



REPUBLIC OF KENYA



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**Odhiambo & 5 others v Republic (Criminal Appeal E007, E008, E009, E010 & E011 of 2024 & E001 of 2025 (Consolidated)) [2025] KEHC 9640 (KLR) (4 July 2025) (Judgment)**

Neutral citation: [2025] KEHC 9640 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT SIAYA  
CRIMINAL APPEAL E007, E008, E009,  
E010 & E011 OF 2024 & E001 OF 2025 (CONSOLIDATED)**

**DK KEMEL, J**

**JULY 4, 2025**

**BETWEEN**

**FREDRICK ODHIAMBO ..... 1<sup>ST</sup> APPELLANT**  
**STEPHEN ONYANGO OMONDI ..... 2<sup>ND</sup> APPELLANT**  
**KENNEDY OKOTH OCHIENG ..... 3<sup>RD</sup> APPELLANT**  
**FREDRICK OUMA OGUT ..... 4<sup>TH</sup> APPELLANT**  
**ARON OUMA OKOTH ..... 5<sup>TH</sup> APPELLANT**  
**MICHAEL OKWIRI OTIENO ..... 6<sup>TH</sup> APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal from the conviction and sentence of Hon. Lester Simiyu (PM) in Siaya Criminal Case No. 794/2019 dated 2/2/2024)*

**JUDGMENT**

1. The appeal herein arises from the conviction and sentence of Hon. Lester Simiyu (PM) in Siaya CRC No. 794 of 2019 dated 2/2/2024 wherein she convicted the Appellants for offences of grievous harm and assault and sentenced them to serve three years each for the injuries on 1<sup>st</sup> and 2<sup>nd</sup> Complainants and further to serve one-year imprisonment each for assault on the 3<sup>rd</sup> Complainant. The six Appellants herein together with there others who were later acquitted had been charged with an offence of robbery with violence contrary to Section 295 as read with Section 296 of the *Penal Code*. The particulars were that on the 8<sup>th</sup> day of July 2019 at Komolo Sub Location in North Alego Location within Siaya County jointly with others not before court while armed with offensive weapons namely pangas,



knives, metal bars and clubs robbed (1) David Ochieng Wanyande of a mobile phone make Tecno valued at Kshs 6500/=, mobile phone battery Ksh500/= and cash Ksh3,000/=, (2) Joseph Onyango Muok of his mobile phone make Tecno valued at Kshs1,200/= and cash Ksh1500/=, (3) Silas Owino Okello of his mobile phone make itel valued at Ksh2,000/=, cash Ksh9441/=, all valued at Ksh 28,341/= and immediately before the time of such robbery used actual violence to the said David Ochieng Wanyande, Joseph Onyango Muok and Silas Owino Okello. Vide the judgment dated 26/2/2024, the six Appellants herein were acquitted of the charge of robbery with violence contrary to section 295 as read with section 296(2) but convicted for offences of grievous harm and assault contrary to section 234 and 251 of the *Penal Code* and sentenced to serve three years each for the grievous harm on 1<sup>st</sup> and 2<sup>nd</sup> Complainants and further to serve one-year imprisonment for assault on the 3<sup>rd</sup> Complainant and which were to run consecutively.

2. Aggrieved by the said conviction and sentence, the Appellants filed separate petitions of appeal and raised several grounds of appeal which can be summarized as hereunder:

- i. That the trial court failed in law and fact in convicting the Appellants yet the case had not been proved beyond reasonable doubt by the prosecution.
- ii. That the trial court erred in law when it shifted the burden of proof upon the Appellants.
- iii. That the trial court failed to evaluate and analyze the evidence properly before convicting the Appellants yet the prosecution's case was riddled with contradictions and therefore arrived at a finding which was not safe.
- iv. That the sentence imposed was harsh and excessive.

Reasons wherefor the Appellants pray that the conviction be quashed and the sentences set aside and the Appellants be set free.

