



REPUBLIC OF KENYA

IN THE SENIOR PRINCIPAL MAGISTRATE'S COURT AT MAKINDU

CRIMINAL CASE NO 1080 OF 2019

REPUBLIC.....PROSECUTION

VERSUS

JOSHUA

KIOKO

NGUTHA.....ACCUSED

JUDGMENT

INTRODUCTION

It is always a matter of deep regret when disputes find their way into court between brothers. What ought to have been resolved within the family bond and guided by mutual respect, understanding, and affection, instead becomes a contest of rights and recriminations. When brothers, bound by blood and shared history, allow discord to supplant dialogue, the very fabric of kinship is strained. The Court is thus called upon, not with satisfaction, but with a sense of sadness, to determine matters that could have been better settled in the spirit of brotherhood and reconciliation. When members of the same family resort to litigation, the consequences often transcend the legal questions before the Court, leaving behind strained relations and lasting emotional scars. There is no judgment, however well reasoned, that can restore the warmth of family once it is lost. Amicable settlement of such disputes not only preserves relationships but also spares families the emotional and financial burdens that litigation so often brings.

THE CHARGE

Joshua Kioko Ngutha (hereinafter referred to as the accused person) is charged with the offence of Assault causing actual bodily harm contrary to section 251 of the Penal code. The particulars of the offence are that on 24/6/2018 at Kalamba area in Nzau Sub-county within Makueni County, the accused person willingly and unlawfully assaulted Daniel Kimanthi Ngutha, thereby occasioning him actual bodily harm. When the plea was taken, the accused person pleaded not guilty. The matter proceeded to hearing.

THE EVIDENCE

The Prosecution Case

The entire prosecution case was heard by another Magistrate who was subsequently transferred. When directions were taken pursuant to section 200(3) of the Criminal Procedure Code, it was ordered that the matter proceeds from where it had reached. I will thus rely on the record, as far as the prosecution case is concerned. The prosecution called a total of five (5) witnesses in a bid to prove its case against the accused person. PW 1 Daniel Kimanthi Ngutha (hereinafter referred to as the complainant) testified that on 24/6/2018 he returned home at about 3:00 pm and found a log on the road. He alighted from his motor vehicle then removed the log and passed. When the complainant was leaving his home, he once again, found the log on the road. He alighted from the car and removed the log. As he entered his car, he saw the accused person, who is his brother, approaching him.

It was the evidence of the complainant that the accused person returned the log on the road. It became like a game where the complainant would remove the log but the accused person would return it. When it happened the fifth time, a struggle between the two ensued. That the accused person head-butted the complainant. He then hit the complainant with blows. The complainant retaliated by hitting the accused person. The two then fought. The complainant reported to the police and went to hospital for treatment. PW 2 Anthony Gitonga testified that he was a Clinical officer. The witness produced in evidence treatment notes and P3 form in respect of the complainant. PW 3 Jane Muthoka testified that on the material day she was at her home at about 4:00 pm when he heard a child crying. The

witness looked over and saw two people fighting. She went to intervene and managed to separate them. According to PW 3, both the complainant and the accused person were bleeding.

PW 4 Joy Nthenya Kimathi testified that the complainant was her father. That on the material day, she was seated outside their house when she saw her father alighting from the car. That the father removed a log that was on the road. The complainant went to the farm and on his way back, he met the accused person who started insulting him. That the complainant did not do anything. He went home and picked his son then left. On the way, the complainant found the log on the road. That the accused person went to where the complainant was, held him by the shirt then hit him using his hand. PW 4 and her brother screamed where after PW 3 appeared and stopped the fight. PW 5 Police Constable Julius Sumu testified that he was the investigating officer herein. The witness stated that he took over the matter after the initial investigating officer had been transferred. He did not conduct any independent investigations into the matter.

