Nkoidillah & 5 others v Republic (Criminal Appeal E037 of 2023)
[2024] KEHC 3201 (KLR) (4 April 2024) (Judgment)

Neutral citation: [2024] KEHC 3201 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KILGORIS

CRIMINAL APPEAL E037 OF 2023

F GIKONYO, J

APRIL 4, 2024

BETWEEN

CHRISTIANO DICKSON NKOIDILLAH ..... 1ST APPELLANT

MOSES LETO ..... 2ND APPELLANT

JAMES OLEPIRIAS ..... 3RD APPELLANT

DAVID KIPON OLE PIRIAS ..... 4TH APPELLANT

JOHN SARUNI ..... 5TH APPELLANT

JOHNSTON SWAKEI LEKAKENY ..... 6TH APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the Judgement, and sentencing by Hon. Moranga (SPM) in Kilgoris SPMCR. No. 548 of 2020 on 22nd December 2023)

JUDGMENT

Numerous charges and question of identification

1. The appellants herein were charged with 8 counts.

2. Count 1: grievous harm contrary to section 234 of the penal code. The particulars of the offence are that on the 24th day of July 2020 at 0 300 hours at Mara Engai Lodge Kerinkani Sub-location in Transmara West Sub County within Narok County jointly with others not in court Unlawfully did grievous harm to Mr. Smith John.

3. In Counts II, III, and IV: assault causing actual bodily harm contrary to section 251 of the Penal Code. In the said counts the particulars were that on 24th July 2020 at 03 100 hours at Mara Enghai Lodge

Kerinkani sub-location in Transmara West Sub-County within Narok county jointly with others not before court and unlawfully assaulted namely Mr. Smith Junia, Richard Kirui, and William Papa Nukrumwa thereby occasioning them all bodily harm.

4. In count V, and VI: Burglary contrary to section 304(2) of the Penal Code. The particulars are that on the 24th day of July 2020 at 0300 hours at Mara Engai Lodge Kerinkani sub-location and Transmara West Sub County Narok County jointly with others not before court broke into a room belonging to Mr. John Smith and Junia Smith with interest to commit a felony.

5. In Counts VII and VIII. Malicious damage to property contrary to section 339(1) of the Penal Code. The particulars were that on 24 July 2020 at 0 300 hours at Mara Engai Lodge Karinkani sub-location in Transmara West Sub County within Narok County jointly with others not before court willfully and unlawfully destroyed two door shutters, valued at Kshs. 30,000/= the property of Mara Engai Lodge and damaged the mobile phone make iPhone 7 plus valued at Kshs 180,000/= the property of Mr. Junia Smith.

6. The appellants were convicted and sentenced to serve 4 years imprisonment for Count I, two years in prison for Counts II, III, and IV, two years imprisonment for Counts V and VI, and two years imprisonment for Counts VII and VII. The sentences were to run concurrently.

Grounds of appeal

7. The appellant being dissatisfied with the judgment and conviction of the trial court filed the appeal herein.

8. The appellant filed a petition of appeal on 22nd December 2023 setting out grounds for appeal as follows:

    i. That the learned trial magistrate erred in law and in fact well the same failed to take cognizance of the fact that the prosecution witnesses admitted that the acts alleged to have been undertaken by the appellants, forming the subject of the charges and particulars thereof, took place deep into the night when it was totally dark and thus not possible to see or identify the perpetrators of the acts forming subject to the offense and thus the evidence of identification or recognition was unsafe to be a basis of conviction and sentence of the appellants.

    ii. The learned trial Magistrate erred to have failed to appreciate that PW1 and PW2 were in deep sleep and the alleged attacks were sudden and owing to the small size of the room and the huge large number of assailants crammed that in small room the evidence of recognition and identification was thus unsafe and not free from pulse error or mistake.

    iii. The learned trial magistrate equally erred when the same believed that the light from the alleged Spotlights/torches purportedly held by the assailants was enough to light up the rooms whereas, ordinarily, no one committing an offense in such circumstances will be naive enough to light up the torch and shine their face to be identified and recognized in the circumstances and that account of lighting was thus unbelievable and unsafe to be a basis of conviction and sentence as no evidence of intensity and brightness or payment was given to obviate the same from any error.

    iv. The learned trial magistrate in not taking cognizance of the potential manipulation and coaching of witnesses by the prosecutor and Council watching brief in line with their conduct in the proceedings as is evidenced on record and the fact that it is admitted on record that the prosecutor was spotted at the complainant's premises whereas she spent a night and was there for two days which preferential treatment is never given to complainants and is not in

the ordinary and usual standard of practice by the office of the ODPP, and the court was thus required to for one itself and proceed with the caution on circumspection while collectively sitting and evaluating the evidence of witnesses by the prosecution.

v. The Learned trial magistrate erred when she allowed witnesses to read evidence from the written statement under the guise of refreshing memory in light of the fact that the studied statements were different from what was furnished to the defense and the inability of witnesses to comprehend what was written thus prejudicing the appellants.

vi. The learned trial magistrate erred when she failed to note that the practice of adapting witnesses' statements on several cases does not apply to criminal cases but as the standards of proof are different and the rules equally do not permit the adoption of pre-written statements more so in the circumstance of the case before her.

vii. That the learned magistrate erred when she arrived at the finding that each appellant did not sufficiently account for their whereabouts on the date and time of the incident, which finding for untrue and incongruence with evidence on record.

viii. The learned trial magistrate erred when she dismissed the evidence of alibi given, whereas the prosecution had applied and leave granted that they had room to investigate any evidence given by the appliance and call further evidence if need be, which window was late open to the prosecution.

ix. That the circumstantial evidence invoked by the court did not meet the requisite and opinions by law are to our definition of circumstantial evidence.

x. That the court had in dismissing in totality the defense advanced by the appellants and the submissions thereof while putting a high premium on the prosecution's case as fault-free and free from errors equating the same with gospel truth thereby leading to miscarriage of justice.

xi. The conviction and sentence of the opponents were thus erroneous and bereft of lawful basis.

xii. That they learned the trial magistrate erred in law and fact by failing to properly evaluate the evidence before her thus reaching an erroneous decision.

xiii. That the magistrate erred when she failed to appreciate that it was not proved that the appellants took part in the alleged act and that the prosecution failed to prove the charges against the appellants.

xiv. The court erred when it failed to appreciate that the photographs produced by the prosecution were of no probative value and shot of what is prescribed for electronic evidence under the *Evidence Act*.

xv. That in any event, the OB proves purportedly relied upon by the prosecution to purport to demonstrate motive was inadmissible as no copy was ever supplied to the appellants and its use was contrary to the criminal law and *the constitution*.

xvi. That the sentence passed against the appellants, that is, four years, in respect of count 1 of the charge for each appellant and two years each for the second, third, fourth, 5th, sixth, seventh, and 8 counts of the charge, running concurrently, against each appellant, were harsh and unjustified.

Directions of the court.

9. Upon express intimation by the parties, the appeal was canvassed by way of written submissions. All parties filed submissions.

The 1st appellant's submission.