3. This being the first appellate court, its duty is to evaluate and analyze the lower court record and come up with an independent conclusion on whether to uphold the decision of the lower court. See *Okeno Vs Republic* [1972] EA 32.

4. The prosecution had presented one charge of robbery with violence contrary to Section 295 as read with Section 296 (2) of the *Penal Code* against the six Appellants and three others who were later acquitted by the trial court. The particulars of the charge were that on the 8<sup>th</sup> day of July 2019 at Komolo Sub Location in North Alego Location within Siaya County jointly with others not before court while armed with offensive weapons namely pangas, knives, metal bars and clubs robbed (1) David Ochieng Wanyande of a mobile phone make Tecno valued at Kshs 6500/=, mobile phone battery Ksh500/= and cash Ksh3,000/=, (2) (Joseph Onyango Muok of his mobile phone make Tecno valued at Kshs1,200/= and cash Ksh1500/=, (3) ( Silas Owino Okello of his mobile phone make ITEL valued at Ksh2,000/=, cash Ksh9441/=, all valued at Ksh 28,341/= and immediately before at a time of such robbery used actual violence to the said David Ochieng Wanyande, Joseph Onyango Muok and Silas Owino Okello.

5. David Ochieng (PW1) testified that they were going to drill water at a certain site and that he was with Michael Ochieng and that he saw the 1<sup>st</sup> Appellant, 2<sup>nd</sup> Appellant, 3<sup>rd</sup> Appellant, and 4<sup>th</sup> Appellant who were with police officers and that the police officers informed them to return to the home where they were drilling water; that he used a motor bike with the 1<sup>st</sup> Appellant herein Fredrick Odhiambo who was known to him as Junior; that they were two pillion but the other one was a stranger to him; that Joseph who was in his company used a different motor bike which was fueled at Bondo junction and rode to Kanungo stage and were joined with another person and at the time he had Kshs4,000/=;



that they were ordered to undress make their last prayer and lie down and that junior gave him a knife asking him to stab himself; that someone rod a motor cycle over him; that junior then stabbed him on his right hand and was as well hit until he fell unconscious; that he woke up only to find himself in the hospital where he was admitted for long; that he produced P3 form and discharge summary as PMFI 1 and 2 respectively; that the had known both accused 1, 2, 3, 4 and 5 some of whom were motor cycle riders and colleagues.

On cross examination, he stated that he recorded his statement, he saw accused 6 at the stage, that he saw those who assaulted him; that accused 1 beat him using a panga; that those who stole from him are not in court; that his right leg was cut by Junior and right hand stabbed.

6. Silas Owino (PW2) testified that he had left the car wash and went to buy food at 1900hours when he saw riders and two police officers who inquired as to where he was going and whereupon they asked him whether he knew a pillion passenger by the name Onyango. That he respondent that he knows him and was asked to accompany them which he obliged and boarded the same bike. That Junior was in their company. That he did not know where they were heading to but were at Mbagajunction. That he knew accused 1<sup>st</sup> Appellant, 2<sup>nd</sup> Appellant and 4<sup>th</sup> Appellant. That they stopped at Gombo and that he was with David and Onyango. That he found three men from Bondo at the stage who ordered them to stop. That the men started beating him thoroughly. That his phone had been stolen but was given to him and ordered tp unlock his Mpesa pin of which he was hesitant. That one man removed a sword and hit him continuously. That he recognizes the 1<sup>st</sup> Appellant. That he and others were taken to Referral hospital for treatment. That he identified the P3 form and discharge summary as MFI-4 and 5 respectively. That he requested the court to help him recover his phone and money.

On cross examination by Mr. Ochanyo, he stated that both the 1<sup>st</sup> Appellant and 2<sup>nd</sup> Appellant assaulted him together with another man who was not in court. That the person who took his phone and the one who snatched his money was not in court. That his money was transferred from his phone to that of Emmanuel Elema Okin and who is not among the names on the file. That accused 2,7, 8(6<sup>th</sup> Appellant) and 9<sup>th</sup> accused were not at the scene. That accused 1(1<sup>st</sup> Appellant),5(4<sup>th</sup> Appellant), and 6 (5<sup>th</sup> Appellant) were at the scene and that he saw them when he was ordered to claim the motor bike. That he saw two police officers at the road who were not in court. That he recorded his statement at Siaya Police Station.

