



**Kabur v Republic (Criminal Appeal E071 of 2023)
[2024] KEHC 16154 (KLR) (16 December 2024) (Judgment)**

Neutral citation: [2024] KEHC 16154 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
CRIMINAL APPEAL E071 OF 2023
REA OUGO, J
DECEMBER 16, 2024**

BETWEEN

DENIS WAFULA KABUR APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal arising from the conviction and sentence of Hon. W.K Onkunya (PM) dated 2/11/2023 in Principal Magistrates Court at Kimilili)

JUDGMENT

1. The appellant herein DENIS WAFULA KABUR was charged and convicted of the offence of assault causing actual bodily harm contrary to section 251 of the Penal Code and sentenced to pay a fine of Kshs 70,000 or in default serve a term of one-year imprisonment.
2. The particulars of the offence were that on 31st day of December 2022 at the Matili area in Kimilili Sub-County within Bungoma County, the appellant unlawfully assaulted one Misper Nandalwe thereby occasioning her actual bodily harm.
3. The appellant was aggrieved by the conviction and the sentence. He filed the instant appeal vide a petition of appeal on the grounds that the prosecution failed to prove its case to the required standard; that the prosecution had only been able to raise mere suspicion; that the prosecution evidence was not corroborated and full of gaps; and that the trial magistrate ignored the evidence and submissions made by the appellant.
4. The appellant seeks that the conviction be quashed and the sentence set aside.
5. Before I consider the merits of the appeal, I will first outline the evidence before the trial court. A first appellate court must consider the evidence adduced in the lower court, analyze it and re-evaluate it before coming to an independent decision. An appellate court must however bear in mind that it



has neither seen nor heard the witnesses testify first-hand and give an allowance for that. (See David Njuguna Wairimu vs Republic [2010] eKLR).

6. Misper Nandalwe (Pw1) testified that on the material day, her sister Elizabeth came to her house at 7:30 crying that her husband (the appellant) had assaulted her and demanded that Pw1 should go and explain why her sister had arrived late in the house. They proceeded to her sister's home and entered the house. They found two lads. Her sister asked her son Patrick to call the appellant. Pw1 asked the appellant why he summoned her that late. The appellant became angry and called his brother Paul. He also took the padlock and key and Elizabeth shouted that the appellant would lock them in. They ran towards the door and managed to get outside the house. Pw1 then felt a blow to her head whereupon her glasses fell. Pw1 saw the appellant strangling her sister and she tried to get him off her, but he then began to strangle her. He strangled them in turns for about 5 minutes. The appellant hit her head and she fell down.
7. Pw1 saw the appellant's brother and asked him why the appellant kept assaulting Elizabeth. The appellant went to the house. Thereafter, Elizabeth shouted that the appellant was approaching Pw1 armed with a panga. Before she could react, she was hit on the head and fell. She regained consciousness and her sister explained to her that she had been cut. Elizabeth assisted her to the car and her husband took them to Kimilili Police Station before she went to Kimilili sub-county Hospital for treatment. She later went to St. Luke Hospital for further treatment.
8. On cross-examination, she testified that she received a blow on the head and her glasses fell off. She got up and saw someone, but could not tell whether it was Paul (the appellant's brother). She explained that she could not see without her glasses.
9. Silas Sitembwi (Pw2) testified that he is a clinician at the Kimilili sub-county hospital. He told the trial court that he holds a diploma in clinical medicine and surgery. He testified that Pw2 had a history of assault by a person known to her. On examination, she was in fair general condition with no smell of alcohol or any substance. On the head and thorax, she sustained a deep cut wound on the scalp which was stitched. There was tenderness on the chest and upper limbs. The elbows were swollen and had bruises. The lower limbs were also tender. He assessed the degree of injury as harm. On cross-examination, he explained that it was a sharp object that caused the cut on the head but he could not tell whether it was a panga or the edge of a wooded stick.
10. No. 260478 Corporal Carolyn Chebet (Pw3) testified that she was the investigating officer. She was assigned the case, issued a P3 form, and took witness statements. At the time Pw1 made the complaint she was wearing a blue dress and was bleeding. Pw3 produced the photographs of the scene (Pexh 4 (a) – (e)) and further produced the blood-stained dress of Pw1 as Pexh3.
11. The appellant when placed on his defence testified that on the material day, he did not speak to Pw1. There was no evidence to show that there was a fracas at his home. The investigating officer relied on the version of events by Pw1 but did not conduct any investigations. He denied assaulting Pw1 and asked that the charges against him be dismissed.

