

**REPUBLIC OF KENYA**

**IN THE CHIEF MAGISTRATES COURT AT MILIMANI**

**CRIMINAL CASE NO. 934 OF 2019**

**REPUBLIC -VERSUS- JAPHETH MUKINYI MWAKAVI**

**JUDGEMENT**

Japheth Mukinyi Mwakavi (the “accused person”) is charged with one count of wilfully obstructing an inspector in the discharge of his duties contrary to Section 24 (1) (a) as read with Section 35 (2) of the Anti-Counterfeit Act, 2008 Laws of Kenya. That on the 12<sup>th</sup> April 2019 at around 1100 hours at Inkymall building, River road, within Nairobi county in the Republic of Kenya, the accused wilfully obstructed Anti Counterfeit inspectors; Jackson Kerebei, Abdalla Ijaba, Aden Dube, Wanjala Wanyonyi and security officers, Inspector Margate Chege and CPL Msrtin Imana while enforcing a court order, miscellaneous criminal application No. 1561 of 2019 issued by Chief Magistrate court at Milimani Nairobi with others not before court. He is also charged with 2 counts of assault causing actual bodily harm contrary to section 251 of the Penal Code CAP 63 Laws of Kenya. The particulars are that on the 12<sup>th</sup> April 2019 at around 1100 hours at Inkymall building, River road, within Nairobi county in the Republic of Kenya, jointly with others not before court, the accused unlawfully assaulted Elvis Aura Nyadimo and George James Omondi thereby occasioning them actual bodily harm.

On 4<sup>th</sup> June 2009, the charges together with their particulars therein were read to the accused in a language he understood best and he pleaded not guilty to the charges. A plea of ‘not guilty’ was entered in all the charges.



The prosecution called a total of 9 witnesses who testified and produced evidence under oath.

**PW 1 JAMES OMONDI ARUM** testified that testified that he was an investigator and that on 12th April 2019, their client HP had instructed them to conduct an investigation on suspicion of counterfeit tonners in Inkymall Building along River Road. They identified three shops namely, Frontchrome Ltd, Wilicom and Tonner World. He was with two other officers from ACA. He was also in the company of 12 AP officers. The shop was closed and they had the authority to break in. The shops were in 1st floor. Before they could break in, the accused went with the crowd do disrupt the process. The accused held him by the shirt and pushed him to the crowd. 2 AP's pulled him back to the building. They started beating him and police cocked the guns. He was injured all over his body, head, hands, legs, ribs. He was all bloody. The accused hit him on the head, stomach and chest. He went to the hospital. He was then stood down and continued as PW 3.

**PW 2 ELVIS AURA NYADIMO** testified that he was a private investigator. On 12<sup>th</sup> April, 2019 he was doing investigation in town. It was about 1100 hours. They were identifying stores where fake tonners were. They were with other police officers. They were in Inkimall building along River Road. He left the other officers and went to get Anti Counterfeit officers. On return, he found a crowd of people. The crowd said that the officers could not do anything and that they were interfering with their businesses. The accused pulled one of his colleagues called George and started beating him.

PW 2 and others rescued him. George was bleeding. The accused said that the officers could not do anything in the building. He warned the officers that they would face the consequence. The accused chased away the police and cornered PW 2. He started beating PW 2. He



couldn't run away. George managed to run away. The witness finally managed to escape and met an officer called Abdalla who took him in a taxi and took him to hospital. He was treated upon which he reported the matter to Central Police Station and was given P3 form. He said that the accused beat him properly and even had a cut on his head. The P3 form was MFI 1. He said that he did not know the accused prior to the case. He identified the accused in court.

On cross-examination, he said that he recorded statement on 31/08/2019 and a further statement on 29/9/2022. He said that he was beaten by 3 people and that he indicated the same in his statement. He was beaten by the accused, Alex and Chege. He said that he was employed by Tango and that he was working on its behalf. He said that he had seen counterfeit goods between January and March. He said that he had bought fake tonners but could not remember the quantity. They got there between 10-11 and that he could not really recall since he was beaten. He reported the incident on the same day and that the P3 form says 3 days later. He was treated by a male doctor.

The weapon used was blunt object and that the total number of police was 12. The accused cornered them and the police was told to leave. He was beaten by about 3 people and that there were about 200 people outside the building. He knew Chege and Alex. He said that he had been to the shop and that he saw the accused on that day.

On re-examination, he said that he saw the accused just before the accused began beating him. He was close to him. He was beaten by 3 people. He went to the doctor after three days.