On being re-examined, the witness stated that there were two men in police uniform at the time he was ordered to board the bike. that accused 2,7,8(6<sup>th</sup> Appellant) and 9 were not at the place where he was assaulted from.

Caroline Akinyi (PW3) testified that she was the mother to Michael who was a rider and that on 8/7/2019 and at 1700 hours she was at a funeral when she received a call. That she was aware that Michael had gone to work in Bondo. That the person who called informed him that Michael had been picked from his home with police and a crowd and that he asked her to report to Siaya. That she tried to seek assistance from Michael's friends who informed her that Michael was at Bondo police station. That she made effort of checking the son at Bondo police station to no avail. That she stayed until 7.30 pm when she informed the police that she was leaving and that is when she was called and was informed that Dave and other persons had been killed at Gombo. That she ran into the reporting office and told police to go to Gombo. That they went to Gombo aboard the police van, as they got closer, several motor cycle rode away very fast and that she saw bodies on the ground and among them was her son David Ochieng who had been cut on leg, back and that he was bleeding. That she informed the police she knew the three men. That Michael Ochieng was found behind the bush and that he had been cut on the back of the head and was bleeding profusely and he together with others were taken to hospital from where they were stitched, put on fluid drips, blood transfusion drips and catheters to pass urine.



That she did not witness the four men being assaulted as nobody was at the scene when they arrived. She further stated that she knew the accused persons.

On re-examination, she stated that accused 3(1<sup>st</sup> Appellant, 5(4<sup>th</sup> Appellant) and 7 were from her village and had earlier seen accused 5 and 7 during a harambee.

7. Silas Omondi Oluoch (PW4) and a Clinical Officer, testified that he was stationed at Rwamba but was transferred from Siaya County Referral Hospital. That he filled the P3 form for Silas Owino Okello aged 33 years and that he signed the same on 29/7/2019. He stated that the patients were treated on 8/7/2019 at Siaya County Referral Hospital at about midnight. That he had card No. 00XX06/2019 and inpatient No. 27XX25. The history was that the patient had been assaulted on 8/7/2019 at 7.30 pm by persons known to him and he sustained multiple injuries. On cross examination, he stated that no clothes had been submitted for examination although the patient was in pain and using a walking aid but stable. That on examination, it was established that he had multiple healed bruises on the head, healed stitched cut wounds on the head, skull Xray done did not show abnormality. CT scan on head was normal, marked tenderness on anterior chest, healed stitched cut wound on left 2<sup>nd</sup> finger and posterior side of elbow joint, bruises at left ankles tender (under the ankle joint) which was painful on touch, age of injury was 20 days old and that probable injuries were friction, blunt objects and sharp objects. He further testified that the patient was treated for hand injury, antibiotics, analgesics and that he classified degree of injury as harm. He stated that he signed the P3 form on 29/7/2019 and produced it together with discharge summary as exhibit 1 and 5 accordingly.

On cross examination, the witness told the court that at the time of filling the P3 form, the patient indicated that he had blood stained clothes of which he had not submitted to the witness at that time and that he did not treat the patient, as same was done by his colleague.

