



**Republic v Wesonga & 2 others (Criminal Appeal E010 of 2021)
[2024] KEHC 12626 (KLR) (22 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 12626 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUSIA
CRIMINAL APPEAL E010 OF 2021
WM MUSYOKA, J
OCTOBER 22, 2024**

BETWEEN

REPUBLIC APPELLANT

AND

GEORGE OCHIENG WESONGA 1ST RESPONDENT

ENOS ODUOR WAMBAI 2ND RESPONDENT

MELKIA OMOLLO WAMBAI 3RD RESPONDENT

(An appeal arising from the judgment of Hon. PA Olengo, Senior Principal Magistrate, SPM, delivered on 29th April 2021 in Busia CMCCRC No. 80D of 2018)

JUDGMENT

1. The respondents had been charged, at the primary court, with the offence of grievous harm, contrary to section 234 of the Penal Code, Cap 63, Laws of Kenya. The particulars of Count I were that on 9th February 2018, in Butula Sub-County, within Busia County, jointly with others not before court, the respondents had unlawfully assaulted Frederick Akwera Wekhave, hereafter the 1st complainant, thereby occasioning him grievous harm. Count II charged the offence of assault causing actual bodily harm, contrary to section 251 of the Penal Code. The particulars were that, on the same date and at the same place, as in Count I, they had, jointly with others not before court, unlawfully assaulted Peter Otieno Ogutu, hereafter the 2nd complainant, and occasioned him actual bodily harm.
2. The respondents denied the offence, a prosecution ensued. The prosecution called 8 witnesses, being Frederick Akwera, Lambert Lwanga Ogochi, Maxmilla Achieng Ogutu, Peter Otieno Ogutu, Philip Nakote Mutasio, Moses Makokha, Dr. Edward Kibochi and John Nzuka. The defence called 4 witnesses, being George Odongo Wesonga, Melkiah Omoto Wambai, Enos Oduor Wambai and Rose Anyango Agoro. The respondents were acquitted.



3. The appellant, the Republic, through the Director of Public Prosecutions, was aggrieved by that outcome, hence the instant appeal, where it raised the following grounds, in its petition of appeal, dated 12th April 2021, that there was concrete to evidence to support the conviction of the respondents; the prosecution had proven its case beyond reasonable doubt; all the complainants and witnesses had placed all the respondents at the scene of the crime; the witness statements of the complainants and the prosecution witnesses were ignored; and the contradictions in the defence raised by the respondents were not pointed out by the court. The appellant sought that the appeal be allowed, and the judgment delivered on 29th April 2021 be set aside, and that it be substituted with an order finding that the prosecution had proved its case beyond reasonable doubt. It prayed that the respondents be convicted, and the matter be remitted to the trial court to convict the respondents.
4. The issues for determination of this appeal are whether the prosecution proved its case beyond reasonable doubt; whether there were contradictions in the defence raised by the respondents; and whether the appeal is merited.
5. Being the first appeal, this court has a duty to analyse the evidence adduced before coming to its own conclusion, keeping in mind that it did not have the privilege of seeing the witnesses first hand.
6. For the purpose of establishing whether the prosecution proved its case beyond reasonable doubt, I will summarise the testimonies of the witnesses for the prosecution and defence.
7. PW1, the 1st complainant, who was also known as Fredrick Pangaras, testified that they were on their way to Shibale, after picking a body from Sega, when a motor vehicle blocked their path. He saw the 2nd respondent holding Peter Otieno by his collar, and before he could reach them, he saw three other people attacking him. As he was running to assist Peter Otieno, he was attacked by the 1st respondent, who hit him on the leg, and he fell down. The 2nd and 3rd respondents also attacked him, and he was left with a broken leg and hand. At Shibale market, he saw the 2nd respondent holding a metal bar. On cross-examination, he reiterated that he was attacked at Sega market. He told the court that Peter Ogutu, Maximilla and himself were assaulted. He denied beating the 2nd respondent.
8. PW2, Lambert Lwanga Ogochi, testified that, after picking the body ,from the mortuary, their motorcade was blocked by motor vehicle registration mark and number KBW 192Q, which was being driven by the 2nd respondent. The 2nd respondent then went to the back door, and pulled out Peter Otieno and started beating him. At Shibale market, they found the road blocked with an electricity pole. When he asked what was going on, he was informed that the 2nd respondent had beaten many people. He then saw the 2nd respondent coming towards him, carrying a metal rod. He was later told that Peter Otieno, who he had earlier carried in his vehicle, was beaten thoroughly and was half dead. They went to Murumba Dispensary, where Peter Otieno and Frederick Akwera had been rushed, and noted that they were badly injured. The former had a cut on the head, while the latter had fractures on the leg and hand. On cross-examination, he reiterated that he saw the 2nd respondent beating Peter Otieno.
9. PW3, Maximilla Achieng Ogutu, told the court that she was in the bus, when she heard her mother, Kinikonda Agola, screaming, asking why her son was being killed. She alighted from the bus, and found Peter Otieno on the ground. He saw the 2nd respondent carrying a brick on his head. She only saw a certain Terry hitting Peter Otieno. She held the said Terry on the waist, and the 2nd respondent came, and started beating her. The bus arrived, and she boarded it, and at Shibale she saw the 2nd respondent blocking the road with an electricity pole. She alighted from the bus, and found the 2nd respondent beating the boy who had dug the grave. On cross-examination, she said she saw Terry beating Peter Otieno about 500 metres from the tarmac.