The Defence Case

Upon closure of the prosecution case, the court found that the accused person had a case to answer and placed him on his defence. The accused person gave sworn testimony and called one other witness. The accused person testified that on the material day, he was constructing a kitchen and chicken pen at his home when the complainant appeared. That the complainant parked his car at his home then went to the farm. After a short while, the complainant returned and went to the home of his second wife. That on the way, the complainant stopped his car, alighted then went to the accused person's home. The complainant asked the accused person who had authorized him to erect the structures. The two argued then the complainant suddenly turned violent. That the complainant started assaulting the accused person.

The accused person stated that he did not fight back. That PW 3 then appeared and restrained the complainant. The complainant was taken to his house. He changed clothes then drove away. The accused person stated that he was injured. He went to hospital and reported the matter at Emali police station. According to the accused person, the

complainant provoked him so that he could find a reason to get the accused person arrested. The accused person kept on following up on the complaint herein as well as other complaints. He was eventually arrested and charged. The accused person denied having assaulted the complainant. DW 2 Jemima Mutanu Kioko testified that the accused person was her father. That she was at home during the incident. According to DW 2, it was the complainant who hit the accused person using a stone. That the accused person grabbed the complainant so as to restrain him. Neighbours gathered at the scene after DW 2 screamed. The accused person was later taken to hospital.

FACTS NOT IN DISPUTE

From the evidence of both parties, the following facts are not in dispute:

- a) The complainant and the accused person are siblings;
- b) There was a scuffle between the complainant and the accused person on the material day;
- c) There was bad blood between the complainant and the accused person.

MAIN ISSUES FOR DETERMINATION

The main issues for determination are as follows:

- i. Whether it was the accused person who assaulted the complainant on the material day;
- ii. Whether the prosecution has proven its case against the accused person beyond reasonable doubt.

ANALYSIS AND DETERMINATION

I have carefully considered the evidence on record as well as the law applicable. In my considered view, for the prosecution to prove its case against an accused person, the prosecution must have established the following:

- a) That the offence complained of was indeed committed;
- b) That the evidence links the accused person to the offence complained of; and
- c) That the accused person's actions were unlawful or without justifiable cause.

It is my further opinion that in order to prove that the offence complained of was indeed committed, the prosecution must establish the key ingredients of the offence. The prosecutor must offer credible evidence in support of each element of a crime and establish the same beyond reasonable doubt.

Section 251 of the Penal code provides as follows:

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

The Penal code does not define the term Assault. However, section 4 of the code defines the term "harm" as:

"means any bodily hurt, disease or disorder whether permanent or temporary."

In my view, the key ingredients of an offence of Assault causing actual bodily harm for which the accused person has been charged are:

- i. The prosecution must establish that the accused person used some physical force on the person of the complainant;
- ii. The prosecution must establish that the use of force was without the consent of the complainant or was against his/her will;
- iii. The prosecution must establish that the force caused bodily injury or harm to the complainant; and
- iv. The prosecution must establish that the accused person used the physical force with the intention of causing injury to the complainant or was reckless as to whether injury would be caused or not.

Where there is an existing grudge or bad blood between parties, the court ought to consider the evidence and in particular the prosecution evidence with great caution as parties are known to resort to criminal sanctions in a bid to settle old scores. It is also to be remembered that existing grudges or disputes between parties are a recipe for chaos. The evidence indicates that there was a scuffle between the complainant and the accused person. The evidence of the complainant was that he was assaulted by the accused person. On the other hand, the accused person's position is that it was the complainant who assaulted him.

For the court to believe the prosecution evidence, the same must be consistent in material particulars, corroborative and credible. I have already pointed out that it appears that there was already bad blood between the complainant and the accused person, for unclear reasons. The eye witnesses for the prosecution case were the complainant and his daughter who testified as PW 4. The sequence of events leading to the alleged assault as narrated by the complainant were that he had removed the log from the road and was about to leave his home when he saw the accused person heading towards him. That the accused person returned the log on the road and the two engaged in some kind of game of removing and returning the log until the accused person assaulted the complainant.

