river, canal, aqueduct, reservoir or inland water, or a work which appertains to a dock, reservoir or inland water, and the injury causes actual danger of inundation or damage to any land or building; or
    - (b) is a railway or is a bridge, viaduct or aqueduct which is constructed over a highway, railway or canal, or over which a railway, highway or canal passes, and the property is destroyed; or
    - (c) being a railway, or being a bridge, viaduct or aqueduct, is damaged, and the damage is done with intent to render the railway, bridge, viaduct or aqueduct, or the highway, railway or canal passing over or under the same, or any part thereof, dangerous or impassable, and the same or any part thereof is thereby rendered dangerous or impassable, the offender is guilty of a felony and is liable to imprisonment for life.
  - (4) If the property in question is a testamentary instrument, whether the testator is living or dead, or a register which is authorized or required by law to be kept for authenticating or recording the title to any property, or for recording births, baptisms, marriages, deaths or burials, or a copy of any part of any such register



which is required by law to be sent to any public officer, the offender is guilty of a felony and is liable to imprisonment for fourteen years.

- (5) If the property in question is a vessel in distress or wrecked, or stranded, or anything which belongs to that vessel, the offender is guilty of a felony and is liable to imprisonment for seven years.
- (6) If the property in question is any part of a railway or any work connected with a railway, the offender is guilty of a felony and is liable to imprisonment for fourteen years.
- (7) If the property in question-
  - (a) being a vessel, whether completed or not, is destroyed; or
  - (b) being a vessel, whether completed or not, is damaged, and the damage is done with intent to destroy it or render it useless; or
  - (c) is a light, beacon, buoy, mark or signal used for the purposes of navigation, or for the guidance of persons engaged in navigation; or
  - (d) is a bank or wall of a river, canal, aqueduct, reservoir or inland water, or a work which appertains to a dock, canal, aqueduct, reservoir or inland water, or which is used for the purposes of lading or unlading goods; or
  - (e) being a railway, or being a bridge, viaduct or aqueduct which is constructed over a highway, railway or canal, or over which a highway, railway or canal passes, is damaged, and the damage is done with intent to render the railway, bridge, viaduct or aqueduct, or the highway, railway or canal passing over or under the same, or any part thereof, dangerous or impassable; or
  - (f) being anything in process of manufacture, or an agricultural or manufacturing machine, or a manufacturing implement, or a machine or appliance used or intended to be used for performing any process connected with the preparation of any agricultural or pastoral produce, is destroyed; or
  - (g) being any such thing, machine, implement or appliance as last aforesaid, is damaged, and the damage is done with intent to destroy the thing in question, or to render it useless; or
  - (h) is a shaft of a passage of a mine, and the injury is done with intent to damage the mine or to obstruct its working; or
  - (i) is a machine, appliance, apparatus, building, erection, bridge or road, appertaining to or used with a mine, whether the thing in question is completed or not; or
  - (j) being a rope, chain, or tackle of whatever material, which is used in a mine, or upon any way or work appertaining to or used with a mine, is destroyed; or



(k) being any such rope, chain or tackle, as last aforesaid, is damaged, and the damage is done with intent to destroy the thing in question or to render it useless; or

(l) is a well, or bore for water, or the dam, bank, wall or floodgate of a millpond or pool, the offender is guilty of a felony and is liable to imprisonment for ten years.

(8) If the property in question is a document which is deposited or kept in a public office, or which is evidence of title to any land or estate in land, the offender is guilty of a felony and is liable to imprisonment for ten years.

30. There was an issue of the road. The court indicated that the dispute of over the road is irrelevant. However, the dispute was relevant as the Appellants indicated that the wall encroached to the road, essentially causing the Appellant to glaze against the wall of the 1<sup>st</sup> complainant's iron sheet fence. Building a structure on a road causes parties using the same to be unable to maneuver in case of a slippery road. The court cannot as such begrudge the Appellants for failing to maneuver the road. In the case of *Wilson Gathungu Chuchu v Republic* [2018] eKLR, G.W. Ngenye Macharia as she then was stated as follows: -

