REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

CRIMINAL APPEAL NOS. 71, 73 & 74 OF 2018

APPELLATE SIDE

(Coram: Odunga, J)

JOSEPH MUSEMBI SILA ALIAS KIVI.....1ST APPELLANT

JOSEPH KITHUKA KIMEU.....2ND APPELALANT

MUTISO TONDE ALIAS MUKOLOI.....3RD APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal against both conviction and sentence of the Machakos Chief Magistrate's Court

Criminal Case No. 907 of 2016, Hon. A. Lorot (SPM) on 30th August, 2018)

BETWEEN

REPUBLIC.....PROSECUTOR

VERSUS

JOSEPH MUSEMBI SILA ALIAS KIVI.....1ST ACCUSED

JOSEPH KITHUKA KIMEU.....2ND ACCUSED

MUTISO TONDE ALIAS MUKOLOI.....3RD ACCUSED

JUDGEMENT

1. The appellants herein **Joseph Musembi Sila Alias Kivi, Joseph Kithuka Kimeu** and **Mutiso Tonde Alias Mukoloi,** were initially charged together with one **Vitalis Kimuyu Mulwa** with charged with the offence of attempted robbery with violence contrary to section 296(2) of the ***Penal Code***, the particulars being that on the night of 17th and 18th August, 2016, at Mitaboni Market in Kathiani Sub Couty of Machakios County, they jointly with others while armed with offensive weapons namely axes, iron bars, *panga* and clubs robbed one **Joseph Kilonzo Kivusi** of his mobile phone make Nokia valued at Kshs 4,000/= and cash Kshs 500/= all totalling to Kshs 4,500/= and immediately before the time of the robbery used personal violence to the said **Joseph Kilonzo Kivusi**.

2. However, the charge against the said **Vitalis Kumuyu Mulwa** was later withdrawn.

3. To prove the said offence the prosecution called Ten (10) witnesses before substituting the charge on 12th February, 2018 to that of attempted murder contrary to section 220(a) of the ***Penal Code***, the particulars being that on the night of 17th and 18th August, 2016, at Mitaboni Market, Kathiani Sub County within Machakos County, jointly with others not before the court attempted to murder **Joseph Kilonzo Kivusi** by inflicting injuries to the said **Joseph Kilonzo Kivusi** using weapons namely axe, iron bars, *pangas* and clubs.

4. After the said substitution, the prosecution called three additional witnesses before closing its case. Upon being placed on their defence, the appellants gave sworn testimony and the 1st appellant called as his witness, his wife. In his judgement delivered on 30th August, 2018, all the appellants were convicted of the offence of attempted murder and sentenced to life imprisonment. It is that conviction and sentence that provoked this appeal.

5. According to PW1, **Joseph Kilonzi Kibusi,** he was employed by **Katiku Kivuva** as a watchman to guard Jamhuri Bar in Mitaboni Town. He was also guarding a butchery owned by one **Muli** for which he was being paid and had worked there for more than three years. According to him, there were shops on the upper side and the bar opposite and some shops and a supermarket opposite and there were other watchmen guarding the other establishments. The supermarket was being guarded by one **Samuel Kakovu** while the opposite side was guarded by another old man whose name he could not recall. There was another watchman called **Muli** who was guarding the shops of one **Mwango** while another watchman, **Muli**, was guarding a new pub and who was employed by a woman called **Jane**. All his fellow watchmen were murdered.

6. According to PW1, on the night of 17th August 2016, he reported to work at 5.20 p.m. as was usual, did his rounds and sat on his usual chair outside the butchery which was closed at 9.30 p.m. It was his evidence that there was a wooden structure which they were using to conceal the entrance to the veranda to signify that the butchery was closed. However, the bar was still open till around 11.00 p.m. when it was closed and he used a similar wooden structure to conceal it after its doors were locked. According to him two of the workers, **Ruth** and **Kalukyi**, have rooms behind the pub and his job was to guard the front.

7. Around 1.30 p.m., he heard voices of people speaking from behind the pub. Apart from the pub that had been closed there was another pub that used to close late. The said noises went on and died after some time and the place became quiet. After some time, the said **Samuel Kakovu** who used to be 10 metres opposite him shouted and when he stood up, he saw about 7 people surrounding him and beating him. He then took bow and arrows but he was outnumbered. According to him, since the place was well lit, he could see them though they could not see him.

8. In order to scare the attackers, he screamed 4 times and 4 of the attackers approached where he was. When he threatened to shoot them, they took cover on the frames of the veranda and two of them rushed towards the entrance of the pub and he was able to see them clearly. Shortly, he heard the sound of the alarm and by that time he had been hit on the head and fell to the ground. He sustained a cut on the head and passed out and when he came to he did not find anyone around. He then struggled and managed to walk to the corridor. He was later informed that he had knocked on the doors of the ladies who took me to Makueni-Wote Hospital where he found himself.

9. It was his evidence that because there was good security light, he could identify the attackers well. While at Wote, he was called to Wote Police Station where he was taken to a parade made up of 9 people or thereabouts in civilian clothes and asked to see if he could identify any of the persons. After looking at them, he identified one person whom he knew by name and face before and whom he saw on the night of the attack. According to him, he was called **Musembi** – but they used to call him by the nickname of "Kivi". He pointed him out and went to touch him by the shoulder. He was no. 4 from the right side and 5th from the left side.

10. After that he left and was called back to the Station where he was taken to two other parades where he identified 2 other persons in different parades whom he had seen them on the night of the attack through the lights though that was his first time to see them. It was his evidence that **Musembi** – aka "Kivi" was the 1st appellant while the other two were the 2nd and 3rd appellants. According to him the 2nd appellant was with the first 4 people who leant on the side while the 3rd appellant was with the other last group of two who rushed to try to enter the pub entrance.

11. According to PW1, he was informed that he had been taken to Kenyatta National Hospital though he was not aware of the same and that he regained consciousness on a Saturday when he was able to see his wife and children and was then taken home where he continued with the treatment. It was his evidence that it took him about 1 week to regain my consciousness. He identified the P3 form which was filled at Wote – Makueni Hospital. He also identified the photographs of **Muli**, **Samuel Kakovu**, **Mulwa Kitai** and **Gikonyo** all the watchmen who were deceased. He restated that he knew the 1st appellant and had no grudge with him. According to him, his colleagues were attacked by tools which he could not identify but suspected from the injuries that an axe could have been used.

12. In cross-examination, he stated that he lost Kshs. 5,000/- from his pocket and phone though he had no document to prove that he lost the phone. According to him the incident happened between 1.30 – 2.00 a.m. and when he heard Samuel being attacked, it was about 10 metres away. Though he could not recall the clothing the attackers wore, he saw their faces well. Referred to his statement, he stated that he indicated that the 1st appellant was wearing a brown jacket and his colleague was in a black jacket. He stated that he saw his clothes and that the light was good. However, the attackers could not see him because he was behind the wooden structure though he could see them through the gaps between the wood. He however did not know who struck him. Since the attackers approached him closely, he could not shoot his arrows. According to him, when he came to, he walked slowly to the corridor and woke up people. He however insisted that he vividly recalled the faces of the people who attacked him and though he was tense, his memory was clear and he clearly saw 6 attackers and identified some of them.

13. PW2, **APC Amos Obare**, attached to Kathiani Sub-County, Mitaboni AP Post was on 20th August, 2016, around 10.30 a.m., called by **I.P Ngemu**, the Post Commander who asked him to accompany him to Mitaboni Machakos stage where there was information that a murder suspect being sought and whose name was given as **Musembi Sila**, the 1st appellant, was sighted aboard a vehicle to Kenol. They boarded a motor bike and intercepted a vehicle he was said to be aboard before Kenol and found the 1st appellant whom he knew previously having spoken to him before, in the motor vehicle, a *matatu*. They arrested him and by means of the same motor bike, took him to Mitamboni AP Post where they interrogated him after which he took them to his house. According to him, they were accompanied by officers from quick response who had been sent to the county. In his evidence, the house was a business premise, behind the market and the suspect informed them that he was a scrap metal dealer. There was nothing significant in form of scrap metal apart from an axe which the suspect said he was using to cut some metal. They then took it back to the station and handed him over to Kenol Police Post on suspicion of murder and for more investigations. He identified the said axe in court.

