



**Republic v Kaveva & 3 others (Criminal Appeal E026 of 2022)
[2023] KEHC 20837 (KLR) (20 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 20837 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT HOMA BAY
CRIMINAL APPEAL E026 OF 2022**

**KW KIARIE, J
JULY 20, 2023**

BETWEEN

REPUBLIC APPELLANT

AND

SHADRACK KAVEVA 1ST RESPONDENT

ABNER MARIENGA 2ND RESPONDENT

STEPHEN BONGO 3RD RESPONDENT

TIMOTHY KIRICHI 4TH RESPONDENT

(From the original conviction and sentence in Criminal case No. E1156 of 2021 of the Chief Magistrate's Court at Homa Bay by Hon. T. M. Olando– Principal Magistrate)

JUDGMENT

1. Shadrack Kaveva, and Abner Marienga were acquitted of the offence of assault causing actual bodily harm contrary to section 251 of the [Penal code](#).
2. The particulars of the offence were that on July 25, 2019 at Sindo Market, in Suba South Sub County of Homa Bay County, unlawfully assaulted Bromick Asoyo Netanyahu occasioning him actual bodily harm.
3. In count two, Stephen Bongo and Timothy Kirichi were acquitted of the offence of assault causing actual bodily harm contrary to section 251 of the Penal code. The particulars of the offence were that on November 10, 2019 at Sindo Market, in Suba South Sub County of Homa Bay County, unlawfully assaulted Bromick Asoyo Netanyahu occasioning him actual bodily harm.
4. Timothy Kirichi was charge with an offence of abuse of office contrary to section 10 (1) as read with section 102A of the Penal code. The particulars thereof were that on November 10, 2019 at Sindo



Police station, in Suba South Sub County of Homa Bay County, being an employee of the National Police Service abused his position by arresting and detaining Bromick Asoyo Netanyahu at Gingo Police station on an allegation of stealing a mobile phone make Oppo model CPH1803 serial number xxxx IMEI: xxxx belonging to Timothy Kirichi Kuria a fact he knew to be false.

5. The state was aggrieved and appealed against the acquittal on the offences of assault and raised the following grounds of appeal:
 - a. That the offence of assault causing actual bodily harm contrary to section 251 of the Penal Code was proved beyond reasonable doubt.
 - b. The magistrate failed to appreciate that the 1st, 2nd and 4th respondents had an ill motive in assaulting the complainant.
 - c. The magistrate erred in law in disregarding the evidence adduced by witnesses of the appellant.
6. The appeal was opposed by the respondents through the firm of Nyakwamba & Company Advocates who contended that the prosecution did not prove their case to the required standards.
7. This is a first appellate court. As expected, I have analyzed and evaluated afresh all the evidence adduced before the lower court and I have drawn my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses. I will be guided by the celebrated case of *Okeno vs. Republic [1972] EA 32*.
8. One of the finding by the trial court is that one of the P3 forms which the prosecution sought to rely on had information that raised eyebrows. This P3 form indicates that the complainant was sent to hospital for examination on June 29, 2020 but the doctor signed that he examined him on July 30, 2019. This information does not add up.
9. When the complainant was being arrested in the first instance, the arresting officers indicated that he resisted arrest and undressed in order to avoid arrest. The investigating officer ought to have called evidence to show that this was not the case. This was not done and the court was not in a position to make a finding if the arresting officers used more force than was necessary. The prosecution did not discharge their onus in this regard.
10. Curiously, the complainant (PW1) testified that he was robbed of Kshs 11, 000/= but there was no robbery charge or even a mention of the amount allegedly robbed of the complainant by the investigating officer (PW15).
11. It would appear that the prosecution intended the court to believe the evidence of the complainant selectively. The court was not convinced on how Timothy Kirichi Kuria could report his phone having been stolen, and then the same phone be found with a relative of the complainant. The evidence of Dan Ouma Orieyo (PW7) who claimed he was a phone technician is not convincing.
12. This witness claimed that a customer took to him a phone that was not working for repairs. The customer was not known to him before and yet he purported to identify him. The proper procedure was to conduct an identification parade which was not done.
13. There was another interesting twist to the phone issue that left many unanswered questions. When he was unable to repair it, he took it to Jared Ochieng another technician who repaired it. When he went to pick it he was arrested. Interestingly, Dan Ouma Orieyo (PW7) is a cousin of the complainant who was suspected to have stolen the phone. There was reasonable suspicion that the complainant may have stolen the phone and could explain why the investigating officer in this matter was silent about



that complaint. The Court of Appeal in the case of *Ndungu Kimanyi vs. Republic [1979] KLR 283* (Madan, Miller and Potter JJA) held:

The witness in a criminal case upon whose evidence it is proposed to rely should not create an impression in the mind of the court that he is not a straightforward person, or raise a suspicion about his trustworthiness, or do (or say) something which indicates that he is a person of doubtful integrity, and therefore an unreliable witness which makes it unsafe to accept his evidence.

14. In the instant case, the complainant and his witnesses did not paint a picture of witnesses who could be relied upon to tell the truth. Together with the issues I have pointed out, I find that no reasonable tribunal could have reached a different conclusion in the matter from what the learned trial magistrate made. I accordingly dismiss the appeal.

DELIVERED AND SIGNED AT HOMA BAY THIS 20TH DAY OF JULY, 2023

KIARIE WAWERU KIARIE

JUDGE

