



**Okello v Republic (Criminal Appeal E002 of 2024)
[2024] KEHC 17058 (KLR) (30 April 2024) (Judgment)**

Neutral citation: [2024] KEHC 17058 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT HOMA BAY
CRIMINAL APPEAL E002 OF 2024**

KW KIARIE, J

APRIL 30, 2024

BETWEEN

KENNEDY ONYANGO OKELLO APPELLANT

AND

REPUBLIC RESPONDENT

(From the original conviction and sentence in Criminal Case No. E037 of 2023 of the Chief Magistrate's Court at Homa Bay by Hon. J.S. Wesonga– Principal Magistrate)

JUDGMENT

1. Kennedy Onyango Okello was convicted of the offence of assault causing actual bodily harm contrary to section 251 of the [Penal Code](#).
2. The particulars of the offence were that on the 26th day of December 2022, at Kenyatta village, Kotieno sublocation in Rangwe Sub County of Homa Bay County, willfully and unlawfully assaulted Maurice Ogutu Wasee occasioning him actual bodily harm.
3. The appellant was sentenced to pay a fine of Kshs.20,000.00 in default to serve four months imprisonment. He was aggrieved and appealed against both conviction and sentence. Mr Ammon Oluoch, an advocate, represented him. He raised grounds of appeal as follows:
 - a. The learned trial magistrate erred in law and fact by wrongly treating PW2 as an eyewitness when the complainant, in his statement to the police, had not mentioned her as present during the incident.
 - b. The learned trial magistrate erred in law and fact by stating in her judgment that she did not find any reason why PW2 would lie when it was on record that the witness was the juvenile daughter of the complainant.



- c. The learned trial magistrate erred in law and fact when she failed to consider the following defence exhibits:
 - i. statement of the complainant
 - ii. statement of PW2
 - iii. statement of the appellant recorded at the police station
 - d. The learned trial magistrate erred in law and fact when she failed to consider and address the glaring contradictions between the contents of the statement of the complainant and PW2 vis-à-vis their oral evidence in court.
 - e. The trial magistrate grossly misdirected herself by not considering the contents of the complainant's statement recorded at the police station regarding who was present during the incident.
 - f. The learned trial magistrate erred in law in not drawing an adverse inference about the prosecution's failure to call Ashley and Otieno Okello as witnesses.
 - g. The learned trial magistrate did not appreciate that the prosecution had not discharged the burden of proof.
4. The state opposed the appeal on the grounds:
 - a. That the offence was proved.
 - b. That conviction and sentence were proper.
 5. This is a first appellate court. As expected, I have analysed and evaluated all the evidence adduced before the lower court. I have concluded, considering I neither saw nor heard any witnesses. I will be guided by the celebrated case of Okeno vs Republic [1972] EA 32.
 6. In his evidence, the complainant (PW1) testified when he saw a cow tethered on his tree, he moved closer and established that it was that of the appellant. He, therefore, called the appellant's son to remove it. The appellant, who was nearby, hit him on the left eye with a stone. He went on to say that his daughter Maryanne was present.
 7. His evidence in Court contradicted the statement that he recorded with the police: that Otieno Okello rescued him. He initially denied this fact, but when he was shown the statement, he conceded that that was what he had recorded.
 8. When Shelly Maryanne (PW2) testified, she said she was the only witness at the scene. In court, she testified that she was a pupil at Mission Shinnars Academy. She denied having gone to Bethel Academy, but the statement she recorded with the police indicates that she was a pupil at Bethel Academy.
 9. Ip Lubembe Claud (PW3) gave a different version of the incident. He testified that the complainant found a cow in his maize plantation. In the process, he enquired and saw the appellant's daughter. He called her to untie it. This was when the appellant appeared and hit him with a stone. This version was attributed to the complainant.
 10. The Court of Appeal in the case of Ndungu Kimanyi vs Republic [1979] KLR 283 (Madan, Miller and Potter JJA) held:

The witness in a criminal case upon whose evidence it is proposed to rely should not create an impression in the mind of the court that he is not a straightforward person, or raise a



suspicion about his trustworthiness, or do (or say) something which indicates that he is a person of doubtful integrity, and therefore an unreliable witness which makes it unsafe to accept his evidence.

11. The complainant places Otieno Okello at the scene and calls him his rescuer, but in another breath, he removes him and claims that only his daughter was at the scene.
12. This witness's credibility was severely dented and not redeemed.
13. The prosecution case contained a material contradiction. In his evidence, the complainant said the cow was tied to a tree and called his son to remove it. However, Ip Lubembe Claud (PW3) testified that the cow was in his maize plantation. He called the appellant's daughter to untie it. These contradictions were not reconciled.
14. The upshot of the preceding analysis is that the appellant's conviction was unsafe. I quash the conviction and aside the sentence. The fine that the appellant had paid is ordered to be refunded to him.

DELIVERED AND SIGNED AT HOMA BAY THIS 30TH DAY OF APRIL 2024

KIARIE WAWERU KIARIE

JUDGE