14. According to PW2, On the night of 17th August, 2016, there were murders that occurred in the area and the perpetrators had used crude weapons; axes, and machetes.

15. In cross-examination, he stated that when the incident of 17th and 18th August 2016 happened, there was no suspect. However, the intelligence gathered from members of the public linked him to the offence and he was arrested him on suspicion. He however disappeared from the area when the public threatened to lynch him. PW2 disclosed that the 1st appellant was also suspected to have stolen the gate of Kalikya borehole and they were following on those leads. According to PW2, he knew the 1st appellant as a driver of a sand lorry.

16. PW3, **Onesmus Mwango Mwololo**, testified that he was a businessman living in Mitaboni operating an Mpesa shop and selling electronics and general goods in the same plot but from different doors. According to him his night guard in respect of the three premises, **Daniel Kitai**, who started working for him in November 2015, was murdered. The said person used to report to work at 5.30-6.00 p.m. and would sign out at 6.00 a.m., next morning. On 17th August, 2016, the said Daniel **Kitai** reported for duty as usual and they were together till 9.00pm when he escorted PW3 to where he was staying behind the shops after PW3 closed shut the doors. At around 2.00 a.m. on 18th August, 2016, PW3 heard the iron sheets of the room where he was sleeping being hit and when he tried to call Daniel, he found his phone was off. He then tried to call another watchman, **Sammy Kakovu**, who was working for a neighbour, **Mbuva Muthoka**, and though the call went through, it was not picked. He then called the AP Post and called an officer called **Obare** who picked the call but said he was not nearby as he was off-duty and promised to call his colleagues. **I.P Ngemwa** then called him and told him that they were outside his shop and when he heard the sound of voices of neighbours, he went out. Upon checking his shop, he found 2 padlocks to the Mpesa shop cut but one was still intact. However, the general shop had the door broken and the coins amounting to between Kshs. 8,000/- and Kshs. 10,000/-. missing.

17. Upon searching around they did not see any of the watchmen around buy eventually found his watchmen having fallen down in an incomplete structure with a cut on the nape and the officers told him he was dead. There were other watchmen who were still alive but badly injured and apart from PW1, who could mumble a few things, none of the other watchmen could speak. The watchmen who were alive were then taken to hospital and the rest to the morgue. According to him, **Sammy Kakovu** and PW1 were badly injured and were taken into the ambulance.

18. In cross-examination, he stated that though he knew the 1st appellant, he was unable to say that he robbed them or not.

19. PW4, **Ruth Omukuba**, was employed at Jamhuri Bar which was owned by **Peter Katiku**. There was butchery in the same building and the bar has a watchman, PW1. On 17th August, 2016, she opened the pub at 5.00 p.m. and closed at 11.00 p.m. After about an hour, or 30 minutes, she heard noises. She was with her colleague, **Elizabeth Kalukyi** with whom they were sleeping behind the pub. At around 1.30 am, she heard someone screaming outside and when she called PW1, he did not pick and the second time, the phone went dead. She then decided to call their boss who called the AP Inspector, **IP Ngemwa**. She was later called and told to get out and she found **IP Ngemwa** outside. On the corridor, she was PW1 who was badly injured with a dep injury on the head and was bleeding profusely. They rushed him to the hospital and followed him later to Mitaboni Health Centre – "Mulingo". According to her, there was blood all over the area and there were watchmen who had been murdered.

20. PW5, **CPL Vincent Ngoywa**, attached to flying squad Unit Kyumbi on 6th September, 2016 while in the office, at about 9.00 am received information from members of the public that there were two suspects in a certain house within Kyumbi market whom they believed were among those who committed robbery and murder at Mitaboni. In the company of **CPL Wekesa**, **PC Musyoki** and **PC Aden**, they hurriedly left and based on the said information and directions found 2 men asleep, snoring. They woke them up and inquired to know who they were but they hesitated. They arrested them and upon searching the house, found **James Kithuka Kimeu** (the 2nd appellant) with 2 phones – make I-Tel and Nokia. They took them to Kyumbi Police station, to their offices and got to know their names there as **James Kithuka Kimeu** and **Mutiso Tonde**, the 2nd and 3rd appellants. They then took them to court to seek more time to hold them, so as not to infringe on the 24 hour rule which they were granted.

21. On 9th September, 2016, they decided to go to their rural homes and they found a house belonging to one **Vitalis Kimuyu** – friend to **Mutiso Tonde**. Before then they had gone to the home of the 2nd appellant, **James Kithuka Kimeu**, to a place called Kilala but did not find anything there as he was said not to have been seen at home for a long time. They then proceeded to Kavingoni – the home of **Mutiso Tonde**, the 3rd appellant, where they found a Prison name tag showing he was once a convict in the names of **James Mutiso Tonde**. They took it and upon making inquiry from Kamiti Maximum Prison, they got a response that the 2nd appellant had served at Kamiti for five years for the offence of attempted rape on 23rd February, 2011, by CM's Court Machakos in Cr. Case No. 23 of 2011 and was released on 23rd June 2014 upon completion of the sentence. The said response was identified by the witness.

22. On 19th September, 2016 they wrote a letter to Principal Criminal Registrar after taking the said appellants' finger prints and the finger print analysis of both was done which revealed that the 3rd appellant was associated with robbery with violence cases.

23. On 3rd October, 2016, PW4 obtained warrants from the court of call dates for cell phone No. 0732-774980 and 0786-700180, both of the 2nd appellant and took them to Airtel. He obtained the call data for 0732-774980 which placed the 2nd appellant at the geographical position of Mitaboni, between 16th and 19th August 2016. According to the said data, on the 17th August 2016, at 20.00 hrs (8.00pm), upto 0226 hrs (2.26 a.m.) on 18th August 2016, the 2nd appellant was within the geographical position of Mitaboni. At 2.51 a.m., he rushed to Tala until 3.21 a.m. when he came back to Mitaboni. At 3.35 a.m., he was seen on the road to Manza and on the road towards Nairobi. The analysis of this data revealed that the SIM card 0732-774980 was registered in the name of **Isaac Waweru**. He identified the order to investigate, Call Data, Phone Make I-tel – with airtel No. 0732774980, and Nokia phone with no sim card all obtained from the 2nd appellant who did not deny that the phones belonged to him.

24. Though PW4 did an inventory of the recovery from the 2nd appellant, he refused to sign the inventory despite telling the court to have it

released to him.

25. PW4 stated that both the 2nd and 3rd appellant, were together within the locality of the crime and it was the 3rd appellant who had sought to sleep at the home of **Vitalis Kimuu** who was later shocked to find the 2nd appellant in the house. **Vitalis** said the 3rd appellant was known to him as a driver of a sand lorry but they did not find any evidence he was such a driver.

26. In cross-examination, PW4 stated that he was only the arresting officer and that there was an investigating officer in the case. According to him, the initial information was that 5 suspects were in a house but they found two. According to him, the house is a plot with iron sheets and the room is next to the gate. They were however, directed to a very specific door where they found the two snoring at 9.00 a.m. and recovered the 2 mobile phones. His first target was looking for weapons but they did not find any. While one phone was on the bed, the other was in the jacket and the 3rd appellant said he had no phone while the 2nd appellant confirmed the phones, particularly the I-Tel, were his and had severally asked the court to release the phone to him.

27. Though he was aware of the procedure to register sim cards, it was his evidence that they have encountered many cases of criminals who have registered sim cards in the names of innocent people, for criminal purposes. According to him, he was investigating a sim card given to me by the 2nd appellant and established it was within the scene of crime. He selected the Airtel line to verify geographical location. He stated that Mitaboni and Tala is some distance though the distance is dependent on the means one is using which could be 20 minutes.

28. According to his evidence the Prison Authorities retained the 2nd appellant's prison tag and he had previous cases of robbery with violence such as Police Cr. Case no. 440 of 2011 which was an ongoing pending case.

29. He stated that the 2nd appellant gave him his number as 0732-774980 and that the serial number of the phone had been transmitting through that number. The sim card was in the I-Tel phone which he claimed was his.

