Gitonga v Republic (Criminal Appeal E054 of 2022)
[2025] KEHC 5684 (KLR) (8 May 2025) (Judgment)

Neutral citation: [2025] KEHC 5684 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NANYUKI

CRIMINAL APPEAL E054 OF 2022

AK NDUNG'U, J

MAY 8, 2025

BETWEEN

PAUL GITONGA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal from original conviction and Sentence in Nanyuki CM Criminal Case No E387 of 2021 – Ben Mararo, PM)

JUDGMENT

1. The Appellant, Paul Gitonga was convicted after trial of four [4] counts of attempted murder contrary to Section 220[a] of the *Penal Code*. The particulars in count I were that on 24/02/2021 at Katheri Market Buuri west subcounty, Meru County, attempted unlawfully to cause the death of Faith Karwitha by breaking a widow, pouring in petrol and setting the house in which she was sleeping on fire. The particulars for count II, III and IV were that on the same date and place, he attempted to cause the death of Mishel Kathambi, Leon Victor and Fridah Kendi respectively by breaking a window, pouring in petrol and setting the house in which they were sleeping on fire. On 29/08/2022, he was sentenced to 25 years imprisonment on each count. The sentences were ordered to run concurrently.

2. Aggrieved by the conviction and sentence, he lodged this appeal vide a petition of appeal filed on 09/09/2022 followed by an 'amended memorandum grounds of appeal' accompanying his submissions. In the petition of appeal, he raised the following grounds;

    i. The learned magistrate erred by failing to note that the prosecution failed to prove their case beyond reasonable doubt thus contravening section 107 of *Evidence Act*.

    ii. The learned magistrate erred by failing to note that the evidence adduced pertaining the purported window did not tally with the photographic evidence presented before court.

iii. The learned magistrate failed to note that the evidence tendered was insufficient to sustain a secure conviction.

iv The learned magistrate failed to appreciate that the description of the alleged attire of the culprit did not match with the exhibits before court in terms of colour.

v The learned magistrate failed to note that there were key witnesses who did not testify even after recording statements.

vi. The learned magistrate failed to note that the photographic evidence was presented to court by a different person who was unable to satisfy the court on validity of the said evidence showed no time or data or when they were taken.

In the 'Amended memorandum grounds of appeal' filed alongside his submissions he added the following grounds;

i. The learned magistrate erred convicting on a case where identity of the culprit was not conclusive.

ii. The learned magistrate erred convicting him without appreciating that the key witness alleged to be an eye witness at the scene of crime was not availed thus leaving the matter of identity to be pegged on hearsay evidence.

iii. The learned magistrate erred convicting him while placing reliance on a prosecution's case riddled with inconsistencies and lack of corroboration.

iv The learned magistrate erred convicting him without weighing his defence vis-à-vis the prosecution's case.

v The learned magistrate erred by meting out a manifestly harsh and excessive sentence on a case that was not proved against him.

3. The appeal was canvassed by way of written submissions. The Appellant in his submissions put forth a case that according to PW1's evidence, one Kennedy was the only eye witness. That PW1 did not see the perpetrator at the scene or even recognize the man she saw along the road. He querried the source of light that enabled Kennedy to identify dull colours at night to the extent of differentiating army green colour from black and black from brown. That from PW1's testimony, there was no mention that the culprit was carrying an army bag and her evidence was that the Appellant used to carry a bag. The Appellant urges that PW1's second well prepared and coached examination in chief did not tarry with her first testimony and it is clear that the light green jumper, military bag and black trouser which she relied upon was a mere fabrication. That she was in a relationship with the Appellant so she knew his clothes.

4. He submitted that Kennedy, the only eyewitness, was not availed to testify. PW2 and PW5 would not have recognised him for they did not know him before so their identification was dock identification. Only Kennedy could identify who he saw at the scene and the rest was hearsay evidence. That it was crucial to call Kennedy to explain the mode of light he used to see the culprit, how close he was in order to recognise the colour of the clothes and how sure he was that the man on the road was the culprit he saw. Further, one Gikundu who PW5 alleged to have identified the culprit was also not called to testify. Their evidence was material and failure to testify left gaping holes in the prosecution's case. That there is no evidence that Kennedy used any form of light to identify the culprit. The landlord did not say whether the plot had a security light, the crime was committed at midnight hence it cannot be said that identification was conclusively proved. That PW1 was the remaining sole witness who

could have recognised him but it was doubtful in the circumstances. That she was left to base her identification on his clothes and army bag which she was quite familiar with and which she confirmed on cross examination that there was nothing unique with the army bag and the jumper.

