

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISUMU
CRIMINAL APPEAL NO. E082 OF 2025

VINCENT OTIENO OPEYO APPELLANT

- VERSUS -

REPUBLIC RESPONDENT

(Being an appeal from the judgment & conviction of **Hon. M.N. Olonyi SRM** delivered on the 13/08/2025 and sentence passed on the 15/08/2025 in **Tamu SPMCC Case No. E025 of 2025, R. vs Sperious Gor & Vincent Opeyo**)

J U D G M E N T

1. The appellant and others not before Court were jointly charged with the offence of grievous harm contrary *to section 234 of the Penal Code*. It was alleged that on the **18/01/2025** at around **0030hrs** at Super Digital Bar in Muhoroni sub county within Kisumu County, they intentionally and unlawfully did grievous harm to one **Carrey Francis**.
2. The appellant pleaded not guilty and the matter proceeded to trial. The prosecution called four (4) witnesses while the appellant gave a sworn testimony and further relied on the testimony of 5 other witnesses.
3. In its judgment dated **13/08/2025**, the trial court found the appellant and his co-accused guilty of the charge, convicted and sentenced them to serve 10 years' imprisonment.

4. Dissatisfied by that decision, the appellant filed his petition of appeal dated **26/08/2025** raising six (6) grounds summarised as follows: -

- a) **That the learned trial magistrate erred in law and in fact by failing to appreciate that the prosecution did not prove their case beyond reasonable doubt against the appellant herein as required by law.**
- b) **That the learned trial magistrate erred in law by failing to adhere to the provisions of section 211 of the CPC by purporting to have delivered a ruling on a no case to answer whereas there was none.**
- c) **That the learned trial magistrate erred in law and in fact by failing to consider the appellant's defence.**
- d) **That the learned trial magistrate erred in law by failing to set out the issues for determination in her said judgment and thereafter determining them thereby going against good judgment writing.**
- e) **That the learned trial magistrate erred in law by imposing a harsh sentence to the appellant whereas the appellant was a first offender.**

f) **That the learned trial magistrate erred in law by failing to set out the issue to be determined thereby going against the rules of judgment.**

5. This being the first appellate Court, its duty is well spelt out, namely, to re-evaluate the evidence tendered before the trial court and subject it to a fresh analysis so as to arrive at its own independent conclusions and findings but at all times bearing in mind that it did not see the witnesses testify. (See **Okeno v Republic [1972] EA 32.**)
6. **Pw1 Carrey Francis**, the complainant, testified that on **18/01/2025** he went to watch football and joined his friends Edwin Ochieng, Francis, Joy and Kevin. That as they watched the match, his friends started dancing as he sat. That a waiter, Evelyn, approached them and held Joy by the neck claiming that Joy had stepped on her. That Edwin and others managed to separate the two ladies and they continued seating peacefully.
7. That Evelyn returned and pulled Frenzy's head causing her to fall but the two were separated again but the appellant came and started beating the girls before pulling them outside. That all this time, he was sat at the table. That the appellant returned with one Owino and pushed the table **Pw1** was at causing the alcohol that was on the table to pour.

8. **Pw1** stood up, took his phone and stood by the side but was surprised when the appellant punched him in the eye and mouth, grabbed him by the neck and pulled him outside. That at the door, Owino hit his leg with a chair causing him to fall down at which point the appellant stepped on his leg. That one Sperious Gor joined the appellant in the attack and beat him with a whip.
9. That the beating continued until people from a neighbouring pub came screaming alarmed at the level of beating he was receiving. That after the beating, the appellant took his phones while Gor took his watch, ring and shoes. That he subsequently sought treatment where it was established that he had injuries to his ribs and leg and further that his pulmonary artery had enlarged.
10. **Pw1** identified the appellant as one of the individuals who attacked him, a person he had known for almost a year as he used to go watch football at his bar.
11. In cross-examination, **Pw1** reiterated that the appellant was part of the people who attacked him. That though the appellant was not armed, he used his hands and legs to attack him. In re-examination, he stated that on the night of the incident, he had gone to watch football at Super-Digital Bar. That though he sat with people who drank alcohol, he drank no alcohol.