On the other hand, PW 4 testified that the complainant was on his way home from the farm when he met the accused person on the way. That the accused person started insulting the complainant. PW 4 stated that the complainant did not respond but returned home and left with his son. On the way, he found the log. That the accused person then approached the complainant and assaulted him. The evidence of the complainant was that he fought with the accused person after the latter had attacked him. PW 3 confirmed that she saw the two fighting and that they were both injured. They both bled. The evidence of PW 4 was that the complainant did not fight back and that the witness did not see any injuries on the accused person.

It is evident that the prosecution evidence is contradictory. What is to be determined is whether the contradictions are so fundamental so as to vitiate the charge against the accused person. In all cases, discrepancies in witness testimonies are bound to occur. Where the discrepancies are minor and do not go to the root of the case, the same can be overlooked. My view is buttressed by the authority of Peter **Ngure Mwangi v Republic [2014] eKLR** wherein the Court of Appeal held that where the evidence adduced by the prosecution consists of minor discrepancies and inconsistencies, the same are not material and cannot weaken the probative value of the evidence tendered by the prosecution in support of their case.

In the case of **Philip Nzaka Watu v Republic [2016] eKLR**, the Court of Appeal had this to say:

"It cannot be gainsaid that to found a conviction in a criminal case, where the trial court has to be satisfied of the accused person's guilt beyond reasonable doubt, the prosecution evidence must be cogent, credible and trustworthy. Evidence that is obviously self contradictory in material particulars or which is a mere amalgam of inconsistent versions of the same event, differing fundamentally from one purported eyewitness to another, cannot give the assurance that a court needs to be satisfied beyond reasonable doubt. However, it must be remembered that when it comes to human recollection, no two witnesses recall exactly the same thing to the minutest detail. Some discrepancies must be expected because human recollection is not infallible and no two people perceive the same phenomena exactly the same way. Indeed as has been recognised in many decisions of this Court, some inconsistency in evidence may signify veracity and honesty, just as unusual uniformity may signal fabrication and coaching of witnesses. Ultimately, whether discrepancies in evidence render it believable or otherwise must turn on the circumstances of each case and the nature and extent of the discrepancies and inconsistencies in question."

Similarly, in *Dickson Elia Nsamba Shapwata & Another v The Republic, Cr. App. No. 92 of 2007*, the Court of Appeal of Tanzania addressed the issue of discrepancies in evidence and concluded as follows:

"In evaluating discrepancies, contradictions and omissions, it is undesirable for a court to pick out sentences and consider them in isolation from the rest of the statements. The Court has to decide whether inconsistencies and contradictions are minor, or whether they go to the root of the matter."

The events leading to the assault of the complainant and the manner in which he was assaulted are key. I find that the discrepancies in the prosecution evidence were fundamental and went to the root of the case. They cannot be overlooked. I say so because the discrepancies relate to events leading to the assault of the complainant as well as the manner in which he was assaulted. The court must be convinced beyond reasonable doubt that the complainant told the truth. Such discrepancies as pointed out in the prosecution case create room for doubt.

I have considered the accused person's defence. The version given by the accused person was that it was the complainant who attacked and assaulted him. The accused person's evidence was corroborated by that of his daughter. The testimony of the investigating officer was not helpful. He was not the initial investigating officer and did not conduct any investigations into the matter. The initial investigating officer was not called to testify. It is therefore not known what kind of investigations were conducted. I am aware that it is not mandatory to call the investigating officer but it is my view that the evidence or testimony of the initial investigating officer was crucial and critical in this case. This is a case where both the accused person and complainant accuse each other of assault. There is evidence on record to show that the two engaged in a fight, although the accused person denied the fact.

The investigating officer would have told us why he believed that it was the accused person and not the complainant who committed the offence or why the two were not charged with affray. The evidence on record does not irresistibly point to the fact that it was the accused person who assaulted the complainant or that he (accused) was the aggressor. Both versions given by the opposite sides are probable. There is nothing to show that the investigating officer interrogated the accused person or even interviewed any of the accused person's witnesses. In my view, the role of an investigating officer is to try and find out the truth concerning a complaint and not just to gather evidence to support a complaint. Investigations ought not to be one-sided. It is the investigating officer who is required to piece the evidence together and present it to court so that the court can make an informed decision. Quite unfortunately, most investigators operate under the misconceived notion that their duty is to solely act for the person who lodges a complaint.

