



REPUBLIC OF KENYA



KENYA LAW
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**Omar v Republic (Criminal Appeal E024 of 2022)
[2023] KEHC 18570 (KLR) (16 June 2023) (Judgment)**

Neutral citation: [2023] KEHC 18570 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT GARISSA
CRIMINAL APPEAL E024 OF 2022
JN ONYIEGO, J
JUNE 16, 2023**

BETWEEN

ABDIKARIM HUSSEIN OMAR APPELLANT

AND

REPUBLIC RESPONDENT

*(From the original conviction and sentence of Hon. Mugendi Nyaga in
Criminal case no. E104 of 2021 of the Principal Magistrate's court at Wajir)*

JUDGMENT

1. On March 14, 2022, Abdikarim Hussein Omar (hereafter the appellant) was arraigned before Wajir Magistrate's court charged with the offence of assault causing actual bodily harm contrary to section 251 of the *Penal Code*.
Particulars were that on the 10th day of March, 2022 at Maalim Salat Location in Wajir East Sub – county within Wajir County assaulted MKA, thereby occasioning him actual bodily harm.
2. Having returned a plea of not guilty, the matter proceeded to full trial with the prosecution calling 5 witnesses. At the close of the trial, the court found the appellant guilty and convicted him accordingly. Consequently, he was sentenced to 5 years' imprisonment on May 16, 2022.
3. Aggrieved by the conviction and sentence, the appellant preferred this appeal citing 7 grounds but which can be summarised as follows; the evidence of the prosecution was not well corroborated and was full of doubts; prosecution did not prove its case beyond reasonable doubt; the doctor who filled the P3 form did not testify; the court failed to take into account the fact that he had a grudge with his wife who wanted to bring him down, the blood stains in his son's(Pw1) clothes were from the assault occasioned by a neighbour's son.



4. During the hearing, the appellant relied on his submissions filed on March 10, 2023 thus reciting the grounds of appeal.
5. He basically blamed his wife for the problems he was facing due to their domestic differences as a result of her taking his land together with her family. He accused his wife of infidelity which resulted to her conceiving out of wedlock but later terminated the pregnancy through abortion.
6. Regarding sentence, he submitted that the same was excessive as the court relied on a biased report prepared by a probation officer who was an in-law to the wife's family. He submitted that the report prepared by human rights group alleging that he had neglected his children was false and manipulated.
7. On the prosecution's side, Mr Kihara Prosecution counsel also recited the evidence before the Lower court. On sentence, counsel submitted that the same was lawful.
8. This is a first appeal. As the first appellate court, the court is bound to re-evaluate, re-consider and re-assess afresh the evidence tendered before the trial court and make its independent finding without losing sight of the fact that the trial court had the benefit of seeing and listening to the witnesses hence able to assess their general demeanour. See: *Pandya-Vs-Republic* (1957) EA 336.
9. Brief facts of this case were that on 10th day of March,2022, MKA a child aged 12 years who is also a son to the appellant was washing clothes when his father (the appellant) called him. As he went to where the father(appellant) was, he slapped him on the right side of the shoulder. He lifted and dropped him with his head facing down. When he fell down, the appellant lifted him up and hit him with his knees on the stomach.
10. That when a Sheikh (Pw3) who was passing by asked him(appellant) why he was assaulting him(Pw1), the appellant turned against him and slapped him(sheikh). When people responded, the appellant left and went to his uncles' home whereof the uncle called his mother who took him to Wajir Police Station and later to Wajir Referral hospital where she was treated and a P3 form filled.
11. The witness told the court that his father had claimed that he had put poison in the food he was to eat. He claimed that he sustained injuries on the mouth, shoulder, left ear and right thumb.
12. On cross –examination, he stated that there was a time he fought with some children but he was never taken to hospital after he fell on stones. He also denied hitting his parents with stones.
13. PW2 Nuria Khalif Mohamed mother to Pw1 received a call from her brother on March 10, 2022 to the effect that her husband had badly assaulted her son (Pw1). That she rushed to her mother's home where her son was. That her son was lying on the ground having sustained serious injuries on the mouth, shoulder and the entire body. She took the boy to the Police station and later to Wajir Referral hospital. On cross –examination, she denied attempting to poison the appellant.
14. Pw3 Abdi Mohamed Maalim an Iman was on March 10, 2022 on his way going to the mosque when he found his neighbour the appellant assaulting Pw1 on the stomach using his knees. That when he tried to stop him, he (appellant)slapped him. As members of the public responded, the complainant escaped. Pw3 proceeded to the complainant's grandmother's home where he reported to his uncle who called the mother.
15. Pw5 Thomas Nyagaka produced the P3 form prepared by his colleague one Feisal Hassan a clinical officer. According to his testimony, when the complainant appeared before Feisal, he had a blood stained shirt. He had injuries on both shoulders which were bruised, right elbow and lacerations on the head next to the right ear. That both shoulders were tender to touch. He was put on anti-biotics and the injury classified as harm.



