



**Republic v Emase alias Jatelo (Criminal Case E016 of 2025)  
[2025] KEMC 206 (KLR) (29 July 2025) (Judgment)**

Neutral citation: [2025] KEMC 206 (KLR)

**REPUBLIC OF KENYA  
IN THE LAMU LAW COURTS  
CRIMINAL CASE E016 OF 2025  
FM MULAMA, RM  
JULY 29, 2025**

**BETWEEN**

**REPUBLIC ..... PROSECUTOR**

**AND**

**DAVID EMASE ALIAS JATELO ..... ACCUSED**

**JUDGMENT**

**A. Introduction.**

1. The accused is charged with grievous harm contrary to section 234 of the penal code. The particulars were that on 25/1/2025 at around 2240Hours at Mokowe Jetty the accused unlawfully did grievous harm to Babu Saidi Mohamed
2. The prosecution marshalled a total of 5 witnesses to prove the charge against the accused person whereas on the other hand the accused gave sworn evidence and called 1 other witness.

**Prosecution’s case.**

3. It is the prosecution’s case that on the material date and time the complainant he parked his motorcycle and gave one Salim (Pw2) a bottle of the local brew(Mukoma) to briefly hold it for him as he handover a fuel tank and a reflector jacket to his friend called Mureithi(pw 5) who operates a speed boat.
4. That after handing over the items he came back and took his bottle of brew and went to a place to enjoy the drink after a day’s work and no sooner had he started enjoying the drink than the accused came in the company of 2 other men and borrowed his drink for a sip or 2 but he refused, he returned the cap to the bottle and stood up and accused tried to grab his bottle in the process but he could not let it go and a result a scuffle ensued and soon thereafter the accused removed a rungu akin to the ones Maasai’s have and he hit him on the forehead and he bled profusely and he showed the court the mark on the forehead.



5. As thought that was enough, it is the evidence of Pw 1 that the accused seemingly not done flashed out a panga and hit/slapped him twice on the back and seeing his life was in danger he jumped into the ocean and he was rescued by Pw 2 and thereafter he was assisted to report the matter to the police.
6. Pw 2 Salim Hilal corroborated the evidence of the complainant whereas Pw 3 the doctor testified in court and in his testimony stated that the complaint complained of having been cut on the head with a panga and upon examination he saw a deep cut wound on the head measuring 8cm by 3cm and was bleeding profusely. In the P3 he assessed the injury as grievous harm and the estimated date of the injury was 3days from the date he filled the P3 form.

#### **The defence case.**

7. The accused in his defence stated that on the material day at 6pm reported to work where he worked as a guard and at around 10pm while on duty he heard some noise of some metal rods or bars being pulled and he went to see what was happening and upon arrival and flashing his torch he saw 2 people being Pw 1 and Pw 2 and he started shouting “thief” “thief” as they were armed and dangerous.
8. That the Pw 2 was armed with a panga, rungu and hacksaw and the accused was the one pulling the metal bars and when they saw they had been cornered they went and jumped into the ocean. He then returned the metal bars and he informed the manager and the accused reported the matter vide OB 07/1/26/2025 and later he also realized that the 2 (Pw 1 and 2) had reported him as the one who attacked the complainant. Pw 2 corroborated the evidence of the accused.

#### **B. Issue for Determination.**

9. Whether the prosecution have proved the charge of grievous harm against the accused person.

#### **C. Analysis and Determination.**

10. For the accused to be convicted of the offence of doing grievous harm contrary to section 234 of The Penal Code, the prosecution has to prove each of the following essential ingredients beyond reasonable doubt;
  - a. The victim sustained grievous harm.
  - b. The harm was caused unlawfully.
  - c. The accused caused or participated in causing the grievous harm.
11. Concerning the first element, bodily “harm” means any bodily hurt, disease or disorder whether permanent or temporary. The nature of grievous harm is defined by section 4 of The Penal Code as 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 a permanent or serious injury to any external or internal organ, membrane or sense.
12. The court in the case of Pius Mutua Mbuvi v Republic [2021] eKLR held that;

“The specificities of “grievous harm” therefore are;

  - (1) 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
  - (2) a mental injury may amount to grievous harm but not to bodily harm



(3) the injury must be "of such a nature as to cause or be likely to cause" permanent injury to health."