10. The 1st appellant submitted that the circumstances obtaining in locus quo did not ever have the correct identification of the 1st appellant. It was submitted that the allegations were that, they led the number of attackers, and the spotlights/torches in the same circumstances of the attack which was an ambush from sleep; however bright will not enable a person to identify the other. The circumstances of the attack as given by the two main eyewitnesses in this case were stressful and could not therefore permit a correct identification. The 1st appellant relied on the cases of Stephen Mbondola Fanuel Juma and Ali Ouma Vs Republic [2000] eKLR, R Vs Turnbull [1976] 3 All ER 546, Abdullah Bin Wendo Vs Rex 20 EACA 166, Maitanyi Vs Republic [1986] 2KAR 75.

11. The 1st appellant submitted that there was no evidence placed by the prosecution on record to displace the alibi defense raised by the 1st appellant. The 1st appellant relied on the case of Victor Mwendwa Mulinge versus R [2014] eKLR

12. The 1st appellant submitted that the 1st appellant was not among the persons whose names were mentioned to have approached the complainant seeking forgiveness as was alleged by the prosecution in their submissions filed in court on 18/07/2023.

13. The 1st appellant urged this court to grant the orders sought in the petition.

The 2nd, 3rd, 4th, 5th, and 6th appellant's submissions.

14. The 2nd, 3rd, 4th, 5th, and 6th appellants submitted that the role of the first appellate court is to reevaluate the evidence by way of retrial and arrive at its own determination. They relied on the cases of China Zhongxing Construction Company Ltd V Ann Akuru Sophia [2020] eKLR, and Jackson Kaio Kivuva V Penina Wanjiru Muchene [2019] eKLR.

15. The 2nd, 3rd, 4th, 5th, and 6th appellants submitted that the court failed to exercise any caution as required of her in the face of the difficult condition under which the offences were committed which hampered any alleged identification or recognition. No inquiry was done by the court to assure itself that lighting was reliable succinct and error-free. They relied on the cases of Pius Isaya Manjero & Another Vs Republic [2010] eKLR, Rogers Amuke Ochebo &3 Others Vs Republic [2019] eKLR, Wycliffe Omondi Orondo Vs Republic [2008] eKLR, Ndungu V Republic [2004] eKLR, Cleophas Otieno Wamunga V Republic [1989] eKLR, Joseph Waweru Muriithi Vs Republic [2014] eKLR, Paul Njoroge Ndungu V Republic [2021] eKLR, Republic Versus Brian Kipsang Kapkomu [2020]eKLR, Paul Etole & Another Vs Republic CRI. Appeal No. 24 of 2000, and Jared Ochieng Ogema & Another Versus Republic [2017] eKLR.

16. The 2nd, 3rd, 4th, 5th, and 6th appellants submitted that the court failed to address its mind to the credibility of the fact that the prosecution's case was converted into a note-taking event and thus the evidence given cannot be said without contradiction to be that of the witnesses and not choreographed written testimony to drive the particular narrative to fix the appellants.

17. The 2nd, 3rd, 4th, 5th, and 6th appellants submitted that, it is not a must that the accused persons must give the details of the place where they were and persons with whom they were with in advance for the

defense of alibi to be considered by the court. They relied on the case of Eric Otieno Meda v Republic [2019] eKLR.

18. The 2nd, 3rd, 4th, 5th, and 6th appellants submitted that, in light of the inadmissible photographs, the charges in respect of burglary and malicious damage to property collapsed.

19. The conviction and sentence were not safe.

20. The sentence in the circumstances was harsh.

The respondent's submission

21. The respondents submitted that the prosecution proved eight charges beyond reasonable doubt.

22. The respondent submitted that the offences of malicious damage, burglary, and grievous harm were proved. the respondent relied on photographs of PW2's broken door (P Exh 9), a photo of the vandalized room (P Exh 10), a broken iPhone (P Exh 11), maasai rungu (P Exh 7), and two wooden sticks (P Exh 8a and 8b).

23. Respondents submitted that the trial court rightly found on the circumstances of identification after warning herself of the dangers of a single eyewitness and a careful and well-reasoned analysis of the circumstances of the identification. The respondent relied on the cases of Hamisi Mungle Burehe V Republic [2015] eKLR, Ayub Kariuki Wamae & 5 Others V Republic [2001] eKLR, and Cypriano Murori Vs Republic [2002] eKLR.

24. The respondent submitted that there was nothing to show that the prosecutor coached any witnesses on any of the stated dates.

25. They also submitted that, it is common practice for the prosecution to work together with investigative agencies. And, the presence of the prosecutor on the field could be for many constructive and legal reasons. The respondent relied on the cases of Job Otieno Otindo Vs Republic [2018] eKLR, Dennis Edmond Apaa &2 Others Vs Ethics and Anti-Corruption Commission & Another [2012] eKLR.

26. The respondent submitted that the prosecution witnesses provided corroborating evidence that enabled the prosecution witnesses to meet the requirements of the *Evidence Act*. The respondent relied on section 124 of the *Evidence Act*.

27. The respondent submitted that, witness reading the statements while testifying is not entirely alien to the criminal trial. The witnesses need to refresh their memories as they were testifying more than two years after the alleged incident. They were referring to their own written statements which were served on the appellant and the appellants had the opportunity to cross-examine the witnesses extensively on their testimonies in chief. Furthermore, even if the testimonies of the select prosecution witnesses were disregarded, the residual evidence would still be overwhelmingly sufficient to support a safe conviction on all comments of offenses charged the response relied on the case of Dominic Sibi Peter Versus Republic [2014] eKLR.

28. The respondent submitted that the defense of Alibi was not raised at the earliest possible opportunity. All alibi evidence was first raised during the defense hearing. The respondent relied on the case of Republic Versus Sukha Singh S/O Wazir Singh & Others [1939] EACA 145, Erick Otieno Meda V Republic [2019] eKLR.

29. The respondent submitted that the trial court made no error in imposing the sentence and urged this court to dismiss the appeal in its entirety. The respondent relied on the case of MMI Vs. Republic [2022] eKLR.

Analysis and Determination.

30. This being first appeal; this court will re-evaluate the evidence afresh and arrive at its own independent conclusions. Except, being minded to give allowance to the fact that the court neither saw nor heard the witnesses firsthand (Njoroge v Republic (1987) KLR, 19 & Okeno v Republic (1972) E.A, 32.)

Issues

31. From the numerous grounds of appeal, the evidence adduced in the lower court, and the respective parties' submissions, the broad issues for determination are;

    Whether the prosecution proved its case beyond reasonable doubt.

    i. Whether the sentence was manifestly harsh and excessive.

Whether the prosecution proved its case beyond reasonable doubt.

32. Several counts were preferred. The question is whether the charges were proved beyond reasonable doubt. And, central to this broad issue is the question of identification, recognition- including recognition by voice and circumstantial evidence as the basis for conviction of the appellants. It is therefore, important to set out the law on these subjects under contestation.