If an investigator forms the opinion that the accused person could have committed the offence and should therefore be charged, the investigator must present evidence to dispel any defence that may be put forth by the accused person. Mere recording of favourable statements cannot suffice. I am afraid that the investigations conducted herein, if any, were quite shoddy. With the kind of evidence on record, I am unable to ascertain who between the complainant and the accused person told the truth. It is probable and possible that the accused person assaulted the complainant on the material day. On the other hand, I have

no reason to disregard the version given by the accused person. The best I can do is to suspect that the accused person assaulted the complainant.

Suspicion can never in law form the basis for a conviction. In the case of *Joan Chebichii Sawe v Republic [2003] eKLR*, the Court of Appeal held thus:

“The suspicion may be strong but this is a game with clear and settled rules of engagement. The prosecution must prove the case against the accused beyond any reasonable doubt. As this court made clear in the case of Mary Wanjiku Gichira v Republic (Criminal Appeal No. 17 of 1998 (unreported), Suspicion however strong, cannot provide a basis for inferring guilt which must be proved by evidence”

In *Philip Nzaka Watu v Republic [2006] eKLR*, it was held that to find a conviction in a Criminal case, the trial court has to be satisfied of the accused person’s guilt beyond reasonable doubt. On proof beyond reasonable doubt, the court stated in *Stephen Nguli Mulili v Republic [2014] eKLR*:

“It is not in doubt that the burden of proof lies with the prosecution. The locus classicus on this is the case of DPP V WOOLMINGTON, (1935) UKHL 1 where the court eloquently stated that the “golden thread” in the “web of English common law” is that it is the duty of the prosecution to prove its case. The Kenyan Courts have upheld this position in numerous cases. See FESTUS MUKATI MURWA V R, [2013] eKLR.”

In the famous case of *Miller v Ministry of Pensions [1947] 2 All ER 372*, Lord Denning stated with regard to the degree of proof beyond reasonable doubt:

“That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence of course it is possible, but not in the least probable, the case is proved beyond reasonable doubt, but nothing short of that will suffice.”

In *Bakare v State (1987) 1 NWLR (PT 52) 579*, the Supreme Court of Nigeria emphasized on the phrase proof beyond reasonable doubt, stating:

“Proof beyond reasonable doubt stems out of the compelling presumption of innocence inherent in our adversary system of criminal justice. To displace the presumption, the evidence of the prosecution must prove beyond reasonable doubt that the person accused is guilty of the offence charged. Absolute certainty is impossible in any human adventure, including the administration of criminal justice. Proof beyond reasonable doubt means just what it says it does not admit of plausible possibilities but does admit of a high degree of cogency consistent with an equally high degree of probability.” (Emphasis mine)

I have always observed that it is not the duty of the court nor that of the accused person to patch up or fill in the gaps or tie up the loose ends in the prosecution case. While putting up its case, the prosecution should endeavour to close all the loopholes since at the end of the day, it is the duty of the prosecution to prove its case against the accused person beyond reasonable doubt. The accused person is under no duty to prove his innocence.

DISPOSITION

The upshot of the above considerations is that the prosecution has failed to prove its case against the accused person beyond reasonable doubt. Consequently, I find the accused person **NOT GUILTY** and proceed to **ACQUIT** him of the charge of Assault causing actual bodily harm contrary to section 251 of the Penal Code pursuant to the provisions of section 215 of the Criminal Procedure Code.

**DATED, SIGNED AND DELIVERED IN OPEN COURT AT MAKINDU THIS 15TH DAY OF
OCTOBER, 2025.**

Y.A SHIKANDA

SENIOR PRINCIPAL MAGISTRATE.