30. PW6, **Dr. James Vincent Kiuluku**, testified on behalf of his colleague, **Dr. Makena Daniella**, with whom he had worked and was familiar with his handwriting, who on 2nd November, 2016 filled in the P3 for PW1 but who was engaged in a surgery on the day of his testimony. According to the form, PW1 was 75 old male from Mitaboni and the alleged offence was on the night of 17th August, 2016 and 18th August, 2016. The patient went to their facility on 25th August, 2016 but was first seen at the hospital on 18th August, 2016. He was released to Kenyatta Hospital for specialized care on 19th August, 2016. On examination, the state of the clothing was not significant since he had changed clothes. He was reported to have been attacked by a group of armed men, some known to him and beaten using crude weapons and sustained injuries to the head and back and amnesia. He suffered psychologically distress with no sign of drug use. On examination he was found to have several scars on the scalp measuring 5 cm by 4 cm long while the CT scan was produced showing comminuted depressed fracture on the left parietal bone, epidural haematoma (Bleeding internally in the brain) and large scalp haematoma (bleeding in the scalp). On thorax and abdomen, there were bruises and tenderness on left side of the back. The age of injuries to the date of filling the P3 was 3 months and the object(s) causing injuries was (were) blunt. He was treated by surgical toileting of the wounds at Makueni County Hospital and Anti-consultants were administered along with antibiotics. The degree of injury was assessed as grievous harm and the P3 form was exhibited.

31. In cross-examination he conceded that he was not the one who treated PW1 and that he produced P3 on behalf of **Dr. Makena**. According to the report, the patient suffered psychological distress and that usually it is a general examination. The patient suffered comminuted fracture of the skull whose management is usually conservative though neurosurgical care would be needed. According to him, surgical toileting was appropriate while the head fractures heal on their own. He was seen at Kenyatta National Hospital by a specialist and from the treatment notes of the patient, he was admitted on 18th August, 2016 having been received from another facility where he was only offered 1st Aid.

32. PW7, **IP Osman Mohammed Adan**, on 18th August, 2016, around 3.00 a.m., received a call from **IP Ngeno** of AP Mitaboni Post that there were 2 watchmen guarding a certain shop who had been murdered. He proceeded from Kenol to Mitaboni – 5km and found 2 dead bodies lying separately behind shops were within the shopping center. He was also informed one watchman had been rushed to Mitaboni Health Centre, and three were rushed to Kathiani District Hospital for further treatment. While at the scene, he was joined by **C.I Kenol**, **OCS Kathiani** and **OCPD Kathiani**, as well as Div. Crime Personnel from CID Machakos. With help of officers, they marked the scene and removed the 2 dead bodies to Kathiani Level 3 Hospital mortuary. They learnt that the other watchman taken to Mitaboni Health Centre had also passed on and they proceeded to Mitaboni Health Centre and removed the dead body to Kathiani Sub-District Hospital mortuary where identification was to be done.

33. In addition, they went round and I saw one Mpesa shop belonging to one **Mwarigo** whose padlocks were broken into but the thugs were unable to break into the said shop as they were repulsed by the watchmen. In the morning of 19th August, 2016, together with the CID team, they revisited the scene and collected more samples and evidence and they then began recording statements from the available witnesses. It was his evidence that at the scene, there was a pub christened "Jamhuri" within Mitaboni whose doors were all intact. At the veranda, there was a pool of blood. They recovered 2 metal objects: a small axe (pick axe) and a metal rod with a long inch bold –head and plastic outer cover both of which he identified. The wall of the veranda had splashed blood, as if blood gushed out with force.

34. He stated that on 24/8/2016, **IP Ngemo** of AP took to him one suspect, by the name **Joseph Musembi** – the 1st appellant in court whom **IP Ngemo** said was a suspect was in a case of illegal harvesting of sand. He also had with him a large axe which was allegedly been used in the robbery at Mitaboni. The axe was bloodstained at its cutting edge. However, since they did not have sufficient evidence to hold him, he released the suspect on police form 52 since the complainant was not revealed to him and he directed the suspect to report to his office the next morning. Immediately after releasing him, PW7 went to Mitaboni to conduct his investigations and was informed **Musembi's** name was not known in the area but that he was known by the name **Kivi** and was one of the men who committed the murder and robbery. On 25/8/2016, he found **Joseph Musembi alias Kivi** outside his office and took him to Div. Crime Office Machakos for further investigations pursuant to what he had learnt. He also took the big axe that was taken to his office by **IP Ngemo** which he also identified. It

was his evidence that prior to the 1st appellant going to his office, he did not know him. He later learnt that 5 watchmen died and one survived.

35. In cross-examination, PW7 stated that the weapons he identified were recovered on the same night of the commission of the offence and that he was the one who collected them. The 1st appellant was first taken on 24th August, 2016 and he was arrested on 25th August, 2016 when he handed him over to Division crime.

36. PW8, **IP Simon Kamau**, was the OCPD Kovica Police Post, Machakos County. On the 25/8/2016, **IP Mutisya** requested him to conduct an identification parade in a case of robbery with violence. They went to Makueni Police Station. The first identification parade was on 25th August, 2016 and the 2nd was on the 16th August, 2016 –the first parade involved the 1st accused and the second parade involved the 2nd and 3rd accused persons. They conducted the identification parade at Makueni police station. On 25th August, 2016, he personally arranged a group of 8 people and informed the suspect the reason for conducting the identification parade. He did not object to participating in the identification parade. He also said it could be conducted without the presence of a friend or solicitor/advocates. He then requested him to place himself anywhere among the 8 parade members. That made the parade of 9 people including the suspect, the 1st appellant. He placed himself in between member no. 3 and member no. 4 after which PW8 called in the lone witness and also informed the witness the purpose of the parade and whether he could identify a suspect within the parade. The witness positively identified the suspect by touching and by his alias name – **Kivi**. The suspect was satisfied with the parade and appended his signature to the parade form which PW8 exhibited.

37. On 16th September, 2016, the investigating officer again called him to conduct another identification parade. They again went up to Makueni police station where there were 2 suspects. He paraded 8 members and informed the 1st suspect – **Mutiso Tonde** the reason for conducting the parade. He did not object to participation neither did he desire a friend or Advocate to be present. He requested him to place himself in any position between the 8 members and he placed himself in between members no. 5 and 6. He then called in the witness and also informed the witness the purpose of the parade. Though the witness was hesitant, he touched the 1st suspect – **Mutiso Tonde** by touching him. The suspect became shaky and was trembling. He confirmed he was satisfied in the manner the parade was conducted and signed the parade form which PW8 Exhibited.

38. On the same day, 16th September, 2016, he again organized another 8 member parade and called another 2nd suspect – **James Kithuku Kimeu** and explained to him the reason and purpose of conducting the parade. He did not object and did not have a friend or advocate he wished to attend the parade saying he would do it on his own. PW8 requested him to position himself anywhere among the 8 members and he placed himself between member no. 3 and no. 4. PW8 then called in the witness and also explained why we were conducting the parade. The witness was hesitant saying that he came from the same locality with the suspect but nonetheless touched the suspect and positively identified him. According to PW8, the two knew each other and the suspect made no comments and signed on the parade form which he exhibited.

39. According to PW8 the three persons who were identified were the 1st, 2nd and 3rd appellants respectively and he neither knew the appellants nor the witnesses prior to that day.

40. In cross-examination, PW8 stated that the identification parade was conducted at Makueni police station but he did not inquire why. He believed it must have been because the witnesses were from there. According to him, the investigation officer did not attend the parade though he was in the Makueni police station area as he was the one who brought the suspects. According to him, the witness was hesitant on identifying the 2nd and 3rd appellants and he knew both 1st and 3rd. He knew the 1st appellant as alias Kivi and claimed that the 3rd appellant was from the same locality. All three executed in writing of the parade forms. According to him, he informed the accused persons of their rights and they did not wish to call a friend or advocate. It was his evidence that on 16th September, 2016, he used same members of the identification parade for both parades due to scarcity of personnel at the station but he re-arranged them and asked the members to change clothes and alter their positions.