12. **Pw2 David Matheri**, a clinical officer testified that he filled the P3 form for the complainant which he produced as PExh1b. He testified that he examined the complainant and established that he had sustained injuries to the right knee, back, had chest pains and bruises caused by whips.
13. That on further examination he noted that the complainant had a swollen puffy face especially on the right cheek, swollen upper limbs with blood stains, difficulties in opening the mouth with tenderness on the jaws, red right eye caused by accumulation of blood on the white part caused by trauma, tenderness on the head with multiple swelling. That the complainant was not under the influence of alcohol. As a result of his examination, he assessed the degree of injuries sustained by the complainant to be grievous harm meaning permanent – semi permanent as he could not function as before with his right knee.
14. In cross-examination, he told the court that he had previously worked with the complainant at Muhoroni sub-county hospital.
15. **Pw3 Frenzy Atieno Adoyo** testified that she worked at Super – Digital Bar. That at the material time, she was watching football with her friends Joy and Edwin. That they were taking alcohol as they waited for the football match to commence and were later joined by **Pw1**.

16. That one Evelyn who was sitting at the corner approached them and started choking Joy prompting her to forcefully separate them. That she saw Evelyn approach Collabo. The two returned and Evelyn dragged **Pw3's** hair causing her to fall while Collabo slapped and dragged Joy out of the bar.
17. That all this time, the complainant was seated watching and scrolling his phone. That when Collabo returned, he poured all that was on the table and attacked the complainant. He was joined by Gor and Owino in the assault an assault which continued leading to the complainant sustaining serious injuries. She identified the appellant as Collabo.
18. In cross-examination, **Pw3** reiterated the nature of the appellant's assault on the complainant. She further denied dating the complainant or that he was renting a house for her.
19. **Pw4 No. 112008 PC Evans Opiyo** testified that on the **18/01/2025**, the complainant made a report on grievous harm against him by 4 men while he was at Super-Digital Bar. That he was tasked with carrying out investigations over the case and on physical examination of the complainant, he noted that he had bruises on the face, injured left leg, some marks on the stomach and on the head.
20. That he further established that the complainant's motorcycle had been damaged by the individuals who attacked him specifically one Sperious Gor.

That when they went to the scene, things appeared normal as the floor had already been washed.

21. In cross-examination, he admitted knowing the appellant as the business community Chairman and owner of Super –Digital Bar. That the appellant went missing after the incident. That he discerned that the case was one of grievous harm from the injuries sustained by the complainant and had not escalated to robbery with violence.
22. At the end of the testimony of **Pw4**, the prosecution closed their case and the trial court made a ruling on case to answer finding that the appellant and his co-accused had a case to answer thus putting them on their defence.
23. When placed on his defence, the appellant gave a sworn testimony denying the charges against him. He testified that on the day of the incident, he was in his office which is a few meters from the bar when he heard a commotion. That he saw a customer who approached his office asking him why he was calm whereas there was commotion in the bar. That he informed the customer that there was a bouncer to handle the same but the customer retorted that he could not see the bouncer hence his approach.
24. That he then rushed into the bar where he found one of his workers, Evelyn on the ground being fanned. That he saw customers fleeing and others left

the scene. That the following day, he learned that people were being arrested for attacking the appellant and that he was also being pursued.

25. That being the leader of the business community, he would usually receive a call from the police in case of any incident but this time round, he received none but instead learnt that PC Opiyo was intent in arresting him. That he called PC Opiyo who informed him that he had no issue with him but instead he should look for the complainant and talk to him. That he was subsequently arrested and charged before court.
26. That the case against him was politically motivated to bar him from defending his position as the Chair of the Business Community. That the complainant was his friend who had previously helped him when he was injured.
27. In cross-examination, he reiterated his testimony and confirmed that he knew the complainant prior to the incident. That the commotion at the bar was caused by two ladies fighting and that he could not tell if the complainant sustained his injuries from the commotion.
28. In re-examination, he stated that he did not bear responsibility for the complainant's assault as he had employed people to shoulder the said responsibility. That he and the complainant were friends.