10. PW4, Peter Otieno Ogutu, told the court that he was in the car driven by Lambert Ogochi, and as they approached the main road to Busia, a saloon car stopped in front of them, blocking their way. The 3 respondents alighted, together with 2 others. The 2nd respondent moved towards him, and held him by his shirt, pushed him out, and started beating him, asking him why he was leading the convoy. He took a motorcycle to Bumala Police Station, where the police directed him to the hospital as he was bleeding from his nostrils. He went to Khunyangu Sub-County Referral Hospital, where he received medication. He took another motorcycle, to go home, and when he reached Shibale Trading Centre, he found an electricity pole on the road. The motorcycle rider used another route, where they found the 2nd respondent with a group, armed with a crude weapon. The 2nd respondent stopped the motorcycle rider, and hit him on the head. He fell off the motorcycle, and lost consciousness, and only came to 3 days later, at Busia County Referral Hospital. He reiterated that the 1st and 3rd respondents beat him while he was lying face down, while the 2nd respondent hit him on the head with a metal rod. His testimony remained the same on cross-examination.
11. PW5, Philip Nakote Mutasio, a clinical officer, testified that PW1 first sought treatment at Nambale Sub-County Hospital, before he was referred to Busia County Referral Hospital. He saw PW1 on 12th February 2018, and then he prepared a report on 29th September 2018. He produced a medical treatment booklet as PEX1, a medical report dated 24th September 2018 as PEX 2, and a duly-filled P3 Form as PEX3. On cross-examination, he testified that elderly patients take time to fully heal, and that was why he arrived at the conclusion that there was grievous harm.
12. PW6, Moses Makokha, was a clinical officer, based at Sio Port Sub-County Hospital, who had previously worked at Buyangu Sub-County Hospital. He testified that he saw PW4 on 9th February 2018. He was conscious, with blood on his face, and he diagnosed that he had suffered head injuries. He arrested the bleeding, and referred him to the Busia County Referral Hospital. He saw him again on 9th June 2018, when he processed his P3 Form. He classified the injuries as grievous harm. He produced the P3 Form as PEX7, a treatment booklet as PEX5, a CT-scan report as PEX8, and an X-ray form as PEX11.
13. PW7, Dr. Edward Kibochi, a medical doctor at Busia County Referral Hospital, testified that the clothes of PW4 were bloodstained, and he had a cut wound on the scalp. There was bleeding from bruises around the neck, and a history of loss of consciousness. He said that the correct level of assault was grievous harm, and not his previous assessment of harm. He produced a medical report as PEX9, a discharge summary as PEX6, a P3 Form as PEX10, a treatment booklet as PEX5, and an X-ray film as PEX11(a) and 11(b).
14. PW8, No. 56257 Sergeant John Nzuka, the investigating officer, stated that he was informed of the incident by the then Officer Commanding Station, OCS, Daniel Osano, and by the assistant Chiefs of Sigona and Kingandole Sub-Locations. He arrested the 1st respondent, when the latter came to the police station, and was identified by the 1st complainant. The 2nd respondent was arrested, and arraigned before court, on 7th March 2018; while the 3rd respondent was brought to the police station by his Advocate.
15. The 1st respondent, George Odongo Wesonga, testified as DW1. He stated that they had been given a letter to stop a burial that weekend. He came out of the vehicle to give the other side the letter. He handed it to his in-law, one Vitalis Wekesa, who tore it and threw it on the ground. The 2nd complainant came out of a vehicle, and punched him twice. People started alighting from the bus, and the 1st complainant came out, and started beating the 2nd respondent, who ran away to the other side of the road. The 1st complainant tried to block the 2nd respondent, but he was unsuccessful, and instead fell