Of identification or recognition (including voice) at night

33. In determining identification or recognition of a perpetrator at night, it is the duty of the court to test the reliability of the said evidence through an inquiry into or evaluation of the relevant circumstances attending the identification (Kenneth Josphat Bamu v Republic [2013] eKLR).

34. See also the case of John Muriithi Nyagah V Republic [2014] eKLR, where the Court of Appeal held that:

> " In testing the reliability of the evidence of identification at night, it is essential to make an inquiry of the relevant circumstances such as the nature of the light, the strength of the light, its size, its position relative to the suspects etc."

35. The kind of inquiry required of the circumstances of identification at night is not a superficial or generalized one, but quite intense into the specific elements constituting identification so as to establish that the identification was free from mistaken identity, error or any form of delusion or illusion.

36. There is no dearth of judicial authorities on this subject; which this court wishes not to multiply. Except, is content to cite R –vs- Turnbull & Others (1973) 3 ALL ER 549, which is generally accepted in our jurisprudence as an expression of the kind of inquiry intended for purposes of identification in difficult circumstances such as at night, where it was stated that:

> ... The Judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have with the Accused under observation? At what distance? In what light? Was the observation impeded in any way....? 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 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?

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

37. Even of recognition of a person known to or familiar to the witness, whereas: -

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

38. Voice recognition is basically identification by recognition of the voice. See the case of Karani v Republic [1985] KLR 290. This was held at page 293 that:

> 'Identification by voice nearly always amounts to identification by recognition. Yet here as in any other cases has to be taken to ensure that the voice was that of the appellant, that the complainant was familiar with the voice and that he recognized it and that there were conditions in existence favouring safe identification'.

39. The inquiry and evaluation of the evidence on identification or recognition, is 'so as to rule out a possibility of a mistaken identity' (Kenneth Josphat Bamu v Republic, supra).

Circumstantial evidence

40. Of circumstantial evidence as a basis for conviction, was stated in R vs. Kipkering arap Koskei and another (1949) 16 EACA 135:

> " That in order to justify, on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt, and the burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any reasonable hypothesis of innocence is always on the prosecutions and never shifts to the accused."

41. These principles were refined further in the case of Simon Musoke v. R [1958] EA 715 where the Court of Appeal at Kampala referred to the case of Teper v. R(2) [1952] A. C. 480 where the Privy Council held:

> " It is also necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference."

42. The evidence adduced in support of the various charges herein shall be evaluated within the framework of the law stated above.

Of Grievous harm.

43. The appellants were charged with the offence of grievous harm contrary to Section 234 of the Penal Code. Section 234 provides that: -

> "Any person who unlawfully does grievous harm to another is guilty of a felony and is liable to imprisonment for life."

44. The appellants were charged with causing grievous harm to Mr. John Smith.

45. PW2- John Smith testified that he was an executive officer at Mara Engai Lodge. He had hired some of the appellants to fence the land in 2009. He knew the 1st, 2nd, 3rd, 4th, 5th and 6th appellants. On 24/07/2020, the 5th appellant was at work and the 4th appellant was on unpaid leave. The 3rd and 1st appellants were not working with them at the time. The 5th, 4th, 2nd and 3rd appellants are brothers. The father of the said appellants is their landlord. On 24/07/2020 at around 4-5 a.m. He was asleep in his room. He heard a big bang on his door. He woke up. He saw three gentlemen approach his bed. They hit him on his leg and ran back outside. They hit him with sticks and rungus. There was no light in his room. The door brought him some light. He saw three people but he could not identify them. He pushed the door to shut it but the attackers pushed and overpowered him. He screamed for help. He had a group of people saying 'utakufa leo, utakufa leo'. The people who were about 15 in number gained access and came with bright torch lights. He could not switch on the power. He saw the 4th appellant who was right next to him. The torches were about 9. The 5th appellant was ahead of him. A tall person told the rest of the attackers a word in Maasai and they started hitting him. The 1st appellant was the tallest. He noticed the 6th and 3rd appellants as they were ahead of him and were hitting him. They were hitting him using sticks and rungus with a piece of iron. He called out for the 4th and 5th appellants to spare his life. He got two heavy blows and fell. They continued hitting him until he passed out. When he regained consciousness, he heard a commotion in Junia's room. He was later taken to Lolgorian Hospital for first aid and airlifted to Nairobi. He was injured on the area on top of his head. It was stitched. They stabbed him in his arm. The blows were all over his body, legs, chest, and abdomen. He produced treatment notes/ medical reports on the injuries by Dr. J.D. Patel dated 26/07/2020 (PMFI 2), P3 form dated 31/08/2020(PMFI 3), photographs of him (PMFI-4 (a), (b), 5, 6(a),(b). He testified that 4 months prior to the incident the 6th appellant had gone with some young Maasai requesting for a bull to slaughter for the initiation ceremony. He gave them Kshs. 20,000/ in the presence of the area chief.

46. The appellants had many torch lights over the room. He did not have to see their faces as he knew them by voice even if they turned their backs. The four brothers had claimed he had more preference for landlord 68 and that gave them the reason to kill him. Their father's land who is PW2 landlord was no. 67. He produced a wooden maasai rungu (PMFI 7), 2 wooden sticks (PMFI 8 (a) and (b))

47. On cross-examination, he stated that the lighting system was de-energized. There was no power or light. He knew the people because he had stayed with them for over 11 years.

48. On re-examination he stated that he was able to identify the attackers. They had torch lights and could easily identify them with the help of the lights.

49. PW9- IP Leyrice Ligaka Mukutur a crime scene investigator. He produced the photographs; photographs of John Smith's blood-covered face (P Exh 4(a) and (b)), a photo of John (P Exh 5)), a certificate of photographic print or enlargement of 02/03/2022(P Exh 15), a letter of request from the DCI Transmara West for certification of the photograph (P Exh 16).

50. On cross-examination, he stated that he did not take the photographs. He did not know who took the photographs. The equipment used to photograph was not forwarded to him.

51. On re-examination, he was not at the scene.

52. PW13-Dr. Kamau Meriga police surgeon. He testified that he examined John Smith. He had been assaulted. He had a mild head injury with healed scars on the frontal parietal temporal scalp. He had multiple hematomas on the right anterior part of the chest and abdomen. On the right buttock and right thigh. He had saturated wounds on the upper limbs. The injuries were burnt traumatic injuries.

The patient had been seen and treated at Nairobi Hospital. The injuries were classified as harm. On 31/08/2020. Dr. Kamau filled the P3 form. He produced the P3 form of John Smith as P Exh 13.

53. On cross-examination, he stated that Dr. Kamau is deceased.

54. PW16-Dr. J.D. Patel. He examined John Smith who was bleeding and in a serious state. He was disoriented and confused. He had multiple lacerated wounds on the head, left shoulder, and left firearm.

55. Multiple bruises on the left upper arm which was swollen with a large hematoma. He could not lift his left shoulder. multiple large wounds on the right side of the face with bruises and a slight tear on the right upper eyelid on the right side of the face. Bruises on the right side of the abdomen about the umbilicus. Multiple bruises on the intrascapules region on both knee joints, multiple bruises, and the right ankle joint. He made a clinical diagnosis of several concussions, head injuries, and multiple injuries to the body. He produced the report as P Exh 2.