**PW 3 JOHN JAMES OMONDI ARUM** who testified on 18th October 2022, stated in chief that he was a security



consultant and that he offered consultancy and training, investigation, forensic and fraud. He had a consultancy firm called Top Max Consultancy Ltd. He said that on 12th April, 2019 they were conducting a sweep for HP products. He was contracted through Tango Security. They identified 2 outlets. Front Chrome Ltd owned by Francis Njau of ID 21191349, Lizgate Enterprises.

The other one was Copyrex Business solution on Latema Road owned by Alex Chege Ruhia of ID No. 21662407. They were able to analyse the products which result confirmed that they were fake. On 12th April 2019 they were in company of Anti-Counterfeit Authorities and 12 police officers when they went to the 2 shops. The Frank home shop was closed. Someone had tipped them off. The Copyrex shop was open and upon analysing the tonners, they were all genuine. The officers had a court order to break the closed store with the fake tonners. The accused was shouting at the top of his voice. He held PW 3 and started pulling him towards the crowd. He was beaten and it's the police who saved him. He was taken inside the building bleeding.

~~That the accused together with Alex and Francis followed them inside the building and continued beating them. He managed to escape and took a taxi to Mater Hospital where he was treated and discharged. He had the treatment notes. He reported the matter at Central Police station.~~

MFI 2 was P3 form while P.exh 3 was treatment notes. He was called to do an analysis of the 993 tonners. He did a report dated 18th/April/2019 which was P.exh 4. He had a Power of Attorney dated 8th /May/2019 which was P.exh 5 and another one dated 9th/April/2019 from Anti-Counterfeit Authority which was p.exh 6. Letter of complement was p.exh 7.



The accused raised an objection during cross examination that he did not have all documents hence was not able to effect cross examination.

**PW4 WANJALA WANYONYI**, said that he was a ACC officer employed vide Gazette No. 2654 of 19th/March/2019 (exh 8). On 12th April 2019 he was in the office in the HQ's when he was asked to accompany colleague officers who had a court order to search a building along River Road. He went with inspector Abdi ,Kelebie, Abdalla, PC Chege, CPL Maina and other police officers they went to River Road. They were led to a building by a complainant who had launched a complaint of suspected counterfeit HP Tonners. MFI 9 was Misc. Application. While there they found the store. Suddenly a group of rowdy youths went to them and began shouting calling them thieves. They obstructed them from carrying on with their legal duties despite them even showing the court order.

His colleague Abdalla was thrown into the crowd and had his shirt even torn. He was rescued by the police. They called for backup. The shop was then broken and goods taken to a deport. There was an inventory of the goods 001057. The inventory was MFI 10. There were also photos showing how they were obstructed. MFI 11 was the photos and MFI 12 was the torn shirt. The accused was present and was even the one who pulled the police outside. He said that he did not witness the assault but saw the injuries after the confrontation.

On cross examination, he said that they got to the place at about 11.00 am and the premises was closed. The accused was among the crowd. He was not sure whether he was captured in the photos. They broke into the building after the enforcement went in. There were two inventories and that he could only see one in court. He



said that he did not see the accused assaulting the people.

On re-examination, he said that the accused was part of the crowd and was shouting. He was charged with obstruction and assault.

**PW 5 DR. KAMAU MARIGA** testified that he was a doctor and surgeon. He was in court on behalf of Dr. Mwandu. He wanted to produce the P3 form under Section 77 of the Evidence Act. There was no objection to the production and he produced MFI 2 as p.exh 2. The form of PW 1 confirmed that he was indeed assaulted and had injuries on the upper limbs and cut wounds on both hands. The injury was 3 days old. He was assaulted by blunt object. He had another P3 form of PW 2. He had bruises and cuts. The injuries were 3 days old and that he was assaulted by blunt object. He produced the documents as evidence. The documents were in the archives.

On cross examination, he said that he did not the doctor who treated PW 1 and 2. He did not see the treatment records. He said that he went to court to ascertain the injuries and give the degree of injuries. He said that he did not examine the patients. He took over the office upon the death of Dr. Maundu.

On re-examination, he said that the patients appeared with the treatment notes and had been attended to at Mater Hospital.

**PW 6 No. 235200 CI SAMSON OGUTU** testified that he worked at DCI Forensic Lab doing forensic investigation. He said that he is qualified analyst with 8 years' relevant work experience. He was an officer appointed by DPP under Gazette Notice 5548 dated 30th June 2015. He processes, analyses and certify photographic images and electronic recording and pen section as per sections 106, 78 A and 78B of the Evidence Act. On 6th September



2019, IP Kiptanui brought 2 sealed envelopes to the lab (MFI 13 a). There was a video recording and exhibit memo signed by Kiptanui (MFI 13b). He was to process the footage and prepare a report. He produced the report as P. exh 15 (a). He also had certificate of production. He also produced 8 photographs as p. exh 11(a-h).

