



REPUBLIC OF KENYA



**KENYA LAW**  
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**Republic v Ireri (Criminal Appeal E013 of 2024)  
[2024] KEHC 14074 (KLR) (13 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 14074 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT EMBU  
CRIMINAL APPEAL E013 OF 2024  
LM NJUGUNA, J  
NOVEMBER 13, 2024**

**BETWEEN**

**REPUBLIC ..... APPELLANT**

**AND**

**ALISON IRERI ..... RESPONDENT**

*(Appeal arising from the decision of Hon. D. Endoo (R.M) in the Chief Magistrate's Court at Embu Criminal Case No. E1017 of 2021 delivered on 7th February, 2024)*

**JUDGMENT**

1. The Respondent herein was charged with the offence of assault causing actual bodily harm contrary to section 251 of the Penal code. The particulars of the charge were that, on the 23<sup>rd</sup> day of June, 2021, at around 1400 hours, at Kambo village, Itabua sub location, Mbeti North location within Embu County, unlawfully assaulted Mergery Marigu thereby occasioning her actual bodily harm.
2. He pleaded not guilty to the charge and the matter proceeded to full hearing with the prosecution calling four witnesses in support of its case.
3. The complainant testified as PW1. She stated that on the 23<sup>rd</sup> June, 2021, at around 2.00pm, she was on her way home and at the shop, she met the respondent and asked him why he destroyed her crops which were growing on her land when he was laying water pipes on his land without her permission. That he did not answer but instead, he held her throat and hit her with a fist on her mouth and she was rescued by two ladies one of them being Grace Karimi who escorted her home. That the other lady is called Mwende.
4. That she reported the matter to Beatrice Nguo of Nyumba Kumi who visited the land and confirmed the damage and thereafter at Itabua police station from where she was referred for treatment because she was bleeding from the mouth and the nose. She was treated at Embu level 5 Hospital on the 25<sup>th</sup>



- June 2021 and on the 26<sup>th</sup> June, she was issued with a P3 form which was filled in the same Hospital and she returned it to the police station. That she had known the respondent for seven years before this incident and that at the scene, there were several people. On X- examination, she stated that she did not see the respondent destroy her crops and that she could not remember what the respondent was holding in his hands or how he was dressed on the day of the incident.
5. PW2 was Grace Karimi Mwaniki who testified that on the material day, she had gone to the shop to buy meat when she met the complainant asking the respondent why he had passed pipes across her land. The respondent held the complainant on the neck and slapped her on the nose, while abusing her and calling her a prostitute and telling her that she had been looking for her and that he was going to kill her. She ran to pick the complainant who by then had fallen down and took her to her house and she was bleeding from her mouth and nose. That she was there with a lady called Mwendu and that she knows the respondent and the complainant and there is no bad blood between her and the respondent.
  6. On X-examination, she stated that the respondent's house is not far from hers and that on the day of the incident, there were several people. That she accompanied the complainant to Hospital and to the police station
  7. PW3 was Dr. Dennis Mwenda, a forensic physician who examined PW1 at Embu level 5 Hospital after she was sent there from Itabua Police Station on allegations of assault. On examination, she had a problem of dental carries of fore teeth which had holes. The lower incisor tooth was loose either by assault or due to dental carries. That the problem could have been occasioned by blunt force trauma or the said disease. That when he saw PW1, she had treatment notes from prisons dispensary in Embu . On X-examination, he stated that the looseness of the teeth may have been caused by blunt force trauma or the disease of dental carries.
  8. PW4 was Sgt Musa Rogony who investigated the matter. He told the court that, on the 24<sup>th</sup> June, 2021, he was at Itabua police station when PW1 went to the station complaining of having been assaulted by a neighbor who is well known to her. She named the respondent as the person who assaulted her. He recorded the witnesses' statements, arrested the respondent and charged him with the offence before the court. On X- examination, he stated that both the respondent and the complainant reported the incident and that it was the respondent who reported first. That the complainant first went to a private Hospital but he referred her to Embu level 5 Hospital later. He denied that he asked the respondent for Ksh.30,000.
  9. At the close of prosecution's case, the learned Magistrate in her ruling acquitted the respondent after finding that the prosecution did not establish a prima facie case. The prosecution having been dissatisfied with the said ruling filed an appeal before this court raising four grounds of appeal as hereunder;
    1. The trial magistrate erred in law and in fact by prematurely dismissing the prosecution's case under section 210 of the Criminal procedure code despite the prosecution having provided sufficient evidence to warrant the respondent to be put on his defence.
    2. The trial magistrate erred in law and in fact by failing to thoroughly analyze the evidence of all the prosecution witnesses and exhibits before arriving at the decision that there was no sufficient evidence tendered by the prosecution in support of the charge.
    3. The trial magistrate erred in law and in fact by acquitting the respondent without even testing the defence evidence and weigh it against the evidence by the prosecution.