5. He submitted that there were inconsistencies in the prosecution's witnesses' evidence as PW1 testified that he had a big grey trouser and a jumper but did not describe the colour of the jumper and did not mention the army bag. PW2 stated that he had a green jumper and military bag but did not state the colour of the trouser. PW5 stated that Kennedy said he had a green jumper but did not mention an army bag or a grey, black or brown trouser. That this shows that the witnesses were not truthful if they could not agree on the colours, clothes or items the culprit had. That there was variance as to how close they got to the suspect or whether they talked to him. The viewing distance was not described and duration of the encounter as the evidence was clear that the man fled even before meaningful identification. Further, he was not found in possession of anything to create a nexus to link him with the crime as no dusting was done, no container of petrol was found in his home and there was nothing implicating him was found on his person or in his home.

6. That the trial court was obligated to consider his defence case and failure to consider is against natural justice. That he conceded that he was in a love affair with PW1 and therefore, PW1 knew his clothes and it would prove nothing if the police went looking for a green jumper from his home. That the claim that there were threatening calls from him to PW1 was not proved. Thus, mens rea was not proved as well as actus reus. He adds that there was no evidence that the investigating officer interrogated his wife on his whereabouts on the previous night. Further, he argues that since PW1 took police officers to his home meaning that she knew it, the question is why she never took them there on the material night.

7. The trial court is faulted for failing to show that it had regard the mode of lighting distance, corroboration and hearsay evidence and he urged the court to render judgment as null and void for failing to conform to Section 169[1] of the *Criminal Procedure Code*.

8. In respect of the sentence, the Appellant urged the court to re-look into the sentence while considering his mitigations. That further, Section 333[2] of the *Criminal Procedure Code* was not complied with as the time spent in custody during trial was not considered.

9. In rejoinder, counsel for the Respondent noted that the Appellant introduced new grounds of appeal without leave of the court in his written submission and he urged the court to disregard those grounds of appeal. As to whether the prosecution's case was proved, the counsel relied on the case of Abdi Ali Barre v Republic [2015] eKLR to emphasis that the main ingredient of an attempted offence is the intention to commit the offence, whether or not the same is carried out to fruition or not. That the intention constitutes the mens rea while the actual execution of any attempt to commit the crime is actus reus. That the Appellant's action amounted to an attempt to murder the victims as he had taken the necessary steps to burn down the house which shows that there was a plan by the Appellant to commit the offence of murder. That he had been spotted lighting the fire by a neighbour who chased him. He was spotted while they were heading to Timau police station and his identity was confirmed by the clothes he was wearing while lighting the fire- a green jumper with a military bag and when he was invited to get into the car, he vanished into the bush when he saw the victims.

10. He submitted that in accordance with Cross & Jones' Introduction to Criminal Law, Butterworths, 8th Edition [1976] P. Asterley Jones and R.I.E Card, the act alleged to constitute attempted murder must be sufficiently proximate to murder to be properly described as attempt to commit murder. That the real question is whether the acts by the accused amounted to mere preparation to commit murder or whether the accused had done more than mere preparatory acts. That in the instant case, the Appellant lit the fire while the victims were asleep and were it not for the intervention of the neighbours who

rescued them, the victims could not have seen the light of the next day. That his intention was clear and was manifested through the vicious act of lighting fire on the victims' place of abode.

11. On identification, he submitted that the prosecution's witnesses were well known to the Appellant as he was a resident of their village and had frequented their homestead on several occasions. On the material day, he was in Katheri area, the same location PW1 and the witnesses live. He was seen by the witnesses and one Kennedy and he was identified by the clothes he was wearing. That when he spotted PW1, 2, 3 and 4, and one Kennedy on the way, he immediately vanished and this raises suspicion as to why he disappeared if he was not guilty. He was spotted twice and he was not a stranger to the victims. As to his defence, he submitted that the same was considered and the trial magistrate found that it did not dislodge the watertight testimony by the prosecution.