Analysis and Determination

12. The only issue before the court is whether the prosecution proved its case to the required standard and whether the sentence meted out was proportionate to the offence.
13. The appellant in his submissions maintains that the events as presented by the prosecution did not occur but instead, Pw1 bribed the clinical officer and the investigating officer with Kshs 20,000/- and Kshs 30,000/- respectively. The appellant pointed out that the prosecution must prove its case



- beyond reasonable doubt (see *Bhat v Republic* (1957) EA 332). The appellant faulted the prosecution for failing to call Elizabeth and the complainant's husband who had been mentioned repeatedly as prosecution witnesses. The prosecution failed to call key witnesses.
14. The prosecution in their submissions argued that there was sufficient evidence by the prosecution. It was submitted that the appellant was positively identified and there was evidence pointing to the assault of the complainant which was confirmed by Pw1, Pw2 and Pw3.
 15. The appellant was charged with the offence of assault causing bodily harm contrary to Section 251 of the Penal Code. In *Guya v Republic* (Criminal Appeal 76 of 2018) [2023] KEHC 2312 (KLR) (24 March 2023) (Judgment) the court observed:

“The essential ingredients of the offence of assault causing actual bodily harm were spelt out in *Ndaa v Republic* as follows: - i. Assaulting the complainant or victim, (ii). Occasioning actual bodily harm.”
 16. In this case, the only direct witness was Pw1. The trial magistrate did not address in his judgment the evidence given by a single identifying witness. Therefore, before delving into this matter, I will examine the legal principles governing the evidence of a sole identifying witness. In *Anil Phukan vs. State of Assam* (1993) AIR 1462 the Court held as follows: -

“A conviction can be based on the testimony of a single-eye witness and there is no rule of law or evidence which says to the contrary provided the sole eye witness passed the test of reliability in basing conviction on his testimony alone.”
 17. The appellant, Pw1 and her sister Elizabeth were at their home. The three were seated discussing the issue that arose that evening regarding Elizabeth's lateness. Pw1 testified that she saw the appellant take the padlock and key before they ran for the door. She was hit by the appellant and fell. It is clear that at this point the only people at the scene were the three persons and the fact that Pw1 broke her glasses was not of consequence. The assault could only have been made by the appellant. Although Pw1 testified that the appellant's brother Paul arrived at the scene later, the appellant at this point had assaulted both Pw1 and her sister. The evidence of Pw1 was further corroborated by the clinical officer Pw2 who confirmed the injuries sustained and classified them as harm. In this case, there was clear evidence that the appellant had assaulted the complainant and occasioned her actual bodily harm. The appellant's defence merely talks of falsehoods and remains a mere denial. Dw2 did not witness the incident and he could not tell if the accused committed the assault.
 18. I have fully considered the evidence on record and find and hold that the conviction was sound, I uphold it and dismiss the appeal against conviction.
 19. On the issue of sentences, section 251 of the Penal Code provides:

“Any person who commits an assault occasioning actual bodily harm is guilty of a misdemeanour and is liable to imprisonment for five years.
 20. The Court of Appeal in *Shadrack Kipchoge Kogo vs Republic*, Criminal Appeal No. 253 of 2003 stated:

“Sentence is essentially an exercise of the trial court and for this court to interfere, it must be shown that in passing the sentence, the court took into account an irrelevant factor or that



a wrong principle was applied or short of those the sentence was so harsh and excessive that an error in principle must be inferred”

21. Considering the circumstances of the case and the fact that the appellant was a first offender and his mitigation taken into account, the sentence imposed was proper. Consequently, the conviction of the appellant and the sentence imposed is upheld. The appellant has the option to pay the fine and in default to serve the remainder of the imprisonment term.

DATED, SIGNED, AND DELIVERED AT BUNGOMA THIS 16TH DAY OF DECEMBER 2024.

R.E. OUGO

JUDGE

In the presence of:

Appellant in person - Present

Miss Matere -For the Respondent

Wilkister - C/A

