Republic v Kimutai & another (Criminal Appeal E062 of 2024)
[2026] KEHC 2444 (KLR) (26 February 2026) (Judgment)

Neutral citation: [2026] KEHC 2444 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CRIMINAL APPEAL E062 OF 2024

E OMINDE, J

FEBRUARY 26, 2026

BETWEEN

REPUBLIC ..... APPELLANT

AND

ENOCK KIPKOSGEI KIMUTAI ..... 1ST RESPONDENT

EVANS KIPRUTO KEITANY ..... 2ND RESPONDENT

(Being an Appeal from the Judgment by Hon. Emily Kigen (PM) in MCCR E450 OF 2024 delivered on 14th November 2024)

JUDGMENT

1. The Respondents were charged with the offence of Grievous Harm contrary to Section 234 of the Penal Code. The particulars of the 1st Count of the offence was that on the 12th day of April 2024 at around 1500 hours at Kendur Village Kapchemutwa location in Keiyo North Sub County within Elgeyo Marakwet County, the 1st and 2nd Respondents unlawfully and wilfully did grievous harm to John Kipserem by hitting him using a metal bar on the right shoulder hence sustaining injuries.

2. The particulars of the 2nd count, against the 1st Respondent, was that on the 12th day of April 2024 at around 1500 hours at Kendur Village Kapchemutwa location in Keiyo North Sub County within Elgeyo Marakwet County, he unlawfully and wilfully did grievous harm to John Kipserem by hitting him using a metal bar on the head hence sustaining injuries.

3. The accused persons pleaded not guilty to the charges and the matter proceeded to full hearing. The prosecution called 4 witnesses in support of its case and at the close of the Prosecution's case, the trial Court placed the Respondents o their defence. They each gave sworn statements and called 3 witnesses. By the Judgment delivered on 14th November 2024, the trial magistrate acquitted the accused persons under Section 215 of the Criminal Procedure Code.

4. Dissatisfied with the decision, the Appellant, through Prosecution Counsel Racheal Mwangi, filed this Appeal on 28th January 2025 against the acquittal. She listed the following 8 grounds that:

    1. That the learned trial Magistrate erred in law and facts in relying on extraneous factors like finding that there was a land dispute between the respondents and the appellant herein yet the same had no bearing in the case.

    2. That the learned Magistrate erred in fact in-finding that the 1st respondent was not present at the scene when the appellant was attacked.

    3. That the learned trial Magistrate failed to appreciate that the prosecution had filed a consolidated charge sheet consolidating file number ITEN MCCR E450 of 2024 with file number ITEN MCCR E 484 of 2024 on 6th May 2024.

    4. That the learned Magistrate erred in law and fact in finding that the 1st Respondent had been maliciously prosecuted by failing to note there were two complainants in the matter after the above consolidation.

    5. That the learned trial magistrate erred in law and in fact in relying on the alibi evidence by the 1st Respondent which was not raised during the prosecution case.

    6. The learned trial magistrate erred in law and in fact in completely ignoring the evidence of PW6 who was also a complainant in the matter and proceeded to give judgment that excluded him.

    7. That the learned trial magistrate erred in law and in fact in finding that the evidence by the prosecution witnesses was contradictory and lacked corroboration.

    8. That the learned trial magistrate erred in law and in fact in disregarding the evidence of the prosecution witness.

Prosecution Evidence

5. PW1 was Francis Kibet Kimetto, who testified that on 12th April 2024, his son, Ian Kiplimo, called him and informed him he heard a tractor on the land. He called his brother Kipserem John and together they went to the farm. He stated that he found the 2nd accused ploughing the land with a tractor. He asked him to stop and he alighted armed with a claw hammer and panga and they spoke for 3 minutes. He then jumped onto the tractor and continued ploughing. His brother John Kipserem went and stood in front of the tractor and the 2nd accused took a hammer and hit him on the elbow and he fell down. The 2nd accused then took a panga and PW1 went to stop him. He jumped to the other side of the tractor.

6. That the 1st accused who had reached where he was hit him on the head with a metal rod by the 1st respondent who had reached where he was. He further stated that he also saw the 1st respondent stab his brother on the abdomen with a dropus. He screamed for help and people came to his rescue and took him to hospital where he was treated and stitched. He then reported the matter and a P3 form was issued.

7. During cross examination, he stated that the 1st respondent had a metal rod and picked the tropus from the fence and that the 2nd respondent had a panga, hammer and a bow. He stated that the exhibits were not recovered. He stated that the respondents are his brother's children and that their relationship is also not good. That the respondents live on land that belongs to the PW1's father and that they do not have a shamba.

8. PW2 was Cosmas Kurumei, who is a cousin to the respondents and the appellants are his uncles. He stated that on 12th April 2024 he was at Korkitony in the farm digging when the 2nd respondent called him to go and plough the land which he did. That 2nd respondent continued to plough and the 1st respondent went for lunch. That at about 3.00pm Evans(sic) and John alighted from the motorcycle and John Kipserem (PW6) asked the 2nd respondent not to plough the land.