56. The complainant testified that he was assaulted. The medical evidence by PW 13 and 16 and the photographs produced by PW9 corroborate the complainant's evidence that he was assaulted. The result of the assault as per medical evidence was grievous bodily harm occasioned to the complainant.

57. Nevertheless, the assault causing grievous bodily harm upon John Smith, the complainant herein, must, however, be proved to have been committed by the appellants.

58. From the evidence, the unlawful act occurred at night, making an inquiry for purposes of testing the reliability of the evidence of identification at night, absolutely necessary in this case.

59. The identification of the attackers and /or the appellants by the complainant should be handled within the law stated above.

60. For purposes of identification, it bears repeating the evidence and the kind of identification of the appellants by John Smith, who testified as PW2. He stated that he had hired some of the appellants to fence the land in 2009. He knew the 1st, 2nd, 3rd, 4th, 5th and 6th appellants. On 24/07/2020, the 5th appellant was at work and the 4th appellant was on unpaid leave. The 3rd and 1st appellants were not working with them at the time. The 5th, 4th, 2nd and 3rd appellants are brothers. The father of the said appellants is their landlord.

61. His evidence was that, on 24/07/2020 at around 4-5 a.m. He was asleep in his room. He heard a big bang on his door. He woke up. He saw three gentlemen approach his bed. They hit him on his leg and ran back outside. They hit him with sticks and rungus. There was no light in his room. The door brought him some light. He saw three people but he could not identify them. He pushed the door to shut it but the attackers pushed and overpowered him. He screamed for help. He heard a group of people saying 'utakufa leo, utakufa leo'. The people who were about 15 in number gained access and came with bright torch lights. He could not switch on the power. He saw the 4th appellant who was right next to him. The torches were about 9. The 5th appellant was ahead of him. A tall person told the rest of the attackers a word in Maasai and they started hitting him. The 1st appellant was the tallest. He noticed the 6th and 3rd appellants as they were ahead of him and were hitting him. They were hitting him using sticks and rungus with a piece of iron. He called out for the 4th and 5th appellants to spare his life. He got two heavy blows and fell. They continued hitting him until he passed out. When he regained consciousness, he heard a commotion in Junia's room. He was later taken to Lolgorian Hospital for first aid and airlifted to Nairobi. He was injured on the area on top of his head.

62. He testified that 4 months prior to the incident the 6th appellant had gone with some young Maasai requesting for a bull to slaughter for the initiation ceremony. He gave them Kshs. 20,000/ in the presence of the area chief.

63. This was identification by recognition. However, it does not lessen the intensity of the inquiry into the circumstances of the identification as it was at night and dark, and involved a group of people which PW2 and PW3 estimated to be about 40 people. The rationale for this approach is explained in the Turbull case (supra) that, whereas:

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

64. According to him, the appellants had many bright torch lights in the room. He stated that he did not have to see their faces as he knew them by voice even if they turned their backs. He was convinced that, because the four brothers had claimed he had shown more preference for landlord 68, they had a reason to kill him. Their father's land who is PW2 landlord was no. 67.

65. On cross-examination, he stated that the lighting system was de-energized. There was no power or light. He claimed he knew the people because he had stayed with them for over 11 years.

66. On re-examination he stated that he was able to identify the attackers. They had torch lights which could easily identify them with the help of the lights.

67. The evidence by PW2 was that he saw three gentlemen approach his bed, and hit him on his leg and ran back outside. He was categorical that there was no light in his room. He alluded that the door brought him some light. This was no explained; source, nature, intensity of the light in relation to the persons who assaulted him.

68. Although in re-examination he stated that he was able to identify the attackers with the help of the lights, he did not describe the position of the bright torchlight in relation to the appellants or any of them that he claims to have identified. This is important and has been picked up in most judicial decisions on this subject, because, he did not claim that the bright torchlights were illuminated upon the face of the appellants at one time or other, and for how long as to be able to identify the appellants. From the evidence and the manner in which the incident is described to have happened, there is every possibility that the bright torchlights were directly illuminated upon him or to his direction making the lights dazzling lights, especially so as to blind the eyes temporarily and the victim does not see the attacker. See also the evidence by PW4 that, the crowd of about 20 people beamed torchlights onto his eyes. He shielded his face to avoid the glare. And, he could not see or identify any of them. Such succinct details are relevant to know whether it was possible to see the attackers in the circumstances of this case. Merely stating that the 3rd, 4th, 5th and 6th appellant were ahead of him, PW2 did not describe the position or direction of the bright torch light in relation to the appellants or how he was able to see them. Similarly, stating that he called out the 4th and 5th appellants by their names to save his life does not improve the lapse or fill the omission.

69. Notably, he initially stated that he saw the three people but he could not identify them.

70. Later, PW2 stated that he did not have to see their faces as he knew them by voice even if they turned their backs. Recognition or identification by voice also requires foundation to be set on the voice identification, say, the voice was of the particular appellants, he was familiar with th.e voice, the words uttered by or any conversation with the appellants specifically through which recognition by voice is premised etc. none of these were distinctly supplied in the evidence by PW2.

71. It is a standard practice that: -

> If the complainants were sure they had recognized the appellant as one of the perpetrators, they ought to have recorded a detailed description of the appellant to the police. We do not see why this was difficult if indeed they had recognized him. Even the Investigating Officer does not seem to have received a proper description of the appellant because this is what he said in his evidence;-
>
> > 'In the process they identified the voice of one of the robbers whom they named as Bamo' (Kenneth Josphat Bamu v Republic, supra).

72. Other than giving the names of the appellants to the IO and claiming that he knew the four for 11 years, the evidence by PW2 as well as the Investigation Officers does not record any detailed description of the appellants which enabled the witness to recognize them.

73. The threshold for recognition by voice is not satisfied by the claim by PW2 that, a tall person told the rest of the attackers a word in Maasai and they started hitting him.

74. The threshold for recognition by voice is not also satisfied by the generalized claim by PW2 that, 'I could hear a big crowd and noises of people saying 'utakufa leo, utakufa leo'. According to him, the said group of people was of about 15 in number. And, there was no attribution of these noises to any particular appellant. The evidence by PW2 does not meet the threshold for recognition by voice of any of the appellants.

75. Proper identification of the assailant was necessary, especially to anchor his apprehension that, the four brothers had a reason to kill him since they had claimed that he had shown extreme preference for landlord 68 over their father- No 67- and who was PW2's landlord. So as to avoid this belief to be said to work an illusion, PW2 ought to have provided proper identification of the appellants as to leave no doubt that they are the ones who attacked him. The trial court drew to much premium on these previous incidents without seeking to establish any direct connexon with the current incident.

76. But was there any other or independent evidence on identification?

Other or independent evidence on identification

77. Was there any independent evidence which identified one or more or all the appellants as the person or persons who attacked the complainants herein or destroyed their properties?