“25. The relevance of the reports is that they clearly indicated that the fence was trespassing into the Appellant's land and causing a nuisance. Although this is a criminal trial, the law of nuisance does allow a defendant (in this case the Appellant) to quell the persisting nuisance. The manner in which such a nuisance can be abated varies and the need to involve the party from whom the nuisance emanates before determining to quell it is necessary in most cases. However, an exception exists with regards to tree branches as was set out in the case of *Earl of Lonsdale v. Nelson* [1823] 2 B. & C. 302. The Court of Appeal in England in a case of trespass for breaking and entering the Plaintiff's manor, held that;

“Nuisances by an act of commission are committed in defiance of those whom such nuisances injure, and the injured party may abate them, without notice to the person who committed them; but there is no decided case which sanctions the abatement by an individual, of nuisance from omission except that of cutting branches of trees which overhang a public road, or the private property of the person who cuts them. The permitting these branches to extend so far beyond the soil of the owner of the trees is a most unequivocal act of negligence, ...”

26. A similar position was held by the House of Lords though in a civil suit in *Thomas Warne Lemmon vs Walter Webb* [1984] UKHL 1 where Lord Macnaghten delivered himself thus;

“My lords, I am of the same opinion. I think it is clear that a man is not bound to permit a neighbours tree to overhang the service of his land, however long the space above may have been interfered with by the growth of the tree. Nor can it, I think, be doubted that if he can get rid of the interference or encroachment without committing



a trespass or entering upon the land of his neighbor he may do so whenever he pleases, and that no notice or previous communication is required by law. That, I think, is the good sense of the matter; and there is certainly no authority or dictum to the contrary. Whether the same rule would necessarily apply to the case of trees so young that the owner might remove them intact if he chose to lift them, or to the case of shrubs capable of being transplanted, may perhaps be worthy of consideration. That, however, is not the case here, it is admitted that the trees here are of great age, and the only possible remedy was by cutting or lopping the offending branches.

I am, therefore, of opinion that Mr. Webg has not exceeded his legal right, and that the appeal must be dismissed.”

31. There was no evidence that the destruction was malicious. It happened that the vehicle glazed specifically one line of the iron sheets. At no time did the parties go back to hack or do anything else. Malice is determined from recklessness with which an act is done. There did not appear any evidence of the intent to destroy.
32. Malice according to Black’s Law Dictionary, 11<sup>th</sup> Edition, page 1147 means,
  - “The intent, without justification or excuse, to commit a wrongful act or (ii) reckless disregard of the law or of a person’s legal right.”
33. There was no reckless disregard shown in this matter. The case was exacerbated by what appears to be prior relations that read too much of an accident.
34. In the case of Simon Kiama Ndiagui vs. Republic (2017) eKLR, Ngaah J. posited as hereunder: -
  - ‘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 willful and therefore there must be proof of intent; and fourth, the court must also be satisfied that the destruction was unlawful.
35. Justice Anne Onginjo in the case of Joseck Muthuri Mwarania v Republic [2020] eKLR Set 4 elements of the offence of malicious damage to property as: -
  - a. Proof of ownership of the property.
  - b. Proof that the property was destroyed or damaged.
  - c. Proof that the destruction or damage was occasioned by the accused.
  - d. Proof that the destruction was willful and unlawful.
36. My take is that proof of the last 3 elements will suffice to avoid wanton destruction of property. In this case, it was shown that there was destruction of the property and it was caused by the 1<sup>st</sup> Appellant’s vehicle. It was not shown to be intentional on part of the Appellant. It is therefore not necessary to go into the issue whether the same was done by the 1<sup>st</sup> Appellant.
37. I find that conviction of the Appellants in counts 1, II and III for the 1<sup>st</sup> Appellant and count I and II for the second appellant was unsafe. The same was not proved beyond reasonable doubt.



38. In the circumstances I set aside the conviction on all counts and the sentences are enslaved to the conviction. Sentences are equally set aside.

**Order**

39. In the circumstances, I find that the Appeal is merited. Accordingly, I dismiss all counts as the same were not proved beyond reasonable doubt and I set aside the conviction and sentence in counts I, II and III for the 1<sup>st</sup> Appellant and counts I and II for the 2<sup>nd</sup> Appellant, all counts in Othaya Criminal Case No. 218 of 2023.

**DELIVERED, DATED AND SIGNED AT NYERI ON THIS 2<sup>ND</sup> DAY OF JULY, 2024.**

**KIZITO MAGARE**

**JUDGE**

In the presence of:-

Ms. Kaniu for the State

Appellants in person

Court Assistant - Jedidah