8. Kennedy Opiyo Omondi a clinical officer (PW5) a clinical officer and Registration No. 10799 working at Siaya Referral hospital and he had a P3 for Joseph Onyango Muok aged 26 years and Erick Otieno aged 25 years at the time of examination. That the P3 form dated 19/7/2019 with a history of assault by persons known by name to the patient/complainant and that he was assaulted on 8/7/2019 at Gombo in Alego at 8.30 pm. That at examination, no clothes were shown to him and that he was in pain and on a walking aid. Further that, the patient had been admitted on 8/7/2019 to 10/7/2019 in patient No. 27932/005709. During examination the witness noted these injuries healing cut wound at back of skull appears 7 cm, healing joint wound on head about 10 cm, cut wound had linear edges (sharp edges with Haemotoma on surface of cut wound), cut wound on ear about elbow joint, stitched wound on right lateral part of about 6 cm with linear edges, the patient's right knee was still, stitched cut wounds on left knee about 6 cm, damage of tender on left feet which had been repaired and that the weapon that had been used to inflict the injuries were sharp and blunt objects. He further indicated that he filled the P3 11 days after the assault. That the patient was treated; transfusion, intravenous fluid, surgical interventions, intravenous antibiotics, discharge was done through surgical outpatient clinic and that the degree of injuries were classified as grievous harm. He produced the P3 form, discharge summary and invoice as Exhibit 6, 7 and 8 respectively.

The witness further examined David Ochieng Wanyande who was aged 25 years at the time and the history was assault by a group of people but only one was known to him and that the complainant/patient was able to identify his assailant in a parade. He stated that the patient was admitted while in bad state and was discharged 9 days later. The witness further stated that at the time of examination the complainant was using a walking aid and he had sustained injuries as follows; multiple healing of wounds on mouth on cheek born and right behind the ear and on back of skull, all cuts were about 30 cm, all wounds had linear edges, multiple lacerations and healing soft tissue cuts on his back, dark lacerations, swollen and tender, difficulty in bonding, upper limb support cut wound on right and left



shoulder joints about 10 cm long, left hand multiple soft tissue cut wounds and swollen metatarsals, confound tender damage on right calcanea area and was repaired in fibula and a cut on left leg and that he prepared and signed a P3 form. He established that a sharp and blunt object were used to cause the injuries. The patient received treatment in form of transfusion with blood, surgical tender repair, surgical toiling and wound enduring, X-ray of skull and chest, abdominal ultrasound clinic and classified the degree of injuries as grievous harm. The witness produced P3 form, discharge summary and final invoice as PEX1, PEX2 and PEX3 respectively.

On being cross examined by Mr. Ochanyo, the witness submitted that none of the patients produced the clothing and that they had known their assailants and could be able to identify them in case a parade was conducted.

9. Joseph Onyango Muok (PW6) testified that he is a boda boda rider and drill wells and that on 8/2/2019 they were drilling a bore hole in Bondo. That they completed work at 5.00 pm and went to bath with David at a river and he came out ahead of David when some people arrived and started asking what they were doing at the river and that they explained that they were bathing. That the said people snatched his Tecno phone worth Ksh3,500 and ksh500/= and they were told to dress up as they were being taken to police in Siaya. That they walked about 2-3 km from the river and they were taken to the site, took their helmet and rode their bikes to Siaya. While at Bondo junction heading to Siaya, and the riders rode to Gombo area and upon reaching the 5<sup>th</sup> accused hit him with a panga and that he fell. He was also slashed on both legs at knee area first and right hand and was continuously beaten with sticks and that they were rescued by police and taken to hospital. To date, I don't know why we were assaulted. That he recorded statement with police and it was written by the officer since the complainant was illiterate he indicated that among their attackers two persons were in police uniform and he was not able to ascertain if they were really police officers and that they were not in court. he emphasized that the persons he pointed at were the ones who assaulted him. He further said that he was not among the search party that was looking for cattle thieves who were being searched. He further stated that their livestock had lost and were being searched for and that he was informed that they were recovered. That he was at the time in Bondo and didn't know exactly about the search 2 part of the livestock. He further stated that accused 2,6, 7 and 9 are known to him and that he did not attend any identification parade.
10. After the close of the prosecution's case, the trial court later found that three of the Appellants' Co-accused (2<sup>nd</sup>, 7<sup>th</sup> and 9<sup>th</sup>) did not have a case to answer and were subsequently acquitted of the charges while the Appellants herein were found to have a case to answer and subsequently placed on their defence. The Appellants opted to tender sworn testimonies.
11. Fredrick Odhiambo (1<sup>st</sup> Appellant) testified as DW1 during the defence hearing that he resides in Mbaga in North Alego and that he ran shop and taxi business and that he understood the charges preferred against him. That on 8/9/2019, he was at his shop and later left to town to purchase stock at the wholesale and that it was about 5.00 pm and returned with goods on the motor bike, when he entered the shop which he had not locked while leaving for town, he was informed by a neighbour that David's mother had come looking for him. He replied to the neighbor that he knew David's mother and hopefully he had come to purchase goods and that he continued with his normal chores. That at about 7.00 pm he switched on lights and could see a crowd and that he returned to his shop. That on 20/8/2021 at about 5.30 pm a Land Cruiser came and stopped and more than 7 police officers alighted and that two entered his shop and arrested him without any explanation. That he obliged and went to the station. That he called Richard Omondi and informed him of the arrest upon which Richard followed him to the station of whom he requested to go and lock the shop for him. That while there, fingerprints and names ere taken and that he was held for not less than 4 days before he was informed