78. PW5-Tamuni Dickson Kiswara testified that he was a security guard at Mara Enkai. He knew most of the appellants. The 1st and 6 appellants are his cousins. He reported to work at 6 p.m. on 23/7/2020 and left early on 24/7/2020. He was on patrol with Saningo. He met someone whom he beamed torch. He identified him as the 4th accused. The 4th appellant ran towards where their bosses lived.

79. On cross-examination, he stated that he heard a sound like a sufuria falling in the kitchen and the lights at the staff quarters went off immediately. He had a torch.

80. On re-examination, he stated that he was afraid of using his torch as he could have been stoned.

81. The witness claimed to have identified David upon whom he beamed a torch and turned suddenly and took off and ran away. His evidence was that he and his colleague, Saningo were under attack as stones were being hurled at them. He did not state categorically that he beamed the torch on the face of David or that he had enough time to recognize him or how he recognized it was David. It is clear they were under attack and it appears from his evidence things happened quite fast. Identification or recognition

in such difficult circumstances require detailed and specific outline of the manner the person identified the perpetrator. The witness ought to be quite specific rather than general in order to eliminate any possibility of mistake, or error, or mistaken identity or delusion or illusion.

82. He also stated that he called Punda, the driver to beam vehicle lights to the crowd so that he could se them better. He did not categorically state that the driver beamed the vehicle lights to the crowd. He stated in his examination in chief that the driver told him that beaming the vehicle lights was risking given the situation.

83. The second time he said that he saw two people. But, stated that he noted it was David. Did see David as two people or he saw David with another? He did not clarify this or even attempt to describe or name the other person.

84. Merely stating that David went towards where their bosses lived does not exactly place him at the scene of the crime.

85. His evidence lacked clarity or specific or indomitable element of identification of the 4th appellant or any other appellant in relation to the offences before the court.

86. PW6- Benson Tunai, was the human resource Manager at Mara Lodge. On 24th July 20 20 at 4A M he was at home. He was called by one of the security guards Saningo Imbrika. He was informed that the hotel was under attack and they needed help. He took his torch and a rungu and called Marwa of the Kerinkan police post. He knew the 1st appellant. He did not meet him.

87. In 2018, posters were all over demanding that John and Junia Smith leave in 2 days but there was no attack.

88. On cross-examination, he stated that Dickson and Saningo were on duty.

89. Again, his evidence does not identify the appellants or any one of them as the perpetrator of the offences before the court.

90. PW7- Joshua Mbirika Letoo. On 24/07/2020 He was asleep. James Ngatunyi and William Lepone Nkurume went to his door he had nurses from the residence of John and Junia. He left .one person who beamed a torch on him from behind. Two people were ahead of him. A torch was beamed on Joshua Ngelabos. He did not identify the one who beamed the torch. There was no electricity. He heard noises but he could not identify any. He did not identify any of the appellants.

91. On cross-examination, he stated that he was asleep and was woken up thinking elephants had invaded the shamba.

92. His evidence does not corroborate identification of the appellants as the perpetrators of the offence.

93. PW8-CPL Joseph Sitienei attached to Morgor patrol base Lolgorian police station. They received a call from the lodge that they had been attacked. A vehicle from the lodge went for them. The lodge was very dark, there was no electricity. They were led to the room of the victim. John Smith's door was broken and there were stones in the corridor. They fired several times in the air and they were no response. Mara Conservancy security personnel came with sniffer dogs. The dogs led to the home of some suspects the 4 suspects were Ben Shekere, the 6th appellant, Leonard, and Josphat.

94. On cross-examination, he stated that a number of the appellants were arrested at the scene. He was referring to the statement because he could not recall the names without reference.

95. PW10-Daniel letoo. Driver at Mara Engai Lodge. Most of the appellants are his relatives. On 24/07/2020, he was at home asleep when he heard screams around 4-5 a.m. He produced his statement

as P Exh 17. PW10 read a statement that from the way the attack was orchestrated was an inside job. He suspected his brothers. The 4th appellant went to the lodge to spy. The rest were not concerned. James Lekakeny said that he was at the scene and prevented the rest from killing John Smith. They had two meetings and the aim was to chase foreigners for they were not giving them jobs.

96. The evidence of PW10 was founded on suspicion. It was also evidence by accomplice. This court is aware that, 'An accomplice shall be a competent witness against an accused person; and a conviction shall not be illegal merely because it proceeds upon the uncorroborated evidence of an accomplice' (s.141 of the *Evidence Act*). However, courts exercise caution when considering accomplice evidence, especially because of 'justice concerns' to lessen the danger of convicting an innocent person on account of evidence by a person who may be on a mission for 'self-preservation' by testifying for the prosecution. His evidence should be seen within the entire evidence adduced to see whether there is material, relevant and cogent evidence supporting the accomplice evidence in material respect. His claim that he suspected his brothers or that there was a meeting where the attack was planned, remained mere allegations and were not supported by evidence of identification or recognition or circumstantially situating the appellants in the scene of crime offered by witnesses herein.

97. PW12- Dickson Malicheo Ketuiywo. He knows most of the appellants. On 24/07/2020, he was at work at Mara Engai as a security guard. He was asleep. He was not on duty. Saningo called him at 12:30 a.m. He went out. There was no electricity. He heard shouts at the main lodge. Before he could comprehend anything, he was beaten with rungus, and he could not identify any of the voices.

98. On cross-examination, he had no prior knowledge of the attack. David Letoo was not at the camp that day of the attack.

99. PW14-David Kipyegon. An employee of the Mara Conservancy team and rangers. He is a dog handler. He produced a certificate dated 26/06/2009 on trailing dog handling (P Exh 17(a)), a basic k9 tactical deployment course dated 05/04/2011 (P Exh 17b), basic training on dog handling dated 05/04/2011(p exh17c), certificate of tracker dog puppy training (P Exh 17(D)), he was stationed at mara serena during the incident. On 24/07/2020 at around 4 a.m., they received a call that Mara Engai had been attacked. They went with 6 dog handlers and police officers. The dog led them to the home of the 10th accused. They found him having tea. It led them to the home of 5th accused. A man ran away. They found 7,8, and 9 accused in the home.

100. On cross-examination, he did not know the accused before that day. They only used one dog that day.

101. The evidence by the dog handler was crucial. This court also appreciates the role of sniffer or trailing dogs in trailing the scent of a perpetrator. However, in the circumstances of this case, the evidence by the dog handler required specific corroboration and real substantiation on whether the person or persons found in the compound is the one who left the trail of the scent that the dog followed. In the instances where arrest was made pursuant to the lead by the dog, there were more than one person and homestead, which made it absolutely necessary to seek a pointed substantiation or corroboration of the evidence by the dog handler. This evidence could have been augmented greatly by evidence of PW17 as well as evidence on identification or recognition by the other witnesses. The latter is lacking. What about PW17?