13. Pw 1 testified how he was hit with a rungu akin to that the Maasai's walk with and that as a result he bled profusely and thereafter he was slapped twice with a panga on the back.
14. The doctor on the other hand states that upon examining the patient he noted that he had suffered a deep cut wound on the head measuring 8cm by 3cm. This is contrary to what the complainant said caused the injuries but be that as it may the injuries were assessed at grievous harm in the P3 which was produced in evidence.
15. From the evidence of Pw 1,2 and 3 indeed confirm that the complainant sustained those injuries and which have now been classified by the doctor as grievous harm. The first ingredient is thus proved.
16. The second element is that the harm was unlawful. This means that the injury was caused without any lawful justification or excuse. From the evidence on record, it is alleged that the accused attacked the complainant without any provocation and he did not defend himself whatsoever. The mistake the complainant did was that he denied him a sip of the mukoma brew.
17. I therefore make a finding that the harm that was caused on the complainant was unlawful and without any justification. The 2<sup>nd</sup> element is also proved.
18. The third element is whether the accused participated in causing the grievous harm. Pw 1 and 2 explained in details how the accused attacked the complainant.
19. The accused in his defence gave a different account of what transpired on that night and instead accused the complainant of being a thief while in the company of Pw 2 and that he did not even attack the complainant since after being noticed and calling them out for being thieves, they jumped into the ocean and escaped.
20. I take issue with the accused's defence as this issue was raised at defence stage and the accused never asked the complainant and Pw 2 on this issue of them stealing the metal bars and I find this as an afterthought and meant to confuse and conflate the issue herein given that the complainant has no window to test the veracity of the accused's story and this court too cannot since his evidence has not been tested as against Pw 1 and 2 and I therefore dismiss the defence in its entirety.
21. It is not in doubt now that the incident happened at night and particularly at around 2240 hours and the issue of how the complainant identified the accused comes into play.
22. The law on identification especially where it takes place in difficult circumstances is that it should be treated with a lot of care so as to avoid convicting the accused person on evidence of mistaken identity.
23. In Francis Karuiki and 7 others vs. Republic Cr. Appeal No 6 of 2001 [200] eKLR cited with approval in the case of LSA v Republic (Criminal Appeal E035 of 2024) [2025] KEHC 6356 (KLR) (14 May 2025) (Judgment) (Justice JN Njagi) it was held that;

"The law on identification is well settled and this court has from time to time said that the evidence relating to identification must be scrutinized carefully and should only be accepted and acted upon if satisfied that the identification is positive and free from possibility of error."



24. In *Wamunga v Republic* [1989] KLR 424 at 426 the Court of Appeal had this to say on the subject:
- “Where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favorable and free from the possibility of error before it can safely make it the basis of a conviction.”
25. In *Kimea v Republic* (Criminal Appeal 010 of 2020) [2022] KEHC 104 (KLR) (18 February 2022) (Judgment) the court enumerated the factors to be considered in identification to include such factors as the lighting conditions under which the witness made his/her observation; the distance between the witness; the period of time the witness actually observed the perpetrator and whether the witness had an unobstructed view of the perpetrator.
26. The complainant in his evidence-in-chief never stated how he identified the accused and never stated the state of lighting at the scene and generally there was no compliance with the factors enumerated in the *Kimea* case given that the incident happened at night. The prosecution ought to have led evidence to demonstrate how the complainant managed to identify the accused which was not done in the circumstances.
27. I am not thus not convinced that the accused was properly identified in the circumstances and I cannot say that the identification was free from possibility of error.
28. I also have doubts as to what exactly caused the injuries as the complainant on one hand states the accused hit him with a rungu and later on slapped him with a panga while on the other hand the doctor who examined the complainant stated that the complainant suffered a deep cut wound measuring 8cm by 3cm. This is a grave contradiction that creates a doubt in the case of the prosecution and no explanation was given for this contradiction.
29. It is therefore, in my view, not safe to convict the accused in the wake of such contradiction as to what caused the injury and the issue of identification and the accused is entitled to the benefit of doubt

#### **D. Conclusion and Disposition.**

30. The upshot of the foregoing is that there exists doubt in the prosecution’s case on the twin issue of identification and what caused the injury to the complainant and which doubt the accused benefits from.
31. The net effect being that the prosecution failed to prove its case against the accused person and consequently the accused is acquitted for the offence of grievous harm contrary to section 234 of the Penal code under section 215 of the CPC. The accused is now at liberty unless otherwise held.
32. Right of appeal 14 days.
33. Those shall be the orders of the court.

**DATED, SIGNED AND DELIVERED AT LAMU LAW COURTS THIS..29<sup>th</sup>DAY OF July, 2025**

**F.M. MULAMA.**

**RESIDENT MAGISTRATE**

In the presence of:

Ahmed Omar for DPP.

Court Assistant:- Fathiya Loo.



David Emase alias Jatelo.