- on the tarmac, and started limping. The vehicular convoy left, and they went and reported the incident at Segga Police Station, where they remained for about an hour. They left, and went to Bumala Police Station, to make a report. While there, he was taken to the OCS, where he found the 1st complainant and others. The OCS did not listen to him, but he said he should be booked into the cells. He said he had filed a case, at Ukwala Law Courts, which they later withdrew, as the complainants asked them to for they were relatives.
16. The 3rd respondent, Melkiah Omoto Wambai, testified as DW2. He told of the 1st respondent giving the letter to Vitalis, who tore the same into 4 pieces. The 2nd complainant then came from behind, and punched the 1st respondent twice. She then saw the 1st complainant come and punch the 2nd respondent, who punched back. She said that the 1st complainant slid and fell on the tarmac. She and the other respondents went to Segga Police Station, where they waited for 1½ hours before they were assisted. They thereafter left for Busia, to inform their Advocate of what had transpired, but they dropped the 1st respondent at Bumala first. She denied that the scar on the head of the 2nd complainant was as a result of an altercation at Segga.
 17. The 2nd respondent, Enos Oduor Wambai, testified as DW3. He said that the 1st respondent gave the letter to Vitalis, who tore it up, saying that it was not a court order. The 2nd complainant punched the 1st respondent twice. The 1st complainant was following him, and he started running. Lambert tried to block him, but he went to the other side of the road. He did not see the 1st complainant fall. They made a report at Segga Police Station, before they left for Busia, to brief their Advocate. The 1st complainant alighted at Bumala. He denied that he injured the 1st complainant as claimed. He further denied that the 2nd complainant got the scar on his head during the altercation, as he first saw that scar in 2016 during a burial at the family.
 18. DW4, Rose Anyango Agoro, told of how she saw the 1st respondent hand over a document to Vitalis, who tore it, and threw the pieces to the ground. She then saw people coming out of the vehicles. She saw someone beat the 1st and 2nd respondents, while she and the 3rd respondent remained in the vehicle. They went to Segga Police Station to make a report, and they left there at about 4.30pm.
 19. From the prosecution witnesses evidence, it appears that PW1 and PW4 got injured from the incident that happened on 9th February 2018. The defence witnesses said that PW1 sustained a fracture of the left radius and a sprained left knee, with bruises. They testified that he was injured because he fell while trying to assault the 2nd respondent. In relation to the Count I, the prosecution witnesses stated that the 1st complainant was injured, after he was attacked by the 2nd and 3rd respondents, as he was trying to help the 2nd complainant. Both defence and prosecution witnesses' testimonies seem to corroborate each other.
 20. I am inclined to agree that the prosecution proved their case, however, but does that dispel the doubt? It is plausible that the 1st complainant incurred the injuries when he fell on the road, as the defence witnesses stated. The 2nd complainant stated that the 1st complainant tried to assist him after he was similarly attacked. That assistance was allegedly offered when he was being attacked, and was on the ground. The trial court properly noted that there were 2 incidents of alleged violence, one at Segga within Siaya County, and the other at Shibale, Butula, within Busia County. The 1st complainant testified to being attacked at Segga, and not at Shibale. The offence charged, at Count I, was with respect to an attack at Shibale, Butula. The 1st complainant was not attacked at Shibale, but at Segga, according to his own testimony, hence the particulars of the place of an attack at Shibale, Butula, were not established. I am not persuaded that the prosecution proved Count I beyond reasonable doubt.



