



**Elema v Republic (Criminal Appeal E001 of 2024)  
[2025] KEHC 12900 (KLR) (Crim) (18 September 2025) (Judgment)**

Neutral citation: [2025] KEHC 12900 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ISIOLO  
CRIMINAL  
CRIMINAL APPEAL E001 OF 2024  
SC CHIRCHIR, J  
SEPTEMBER 18, 2025**

**BETWEEN**

**ADAN GUYO ELEMA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an Appeal from the Judgment of Hon. L. Mutai ( CM), delivered on 15th May 2024 in Isiolo chief Magistrate’s court criminal case No. E125 of 2022)*

**JUDGMENT**

1. The appellant was charged with the offence of attempted murder contrary to section 220 (9) of the Penal Code. The particulars of the offence were that on the 23<sup>rd</sup> day of December 2022 at Komdurte Area, Kom Location in Merti sub- county within Isiolo County, attempted to unlawfully cause the death of Garbija Doyo by stabbing him with a knife on his ribs and head.
2. At the conclusion of the trial, the court reduced the offence to that of grievous harm ,contrary to section 234 of the penal code, and convicted him of the same. Aggrieved by the outcome, he has moved to this court on Appeal.

**Petition of Appeal**

3. In his amended grounds of appeal he has pleaded as follows:-
  - a. That the trial magistrate erred in both matters of law and fact for convicting and sentencing the appellant to serve an unlawful sentence in contravention of Section 389 of the Penal Code and Article 50(2) (P) of *the constitution*.



- b. That, the time spent in custody while undergoing trial was not taken into account during sentencing as stipulated by Section 333(2) of the Criminal Procedure Code.
  - c. That, the learned Magistrate erred in both matters of law and fact by failing to notice that identification of the appellant as the possible assailant fell short of the required standard in law.
  - d. That the learned Magistrate erred in both matters of law and fact by failing to notice that there existed personal differences between him and the complainant.
4. The appeal was heard by way of written submissions.

#### **Appellant's submissions**

5. It is in the appellant's first submission that he was sentenced to serve unlawful sentence of 15 years imprisonment in contravention of Section 389 of the Penal Code and Article 50(2) of *the Constitution*.
6. He further submits that there is a conflict between sections 220(a) and 389 of the penal code and Article 50 (2) (p) of *the Constitution*. He states that the drafters of both sections of the penal code created two sentences for the same crime. He further submits that in terms of the provisions of Article 50 (2) (p) of *the Constitution* this court should declare that he is entitled to the serve sentence provided for under section 389 of the Penal Code.
7. On the provisions of the Section 333 (2) of the Criminal Procedure Code, the appellant states that he spent 1 year, 4 months and 19 days in custody, which period was not discounted from his sentence.
8. The appellant further argues that he was not identified as the assailant. He points out that the when the complainant reported the incident to the police, he did not name the attacker; that although the complainant told the court that he used to see the person who stabbed him in the quarry, he did not state whether he was familiar with the voice of the said person. He further points out that the incident happened at 8:30 p . m and there was no moonlight or other form of illumination; that under such circumstances it was difficult for PW1 and PW2 to have positively identified the assailant. He contends that it was for this reason that the complainant could not give any name or description of the assailant to the police when he made the report. In this regard, the appellant has relied on the case of Norman Ambich Miero & Ano -vs- Republic, Nairobi CR. Appeal No.. 229 of 2005.
9. He further states that even when identification is through recognition, mistakes can still occur. To conclude on this issue, the appellant submits that the identification was not proved beyond reasonable doubt and his conviction was therefore unsafe.
10. It is the appellant's final submissions that there was a pre-existing dispute between him and the complainant over ownership of a mine at KOM area in Isiolo County; that the complainant framed him, so as to get rid of him and give the complainant a chance to take over the gold mine.

#### **Respondent's submissions**

11. On the legality of the sentence, the respondent submits that contrary to the appellant's submissions, he was convicted and sentenced for the offence of grievous harm and not attempted murder .That consequently the Appellant's allegation that he was convicted under a wrong section of law is unfounded.
12. On the provisions of section 333(2) of the criminal procedure code, the respondent concedes that the period spent in custody was not factored in . On identification, it is the respondent's submission that



the complainant's knew the appellant before the incident and that the complainant and PW2 placed the appellant on the scene.

13. On whether the charge was a fabrication due to alleged previous personal differences between the Appellant and the complainant, the respondent submits that the appellant did not provide particulars of , or the nature of the feud; that in any case the Appellant gave an unsworn statement, whose probative value is little.

#### **Analysis& determination**

14. An appeal to this court from the Magistrate's court, is by way of retrial. Consequently, this court is expected to review the evidence, do its own evaluation and arrive at its own findings. However, allowance must be made for that fact that the trial court had the advantage of seeing the and hearing the witnesses first- hand.
15. I have considered the grounds of appeal and party's submissions and I have identified the following issues for determination:
  - a. Whether the sentence imposed was lawful.
  - b. Whether Section 333 (2) of the Criminal Procedure Code was complied. With.
  - c. Whether the charges was motivated by ulterior motive.

#### **Whether the sentence was unlawful**

16. The appellant was initially charged with the offence of attempted murder, but at the conclusion of trial , the court reduced the charge to grievous harm contrary to section 234 of the penal code. This was following the court's finding that the circumstances of the offence did not prove the offence of attempted murder. He was then sentenced to 15 years.
17. Section 234 of the penal code provides as follows: 'Any person who unlawfully does grievous harm to another is guilty of a felony and is liable to imprisonment for life". The sentence of 15 years, for the offence of grievous harm, is therefore valid. Further when considered against the prescribed sentence of up to life imprisonment, 15 years was not excessive. Nevertheless, to the extent that the appellant in his submissions assumes he was convicted and sentenced for attempted murder, his argument is misplaced.