41. PW9, **IP Fredrick Kyalo Ngemu (AP)** was attached to Mitaboni AP post. On the 20th August, 2016, around 10.30 a.m., he was with his colleague **APC Amos** when they arrested **Joseph Musembi**, the 1st appellant, as a suspect of murder in Mitaboni, and another case which did not reach court due to lack of evidence. They went for him between Kenol bus stop upon receiving information he was involved in the murders at Mitaboni in the night of 18th August 2016. He had also been suspected with theft of a gate to borehole pump. The members of the public had planned to arrest him and lynch him. On 19th August, 2016, they had received information that he was being sought by members of the public in order to be lynched and this was one of the reasons they arrested him. He was arrested inside a matatu on the way to Kenol market after they followed the *matatu* and went with him to Mitaboni market. He led them to a room where he claimed was his store. Inside the room, they found nothing but one metal axe with a sharp edge which he identified. They took him and the axe to Kenol Police Post. According to him, it was an empty house with no bed, no mattress, nothing except the axe. The 1st appellant claimed it was a store but the house appeared occupied even without bedding and mattress. He did not know him prior to that day though he was known in the area by his nickname, "Kivi".

42. In cross-examination, he stated that the 1st appellant was arrested on 20th while the incident happened in the night of 1st August. On 19th August 2016, that is the day they received information that the members of the public were planning to lynch the 1st accused. He was suspected to have stolen a gate. The present case was however related to the events of 18th August 2016. Though there was mention of phone and money, he had no evidence on the phone or money. The connection between the axe found in the store and the incident was according to him from the surviving victim that those who cut them were armed with axes and other sharp objects. It was however his evidence that though he took the axe to be investigated, his naked eye did not perceive blood.

43. PW9, **Dr. Geoffrey Mutuma**, conducted Post Mortem examinations on 20/8/2016 at Machakos Funeral Home. According to him, the 1st was in respect of **Makenzi Makau** – adult Male. External examination showed blood stains over the head and oozing from the nose and mouth. There was laceration 10cm over the parietal region and temporal region. There were no other external injuries. On opening the body, there was a laceration and haematoma of the left parietal region. There was a cracked pot appearance of multiple fractures of the skull and

intracranial haemorrhage and brain laceration and left occipital region. He formed the opinion that **Makenzi Makau**'s cause of death was intracranial haemorrhage due to skull fracture following a sharp injury to the head. He signed the report on 20th August, 2016 and produced it as exhibit. The 2nd report was for **Raphael M. Nzioki**, adult African male at the same venue. On external examination, there was a white bandage covering the head, which was soaked in blood. There was blood oozing from the nose and the ears. On opening the bandage, there was a large laceration over the left temporal region measuring 10cm in length. On opening up the body, there was a laceration of the scalp with haematoma over the occipital region. The skull was fractured at the left region of the temporal region with intracranial bleeding into the brain. He formed the opinion that the cause of death was intracranial bleeding due to fracture of the skull due to a sharp object. He signed the report and produced it.

44. The next related to **Kimeu Veke**, an African adult male which he did the same day. On external examination, the skull had blood oozing from the nose and ears. There was deep laceration on the head measuring 10cm over the temporal and occipital regions. There was bruising over the eyebrows. There was sub cutaneous bleeding on the left wrist joint. On opening up, there was scalp haematoma on the occipital region. There was also fracture of the skull on the occipital region with intracranial haemorrhage. He formed the opinion that cause of death was intra cranial haemorrhage following sharp skull fracture secondary to sharp injury to the head and he produced his report. The 4th was that of **Samuel M. Kakovu**, a male African adult. External examination showed blood all over the head. There was laceration left temporal region measuring 5cm long. There was depression over the left temporal region. On opening up, there was scalp haematoma with depressed fracture of the skull and intracranial bleeding into the brain. He formed the opinion that cause of death was intracranial bleeding due to fracture of the skull due to sharp object and produced the report. Lastly, he examined **Daniel Kitai**, male African adult. On external examination, the face and the nose was bloodshed, blood all over the head. There was depression of the occipital region with a large laceration of the occipital and intracranial bleeding into the brain. He formed the opinion that the cause of death was intracranial bleeding due to skull fracture following sharp object injury and produce the report.

45. In cross-examination, he stated that the object ought to have blood stains if found.

46. Upon being questioned by the court he stated that the weight of the object was heavy, resulting in the cracks and depression. The 10cm injuries show that it was likely the same object an axe would fit for that, not a knife.

47. PW 11, **Sgt Benard Wekesa**, previously attached to Flying Squad Office, Kyumbi recalled that on the 6th September, 2016, while at Kyumbi Flying Squad Office, they received information that at Kyumbi Shopping Centre, there were people who were living in the same house and these were the people involved in the murders at Mitaboni on the 17th and 18th night of August 2016. Together with **Cpl. Ngeywa**, **PC Aden** and **PC Musyoki**, they proceeded to the location of the house which was within Kyumbi area at around 9.00 a.m. The door was not locked. They pushed the door open and inside, they found 2 men asleep. They woke them up and found the two were the 2nd and 3rd appellants herein – **James Kithuka** and **Mutiso Tonde**. Upon interrogation, they could not give satisfactory explanation of why they were there. The house belonged to one **Vitalis Kimuyu** who brought himself to their office and said the house belonged to him and he had housed the 3 appellant but did not know the 2nd appellant.

48. While in the house, they searched the house and recovered 2 phones, both belonging to the 2nd appellant, a Nokia and I-Tel which he identified. They booked them at Machakos Police Station and also recovered the identification of both appellants from the said house. After booking them they took them to their homes in Makueni County. From the 2nd appellant's home, they did not find anything of significance and proceeded to the 3rd appellant's home, Mbondo, where upon search they found a "Kamiti GK Prison" tag bearing his name – **Mutiso Tonde**. They then returned them back to the police station.

49. According to him, they sought confirmation from the GK Prison Kamiti regarding the said tag and it was confirmed that it belonged to **James Mutiso Tonde** who had been jailed for 5 years in Chief Magistrate's Court Machakos Cr. No. 23 of 2011, for the offence of attempted rape, was sentenced on 23rd February, 2011 but completed the sentence n 23rd September 2014. The prison however retained the Prison tag.

50. He stated that from the two phones recovered from the 2nd appellant, one had Airtel sim card no. 0732-774980. The other had line no. 0786-700180. **Cpl. Vincent Ngeywa** then sought a court order to investigate the lines by obtaining call data for the two phones and lines between 16th August, 2016 and 19th August, 2016. The said call data revealed that on 17th August 2016, at 8.01 p.m., the line was at Mitaboni market. It remained at Mitaboni until 2.26 a.m. on 18th August, 2016. At 2.51 a.m., the line was in Tala market. At 3.21 a.m., the line was again traced to Mitaboni. At 3.35 a.m., the phone was tracked to Manza within Machakos. They then caused them to be charged with the offence now before court. He however did not know them prior to the incident.

51. He testified further that they sent to the Criminal Records Office fingerprints of both the 2nd and 3rd appellants to know if they had any criminal record and the office of the Identification Bureau, DCI Nairobi responded that one **James Mutiso Tonde** had been charged with Robbery with violence vide CR. 440/08/2011 (Machakos Police Station) but the case was not concluded. The witness proceeded to produce the marked items as exhibits.

52. In cross-examination he stated that they received the information from an informer hence from a protected information and did not ask him to record a statement. According to him the two phones recovered had 2 sim cards. The sim cards were nos. 0732-774980 found in the I-Tel phone and 0786-700180 contained in the Nokia phone and that both phones belonged to the 2nd appellant. However, the 3rd appellant had no phone on him.

53. He reiterated that the call data for 0732-774980 showed that the 2nd appellant was in Mitaboni on the night of the murders at Mitaboni. They were however told that the 0786-700180 was not functional. He restated that between 8.01 p.m. and 2.26 a.m., the number was at Mitaboni. At 2.51 a.m., the number was in Tala. He did not know the distance between Mitaboni and Tala though both are within Machakos County. According to him, the mode of transport would determine how long one took between the two places. However, Manza is within Machakos. It is the route between Machakos and Kyumbi and can be covered in less than 10 minutes.

54. In his evidence the said appellants were arrested on 15th September, 2016 but he did not know when they were brought to court save that they sought for time to hold them. He disclosed that they also charged **Vitalis** but he was released. He admitted that he was connected to the offence since **Mutiso** was housed by **Vitalis**.