102. PW17- Cpl Stanley Korir, DCI Transmara West Sub County was one of the investigating officers. On 25/07/2020, they went to Angata police station over a case that had been reported at the station. They found 7 suspects had already been arrested. From his findings, there were differences between the accused and John Smith. In 2017, they had been threatened, OB 6/28/4/2017 was a report of the same by John Smith. He had been threatened by landlord Othila Ole Pirias. He produced a wooden Maasai Rungu (P Exh7 (a) wooden sticks(P Exh 8(a), 8 9b) broken iPhone black in colour (P Exh

11), a large stone covered with a green sack(P Exh18), OB No. 28/04/2017(P Exh 19), photographs (P Exh 56 (a), (b) and (c).

103. However, on cross-examination, he stated that he did not dust the exhibits for fingerprints, hence he could not tell who had used the sticks and rungus. This omission is the straw that broke the camel's back. Finger prints are specially-capable of identifying a person with laser precision. This court wonders why the IO found it unnecessary to dust the items recovered at the scene of crime for finger printing. The prosecution missed the power and punch this kind of evidence ordinarily offers, especially given the difficult circumstances of the commission of the crime; at night and involved large group of people.

104. PW15-CIP Patrick Gichunge Arimi OCS at Angata Barogoi police station. He took over the scene from CPL Joseph Sitienei. He produced photographs of broken sticks, rungu, and a bank as P Exh 6 c, b. he produced the OB as P Exh19. They managed to arrest 5 suspects.

105. The evidence adduced, does not depict a proper or positive identification of the appellants as the attackers of PW2. It leaves reasonable doubt in the mind of the court as to the guilt of the appellants on count 1. And, such doubt is in law resolved in favour of the accused.

106. Thus, whereas PW2 suffered grievous bodily harm in the hands of demented persons, the prosecution did not prove beyond reasonable doubt that the appellants attacked and injured him.

Assault causing actual bodily harm.

107. The appellants were also charged with counts II, III, a.nd IV on an assault causing actual bodily harm to Mr. Smith Junia, Richard Kirui Bii, and William Paapa Nkurumwa.

Of William Papa Nkurumwa

108. PW1- William Papa Nkurumwa. He was a waiter at Mara Engai Lodge. On 24/07/2020 he was in his house at his place of work. At 3 a.m. he heard people screaming. He heard the security officer asking for help. It was dark. He went out and a panga was thrown at him. He went to the other side where he saw Richard Kibii Kirui being attacked. He was also hit on the hands and the ribs. The attackers were about 20 people. He was issued with a P3 form (PMFI 7). He was not able to identify any of the attackers.

109. On cross-examination, he stated that it was dark and at night. He was not able to see or identify anybody. He attempted to use his phone light but was unsuccessful.

110. PW11-Gideon Kibichu Rono. A clinical officer at lolgorian sub-county hospital. He examined and filled the P3 form of William Nkurumwa. He had injuries to the chest, and abdomen and, a tender swollen left hand. The degree of injury was harm. He produced the p3 form dated 28/7/2020(P Exh 1).

111. On cross-examination, he stated that William Nkurumwa knew his attackers but he however did not give names.

112. The complainant testified that he was assaulted. The medical evidence by PW 11 corroborates the complainant's evidence that he was assaulted. The result of the assault as per medical evidence was bodily harm occasioned to the complainant.

113. Nevertheless, the unlawful act occurred at night. Again, identification of the attackers and /or the appellants by the complainant ought to have been considered within the framework of the law stated above. William Nkurumwa did not identify his attackers. There is also no other independent evidence to prove that the appellants attacked and injured him. He was categorical that he was not able to identify his attackers. This court finds that identification was not proved beyond reasonable doubt.

Of Junia Smith

114. PW3-Junia Smith. He is the operations manager at Mara Engai Lodge. He knew the 5th, 4th,1st,2nd, and 3rdappellants. The hotel closed due to covid and most of their customers were international. They retained the security staff and key staff like cleaners, chefs, and cooks. They had about 20 staff. The lodge was fenced but after the attack, they added an electric fence. Anyone could access it. On 24/07/2020 at 4-5 a.m., he had gone to bed. There was a big bang on his door with sticks. He heard the 5th appellant's voice. He panicked and went out of his door. The people were chanting Maasai war chants. when he opened the door he was hit with some sticks all over his hands. He heard the 4th appellant's name. He peeped outside and saw several spotlights and heard a lot of noise. It was dark outside. At his bedroom window the 2nd, 6th, and 5th appellants had a rungu outside his door. They all had sticks waving and jumping. They were flashing lights from a little distance. When the light flashed he realized it was people he knew. He estimated that there were about 40 people. A heavy item was used to push his door. After a while, they burst the hinges and lock. There were screams of 'maa ha' when the door gave way he fell outside with the door. He was hit by different sticks and rungus. He tried to run, but he slipped and fell on his stomach. He was hit left, right and center of his hand, thighs, left arm was more bruised. He had injuries on both legs. He had a deep cut on his elbow. A lot of people were beating him. He did not recognize any. While on the ground they stopped after they thought he was dead. He produced a photograph of a broken door and pulled-out hinges (PMFI 9) and a vandalized room (PMFI 10).

115. He was in a lot of pain. He could hardly walk. He was trembling and his head was bleeding. A driver called Punda was there and James Miguni and Joshua took them to the rooms. He recovered his phone but it had been smashed. His phone was an iPhone 7. Its approximate value is 3,400 pounds- Kshs. 60,000/= (PMFI 11).

116. They were taken to Lolgorian Hospital for first aid. PW2 was later airlifted to Nairobi. He was placed on painkillers and his head was dressed. He had a big hole in his left forearm. He was put in a sling. He stayed in hospital for 10 days. He produced his medical report by Dr. Patel (PMFI 12) and a P3 form dated 31/08/2020(PMFI 13).

117. He did not know who beat him as the beating happened so fast. He identified 4 people with torch lights flashing. In 2016 he recorded an OB on the threat by the landlord for redundancy.

118. On cross-examination, he stated that he was deep asleep before the event. PMFI 9 and 10 did not show a window in his room. He heard the 4th appellant's name. He did not know it was him until he saw him outside his window. He recorded his first statement in Nairobi in August and later at the lodge on 26/03/2022. He denied having been couched on the evidence. There were no visitors at the lodge as it was Covid time.

119. PW13-Dr. Kamau Meriga police surgeon. He testified that he examined Junia Smith. It was a case of assault. He had suffered an injury to the head. He had a healed scar which was visible on the head. Healed bruises on the back and buttocks, back of left arm and wrists. The leg had a scar. The probable weapon used was a blunt. He had been attended to at Nairobi Hospital. The doctor classified the injuries as harm. Dr. Kamau examined him on 31/08/2020. He produced the P3 form for Junia Smith as P Exh 13.

120. On cross-examination, he stated that Dr. Kamau is deceased.

121. PW16-Dr. J.D. Patel. He examined Junia Smith. He had sustained a cerebral concussion multiple lacerated wounds on the left hand, large bruises, on the frontal area of the head with multiple minor

abrasions; on the right thigh and right knee. On the lumbosacral area, multiple bruises on the right ankle. On the left buttock, on the face near the left cheekbone. He was stitched and provided with an arm sling on his left shoulder. He produced the report as P Exh 12.