#### **Whether Section 333 (2) was complied with.**

18. Section 333(2) of the Criminal Procedure code provides as follows: "Subject to the provisions of section 38 of the Penal Code (Cap 63) every sentence shall be deemed to commence from, and to include the whole of the day of, the date on which it was pronounced, except where otherwise provided in this Code. Provided that where the person sentenced under subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody.'
19. It is trite law that the requirement under the section is that the period spent in custody prior to conviction must be discounted from the period of sentence meted out. (See Paragraphs 2.3.18 and 2.3.19 of the Kenyan Judiciary sentencing policy guidelines and the court's decision in the case of Bethwel Wilson Kobor Vs. Republic (2009) eKLR cited by the Respondent. )
20. The record shows that the appellant was arraigned in court on 29.11.2022 and remained in custody up to 15.4.2024 being the date he was convicted. The record is silent on whether the trial magistrate factored in the 1 year, 5 months and 17 days ,the appellant had spent in custody while undergoing trial.



I will take the silence to mean that this period was not factored in. This ground of appeal is therefore merited.

### **Whether The Appellant Was Positively Identified As The Perpetrator**

21. It is the appellant's case that the incident took place at night and there was no illumination. That the complainant could not have identified him and indeed that was the reason why the complainant did not provide a name to the police when she reported the incident.
22. I have perused the witnesses' accounts and I find that there is nothing indicating that this question was posed either to the complainant (PW1) or the investigation officer (PW3). The submission that no name was given to the police therefore has no evidential basis.
23. Although there is no contention on the time of the incident which was given as 8:30 p.m., the complainant told the court that the attacker first talked to him before stabbing him. The complainant stated on cross-examination "you first spoke to me and then stabbed me". Then on re-examination he stated, "I knew the accused well before".
24. Further, the complainant was not the only witness on the issue of identification. PW2 told the court that he was at the Quarry when the attack took place. He heard the complainant talking to the accused.
25. Finally on this issue of identification, the appellant's line of cross-examination of the complainant PW2 and PW3 show that identification was a non-issue. The whole of the complainant's testimony at cross-examination went as follows: "I would not know why you stabbed me at 8:30 p.m. We never differed because of your mother and gold mine. I was working as a casual worker at the mining quarry. You were looking for somebody, you had a rungu and a knife. You stabbed me on the head as well. Somebody saw you attacking me. I have never been summoned by the elders. You first spoke to me and then stabbed me". On the other hand the PW3 stated on cross-examination, "I saw you stabbing the complainant. I escorted him to hospital; you ran away from the scene of the attack. I did report the matter to the police station. I saw the complaint with injuries on the person."
26. Thus the appellant herein never raised issues of identification during cross-examination of the prosecution witnesses. He never questioned the complainant or even the investigation's officer (PW3), on whether they had the right person. Identification therefore was not an issue during trial. It has only been raised in this appeal. It is merely an afterthought.
27. Finally, in his defence the Appellant told the court that he used to work with the complainant. Thus these were two people who knew each other well. It is trite law that identification by way of recognition is more assuring and more reliable.
28. In the circumstance this ground of appeal is dismissed.

### **Whether the Charge was a Fabrication .**

29. The appellant has argued that the charge he was facing was a fabrication; that it was fabricated so to get him out of the way, and allow the complainant free access to the mine. He has also stated that they had had a dispute over the said mine.
30. It emerged from the cross-examination of the complainant that indeed there was a dispute relating to the mining quarry, as the complainant stated "it is not true I wanted to take your gold mine by force". In my view what the above answers suggest is that the mine was the reason for the quarrel, and eventual attack, and not fabrication to get the appellant out of the way.



31. Further, although the Appellant in his testimony stated that the case was made up against him , he did not state that it was fabricated by the complainant in order to have him removed from the mine. For the effect I will reproduce the his entire, unsworn, testimony. It went as follows: ‘I am Adan Guyo Elama. I am familiar with the allegation. I left Moyale at KOM at the gold mines. People got jealousy over me. I used to work with the complainant. I feel(sic) sick and when I went back to work I was told off. I left and looked for another group. I started working well. I heard later that the grounds had collapsed since we used to dig gold. It was alleged that I was the cause. They came after me and I ran to the police station. This case was just made up against me. “I deny the allegation”. His reference “people” could not and cannot be read to mean the complainant. The basis or circumstances surrounding the jealousy have not also been stated.
32. I am therefore not convinced that the charge was a fabrication. There was medical evidence that the complainant was injured, and I am satisfied based on the testimony of the complainant and PW2, the appellant was the attacker. This ground of appeal is equally without merit.
33. I am satisfied that the prosecution’s case was duly proved and the appellant’s conviction was safe. On the sentence, the appeal partially succeeds, as aforesaid .
34. In conclusion I hereby proceed to make orders as follows:
  - a. The conviction by the trial court is upheld.
  - b. The sentence is upheld, save that the same is varied to the extent that it is deemed to have taken effect from 29/11/2022 being date when the appellant was first arraigned in court.

**DATED, SIGNED AND DELIVERED AT ISIOLO THIS 18<sup>TH</sup> DAY OF SEPTEMBER, 2025**

**S. CHIRCHIR**

**JUDGE.**

In the presence of :

Roba Katelo- court Assistant

Adan Guyo- The Appellant

Mr. B. Ngetich- for the Respondent.

