



REPUBLIC OF KENYA



**Owuor v Republic (Criminal Appeal E039 of 2023)  
[2025] KEHC 8830 (KLR) (23 June 2025) (Judgment)**

Neutral citation: [2025] KEHC 8830 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT SIAYA  
CRIMINAL APPEAL E039 OF 2023**

**DK KEMEL, J**

**JUNE 23, 2025**

**BETWEEN**

**ROBERT OUKO OWUOR ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal from the judgment of Hon. J.P. Nandi (SPM)  
delivered on 30th August 2023 in Bondo SPMCCR No. E446 of 2022)*

**JUDGMENT**

1. The Appellant herein Robert Ouko Owuor alias Robaa was charged with an offence of attempted murder contrary to section 220(a) of the *Penal Code*. The particulars were that on the 15<sup>th</sup> day of May 2022 at about 0330hrs at Bar-Kowino junction in Bondo Sub County within Siaya County; jointly with others not before court attempted unlawfully to cause the death of Moses Owino Otieno alias Paul by cutting his head using a panga and uttering to him the following words “uwa na upoteze ushahidi.”
2. The matter proceeded to full trial wherein the Appellant was eventually found guilty, convicted and was sentenced to 10 years’ imprisonment.
3. Aggrieved by the conviction and sentence, the Appellant has appealed and filed his Petition of Appeal filed on 8/9/2023 wherein he raised the following grounds of appeal:
  - i. That the learned trial magistrate erred in law and fact in convicting the Appellant against the weight of the evidence on record.
  - ii. The trial magistrate erred in law and in fact in convicting the Appellant but failed to observe that the prosecution failed to prove its case against him beyond reasonable doubt.



- iii. That the trial magistrate erred in law and fact in convicting the Appellant when the evidence on record did not support the charge and or particulars thereof.
  - iv. That the trial magistrate erred in law and fact in relying on contradictory evidence of the prosecution to arrive at the verdict.
  - v. That the trial magistrate erred in law and fact in failing to observe that the sentence imposed on him was against the evidence adduced.
  - vi. That the trial magistrate erred in law and fact in delivering a judgment contrary to the law.
  - vii. That the trial magistrate erred in law and fact by failing to consider the Appellant's sworn defense statement.
4. This being a first appeal, this Court must re-consider and re-evaluate the evidence adduced before the trial Court in order to arrive at its independent findings and conclusion. (See *Okeno v Republic* [1972] EA 32). In doing so, this Court is required to take cognizance of the fact that it neither saw nor heard the witnesses as they testified before the trial Court and, therefore, it ought to make due allowance in that respect as was held in *Ajode v. Republic* [2004] KLR 81.
  5. The prosecution called a total of three witnesses in support of its case.
  6. Moses Owino Otieno alias Paul (PW1) stated that he was assaulted by the Appellant on 15/5/2022 at 0330hrs outside Bondex Club. He stated that he was on his way from the club, and was taking a boda boda rider to take him home when the Appellant came from behind and pulled out a panga and attacked him. That he tried to run away but the Appellant caught up with him. He stated that he was cut on the forehead from the right eye to the left side and also on the scalp.

That he was rescued by a boda boda rider who took him to Bondo Sub County Hospital, where he was later referred to Siaya County Referral Hospital from where he was further referred to Jaramogi Oginga Odinga Referral Hospital (JOOTRH) in Kisumu. The Referral form from Siaya County Hospital to JOOTRH was marked as PMFI- 1. That at JOOTRH, he was admitted for three days. He identified the discharge summary from JOOTRH which was marked as PMFI- 2. After the discharge, he made a report at Bondo Police Station, but found out that his friends had already made a report the same day of the incident. He was issued with a P3 form which was duly filled at Bondo Sub County hospital on 16/6/2022 which was marked as PMFI- 3.

He testified that he had known the man who assaulted him as Robert and that he was able to see him clearly because there were security lights at the scene and further that they came from the same town That Robert had earlier disagreed with one Bon Alila at Bondez Club on the same day before the attack. That he was able to identify the Appellant in the dock.

On cross-examination, he stated that the Appellant was in the company of other people one of whom was "Daddy", but he alone assaulted him.

7. John Okidi Bunde (PW2) a clinical officer based at Bondo Sub County Hospital testified that he had a P3 form that had been filled by his colleague Stephen Okwiri. That he had worked with him for three years and was very familiar with his handwriting and signature. That the Said Stephen Okwiri was at that time attending a one-month training thus the prosecution sought leave for PW2 to produce the medical documents on behalf of his said colleague. The Appellant did not object. The witness therefore went on to state that the P3 form was in favor of Moses Owino Otieno who had been attended to at the facility on 16/6/2022. That the patient is alleged to have been dressed with blood soaked clothes both dry and wet. That on examination, he had a severe deep cut on his frontal parietal lobe, heading



on scalp causing bleeding and fracture of the scalp. That the age of injury was 12 hours and that the weapon used was a sharp object. That according to the complainant, it was a panga. That X-ray and CT scans were carried out. That the injury was classified as grievous harm. That he produced the P3 form dated and signed on 16/6/2022 as exhibit 3. That the referral form from Siaya County and referral hospital where he had been earlier treated at Kisumu for further management was produced as exhibit 1 while the discharge as summary exhibit 2.

