

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MACHAKOS**  
**CRIMINAL APPEAL NO. E088 OF 2023**

**ANTONY  
MBOGO.....APPELLANT**

***VERSUS***

**REPUBLIC .....RESPONDENT**

*(Being an Appeal against the judgment by Hon.E. Kimaiyo Suter (PM) in Mavoko  
Chief Magistrate's Court case No E081 of 2023 Delivered on 5<sup>th</sup> December,  
2023)*

**JUDGMENT**

- 1.The Appellant herein **Anthony Mbogo** was charged with the offence of Assault causing actual bodily harm contrary to section 250 as read with section 251 of the Penal Code.
- 2.The particulars of the offence being that on 6<sup>th</sup> January 2023 at about 2100 hours at Standard Court in Githunguri area of Muthwani ward, in Athi -river Sub-county within Machakos County assaulted Florence Wangui thereby occasioning her actual bodily harm.
- 3.After hearing and analyzing the testimonies of the three prosecution witnesses and also that of the appellant the trial Magistrate found the appellant guilty on the charge of

defilement, convicted him and sentenced him to pay a fine of kshs 30,000 or serve 3 months imprisonment.

APPEAL:

4. Aggrieved by the Judgment the appellant filed his amended Petition of appeal based on the following grounds;

- “1) That the Learned Magistrate erred in law and fact by finding that there was sufficient evidence to prove the charge of assault against the appellant beyond reasonable doubt.***
- 2) That the Learned Magistrate erred in law and fact by failing to find that the prosecution did not prove the elements of the offence of assault causing bodily harm contrary to section 251 of the Penal Code as required by law.***
- 3) That the Learned Magistrate erred in law and fact in convicting the appellant against the weight of evidence and also against the uncorroborated evidence of the complainant.***
- 4) That the Learned Magistrate erred in law and fact when she failed to find that the circumstances of the alleged assault, the dates of visiting the hospital by the complainant raised doubts as to the commission of the offence so as to warrant a conviction of the appellant.***
- 5) That the Learned Magistrate failed to properly consider the appellant’s defence which if she had would have arrived at a verdict of acquittal.”***

5. The Appeal was canvassed by way of written submissions.

6. The Appellant submitted that there was material inconsistencies in the complainant's testimony especially because the medical evidence did not match with her testimony on where she had been punched.
7. He relied on the case of **Republic vs Oyier [1985] eKLR, Republic v Mwangi [2003] e KLR, Ndungu Kimanyi vs Republic [1979] eKLR.**
8. He submitted that the prosecution's case was riddled with contradictions, omissions and inconsistencies, the medical evidence failed to substantiate the essential elements of the offence.
9. It was submitted that in the instant case the prosecution did not prove the offence of assault causing bodily harm beyond reasonable doubt hence the conviction was not safe and urge the court to set the same aside.
10. On behalf of the Respondent it was submitted that state opposes the appeal on the grounds that the elements of the offence were proved beyond reasonable doubt and appellant's defence was considered by the trial court and dismissed.

11. It was submitted that the evidence of Pw1 confirms the appellant assaulted her on the material day and she suffered injuries that were corroborated by Pw2.
12. On the appellant's defence it was submitted that the defence by the appellant did not displace the prosecution's case and that the same should be dismissed as it consisted of mere denial.
13. The court was urged to uphold the conviction and sentence passed by the trial court

### **DETERMINATION**

14. I have considered the Appeal, the Trial Court record and the submissions of parties on record.
15. This is a first Appeal and I have considered and evaluated the evidence in the court below as was held in the case of **Okeno v Republic [1972] EA 32** that:

***“An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya v. R., [1957] E. A. 336) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (Shantilal M. Ruwala v. R., [1957] E.A. 570). It is***

***not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the Magistrate's findings should be supported. In doing so, it should make allowance for the fact that the Trial Court has had the advantage of hearing and seeing the witnesses, see Peters v. Sunday Post, [1958] E. A. 424."***

16. It is trite that all criminal offences require proof beyond reasonable doubt. Lord Denning in **Miller vs. Ministry of Pensions (1947) 2 All ER, 372** stated as follows:

***"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."***

17. The Appellant herein was found guilty and convicted of the offence of assault causing actual bodily harm contrary to section 251 of the Penal Code in the trial Court.
18. The grounds raised in this appeal can be collapsed into two issues. These are firstly, whether the Appellant's conviction for the offence of assault causing bodily harm was based on reliable, consistent and sufficient evidence; and secondly, whether if so, the sentence imposed on the Appellant was appropriate.
19. On the issue whether there was sufficient evidence to convict the Appellant for the offence of assault causing bodily harm, the ingredients of the offence of assault are the application of force on the person of another, which occasions bodily harm. In the present appeal, as regards proof of use of force on another person, the complainant who was PW1 testified that she was scratched on the face and punched on the face by the accused who is her husband. He also took a stool and hit her.
20. She testified that she went upstairs in the bedroom and locked herself through the night and the next day she decided to go report at Muungano Police.

21. Her evidence was corroborated by that of PW2 who examined her noting that she had gone to their facility 3 days after the occurrence of the offence and concluded at the extent of injury was harm by a blunt object. There was also treatment notes from AP Health Center which confirmed that she had a swelling on the right side of her face.
22. This evidence was consistent with the evidence of the nature of assault by the Appellant. It is thus my finding the prosecution proved its case beyond reasonable doubt, and the conviction of the Appellant by the trial Court for the offence of assault causing bodily harm was not erroneous.
23. On the second issue as to whether the sentence meted on the Appellant was appropriate, section 251 of the Penal Code in this regard provides that any person who commits an assault occasioning actual bodily harm is guilty of a misdemeanor and is liable to imprisonment for five years. The trial magistrate sentenced the appellant to pay a fine of KShs 30,000 in default serve 3 months imprisonment. I find no reason to interfere with the same.
24. I note that the offence arose from a family dispute, however I take note of the fact that the violence on PW1 could not

be wished away and apply the essence of the sentence being deterrence.

25.I accordingly uphold and affirm the conviction of the Appellant for the charge of assault causing actual bodily harm contrary to section 251 of the Penal Code.

26. This appeal thus fails and is hereby dismissed.

**Judgment signed, dated and delivered virtually on this 14<sup>th</sup> day of November 2025.**

**E N MAINA  
JUDGE**

**IN PRESENCE OF:**

Miss Kaburu for the state

Appellant in person

C/A: Geoffrey