



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

APPELLATE SIDE

(Coram: Odunga, J)

CRIMINAL APPEAL NO. E013 OF 2021

STEPHEN NGILA NTHENGE.....APPELLANT

-VERSUS-

STATE.....REPUBLIC

(An appeal against both conviction and sentence of the Machakos

Chief Magistrate's Court Criminal Case No. 214 of 2016,

Hon. B. Bartoo (SRM) on 9th February, 2021)

BETWEEN

REPUBLIC.....PROSECUTOR

AND

STEPHEN NGILA NTHENGE.....ACCUSED

JUDGEMENT

1. The appellant herein, **Stephen Ngila Nthenge**, was charged with the offence of attempted murder contrary to section 220(a) of the **Penal Code**. The particulars of the offence being that on the 18th day of July 2016 at around 1930hours in Ilinge village, Mithini sub-location, Mwala SubCounty within Machakos County, he attempted unlawfully to cause the death of **Jackline Mwende Ngila** by chopping off her both hands at the wrist and cutting her deeply on the hand. Upon his conviction, he was sentenced to serve 30 years imprisonment without an option of fine.

2. To prove the said case, the prosecution called Fourteen (14) witnesses.

3. According to the complainant who testified as PW1, though she was married to the Appellant, a marriage that was not blessed with children, by the time of the incident, they were not living together as the Appellant had left the Complainant in the matrimonial home for three months. Though their marriage was initially good, after sometime the Appellant changed when he bought a motor cycle, started taking alcohol and returning home late and upon being asked by the Complainant why he was going home late, he would beat her up saying that he was with his fellow men.

4. The Complainant sought the services of their Pastor, **Pastor Kioko** of SDA Church, Katoloni, in April, 2016 who with the church elders advised the Appellant to stop drinking and return home but the Appellant who was staying in Masii Town did not heed the advice. She stated that they had several sessions with the Pastor together with the elders where the Appellant stated that the Complainant could not conceive and they were advised to go to the Hospital in order for the problem to be determined. However, when the couple went to Nairobi Hospital, it was found that the problem was with the Appellant and was advised to be attending clinics but he failed to do so despite promising the Pastor that he would do so.

5. It was the Complainant's testimony that on 16th July, 2016 at around 7am, the Appellant went to the house on a motor cycle and knocked the door but when the Complainant declined to open for him, he proceeded to the neighbour's home before returning to pick his motor cycle and left without the Complainant speaking to him.

6. On 18th July, 2016, at 9.20pm the Complainant was alone at home eating when she heard a knock on the door and the Appellant's voice. When she opened, she saw the Appellant who was wearing a maroon jacket carrying a *panga* in his hand. The Appellant cut her right hand and pulled her into the room. When she asked looked at him and asked him why he was killing her, the Appellant told her that that was her last day to speak. It was her evidence that she had a lantern lamp on the table in the living room. She testified that she fell on the floor and struggled to lift herself but blood was flowing from her hand. She screamed and lost consciousness. By then, both her hands had been cut. By the time she regained her consciousness there were many people in the room and she recognised her neighbours **Makau** and **Veronica Munyoki** whom she requested for assistance but they said they would do nothing until the arrival of the police.

7. When the police arrived, she informed them that it was the Appellant who had cut her and she was then taken to Machakos Level 5 Hospital. She was later taken to PCEA Kikuyu Hospital where she was admitted for 1 month after which she was taken to South Korea where artificial limbs were fitted and she was there for 10 days. On the material date she wore wore a blue/white checked skirt, a red T-shirt and a black bra and an orange jacket all of which she identified.

8. It was her evidence that on 18th July, 2016 she was home the whole day since she was not feeling well as she had been unwell for three days and that save for 16th July, 2016 when she went to the chemist to buy drugs at Masii, all the other days she was at home. She stated that she had never disclosed to anyone that her life was in danger. She denied that she was pregnant at the time of the hearing.

9. According to the Complainant, she was given the capital for the shop by the Appellant and also took a loan from SMEP Micro Finance and she owed Kamulooni, a wholesale trader, not more than Kshs 50/- and Killu Kshs 630/-. She stated that **Esther Munyau** was a member of her group who went to see her in the hospital. She denied being asked to keep money for anyone in the hose. While stating that on 12th March, 2016, the Appellant went and smashed the window glasses and she went to call her neighbours, she denied having stabbed the Appellant. She disclosed that the headman, **Dominic**, locked her husband in the home having been injured in the forehead by the window panes and reported the matter to the Subchief. She however denied that she was arrested in the incident that occurred at 9.20am.

10. That night, she stated that **Veronica** picked her phone and called the people then took to her phone when she left the Hospital. Though she admitted that she stated in her statement that the incident occurred at 7pm, she clarified that she did not have a watch and she had just come from the theatre.

11. According to her evidence, she opened the door when she heard the knock and heard the Appellant calling her but upon him getting in, he did not talk to her before cutting her. It was then that she looked at him and talked to him. On that night, the Appellant did not have a cap but was wearing a maroon jacket.

12. She admitted that **James Musyimi**, a motor cycle rider who used to go to her shop, went to her home and he even ate supper but left her house at about 7.00 p.m. and that she ate after he left. The Complainant however, denied that she was in a relationship with the said James and that he used to sleep in her house and stated that she used to send him to the shop. She denied that there was a fight between her and the said James. She however, admitted that she was aware that there was someone who was planning to marry in the Appellant's family.

13. PW2, **Dominic Mwanzia Makau**, the Matunge Village Manager, testified that on 18th July, 2016, he was in his home at around 9.00 p.m. approaching 10.00 p.m. with his wife and son, Stephen Makau. His son stepped out and shortly, the son called and asked him to rush to the Complainant's home. PW2 picked his walking stick and proceeded to the Complainant's home which was about 40 metres from his house. On his way he heard the Complainant screaming and on arrival, he found he found his son, Makau and Musyimi in the compound and he was informed by Musyimi that the Complainant had been cut. When he got into the house with a touch, he saw a hand on the door and found that the Complainant lying about 5 meters from the door facing upwards with a deep cut on the cheek while the other remaining hand had been cut on the wrist.

14. When PW2 called the Complainant, she did not respond upon being called. According to the witness, the hands were about 4 metres from the door. PW2 then stepped out relayed the information to the Assistant Chief told Makau to rush with PW2's motorcycle which was at home to the police station. When he asked the Complainant who had cut her, she responded it was the Appellant. After a while the OCS and 2 other Officers arrived in a Land rover and they entered the house with the OCS. When the OCS asked the Complainant who had cut her, she responded Ngila. After that the Complainant was taken to the Hospital while the witness returned home.

15. According to PW2, he used to be called to the Complainant's place every weekend whenever the Appellant came since the Appellant, who never used to stay there, would beat the Complainant. It was his evidence that he had known the Appellant for over 6 years during which time they had reconciliation meetings for over 3 times in the presence of the couple's relatives and encouraged them to live peacefully. It was his evidence that the Appellant used to say that he did not want the Complainant but the Complainant insisted that she would not move out. According to PW2, their main bone of contention was that the Complainant was not conceiving and she used to deny him conjugal rights while the Complainant claimed that the Appellant was impotent.

16. When he arrived he found Musyimi and Makau and the table with food was in a different room where he found 2 plates one for ugali and 1 for vegetables. He admitted that he talked with Maithya that night and that the Complainant had a jacket and a trouser and that there was a cloth beside the Complainant which he did not check. He asserted that the Complainant had clothes on but there was a lot of blood inside the house though he could not tell if there was blood outside the house. According to PW2, he had been listening to news and he was called when the news was over. He however, did not hear any scream. He however, denied ever having locked the Appellant in the house. It was his evidence that after the squabble the Complainant spent in his home though he denied that the Appellant was stabbed. It was his testimony that the Appellant was locked in the house by the Complainant because the Appellant was injured while trying to break the door. He confirmed that whenever the Complainant was chased, she would spend at his home. PW2 however denied that his son ever slept at the

Complainant's house.

17. PW4, **Samuel Munywoki Kyule**, the Complainant's father testified that on 13th July, 2016 while at home at around 10.00Pm, he was called by Mutisya Mavita who informed him that he had been called by the Assistant Chief, Mwendu Munene, and was informed that the Complainant had been cut. PW4 woke up his son, Kyalo and his brother, Kituku and told them to rush to the Complainant's home to see the situation. He then called Stephen Musyoka who had a car and asked him to accompany him to go and see what had happened. On their way, he was called by Kituku and was informed that the police vehicle had taken the Complainant to the hospital and that they should proceed to Masii to meet them. At a petrol station at Masii they found a police vehicle carrying the Complainant whom he thought was dead since she had cuts on both hands the right hand was fully chopped off while the left hand was almost falling. She also had cuts on the head, neck, chin and waist and her teeth were also lost. Her clothes also had cuts. She had a red jacket which was soaked on blood. They proceeded to Machakos Level 5 hospital and at the ICU the Complainant was placed on oxygen and the wounds were stitched after which PW4 returned home.

