

KENYA / JUDGMENT

Republic v Wafula [2026] KEMC 393 (KLR)

[2026] KEMC 393 (KLR)**COURT**

Magistrate's Court

BEFORE

AK Njeru

CASE / FILE NUMBER

Criminal Case E480 of 2024

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REPUBLIC OF KENYA**IN THE SENIOR RESIDENT MAGISTRATE'S COURT AT PORT VICTORIA****CRIMINAL CASE NO. E480 OF 2024****REPUBLIC VERSUS NOAH KIMANI WAFULA****JUDGMENT**

1. The accused has been charged with the offence of assault causing actual bodily harm contrary to section 251 of the Penal Code. Particulars are that on the 6th day of December 2024 at about 2300hrs at Port Victoria area in Bunyala Sub-County within Busia County, the accused unlawfully assaulted Bonface Nafula, thereby occasioning him actual bodily harm
2. Accused faced another charge of Malicious damage to property contrary to section 339(1) of the Penal Code. Particulars are that on the 7th day of December 2024 at about 0100hrs at Port Victoria area in Bunyala Sub-County within Busia County, the accused unlawfully damaged eighteen (18) glass window panels valued at Kshs 7,050, the property of Bonface Nafula.
3. The accused denied both counts and the prosecution presented evidence as follows
4. PW1 Bonface Khanyaka Wafula testified that on the material day he was at Siangiri Bar watching television and taking alcohol when he went to the washroom to relieve himself. On his way back, he met the accused, who is his cousin, picking up stones and began to assault him. The attendants intervened. He reported the matter to the police and sought treatment at Port Victoria Hospital at around midnight. He sustained injuries on his head. The following day, a P3 Form was filed. It is not true that he fell and sustained the said injuries. Otiato is the one who escorted him to the hospital. That he later went to sleep around 1.00am and while heading to the corridors, saw accused break his glass window panels. There was another case he had filed E 120/2024. It is not true that he has a habit of court process abuse to frustrate members of his family.

5. PW2 237147 IP Stephen Ghati testified as the investigating officer. That on 6/12/24 at around 2300hrs while at Port Victoria Police station, complainant herein presented himself with a report that he had been assaulted by accused herein while they were at Siangiri Bar. His complaint was recorded and complainant advised to seek treatment. At around 0100hrs, complainant returned with treatment notes and further reported having noted the accused breaking his window glass panels upon arrival at his home from the hospital. He was issued the following day with a P3 Form which was filled. He visited the scene and saw the 18 broken window panes. Accused was later arrested. The issue of broken panels was reported on 8th December 2024. There was no eye witness to confirm the breaking of the window panels. He does not know if the accused fell that night from drunkenness and sustained the said injuries.
6. PW3 Collins Oscar Wesebebe, a clinical officer working at Port Victoria Hospital, testified to have examined the complainant on 7/12/2024. The said complainant gave a history of being assaulted and had a cut wound on his scalp. He was stitched and medication given to him. Later, a P3 Form was filled with the same notes. He produced the treatment book as Pex no. 1, and the P3 Form as Pex no. 2. The P3 Form did not indicate the OB number, nor does page 2 thereof indicate the patient's name. complainant's clothes were blood-stained at the time of the incident.
7. Accused was found with a case to answer on the first count and acquitted under section 210 of the Criminal Procedure Code for lack of evidence in the 2nd count.
8. In his defence in the charge for assault causing actual bodily harm, accused, testifying as DW1 Noah Kimani Wafula, stated that he understood the charges he faced well and that complainant was his elder brother. That on the material day, he was at Siangiri Bar, and the complainant was also there in the company of his friends, Otiato and Mwalimu Som, all dancing while drinking beer. He saw the complainant begin to point at him with the Pilsner beer bottle in his hand, showing him signs that he would slit his throat. He headed to the washroom, and that is when, on his way out, he encountered the complainant at the doorstep with the same beer bottle in his hand. The complainant was mocking him to assault him, but he remained calm. It was then that complainant threw a punch at him and he ducked to avoid the same. The complainant fell on the ground and injured his head, and people grabbed him, advising him to leave him alone and head home. Complainant's friends escorted him home, and he headed home as well. On 20/12/24, he was at work when police officers arrived and took him into custody. He was later released on police cash bail, and complainant kept promising to ensure he spent Christmas festivities in jail. They have a long-standing land dispute which is an active succession case in court. Complainant, a retired marine officer, has abused court process by filing numerous cases against family members, intimidating them. he did not commit this offence, but rather, the charges herein are a frame-up.