12. As regards sentence, he submitted that sentencing is a discretion of the trial court and it was upon the Appellant to demonstrate that the sentence was manifestly excessive, that the trial court overlooked some material factor or took into account some wrong material or acted on a wrong principle as was held in Shadrack Kipkoech Kogo v R Eldoret Criminal Appeal No. 253 of 2003 for this court to interfere with the sentence. That the trial court considered his mitigation and that he was a first time offender hence, the sentence of 25 years was not only lawful but lenient in the circumstances.

13. This is a first appeal. It is the duty of this court as the first Appellate court to re-evaluate the evidence and make its own findings on the culpability or lack thereof of the Appellant. In the case of Okeno v Republic [1972] EA 32 at 36, Court of Appeal laid down the duty of the Court on a first appeal:

> " 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 v R., [1957] E. A. 336] 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. [Shantilal M. Ruwala v R., [1957] E.A. 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 findings and conclusions; 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 v Sunday Post, [1958] E. A. 424."

14. The Court of Appeal for Eastern Africa in Pandya v Republic [1957] EA 336 stated: -

> " On a first appeal from a conviction by a Judge or magistrate sitting without a jury the appellant is entitled to have the appellate court's own consideration and views of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the witnesses before the Judge or magistrate with such other material as it may have decided to admit. The appellate court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises which witness is to be believed rather than another and that question turns on manner and demeanor, the appellate court must be guided by the impression made on the Judge or magistrate who saw the witness but there may be other circumstances, quite apart from manner and demeanor which may show whether a statement is credible or not which may warrant a court differing from the Judge or magistrate even on a question of fact turning on the credibility of witnesses whom the appellate court has not seen."

15. The court is not involved in finding evidence to support the conviction. It is involved in wholesome review of evidence and reaching its own conclusions.

16. That duty is also further explained in Kiilu & Another v Republic [2005]1 KLR 174, where the Court of Appeal held that:

> " 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. 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.

17. Further afield, the Supreme Court of India in K. Anbazhagan v State of Karnataka and Others, Criminal Appeal No. 637 of 2015 put it more succinctly as follows:-

> " The appellate Court has a duty to make a complete and comprehensive appreciation of all vital features of the case. The evidence brought on record in entirety has to be scrutinized with care and caution. It is the duty of the Judge to see that justice is appropriately administered, for that is the paramount consideration of a Judge. The said responsibility cannot be abdicated or abandoned or ostracized, even remotely,...The appellate Court is required to weigh the materials, ascribe concrete reasons and the filament of reasoning must logically flow from the requisite analysis of the material on record. The approach cannot be cryptic. It cannot be perverse. The duty of the Judge is to consider the evidence objectively and dispassionately. The reasoning in appeal are to be well deliberated. They are to be resolutely expressed. An objective judgment of the evidence reflects the greatness of mind – sans passion and sans prejudice. The reflective attitude of the Judge must be demonstrable from the judgment itself. A judge must avoid all kind of weakness and vacillation. That is the sole test. That is the litmus test."

18. Within this background a summary of the evidence recorded at trial becomes a necessary step to enable the court appreciate, consider and re-evaluate the evidence as required by law.

19. To prove their case, the prosecution called eight [8] witnesses. PW1, Faith Karwitha testified that they were asleep in her house with Frida, Michelle and her son Victor and she heard the sound of a broken glass. She called Frida but she was asleep. She smelt petrol and as she went to light up the bulb, a flame burst out. They entered the bedroom and she screamed for help and neighbours came and they were able to remove the children through the spaces. A widow was removed and they were able to get out. She found the neighbours trying to put out the fire and one Ken informed them that he was from the toilet and he had chased the perpetrator. He said the person had a green jumper, army bag and brown trouser. They reported to Nanyuki police station but they were referred to Timau. At around 1:30am when they got to Maili Nane, they passed someone and Ken said it was the person he had chased. They got close to him and offered him a lift but he ran into the bush.