29. **Dw3 Geoffrey Ayieko Odhiambo**, a bouncer at Super-Digital Bar, testified that on the material day, Joy and Frenzy came as customers to the Bar, ordered food, ate and went outside. That they returned with 3 other people. That later on in the night, he found the two arguing with one of the waiters Evelyn who appeared to have been assaulted. He therefore tried to remove them from the bar. That the complainant sat at the table all this time and the owner of the bar was not in the vicinity.
30. In cross-examination, **Dw3** admitted that he saw the complainant, Joy and Frenzy at the bar. That the complainant did not have crutches when he entered the bar. That he was the one who removed people from the bar and that the appellant was in his office on the material day. That the only one who got hurt on that day was Evelyn.
31. **Dw4 Evelyn Achieng Nyamwanga** testified that the appellant was her boss. That commotion commenced when she brought alcohol to the table where the complainant and his friends were. That the complainant discovered that it was from another girl. That the complainant hit her on with his leg and she fell and that Frenzy also started attacking her.
32. In cross-examination, she testified that her boss, the appellant was not in the bar and that she only saw him when she was heading to hospital. That the

complainant and Frenzy were dating. She denied seeing the complainant being assaulted.

33. **Dw5 Chrispin Okala**, a smokie trader testified that on the material day he was at his business place serving his customers when he heard a commotion at the club. When he went there, he found the bouncer pushing 5 people outside including Joy, Frenzy, Doc and 2 other unknown people.
34. In cross-examination, he stated that he did not see the appellant around on the material day. That his work was outside the bar. That he saw the appellant leaving the bar with the girl to the hospital.
35. **Dw6 Collins Ouma Ongira** testified that he was in the bar on the material day at the counter when a commotion ensued. That he watched the same from a distance and saw people being pushed out including the complainant. That the door was closed and he saw a girl called Evelyn lying down on the floor and the boss asked the bouncer and Gor to take her to hospital.
36. In cross-examination, **Dw6** stated that he had been the accountant at the bar for about a year. That he saw the complainant in the bar and he did not have crutches. That there was commotion but he could not tell who were involved as the place was dimly lit.

37. **Dw7 Tom Otieno Opiyo** testified that he was watching football on the material night adjacent to the table where the complainant was sitting and where fracas broke out. That he went to inform the appellant who was in his office and on his return found that one of the waiters was lying down. That he did not see the appellant near Carey. He admitted in cross-examination that the complainant fought no one. That Eve was fighting with two girls.

38. It is on the foregoing evidence that the trial court found the appellant guilty, convicted and sentenced him accordingly.

39. The issues that arise for determination in this matter are the following:

i) Whether the grievous harm charge against the appellant was proved beyond reasonable doubt.

ii) Whether the sentence of 10 years' imprisonment imposed against the appellant was justified.

40. The offence that the appellant was convicted of was "grievous harm" contrary to *section 234 of the Penal Code*, which provides as follows: -

"Any person who unlawfully does grievous harm to another is guilty of a felony and is liable to imprisonment for life."

41. To secure a conviction under the offence of grievous harm therefore, the essential elements that the prosecution has to prove are that *(i) the victim*

sustained grievous harm, (ii) the harm was caused unlawfully and (iii) the accused caused or participated in causing the “grievous harm”.

42. The definition of “grievous harm” is set out in *section 4 of the Penal Code* as follows: -

“grievous harm” means any harm which amounts to a maim or dangerous harm, or seriously or permanently injures health, or which is likely so to injure health, or which extends to permanent disfigurement, or to any permanent or serious injury to any external or internal organ, membrane or sense”.