of the charges. That he did not rob anybody. That he was charged in court and that is why he knew the charges preferred. He further stated that he did not commit the offence.

12. Richard Omondi Osuso (DW2) testified as a witness for the 1<sup>st</sup> Appellant. That he resides at Mulaha and was a boda boda rider. That he knew the 1<sup>st</sup> Appellant who had a shop at Kanungo junction near a boda boda stage and from whom he used to purchase from. That he knew nothing about 5.30 pm and that he was looking for change and went to the shop and that Fredrick gave him the change in coins and that he also shopped flour and sugar from Fredrick's shop upon which he proceeded to the main market near Rubis and that he walked to Walias where he purchased fish. That he left and was informed that riders at the stage had been arrested including Fredrick. That he went to the shop and found that Fredrick was not there. That he locked the shop and took the keys to Fredrick's home and handed the keys to Fredrick's sister. He further testified that he did not beat anybody or rob anybody on 8/7/2019.

On cross examination, he stated that he only heard of the arrest as he was informed of the same. That he did not witness anything as he was not at the scene. That he was informed that Fredrick had been arrested and that he only locked his shop and that Fredrick's sister was not near the shop.

13. Stephen Onyango Omondi (7<sup>th</sup> Appellant) testified as DW3. That he was the 3<sup>rd</sup> accused and a boda boda rider and that he resided at Okwato. That on 8/7/2019 he was working as a rider. That at about 5pm, he was at Kanungo junction and that at 3.00pm he had picked up the lower-class child and at 6.20 pm he had picked the one in class 8. That he left the stage at 6pm and while at Siaya Medical, two women holding basins waved him down and asked to be ferried and that he ferried them and went to fuel at Lake Oil pump. That a group of people came and among them he was able to recognize Abdul who called him by name. That Abdul had one civilian and one officer as pillions and who informed him that one of the pillion passengers had assaulted him while he was taking a child to hospital and that the child was his nephew and that had been assaulted previously. That he had seen Abdul with bandage on the arm in June 2021 and that Abdul had previously informed him that he had been attacked while taking his nephew to hospital and that his nephew had died. That Abdul informed him that he was from Bondo. That he proceeded to Central Primary and took the child home and the said child was currently in form 4 at Rangala. He further stated that he did not assault or rob anybody and that he did not follow Abdul because two of the pillion passengers wore police uniforms one of whom he believed was taking the offender to the station.