9. That the 2nd respondent alighted and they spoke and then he continued to plough while Francis (PW1) rushed towards the tractor. That John Kipserem hit the 2nd Respondent with a small stick. That Francis boarded the tractor and he fell when he got injured. He stated that the 1st respondent was not at the scene and he came later. During cross examination by the 1st respondent, he stated that the said respondent was not on the tractor and he also did not see him open the fence. He reiterated that PW1came to where the tractor was fell on the fence and got injured but PW6 did not get injured.

10. PW3 was Ian Kiplimo Kibet, is a son to PW1 and a cousin to the respondents. He stated that on 12th April 2024 while at home relaxing, he saw the accused, Keitany, Evans and Cosmas Kipng'etich on the ground, and they opened the fence to the farm. He called his father and informed him. That shortly thereafter, his father came with John Kipserem (PW6). That PW6 went to the farm and asked the 2nd respondent to stop. They refused and Evans moved the tractor and then took a panga and hammer. He then hit PW6 on the left shoulder with the hammer.

11. He stated that the 1st respondent came with tippers and metal rod and attacked PW1 who was going to rescue PW6 who had been hurt. That he hit him on the head. PW6 screamed and the witness rushed and pulled him where he was lying next to the tractor. That the 1st respondent banged the tractor and shouted 'niue huyu mzee ndio kesi iishe'. That one Kipngetich rushed to the house and brought bows and arrows and gave the 1st respondent and went back. He stated that they took the two men to Chebyemit hospital since Francis was bleeding and John had a fracture. He was taken to theatre and the matter reported to the police.

12. During cross examination he stated that the 1st respondent was not there when the fence was opened but he had a metal and a dropus and he hit John (PW6) with a metal. He further stated that both the accused persons attacked his father. That the 2nd Respondent stopped the tractor and picked the tools that were behind the chair. The witness stated that he was at the edge of the fence and that the 2nd respondent also had a bow and an arrow.

13. PW4 was Timothy Kiprono. He stated that he knows PW6. That on 12th April 2024 at 3.00 pm, he received a call from PW1 who asked him to take him to the farm using his motorcycle. On the way they picked another person and they arrived the farm where he saw a tractor digging the land. That PW6 went in first and PW1 followed him. That the 2nd respondent stopped the tractor and alighted with a hammer and panga. An argument ensued and he turned towards his motor cycle ready to flee. That one Ian Kipruto went back to the tractor and he saw a group of 5 people including the 1st respondent. The tractor continued digging. That PW6 went and stopped the tractor and it stopped again. That Kipruto alighted with a hammer and panga attacked PW6, hitting him on the shoulder and PW1 went to rescue him.

14. That the 1st respondent picked a dropus from the entrance and went to where the said people were, and hit PW1 on the head as the 2nd respondent was still attacking PW6. PW1 screamed and Cosmas and Ian came and rescued the two and took them to hospital.

15. PW5 was Peter Kiptoo, a clinical officer who produced 2 P3 forms. He stated that the first P3 form was with respect Francis Kibet Kimetto (PW1) and that he had had blood stained clothes and cap.

That he had a cut on the head but his neck, chest, stomach was normal. The left hand too had a cut. That they applied a plaster, gave him antibiotics and anti-tetanus. He concluded the degree of injury occasioned to the patient was grievous harm and produced the said P3 Form and Medical notes which were marked as Pexh1(a)

16. That the second P3 form was with respect to John Kipserem (PW6). He stated that he had blood on his shirt and on examination he had a swelling in the right hand with a fracture and that the X-ray revealed a fracture of the right clavicle. He was given analgesics and he was reffered to theatre. He produced the said P# Form and the same was marked as Pexh2

17. PW6 was the complainant, John Kipserem. He stated that on 12th April 2024 at about 3.00pm, PW1 called him and informed him that his nephews were ploughing the land. That they took a boda-boda to the said farm and found the 2nd respondent was ploughing using a tractor and the 1st respondent was standing next to the entrance. That he went and asked the 2nd respondent to stop since they had a land case and the 2nd respondent alighted and tried to cut him and in the process he fell and the 2nd respondent then took a hammer and hit him on the elbow. He stated that it was the 2nd respondent who hit him and the 1st respondent hit PW1 on the head.

18. In cross examination he reiterated that it is the 1st respondent who hit PW1 and that he went to the entrance which was far from where the tractor was. That the panga and hammer which the 2nd respondent had were in the mudguard.

19. PW7 was Sergeant. Daniel Chepkok from Bugar police post, the current investigating officer in the matter, who stated that the original investigating officer PC Kemei was unwell and bedridden. He stated that he investigated the matter with him and recalled that on 12th April 2024, they were at Bugar police post when 2 complainants, PW1 and PW6 went to the police post with injuries. That PW1 had injuries on the forehead and had a bandage on the right hand. PW6 had an arm sling.