20. They got to police station and when they were on their way home, and at a place called Wamaku, they shone light on him and saw it was the Appellant. They turned the car and looked at him. They returned to police station and informed the police but they did not see him on the road. She testified that the Appellant had threatened her before on two occasions and she reported to the police. He later sought forgiveness and he wanted to have an affair with her. That he had light green jumper, military bag and black trousers and he used to go to her place in those clothes. That she pointed him to the police and

he was arrested and the police recovered a military bag and green jumper from his house. She testified that it was the Appellant who burnt her house as she had rejected his sexual advances.

21. On cross examination, she testified that she did not know the distance between her house and his house. That she knew his bag and jumper though they were not unique.

22. PW2 Frida Kendi testified that she had visited PW1. They were asleep when she heard a loud bang. She got up and heard Faith asking whether it was their house [sic] and she saw fire at the table room. They started screaming and with the help of the neighbours, they managed to remove the children through the windows. The widow was broken and they were freed and the fire was put off. A person said he saw the perpetrator lighting the fire. He had a green jumper and a military bag and he chased him away. While they were going to report, they met a person on the road and Kenneth said it was him. They turned the vehicle and asked him whether he was going to Timau and he fled. After reporting and on their return in full glare headlights, PW1 identified him as the Appellant. They informed the police but they did not get him. She identified the Appellant.

23. On cross examination, she testified that it was at night but she recognised him as the light shone on him and they spoke to him asking him if he was going to Timau. They saw him twice and complainant also recognised him.

24. PW3, a minor testified that she was in the bedroom sleeping with PW2. She heard her mother calling her 'amka moto'. She got up and saw the sitting room on fire. They were removed through the bedroom window since they could not get through the sitting room. That there was a big fire/smoke in the sitting room and her mom and PW2 were rescued after the window was broken. People went with basins/jerrycan and put out the fire. The door was opened and her things in the sitting room were burnt. She testified that she knew the Appellant, Baba Kendi as he used to visit their home but her mom chased him.

25. PW4 a minor testified how the house was burnt and they got out through the window. That an uncle burnt their house but he did not know who burnt the house. The fire was put off. He testified that he did not know the Appellant.

26. PW5 testified that he was called at midnight by Nicholas Gikunda who informed him that his house had been burnt. He went to the scene and confirmed. Someone saw the person who lit the fire. They went to report and passengers identified the Appellant as the person who burnt the house. Kennedy said he had a green jumper. They met him at Ibis and Gikunda identified him. He was on the left side of the road and they turned the motor vehicle and planned to offer him a lift. They got near him but he disappeared after they offered him a lift. They also met him at Mia Moja area. He testified that he did not know the Appellant though he had seen him once coming from PW1's house.

27. PW6, a government analyst testified that he received a plastic bottle with reddish liquid and exhibit memo form with a request to ascertain whether the liquid in a container was flammable. He used ultra-visual mechanism liquid analysis and found it to be petrol. The hosepipe that was submitted had traces of petrol as well. He produced the report as Pexhibit9, the bottle as Pexhibit7, hosepipe as Pexhibit6 and exhibit memo as Pexhibit8.

28. PW7, the investigating officer testified that a report was made by PW1 that she was attacked and her house burnt. That Kennedy Kitonga was in the toilet and he saw the arsonist flee. He chased him but the person ran into a forest. He had a brownish trouser, a green jumper and a jungle green bag. That he was woken up and he was informed that the Appellant had been seen on the road. One person identified him and they stopped him and offered him a lift but he ran away. Upon return and at a place called kwa makaa, they saw him and PW1 identified him. They returned and reported again but

when they got back, they did not get him. They went to the scene of crime and photos were taken. On 25th, PW1 took them to where the Appellant used to stay. She spotted him and he was arrested. The Appellant took them to his house where they found his wife. He gave them the jungle bag, Pexhibit3 and his wife gave them the green hood, Pexhibit2 and the brown trousersPexhibit4 which were on the washing line. There were pipes outside and there was a pipe that looked like the cut hosepipe. That in 2020, the Appellant had threatened to kill the complainant. He produced the OB extract as Pexhibit II. That the key witness could not be traced as he was attacked and injured and fled to Nairobi and switched off his phone.