14. Kennedy Okoth Ochieng (3<sup>rd</sup> Appellant) testified as DW4. That he stays near water offices and that on 8/7/2019 he had a customer he had picked from Dondi and brought him to Friends at about 4.30 pm. That he dropped the said customer near ACK church town and the customer was discussing something for about two hours as he waited. That he later took the customer to the site but before they reached, he saw a crowd of 11 people and who included Abdul, Silas Owino Okalo, Peter owino and Daniel Otieno. That he enquired about the rally and that Abdul informed him that there was no political rally. That the said customer was impatient and that he rode ahead to a site. That later he took the customer at about 6.20 pm. That he took the customer to Ramba market near Catholic church at Karapul. That he came back rushing to escort someone near the police station thinking that the crowd had gone and that there was nobody. That he went to Mbagu/Kanungo junction where he got a customer after 10 minutes and took him to Nyakango school. That he did not beat or rob anyone. That he was at the stage and at 4.30 pm and while it was raining as he sheltered, a Land cruiser owned by police arrived and that the police alighted and arrested everyone at that stage without rendering any explanation.

On cross examination, he stated that he took a customer to Nyakango who was a stranger to him and that he never asked him of his name.



On re-examination, he stated that he usually gets many customers and that he was not asking names of his customers and that the said customers pay cash thus was unable to get their respective names.

15. Fredrick Ouma Ogut, (4<sup>th</sup> Appellant) testified as DW5. That he was the 5<sup>th</sup> accused, a boda boda rider and that he resided in Nyakongo village. That on 8/7/2019 he was at Mbaga/Kanungu stage between 4.00pm – 5.00 pm. That a lady called him and who was known to him as Nya-Uyoma and who informed him that she had a customer who was going to Bondo. That he did the job and while returning to Siaya at Nyawita bridge he met a fellow rider by the name Abdul who had two pillion passengers one of whom wore police uniform. That there was another rider by the name Agoyo. That he joined them as he wanted to find out what the issue was and that he learnt that the police had come to capture the persons who had assaulted Abdul. That the assailants were David, Silas and Joseph and one Michael. That they all headed towards Siaya town where he got two pillion passengers whom he took to Usonga area and returned back to Siaya town at 6.30 pm and closed his business when it had gotten dark. That he did not injure anybody as alleged. That the said Abdul later died one month later and was buried on 23/8/2019.
16. Aron Ouma Okoth (5<sup>th</sup> Appellant) testified as DW6. That his grandfather one Joseph had died on 8/7/2019 and that he had come home for burial. That he went to Walkins Supermarket to buy food when he met a stranger who was in company of police and who pointed him out to the police whereupon he was arrested. He found himself in custody with the other Appellants. That he was not at the scene on 8/7/2019 since he was at the bus stage. He maintained that the 1<sup>st</sup>, 2<sup>nd</sup>, and 3<sup>rd</sup> Complainants informed the court that they did not see him at the scene. That he is shocked why he is still in the case.

**On cross examination, he stated that his father died on 2/7/2019.**

17. Michael Okwiri Otieno ( 6<sup>th</sup> Appellant) and testified as DW7. He stated that on 8/7/2019 he was at Ugenya. That he had left Siaya on 5/7/2019 and returned on 10/7/2019 and retired to his home. That the next day he was informed that some persons had been brought from Bondo and were attacked, injured and dropped. That he is innocent because he was away from Siaya. That the complainants were strangers to him.
18. The trial court later established that the charge of robbery with violence under Section 295 as read with 296 (2) of the *Penal Code* had not been proved by the prosecution. However, the court ruled that the prosecution had proved offences of assault causing actual bodily harm contrary to Section 251 and grievous harm contrary to Section 234 of the *Penal Code* had been proved against the Appellants beyond reasonable doubt. The trial court ordered the Appellants to serve three years imprisonment each for the offence of grievous harm on each of the complainants and a further one-year imprisonment with the offence of assault and that the sentences were to run consecutively from the date of conviction (2/2/2024).
19. The appeal was canvassed by way of written submissions. It is only the Appellants' counsel who complied.
20. Vide submissions dated 14/1/2025, Ms Nungo, learned counsel for the Appellants, submitted that the trial court did not consider the alibi defenses of the Appellants as can be seen in the learned trial magistrate's judgement dated 2/2/2024. It was also submitted that the only eyewitnesses who were present at the scene were PW1, PW2 and PW6 but that PW2 and PW6 did not even mention the presence of the 5<sup>th</sup> Appellant at the scene except only during cross-examination. It was submitted that the trial court ought to have acquitted the 5<sup>th</sup> and 6<sup>th</sup> Appellants of the charges. It was also submitted that the rest of the Appellants ought to have been acquitted as there was no cogent evidence adduced



against them. It was finally submitted that the sentences imposed were harsh and excessive and further that the same ought to run concurrently.