20. That the said complainants narrated that they had been assaulted by the 1st and 2nd Respondents. That PW1 was bleeding and they referred him to Chebyemit sub county hospital and came the following day and recorded their statements.

21. That the complainants stated that the incident happened in the grandparents' home. That the land was being tilled by the respondents and they had been stopped. He stated that the complainants narrated that they went to the farm and PW6 asked the driver to stop but he did not and that Pw6 then climbed the tractor and asked the driver to alight and a quarrel ensued. That PW1 was headed there and then the 1st joined in and a fight ensued.

22. The witness stated that they could not tell who caused the injuries since they did not get an eye witness as the incident happened on family land. That he went with PC Kemei to the scene after two weeks. He testified that there had been several fights over the subject parcel of land. That they then summoned the respondents and arraigned them. He testified that the whole dispute is over land and that the complainants and the father of the respondents are real brothers.

23. At the close of the prosecution case, the court found that the respondents had a case to answer and placed them on their defence. They each gave sworn statements and between the m called three witnesses.

24. DW1 was the 1st respondent who gave sworn testimony. He stated that ton 12th April 2024, he had gone to Kapchelal to plant on his farm and at about 4.30 pm they had finished and came to the center to take tea and parted. He left and passed by the forest to check on their cows, going home at 5.30pm. On reaching home he found one Charles Kipchumba who told him there were people who had been

hurt and he turned his motor cycle and went to check. He was told PW1 and PW6 had attacked the 2nd respondent while ploughing the land. That prior to that PW1 had been reporting him and the 2nd respondent severally from 2016 and that they had had cases at the Kenya Police where they were kept in the cell upto 5.00pm and released in the evening when they would find the land had been ploughed and planted.

25. He testified that he had been assisting the 2nd respondent to uplift his livelihood and that recently, in August, PW1 had a hammer and he stated that he had seen the 1st respondent with a knife which was a lie because the 1st respondent does not go to his home. That when he bought a lorry, PW1 asked him how he had bought it and alleged that he had stolen it from their grandfather. That the PW1 has a tendency of hurting the 1st Respondent. He stated that the land was divided in 2014 and the 2nd respondent was given a share but PW1 was not happy. In cross examination he testified that when he got to the scene, the 2nd respondent was still ploughing the land and that he was with 5 other people.

26. He stated that he had been told that PW1 had been stepped on by the tractor but he did not find him at the scene for they had gone to hospital. That the tractor belongs to their father and the land belongs to the 2nd respondent. That land dispute is between PW1 and the family of the 2nd respondent. That PW6 had indicated that the 1st respondent did not touch him and when he went to see PW6, he chased him away. He testified that he did not go to that land on the material date.

27. DW2 was Evans Kipruto Keitany, the 2nd respondent who testified that on 12th April 2024 he was at home at 2.00pm and called his father since he wanted to plough the land. That he asked his father named Josphat to give him the tractor and the same was brought to him at about 4.00pm by one Kenneth Matiba and Cosmas. That after about 30 minutes PW6 and PW1 came on a motorcycle. The picked 2 dropus and went towards him. That PW6 tried to hit him with a drupes and he turned the tractor when he heard screams that he had stepped on someone. That he did not know that PW1 was behind the tractor and that he had knocked him. That Cosmas then came and took him to hospital.

28. He further testified that the complainant had threatened him severally and he has reported to the police and has OBs dated 14th February 2022 @1100hours and 14th April 2022 @ 1249 hours which he produced as DExh 1 and 2 respectively but the police have never taken any action. In cross examination, he stated that he is the one who was driving the tractor, that when the complainants went to where he was they did not talk, that he did not alight with a hammer and did not alight from the tractor except when PW1 got hurt, That PW1 was knocked by the plough and that PW6 tried to hit the 2nd respondent but because the tractor was moving, he did not manage. That Ian(PW3) was at home and not at the farm and Cosmas came with the tractor. He stated that they have a land dispute with PW1 but he has no issues with PW6.

29. DW3 was Collins Kibet who testified that on 12th April 2024 he had gone with the 1st respondent to Keiyo to plant and they came back at 4.30pm and went to Kapchelel center and when he was dropping them off he met one Josephat who told him that PW1 and PW6 had been hurt and had gone to hospital. In cross examination he stated that he heard that he fell from the tractor.

30. DW4 was Charles Kipchumba Kemboi who testified that on 12th April 2024 he was at Tongai at about 3.00pm where the 2nd respondent was ploughing with a tractor when PW1 and PW6 came and attacked the 2nd respondent. That PW1 jumped on the tractor and a fight ensued between him and the 2nd respondent and that he left and on his way home he met one the 1st respondent who he told to go and check Msundu who had fallen from the tractor.

31. In cross examination, he stated that PW1 and PW6 climbed onto the tractor and that each had a drupus in their hands and that they attacked the 2nd respondent intending to pull him out of the tractor but

they fell. That PW1 fell. That he witnessed the fight but he feared to intervene because the family has land disputes. That he later learnt that the complainants got hurt but he did not see any weapon. That the Msundu that he had asked the 1st respondent to go and see was his father Josephat because he thought the said Josephat had been stepped on.