55. PW12, **PC Joshua Kimbati**, testified that on 17th August, 2016 he was on duty with **I.P Mutisya** and at around 12.30 a.m., (18th August, 2016) they were called and informed that there were watchmen who were attacked at Mitaboni market. They rushed to Mitaboni and found people had milled around the market. Thy met AP officers from Mitaboni who informed them that thugs invaded the market and attacked watchmen killing others and wounding others and they had taken the dead to the mortuary and the injured to hospital. According to him, they saw Mpesa shops had been broken into. The DCIO directed them not to leave the market as he would send others to go check on the bodies and the injured. They then continued with their investigations by recording some statements. While there, they learnt that one of the watchmen had been hit on the head and was still alive and had been taken to Wote. The next morning, they proceeded to Wote and found that he had gone to stay with a cousin for fear of his life. He went to where he was hiding and left my colleagues at Wote police station. He recorded his statement and he explained that they had been on duty with fellow watchmen when they were attacked. He however identified 2 of the attackers as **"Kivi"** and **Mutua** since the place was well lit. He said he could identify all if he saw them since they are faces he saw well. Later an identification parade was conducted at which PW1 identified one of the suspects.

56. In cross-examination he stated that he was not the investigating officer and that he went after the incident. He was however an investigator whose duties involved collection of information. According to him, they went to the scene of crime which was well lit by security lights sufficient to identify someone.

57. PW13, **IP Simon Muinde Mutisya**, testified that on the nights of 17th and 18th August 2016, a report was made at Kathiani Police station as OB No. 6 of 18th August, 2016 by phone. The OCS Kathiani was notified that some thieves numbering about 10, armed with crude weapons had broken the Mpesa shop of one **Mwango**. The same report also showed that 5 watchmen had been injured and all were taken to Kathiani hospital out of whom 3 were confirmed dead on arrival. The other two injured were rushed to Machakos Level 5 Hospital and one was transferred to Makueni since the doctors were on strike at the time.

58. According to him, they left Machakos around 4.00 a.m. with his officers from DCI. When they arrived at Mitaboni, they met officers from Kathiani led by OCPD Kathiani, AP Commander Kathiani & DC Kathiani. Mitaboni market was crowded with many people. All the watchmen were from that area. Elders, women, children and youth were milled all over. They turned chaotic because they wondered how the watchmen were attacked and brutally killed. Upon investigations that found that all the places the watchmen guarded were properly lit. They were also close by since the shops were nearby. According to him, the scene had been disturbed by the mob. Dogs had also interfered with the scene by licking blood. The Mpesa shop had also been interfered with by the members of the public. They visited Kathiani and found the 3 bodies. In Machakos, they were informed the only survivor had been moved to Makueni. His colleague had died on arrival and had been moved to Machakos Funeral Home. While still there, they learnt that another watchman had been killed at Kaloleni market on the way to Mitaboni from Machakos. They also learnt that at Kakuyuni, there was a vehicle that the thugs used towards Kangundo and also killed a watchman. Passions were high and they were overwhelmed. The County Security Team stepped in led by the County Commissioner, the CCIO, the APCC and the PCC. They went to Mitaboni and calmed the public.

59. PW13 stated that they went round looking for the weapons and found that **IP Osman** had picked two murder weapons and took them to Kathiani police station which were both before court. They then asked for help from the security network by circulating the information. Accompanied by **PC Kiambati** they proceeded to Makueni to look for the lone survivor. Led by a relative, they found PW1 who could not talk and the doctor advised then to let him heal. He was taken to Kenyatta National Hospital and when he came back, he maintained that he knew 2 of the attackers by name and could identify the others if he saw them. He named the 2 by their nicknames. "Kivi" and another "Vutu" as his neighbours. According to PW13, they partnered with **IP Ngeno** of AP Mitaboni who were to assist them look for the two. The 1st appellant was later arrested and he is **Joseph Musembi Sila**, alias "Kivi".

60. He stated that they arranged for an identification parade be done at Makueni police station. Apart from reiterating the evidence of the other witnesses, PW13 stated that he witnessed post-mortem on the body of deceased, **Samuel Kakovu**, **Makenzie Makau**, **Raphael Nzyoki**, **Kimeu Veke** and **Daniel Kitai**. According to him, he proceeded with **PC Olang'o** of scenes of crime who photographed the bodies and prepared a report which were exhibited. He then charged the 1st accused with the offence of murder HC murder no. 32 of 2016. They also arrested the other suspect, **Kasyoki** and joined him with the charge. He later changed the charge from robbery to attempted murder. According to him all the rest of the watchmen were murdered. He however, did not know any of the suspects prior to their arrest. According to him, the evidence is clear that the intention was to kill.

61. In cross-examination, PW13 stated that he was the investigating officer herein and he visited the scene on the morning of 18/8/2016. The scene was disturbed and they were being petted with stones. He could not tell if any of the accused persons were present since they had not known the culprits. According to him, some of the exhibits were collected from scene of crime. According to him, the complainant identified "Kivi" and "Vutu" and "Kivi" was the 1st appellant while "Vutu" was not before the court as he was charged in the High Court. According to his evidence, he was not aware of the loss of money.

62. On being placed on their defence the 1st appellant stated in his sworn evidence that from 13th August, 2016, he had a problem with my chest. He was living in Kalikya, Mathunya – Kathiano area where he was a scrap metal dealer. Due to the said chest problem, he could not leave the house the whole week till 20th August, 2016 since he was bedridden and there was a Doctor's strike hence he did not get treatment. On 20th August, 2016, his wife took him to the stage and he boarded a vehicle while the wife went home. At Kenol the vehicle stopped and police officers called him. Upon alighting they asked him about a stolen gate at Kalikya borehole and he told the officer he had no idea. He was then taken on the motorbike to Mitaboni where he was locked up but nothing was mentioned about this incident.

63. It was his evidence that he was coming to Shalom Hospital when he was asked to take him to his store at Mitaboni which is behind the shops. He opened for them and there was a *jembe*, a motorbike, an axe and a hand-held weighing machine, with a hook. They took the axe as an exhibit claiming that he knew something about the gate. They said he used it to cut the gate. He slept in the cells that day and on 21st

August, 2016, he was taken to Kenol Police Station the whole day and the next Tuesday, the officer in charge told him he was going to be released on 23/8/2016 but was to return on 25th August, 2016. When he went back on 25th August, 2016 at 7.30 a.m. the officer in charge came around 9.00 a.m. He then left and came back at 11.00 a.m. and he was handcuffed and put in the police vehicle. He was then taken to Machakos CID offices where the CID officers took him, put him in a vehicle and took him to Makueni, police station where he found people inside the compound.

64. According to him, they called 6 people and added two more making a total of nine and they were placed on a line, standing. The complainant was called and asked whom he knew from among them and the complainant touched him and the rest were returned in the cells. According to him, three of them were in suits while the rest were in different clothing and he was the only one in shoes. He was however, not told why they wanted an identification. When asked if he was satisfied, he said I knew the old man whose sister is married to his uncle and they were also neighbours. He was then interrogated, brought to Machakos police station and charged.

65. In cross-examination he stated that he had no treatment documents and that there was a Doctor's strike and he was only sent to buy medication which he bought. According to him, he was treated in prison. Though his wife escorted him to the stage, he did not reach the hospital as he was arrested midway. He had however heard over the radio that there were watchmen killed at Mitaboni. Though his home was 3km to Mitaboni market, he did not hear the screams of the watchmen. He maintained that the initial complaint was theft of a gate. He maintained that the axe was his.

66. In the parade they were 9 members out of whom 3 had suits like him and they were of similar height. He admitted that he was identified by being touched and he had no complaint, this being his first time on identification parade. PW1 however knew him well since he was his neighbour and had known him since he was born.

67. In support of his case, the 1st appellant called his wife, **Sera Mwende Musembi**, as DW1. According to her, the 1st appellant was unwell between 13th August, 2016 to 20th August, 2016 and she was at home with him. On 20/8/2016, she escorted him to the stage when he was going to hospital and he boarded a vehicle while she proceeded to her casual jobs. The 1st appellant then called her the same day around 1.00 p.m and told her he had been arrested.