18. It was his evidence that he did not see Mutisya that day but was told that it was the Appellant who cut the Complainant though he did not see the Appellant that night. The Complainant, he stated, was admitted in Machakos Level 5 for 3 weeks after which they took her to Kikuyu Hospital for 1 month. When she came back she had fully recovered. He however, could not tell why the Appellant cut the Complainant as he had nothing against the Appellant. He confirmed that he attempted to reconcile the couple since the Appellant was blaming the Complainant for failing to give birth while the Complainant accused the Appellant for going home late.

19. In cross-examination, he stated that he was not present when the incident occurred since his home was about 2Km from the Appellant's home.

20. PW5, **Joseph Mbindyo Mwaluko**, a church elder at Uthithini SDA church testified that both the Appellant and the complainant were known to him for about 2 years as husband and wife. He stated that the two had a dispute on 20th April, 2016, and their Pastor Mr Kioko called them and told them that due to the problem between the couple, he wanted a subcommittee to try and resolve the issue. PW5, together with Agnes Kyalo, Peninnah Muthoka and Kyalo James were nominated and they arranged for a sitting on 26th April, 2016 which was attended by both the Appellant and the Complainant. While the Complainant stated that they were experiencing marital problems and had no conjugal relationship, the Appellant, who appeared angry, was not pleased with the exposure and asked that they be separated. The said committee was informed that the Appellant had left his home and had moved to Masii. Though the Committee asked for time to investigate the truth of the allegation, no further meeting was held until the incident which he heard on the radio. On the date of the meeting, the two went separate ways.

21. PW6, **Michael Kyalo**, a brother to the Complainant, recalled that on 18th July, 2016 at around 10.30Pm his wife, Faith Ndunge, was called by Patrick Mutisya, the Chairman of *Nyumba Kumi*, and was informed that the Complainant had been cut by the Appellant and his wife was requested to relay the information to him with a request that they rush her to hospital. Mutisya is the Chairman of *nyumba kumi*. PW6 and his said wife went to wake up their parents and in the company of one his uncles, Joseph Kituku, they took off. However, on the way they met a police vehicle from Masii which they boarded since it was headed to the same place.

22. Upon their arrival, they found very many people in the compound and when they entered the house, they found the Complainant lying down on her back in the sitting room about 2 ½ metres from the main door. Inside the house the source of lighting was a Hurricane lamp that had been lit. According to the witness, one of the Complainant's hands had been cut while the other hand though also cut had not been fully detached. Using a mattress, they lifted onto the police vehicle. However, before they did so, he inquired from the Complainant who had cut her and she responded that it was the Appellant. This information, he stated, the Complainant repeated to the doctors at Machakos Level 5 Hospital.

23. It was his evidence that he had known the Appellant, his brother in law, for about 5 years before the incident and that at the particular moment the Complainant was living alone.

24. PW7, **Patrick Kioko Mukilia**, a Pastor at SDA Katanga Muranga, recalled that one morning in mid-2015 while he was a Pastor at Kilungu, the Complainant, who had nothing with her and who was putting on slippers, went to see him and informed him together with his wife, having been the first couple in the wedding between the Complainant and the Appellant, that on that morning her husband, the Appellant, woke up and locked the home and took the keys and told her that he should not find her at home in the evening. The Complainant informed them that she had reported to their respective parents but nothing had changed and narrated to them the problems facing them from which the witness deduced that the couple's problems started shortly after they got married, the biggest being that they were not engaging in sex.

25. PW7 decided to get hold of the Appellant and upon getting him, he called the couple together and they explained so many things. According to the Complainant, she was being assaulted by the Appellant who would sometimes return home drunk. On his part, the Appellant complained that the Complainant never used to heed to his instructions. The Complainant disclosed that since they got married they had never had sex with the Appellant and that the problem started immediately after discussing the issues with the Appellant at which they agreed that the Appellant would seek medical attention. After doing so, they got some drugs which assisted them and they had sex thereafter. However, the Appellant later stopped using the drugs and then stopped engaging in sex.

26. PW7 testified that the Appellant did not deny these allegations and when PW7 offered to accompany him to the hospital, the Appellant told him that he could live without children and that if the Complainant wished, she could go and get a child elsewhere. By then the couple disclosed that they had stopped sleeping together and that the Complainant was living in a couch in the sitting room while the Appellant slept in the bedroom. The Appellant stated that he was not ready to continue living with the Complainant whom he alleged was disobedient.

27. Later when the witness was transferred to Masii, he found that the couple was no longer living together since the Appellant was living in Masii while the Complainant was in the matrimonial home. He however continued talking with the two to get together but when he saw that things were getting worse between the two he decided to inform the leadership of the church and a committee was set to discuss the issue.

However, the Appellant was unhappy with the Complainant's disclosure of their problem to the church and insisted that he was not ready to continue living with the Complainant. PW7 testified that on 18th July, 2016, he had a conversation with the Appellant during which the Appellant complained that he was being burdened by the Complainant who was taking goods on credit from shopkeepers using his name. On 19th July, 2016, PW7 received information from the one Kasine, the husband to the Appellant's aunt.

28. According to PW8, **Salome Muthoki Mavuna**, the area chief Masii Location, on 11th December, 2015, she was in the office at around 3.00PM when the Appellant went and reported that they had been having dispute with his wife and that the matter had been reported to the Assistant Chief who had unsuccessfully tried to resolve the case. He then told the Appellant to return with the Complainant and their parents on 14th December, 2015. When they returned he decided to hear the couple alone. The Appellant complained that the Complainant was disobedient and had against his advice refused to close a business she was running. The Complainant, on her part stated that the main reason was that they have been married for 5 years and they did not have a child and that the Appellant was sexually inactive, an allegation the Appellant denied asserting that he was sexually active since he had tried elsewhere and confirmed. PW8 advised them to seek medical attention and stop fighting and got an assurance from the couple that they would do so. He then called the parents in and told them that the issues had been handled.

29. However, on 18th July, 2016, he received the information from the Area Manager, Dominic Mwanzia Makau, that the Complainant had been attacked and the suspect was the Appellant. PW8 called the OCS who confirmed that he had received the report. It was her evidence that the two were living at their home near Masaani village and that she had known the Appellant since he was a businessman in Masii and also knew the Complainant's parents.

30. According to PW9, **James Musyimi Maitha** a bodaboda rider, on 18th July, 2016 at around 9.45Pm, he heard scream of a woman from his neighbours' home. When he went outside the screams which were coming from the Complainant's home persisted. He proceeded to the home of Makau Mwanzia who was a neighbour and told him that there were screams from the Complainant's home and the said neighbour told him they ought to go and check what was happening there. When we arrived at the Complainant's home, they found the door half open and Makau who was ahead got inside and said things were not good. When PW9 approached the door he saw one hand on the door with the other hand less than a metre from the door. He however did not see. He then told Makau to call his father, Dominic Mwanzia since he was a village manager, which Makau did. When Dominic Mwanzia arrived, he asked the Complainant who had cut her and she responded that she had been cut by her husband. At the time Dominic was standing on the door and the Complainant was lying on the floor and the witness was about 2 steps from where Dominic was.

31. Dominic then sent Makau Mwanzia to go and report at Masii Police Station and when the police arrived, they and took the Complainant to the hospital.

32. According to the witness he had not spoken to the Complainant during the day and denied either meeting her or even taking a meal at her home. It was his evidence that both his home and Makau's home are close to the Complainant's home. Prior to that day, he had last seen the Complainant on a Friday at Ilinge market in her shop. It was his evidence that there was no lamp in the Complainant's home when they arrived but there was moonlight. He however only saw the hand that had been cut and by then the Complainant was not speaking. He however confirmed having seen Florence Masika at the Complainant's home that day in the company of other neighbours before police came though he neither saw Michael Kyalo or Stephen Ngila that evening. He also did not see any motor bike on the way.