122. The complainant testified that he was assaulted. The medical evidence by PW 13 and 16 and the photographs produced by PW9 corroborate the complainant's evidence that he was assaulted. The result of the assault as per medical evidence was bodily harm occasioned to the complainant.

123. However, the unlawful act occurred at night. The ghost of identification at night still stalks the path of this charge. Identification of the attackers and /or the appellants by the complainant should be done within the framework of the law established in the previous paragraphs of this judgment.

124. At one point the witness stated that he did not know and could not identify his attackers as they were too many and the beatings were unleashed upon him in quick rapid and uncountable succession by a big number of people. At another time, he stated that, when the light flashed he realized it was people he knew. He estimated that there were about 40 people.

125. Yet, at another time, he stated that, he identified 4 people when torch lights were flashed, whom he also connected to the 2016 report he made and recorded in the OB on the threat by the landlord for redundancy. These appears to be the four brothers John Smith, PW2, said had a motive to kill him. To avoid this allegation from being seen as working an illusion, the prosecution needed to adduce such tight evidence on identification of the appellants or of robust circumstantial situating to eliminate any doubt as to the guilt of the appellants.

126. Junia Smith also stated that he heard the name of the 4th appellant, and confirmed it was him when the spotlights were flashed. This is irreconcilable with what he said that, there were about 40 people who were singing maasai war songs, and that. there was a lot of noise outside at the time in the establishment. These statements were also at a very high level of generalization and devoid of any succinct detail or explanation as to the nature, intensity of the light and the position of the light in relation to the 4th appellant. It was not also stated whether the spotlight was splashed on his face and for how long so as to enable the court determine whether it was sufficient for identification.

127. The trial court did not carefully carry out the inquiry required in such circumstance before founding a conviction in this count.

128. The charge in this count was not proved beyond reasonable doubt.

Of Richard Kirui Bii

129. PW4-Richard Kirui Bii. He was a security guard at Mara Engai Lodge. On 24/07/2020 he was off duty. At 3.02 a.m. he heard screams. He heard his fellow security guard (Saningu) pass by. He followed him. There was no light. They went to a certain corner and stones were hurled at them. He could not see the people who were hurling stones. He saw a crowd of about 20 people. They beamed torches at his face. His hand was hit with a wooden stick. He could not identify any person. He was treated at Kerikany. He produced a P3 form dated 28/07/2020(PMFI 14). He knew the 5th and 4th appellants. Saningo and Dickson Baringo were on night duty.

130. On cross-examination, he stated that the trial court noted that PW4 appeared frightened and reluctant to answer. The advocate had to assure him of not ill intent. He stated that he was not a security at the site. He did not see whether Saningo had a torch or not. He did not see who hit his left hand.

131. The complainant testified that he was assaulted. The medical evidence corroborates the complainant's evidence that he was assaulted. The result of the assault as per medical evidence was bodily harm occasioned to the complainant.

132. The unlawful act occurred at night. As it is relevant, it bears repeating that, identification at night lingers on and has no intention of leaving the backyard of this case.

133. The framework for testing the reliability of evidence of identification at night has been stated. Were the appellants identified as the attackers of the complainant?

134. The complainant stated that he did not see the people who were hurling stones at or injured him. His demeanor as recorded betrayed his credibility. Nevertheless, there was no evidence that the appellants or any one of them attacked or injured him. This court finds that the charge was not proved against the appellants beyond reasonable doubt.

Burglary

135. The appellants were charged with breaking into a room belonging to Mr. John Smith and Junia Smith with intent to commit a felony.

136. PW2 testified that he pushed the door to shut it but the attackers pushed and overpowered him.

137. PW3 testified that A heavy item was used to push his door. After a while, they burst the hinges and lock. He estimated the number of people who were outside at 40.

138. PW8- Cpl Joseph Sitienei testified that John Smith's door was broken and there were stones in the corridor.

139. PW9- IP Leyrice Ligaka Mukutur a crime scene investigator. He produced the photographs of the crime scene outside and inside John Smith's room(P Exh 6(a) (b) and (c), a photograph of the door of Junia Smith's pulled out of its hinges(P Exh 9), photo of Junia Smith's room which was vandalized(P Exh10)), certificate of photographic print or enlargement of 02/03/2022(P Exh 15), a letter of request from the DCI Transmara West for certification of the photograph(P Exh 16).

140. On cross-examination, he stated that he did not take the photographs. He did not know who took the photographs. The equipment used to photograph was not forwarded to him.

141. On re-examination, he said that he was not at the scene.

142. The complainants herein testified that their rooms were broken into. The photographic evidence by PW9 corroborates the complainants' evidence that their rooms were broken into. The result of the investigation is that there was a burglary.

143. But, as the unlawful act occurred at night, the identification of the attackers and /or the appellants by the complainants is paramount. The complainants did not, with certainty, identify the appellants to be the persons who attacked them on the material day. From the evidence by John Smith and Junia Smith, they had strong suspicion and or belief that the four sons of their landlord were amongst the people who attacked them. However, there was no proof beyond reasonable doubt that, the appellants were amongst the people who attacked them and broke into their property. This court finds that identification was not watertight and hence not proved beyond reasonable doubt.

Malicious damage to property

144. The appellants were charged with willfully and unlawfully destroying two door shutters, valued at Kshs. 30,000/= the property of Mara Engai Lodge and damaged the mobile phone make iPhone 7 plus valued at Kshs 180,000/= the property of Mr. Junia Smith.

145. From the evidence of PW2 and PW3, the attackers broke into their rooms destroying their room doors. Their evidence was corroborated by the investigating officer (PW8) and the crime scene officer (PW9).

146. PW3 testified that he recovered his phone but it had been smashed. His phone was an iPhone 7. Its approximate value is 3,400 pounds- Kshs. 60,000/= (PMFI 11).

147. The complainants herein testified that their rooms were broken into and PW3 mobile phone was destroyed. The photographic evidence by PW9 and the oral testimony of PW8 corroborate the complainants' evidence that their rooms were broken into. PW3 produced his smashed iPhone. The result of the investigations is that the properties of PW2 and PW3 were damaged.

148. The unlawful act occurred at night, making identification of the attackers and /or the appellants as the people who destroyed their property to be of paramount importance. The complainants did not identify with certainty that the appellants attacked and destroyed their property. This court finds that the identification was not watertight and hence not proved beyond reasonable doubt.

Defence case and alibi

149. The appellants raised a defence of alibi during their defence. They argued that, neither the trial court considered the alibi defence, nor the prosecution checked it out.