32. DW5 was Josphat Kimutai Kimetto father to the 1st respondent and Uncle to the 2nd respondent and a brother to the complainants. He stated that on 12th April 2024 a tractor was ploughing the land of 2nd respondent, when PW1 and PW6 went to the farm using a boda boda. He stated that he was there when PW6 picked drupus from the fence and PW1 had a walking stick. That PW6 went towards the right while PW1 climbed the tractor to attack the 2nd respondent. That a struggle ensued and shortly PW1 started screaming. That he was injured. His driver came and they took him to hospital at Chebyemit.

33. He testified that the issue was a land dispute between PW1 and the 2nd respondent which happens every year, and that PW1 wants to take the land from the 2nd respondent by force. That the dispute has been handled by the DO, Chief and DCC and in all these forums, PW1 has lost. That they even brought the dispute to court where still PW1 lost. And he does not understand why PW1 wants to take the land forcefully yet his father divided the land equally amongst his sons. That PW1 usually brags that he cannot be harmed because he is police. That this dispute occurs every season.

34. In cross examination, he stated that PW1 was on top of the plough from where he fell and got injured. That the tractor is his and he was present. That it has tools to wit a spanner box, hammer and panga but he did not see any one remove the tools. That there were many people but they feared because of threats. That PW1 got injured on the head and PW6 fell with the 2nd respondent while struggling. That the 1st respondent was defending himself. That it is his son Cosmas who pulled PW1 from under the plough and that PW3 locked himself in his house when the fight got intense and the 1st respondent was not present for he had gone to his farm in Keiyo and came when the injured had already been taken to hospital.

Appellant's submissions

35. Learned counsel for the State submitted that the prosecution proved its case beyond any reasonable doubt. That the prosecution proved that on 12th April 2024, the complainants, John Kipserem and Francis Kibet, sustained the injuries after being attacked by the Respondents. Counsel reproduced the evidence of the prosecution witness and urged that Grievous harm is defined by Section 4 of The Penal Code as any harm which amounts to a maim or dangerous harm or seriously or permanently injures health or which is likely to impair health, or which extends to permanent disfigurement or to a permanent or serious injury to any external or internal organ, membrane or sense.

36. She urged that according to the Clinical Officer at Chebyemit Sub-County Hospital, who testified as PW5, Francis Kimetto had blood-stained clothes and a cap. He had cuts on his head, neck, chest, and stomach. He stated that Francis had cuts on his left hand. This is consistent with the statements of Francis that the 1st Respondent assaulted him. PW5 also testified that the 2nd Complainant John Kipserem had swelling in the right hand with a fracture. The X-ray done concluded that he had a revealed fracture of the right clavicle. The injuries sustained by both complainants' amounts to the elements as stated in the Penal Code and cited the decision of the Court of Appeal in the case of John Oketch Abongo v Republic [2000] eKLR and urged that in this case, the Clinical officer produced P3 forms, and his medical opinion in open court was that both the complainants really did sustain grievous injuries.

37. On the issue of identification, counsel urged that the learned trial Magistrate found that the 3 prosecution witnesses were not able to identify the respondents and submitted that the respondents,

PW1 and PW6 were relatives who lived close by. PW1 and PW2 were able to positively identify the respondent. The offence took place during the day and there was therefore no issue of mistaken identity. PW2 was also able to identify both the respondents, he confirmed that the 1st respondent came later while the 2nd respondent was present. PW3 who was also an eyewitness, was able to identify the respondents according to his testimony. Counsel placed reliance on the decision of the Court of Appeal in Wanjohi and another vs Republic (1989) KLR 436 and Anjononi and others vs Republic (19891 KLR on the issue of recognition.

38. Counsel urged that the testimony of the above witnesses was sufficient to prove the identity of the respondents. That the four witnesses were able to prove beyond any reasonable doubt that the respondents assaulted PW1 and PW6, and as a result, they sustained injuries which PW5 classified as grievous harm,

39. Counsel submitted that the learned trial Magistrate erred in law and fact in finding that there had been a land dispute between PW1, PW6, and the respondents, and that the decision favoured the respondents herein, yet no evidence was produced to that effect. She urged that these were extraneous factors that did not have any bearing on the case before the court.

40. She further submitted that as held in Republic vs Mwangi (1983) KLR 543, the court must not speculate on motive and must decide the case based on the evidence presented before it. That the case before the Court was a case of grievous harm and not a land matter where the appellant proved beyond any reasonable doubt that the complainants were assaulted by the respondents herein as a result of which they sustained injuries. The acquittal based on this flawed reasoning was therefore a miscarriage of justice.