33. PW10, **Kituku Kyule**, on 18th July, 2016, asleep at 10.30Pm. when he was called by his brother's son, Kyalo Munyoki, who informed him that the Complainant had assaulted by her husband. In the company of Kyalo, they proceeded to the Complainant's home, about 1½ Kms away since the Complainant is a daughter to his brother. On getting there, they found a lot of people in the home and saw the Complainant lying near the sitting rooms door (main). When he moved nearer, the Complainant informed him that she had opened the door for her husband who cut her. She had cuts on the head while one hand was fully detached and the other one was about to fall off and had several cuts on her body. Upon the arrival of the police, the Complainant as taken Level 5 at Machakos. It was his evidence that there was a lamp in the house.

34. **Dr. John Mutunga**, PW11, a Doctor at Machakos Level 5, examined the Complainant who alleged she was assaulted on 18th July, 2016, by a person known to her. She sustained injury to both upper limbs and head and sustained traumatic brain injury and multiple deep cuts on the head. She also had injury on the mouth roofing to teeth and a deep cut wound at the back. She had bilateral traumatic amputation of both upper limbs (hands) below the elbow. In his opinion, the weapon used was sharp.

35. The Complainant underwent surgery at Machakos Level 5 Hospital and underwent fixing of prosthetic upper limbs in South Korea. In his assessment, the injury as grievous harm. He signed the same on 27th October, 2016 and had it stamped. At the time of examination, the injury was about 3 months but he had with him treatment notes from hospital, the X-ray and discharge summary form various hospitals.

36. According to him, the name of assailant was not mentioned to him though it was alleged it was her husband. He could not therefore state whether it was an estranged husband or current husband.

37. PW12, **Chief Inspector Dickson Walukano**, who was in July 2016, the OCS Masii Police Station received a call on 18th July, 2016, at 22.40Hrs. from Assistant Chief of Mathina, Pauline Mwendu, that there was a distress call from the house of the Complainant who was said to have been attacked and seriously injured. Upon proceeding there, he found a big crowd and I was shown the house where he found the palm of a hand that was at the door step. On entering the house, he found the Complainant lying down in a pool of blood with the right hand had been chopped off. The left hand was hanging by help of the skin, it had been cut. When he inquired from her what had happened, the Complainant respondent in Kiswahili "*Ni bwana yangu Ngila ndio amenikata hivi*" and added, "*alibisha mlango, nikasikia sauti yake, kisha nikamfungulia*".

38. PW12 then placed her in a mattress and rushed her to Machakos Level 5 hospital. According to him, the victim was in the sitting room, near the bedroom door and that the room had no enough light, so he was using his spot light.

39. He added that though there was a lantern, it was weak light.

40. PW 13, **PC Daniel Dura**, was the investigating officer. He narrated his investigations and how the Appellant was arrested at Machakos Referral Hospital.

41. PW14, **Ronald Emase**, an IT expert and a Liaison Officer with Safaricom, testified that after analysing the call data for the Complainant and the Appellant's from 16/7/16 from 12.00hrs and 19/7/2016 12.00hrs, found that the two numbers at one point were on the same point sub location Uthithini and Uuni meaning that the two were at that sub location. He concluded that the documents are in the same location and that the 2 shared the same network of the mast since the range showed the 2 were within the same radius

42. Upon being placed on his defence, the Appellant testified that he was doing tailoring business at Masii and that the Complainant was his wife having gotten married to her on 4th November, 2011 in a Christian marriage. He stated that they were no longer living together as their marriage was fraught with a lot of challenges in 2012. It was his evidence that after one year, the complainant started having affairs with other men in the area and he was threatened by her and other men who said they would kill him as they wanted his land. He narrated that at one point when he returned home, he did not find the Complainant and while sleeping, he was attacked by thugs who injured him. The second time, he found the Complainant with one Dominic Mwanzia, a village elder and when he inquired what was happening, the complainant stabbed him on his forehead. He stated that the village elder, Dominic, was his wife's boyfriend who stabbed him and he was locked inside the house. It was not until the same was opened for him by his uncle, James Kasina, that he was taken to hospital. He added that his wife did not come back after locking him in the house and left with the area elder.

43. According to him, after he reported the same, he was advised by the police to leave the home and live near security and he then moved to Masii town in 2016. He stated that on or before 18th July, 2016, he was living alone having moved from home while his wife was away all the time, moving up and down. On the 18th July, 2016, he was with James Kasina, his uncle, who was a cobbler, at Masii Market where he was working the whole day since their businesses are adjacent. In the evening they left for James's home, since he had a dowry negotiation meeting on that day with his brother Leonard Kyalo Nthenge and that they met from 7.30Pm – 10.00pm. By then, he did not know where complainant was. In the meeting were the Appellant, James Kasina, Joyce Kasina, Meshack Kyalo, Agnes Kyalo and Mike Muteti.

44. At 10.00Pm he received a call from Florence Masika, who asked where he was and upon being informed where the Appellant was, asked to speak to James. Florence told the Appellant that the complainant had been hurt and was at his place. The Appellant referred to her statement in which she confirmed that the Appellant was in a meeting with people which statement he exhibited. Upon getting the report, he thought of going to his house but decided to go to the police. However, Florence informed him that the police had responded and taken the Complainant to Machakos Level 5 hospital. He therefore decided to go the following day and while in the company of James Kasina, he was arrested while at hospital at 11 am though they had arrived at 8.00am but he was not allowed to see complainant by the doctor as the doctors were attending to her and that he was with other family members too.

45. According to the Appellant, he got a report that James Maithya was having dinner with his wife on the night of incident. He stated that the following morning, he got a report from some *boda boda* people that Maithya, a boda person, had told that that the *oria* was about to kill him at the Appellant's house due to the money given to the Complainant by the said *oria*. Apparently, the Appellant stated, there was an affair with the Complainant. According to the said report, Maithya said they were having dinner when the *oria* entered armed and he hid under the bed and *oria* cut the Complainant as he was hiding in the bed.

46. According to the Appellant, the Complainant had several affairs with *oria* and the *bodaboda* guy While he was aware that the Complainant had children, he did not know who their father was and that the complainant had lied that she was not pregnant but gave birth. The Appellant denied that he assaulted the Complainant and sought to be acquitted.

47. According to him, their marital problems were not due to lack of child problems but adultery. Referred to the statement made by Florence, in which she stated that she called James, the Appellant insisted that he was called by her and he gave James the phone. It was his evidence that he did not know the *oria*, but he was known as Mohamed.

48. DW2, **James Kasire Nyamu**, confirmed that on 18th July, 2016 he was at work with the Appellant from 9.00 a.m. up to late after which they proceeded to his home for the dowry negotiations meeting started at 7.30 p.m. up to 10.00 p.m. after which he went to his house and left the Appellant at his son's place. When he was about to sleep, the Appellant went and informed him that he been called by Florence who wanted to talk to him regarding the report that the Complainant had been cut. Since the area is far, he suggested that they should go to hospital since he got a report that the police had arrived and the Complainant had been taken to hospital.

49. According to him, the allegation that the Appellant had cut the Complainant was not true as the Appellant was with him throughout.

50. In cross-examination, he stated that on that day, they left work at 6.30 p.m. and got home at 7.00 p.m. but they did not start the meeting right away, as he went with the Appellant to his shop.

51. DW3, **Agnes Kyalo Kasive**, stated that the dowry negotiation meeting was at her home and the meeting kicked off at 7.30 p.m. At 10.00 p.m. when they were planning to go and sleep, the Appellant was called by one Florence, and he was told to give DW2 the phone after which DW2 informed them of what had happened to PW1. According to her, the allegation that the Appellant cut the Complainant was not true as the Appellant was at her house

52. In her judgement, the learned trial magistrate found that based on the evidence on record, she was satisfied that the Complainant sustained grievous harm. She also found that the Complainant recognised the voice of the Appellant prompting her to open the door and having warned herself of the danger of a single identifying witness, found that there was sufficient corroborating evidence through the testimony of the witnesses who responded to the scene that the Complainant was consistent that she was assaulted by the Appellant. As regards the defence case, she found that the defence witnesses contradicted themselves as to whose house the meeting took place and the

time the meeting started. She therefore disregarded the alibi defence as well as the evidence of PW14 in the absence of the certificate. However, from the evidence on record, the Court found that the acts committed by the Appellant amounted to an attempted murder of the Complainant.