43. In the case of *John Oketch Abongo v Republic [2000] Eklr.* the Court of Appeal held as follows: -

“Whether or not grievous harm or any other form of harm is disclosed must be a matter for the court to find from the evidence led and guided by the definition in the Penal Code. A court will be assisted by medical evidence given in coming to the conclusion on the nature and classification of the injury. In many cases, the courts have accepted and gone by the findings and opinions in the medical evidence. But, in appropriate circumstances, the court is at liberty to form its own opinion, having regard to the evidence before it as to the nature and classification of the injury.

In this case we have carefully considered the medical evidence and the findings made by the Clinical Officer both in the P3 form and in the evidence in court. We have also carefully considered the definition of grievous harm as contained, not only in the Penal Code already quoted in this judgment, but also in the P3 form to which we were referred by Mr. Onsongo.

*We are satisfied that the complainant's injury amounted to grievous harm as defined in the Penal Code. The definition contains several ingredients of what constitutes grievous harm. We are of the opinion that the presence of any one of these ingredients would suffice to disclose grievous harm. Here, we are satisfied that the complainant's injury did amount to dangerous or serious injury to health both of which are ingredients contained in the definition.”
(emphasis added).*

44. Therefore, it is clear that although the definition of “grievous harm” contains several ingredients, proof of any one of those ingredients is sufficient to prove the offence. In this regard, the ingredients of "grievous harm" are; (i) in the case of “grievous harm”, the injury to health must be permanent or likely to be permanent, whereas, to amount to “bodily harm”, the injury to health need not be permanent, (ii) a mental injury may amount to grievous

harm but not to bodily harm, and (iii) the injury must be of such a nature as to cause or be likely to cause permanent injury to health.

45. In this case, the Clinical Officer (**Pw2**) who examined the complainant on **21/01/2025** produced the P3 Form. He testified that the complainant sustained multiple injuries, including a swollen puffy face especially on the right cheek, swollen upper limbs with blood stains, difficulties in opening the mouth with tenderness on the jaws, red right eye caused by accumulation of blood on the white part caused by trauma, tenderness on the head with multiple swelling.
46. That as a result of his examination, he assessed the degree of injuries sustained by the complainant to be grievous harm meaning permanent – semi permanent as he could not function as before with his right knee.
47. A look at the extent of injuries suffered by the complainant indicates “harm” which in accordance with the definition given in **section 4 of the Penal Code** “amounts to a maim or dangerous harm”, or “serious or permanent injured health”, or “is likely so to injure health” or “cause permanent” or “serious injury to external or internal organ, membrane or sense”.
48. Accordingly, I find no reason to depart from the trial Court’s findings that the complainant sustained “grievous harm” within the meaning contemplated under **section 4 of the Penal Code**.

49. On whether the harm was caused “unlawfully”, from the sequence of events, it is evident that there was no lawful reason for the attack and none has been offered or even alleged. In the circumstances, I am also satisfied that this element was satisfied.
50. On the issue of “identification” and/or participation of the appellant in the offence, the Court of Appeal, in the case of Cleophas Wamunga v Republic [1989] eKLR cautioned as follows: -

“Evidence of visual identification in criminal cases can bring about miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimize this danger. Whenever the case against a defendant wholly depends or to a great extent on the correctness of more identifications of the accused which he alleges to be mistaken, the Court must warn itself of the special need for caution before convicting the defendant in reliance on the correctness of the identification”.

51. In this case, both the appellant and complainant were well known to each other. The appellant testified that the complainant was his friend to the extent that he even treated him for free. They are therefore familiar with and were well known to each other even prior to the incident. This was therefore a case of “recognition” rather than identification of a stranger. Such

evidence of “recognition” is clearly more reliable and believable in “identification”.

52. In the present case, both **Pw1 and Pw2** gave a detailed explanation on how the appellant participated in raining blows on the complainant. They were specific on what the appellant did and when. It was not a fabricated story. The complainant had no reason to frame the appellant. In this regard, I am satisfied that the trial court correctly found that the appellant was positively identified as one of those who inflicted the complainant with the injuries complained of.
53. The appellant contended that the trial court failed to consider his defence. The Court has considered the judgment in its entirety. At paragraph 17, the trial court set out the defence put forth by the appellant, analyzed it and found that the prosecution evidence remained unshaken.
54. I am inclined to agree with the trial court. The appellant’s defence was an attempt not exonerate him from the scene. However, he admitted that he was called by one of his customers and informed about the commotion whereby he went to the scene. Other witnesses testified that they saw him at the scene during the commotion. When weighed up against the prosecution evidence, it is evident that the defence evidence was a calculated cover up created to shield the appellant and could not displace the prosecution evidence.