41. Counsel urged that both respondents were present at the scene when PW1 and PW6 were assaulted. She urged that the alibi raised by the 1st respondent was not presented during the prosecution case and therefore, it was an afterthought. That the prosecution did not have the chance to tender rebuttal evidence against the 1st respondent's alibi. She placed reliance on Aroko & another v Republic [2022] KECA 1044 (KLR) in this regard. Counsel urged that both Respondents were present at the scene and that they had injured PW1 and PW6. The learned trial magistrate therefore erred in relying on the alibi evidence of the 1st Respondent.

42. Counsel urged that the learned trial Magistrate erred in law in failing to comply with the requirements of Section 211 of the Criminal Procedures Code. She cited the provisions and urged that it mandates that the court to inform the accused of their rights at the close of the prosecution's case, specifically when a prima facie ease has been established and the accused is put on their defence. She maintained that although the Respondents were not prejudiced in any way, the trial was irregular as it was conducted contrary to the procedure stipulated by the law.

43. Counsel urged that although there were a few contradictions in the prosecution case, the same were minor contradictions which did not create doubt as to the guilt of the Respondents herein. PW1 and PW6 were able to identify their assailants; their evidence was corroborated by the evidence of PW3 and PW4, who gave an account of what transpired at the scene.

44. PW5 also corroborated their testimony to the effect that PW1 and PW6 sustained injuries as a result of the assault. He classified their injuries as grievous Harm. The few contradictions were therefore not fatal to the prosecution's case. The appellant placed reliance on John Nyaga Njuki& 4 others v Republic 2002 KECA 288(KLR) and the case of Thomas Kitsoo alias Katiba v Republic MLD CA Criminal Appeal No. 123 of 2014 [20151 eKLR and urged that any contradictions were minor and did not affect the prosecution's case.

45. Counsel submitted that the learned trial magistrate failed to consider that; there were two complainants in the matter since the matter had been consolidated on 5th June 2024. After the said consolidation, there were two counts where John Kipserem was the 1st complainant and Francis Kibet Kimetto was the 2nd complainant.

46. She pointed out that in her Judgement dated 14th November 2024, the learned trial magistrate noted that the complainant, Francis, was: the author of his misfortune and had no one to blame for it She, however, excluded PW6 John Kipserem, who was also a complainant in the matter, from her judgment. Counsel submitted that the 1st Complainant, John Kipserem, was greatly prejudiced following the decision of the learned trial magistrate.Counsel urged the court to set aside the Judgment and order a retrial of the case.

Respondents' Submissions

47. Learned counsel for the respondent submitted that the trial court carefully analysed the testimonies of the complainants and the prosecution witnesses and there were contradictions on who assaulted whom, with what weapon, and where exactly, which rendered the prosecution evidence unreliable. He cited the case of Ndungu Kimanyi v Republic [1979] KLR 282 in this regard. Counsel urged that the learned magistrate was correct to treat the contradictory and inconsistent prosecution evidence with caution.

48. On the presence of multiple complaints and malicious prosecution, counsel submitted that it was not disputed that there were two complainants, each alleging to have been assaulted by different respondents on the same occasion. The trial court noted that there was an underlying land/family dispute between the parties, which cast doubt on the impartiality of the complainants. Indeed, DW3 testified that the complainants harboured grudges against the respondents. The court was therefore justified in entertaining the defence argument of malicious prosecution. Counsel placed reliance on the decision of the Court of Appeal in Stephen Gachau Githaiga & Another v Attorney General [2015] eKLR and David Njuguna Wairimu v Republic [2010] eKLR in this regard.

49. Counsel submitted that PWl said he was struck with a jembe on the right shoulder. PW2 claimed he was hit with a metal bar on the head. PW3 contradicted both accounts, testifying that he only saw Enock with a jembe and Evans pushing the complainant Francis. No independent witness corroborated the assaults, despite the incident allegedly occurring in broad daylight. He cited the decision of the Court of Appeal in Philip Nzaka Watu vs Republic [2016] eKLR where the court stressed that material contradictions in the prosecution evidence must be resolved in favour of the accused.

50. Counsel urged that the burden of proof never shifts to the accused and that the prosecution must prove the charge beyond reasonable doubt. Further, that the learned magistrate correctly held that the evidence fell short of this standard. He cited the decision of the Court of Appeal in Sawe v Republic [2003] KLR 364 in this regard, urging that the suspicion arising from a pre-existing land dispute and inconsistent testimony could not sustain a conviction. Counsel urged the court to dismiss the appeal.

Determination

51. It was held in the case of Okeno vs Republic [1972] EA 32 and further in the Court of Appeal case of Mark Oiruri Mose vs R [2013] eKLR that the 1st appellate court is duty-bound to revisit the evidence tendered before the trial court afresh, evaluate it, analyse it and come to its independent conclusion on the matter but always bearing in mind that the trial court had the advantage of observing the demeanour of the witnesses and hearing them give evidence and give allowance for that.