53. In this appeal it is submitted on behalf of the Appellant that the Learned Magistrate' erred both in law and fact when she convicted the appellant on contradicting testimonies. It was pointed out that whereas the Complainant stated that she had supper with PW9, the later denied the same and even claimed not to have seen the complainant that day. Further while PW1 produced a checked blue white skirt, red t-shirt black and an orange torn Jacket which she alleged to have been wearing on that day, PW2 on the other hand who was the first to arrive at the scene testified that the complainant was clothed in a jacket and a trouser hence contradicting the testimony of PW1. PW1 in her statement recorded by the police stated that she was attacked at 1930hrs as evidenced on the charge sheet. However, in court she testified the attack was at 9.30 pm while other prosecution witnesses stated it was 9.00 pm. According to the Appellant, these inconsistencies were not addressed by the trial magistrate and hence resulted to unsafe conviction. In support of this submission, the Appellant relied on the case of **Joseph Ndungu Kimanyi –vs- Republic (1979) eKLR.**

54. It was further submitted that there was no proper identification of the assailants which led to miscarriage of justice since the incident occurred at night and the intensity of the light was not proved to enable one identify someone. In this regard reliance was placed on the case of **Cleophas Otieno Wamunga –vs- Republic (1989) eKLR** and **David Wambura Nahashon –vs- Republic (2016) eKLR.**

55. It was further submitted that the trial magistrate did not subject the voice identification to test and analysis which casted doubts as to the veracity of the voice identification since the trial court judgment does not show in what language the words were spoken by the appellant. In support of this contention the Appellant relied on the case of **Joseph Muchangi Nyaga & another –vs- Republic (2013) eKLR.**

56. According to the Appellant, the learned magistrate erred both in law and fact when she convicted the appellant on a single witness evidence and failed to warn herself on the dangers of relying on a single identifying witness. In this regard reliance was placed on the decision of the Court of Appeal in **Maitanyi –vs- Republic (1986) eKLR** and **Abdulla Bin Wendo & Another –versus Reg(1953) 20 EACA 166.**

57. It was further submitted that trial magistrate failed to appreciate the failure by the prosecution to call a witness who had recorded statement that her evidence would be adverse to the prosecution case and which exonerated the appellant as at the time it was confirmed by the witness the appellant was attending a dowry negotiations meeting elsewhere. It was submitted that crucial witnesses who had recorded statement were not called to testify and no reason were offered by the prosecution on the failure to call such witnesses.

58. It was submitted that the Learned magistrate erred both in law and fact when she dismissed the accused defence which raised an alibi supported by two witnesses. In this regard reference was made to **Mutuku Mwema Munguti –vs- Republic Cr. Appeal no. 99 of 2001** and **Victor Mwendwa Mulinge –vs- Republic (2014) eKLR.**

59. It was contended that the learned magistrate erred both in law and fact when she convicted the appellant with an offence under section 220(a) of the ***Penal Code*** which had not been proved and proceeded to sentence him. It was submitted that the prosecution herein had a duty to prove the *actus reus* elements that is an act which endangered the life of another and also needed to prove the *mens rea* element that is the intention to kill based on **Jane Koitee Jackson –vs- Republic (2014) eKLR** and **Cheruiyot –vs- Republic (1976-1985) EA 47.**

60. It was further submitted that the Learned Magistrate imposed excessive sentence on the Appellant despite being a first offender and that she never considered the fact that there were domestic squabbles between the appellant and the complainant hence there was vendetta against the appellant. Reference was made to **Francis Ngui Kondi –vs- Republic (2016) eKLR.**

61. It was therefore submitted that the conviction and sentence of the charge was an error and led to a miscarriage of justice and the Court was urged to set aside and quash the sentence and acquit the appellant.

62. On its part, the Respondent submitted that attempted murder as defined in section 220 and 221 of the ***Penal Code*** is committed when a person attempts unlawfully to cause the death of another; or with intent unlawfully to cause the death of another does any act or omission to do any act, which there is a duty to do, which act or omission is of such nature as to likely endanger human life.

63. Based on **Rex v Gwempazi s/o Mukonzho (1943) 10 EACA 101,** it was submitted that *actus reus* for the offense is an act or omission which endangers the life of another. In this case, it was contended that the Appellant's intention to kill the victim is clear from the witness accounts and the evidence that was tendered before the court by the prosecution in support of the charge and reference was made to **Ahmed Mohamed Saeed -vs-Reginam (1956) EACA 396.**

64. According to the Respondent, when a person, intending to commit an offence, begins to put his intention into execution by means adapted to its fulfilment, and manifests his intention by some overt act, but does not fulfil his intention to such an extent as to commit the offence, he is said to attempt to commit the offence and this contention was based on **John Ngare Kwema -vs-Republic (2016) eKLR** and **Indian Penal Code (Act XLV of 1860),** and it was submitted that attempted murder requires the existence of an intention to kill or cause grievous bodily harm. In this case it was submitted that the Appellant had intent to commit the offense and that the evidence on record proves that the appellant cut the complainant so many times with a *panga*.

65. Regarding the alleged contradictions, it was submitted that the same will only be fatal to the prosecution case when considered will cast doubt in the prosecution case and reliance was placed on the case of **Daniel Njoroge Mbugua-v- Republic (2014) eKLR.**

66. It was submitted that the appellant was positively identified and recognized by PW1, his wife, as the person she saw at the scene. The Respondent submitted that the evidence of a single witness can suffice to prove a case provided that it is tested with the greatest care and that it is not necessary to call all the people who know something about the case. The issue is whether those called are sufficient to aid the court

establish the truth, whether the evidence is favourable to the prosecution or not.

67. In the Respondent's view, in light of the earlier defense adopted by the accused person, the defense of alibi is an afterthought. As regards the sentence, it was submitted that the sentence of 30 years imprisonment was lenient as the prescribed sentence is life imprisonment.

Determination.

68. This Court's duty on a first appeal was restated in **Okeno vs. Republic [1972] EA 32** as follows:

“An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya vs. Republic (1957) EA. (336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala Vs. R. (1957) EA. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters vs. Sunday Post [1958] E.A 424.”

69. The offence of attempted murder with which the appellant was charged falls within the category of offences known as inchoate offences. These types of offences were dealt with by **Mativo, J** extensively in the case of **Moses Kabue Karuoya vs. Republic [2016] eKLR** where the learned Judge expressed himself as follows:

“In the case of *Bernard K. Chege vs Republic* this court had the occasion to address its mind and to define in detail ingredients of incomplete offences also described as *inchoate* offences. *Inchoate* crimes are incomplete crimes which must be connected to a substantive crime to obtain a conviction. Examples of *inchoate* crimes are criminal conspiracy, criminal solicitation, and *attempt to commit a crime*, when the crime has not been completed. It refers to the act of preparing for or seeking to commit another crime. An *inchoate* offense requires that the accused have the specific intent to commit the underlying crime. An *inchoate* crime may be found when the substantive crime failed due to arrest, impossibility, or an accident preventing the crime from taking place. Strictly *inchoate crimes* are a unique class of criminal offences in the sense that they criminalize acts that precede harmful conduct but do not necessarily inflict harmful consequences in and of themselves. It can thus be appreciated that it could extend the criminal law too far to reach behind those acts and criminalize behaviour that precedes those acts. Every *inchoate* crime or offense must have the *mens rea* of intent or of recklessness, but most typically intent. Specific intent may be inferred from circumstances. It may be proven by the doctrine of "dangerous proximity", and the presence of a "substantial step in a course of conduct". The dividing line between legal and illegal conduct is whether there is a "substantial step" towards committing a *specific* crime. When a person, intending to commit an offence, begins to put his intention into execution by means adapted to its fulfilment, and manifests his intention by some overt act, but does not fulfil his intention to such an extent as to commit the offence, he is said to attempt or to prepare to commit the offence. The essential ingredients of an *attempt to commit an offence* have been laid down in the following words:-

“In every crime, there is first intention to commit it, secondly, preparation to commit it, thirdly to commit it. If the third, that is, attempt is successful, then the crime is complete. If the attempt fails, the crime is not complete but the law punishes the act. An 'attempt' is made punishable because every attempt, although it fails of success, must create an alarm, which, of itself, is an injury, and the moral guilt of the offender is the same as if he had succeeded”

Thus, for there to be an attempt to commit an offence by a person, that person must:-

- a. *Intend to commit the offence;*
- b. *Begin to put his intention to commit the offence into execution by means which are adapted to its fulfilment. This means that the accused begins to carry out his intention to commit the offence in a way suitable to bring about what he intends to achieve;*
- c. *Do some overt act which manifests his intention; that is, the accused performs an act which is capable of being observed by another (although it may not have been) and which in itself makes clear his intention to commit the offence,*

But in fact he does not commit the whole offence. For the offence of or attempting to commit an offence to be proved, the prosecutor must prove each of those three elements beyond reasonable doubt.