16. Pw5 PC Suleiman Twafa investigated the case and preferred the charges before court. He stated that when PW1 reported over the assault claim, he had visible injuries on both shoulders and head which were painful to touch.
17. On his sworn testimony, the appellant stated that on the material day, he was poisoned after eating food served by his wife, hence was feeling unwell. He said that the complainant had been assaulted on March 9, 2022 by some other boys hence the source of the injuries. He basically denied the offence and stated that the charge was a frame up due to a land dispute between him and the mother-in-law.

Analysis and Determination

18. I have considered the record of appeal, grounds of appeal and submissions by both parties. Although the appellant raised seven (7) grounds of appeal, three grounds stood out inter alia: whether the prosecution had proved its case beyond reasonable doubt, Whether the case was fabricated and, whether the sentence imposed was excessive.
19. It is trite law that in a Criminal case, the legal and evidentiary burden to prove a case beyond reasonable doubt lie with the prosecution at all material times and the same does not shift. See *Stephen Nguli Mulili -vs- Republic* (2014) eKLR where the court held that the burden of proof in a criminal case always lie with the prosecution. Similar position was held in *Kiilu and another -vs- Republic* (2005) eKLR.
20. In the instant case, Pw1 a son to the appellant gave a sworn and detailed testimony how his father confronted and attacked him on suspicion that he had poisoned him. The injuries occasioned were confirmed by the P3 form produced by Pw4 Mr Nyagaka which revealed injuries sustained on the head and shoulders.
21. Besides, Pw3 Abdi Mohamed an Imam did testify that he witnessed the appellant assault the son and when he intervened, he was slapped. Further, Pw2 Nuria, mother to Pw1 also told the court how she received a call regarding her son who had been assaulted. When she went to her mother's home, she saw her child with soiled clothes indicative of having been beaten while on the ground.
22. The appellant does not deny the fact that the son had injuries. He only associated the same to injuries occasioned by a neighbour's son the previous day. I do not see any good reason why Pw2 and Pw3 would frame up the appellant. Pw3 was an independent witness who witnessed the assault and tried to intervene but suffered a slap.
23. From the totality of the evidence, it is clear that the complainant did suffer the alleged injuries on the material day and that the same were occasioned by the appellant.
24. What was the motive of the attack? From the testimony of the appellant and cross-examination of Pw2, there was a grudge between the appellant and the wife with whom he had separated and that he suspected Pw1 had been used to poison him. This was an act of misplaced revenge. There was no proof that Pw1 had poisoned him. The attack was unjustified hence unlawful. Accordingly, I am satisfied that the prosecution had proved its case beyond reasonable doubt and that the appellant was properly convicted. To that extent, the appeal against conviction is dismissed.
25. Regarding sentence, the same is at the discretion of the trial court to which an appellate court can only interfere with if the same was excessive, the court applied irrelevant factors or wrong legal principles. This position was espoused succinctly in the case of *Jackson Konde Kyalo -vs- Republic* (2018) eKLR.
26. Taking into account the motive of the offence and the degree of the injuries sustained which were not very serious, and further considering the fact that the complainant is a son to the appellant, I find the



sentence of 5 years to be excessive. Accordingly, I am inclined to substitute the sentence of 5 years with two (2) years imprisonment to be calculated from the date of sentence.

27 Right of appeal 14 days.

DATED, SIGNED AND DELIVERED AT GARISSA THIS 16TH DAY OF JUNE, 2023

J. N. ONYIEGO

JUDGE