68. In cross-examination, she stated that the appellant is called Joseph Musembi – aka Kivi and reiterated that he had difficulty in his chest. They however had no money to go seek treatment as a result of which he remained home with the children while she went to fend for their children. According to her the 1st appellant informed her that he had been arrested over theft of a gate. She stated that the 1st appellant had a store in Mitaboni for the scrap metal.

69. The 2nd appellant on his part testified that on 6th September, 2016, he woke up in the place I lived called Gata and went to work at By Grace, Hardware where he was working as a carpenter making sofa sets, wardrobes, chairs, beds and selling woods. They normally worked till around 4.30p.m. However, at 10.00 p.m, he went to have tea at a café called "Katanga Hotel". Before he finished his tea, **Mutiso Tonde**, the 3rd appellant walked in and told him that he had a chair which the 2nd appellant sold to him that needed repair and the chair was in his house and they should go so he could can do assessment on costs and materials. The 3rd appellant who was a driver led him to his house and they passed Kyumbi Police station to a nearby plot where the 3rd appellant opened the gate and they went in. Two people emerged asking who they were and the 3rd appellant explained he lives there and introduced the 2nd appellant as a carpenter and his mission. Though the 3rd appellant said he lived in Door No. 10, they were forced onto house no. 1 and the two who were speaking to the 3rd appellant introduced themselves as police officers. The 2nd appellant then gave them his phone and his original ID card. They were then taken to Kyumbi police station where they were in the cells till the next day when the officers sought more time to investigate.

70. On 19th September, 2016, they were taken to Makueni police station. They were removed from the cells and together with 7 others, they were placed in a line and an old man was called and asked if he saw any one of them in the robbery. He went round but did not identify him. According to the 2nd appellant, he found the 7 persons in the cells all dressed in different colours of clothes while he had one shoe on. He then signed the parade form without knowing what was going on. On 21st September, 2016, they were brought to court and charged.

71. According to him, his phone is still with the police and his cell no. is 0713537244. While referring to a note pad he was holding, he stated that he also had an Airtel line – 0738-341519. He however denied that the numbers quoted by the officers were his and denied knowing **Isaac Waweru**. According to him, he had never been to Mitaboni, Tala or Lukenya and PW1 was unknown to him.

72. In cross-examination, he stated that he was an employee of 'By Grace Hardware' though he had no documents. He knew 3rd appellant, **Mutiso Tonde** for close to 1 year. He stated that he can work at his client's place. In his evidence the Identification parade was done once and he did not complain as he was satisfied. According to him, the phone he gave the officer was never brought to court. He however confirmed that he was arrested with the 3rd appellant, just the two of them.

73. Questioned by the court, he stated **Vitalis** came to ask who was in his house and he was arrested. He did not know him prior to that day. According to him his employment documents were in the yard and he only saw the 1st appellant in court.

74. The 3rd appellant testified that he was a lorry driver. On the 6th September, 2016, around 10.30 a.m., he was arrested at Kyumbi where he used to stay. He had woken up and went to see the 2nd appellant, the carpenter at around 8.30 a.m. behind the Kyumbi Mosque but did not find him at work. Instead he found another *fundi* who directed me to the place the 2nd appellant was having tea at Katanga restaurant. He found him and paid for his tea. On that day he was off duty. Outside he explained to the 2nd appellant that he had a chair which needed repair in the house. They went to the plot where he lived called Matopeni Plot where he was going to show the 2nd appellant the damaged chair.

75. According to him, his house was no. 10. He opened the gate and inside they met two men next to the toilet who ordered them to sit. He

explained he lived in the plot and they were directed to identify themselves. He then explained why the 2nd appellant was there but they were both handcuffed and their ID cards and the 2nd appellant's phone taken. They were then taken into the house no. 1 of **Vitalis Kimuyu** who was not related to him where they stayed in for 3-4 minutes before they were escorted to Kyumbi police station where they were locked in cells. His wife went at 4.00 p.m. but was not allowed to see him and she returned back on 7th September, 2016 but never went back again.

76. On 7th September, 2016, they were brought to court and the police sought more time to investigate. On 19th September, 2016, they were taken to Makueni police station where the 2nd appellant was called out. After a while, he was also called and he found about 7 people in an identification parade. The 7 people were the 2nd appellant's parade members as well. He was asked to sign a piece of paper which he declined. According to him, PW1 went and circled him twice without identifying anyone.

77. According to him, he was a driver and on 5th August, 2016, he left Makutano, Kyumbi. He used to supply sand from Kaitoloni in Kangundo County to Emali. On 17th August, 2016, he was in Emali and was not close to Mitaboni or Kathiani. He left Emali on 4th September, 2016 when he was given off-duty. The only person he could call was his boss who was in Dubai.

78. In cross-examination he stated that he was arrested around 10.30 a.m. when he was going to his house. He had proof in his house. The chair that was to be repaired had been made by the 2nd appellant whom he knew as a 'fundi'. According to him, he was driver of lorry ferrying sand registration no. KBZ 506L.

79. According to him, the officers took his driver's licence and his identification card and the licence was returned to him on 21st September, 2016. The court noted that it had seen the same.

80. After considering the evidence, the Learned Trial Magistrate found the evidence of the complainant very clear and concise and that the appellants were well known to the complainant. He found the conditions prevailing on the night of the attack were conducive for proper identification or recognition of the attackers by the complainant as the area was well lit. He further found that the evidence of the complainant was corroborated by the data obtained from the mobile phone provider as well as the manner in which the appellants were arrested. In his view the evidence adduced clearly showed that the attackers intended to unlawfully kill the complainant. He therefore found that the prosecution had proved its case of attempted murder and proceeded to convict them and sentenced accordingly.

81. Before this Court the 1st appellant has raised the following grounds of appeal:

1) That the trial court erred in law and facts by failing to caution itself while acting upon evidence of a sole identifying witness despite the circumstances of identification not conducive for a positive identification/recognition.

2) That the trial court erred in law and facts by discounting or neglected the issue of mistaken identity.

3) That the trial court erred in law by failing to re-evaluate the alleged mode of arrest and observe that it was suspect and contrary to Section 150 of the CPC.

4) That the trial court erred in law and facts by acting upon inconsistent and contradictory evidence rendering prosecution evidence unreliable, mistaken, incredible and contrary to Section 163 (c) of the Evidence Act.

5) That the trial court erred in law and facts by acting upon circumstantial evidence that lacked the required certainty and raised merely a suspicion against the Appellant, recovery of the axe in accused scrap metal business premises, does not point irresistible to accused culpability.

6) That the trial court erred in law by failing to observe violation of Section 214 of the Criminal Procedure Code Cap 75 Laws of Kenya. That accused had cross-examined 10 witnesses on robbery contrary to Section 296 (2) of the Penal Code but upon amendment 3 witnesses in attempted murder, right to cross-examine witnesses already testified prior to amendment, in respect of murder was infringed as the substances are distinct.

7) That the trial court erred in law by failing to adequately consider my sworn defence contrary to section 169 (1) of the CPC.

8) That the learned trial magistrate erred in law and facts when he relied on the visual identification that was not free from error.

9) That the learned trial magistrate erred in law and facts when he relied on the evidence of identification parade that flaws as same was conducted in violation of Chapter 46 of Force Standing Orders.

10) That the learned trial magistrate erred in law and facts when he convicted me in the present case yet failed to comply with Section 213 and 310 of the CPC.

11) That the learned trial magistrate erred in law and facts when he shifted the burden of proof against the appellant by introducing non existing theories in the present case.

82. It was submitted by the appellants that since the incident occurred at night the circumstances of identification were not conducive for positive identification/recognition. Accordingly, the case rotated around circumstantial evidence and substantially on identification by recognition by the sole complainant which is questionable, given the circumstances and inherent weaknesses. It was submitted that there was no evidence that the complainant gave any description of his assailants to the police. While it was appreciated that recognition is more

reliable that identification, it was submitted that this does not relieve the court from investigating the mode of illumination. Even PW8 who stated that he was given the names by the complainant did not give the description of the suspect as narrated to him by the complainant.

83. It was submitted that the complainant did not even attribute the role played by the 1st appellant in the attack.

84. It was submitted that the 1st appellant was arrested in connection with the stolen gate and that nothing incriminating was recovered in his possession. Accordingly, there was no evidence why the police took the axe with them as there was no nexus between the axe and the incident.