The act relied upon as constituting the attempt to commit an offence must be an act immediately, not merely remotely, connected with the contemplated offence. This was enunciated in the case of *Williams, Ex parte The Minister for Justice and A-G*. The act must go beyond mere preparation to commit the crime and must amount really to the beginning of the commission of the crime. But it is necessary that the accused should have done his best or taken the last steps towards the intended offence. There can be an attempt to commit an offence where the failure to complete the commission of it is due to ineptitude, inefficiency or insufficient means on the part of the accused person. In fact, the fact that a person, having done something which amounts to an attempt, then voluntarily desists from continuing the attempt, does not relieve him from criminal responsibility for the attempt which he made before desisting. For the prosecution to prove the offence of preparation to commit a felony, they must establish that the accused had the intention to commit the offence. It must be shown that the appellant had put in motion his intention by making preparations to commit the offence. The prosecution must establish that the appellant made the attempt to put into effect his intention. The question that calls for determination is whether or not the conduct of the appellant constituted an overt act sufficiently proximate to constitute preparation to commit an offence. *Spry J* (as he then was) put it more authoritatively when he stated:-

“The principles of law involved are very simple but it is their application that is difficult.....The intention will, in the majority of cases, only be capable of proof by inference and it follows in such cases that an act must be of such a character as to be incompatible with another reasonable explanation. Secondly, if the intention is established, the act itself must not be too remote from the alleged intended offence”

Criminal law seeks to restore order, decency and social equilibrium in society. It is aimed at curtailing or reducing to the minimum grave incidents of anti-social conduct. Punishment of an offender lies at the root of criminal law. Where an offence is committed, the offender or wrong-doers is punished, however, the criminal law also seeks to punish those who intend to commit offences but could not successfully do so. That is, they merely attempted to commit an offence. The fact remains that they intended to commit an act which they know is unlawful and prohibited, but the completed offence was never accomplished. The offence remains *inchoate* because the accused could not accomplish his desires, or that the end result of his acts or omission is not what he envisaged. He has all the same, attempted to commit an offence. It is a criminal attempt and therefore an offence. Will an accused person be allowed to go scot-free because he could not finish his plans" No. He would be made to face some form of punishment even though he never completed the offence. In my view, any legal system would be defective if criminal liability only arose when substantive offences have actually been committed.”

70. **Mrima, J** similarly expressed himself in **Brian Kennedy Odhiambo vs. Republic [2019] eKLR** as follows:

“Section 388 of the *Penal Code* defines “attempt” as follows: -

388 (1) When a person, intending to commit an offence, begins to put his intention into execution by means adapted to its fulfillment, and manifests his intention by some overt act, but does not fulfill his intention to such an extent as to commit the offence, he is deemed to attempt to commit the offence.

(2) It is immaterial, except so far as regards punishment, whether the offender does all that is necessary on his part for completing the commission of the offence, or whether the complete fulfillment of his intention is prevented by circumstances independent of his will, or whether he desists of his own motion from the further prosecution of his intention.

(3) It is immaterial that by reason of circumstances not known to the offender it is impossible in fact to commit the offence.

The above section brings out the two main ingredients of an attempted offence; the *mens rea* which constitutes the intention and the *actus reus* which constitutes the overt act towards the execution of the intention. In the case of **R vs. Whybrow (1951) 35 CR APP REP, 141**, Lord Goddard C.J., had the following to say on *mens rea* when the court was albeit dealing with the offence of attempted murder: -

..... But if the charge is one of attempted murder, the intent becomes the principal ingredients of the crime.

Eminent learned authors in criminal law, J. C. Smith and Brian Hogan in their book *Criminal Law*, Butterworths, 1998 (6th Edition) at page 288 while discussing the aspect of *mens rea* in an attempted murder had this to say: -

... Nothing less than an intention to kill will do.

And in **Cheruiyot v Republic (1976 - 1985) EA 47** Madan, JA, as he then was, while approving the holding in **R v. Gwempazi s/o Mukhonzu (1943) 10 EACA 101**, **R v. Luseru Wandera (1948) EACA 105** and **Mustafa Daga s/o Andu vs. R (1950) EACA 140**, stated as follows on *mens rea* in an attempted murder charge: -

In order to constitute an offence contrary to Section 220, it must be shown that the accused had a positive intention unlawfully to cause death.... The essence of the offence is the intention to murder as it is presented by the prosecution.

Recently the Court of Appeal had yet another occasion to look at the aspect of the *actus reus* in attempted offences. In the case of **Abdi Ali Bare vs. Republic (2015) eKLR** learned Honourable Justices Githinji, Mwilu and M'Inoti had the following to say as they considered the offence of attempted murder: -

..... The more challenging question in a charge of attempted murder is the actus reus of the offence. Although a casual reading of Section 388 of the Penal Code may suggest that an attempt is committed immediately the accused person commits an overt act towards the execution of his intention, it has long been accepted that in a charge of attempting to commit an offence, a distinction must be drawn between mere preparation to commit the offence and attempting to commit the offence. In the work quoted above by Smith & Hogan, the authors give the following scenario at page 291 to illustrate the distinction:

D, intending to commit murder buys a gun and ammunition, does target practice, studies the habits of his intended victim, reconnoiters a suitable place to lie in ambush, puts on a disguise and sets out to take up his position. These are all acts of preparation but could scarcely be described as attempted murder. D takes up his position. loads the gun, sees his victim approaching, raises the gun, takes aim, puts his finger on the trigger and squeezes it. He has now certainly committed attempted murder....

In the present appeal, to prove attempted murder on the part of the appellant, he must be proved to have taken a step towards the commission of murder, which step is immediately and not remotely connected with commission of the murder. Whether there has been an attempt to commit an offence is a question of fact. The act alleged to constitute attempted murder, for example, must be

sufficiently proximate to murder to be properly described as attempt to commit murder. In *CROSS & JOINES' INTRODUCTION TO CRIMINAL LAW, Butterworths, 8th Edition (1976), P. Asterley Jones and R. I. E. Card state as follows at page 354:*

..[A]n act is sufficiently proximate when the accused has done the last act which it is necessary for him to do in order to commit the specific offence attempted....

The learned authors add that the court must answer the question whether the acts by the accused person were immediately or merely remotely connected with the commission of the specific offence attempted on the basis of common sense. Ultimately therefore, the real question is whether the acts by the accused person amounted to mere preparation to commit murder or whether the accused had done more than mere preparatory acts."

71. From the foregone, it is easily deducible that when a court is faced with any charge on an attempted nature, care must be taken to ensure that the attempt as opposed to mere acts of preparation, is proved. However strong the evidence is, if it only relates to actions in preparation to commit a certain crime, that evidence cannot justify a conviction on an attempted charge.

72. For clarity purposes, evidence must be led which goes beyond the preparatory stages and right to the doorstep of possible commission of the offence. It ought to be demonstrated that the accused had committed the last act to the actual commission of the specific offence attempted. Likewise, the intention to commit the crime must also be proved.

73. In this case, section 220 of the *Penal Code* provides as hereunder:

Any person who -

(a) attempts unlawfully to cause the death of another; or

(b) with intent unlawfully to cause the death of another does any act, or omits to do any act which it is his duty to do, such act or omission being of such a nature as to be likely to endanger human life, is guilty of a felony and is liable to imprisonment for life.

74. The appellant was however charged under section 220(a) of the said section. There is no doubt at all that the Complainant was attacked and that the said attack resulted in grievous harm being caused to her. In the process, she lost her two limbs and had numerous cuts on her body.

75. The next question is whether the said attack was intended to cause death to the Complainant. The person who inflicted the injuries on the Complainant must have intended to cause her serious injuries death. As was held in *Jane Koitee Jackson –vs- Republic (2014) eKLR* and *Cheruiyot –vs- Republic (1976-1985) EA 47:-*

“An essential ingredient of an attempt to commit an offence is a specific intention to commit that offence. If the charge is one of the attempted murder, the principal ingredient and the essence of the crime is the deliberate intent to murder. It must be shown that the accused person had a positive intention to unlawfully cause death and that intention must be manifested by an overt act.”

76. It is therefore clear that the intention to cause death need not necessarily be expressed by the attacker. It can be inferred from the overt act where for example the amount of force applied, the type of the weapon used and whether the offender repeatedly assaulted or attacked the victim that the attacks clearly evinced an intention to cause the victim death. Where the same is accompanied by words to that effect, that intention is strengthened.