On cross examination, he said that he did not know which phone was used in recording and also did not know whether it had a sim card. He received the photos and videos in his lab. The accused is not shown saying anything. The video shows the side of the face. He was not given any document about the ownership of the building.

The video does not show which cloth is torn and the time. The footage did not have the name of Inkymall and that he was given the report by the IO which guided his investigation and that he did not know who took the video.

On re-examination, he said that he was in court to produce the photos and video in court and that the accused was at the scene.

**PW 7 ACI ABDI ADEN** testified that he was number 201902174 and was attached at AC HQ's. On 12th /April/2019 he was in the company of PW 1, Inspector Jackan, Inspector Abdalla when he was assigned to implement a court order. (MFI 9). Upon arrival, they were faced by resistance from the shop owner. The shop is located at Inkymall along River Road. They were to seize fake HP tonners. The accused identified himself to them as the owner of the shop. He was not cooperative.

He grabbed PW 7 by the shirt and started pulling him to the crowd. The accused started calling the officers as thugs. His shirt got torn by the crowd. He had the torn shirt in court. It was torn by the accused. They seized the goods and went to Nairobi Central for report. He knew the accused since he saw him on the material date. He said



that he was in charge of business owners in that area. He said that his colleague recorded the video. He identified the accused and he saw the photos. He said that the accused was in photo no. 6 while PW 7 was in photo no.7.

On cross examination, he said that he recorded a statement. He said that PW 1 and PW 2 were assaulted but he did not record the same in the statement. He saw the accused assaulting them. He did not have any evidence that the phone was his. The video and photos do not show the accused assaulting him. He also did not know if the items seized belonged to the accused. There was another man who was shouting in the video and PW 7 did not know why the man was not arrested.

On re-examination, he said that the accused was part of the crowd and was present on the material date. He introduced himself as the owner of the shop.

**PW 8 JACKSON KEREBEI** testified that he was number 201902175 and was employed by ACA. On 12th April, 2019 he was in the company of others when following a complaint made by PW 1 about counterfeited HP tonners. They were executing an order vide MFI 9. Both PW 1 and PW 2 were present identifying the stalls. Before they could be shown the store, the accused was there with his goons to block the legal exercise. They began shouting saying that they were thieves. PW 8 had a reflector of ACA. His shirt became torn. Japheth pulled PW 1 to the crowd saying that they were the people disturbing them. P. exh 12 was the shirt. The crowd entered the building and found the two complainants. He didn't see them being assaulted since he was outside. They called for backup. The accused was present and operated two stalls no. 57 and 63. PW 8 did an inventory (p. exh 10). The counterfeited goods were taken to the police. The two complainants went to record statements. He said that the accused was not known to him prior to the material



date and that a video was taken by phone of IP Dube (p. exh 13). There were many people not before court. The accused tore IP Dube's shirt (p.exh 11). He said that he took the photos and did not capture the whole episode. The accused didn't introduce himself and among those who obstructed them. He said that he did not have P3 forms and that he didn't also see any physical injuries. He didn't know the accused before the incident.

On cross examination, he said that the accused didn't introduce himself to him and that he did not also see the accused assaulting the complainants. He did not see the accused speak in the video clip. He didn't have any inventory. The crowd was about 10 members that came with the accused then it grew.

On re-examination, he said that they introduced themselves and even had the court order hence their reason to be there. They were shown the two stalls by the complainants.

**PW 9 IP ABDALLA IJABA** testified that he was number 20190259. On 12th April, 2019, they went to Inkymall building along River Road to execute a search pursuant to Court order (MFI 9). Upon arrival, they found the accused who introduced himself as the owner of the building. The officers also introduced themselves. The officers requested to enter the building where the stalls were. It was at this point that the accused started shouting "wezi". The crowd became huge and a lady came and pulled PW 1 to the crowd. PW 9 said that it was the complainant who assaulted PW 2. He also said that he was the one who asked for reinforcement from the AP police who came in a lorry.

On cross examination, he said that they introduced themselves and that the accused is the one who called the crowd to block them from performing the exercise. He said that he did not know who assaulted PW 2.



On re-examination, he said that he was present when the incident happened. The two complainants were assaulted.

This court found a prima facie case to have been established and placed the accused person on his defence vide Ruling on 14th September 2023.

### **C. DEFENCE CASE**

The accused complied with Section 211 of the Criminal Procedure Code and chose to give unsworn evidence without calling witness.