Analysis and determination

1. Based on the evidence presented, the sole issue for determination is whether the prosecution proved beyond reasonable doubt the offence of assault causing actual bodily harm contrary to section 251 of the Penal Code, the second count having already been dismissed under section 210 of the Criminal Procedure Code.
2. The prosecution was required to prove:
3. That the complainant sustained actual bodily harm;
4. That it was the accused who unlawfully inflicted those injuries. see **Ndaa vs Republic [1984] KLR**
5. There is no dispute that the complainant sustained injuries. PW3, the clinical officer, confirmed that the complainant had a cut wound on the scalp which was stitched. The treatment notes and P3 Form corroborate this evidence. Although the P3 Form omitted the OB number and page two did not bear the complainant's name, the treatment notes produced in evidence and PW3's testimony sufficiently established that the complainant suffered actual bodily harm. These omissions are procedural irregularities that do not, in themselves, render the medical evidence inadmissible or unreliable.
6. The real question is whether the prosecution proved that the accused caused those injuries.
7. The complainant testified that while returning from the washroom at Siangiri Bar, he met the accused, who picked stones and assaulted him, causing injuries to his head. The incident allegedly occurred at about 11.00 p.m. The complainant maintained that he did not fall as alleged by the defence.
8. The investigating officer (PW2) merely received the report and confirmed the injuries. He did not witness the assault. His evidence was therefore purely formal hearsay and did not identify the assailant.
9. The defence gave a different account. The accused admitted being at the same bar but denied assaulting the complainant. According to him, the complainant, while intoxicated and armed with a beer bottle, attempted to attack him. He avoided the attack by ducking, causing the complainant to lose balance, fall, and sustain the head injury. He maintained that he never assaulted the complainant and attributed the prosecution to a long-standing family land dispute.
10. The prosecution bore the burden of disproving this defence beyond reasonable doubt. considering the evidence presented, I find Several aspects of the prosecution case creating doubt.First, the alleged assault occurred at a bar where, according to both the complainant and the accused, there were numerous patrons. The complainant himself mentioned attendants who intervened, as well as his companions Otiato and Mwalimu. None of these persons was called to testify despite being obvious independent witnesses. Their evidence would have been crucial in resolving the conflicting versions.

11. While section 143 of the [Evidence Act](<https://new.kenyalaw.org/akn/ke/act/1963/46>) (Cap 80) Laws of Kenya is to the effect that in criminal cases the prosecution is required to avail all relevant evidence to enable the court make an informed decision, it was incumbent upon the prosecution to call these independent witnesses to clarify on the matter. In ***Bukonya & Others vs Uganda [1972] EA 549*** the court stated that the prosecution must avail all witness necessary to establish the truth even if their evidence may be inconsistent. That, where the evidence is barely adequate the court may infer that the evidence of the uncalled witness would have been adverse to the prosecution's case.
12. It is now my considered view that the failure to call them must now be construed to the detriment of the prosecution.
13. Secondly, although PW1 stated that attendants intervened, there is no evidence describing how the assault occurred, whether stones were actually used, or whether anyone witnessed the accused strike the complainant. The investigating officer equally conceded that he did not know whether the complainant had fallen while drunk and sustained the injuries.
14. Thirdly, the defence raised the existence of a long-standing family land dispute and previous litigation between the parties. While the existence of such a dispute does not by itself negate the offence, it provides a possible motive for false implication and therefore required careful scrutiny of the complainant's evidence. In the absence of independent corroboration, the court must exercise caution before relying solely on the complainant's testimony.
15. It is trite that a conviction may lawfully rest on the evidence of a single witness if the court is satisfied that the witness is truthful and reliable. However, where there are material inconsistencies and readily available independent witnesses are not called, the court must ask whether the prosecution has removed reasonable doubt.
16. In this case, the prosecution failed to call the complainant's companions or the attendants who allegedly intervened. No explanation was offered for their absence. Their evidence would have clarified whether the complainant was assaulted or whether, as alleged by the defence, he fell while attempting to attack the accused.
17. The accused's defence is not inherently improbable. It remains reasonably possible on the evidence. The prosecution therefore failed to displace it beyond reasonable doubt.
18. I find that although the prosecution proved that the complainant sustained actual bodily harm, it failed to prove beyond reasonable doubt that the injuries were unlawfully inflicted by the accused. The benefit of doubt must therefore be accorded to the accused.

Disposition

The accused is found not guilty of the offence of assault causing actual bodily harm contrary to section 251 of the Penal Code. He is acquitted under section 215 of the Criminal Procedure Code. The accused shall be set at liberty forthwith unless otherwise lawfully held.

Right of appeal within 14 days explained. Cash bail to be refunded accordingly.

Dated, signed and delivered at Port Victoria this 29th July 2026, in the presence of the accused, in English, the language he states to fully understand, Mr Githinji, the prosecutor and Mr Masisga, the Court Assistant.

Hon. Anne K. Njeru

SRM

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Prepared on 25 October 2026 · Esheria