77. In this case the weapon used was sharp and the force applied must have been so severe as to dismember the Complainant's two upper limbs. Apart from that there were numerous cuts on different parts of the body of the complainant. Even without the words uttered, it was clear that the attacker did set out to either cause death to the Complainant or did not care whether the Complainant died or not. In *Rex v Gwempazi s/o Mukonzho (1943) 10 EACA 101*, it was properly held that *actus reus* for the offense is an act or omission which endangers the life of another. The duty of this court in such circumstances, is, as was held in *Ahmed Mohamed Saeed -vs-Reginam (1956) EACA 396*, to determine whether, on the facts adduced, it could reasonably infer either that the Appellant intended to kill or that he at least knew that what he was doing was so eminently dangerous that he must in all probability cause death or such bodily injury as was likely to cause death. Therefore, as correctly stated in *John Ngare Kwema -vs-Republic (2016) eKLR* and *Indian Penal Code (Act XLV of 1860)*.

78. In this case the Complainant stated that when she asked the attacker why he was killing her, the response was that that was her last day to speak. In this case it is clear that the attacker did not just set out to injure or maim the Complainant, but set out and had the intention of eliminating her. The fact that the complainant who was seriously injured was left there clearly shows that the attacker either intended to kill her or did not care whether or not she died. The totality of the evidence show that not only did the attacker have the *mens rea*, but apart from preparing to kill the complainant by arming himself with such a sharp weapon, took steps to do so. I therefore have no doubt in my mind that the offence of attempted murder was proved beyond reasonable doubt.

79. The next question is whether the same was committed by the appellant. It is not in doubt that the only eye witness to the commission of the offence was the complainant. The position in law in this issue is well illustrated in the case of *Charles O. Maitanyi vs. Republic [1986] KLR 198* where the court held:

“Although it is trite law that a fact may be proved by the testimony of a single witness, this does not lesser the need for

testing with greatest care the evidence of a single witness respecting identification...The court must warn itself of the danger of relying on the evidence of a single identifying witness. It is not enough for the court to warn itself after making the decision, it must do so when the evidence is being considered and before the decision is made.”

80. That was the position in Ogeto vs. Republic [2004] KLR 19 where it was noted as follows:-

“It is trite law that a fact can be proved by the evidence of a single witness although there is need to test with the greatest care the identification evidence of such a witness especially when it is shown that conditions favouring identification were difficult. Further, the Court has to bear in mind that it is possible for a witness to be honest but to be mistaken.”

81. The Court of Appeal for East Africa discussed the danger of relying on such evidence without warning in Roria vs. Republic [1967] EA 583 at page 584. It stated:

“A conviction resting entirely on identity invariably causes a degree of uneasiness...That danger is, of course, greater when the only evidence against an accused person is identification by one witness and though no one would suggest that a conviction based on such identification should never be upheld it is the duty of this court to satisfy itself that in all circumstances it is safe to act on such identification.”

82. The court also cited its own decision in Abdala bin Wendo & Another versus Republic (1953), 20 EACA 166 where it held:

“Subject to certain well known exceptions it is trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult. In such circumstances what is needed is other evidence, whether it be circumstantial or direct, pointing to the guilt, from which a judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from the possibility of error.”

83. In this case the evidence against the appellant was solely based on his recognition that night by the complainant. Though the principles relating to identification are somewhat similar to those relating to recognition, there are however distinctions between the two since as was held in Anjononi & Others vs. The Republic [1980] KLR 59:-

“...recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other.”

84. In Stephen Karanja vs. Republic [2011] eKLR, the Court of Appeal held that:

“The evidence of the complainant was that the robbery took place at about 8:00 a.m. hence in broad daylight. The appellant was known to the complainant prior to that day. This makes the evidence of identification, although by a single witness, free from any possibility of error as it was, indeed, evidence of recognition.”

85. It was however cautioned in Ali Mlako Mwero vs. Republic [2011] eKLR by the Court of Appeal that despite there being some measure of reassurance when the case rests on recognition:

“...in either case, the evidence ought to be tested with utmost care because it is not unknown for a witness to be honest but mistaken.”

86. That was the position in the well-known case of R vs. Turnbull (1976) 3 ALL E.R 549 where the Court held that:

“Recognition may be more reliable than identification of a stranger; but even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.”

87. In order, therefore to avoid possibility of mistaken identity, the Court of Appeal in Peter Musau Mwanzia vs. Republic [2008] eKLR, expressed itself as follows:

“We do agree that for evidence of recognition to be relied upon, the witness claiming to recognise a suspect must establish circumstances that would prove that the suspect is not a stranger to him and thus to put a difference between recognition and identification of a stranger. He must show, for example, that the suspect has been known to him for sometime, is a relative, a friend or somebody within the same vicinity as himself and so he had been in contact with the suspect before the incident in question. Such knowledge need not be for a long time but must be for such time that the witness, in seeing the suspect at the time of the offence, can recall very well having seen him earlier on before the incident.”

88. In this case, it is clear that the complainant and the appellant knew each other very well. They had been living together as husband and wife till their relationship became sour and the Appellant left the matrimonial house. According to the Complainant what made her open the door was that she recognised the voice as that of the Appellant. In her evidence there was a lantern lamp in the house. The fact that some of the witnesses might have not found the lamp there does not necessarily mean that the lamp was not there during the attack.

89. I agree with the holding in the case of Joseph Muchangi Nyaga & another –vs- Republic (2013) eKLR where the court of appeal pronounced itself that:-

“The judgment of the High Court does not contain the exact words spoken by the 1st appellant which words led the complainant to recognize his voice. It is also not clear in what language the words were spoken. Failure to subject the voice identification to test and analysis casts some doubts as to the veracity of voice identification.”

90. However, in this case, the voice recognition was followed by the physical recognition when the Complainant opened the door and the Complainant asked the Appellant why he was killing her. In her first reports to those who went to scene, the Complainant was categorical that her injuries were caused by the Appellant. The importance of the first report was appreciated in Tekerali s/o Korongozi & 4 Others – vs- Rep (1952) 19 EACA 259 where it was held that:

“Their importance can scarcely be exaggerated for they often provide a good test by which the truth or accuracy of the later statements can be judged, thus providing a safeguard against later embellishment or the deliberately made-up case. Truth will often [came] out in the first statement taken from a witness at a time when recollection is very fresh and there has been no opportunity for consultation with others.”

91. And in the case of Rex vs. Shabani Bin Donaldi (1940) 7 EACA 60 it was held that:

“We desire to add that in cases like this, and indeed in almost every case in which an immediate report has been made to the police by someone who is subsequently called as a witness evidence of the details of such reports (save such portions of it as may be inadmissible as being hearsay or the like) should always be given at the trial. Such evidence frequently proves most valuable, sometimes as corroboration of the evidence of the witness under Section 157 of the Evidence Act, and sometimes as showing that what he now swears is an afterthought, or that he is now purporting to identify a person whom he really did not recognize at the time, or an article which is not really his at all.”

92. However, the defence case was that the Appellant was somewhere else at the time of the said attack. In other words, the Appellant raised the defence of alibi. In the case of Patrick Muriuki Kinyua & Another vs. Republic Nyeri Criminal Appeal No. 11 of 2013 (UR) the Court held that:

“an alibi is a plea by an accused person that he was not there (was not present) at the place where the crime was committed at the time of the alleged commission of the offence for which he is charged.”

93. In Wang’ombe vs. The Republic [1980] KLR 149, Madan, Miller and Potter, JJA held that:

“...in Ssentale vs. Uganda [1968] EA 365, 368 [Sir Udo Udoma CJ]...said that a prisoner who puts forwards an alibi as an answer to a charge does not thereby assume any burden of proving that answer; it is a misdirection to refer to any burden as resting on the prisoner in such a case; for the burden of proving his guilt remains throughout on the prosecution. We agree, we have ourselves said so on more than one occasion...The defence of alibi was put forward for the first time some four months after the robbery when the appellant made his unsworn statement in court. Even in such circumstances the prosecution or the police ought to check and test the alibi wherever possible. On the other hand, however punctilious the prosecution or police, it throws upon them an unreasonable burden when the alibi is pleaded for the first time in an unsworn statement at the trial, out of the blue. Udo Udoma CJ also said that, if the alibi had been raised for the first time at the trial, different considerations might have arisen as regards checking and testing it...In England, in order to distribute the burden of the prosecution fairly, the Criminal Justice Act, 1967, section 11(1), provides that on a trial on indictment the defendant may not without the leave of the court adduce evidence in support of an alibi unless, before the end of the prescribed period, he gives notice of particulars of the alibi. Under section 11(8) ‘the prescribed period’ means the period of seven days from the end of the proceedings before the examining justices. Section 11(1) applies where the defendant alone is to testify that he was elsewhere at the material time; see R vs. Jackson and Robertson [1973] Crim. LR 356...The alibi was considered by both courts below, the High Court saying (as we have already set out) that it needed to be weighed with the evidence of the prosecution, particularly that of the complainant and his wife, and the fact that the appellant denied knowing Lucy, and particularly with Lucy’s evidence. To weigh one set of evidence with another set of evidence is not to remove the burden of proving that which has to be proved from the party charged with the proof of it. To marshal, analyse and dissect evidence in order to weigh it to determine its value and veracity is a basic function of judicial officers. They do not have to pendanticize. What other approach is there? Judicial officers are not clairvoyant!”