4. The trial magistrate erred in law and in fact by finding that neither did the respondent assault nor occasion actual bodily harm on the complainant contrary to section 251 of the Penal Code without any evidential basis for this finding.
10. The appellant prays that the appeal be allowed and the court do order that the respondent be placed on his defence or re-trial be ordered before a different magistrate.
11. The appeal was disposed of by way of written submissions which both parties filed. The appellant submitted on what constitutes a prima facie case as provided for in section 210 of the Criminal Procedure Code and relied on a number of cases on the definition of a prima facie case being that of Ramanlal Bhatt Vs R, R Vs Ndege and that of Phiri Mailesi Vs Public Prosecutor.
12. The prosecution further submitted that the learned magistrate proceeded to consider the merits of the case on the innocence or guilt of the respondent instead of satisfying herself as to the narrow question before her as to whether the prosecution had tabled before her sufficient evidence to warrant putting the respondent on his defence based on the ingredients of the offence.
13. On his part, the respondent submitted that the prosecution failed to adduce sufficient evidence to establish the elements of the offence of assault. That the testimonies of the prosecution witnesses were inconsistent and contradictory to provide a coherent narrative that implicates the respondent. That the key witnesses of the prosecution have been shown to be unreliable, with the Doctor stating that the complainant did not sustain any physical injuries from the alleged assault and that the complainant had a problem of dental carries on the fore teeth, and further that the teeth had holes and that the loose incisor tooth could have been due to dental carries or the trauma. He urged the court to dismiss the appeal.
14. The court has carefully considered the evidence that was adduced before the trial court and has also read through the submissions that have been filed in this appeal.
15. The respondent was charged with the offence of assault contrary to section 251 of the Criminal procedure Code which provides;

“Any person who commits an assault occasioning actual bodily harm is guilty of a misdemeanor and liable to imprisonment for five years”.
16. From the above provision, the essential elements of the offence of assault are;
  - a. Assault on the complainant or the victim, which
  - b. Occasioned actual bodily harm
17. The evidence available before the court is that the respondent assaulted the complainant on his mouth using his fist following which, she was treated in a private Hospital and at Embu level 5 Hospital. It was the evidence of the complainant that two ladies namely Mwende and Karimi witnessed the incident and that the same happened at a shopping centre. One of the ladies namely Karimi testified as PW2 but Mwende was not called as a witness. I fully agree with the submission by the prosecution that no particular number of witnesses have to be called in evidence for a case to be proven.
18. However, the court has considered the evidence of PW3, the Doctor who examined the complainant. He stated that when he examined her, she had a problem of dental carries on the fore teeth and they had holes. That the complainant told him that she had been injured on the head. In his opinion, the problem could have been occasioned by blunt force trauma or the said disease. When he examined her, he had the benefit of seeing the treatment notes from prisons dispensary in Embu and he is the one who



- filled the P3 form for her. This meant that he had the benefit of seeing and factoring in the contents of the treatment notes from the Prisons and particularly regarding the cause of the problem that the complainant had with her dental carries on the fore teeth.
19. Considering the elements of the offence of assault causing actual bodily harm, the prosecution had the legal burden of proving that the respondent occasioned actual bodily harm on the complainant. This is a legal requirement under section 251 of the penal code. The legal burden does not shift except in some cases and assault is not one of them.
  20. Looking at the evidence of PW3, the cause of the complainant's injury was not conclusive. He stated that the complainant's injury may have been occasioned by a blunt force trauma or the disease that she had. That benefit of doubt is what the learned magistrate gave to the respondent and which he is entitled to under the law.
  21. The prosecution has decried that the respondent was not placed on his defence. A prima facie case is one where a reasonable Tribunal properly directing its mind to the law and the evidence could convict if no explanation is offered by the defence.
  22. In the Malaysian case of Phiri Mailesi Vs Public Prosecutor, the court laid down the following steps to offer guidance on a ruling on a prima facie case;
    - (a) 'At the close of the prosecution's case, the court should subject the evidence led by the prosecution in its totality to a maximum evaluation. Carefully scrutinize the credibility of each of the prosecution's witnesses. Take into account all reasonable inferences that may be drawn from that evidence, then draw the inference that is most favourable to the accused;
    - (b) The presiding Judge or magistrate should ask himself/ or herself the question " If I now call upon the accused to make his defence and he elects to remain silent, am I prepared to convict him on the evidence now before me? If the answer to that question is "yes", then a prima facie case has been made out and the defence should be called. If the answer is No, a prima facie case has not been made out and the accused should be acquitted.
    - (c) If after the defence is called, the accused elects to remain silent, then convict him
    - (d) If after defence is called, the accused elects to give evidence, then if you accept the explanation given by the accused, then you must acquit him.
  24. The question that this court needs to ask itself is, if the respondent had been placed on his defence and he elected to remain silent, would the court have convicted him? My answer is No. This is because at the close of the prosecution's case, it had not satisfied the court, beyond reasonable doubt that the respondent caused actual bodily harm to the complainant. Even if the respondent was placed on his defence, this would not have salvaged the prosecution's case.
  25. It is, therefore, my considered view that the learned magistrate did not err by acquitting the respondent under section 210 of the Criminal Procedure Code.
  26. I find that the appeal has no merit and I hereby dismiss the same.
  27. It is so ordered.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 13<sup>TH</sup> DAY OF NOVEMBER, 2024.**

**L. NJUGUNA**

**JUDGE**



..... for the Appellant

.....for the Respondent

