

REPUBLIC OF KENYA
IN THE SENIOR PRINCIPAL MAGISTRATE'S COURT
AT MARALAL
CRIMINAL CASE NO. E350 OF 2024

REPUBLIC.....PROSECUTOR

VERSUS

JAMES AREMAN.....1ST ACCUSED PERSON

PETER AREMAN.....2ND ACCUSED PERSON

JUDGEMENT

The 2 Accused persons were jointly charged with the offence of assault occasioning actual bodily harm contrary to section 251 of the Penal Code. The particulars were that on 27th November, 2024 at 10am at Tamiyoi village in Samburu Central Sub-County in Samburu County, they unlawfully assaulted ROSE ASUKU. They denied the charges.

The DPP's case was conducted by Prosecution Counsel Moses Ndira while the 2 accused persons represented themselves.

THE DPP'S CASE

PW1 ROSE ASUKUKU KIBET told the court that on 27/11/2024 at 10am she was leaving her house when the 2 accused person confronted her close to the gate by the road. They charged at her saying that she was going to learn a lesson for agreeing to be a witness against them in another criminal case. she knew them well as sons of her brother-in-law Lotukoi.

Suddenly, the 1st accused person punched her on the face and hit her left eye area while the 2nd accused person who had a knife in his hand followed up with a punch too. She screamed out loudly attracting the intervention of her husband who was close by.

The husband rescued her and took her away. She reported to the police at Kirisia Police Post and sought medical attention at the Samburu County Referral Hospital.

Her testimony was unshaken in cross-examination and it emerged that the 2 accused persons begrudged her for agreeing to testify for one Mrs Nyokabi who had complained against the 2. She added that the criminal case by Mrs Nyokabi had been withdrawn but the 2 brothers were bitter that she as their aunt had agreed to testify for Mrs Nyokabi against them.

PW2 DAUDI ARAMAN gave an account similar to that of his wife PW1. He affirmed that it was his wife's loud screams that attracted his attention to rush over to her position.

PW3 CLINICAL OFFICER BRUNO KAIMENYI produced the P3 Form and Treatment notes for PW1 showing that the complainant suffered bodily harm from swollen eye area and redness of the eye that she suffered from a common assault. He added that that he administered painkillers to the patient.

PW4 S/NO. 254628 POLICE CONSTABLE VINCENT MECHA testified as the investigating officer. He told the court that he was at Kirisia Police Post when PW1 and PW2 showed up and lodged a report of assault by 2 of their relatives. He recorded the report and issued a P3 form which was duly filled. Subsequently, he together with PC Mutegi, PC Mwangi and PC Omambia proceeded to Tamiyoi village and effected the arrest of the 2 suspects after PW1 pinpointed them out to the police.

PC Mecha established that the 2 suspects were related to PW1 and were bitter that she had agreed to testify against them in another case where the 2 had been charged with unlawfully assaulting a neighbour.

At that stage the DPP closed their case whereupon the court ruled that each accused person had a case to answer.

1ST ACCUSED DEFENCE

JAMES AREMAN GAVE UNSWORN STATEMENT.

He denied the charges. he told the court that the case was actuated by grudges over land use and occupation between his family and the complainant's family. He said that his elderly parents were suffering while he was in remand and then closed his case.

PETER AREMAN GAVE UNSWORN STATEMENT denying the charges.

He told the court he was out of Tamiyoi village for casual work and returned in the evening only for the police to show up later to arrest him. He closed his case.

The duty of this Honourable Court is to determine whether the DPP had proved the charged beyond any reasonable doubt.

DETERMINATION

The Court of Appeal in NDAA -v- REPUBLIC (1983)eKLR (Hancox JA, Chesoni & Nyarangi Ag. JJ.A) set out the ingredients of the charge of assault occasioning actual bodily harm as constituting the following:

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

From the material placed before the court, the evidence proved **common assault contrary to section 250 of the Penal Code as opposed to assault occasioning actual bodily harm contrary to section 251 of the Penal Code** since the complainant suffered only temporary swelling which were managed by painkillers. There was no bruise, cut or fracture. The accused person, hover, has not been charged with common assault in this case. The course to be taken will be the one provided for under sections 179 and 191 of the Criminal Procedure Code:

179.(1) When a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence, and the combination is proved but the remaining particulars are not proved, he may be convicted of the minor offence although he was not charged with it.

(2) When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence although he was not charged with it.

Section 191 of the Criminal Procedure Code provides that: -

“The provisions of Sections 179 to 190, both inclusive, shall be construed as in addition to, and not in derogation of, the provisions of any other Act and the other provisions of this Code, and the provisions of Sections 180 to 190, both inclusive, shall be construed as being without prejudice to the generality of the provisions of Section 179.”

The scope of the 2 sections above were discussed in the authority of **JEREMIAH OUMA ADONGO V REPUBLIC [2021] EKKLR (ABURILI J.)** held as follows:

“31. Section 179 aforesaid was dealt with by the Court of Appeal in the case of Rashid Mwinyi Nguisa & Another v Republic [1997] eKLR in which it was held:-

“In short this means that apart from recognizing that Section 179 sets out the principle of law applicable in a trial with respect to conviction for offences other than those charged, and that this general principle shall apply as such notwithstanding that Sections 180 to 190 deal with special cases in a trial...Section 179 of the

Criminal Procedure Code cannot be in derogation of the appellate powers of the High Court contained in Section 354(3) (a) of the same code.”

32. The same Court in **Kalu v Republic (2010) 1 KLR** observed as follows:-

“With the greatest respect to the learned Judge there was no law which would authorize a judge on appeal to convict a person with an offence with which that person was never charged. All the provisions of the Criminal Procedure Code which are under the heading:-“Convictions for Offences Other than Those Charged” and beginning with Section 179 up to Section 190 deal with situations in which a court is entitled to convict on a minor and cognate offence where a person is charged with a more serious offence.

Thus it is permissible to convict a person charged with capital robbery under Section 296(2) of the Penal Code for the offence of simple robbery contrary to Section 296(1) of the Code. It is also permissible to convict a person charged with murder under Section 203 of the Penal Code with manslaughter under Section 202 as read with Section 205 of the Penal Code.

That is because the offence of manslaughter, for instance, is minor and cognate to that of murder. But where there is no charge of murder at all, and the only charge available on the record is that of manslaughter, it would be courageous for a trial court to convert that charge into murder simply because the evidence on record proves murder.”

33. The **Black's Law Dictionary 9th Edition page 1186** defines a cognate offence as:

“A lesser offence that is related to the greater offence because it shares several of the elements of the greater offence and is of the same class or category.”

34. In **David Mwangi Njoroge v Republic [2015] eKLR** it was held that:

“...the issue of substituting an offence with the one for which the evidence is established is not an obvious case. The offence substituted must be cognate and minor to the offence that an accused was initially charged with.”

Driven by bitterness that their aunt agreed to testify against them in a case where Mrs Nyokabi was the complainant over a similar offence, the 2 brothers acted in concert to slap PW1. There is no fabrication as alleged by the 1st accused person and the alibi by the 2nd accused was an afterthought coming at a very late stage of the case. Both accused persons are guilty of common assault and are convicted accordingly under section 215 of the CPC as read with section 179 CPC. Right of appeal is 14 days.

**DATED, READ AND SIGNED AT MARALAL THIS 9TH DAY OF APRIL,
2025**

HON. T.A. SITATI

SENIOR PRINCIPAL MAGISTRATE

MARALAL LAW COURTS

PRESENT

DPP MWONGERA

BOTH ACCUSED PERSONS

LAWRENCE COURT ASSISTANT

