



REPUBLIC OF KENYA



KENYA LAW
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**Kithinji v Republic (Criminal Appeal E090 of 2024)
[2025] KEHC 11217 (KLR) (30 July 2025) (Judgment)**

Neutral citation: [2025] KEHC 11217 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIBERA
CRIMINAL APPEAL E090 OF 2024
DR KAVEDZA, J
JULY 30, 2025**

BETWEEN

JAMES NTHUKU KITHINJI APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal against the original conviction and sentence delivered by Hon. Kabunya, I.M. (S.P.M) on 14th August 2024 at Kibera Chief Magistrate's Court, Criminal Case no. E0743/2018 Republic vs James Nthuku Kithinji)

JUDGMENT

1. The appellant was charged with the offence of assault causing actual bodily harm, contrary to section 251 of the *Penal Code*. After a full trial, he was convicted and sentenced to two years' probation.
2. Aggrieved, he filed a petition of appeal challenging the conviction and sentence. In the petition of appeal, he challenged the totality of the prosecution's evidence against which he was convicted. They urged the court to quash their conviction and set aside the sentence imposed.
3. As this is a first appeal, I am required to re-evaluate the evidence tendered in the trial Court and come to an independent conclusion as to whether or not to uphold the convictions and sentences. This task must have regard to the fact that I never saw or heard the witnesses testify (see *Okeno v Republic* [1973] EA 32).
4. The prosecution called four (4) witnesses in support of their case. PW1, Stephen Mugo, a resident of Kileleshwa, testified that on 1st June 2018 at around 10:00 am, upon returning from his morning walk, he was attacked by the appellant, who was inside his apartment building. The appellant allegedly opened the door, threatened to kill him, and forcefully banged his head against the wall. PW1 only managed to proceed to his house after his wife intervened. He later reported the incident at Kileleshwa Police Station, where the appellant also appeared, intending to lodge a complaint. PW1 sought medical



- attention due to swelling on his head and was advised to undergo an X-ray. He stated that there had been no significant conflict between them, save for a prior noise complaint.
5. PW2, Mary Wangui, PW1's wife, confirmed that PW1 entered their house appearing disoriented and informed her he had been assaulted by the appellant. She observed swelling on the back of his head. She accompanied him to the police station and noted that the appellant also arrived there. She acknowledged some prior tension between the two households.
 6. PW3, Dr Joseph Maundu, examined PW1 on 4th June 2018 and noted a non-tender swelling on the occipital region, along with soft tissue injuries on the chest. He classified the injuries as "harm" caused by a blunt object. Though the injuries were superficial, there was visible skin injury without breakage.
 7. PW4, the Investigating Officer, confirmed receiving the assault complaint from PW1 and noted that the appellant had also reported a disturbance claim against PW1. He opined that the appellant's counter-report appeared to be a retaliatory cover-up.
 8. Upon conclusion of the prosecution case, the trial court found that the evidence established a prima facie case against the appellant and placed him on his defence.
 9. In his defence, the appellant produced the investigating officer's diary and covering report. The diary showed that OB entry 14 was made at 1008 hours by the complainant, while his own report was lodged later at 1025 hours under OB entry 16. He was subsequently booked for the offence of assault. He also produced a copy of the complainant's medical report dated 1st June 2018. During cross-examination, he conceded that the complainant made his report before him.
 10. The appeal was canvassed by substantive submissions by the appellant, which have been duly considered, and there is no need to rehash them.
 11. Section 251 of the *Penal Code* (Cap 63) provides that:

" Any person who unlawfully assaults another and thereby occasions him actual bodily harm is guilty of a misdemeanour and is liable to imprisonment for five years."
 12. The offence comprises three essential elements: unlawful assault, actual bodily harm, and a causal link between the assault and the harm. The first element is unlawful assault. PW1 testified that on 1st June 2018, the appellant opened his door, threatened to kill him, and forcefully banged his head against the wall. This action was unprovoked and unjustified. PW2, his wife, confirmed that PW1 returned home disoriented, reported the assault, and had visible swelling on the back of his head. The conduct described was deliberate and unlawful.
 13. The second element is actual bodily harm. PW3, the examining doctor, noted swelling on the occipital region and soft tissue injuries on the chest. Though superficial, the injuries were visible, tender, and consistent with blunt force trauma. He classified the injuries as "harm," which meets the threshold for actual bodily harm under Section 2 of the *Penal Code*. PW2 also observed the swelling soon after the incident.
 14. The third element is causation. PW1 directly attributed his injuries to the appellant's actions. The medical findings matched the time and nature of the assault. There was no suggestion of another intervening cause. PW4, the investigating officer, dismissed the appellant's counter-report as an afterthought and a likely cover-up.
 15. The trial court considered the defence. The appellant produced the occurrence book entries and claimed to have reported a disturbance against PW1. However, the OB record showed that PW1 had



reported first, and the appellant's own complaint followed. During cross-examination, he admitted this sequence. The trial court found the defence unconvincing and properly rejected it in light of the consistent and credible prosecution evidence.

16. In the premises, the prosecution proved its case beyond a reasonable doubt. The conviction of the trial court was proper and is upheld.
17. The appellant was sentenced to serve two years on probation. In doing so, the trial court considered his mitigation and exercised its discretion. There is no indication that the court acted on the wrong principles or failed to consider relevant factors. The sentence imposed was lawful and proportionate. I therefore find no justifiable reason to interfere with the trial court's exercise of discretion on sentence.
18. In the premises, the appeal is found to be lacking in merit and is dismissed in its entirety.

Orders accordingly.

JUDGEMENT DATED AND DELIVERED VIRTUALLY THIS 30TH DAY OF JULY 2025

D. KAVEDZA

JUDGE

In the presence of:

Appellant Present

Ms. Chebii h/b for Mutuma for the Respondent

Ms. Karimi Court Assistant.

