



REPUBLIC OF KENYA



**Wango v Republic (Criminal Appeal E092 of 2023)
[2024] KEHC 12218 (KLR) (15 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 12218 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
CRIMINAL APPEAL E092 OF 2023
SM GITHINJI, J
OCTOBER 15, 2024**

BETWEEN

JOSEPH KING'ORI WANGO APPELLANT

AND

REPUBLIC RESPONDENT

(Being an Appeal from the Judgment of the Chief Magistrate's Court at Malindi by Honourable Onalo J.K.Olga – SRM dated 27th October, 2023 in Malindi Criminal Case No. E267 of 2021)

JUDGMENT

- 1 Joseph King'ori Wangowas charged in the lower court with the offence of assault causing actual bodily harm contrary to section 251 of the [Penal Code](#).
- 2 The particulars of this offence being that on the 14th day of November, 2020 at Mtangani area in Malindi Sub-County within Kilifi County, unlawfully assaulted Leah Njoki Kinyanjui by hitting her using fists, kicked her stomach and twisted her neck thereby occasioning her actual bodily harm.
- 3 The facts of this case are that the appellant is a husband to the complainant. The appellant was a prison warden attached to Malindi G.K Prison and was living with his family at Mtangani, near the said prison. They have children, one of them being the Pw-2 in this case.
- 4 On 14/11/2020 the complainant was pregnant. At about 10.00Pm she was in the house with their daughter namely Sharon (Pw-2). The appellant got into the house. The TV was on and the complainant was on phone. The appellant grabbed the phone and abused the person the wife was talking to. When the complainant asked him why he was doing so he turned violent. He locked the door and placed the key and the complainant's phone in his pocket. He pulled the complainant to the bedroom and kicked her on the stomach. He pulled the "bandika" on her head off and threw them down before twisting her neck. When she screamed for help he increased the TV volume for neighbours not to hear. Pw-2 muted the TV to assist the mother. Neighbours then heard the distress



call and turned up for help. The appellant told them nothing was wrong and that it's the wife who was sick. They urged him to take her for treatment. Two women helped her change and a Tuktuk was got to take her to hospital. They met a police vehicle and the appellant who was in his Jungle Uniform told them the wife was sick. She was taken to Star Hospital where a scan was done. She was then referred to Tawfiq Hospital. The appellant lied to the doctor that she had fallen off a chair. She was admitted at the place for 10 days. While there the matter was reported at Malindi Police Station. The appellant lied that she had attempted to abort but Pw-2 disclosed that he kicked her on the stomach. A P-3 form was issued on 19-11-2020 and filled on 17/12/2020 by Dr Rimba. The complainant was 15 weeks, 3 days pregnant and the fetus was in breech presentation with contractions. The injury was clarified as harm. The appellant was then charged with the offence of assault causing actual bodily harm as carried in the charge sheet.

- 5 In his defence he denied having assaulted her. He indicated when they had a tussle he went to her father to seek reconciliation. He had sent elders to her parents and he was fined 12,000/=. He paid and was promised that he will be called to go for his family. He claimed the family was with their aunt rather than their parents as customs demand. He paid upto 75,000/= to her parents but her father was not involving other family members in the negotiations not to have it as dowry. This was because he had not completed paying dowry himself.
- 6 The trial court evaluated the evidence and found the accused guilty of the offence. He was accordingly convicted. He offered mitigation and a pre-sentence report was called for. The trial court weighed it's finding together with the appellant's mitigation and placed him on probation for a period of 3 years. For the period he is to be closely monitored and offered psychological support. Progressive report was to be presented quarterly in presence of the appellant and failure to adhere to the stated terms would lead to the appellant serving remainder period in prison.
- 7 The appellant dissatisfied with the conviction and sentence appealed to this Court on the grounds that; -
 - i. Conviction was based on extraneous issues not forming part of the trial.
 - ii. Prosecution had not proved it's case beyond reasonable doubt.
 - iii. All ingredients of assault were not established by the prosecution.
 - iv. Defence case outweighed the prosecution case on the scales of justice.
 - v. The law was not properly applied to the facts to arrive at the right finding.
 - vi. The matter had been compromised through a monetary compensation which entitled the appellant a discharge.
 - vii. The probation report recommended counselling and not a probation sentence.
 - viii. After sentence the Court was functus officio and should not have ordered for quarterly reports.
- 8 The appeal was canvassed by way of written submissions and both sides filed their respective submissions.
- 9 I have as the first appellate court re-evaluated the charges, evidence adduced in the lower court, judgment and sentence meted, the grounds of the appeal and submissions.