55. The appellant contended that the trial court failed to adhere to the provisions of **section 211 of the Criminal Procedure Code** in giving a ruling on a no case to answer.

56. **Section 211 of the Criminal Procedure Code** (CPC) guides the procedure for putting an accused on defense after a prima facie case is established. In **Ronald Nyaga Kiura v Republic [2018] eKLR**, the court held: -

“It is important to note that at the close of the Prosecution, what is required in law at this stage is for the trial court to satisfy itself that a prima facie case has been made out against the accused person sufficient enough to put him on his defence pursuant to the provisions of Section 211 of the Criminal Procedure Code...”

57. The trial court is however cautioned that at this stage, it should not make definitive findings should it conclude that the accused has a case to answer. In **Festo Wandera Mukando v Republic [1980] KLR 103**, the court held thus: -

“...we draw attention to the inadvisability of giving reasons for holding that an accused has a case to answer. It can prove embarrassing to the court and, in an extreme case, may require an appellate court to set aside an otherwise sound judgment. Where a submission of “no case” to answer is rejected, the court should say

no more than that it is. It is otherwise where the submission is upheld when reasons should be given; for then that is the end to the case or the count or counts concerned.”

58. Accordingly, it is instructive that upon finding a case to answer, the court must explain the charge, advise on the right to sworn/unsworn testimony, and ask for witnesses.
59. In the present case, the trial court found that the appellant and his co-accused had a case to answer vide its ruling issued on the **30/04/2025** and proceeded to comply with the provisions of **section 211 of the CPC**.
60. The appellant further impugned trial court’s judgment on account that the it failed to set out the issues for determination thus going against good judgment writing and in contravention of **section 169(1) of the Criminal Procedure Code**. That provision states that: -

“(1) Every such judgment shall, except as otherwise expressly provided by this Code, be written by or under the direction of the presiding officer of the court in the language of the court, and shall contain the point or points for determination, the decision thereon and the reasons for the decision, and shall be dated and signed by the presiding officer in open court at the time of pronouncing it.”

61. A perusal of the judgment shows that the trial court complied with **section 169 of the Criminal Procedure Code** as she set out the issues that needed to be proved. It then proceeded to analyze and determine those issues.
62. Taking all the foregoing into consideration, I find that the appellant's conviction was safe. I uphold the trial court's conviction of the appellant.
63. As to whether the sentence of 10 years was justified, the appellant argued that he was a first offender. The applicable principles in considering sentence on appeal were restated by the Court of Appeal in **Bernard Kimani Gacheru v Republic [2002] eKLR**, in the following terms: -

“It is now settled law, following several authorities by this Court and the high Court, that sentence is a matter that rests in the discretion of the trial Court. Similarly, the sentence must depend on the facts of each case. On appeal, the appellate Court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial Court overlooked some material factor, or took into account the wrong material, or acted on the wrong principle. Even if, the appellate Court feels that the sentence is heavy and that the appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for

interfering with the discretion of the trial Court on sentence unless, anyone of the matters already stated is shown to exist”.

64. As earlier observed, *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.”

65. In view thereof, it is clear that the sentence imposed by the trial Court was within the law. Taking into consideration the circumstances of the case, the nature of the unprovoked attack on the complainant and the injuries sustained as a result, the appellant was lucky to have had only 10 years meted out on him. I decline to interfere with the sentence meted out by the trial court.

66. The Court therefore finds that the appellant’s appeal is without merit and is hereby dismissed.

It is so decreed.

DATED and **DELIVERED** at Kisumu this **19th** day of **February, 2026**.

A. MABEYA, FCI Arb

JUDGE