21. Regarding the 2nd Count, the 2nd complainant said that the 2nd respondent pulled him out of the car, and started beating him. That was corroborated by the 1st complainant, and PW2 and PW3. He left the scene using a motorcycle, and went to Bumala Police Station, but he was directed to get help at the hospital first, as he was bleeding. From the hospital, he went home, through Shibale market, where he was hit by the 2nd respondent with a metal bar on the head. He fell unconscious, and he did not regain consciousness until the third day, while at the Busia County Referral Hospital. That was corroborated by PW7, who produced the medical report, dated 12th July 2018, and the P3 Form, dated 16th February 2018. The P3 Form indicated that the 2nd complainant arrived at the hospital with blood-stained clothing, and presented with a cut wound on the scalp. That would mean that the defence account, that the 2nd complainant had had that scar on his head since 2016, was not true. The 1st complainant and PW2 informed the court that they saw the 2nd respondent holding a metal bar or rod at Shibale market. That was in line with the finding, in the P3 Form. Further, the defence witnesses contradicted themselves, when they stated that they were at Sega Police Station for over two hours. The respondents stated that they left the Sega Police Station at 6 pm, while DW4 stated that they left at 4.30 PM. I find that the prosecution proved Count II beyond reasonable doubt.
22. On the issue of the defence alibi, the respondents denied being at Shibale market, where the 2nd complainant got injured on the head. They all claimed to have been at Sega Police Station, making a report, and that they were there until late in the afternoon. They could not, therefore, according to them, have assaulted people at Shibale market. However, the prosecution witnesses, PW1 to PW4, all placed them at Shibale market. Their alibi, of being at the Sega Police Station until late in the afternoon, was dispelled or displaced.
23. There were contradictions on how long it took them to make a report at Sega Police Station. Some defence witnesses said they left at 6.00 PM, while others stated that they left at 4.30 PM. Regardless of the time they left the said police station, the number of people who spotted them at Shibale market, causing chaos, outweigh their alibi. However, contradictions do not always go to the core of the matter, unless it is established that a witness was being deliberately untruthful.
24. In view of my review of the proceedings before the trial court, it is my finding and holding that the respondents were properly acquitted of the charge under Count I; but they were improperly acquitted of the offence charged at Count II. They were properly identified by the prosecution witnesses, at Shibale, Butula, where the 2nd respondent was seen carrying a metal rod, and where Peter Otieno Ogotu testified to being hit by him with that metal rod.
25. I shall, accordingly, dismiss the appeal, with respect to Count I, but allow the same with regard to Count II, with respect to the 2nd respondent. The consequence shall be that the acquittal of the respondents of the offence under Count I is upheld, but that of the 2nd respondent, of the offence under Count II, is quashed, and is hereby substituted with an order convicting him as charged. The 2nd respondent shall be arrested, and presented before the Chief Magistrate's Court, at Busia, in Busia CMCCRC No. E010 of 2021, for mitigation and sentencing. It is so ordered.

JUDGMENT IS DELIVERED, DATED AND SIGNED IN OPEN COURT, AT BUSIA, THIS 22ND DAY OF OCTOBER 2024.

W MUSYOKA

JUDGE

Mr. Arthur Etyang, Court Assistant.

Ms. Eva Adhiambo, Legal Researcher.



Advocates

Mr. Onanda, instructed by the Director of Public Prosecutions, for the respondent.

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