94. In Victor Mwendwa Mulinge vs. Republic [2014] eKLR the Court of Appeal stated thus:

“It is trite law that the burden of proving falsity, if at all, of an accused’s defence of alibi lies on the prosecution. See Karanja v Republic [1983] KLR 501 this court held that in a proper case, a trial court may, in testing a defence of alibi and in weighing it with all the other evidence to see if the accused’s guilt is established beyond reasonable doubt, take into account the fact that he had not put forward his defence of alibi at an early stage in the case so that it can be tested by those responsible for investigations and thereby prevent any suggestion that the defence was an afterthought.”

95. The South African case of Ricky Ganda vs. The State, {2012} ZAFSHC 59, Free State High Court, Bloemfontein provides useful guidance. In the said case it was held:-

“The acceptance of the evidence on behalf of the state cannot by itself be sufficient basis for rejecting the alibi evidence.

Something more is required. The evidence must be considered in its totality. In order to convict there must be no reasonable doubt that the evidence implicating him is true...the correct approach is to consider the alibi in light of the totality of the evidence in the case and the courts impression of the witnesses...it is acceptable in totality in evaluating the evidence to consider the inherent probabilities...The proper approach is to weigh up all the elements which point towards the guilt of the accused against all those which are indicative of his innocence, taking proper account of inherent strengths and weaknesses, probabilities and improbabilities on both sides and having done so, to decide whether the balance weigh so heavily in favour of the state as to exclude any reasonable doubt about the accused's guilt."

96. It was however appreciated in R. v. Sukha Singh s/o Wazir Singh & Others (1939) 6 EACA 145, the former Court of Appeal for Eastern Africa upheld a decision of the High Court in which it was stated:

"If a person is accused of anything and his defence is an alibi, he should bring forward that alibi as soon as he can because, firstly, if he does not bring it forward until months afterwards there is naturally a doubt as to whether he has not been preparing it in the interval, and secondly, if he brings it forward at the earliest possible moment it will give prosecution an opportunity of inquiring into that alibi and if they are satisfied as to its genuineness proceedings will be stopped."

97. In Festo Androa Asenua vs. Uganda, Cr. App. No. 1 of 1998 the Court made the following:

"We should point out that in our experience in Criminal proceedings in this Country it is the tendency for accused persons to raise some sort of alibi always belatedly when such accused persons give evidence. At that stage the most the prosecution can do is to seek adjournment of the hearing of the case and investigate the alibi. But that may be too late. Although for the time being there is no statutory requirement for an accused person to disclose his case prior to presentation of his defence at the trial, or any prohibition of belated disclosure as in the UK statute cited above, such belated disclosure must go to the credibility of the defence."

98. In this case, though raised late, the alibi defence was supported by two defence witnesses. The first, DW2, testified that on 18th July, 2016 he was at work with the Appellant from 9.00 a.m. up to late after which they proceeded to his home for the dowry negotiations meeting which took place from 7.30 p.m. up to 10.00 p.m. after which he went to his house and left the Appellant at his son's place. On the other hand, DW3's evidence was that the dowry negotiation meeting was at her home and it kicked off at from 7.30 p.m. till 10.00 p.m. It is clear that the two versions could not have been correct. Either one was correct or both were incorrect. I cannot fault the learned trial magistrate for disbelieving the said alibi defence.

99. In this case, I have re-evaluated the evidence before this Court and whereas I appreciate that the prosecution evidence had some inconsistencies. However, whether or not discrepancies in the evidence of witnesses have the effect of discrediting that evidence would depend upon the nature of the discrepancies, that is to say, whether or not the discrepancies are trifling. See *Law of Evidence (10th Ed) Vol. 1 at 46*.

100. As was stated in John Cancio De SA vs. V N Amin Civil Appeal No. 27 of 1933 [1934] 1 EACA 13:

"Probably every judge has had occasion at some time or other to regard discrepancies as showing veracity, and to regard uniformity as showing fabrication, but it depends upon the nature of the discrepancies and the uniformity. If two people allege that they made a journey together from Kampala to Nairobi and they differ on such details as the time the train stopped at Eldoret, what they had for lunch and dinner, and whether it rained on the journey and where, it would be more reasonable to argue a difference in memory than that the journey was never undertaken. But if one says they made the whole of the journey by rail, and the other says they went to Entebbe by car and thence by air to Nairobi, it would be more reasonable to argue that the journey never took place than that one or both suffered from a defective memory."

101. This was the position in Willis Ochieng Odera vs. Republic [2006] eKLR, where the Court of Appeal held:

"As for the contradictions in the prosecution evidence it may be true that such contradictions, particularly with regard to the date indicated on the P3 form as the date of the offence, is different. But that *per se* is not a ground for quashing the conviction in view of the provisions of section 382 of the *Criminal Procedure Code*."

102. In the case of Njuki vs. Rep 2002 1 KLR 77, the court said the following in respect of discrepancies in the evidence of witnesses:

"In certain criminal cases, particularly those which involve many witnesses, discrepancies are in many instances inevitable. About what is important is whether the discrepancies are of such a nature as would create a doubt as to the guilt of the accused... however, where discrepancies in the evidence do not affect an otherwise proved case against the accused, a court is entitled to overlook those discrepancies and proceed to convict the accused."

103. In Philip Nzaka Watu vs. Republic [2016] eKLR, the Court of Appeal held that:

"The first question in this appeal is whether the prosecution case was riddled with contradictions and inconsistencies of the magnitude that would make the conviction of the appellant unsafe. It cannot be gainsaid that to found a conviction in a criminal case, where the trial court has to be satisfied of the accused person's guilt beyond reasonable doubt, the prosecution evidence must be cogent, credible and trustworthy. Evidence that is obviously self contradictory in material particulars or which is a mere amalgam of inconsistent versions of the same event, differing fundamentally from one purported eyewitness to another, cannot give the assurance that a court needs to be satisfied beyond reasonable doubt. However, it must be

remembered that when it comes to human recollection, no two witnesses recall exactly the same thing to the minutest detail. Some discrepancies must be expected because human recollection is not infallible and no two people perceive the same phenomena exactly the same way. Indeed as has been recognised in many decisions of this Court, some inconsistency in evidence may signify veracity and honesty, just as unusual uniformity may signal fabrication and coaching of witnesses. Ultimately, whether discrepancies in evidence render it believable or otherwise must turn on the circumstances of each case and the nature and extent of the discrepancies and inconsistencies in question.”

104. In Dickson Elia Nsamba Shapwata & Another vs. The Republic, Cr. App. No. 92 of 2007 the Court of Appeal of Tanzania addressed the issue of discrepancies in evidence and concluded as follows:

“In evaluating discrepancies, contradictions and omissions, it is undesirable for a court to pick out sentences and consider them in isolation from the rest of the statements. The Court has to decide whether inconsistencies and contradictions are minor, or whether they go to the root of the matter.”

105. In Erick Onyango Ondeng’ vs. Republic [2014] eKLR, the Court of Appeal held that:

“The hearing before the trial court invariably entails consideration of often contradictory, inconsistent and hotly contested facts. The primary duty of the trial court is to carefully analyse that contradictory evidence and determine which version of the evidence, on the basis of judicial reason, it prefers. It is the trial court, when it comes to questions of fact, which has the singular advantage of seeing and hearing the live witness testify and being subjected to cross-examination, that time-honoured device for testing the truth or correctness of evidence. Next is the first appellate court which by law, it is its bounden duty to re-consider, re-evaluate and analyse the evidence that was before the trial court, to determine whether, on the basis of those facts, the decision of the trial court is justified. (See OKENO VS REPUBLIC (1972) EA 32). It is in the above context that this Court has said time and again that it will defer to and respect findings of fact by the trial court as affirmed by the first appellate court after due re-evaluation and analysis, because the second appellate court operates from the distinct advantage of not having seen or heard the witnesses. This Court will therefore not interfere with findings of fact by the two courts below unless it is demonstrated that the trial court and the first appellate court considered matters they ought not to have considered or that they failed to consider matters they should have considered or that looking at the evidence as a whole, the courts below were plainly wrong in their decision, in which case such omission or commission would be treated as matters of law.”