29. On cross examination, he testified that he revisited the scene the next day but repair had started. Finger prints were not taken and bottle was not thrown into the house. No bottle was recovered from the Appellant's house and that he lived 20km from the scene. That he had a grudge.

30. PW8 was the scene of crime personnel. He testified that 6 photographs were presented to him from Timau police station in form of a CD and they were processed under his supervision. He generated 6 photographs and prepared a certificate which he produced as Pexhibit15. He produced the 6 photographs as Pexhibit13 A-F and exhibit memo as Pexhibit14.

31. On cross examination, he testified that the investigating officer took the photograph and one showed a window which had been removed.

32. When he was placed on his defence, the Appellant opted to give unsworn testimony. He gave an account of 25/02/2021 the day of his arrest. He was arrested and the police requested that he take them to his place where they found his wife. They asked her of any knowledge of a relationship between him with another woman She denied any knowledge. They asked her if he had a jungle bag and a green pullover. They had a small yellow pipe and they went where the pipes were and they took a pipe looking like the one he had. His wife went to the station where she met PW1 as they knew each other as PW1 used to live where he lived. PW1 told his wife that he will be jailed for 30 years. That he had an affair with PW1 in 2018-2021 and they had not quarrelled. That she knew his bag and pullover which belonged to her.

33. I have had occasion to consider the evidence as recorded at the trial court. In doing so, am alive to the fact that, unlike the trial court, I did not have the advantage of seeing and hearing the witnesses testify and have given due allowance for that fact. I have had due regard to the grounds of Appeal, the submissions made and the applicable law.

34. Of determination is whether the prosecution proved the ingredients of the charges to the threshold set in law, that is, beyond reasonable doubt and if in the affirmative, whether the sentence meted out on the Appellant was legal and appropriate in the circumstances.

35. To sustain a charge of attempted murder, the evidence must show that there was a specific intent to unlawfully cause the death of another as was held in Cheruiyot v Republic [1976- 1985] EA 47 that;

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

36. The Respondent's counsel quoted the Court of Appeal decision in Abdi Ali Bare v Republic [2015] KECA 794 [KLR] where the court discussed at length what constitutes the offence of attempted murder. The court's view was that;

> " Like in virtually all other offences, the prosecution, in a charge of attempted murder, must prove both the mens rea and the actus reus of the offence. In R vWHYBROW [1951] 35 CR APP REP, 141, Lord Goddard CJ, stated that:
>
> "But if the charge is one of attempted murder, the intent becomes the principal ingredient of the crime."
>
> And while discussing the mens rea of the offence of attempted murder, J. C. Smith and Brain Hogan, the learned authors of the preeminent text, CRIMINAL LAW, Butterworths, 1988 [6th Ed], at page 288 state that in a charge of attempted murder:
>
> "Nothing less than an intention to kill will do."
>
> In Cheruiyot v Republic [1976-1985] EA 47, Madan, JA, as he then was, quoting with approval R. v Gwempazi S/o Mukhonzo [1943] 10 EACA 101, R. v LUSERU WANDERA [1948] 15 EACA 105 and Mustafa Daga S/O Andu v R. [1950] EACA 140, stated as follows on the mens rea of attempted murder:
>
> "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."
>
> 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 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 & JONES' INTRODUUCTION 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."

37. In the instant case, the evidence is that the house was put on fire and actually burnt but the neighbours were able to put out the fire. The evidence was also that the fire was emanating from the table room hence the victims could not be able to get out of the house through the main door. They actually escaped through the bedroom window. Further, the assailant used petrol to cause the fire and this was a demonstration of a deliberate intent to murder the occupants of the house taking into account the ferocity of a petrol induced fire.

38. It is safe to make the inference that the assailant had all the intent to cause the death of the victims by putting the house on fire as was rightly held by the trial court that the fact that he opened the sitting room window, poured the fire accelerant and lit the fire shows that he was past the mere preparation stage and was at this point executing his/her intention. The fact that the victims could not escape through the door shows that he/she had started the fire in a point where they would not be able to escape thus he had the intentions to harm or cause death of the occupants of the subject house.