10 The offence of assault causing actual bodily harm is created under section 251 of the Penal Code as follows: -

“Any person who commits an assault occasioning actual bodily harm is guilty of a misdemeanor and is liable to imprisonment for five years.”

11 The ingredients for this offence are therefore: -

- a. Assault to the complainant or victim.
- b. Occasioning to the complainant actual bodily harm.

In *R v Chan - Fook* [1994] 2 ALL ER 557, Lord Hobhouse stated that; -

“We consider that the same is true of the phrase “actual bodily harm”. Those 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 trivial as to be wholly insignificant.”

12 In considering whether the complainant was assaulted by the appellant, there is the evidence of two eye witnesses, the complainant and their daughter Sharon. The evidence is that the appellant kicked her on the stomach while pregnant and twisted her neck. This is a case of domestic violence and the evidence reveals the appellant’s effort to conceal it while the complainant herself was not aggressive in pursuing the complaint. When appellant lied about her injury she did not make effort to reveal the truth. It’s their daughter Sharon who stepped in to assist her. Given the circumstances the complainant had no cause to lie or fix her husband. The evidence is compelling as true that she was assaulted on the material night by the accused person. The accused stated in his defence that they had a tussle but gave no details of what it was about. He sent elders to complainant’s parents for reconciliation and was fined 12,000/= of which he paid. He only fell short of describing what the tussle involved, as in my view, it amounted to the alleged assault. If it was otherwise would have formed his strong line of defence. I therefore find that “assault” was established beyond reasonable doubt.

13 I now turn to “actual bodily harm.” The complainant stated she was kicked on the stomach and her neck twisted. The P-3 form reveals no injury to the neck. However, she was expectant and the medical examination reveals that she had breech presentation.

14 I have made effort to understand what the phrase medically means as it was not described in the evidence.

15 What I have gathered is that Breech presentation occurs when a fetus is positioned with it’s buttocks or feet closest to the birth canal rather than the head.

16 Potential cause for it are; -

1. Prematurity – babies born prematurely often have not turned into the head down position by the time of delivery.
2. Multiple pregnancies – with twins or more, spaces in the uterus is limited, making it harder for babies to move into the head – down position.
3. Excess or too little amniotic fluid – (polyhydramnios) – it allows the fetus too much mobility while too little fluid (oligohydramnios) restricts movement.



4. Uterine abnormalities – abnormally shaped or positioned uteruses, such as a bicornuate uterus or uterine fibroids, can prevent the fetus from turning.
 5. Placenta Previa – if the placenta is covering the cervix, it may block the fetus head from moving down.
 6. Short umbilical cord – A short cord can limit the baby’s ability to move into the correct position.
 7. Fetal abnormalities: - certain birth defects can lead to breech positioning.
 8. Multiparity (multiple previous pregnancies) – This can stretch the uterus, making it harder for the fetus to settle in a head down position.
- 17 Given the foregoing, it’s clear that breech position can be caused by many factors, probably some which may be unknown. A kick on the stomach is not said to be one of them. The report from Tawfiq Hospital shows the complainant was diagnosed with soft tissue injuries. The P-3 form reveals there was abdominal tenderness. Though the breech position is not connected to the kick she got from the appellant on the stomach, it’s clear it caused soft tissue injuries on the stomach, which was tender. I am of the considered view that this amounts to “actual bodily harm.”
- 18 The offence against the appellant was therefore proved beyond reasonable doubt.
- 19 On sentence, the trial court took it’s time to consider circumstances under which the offence was committed, reconciliation efforts made, circumstances of the offender and gave the most appropriate sentence with conditions which would address the appellant noted challenges in effort to avoid re-offending. The sentence and terms meets the demands of the circumstances in the matter. As such, the appeal is devoid of merit and is hereby dismissed.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 15TH DAY OF OCTOBER, 2024

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S.M. GITHINJI

JUDGE

In the Presence of; -

1. Ms Ochola for the State
2. Joseph King’ori Wango – Appellant