On cross examination, he stated that the patient was treated at Bondo hospital then later referred to Siaya Sub County Hospital then again to Kisumu for further management. That the medical documents had letter heads but no rubber stamps. That he had the CT scan report but not an x-ray report.

8. No.112661 PC Winston Obare (PW3) stationed at Bondo police station by then. He testified that he is the investigating officer. That a report was made at the station on 15/5/2022 at 1900hours by the complainant. That the complainant reported that the same day at about 3.00 Am as he was from Bondez club going home, at Barkowino junction, the Appellant attacked him with a panga and who cut him on the head. That the complainant reported that the assailant uttered these words while cutting him “Nakuua nipoteze ushahidi”. That the complainant raised alarm and that the assailant escaped. He was then rushed to Bondo Sub county hospital, then referred to Siaya County Hospital then later to Kisumu for further management.

On cross examination, he stated that he was the investigating officer and that the investigation diary was a summary of the investigations. That he reported to have been assaulted by the Appellant. The officer stated that he visited the scene and that there were blood stains on the ground. That he recorded his witness statement and that of the complainant on 17/5/2022. That the Appellant was well identified by the complainant. That Ip Omuse called the Appellant to go to the station on 20/7/2022 where he was arrested.

9. That marked the close of the prosecution’s case. The trial court later ruled that a prima facie case had been established by the Respondent and that the Appellant was placed on his defence. He opted to tender a sworn testimony.
10. Robert Ouko Owuor (DW1) testified that he had received threats from one George Jalabe on 19/7/2022 at between 7.10 pm and 7.50 pm, who suspected him to have an affair with his wife, which was not true. That he reported the threats at Bondo police station at about 8.05 pm the same night vide OB No. 52/19/7/2022. That the officer at the station asked him where George stays and that he informed him that he did not know but had known where he worked. That he was directed to wait for Inspector Omuse who was on patrol. He stated that Ip Omuse, Pc Obare and himself went to a certain place opposite Easy Coach whereupon the Appellant spotted the said George. That inspector Omuse who was in civilian clothes went to where George was and greeted and hugged him. That they entered into another vehicle opened by George and took too long. Finally, the said vehicle was driven away and that the said George was not arrested while he was asked to return to his home and come the following day with his witnesses to record statements. That the next day he went to the station with his two witnesses and showed the police officers the text message he had been sent by George issuing more threats. That the police later confiscated his phone and erased all his messages and call logs and was put under arrest. He insisted that he knew nothing concerning the instant case of attempted murder.
11. The appeal was canvassed by way of written submissions. It is only the Appellant who complied. The Appellant relied on his grounds of appeal and maintained that the Respondent’s case was full of contradictions and thus its case was not proved beyond reasonable doubt. He submitted that the appeal be allowed and that he be set free.



12. I have considered the evidence tendered before the trial court as well as the submissions filed. I find the issue for determination is whether the Respondent proved its case against the Appellant beyond reasonable doubt.
13. It is noted that the Appellant had been charged with an offence of attempted murder contrary to section 220 (a) of the Penal Code which stipulates thus:

Any person who—

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

(b) .....

is guilty of a felony and is liable to imprisonment for life.

14. The Respondent was therefore under an obligation to prove that the Appellant had attempted to unlawfully cause the death of the complainant on the material date by engaging in an act that endangered the life of the complainant. It transpired from the evidence that the complainant was cut on the head twice and had to undergo hospitalization for some days. This act thus endangered the life of the complainant. It is trite law that the prosecution is under a duty to prove the essential ingredients of a criminal act namely actus reus and mens rea which means the act of injuring the victim and the intention to kill. It must be shown that the Appellant had the intention to kill or cause severe injuries to the complainant. The injuries sustained must be life threatening in nature so as to leave no doubt that the assailant had the intention cause unlawfully cause the death of the complainant which was manifested by an overt act. There must be evidence that the assailant used so much force or used an offensive weapon to leave no doubt that his intention was that the injuries were to cause death. The complainant stated that the weapon used by the Appellant was a sharp panga and which cut his head all the way to the skull.
15. The other key issue that the Respondent was to prove is in regard to the identity of the assailant. It is not in dispute that the complainant was attacked while alone. The complainant stated that he was cut with a panga at about 0330hrs as he left Bondez Club. He stated that there were security lights which enabled him to identify the Appellant. He added that he was able to identify the Appellant using security lights at the scene which was then bright and that he saw how the Appellant was dressed. He also stated that he had known him as Robert as they come from the same town. As the complainant was the only eyewitness, the position of the law is as illustrated in the case of Charles Maitanyi Vs Republic [1986] KLR 198 where the court held:

“Although it is trite law that a fact may be proved by the testimony of a single witness, this does not lessen 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.”