52. From the above, it is my considered opinion that the issue for determination is

Whether the grounds of appeal raised has merit and the prosecution did in fact prove its case beyond reasonable doubt contrary to the finding of the Learned Trial Magistrate

53. In the case of Kombe v Republic (Criminal Appeal E026 of 2024) [2025] KEHC 7300 (KLR) (15 May 2025) (Judgment) the court held that to secure a conviction under the offence of grievous harm, the prosecution had to prove the following essential elements beyond reasonable doubt: -

    a. That the victim sustained grievous harm;

    b. That the harm occasioned on the victim was caused unlawfully;

    c. That it is the appellant who caused the grievous harm to be occasioned upon the Complainant.

54. The above said, from my summation of the evidence adduced by both the prosecution and the defence witnesses, it is not disputed that the complainants herein did get injured and sustained injuries that were classified as grievous harm by the examining doctor. Indeed, even the defence evidence was to that effect and it is their evidence that indeed went further to state who it is that took the complainants to hospital.

55. However, because the respondents deny, as already herein summarised, that it is them that accosted and assaulted the complainants and caused them the injuries complained of, the question then is whether the prosecution by way of the same said evidence, has proved beyond reasonable doubt, that it is the respondents who are to blame.

56. In considering the grounds of appeal and the attendant submissions vis-à-vis the proceedings of the trial court, it is necessary that the court sheds light on a few issues that the prosecution has raised that are not factually correct. To this end the court notes the 3rd ground of appeal which is

    That the learned trial Magistrate failed to appreciate that the prosecution had filed a consolidated charge sheet consolidating file number ITEN MCCR E450 of 2024 with file number ITEN MCCR E 484 of 2024 on 6th May 2024

    and in ground 4 which is

    That the learned Magistrate erred in law and fact in finding that the 1st Respondent had been maliciously prosecuted by failing to note there were two complainants in the matter after the above consolidation.

57. However, the court notes that in the impugned judgment, the court refers to the respondents herein as the 1st and 2nd accused, jointly charged with 2 counts of the offence of grievous harm in counts 1 and 2 with PW6 being cited as the complainant in count 1 and PW1 being cited as the complainant in count 2 just as is reflected in the charge sheet court stamped 5th June 2024 approximately one month after the consolidation was done.

58. Indeed, the court notes that in its judgement, after its summation of the evidence of PW1, the court then immediately thereafter proceeded to summarise the evidence of PW6, who in the said judgement she referred to as the 2nd complainant which is a clear testament to the fact that the Learned Trial Magistrate was very much aware of and alive to the fact that there were two complainants in this case.

59. The court further notes that in its conclusion, the Learned Trial Magistrate in the impugned judgement, states that it is the complainants that attacked the 2nd respondent and that further that the 2nd complainant fell off from the tractor where he had climbed to attack the said respondent, fell and knocked himself on the disc and got injured hence the conclusion that he was the author of his own misfortune which Counsel for the State has construed, and would want the court to believe, amounts

to a finding against the 2nd complainant only. This I find not to be the case, for the reasons herein given. This being the case then, this ground of appeal is not factual, is misleading and therefore lacks merit and the same is accordingly struck out.

60. The other issue raised in the submissions by the Counsel for the State is that the learned trial Magistrate erred in law in failing to comply with the requirements of Section 211 of the Criminal Procedures Code. Without going into much ado over this issue, I note from the proceedings of the trial court that this was done by the Learned Trial Magistrate on 16th September 2024 after delivering her Ruling wherein she found that the respondents herein had a case to answer. This submission too is also erroneous and misleading.

61. The court having clarified the above will now go into the substance of the appeal which broadly put encompasses the issue of the identification of the respondents by the complainant's witnesses, the reliance by the trial court on the alibi given by the 1st respondent in his defence when the same was not introduced at the earliest before the close of the prosecution case, the court placing reliance on the land dispute between the parties in reaching its determination, the allegation that the court ignored the evidence of PW1 and gave a judgement that excluded him and lastly the court's finding that the evidence by the prosecution witnesses was contradictory and lacked corroboration.

62. On the issue of identification, my simple finding that even as the Learned Magistrate raised the issue as a point to consider in the impugned judgement and then failed to follow it up to its logical conclusion, the position is that of all the eye witnesses to the prosecution case, save for PW4 who testified that he was hired as a boda boda rider, all the rest of the witnesses are related to the complainants who testified as PW1 and PW6 as follows; PW2 is a nephew to the two complainants and PW3 is the son of PW6. The court also notes that the respondents are also nephews of the complainants. This being the case then, the issue of identification with respect to this witnesses can then not be in dispute and was therefore not material in the determination of this case.

63. However, the court notes that PW4 clearly stated in his testimony that he did not know the accused persons. As noted by the trial court in her judgement, the witness also testified that he was at an initial distance of 30 metres from the locus in quo and that when it seemed apparent that chaos would erupt, he moved a further 20 metres away and turned his motorcycle ready to flee.

64. For this reason, it was important that his evidence be very well corroborated particularly with regard to which respondent was armed with what weapon, and which one of the complainants did which respondent assault in order for this witnesses' evidence to pass the credibility test. This is because in my considered view, it is not usual, normal and possible to see strangers assault someone from the distance the witness states he was at and be able to clearly capture what exactly happened particularly where there is more than one assailant and also victim.