21. I have considered the evidence tendered before the trial court as well as the submissions tendered. It is not in dispute that the complainants had visited a certain home on the material date to drill water. It is also not in dispute that there was some disagreement at the venue which led to the killing of one Abdul and that a riotous mob descended upon the complainants herein leading to the incident. Indeed, the police from Siaya had gone to Bondo to apprehend the suspects only for things to go out of hand. It is also not in dispute from the evidence of Caroline Akinyi (PW3) that pandemonium broke out during a funeral meeting where several persons were killed and that police officers from Siaya police station had to rush to Gombo area where several people had been fatally injured and who were picked and rushed to hospital. The issue for determination is whether the Respondent proved its case beyond the threshold of proof,
22. It is noted that the Appellants had been charged with an offence of robbery with violence contrary to section 295 as read with section 296(2) of the Penal Code. The said provisions are as follows:

Section 295- Any person who steals anything, and, at or immediately before or immediately after the time of stealing it, uses or threatens to use actual violence to any person or property in order to obtain it or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained, is guilty of the felony termed robbery.

Section 296(2)- If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons, or if, at or immediately before or immediately after the time of the robbery, he wounds or beats, strikes or uses any other personal violence to any person, he shall be sentenced to death.
22. From the foregoing, the Respondent was under duty to prove all the elements of the offence namely stealing and use of personal violence on the victims. As regards stealing, the prosecution ought to prove that the stolen items belonged to the complainants. It is noted that the prosecution did not present any inventory of the stolen items from the complainants and that the complainants did not avail anything in that regard. Indeed, there was no recoveries of the alleged stolen items as none of the complainants identified any in court. The learned trial magistrate rightly therefore that the issue of stealing was not proved by the Respondent beyond any reasonable doubt. That conclusion therefore led the learned trial magistrate to deduce that the offences ought to be grievous harm and assault as per the evidence of the clinical officer (PW5) who produced the relevant P3 forms and treatment/discharge summaries regarding the injuries suffered by the three complainants. The learned trial magistrate was entitled to resort to the provisions of section 179 of the Criminal Procedure Code which provides as follows:
  - 1) When a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence, and the combination is proved but the remaining particulars are not proved, he may be convicted of the minor offence although he was not charged with it.
  - 2) When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence although he was not charged with it.
23. An analysis of the evidence of the three complainants leaves no doubt that indeed there was a riotous mob on the material date following the killing of several persons. Indeed, from both the evidence of the complainants and the Appellants, members of public who were irate about the death of some of the persons one of whom is Abdul descended the scene and caused havoc whereupon police officers were called to intervene. It also emerged from the evidence that the Complainants herein were alleged



to have been among the persons who caused the death of one of the victims namely Abdul. Hence, it is clear that the alleged injuries and theft of property from the complainants was as a result of retaliation by the angry members of public. It also transpired that police officers were at the scene and managed to contain the situation and assisted those injured to hospital and also collected the bodies of the dead. It is instructive that the prosecution failed to call any of those police officers who participated in the arrest of the suspects and investigated the case. It is also instructive that the prosecution did not present evidence regarding the question of what happened to the persons who died and whether suspects were charged over the death of those persons. I find the failure by the Respondent to call the persons who witnessed the incident in which the Complainants herein were assaulted and in which other persons lost their lives is quite telling. The prosecution was under obligation to prove the guilt of the Appellants beyond reasonable doubt. It is instructive that the Appellants raised several alibi defences which required the Respondent to rebut. It is noted that the Respondent failed to do so. Further, the trial court also failed to consider the said alibi defences brought about by the Appellants so as to determine their truthfulness. Under Section 212 of the *Criminal Procedure Code*, it is provided as follows:

“If the accused person adduces evidence in his defence introducing a new matter which the prosecutor could not by the exercise of reasonable diligence have foreseen, the court may allow the prosecutor to adduce evidence in reply to rebut that matter.”