This was the position in Ogeto Vs Republic [2004] KLR 19 where it was held:

“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.”



Again, the Court of Appeal for East Africa discussed the danger of relying on such evidence without warning in *Roria Vs Republic* [1967] EA 583 where the court held:

“A conviction resting entirely on identity invariably causes a degree of uneasiness... The 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.”

Also in the case of *Abdala Bin Wendo & Another Vs Republic* [1953] 20 EACA 166 it was 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 is circumstantial or direct, pointing to the guilt from which an a judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of of a single witness, can safely be accepted as free from the possibility of error.”

15. In this case, the evidence against the Appellant was solely based on the recognition by the complainant that particular night of the incident. The complainant stated that he was with the Appellant at Bondez Club and that he had known him as Robert as thy came from the same town and that the Appellant had followed him for some distance before he cut him twice on the head with a sharp panga. I find that this was a case based on visual identification at night. Iam guided by what was stated by the Court of Appeal in the case of *Wamunga Vs Republic* (1989) eKLR 427 as follows:-

“Where the only evidence against a Defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of the identification were favorable and free from the possibility of error before it can safely make it a basis for a conviction”.

15. Again, in the case of *Anjononi & Others Vs Republic* [1980]KLR 59 it was held:

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

15. In this case, the complainant stated that there were security lights outside Bondez Club and outside a certain hardware shop. He also added that he had been with the Appellant at the said Bondez Club and that the Appellant had an altercation with one Bon Alila before they all left the club. I find that the Appellant was well known to the complainant prior to that date and hence the evidence of recognition though by a single witness was free from any possibility of error as it was evidence of recognition. Iam persuaded that the complainant was not mistaken at all in identifying his assailant whom he referred to as Robert with whom they come from the same town. It is instructive that the complainant gave out the name of his assailant to the police at the time of lodging his report after being discharged from hospital. In the case of *Peter Musau Mwanzia Vs Republic* [2008] Eklr the Court of Appeal held:

“We do agree that for evidence of recognition to be relied upon, the witness claiming to recognize a suspect must establish circumstances that would prove that the suspect is not a stranger to him 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 some time, 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 he 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.”

15. From the evidence of the complainant, it is clear that he had known the Appellant prior to the incident and that both of them were earlier at Bondez Club before they left. He had also known him as Robert as they hailed from the same town. The complainant did not have any difficulty in recognizing the Appellant and that he later gave out his name to the police after being discharged from hospital. The Appellant’s defence claim did not shake that of the Respondent which was overwhelming and which placed the Appellant at the scene of crime as the perpetrator. The evidence of the Appellant relates to his complaint against one George Jubale over a disagreement regarding an incident which took place on 19/7/2022 whereas the attack on the complainant took place on 15/7/2022. I find the two incidents were quite different and hence the defence evidence did not touch at all about the attack on the complainant on 15/7/2022. I am satisfied that the Respondent had proved its case against the Appellant beyond any reasonable doubt. Hence, the finding on conviction by the learned trial magistrate was quite sound and must be upheld.
16. As regards the sentence, it is noted that the Appellant was sentenced to serve ten years’ imprisonment. Under section 220(a) of the Penal Code, an offender ought to serve a sentence of life imprisonment upon conviction. The complainant sustained life threatening injuries out of the panga cuts inflicted on him. Indeed, the injuries almost led to his death. He survived by the skin of his teeth. It seems the Appellant was out to end the complainant’s life. I find that the Appellant deserves a custodial rehabilitation. It is noted that the Respondent did not seek to enhance the sentence. I will therefore not interfere with the sentence imposed by the trial court as the same is quite lenient. It is noted that the trial court took into account the period spent in custody by the Appellant and ordered that the sentence to commence from the date of arrest namely 20/7/2022.
15. In the result, it is my finding that the Appellant’s appeal both on conviction and sentence lacks merit. The same is dismissed. The conviction and sentence are upheld.

**DATED AND DELIVERED AT SIAYA THIS 23<sup>RD</sup> DAY OF JUNE 2025.**

**D. KEMEI**

**JUDGE**

In the presence of :

Robert Ouko Owuor..... Appellant

Soita..... for Respondent

Okumu..... Court Assistant