65. The trial court in its judgement found that there were discrepancies and contradictions to the prosecution evidence that were material and therefore fatal to the prosecution case. Counsel for the State while admitting that although there were a few contradictions in the prosecution case, the same were minor contradictions which did not create doubt as to the guilt of the respondents herein and so they ought not to have been fatal to the prosecution case.

66. In considering whether or not these discrepancies were material or minor, it is necessary to point out that now that the fact that the complainants got injured is not in dispute, the other material particulars that the prosecution evidence ought to prove to the required degree of beyond reason able doubt is that it is the respondents who caused the injuries complained of.

67. To get to the bottom of this issue, the court will re-evaluate and re-consider the evidence of the key prosecution witnesses specifically with regard to which of the respondents as alleged assaulted which complainant, with what weapon and on which part of the body was the harm caused. With regard to PW1 Francis Kibet Kimetto he himself stated that the 2nd respondent was armed with a hammer and a panga and that he hit PW6 with the hammer on the elbow and he fell. That it is the 1st respondent who hit him on the head with a metal rod. PW2 stated that PW6 hit the 2nd respondent with a small stick but PW1 boarded the tractor and fell and got injured.

68. PW3 stated that the 1st respondent had a dropus and a metal rod and he hit PW1 on the head but he did not say with which weapon. He stated that 2nd respondent had a panga and a hammer and he hit PW6 with the hammer on the left shoulder. PW4 stated that the 1st respondent had a hammer and panga and he hit PW1 on the shoulder. He did not say with which weapon. That the 2nd respondent picked a dropus from the entrance and hit PW1 on the head but he did not say with what weapon. PW6 stated that the 1st respondent hit PW1 but he did not say with what and the 2nd respondent hit him with a hammer on the elbow. PW7 the investigating Officer stated that he could not tell who caused the injuries since they did not get eye witnesses.

69. In considering these discrepancies and contradictions, I find that if considered in isolation, that they are indeed minor and ought therefore not be fatal to the prosecution's case. In this regard, the case of Phillip Nzaka Watu vs. Republic [2016] eKLR is relevant. Therein, the court held as follows on the issue of contradictory evidence:

> "...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 recognized 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."

70. The above said, the court will now move to consider the prosecution evidence alongside the evidence of the respondents which they gave in their defence. Counsel for the State submitted that the defence of the 1st respondent ought not have been relied upon by the court in reaching its determination for reasons that it amounts to a defence of alibi which the respondent ought to have raised at the earliest opportunity and more particularly during the prosecution case and therefore, it was an afterthought. Counsel for the State submitted further that because the alibi was raised at the defence stage, the prosecution did not have the chance to tender any rebuttal evidence against the 1st respondent's alibi.

71. Indeed, the Court of Appeal in the case of Karanja V Republic Criminal Appeal No. 65 Of 1983 on when such a defence ought to be raised stated thus;

> "....in a proper case the court may, in testing a defence of alibi and in weighing it with all the other evidence, to see if the accused person's guilt is established beyond all reasonable doubt, take into account the fact that he had not put forward his defence, or his alibi, if it amounts thereto, at an early stage in the case, and so that it can be tested by those responsible for the investigation and prevent any suggestion of afterthought."

72. It should be noted however that it is not mandatory that if a defence of alibi is raised for the first time by a respondent at the defence stage then that evidence cannot be considered by the court for the reason that it can now not be tested. This is because a remed is available to the prosecution and the investigating authorities to subject this evidence to further interrogation if they so wish even if the alibi is presented by the respondent after the close of the prosecution case. The provision of the law that enables this possibility is Section 309 of the Criminal Procedure Code. Pursuant to this provision, the prosecution could have sought leave to adduce further evidence in reply to rebut the appellant's defence. The said section states as follows:

> " 309. If the accused person adduces evidence in his defence introducing new matter which the advocate for the prosecution could not by the exercise of reasonable diligence have foreseen, the court may allow the advocate for the prosecution to adduce evidence in reply to rebut it."

73. In this case, the prosecution failed to do so. However, because the respondents gave sworn statements of defence, the prosecution did subject their testimony to cross examination and in the process, they were at liberty to make the said cross examination as detailed and intense as possible with the sole of intention of demonstrating that the alibi raised was without substance and an afterthought with no merit whatsoever. This being the case, it is my considered opinion that the prosecution case was not at all prejudiced by dint of the fact that the 2nd respondent raised his alibi at the point that he did. For this reason, the court will proceed to consider the totality of the defence evidence vis-à-vis the prosecution evidence in reaching its determination.