106. As was noted in Twehangane Alfred vs. Uganda, Crim App. No. 139 of 2001, [2003] UGCA, 6:

“With regard to contradictions in the prosecution’s case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution’s case.”

107. In Joseph Maina Mwangi vs. Republic CA No. 73 of 1992 (Nairobi) Tunoi, Lakha & Bosire JJA held: -

“In any trial there are bound to be discrepancies. An appellate court in considering those discrepancies must be guided by the working of Section 382 of the Criminal Procedure Code, viz whether such discrepancies are so fundamental as to cause prejudice to the Appellant or they are inconsequential to the conviction and sentence.”

108. Each case must be considered on its own particular circumstances. There are cases where the inconsistency is so minor that clearly it will be of little effect and certainly does not necessarily mean that the witness is lying or that his testimony cannot be relied on. The judge must take all the evidence and all the circumstances of the case into account in deciding whether to accept a witness’s evidence or any part of his testimony. (Nyakisia v. R. E. A. C. A. Crim. App. 35-D-71; -/5/71; Duffus P., Spry v. P. & Lutta J. A., in the East African Court of Appeal).

109. In this case, I have myself subjected the evidence adduced to fresh scrutiny and though it is true that there were inconsistencies in the evidence of the said witnesses, I am unable to find that the same were material enough to warrant interference with the decision.

110. As regards the failure to call some witnesses, I have considered the evidence on record I agree with the Respondent that even without the evidence of the said witnesses, the evidence on record was sufficient to prove the prosecution case. Section 143 of the *Evidence Act* provides that:

No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact.

111. The case of Mwangi vs. R, [1984] KLR 595 holds that:

“Whether a witness should be called by the prosecution is a matter within the discretion of the prosecution and the court will not interfere with that discretion unless it may be shown that the prosecution was influenced by some oblique motive.”

112. According to Keter vs. Republic [2007] 1EA135:-

“The prosecution is not obligated to call a superfluity of witnesses, but only such witnesses as are sufficient to establish the charge beyond any reasonable doubt.”

113. In this case I am not satisfied that the failure to call the other witnesses rendered the evidence adduced insufficient to establish the charge. The Appellant had the option of calling the said witnesses, if he so desired.

114. In the foregoing premises, I have no reason to interfere with the conviction.

115. As regards the sentence, the charge facing the Appellant carried a maximum of life sentence. The trial Court however, sentenced him to 30 years. The Appellant contends that the sentence was excessive in the circumstances, the Appellant being a first offender. It is important to set out the circumstances under which an appellate court interferes with sentence. The principles guiding interference with sentencing by the appellate court were properly, in my view, set out in S vs. Malgas 2001 (1) SACR 469 (SCA) at para 12 where it was held that:

“A Court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court, approach the question of sentence as if it were the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would be to usurp the sentencing discretion of the trial court...However, even in the absence of material misdirection, an appellate court may yet be justified in interfering with the sentence imposed by the trial court. It may do so when the disparity between the sentence of the trial court and the sentence which the appellate court would have imposed had it been the trial court is so marked that it can properly be described as “shocking”, “startling” or “disturbingly inappropriate”

116. Similarly, in Mokela vs. The State (135/11) [2011] ZASCA 166, the Supreme Court of South Africa held that:

“It is well-established that sentencing remains pre-eminently within the discretion of the sentencing court. This salutary principle implies that the appeal court does not enjoy carte blanche to interfere with sentences which have been properly imposed by a sentencing court. In my view, this includes the terms and conditions imposed by a sentencing court on how or when the sentence is to be served.”

117. The predecessor of the Court of Appeal in the case of Ogolla s/o Owuor vs. Republic, [1954] EACA 270, pronounced itself on this issue as follows:-

“The Court does not alter a sentence unless the trial Judge has acted upon wrong principles or overlooked some material factors.”

118. To this, I would add a third criterion namely, “that the sentence is manifestly excessive in view of the circumstances of the case”. (R - v- Shershowsky (1912) CCA 28TLR 263) while in the case of Shadrack Kipkoech Kogo - vs - R. Eldoret Criminal Appeal No.253 of 2003 the Court of Appeal stated thus:-

“sentence is essentially an exercise of discretion by the trial court and for this court to interfere it must be shown that in passing the sentence, the sentencing court took into account an irrelevant factor or that a wrong principle was applied or that short of these, the sentence itself is so excessive and therefore an error of principle must be interfered (see also Sayeka -vs- R. (1989 KLR 306).”

119. The Court of Appeal, on its part, in Bernard Kimani Gacheru vs. Republic [2002] eKLR restated that:

“It is now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, 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 some wrong material, or acted on a 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 states is shown to exist.”

120. I associate myself with views of J. Ngugi, J in Benson Ochieng & Another vs. Republic [2018] eKLR that:

“Re-phrasing the *Sentencing Guidelines*, there are four sets of factors a Court looks at in determining the appropriate custodial sentence after determining the correct entry point (which, as stated above, I have determined to be fifteen years imprisonment). These are the following:

a. Circumstances Surrounding the Commission of the Offence: The factors here include:

i. Was the Offender armed? The more dangerous the weapon, the higher the culpability and hence the higher the sentence.

ii. Was the offender armed with a gun?

iii. Was the gun an assault weapon such as AK47?

iv. Did the offender use excessive, flagrant or gratuitous force?

v. Was the offender part of an organized gang?

vi. Were there multiple victims?

vii. Did the offender repeatedly assault or attack the same victim?

b. Circumstances Surrounding the Offender: The factors here include the following:

i. The criminal history of the offender: being a first offender is a mitigating factor;

ii. The remorse of the Applicant as expressed at the time of conviction;

iii. The remorse of the Applicant presently;

iv. Demonstrable evidence that the Applicant has reformed while in prison;

v. Demonstrable capacity for rehabilitation;

vi. Potential for re-integration with the community;

vii. The personal situation of the Offender including the Applicant's family situation; health; disability; or mental illness or impaired function of the mind.

c. Circumstances Surrounding the Victim: The factors to be considered here include:

i. The impact of the offence on the victims (if known or knowable);

ii. Whether the victim got injured, and if so the extent of the injury;

iii. Whether there were serious psychological effects on the victim;

iv. The views of the victim(s) regarding the appropriate sentence;

v. Whether the victim was a member of a vulnerable group such as children; women; Persons with disabilities; or the elderly;

vi. Whether the victim was targeted because of the special public service they offer or their position in the public service; and

vii. Whether there been commitment on the part of the offender (Applicant) to repair the harm as evidenced through reconciliation, restitution or genuine attempts to reach out to the victims of the crime."

121. In this case, the offence was a gender based offence violence case. I have considered the material on record and even if this Court were minded to impose a lesser sentence were it sitting as the trial court, that in itself does not justify interference with the sentence imposed by the trial court.

122. Before penning off I must mention that this case exemplifies a sad state of affairs where couples stick to their marital relationship even where the embers of the marital fire had long died. Where a marriage has clearly irretrievably broken down for whatever reason, it is better for the couple to accept the reality and pick up whatever remains of their future and move on. Couples, parents and even church leaders ought not to insist that marriage couples stick together even in cases where the centre no longer holds and where the glue that brought them together has since lost its strength. While not encouraging couples to pull apart merely because of minor incompatibility of temperament, where the relationship between a couple no longer meets the basic ingredients of a marriage, that union ought to be legally put asunder in order to save lives.

123. In the wisdom of the hindsight the tragic events that gave rise to this case might possibly have not occurred had the couple realised in good time when to walk away or the legal steps to be taken in event of failure of marital unions. There is no heroism in having a lunch date with death. One should know when to walk away and when to run. While there are options available in such circumstance, violence, however, is not one of them.

124. I therefore find no merit in this appeal which I hereby dismiss.

Judgement read, signed and delivered in open Court at Machakos this 29th day of November, 2021.

G V ODUNGA

JUDGE

In the presence of:

Ms Mercy Mutemi for Mr Kamollo for the Appellant

Mr Ngetich for the Respondent

CA Susan