85. It was further submitted that the people who initiated the appellants' arrest were not availed to support the prosecution case and explain the reason behind the said arrest hence there was no evidence that there was reasonable suspicion of the commission of the offence since the complainant did not testify that the appellants were arrested on the strength of his evidence. It was therefore submitted that the charge was not proved beyond reasonable doubt.

86. It was submitted that after the amendment of the charge, section 214 of the ***Criminal Procedure Code*** was not complied with as the witnesses were not recalled to testify in respect of the murder hence the appellant was denied fundamental right to challenge the evidence concerning the attempted murder.

87. According to the appellants the judgement did not comply with section 169(1) of the ***Criminal Procedure Code*** and further their sworn evidence was disregarded without proper reasons.

88. According to the 3rd appellant, the complainant only identified him in the identification parade after he had been shown to the complainant by the police. According to him, it was very easy for the complainant to identify him because it was a question of minus one plus one since he was placed in the same parade as that the his co accused **Kithuka Kimeu**. According to the 3rd appellant, the offence ought to have been that of robbery with violence as opposed to murder.

89. In opposing the appeal, it was submitted on behalf of the Respondent that the learned trial magistrate did not err in his finding since the area was well lit with security lights and the complainant could easily recognise the attackers and was able to positively identify them since the gang inched closer to him after he screamed and even posed some questions at him.

90. It was submitted that the prosecution's case was consistent all through as brought out by all the witnesses. It was submitted that besides the issue of the recovery of the axe and the 2nd appellant's cell phones data, the trial court in its reasoned judgement considered all the other evidence before it in determining the culpability of the appellants. Both the direct and circumstantial evidence placed the appellants at the scene of the crime and their defences were an afterthought. It was submitted that section 214 of the ***Criminal Procedure Code*** as fully complied with hence the appeal lacks merit and ought to be dismissed.

Determination.

91. This is a first appellate court. As expected, I have analysed and evaluated afresh all the evidence adduced before the lower court and have drawn my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses. See **Okeno vs. Republic [1972] EA 32** where the Court of Appeal set out the duties of a first appellate court 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."

92. Similarly, in **Kiilu & Another vs. Republic [2005]1 KLR 174,** the Court of Appeal stated thus:

1. An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusions.

2. 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 findings and 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.

93. It has been held that in a first appeal the appellant is entitled to expect this Court to subject the evidence on record as a whole to an exhaustive re-examination and to this Court's decision on the evidence having given allowance to the fact that this court did not see the demeanour of witnesses. Further even where the appeal turns on a question of fact, the Court has to bear in mind that its duty is to rehear the case, and the Court must reconsider the materials before the trial Court with such other materials as it may have decided to admit. The Court must then make up its own mind, not disregarding the judgment appealed from, but carefully weighing and considering it. See **Pandya vs. R [1957] EA. 336** and **Coghlan vs. Cumberland (3) [1898] 1 Ch. 704**.

94. However, it must be stated that there is no set format to which a re-evaluation of evidence by the first appellate court should conform. I

adopt what was stated by the Supreme Court of Uganda in the case of **Uganda Breweries Ltd v. Uganda Railways Corporation [2002] 2 EA 634**, thus:

"The extent and manner in which evaluation may be done depends on the circumstances of each case and the style used by the first Appellate Court. In this regard, I shall refer to what this court said in two cases. In Sembuya v Alports Services Uganda Limited [1999] LLR 109 (SCU), Tsekooko JSC said at 11:

'I would accept Mr. Byenkya's submission if he meant to say that the Court of Appeal did not go into details of the evidence, but that is really a question of style. There is really no set format to which the re-evaluation should conform. A first Appellate court is expected to scrutinise and make an assessment of the evidence but this does not mean that the Court of Appeal should write a judgment similar to that of the (trial).'"

95. In **Odongo and Another vs. Bonge Supreme Court Uganda Civil Appeal 10 of 1987 (UR), Odoki, JSC** (as he then was) said:

"While the length of the analysis may be indicative of a comprehensive evaluation of evidence, nevertheless the test of adequacy remains a question of substance."

96. The offence of attempted murder with which the appellants were charged fall within the category of offences known as inchoate offences. These type 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 relief 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."

97. **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 Mukhonzo (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."

98. 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.

99. 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.

100. 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.

101. The appellants were however charged under section 220(a) of the said section. There is no doubt at all that the attack upon the complainant was unlawful. The next question is whether the said attack was intended to cause his death. That the injuries were inflicted upon the complainant is not in doubt. In fact, the complainant sustained injuries similar to those who were sustained by his fellow watchmen who succumbed to the said injuries. It is clear that the intention of the attackers was to get rid of any person who might identify them. They did not just set out to injure or maim their victims but set out and had the intention of eliminating their victims. The complainant himself was injured and was left for the dead after he became unconscious. The totality of the evidence show that not only did the attackers have the *mens rea*, but apart from preparing to kill the complainant they took steps to do so. I therefore have no doubt in my mind that the offence of attempted murder was proved beyond reasonable doubt.

102. The next question is whether the same was committed by the appellants. 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 19*8*** 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."

103. 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."

104. 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."

105. 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."

106. In this case the evidence against the 1st 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."

107. 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."

108. 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."

109. 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."

110. 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."

111. In this case, it is clear that the complainant and the 1st appellant knew each other as neighbours. The 1st appellant in fact confirmed that the complainant had known him since childhood.

112. What is however not clear is whether the complainant in his first report to the police mentioned that one of the attackers was the 1st appellant. It is therefore my view that in such cases the first report becomes important and the importance of such a statement 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."

113. 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."

114. In **Maitanyi vs. Republic (1986) KLR 198** ***(supra)***, the Court held that:

"There is a second line of inquiry which ought to be made and that is whether the complainant was able to give some description or identification of his or her assailants, to those who came to the complainant's aid, or to the police. In this case no inquiry of any sort was made...If a witness receives a very strong impression of the features of an assailant, the witness will usually be able to give some description. If on the other hand the witness says that he or she could not identify or recognize the person, then a later identification or recognition must be suspect, unless explained."

115. In this case, the attack occurred on the night of 17th and 18th August, 2016. According to PW12, an officer from the DCI Machakos, he rushed to the scene when he received the report of the attack on 18th August, 2016 at 12.30 am. From their investigations, they gathered that there was a survivor of the attack who, due to the fear for his life, had gone to Wote. The next morning, presumably, 19th August, 2016, he went where the person was hiding and spoke to him and he informed him that he identified 2 of the attackers as **"Kivi"** and **Mutua**. **Kivi** is a nickname of the 1st appellant. PW7, on the other hand testified that on 24th August, 2016, the 1st appellant was taken to him based on allegations that he was a suspect in a case of illegal sand harvesting. According to him, the person who took him was P9, **IP Ngemu**. According to PW7, the 1st appellant was presented with a blood stained axe. PW9 however testified that his naked eye could not perceive any blood. There was no evidence that the said axe was taken for examination by the Government Chemist to find out if the alleged blood could be linked to any of the culprits of the offence. Finding no reason to hold the 1st appellant, PW7 released him and according to the 1st appellant he was told to return to the station. It was only upon his return that he was arrested in connection with the present offence.

116. The question that begs answers is: if by 19th August, 2016, the 1st appellant's name had already been mentioned in connection with the attack why was he not immediately arrested? There is no evidence of any serious attempts made by the police to apprehend him and according to PW9 he was only arrested when they heard that the members of the public were planning to lynch him on suspicion that he had stolen a gate. From his own evidence it would seem that the 1st appellant's connection with the attack was the axe that was found in his house cum store. PW2 in fact confirmed that when the incident of 17th and 18th August 2016 happened, there was no suspect. However, the intelligence gathered from members of the public linked the 1st appellant who was also suspected to have stolen the gate of Kalikya borehole to the offence and he was arrested him on suspicion. He however disappeared from the area when the public threatened to lynch him.

117. In his evidence, the complainant did not, unlike his testimony regarding the 2nd and 3rd appellant, state the role that was played by the 1st appellant in the attack and at what stage he actually saw the 1st appellant. How far was the 1st appellant when he saw him? Since they were many people how long did he look at him? These were questions which the investigators and by extension the prosecution ought to have put to the complainant in order to displace any possibility of mistaken identity.