39. The elephant in the room is who this assailant was. Put another way, was the Appellant identified satisfactorily as the perpetrator of the heinous act? The Appellant submitted that there was nothing that was produced to connect him to the offence. He further attacked the evidence on identification and maintained that the key witness who allegedly saw him in the act was not availed.

40. It is trite law that the burden of proof in a criminal prosecution is borne by the prosecution throughout and the accused person has no obligation to prove his/her innocence.

The evidential burden is upon the prosecution to prove its case beyond any reasonable doubt. The Court of Appeal for Eastern Africa, in the celebrated case of Okale v Rep 1965 EA 555 held:

> " In every criminal trial a conviction can only be based on the weight of the actual evidence adduced and it is dangerous and inadvisable for a trial judge to put forward a theory not canvassed in evidence or in counsels' speeches;
>
> [repeating the principles set out in Ndege Maragwa v Rep [10]], the burden of proof in criminal proceedings is throughout on the prosecution, and it is the duty of the trial judge to look at the evidence as a whole."

41. The evidence before the trial court was that one Kennedy saw the assailant and chased him. PW1 testified that Kennedy informed them that the assailant had a green jumper, army bag and brown trouser. PW2 testified that Kennedy said the assailant had a green jumper and a military bag. PW5 testified that Kennedy said he had a green jumper. PW1, PW2 and PW5 testified that on their way to the station, they spotted a man and Kennedy recognised him as the assailant. They spoke to him and offered him a lift but he disappeared. While they were returning, they saw him again and they shone the full light on him and PW1 recognised him as the Appellant. PW2 testified that she did not know him before whereas PW5 testified that he had seen him once coming from PW1's house.

42. It is instructive that the evidence of PW1, PW2 and PW5 is that they saw the suspect on their way to report the matter and One Kennedy recognised the person as the assailant and when returning, they again saw him and shone the headlights of the car and PW1 recognised him.

43. It is borne out of the available evidence that the place where the witnesses saw the suspect was away from the scene of crime. The only person who allegedly saw the suspect at the scene was one Kennedy who was not called to testify. This fact appears to have escaped the trial magistrate, a queue apparently taken by the Respondent in submissions where it is submitted that the facts clearly show that the Appellant was well known to the witnesses as he was a resident of their village and had frequented their homestead on several occasions and that he was seen by PW1, PW2, PW3, PW4 and one Kennedy who were all present and witnessed the Appellant's actions.

44. The legal principles for a proper identification of a suspect are well crystalized in case law. In R v Turnbull [1976] 3 ALL ER 549 it was held that;

> "...the judge should direct the jury to examine closely the circumstances in which identification by each witness came to be made. How long did the witness have the accused under observation" At what distance" In what light" Was the observation impeded in any way, as for example by passing traffic or a press of people" Had the witness ever seen the accused before" How often" If only occasionally, had he any special reason for remembering the accused" How long elapsed [sic] between the original observation and the subsequent identification to the police" Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance."

45. Madan J.A in Anjononi & 2 Others v Republic [1980] eKLR stated that;

> "...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. We drew attention to the distinction between recognition and identification in Siro Ole Giteya v The Republic [unreported.]"