**JAPHETH MUKINYI MWAKAVI** testified that he lived in Nairobi and was a businessman. He knew why he was in court. On the material date, he was on 1st floor when he heard commotion. He was in charge. He went downstairs and found more than 20 police and a large crowd. He asked what was happening and was told that the AC police went to raid the premises. People were shouting and tear gas was lobbed upon which people scattered. A lorry then came full of AP's and arrested him. He was then charged.

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### **ISSUES FOR DETERMINATION**

This court is therefore with the following issues for determination

- i. Whether the accused wilfully obstructed an inspector in the discharge of his duties
- ii. Whether the accused assaulted Elvis Aura Nyadimo causing actual bodily harm
- iii. Whether the accused assaulted George James Omondi causing actual bodily harm

### **ANALYSIS OF ISSUES.**



## OBSTRUCTION OF INSPECTOR IN DISCHARGE OF DUTIES

Section 24 (1) (a) of the Anti-Counterfeit Act, 2008 defines wilful obstruction as **“A person who wilfully obstructs an inspector in the discharge of his duties commits an offence”**

PW's 1,2,3,4,6,7 and 8 all testified that on 12th April 2019, they went to Inkymall Building to effect a court order (p. exh 9) which warranted them to enter and search for suspected counterfeit HP tonners. The witnesses all gave sworn evidence that upon arrival at the premise, they faced an encounter with a crowd. The crowd shouted at the witnesses making the execution of the court order difficult. Each statement of each witness corroborated each other. In defence the accused testified that he lived in Nairobi and was a businessman. He knew why he was in court.

On the material date, he was on 1st floor when he heard commotion. He was in charge. He went downstairs and found more than 20 police and a large crowd. He asked what was happening and was told that the AC police went to raid the premises. People were shouting and tear gas was lobbed upon which people scattered. A lorry then came full of AP's and arrested him. He was then charged.

It is upon the prosecution to prove their case and the standard of proof must be beyond reasonable doubt. The obstruction according to the evidence, was caused by a crowd and not by the accused. It is therefore very clear that the prosecution has not satisfied both provisions of

Sections 107 (1) which provides that **“Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”** and 109



which states that ***“The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person”*** of the Evidence Act CAP 80.

In the premise, I find that the prosecution has failed to prove its case against the accused beyond reasonable doubt. I hereby proceed to convict the accused under section 215 of the Criminal Procedure Code.

### **ASSAULT CAUSING ACTUAL BODILY HARM**

Section 251 of the Penal Code defines assault as ***“Any person who commits an assault occasioning actual bodily harm is guilty of a misdemeanour and is liable to imprisonment for five years.”***

PW 1 said that the accused held him and pushed him to the crowd. PW 4 said that he did not witness the assault while PW 6 produced a video which did not show the face of the accused person. It only showed the sides of the accused and did not also show which clothe was torn. Without much deliberation, it is not in doubt that both PW 1 and PW 2 were assaulted. What this court needs to determine is whether the accused herein caused the assault causing actual bodily harm to both PW 1 and PW 2.

Sections 107 (1) provides that ***“Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”*** and 109 states that ***“The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person”*** Evidence Act CAP 80.



This court is a court of evidence and ultimate justice. **Article 50 (2) (a)** of the Constitution of Kenya 2010 provides that: - **“Every accused person has the right to a fair trial, which includes the right-- to be presumed innocent until the contrary is proved.”**

Not only is the burden of proof lies with the prosecution but the standard of proof must also be beyond any reasonable doubt. it is the duty of the prosecution to establish the guilt of the accused for the offence charged beyond reasonable doubt. See **Woolmington v DPP [1935] EA 462 at 481.**

Out of all the corroborative prosecution evidence, the prosecution decided to produce a video footage which to me is independent evidence. The same shows the accused only standing by and watching like the rest of the multitude. It decided law that evidence however strong but not proved to required standards can't for a basis of conviction in other words the court can't convict on strong suspicion. **Joan Chebchir Sawe -vs- Republic Court Appeal 2000 eKLR.** The same position was held in **Bukenya -VS- Uganda 1972 KLR.**

This court has assessed the strength of the evidence by the prosecution and the same has been found not as satisfactory and transparently reliable. Taking this test and standard into consideration, the Prosecution has not placed enough material to make this a fit case.

Falling from above, the prosecution has not proven its case beyond All reasonable doubt and this court proceeds to acquit the accused in all the counts under Section 215

CPC.

Judgment is dated and signed in open court in the presence of the accused.

✓ Certify that this is a true copy  
of the Original

CHIEF MAGISTRATE  
MILIMANI LAW COURTS



This 20th day of November 2023

**HON. MARTHA NANZUSHI**  
**SENIOR PRINCIPAL MAGISTRATE.**

I Certify that this is a true copy  
of the Original  
[Signature]  
CHIEF MAGISTRATE  
MILIMANI LAW COURTS