74. The defence witnesses were unanimous that PW1 on approaching the place where the 2nd respondent was ploughing the land using a tractor, jumped onto the tractor and fell on the plough and was injured as a result. This evidence corroborates the evidence of PW2 as already herein summarized. The court notes that as far as the evidence of the defence witnesses goes, it does not state how PW6 on the other hand sustained the injuries complained of except that the PW6 too had climbed onto the tractor with PW1 and he attacked the 2nd respondent by attempting to hit him with the drupus that he and PW1 had picked on their way to the scene as they approached this respondent. DW5 did in fact state that PW6 hit the 2nd respondent with the drupus as he was trying to protect himself.

75. In considering the evidence of both sides, it is important to take into consideration the fact that the investigating officer who testified as PW7 was very clear in his testimony and it is firstly that a quarrel ensued between the complainants and the respondents which eventually degenerated into a fight and secondly, the witness stated that he could not tell who caused the injuries occasioned to the complainants since they did not get an eye witness as the altercation happened on family land.

76. The latter explanation by the investigating officer only goes to raise more questions than answers as follows; where did all these witnesses eventually emerge from? did they record their statements with the police? And if they did, how then could PW7 say at the hearing of the case that they were not able to get eye witnesses yet from their evidence all the witnesses, both for the prosecution and the defence save for the 1st respondent and his witness claimed to have been at the scene?

77. Further, if the Investigating Officer could not tell who caused the complainant's injuries how then did he reach the decision that it was the respondents who should be charged? And because it was his conclusion that the two sides were fighting, why did the Investigating Officer then choose to charge the respondents only? With all these unanswered questions which only goes to cast doubt on the objectivity and impartiality of the Investigating Officer in deciding to charge the respondents. This is because this decision to charge, given the surrounding circumstances as herein pointed out it lends

credence to the issue of malicious prosecution that the Learned Magistrate touched on but also did not explore to its logical conclusion in her judgement.

78. These circumstances also impact on the honesty and truthfulness firstly of the prosecution witnesses and also secondly to the veracity and trustworthiness of their evidence. It is at this point then that the seemingly minor discrepancies and inconsistencies in the testimony of the prosecution witnesses then become significant when juxtaposed against the questions that I have raised and more significantly the question as to where the prosecution witnesses came from and if indeed they recorded their statements in light of the fact that the Investigating Officer stated that he was not able to reach a conclusion on who to blame for reasons that there were no eye witnesses.

79. Having considered the entirety of the evidence in my analysis of the same that has then given rise to the queries that I have herein raised, I am satisfied firstly that the alibi raised by the 1st respondent was coherent and very well corroborated by the testimonies of not only the defence witnesses, but also by the evidence of some of the prosecution witnesses. In this regard, it is my finding that the 1st respondent was not at the scene but only came there after the fact.

80. Secondly, in determining whether the evidence has reached the required threshold of proof beyond reasonable doubt, emphasis must be on the evidence adduced by the prosecution witnesses. This is because as provided under the provisions of Sections 107, 108, 109 and 110 of the *Evidence Act* Cap 160 Laws of Kenya, the burden of proof lies with the prosecution and that burden does not shift to an accused person, herein the respondent, unless under the circumstances set out in Section 111 of the Act. The circumstances therein envisaged did not occur in this case.

81. In light of the above, the finding by the trial court that there existed a long standing dispute over land between the parties can therefore not be dismissed off hand. It is also not correct as asserted by the Counsel for the State that the existence of a land dispute is a non-issue in this case and the Learned Trial Magistrate ought not to have reached her determination by relying on this issue too. This is because in my consideration of the evidence in its entirety, what is apparent is that this was in fact a cross cutting issue and raised by both sides.

82. The allegations to the effect as made, and more particularly that the dispute is between PW1 and the 2nd respondent and that the two have litigated over this dispute before the various County Administrative Units and even before Court, and that the PW1 has consistently lost in all these forums was not at all rebutted, challenged, controverted and/or denied by the prosecution in their cross examination of the various defence witnesses. Indeed, the record shows that PW6 asked the 2nd respondent to stop ploughing the land because it had a case. An admission by one of the complainats who are the appellants herein.

83. Further, the prosecution did also not seek to clarify any issue raised touching on the dispute over land during the cross examination of its witnesses, by way of the re-examination of the said witnesses. This evidence therefore remains on record as unrefuted and it is indeed a very significant aspect of the evidence for reasons that it goes towards establishing the motive behind the commission of the offence. Motive is a key plank of the doctrine of mens rea which is applies in all criminal cases across the board.

84. From my analysis of the entirety of the prosecution as well as the defence evidence as herein, it is my finding that this evidence falls way far too short of the required threshold of beyond reasonable doubt. This being my finding then, I see no reason to fault the finding of the Trial Magistrate who too reached the same conclusion. In this regard, I find that the Appeal filed by the State on behalf of the two complainants lacks merit and the same is accordingly dismissed and the acquittal of the 1st and 2nd respondents under Section 215 of the Criminal Procedure Code is accordingly upheld.

85. Right of Appeal 14 days

READ DATED AND SIGNED AT ELDORET ON 26TH FEBRUARY 2026

E. OMINDE

JUDGE