46. Faith Muthoni M'ngondu & 3 others v Republic [2018] eKLR the Court of Appeal stated;

> " The guiding principles that the learned Judges took into consideration when addressing the appellants' challenges to their identification/recognition at the scene of the robbery are the same principles we are enjoined to apply in determining the same issue as now placed before us. These have now been crystallized in a long line of cases. See Cleophas Otieno Wamunga v Republic [1989] KLR; Paul Etole & Another v Republic [2001] eKLR; and Francis Kariuki Njuru & 7 Others v Republic Criminal Appeal No. 6 of 2000 [UR]. They may be summarized as follows:-
>
> i. Evidence of visual identification in criminal cases can bring about miscarriage of justice. It is for this reason that a court is enjoined to examine such evidence carefully to minimize such danger.
>
> ii. Whenever the case against the defendant depends wholly or to a great extend on the correctness of one or more identification of the accused which he alleges to be mistaken, the court must warn itself of the special need for caution before convicting the defendant in reliance on the correctness of such identification/ recognition.
>
> iii. The court has an obligation to examine closely, the circumstances in which the identification by each witness come to be made.
>
> iv. The court also had a duty to remind itself of any specific weaknesses which may have appeared in such identification evidence.
>
> v. It is true that recognition may be more reliable than identification of a stranger, but even when the witness is purporting to recognize someone whom he knew, the court should remind itself that mistakes in recognition of close relatives and friends are sometimes made.
>
> vi. Evidence relating to identification has to be scrutinized carefully and should only be accepted upon if the court is satisfied that the identification was positive and free from any possibility of error.
>
> vii. Among the factors surrounding evidence of identification/recognition that a court is required to inquire into is whether the witnesses gave either the description or the names of the attackers to either the police or persons who come to the scene of the attack soon after the attack and at the earliest opportunity."

47. The above tests are certainly applicable in the identification of a suspect in the act of committing a crime. The challenge with the identification in the instant appeal is that PW1, PW2 [who didn't know the Appellant before] and PW5 who had only seen him once before is that they are identifying him after the fact and none of the witnesses could say with certainty that the Appellant was at the scene and committed the crime. This evidence would, even assuming that the identification was proper, been useful in augumenting Kennedy's evidence, Kennedy being the only person to allegedly see the Appellant at the scene.

48. As it were Kennedy was not called as a witness. The prosecution appears to have given a cogent reason for his failure to testify stating that he was attacked and injured and fled to Nairobi something bordering on witness interference. The record also shows there were attempts by the Appellant to interfere with PW1. How these threats to the administration of justice were not persued and dealt with by the prosecution remains an issue of concern. This left the prosecution's case bare and in my view the trial court fell into error when it stated;

> In the present case, the neighbor Kennedy saw the Accused in the scene lighting the fire and saw him again on the road where he identified him based on the clothes he was wearing.....

49. This conclusion by the trial court in the absence of the evidence Kennedy was based on conjecture. The evidence of recovery of clothes from the home of the Appellant would only have been reliable circumstantial evidence if the Appellant was placed at the scene of crime by evidence of an eye witness who would have seen him there wearing the said clothes.

50. Granted, a heinous crime was committed on the material night. In light of the Appellant's love gone sour with PW1 and a documented threat on her, it is reasonable to suspect that the Appellant was the culprit. But suspicion alone in not enough as a basis for a conviction in a criminal trial.

51. The Court of Appeal in Sawe v Rep [2003] KLR 364 held that:

> " Suspicion, however strong, cannot provide the basis of inferring guilt which must be proved by evidence beyond reasonable doubt."

52. Similarly, in Mary Wanjiku Gichira s. Republic, Criminal Appeal No 17 of 1998, as cited in Kevin Kiswiki Kyongi v Republic [2018] eKLR, the same court held that:

> " suspicion however strong, cannot provide a basis for inferring guilt which must be proved by evidence. Before a court of law can convict an accused person of an offence, it ought to be satisfied that the evidence against him is overwhelming and points to his guilt. This is because a conviction has the effect of taking away the accused's freedom and at times life."

53. This court is alive to the fact that it is trite law that the prosecution is not bound to call numerous witnesses to prove a fact. This is in line with Section 143 of the *Evidence Act* which provides that;

> " In the absence of a provision of the law, no particular number of witnesses is required to prove a fact."

54. The prosecution must however adduce adequate evidence to secure a conviction. While the failure to call Kennedy may not be visited adversely on the prosecution given the circumstances, that failure left the case bare and weak raising considerable doubt in the Appellant's culpability. The conviction was most unsafe.

55. With the result that the appeal succeeds. The conviction is hereby quashed and sentence set aside. The Appellant is set at liberty forthwith unless he is otherwise lawfully held under another warrant.

DATED SIGNED AND DELIVERED VIRTUALLY THIS 8TH DAY OF MAY 2025.

A.K. NDUNG'U

JUDGE