In the case of *Kimotho Kiarie Vs. Republic* [1984] eKLR the Court of Appeal restated on circumstances where an alibi evidence can be tested as follows:

“It is trite law that the burden of proving falsity, if at all, of an accused’s defence of alibi lies on the prosecution.

Again, in *Uganda Vs. Sebyala & Others* [1969] EA 204 the Court of Appeal held as follows:

“The accused does not have to establish that his alibi is true. All he has to do is to create doubt as to the strength of the case for the prosecution. When the prosecution’s case is then an alibi which is not particularly strong, it may very well raise doubts.”

Again, in an English decision of *REP vs. Johnson* 46 CR Appeal. R 55[1961] 3 ALL ER 969 it was held as follows:

“Though an alibi is commonly called a defence, it is to be distinguished from a statutory defence such as insanity or diminished responsibility and analogous to a defence such as self defence or provocation. A prisoner who has put forward an alibi as an answer to a charge does not assume any burden of proving that answer and it is a misdirection to refer to any burden as resting on the prisoner in such a case.”

24. From the foregoing authorities, and juxtaposed with the evidence presented by the Appellants, it is clear that the Respondent failed to present evidence to controvert the said alibi defences by the Appellants. It is instructive that no eye witnesses were called by the prosecution despite the fact that this was an incident involving an irate mob responding to the killing of certain villagers. As noted above the prosecution did not call eye witnesses or arresting/investigating officers so as to bolster its case against the Appellants. It is noted that the prosecution’s witness namely Caroline Akinyi (PW3) stated that she



did not witness the incidence. The principles to consider in determining the issue of crucial witnesses was dealt with in the leading case of *Bukenya & Others vs. Uganda* [1972] EA 549 where it was held:

“The prosecution must make available all witnesses necessary to establish the truth even if their evidence may be inconsistent. Where the evidence called is barely adequate, the court may infer that the evidence of uncalled witnesses would have tended to be adverse to the prosecution.”

As the Respondent failed to call the crucial witnesses such as eye witnesses and police officers who were present during the incident and also failed to present evidence as to what became of the other persons who were killed and whether suspects were arrested and charged. It is clear that the case was not properly investigated as it turned out that even the complainants in this case were suspected to have been involved in the killing of the other victims and that the irate members of public were acting in retaliation over the death of some of the villagers one of whom is Abdul.

25. From the foregoing observations, it is clear that the Appellants had presented credible alibi defences which could only be controverted or shaken by the Respondent by calling of witnesses who were present during the incident as well as the arresting/investigating officers. The totality of the evidence presented by the Respondent did not meet the threshold of proof since the Appellants’ defence had cast doubt upon the same. The Appellants therefore ought to have been given the benefit of doubt. In that regard, the finding on conviction by the learned trial magistrate was not safe and must be interfered with.
26. As regards sentence imposed by the trial court, it is noted that the same were not excessive. Further, the sentences ought not to have been ordered to run consecutively because the incident occurred the same day and in the same transaction.
27. In the result, it is my finding that the Appellants’ appeals have merit. The same are allowed. The conviction by the trial court is hereby quashed and the sentences set aside. The Appellants are ordered to be set at liberty forthwith unless otherwise lawfully held.

**DATED AND DELIVERED AT SIAYA THIS 4<sup>TH</sup> DAY OF JULY 2025.**

**D. KEMEI**

**JUDGE**

In the presence of:

M/s Maina for M/s Nungo.....for Appellants

M/s Kauma.....for Respondent

Okumu.....Court Assistant