118. In his evidence, the 1st appellant stated that during the period in question he was indisposed and was arrested on his way to seek medical attention. His evidence was corroborated by his wife who accompanied him to the bus stage. That was alibi evidence. *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."

119. 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 pendantize. What other approach is there? Judicial officers are not clairvoyant!"

120. 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."

121. In **Elizabeth Waithiegeni Gatimu vs. Republc [2015] eKLR** where the Nigerian case of **Ozaki & Another –vs- The State** was relied, where it was held that:

"Thus it is settled law that the defence of ALIBI must be proved on balance of probabilities and that for it to be rejected it must be incredible…"

122. In **Uganda vs. Sebyala & Others, [1969] EA 204** the learned Judge citing relevant precedents had this to say:-

"The accused does not have to establish that his alibi is reasonably true. All he has to do is to create doubt as to the strength of the case for the prosecution. When the prosecution case is thin an alibi which is not particularly strong may very well raise doubts."

123. In the case of ***Adedeji vs. The State [1971]1All N.L.R 75*** it was held that:

"failure by the police to investigate and check the reliability of alibi would raise reasonable doubt in the mind of the tribunal and lead to the quashing of a conviction imposed."

124. 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."

125. 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."

126. 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."

127. In this case, however, the 1st appellant not only testified to his whereabouts on the night of the incident, but called his wife as his witness who corroborated his evidence. There was no serious challenge taken to her evidence in cross-examination in which she also confirmed that the 1st appellant had a scrap metal store in Mitaboni. That there is no inherent objection to a relative testifying in support of an accused was appreciated in **Keter vs. Republic [2007] 1 EA 135** where it was held that:

"Whether or not a witness is to be believed is a matter for the discretion of the trial court. Judicial discretion is based on evidence and sound principles. The practice of criminal law courts is that the trial magistrate or judge has to observe the demeanor and other factors to decide whether any particular witness is a witness of truth or not. There is no principle of law which entitles a court to disbelieve a witness merely because the witness is related to either the complainant or the accused."

128. In my view, this was a clear case in which the Respondent ought to have taken advantage of the provisions of section 309 of the ***Criminal Procedure Code*** which provides as follows:

If the accused person adduces evidence in his defence introducing new matter which the advocate for the prosecution could not by the exercise of reasonable diligence have foreseen, the court may allow the advocate for the prosecution to adduce evidence in reply to rebut it.

129. In the case of ***Adedeji vs. The State*** **{1971} 1 All N.L.R 75** it was held that:-

"failure by the police to investigate and check the reliability of alibi would raise reasonable doubt in the mind of the tribunal and lead to the quashing of a conviction imposed."

130. In my view the evidence presented against the 1st appellant fell short of the required standards.

131. As regards, the 2nd appellant, **Joseph Kithuka Kimeu**, the evidence against him with respect to identification was that of the complainant. The complainant explained that the 2nd appellant was with the first 4 people who leant on the side. There was also the evidence from the mobile service provider, Airtel, which analysed the call data for 0732-774980 and placed the same within the geographical position of Mitaboni, between 16th and 19th August 2016. According to the said data, on the 17th August 2016, at 20.00 hrs (8.00pm), up to 0226 hrs (2.26 a.m.) on 18th August 2016, the 2nd appellant was within the geographical position of Mitaboni. At 2.51 a.m., he rushed to Tala until 3.21 a.m. when he came back to Mitaboni. At 3.35 a.m., he was seen on the road to Manza and on the road towards Nairobi. According to

the said records, the 2nd appellant was within the vicinity of the area where the crime was committed on the said night. While in his evidence he claimed that the said number was not his, it is on record that he sought for an order that the said phone be released to him.

132. From the totality of the evidence presented before the court I agree that the said phone was found in possession of the 2nd appellant and the data showed that the line therein was traceable to the vicinity where the crime was committed at the material time. The 2nd appellant's defence that he had never been to Mitaboni was clearly untenable in light of the said evidence. To my mind, the evidence placing the 2nd appellant at that place at the material time casts serious doubts as regards the 2nd appellant's evidence in totality and his alibi defence in particular, since as was stated in in the court of appeal case of **Ernest Abanga Alias Onyango vs. Republic CA No.32 of 1990**.

"In RAFAERI MUNYA alias RAFAERI KIBUKA V REGINAM (1953) 20 EACA 226, the appellant there was convicted of murder and the case against him was mainly based on circumstantial Evidence. In his sworn evidence at the trial, he made some denials which were obviously false. It was held that: The force of suspicious circumstances is augmented where the person accused attempts no explanation of facts which he may reasonably be expected to be able and interested to explain; false, incredible or contradictory statements given by way of explanation, if disapproved or disbelieved become of substantive inculpatory effect". This case in our view does not in any way go against the basic legal principle that the burden of proving a criminal charge beyond doubt is solely and squarely upon the prosecution. But it`s a basic holding, namely that when an accused person tells an obvious and deliberate lie which is disproved or disbelieved, then such a lie is capable of providing corroboration to other independent availably."

133. I therefore agree that the complainant's evidence that the 2nd appellant was amongst the people who attacked him on that night was corroborated with the call data obtained from the mobile phone service provider. The findings of the learned trial magistrate as regards his conviction cannot therefore be disturbed and the same is hereby confirmed.

134. Regarding the evidence against the 3rd appellant, he was similarly known to the complainant. Accordingly, the evidence against him was that of recognition. The complainant testified that on the material night, he was with the other last group of two who rushed to try to enter the pub entrance. Not only did they approach the complainant, they also exchanged words with the complainant. According to PW8 who conducted the parade, after the 3rd appellant was identified by the complainant, the 3rd appellant became shaky and was trembling.

135. In my view though the 3rd appellant's conviction was based purely on recognition of the complainant, I am satisfied that the evidence of the complainant concerning his role on the night of attack was free from the possibility of error. It was properly acted upon by the learned trial magistrate and the 3rd appellant's conviction cannot be disturbed.

136. For completeness of the record I find that the complaints by the appellants that they were not afforded an opportunity to recall the witnesses has no substance. The appellants' counsel had opportunity to do so and expressly made an informed decision not to do so. Regarding the issue of the failure to consider the appellants' case, I am satisfied that the judgement of the trial court was in compliance with the law and cannot be faulted on that ground.

137. As regards the sentence, it is clear that the 2nd and 3rd appellants are repeat offenders. The charge the subject of these proceedings is however, attempted murder. In meting out the maximum sentence prescribed by law the learned trial magistrate seems to have been influenced by the loss of life by the other victims. That is however a fact which may well be the subject of other cases and unless and until the same are determined it would be premature and prejudicial to take them into consideration in imposing the sentence. This court however agrees with the learned trial magistrate that the injuries inflicted on the complainant were very serious and as I have found were geared towards taking away his life as opposed to merely stealing from him. The attackers, it seemed, set out to erase any evidence of their being identified by eliminating any eye witness. I agree with the learned trial magistrate that the complainant is lucky to be alive today. In those circumstances the Court must impose a sentence that is commensurate with the gravity of the offence.

138. Accordingly, I hereby allow the 1st appellant's appeal herein. I must however emphasise that the basis for allowing his appeal is the evidence against him does not meet the threshold in criminal offences – proof beyond reasonable doubt. Therefore, in allowing the appeal, the court does not necessarily make a definite finding that the 1st appellant is factually innocent of the offence with which he is charged and the finding herein may not necessarily bind any pending or other related cases. It simply makes a finding that the prosecution has failed to prove his guilt and he is therefore constitutionally deemed to be innocent. That is what our law provides. Accordingly, his conviction is hereby set aside and the sentence quashed and he is set at liberty unless otherwise lawfully held.

139. As for the 2nd and 3rd appellants, their conviction is confirmed. I however quash the life sentence imposed upon them and substitute therefor a sentence of 40 years to commence from the date of their incarceration on 6th September, 2016.

140. Orders accordingly.

Judgement read, signed and delivered in open Court at Machakos this 29th day of January, 2020.

G V ODUNGA

JUDGE

In the presence of:

Appellants in person

Ms Mogoi for the Respondent

CA Geoffrey