150. The prosecution submitted that the alibi was not introduced at the earliest opportune time.

151. Consideration of the defence of alibi has been discussed in great number of cases.

152. In R. v. Sukha SinghS/O Wazir Singh&Others(1939) 6 EACA 145, the former Court of Appeal for Eastern Africa upheld a decision of the High Court in which it was stated:

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

153. The Supreme Court of Uganda, in Festo Androa Asenuav. Uganda, CR. APP No1 of1998 made a similar observation when it stated:

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

154. In a more recent case of Athuman Salim Athuman v Republic [2016] eKLR the Court of Appeal sitting in Mombasa stated as follows;

> "Although the appellant in this case put forth his alibi defence rather late in the trial, we cannot agree with counsel for the respondent that the alibi defence must be ignored. That defence must still be considered against the evidence adduced by the prosecution. Indeed in Ganzi& 2 Othersv. Republic[2005] 1 KLR 52, this Court stated that where the defence of alibi is raised for the first time in the appellant's defence and not when he pleaded to the charge, the correct approach is for the trial court to weigh the defence of alibi against the prosecution evidence. In the circumstances of this appeal, we are satisfied that when weighed against the evidence of his identification at the scene which we now turn to consider, the appellant's alibi defence was completely displaced."

155. The 1st appellant testified as DW2. He testified that on 23/07/2020 he had a sitting at the Chief Joshua Sankey's home. They were discussing the loss of a cow on 24/07/2020. He had attended a ceremony at the Chief Joshua Sankey's home. They were discussing the loss of a cow on 24/07/2020. He had attended a ceremony at Kabingoi Barta's place where he spent a night and left at 10 a.m. He denied participating in the raid at the lodge. He denied having any differences with the complainant and did not stand to benefit in any way. He was arrested on 06/09/2020 and taken to Kerinkan police station and later to Angata Barkoi and finally to Kilgoris police station. He admitted having worked at the lodge as a waiter and had even lived in the camp. He admitted he had worked on contract at the bar and restaurant.

156. DW12- Joshua Saringe testified as a friend to the 1st appellant. He stated that on 23/07/2020 they had a meeting as Chief Ben Rono had lost his livestock and the meeting took 4 hours till 5 p.m. he then went to Sammy Lemunth's home with the 1st appellant for a housewarming ceremony and left at 10 a.m. on 24/07/2020. It was his evidence that they slept in the same house with the 1st appellant. He was aware that the 1st appellant was employed with Kichwa Umbo and later at Mara Engai in the hospitality section.

157. DW14 Samuel Ole Barta testified that on 23/07/2020 they were at the chief's place with the 1st appellant. On 24/07/2020 the 1st appellant and others slept at his house following the celebrations of having moved to his new house. He claimed the 1st appellant spent the night and left that morning along with DW12 and others who left the following day at 10 a.m. he confirmed that the 1st appellant had worked at the lodge at some point.

158. The 2nd appellant testified as DW3. He stated that on the night of the attack, he was at home at Kerinkan 2 km from the lodge. At 2 p.m. he went to attend a church seminar. He later learned of the incident after his brother the 5th appellant was arrested. He was too arrested on 06/09/2020 with the 6th appellant. He denied having been part of the attackers on 24/07/2020. He noted that he had no differences with PW2 whom he had severally met at the lodge. He recalled that he was at home that night. He denied having any objection to the lease by his father to the lodge.

159. The 3rd appellant testified as DW4. He termed the evidence by the prosecution as lies. He noted that he was arrested at home at 2 a.m. after about a month and 3 weeks. He denied any involvement in the incident at the lodge. He admitted being involved in the construction of the lodge and others as stewards for 4 years. He denied harboring any motive. At the time of the incident, he had already been laid off. He termed pw2 as a good friend. He admitted PW3 was his brother but was unaware of any conflict his father had with PW2 and PW3.

160. The 4th appellant testified as DW6. He stated that he had helped in the maintenance sections of the lodge where he was a mechanic and conducted repairs for 6 years from 2014 to 2020 when his services were terminated due to corona. He acknowledged that the lodge was on his father's land but denied having any differences with the management or having participated in the raid. He recalled that on 24/07/2020, he was arrested while at his house at 11 p.m. He too was among the people who had gone to lodge at 9 a.m. after the news of the attack reached him. He joined his brother the 5th appellant who was also under arrest. He denied having any land issues.

161. The 5th appellant testified as DW7. He stated that he worked as a general cleaner at the lodge for 5 years from 2015. He had not been laid off. He testified that he was at home and never participated in the raid on 24/07/2020 on 23/07/2020. He had worked till 3 p.m. before leaving for home. He only learned of the incident, while on his way to work on 24/07/2020, he met police and rangers with dogs. On arrival, he found employees gathered and that is when he learned of the incident. At 4 p.m. that day after work he was arrested with his brother (2nd appellant) he later found his brother (4th appellant). He recalled that he would welcome and sing for his visitors at times. He denied being unhappy at his brother's sacking or laying off.

162. The 6th appellant testified as DW8. He stated that he never worked at the lodge. On 24/07/2020 he was at home when he was arrested by rangers and police officers who had dogs after he met them at the gate. That is when he learned of the raid at the lodge. He was later joined by his brother Ben(accused 5) their workers (accused 8 and 9) were also arrested after they were found in the house. The only time he had met PW2 and PW3 was in 2008 when the lodge was under construction. He was involved in fencing the lodge for 8 months. He denied that any of his sons had been circumcised in 2010 when he was allegedly helped by PW2. He acknowledged receiving Kshs. 40,000 for the use of a water tank at home because of the celebration they had. He recalled that on 23/07/2020 he was drunk with alcohol as he often was. He denied being part of the team that attacked the lodge. He was at home with his wife and family. He denied having any differences with PW2 with whom he sat at a table.

163. DW13- Margaret Lekenai a wife to Daniel Letoo who was a brother to the 2nd appellant. She testified that on the nights of 23/07/2020 and 24/07/2020, she was at home with a child. She was nursing while the rest had gone to boarding school. Her husband she said stayed elsewhere from her and could not tell where he was on the factual night. She noted that her husband an employee of the lodge was a brother to the 2nd, 3rd, 4th, and 5th appellants respectively.

164. DW15- Florence Namusi Kiriswa. She is the wife of the 4th appellant. She stated that the 4th appellant left home on 23/07/2020 in the morning and came back at noon for lunch. He went back to tend to the cattle up to 5 p.m. he did not come home until 24/07/2020 at 9 a.m. and came back at 5 p.m. he was arrested that night on the allegation he had participated in the raid. She acknowledged he had worked at the lodge but had left the job. She acknowledged that the 2nd, 3rd, and 5th appellants were her brother-in-law. She was aware that her husband was working as a lorry driver and not a plant maintenance operator.

165. DW16 Rodha. She is the 3rd appellant's wife. She testified that on 23/07/2020 they were weeding at the shamba with her husband where they worked up to 4 p.m. on 24/07/2020. She woke up at 6 a.m. to milk the cows and left for the shamba at 8 a.m. They came back at 2 a.m. She denied the charges-against her husband. After one week he was arrested at 2 a.m. She acknowledged that he was a cook at the lodge.

166. Alibi defence, where it comes too late during the defence hearing, is to be considered within the entire evidence especially on identification and circumstantial evidence to establish whether it has been unraveled by the evidence by the prosecution.

167. After careful evaluation of the circumstances of identification and recognition of the appellants, this court finds that, the evidence on identification or recognition of the appellants did not yield such positive identification of the appellants as to situate them in the scene at the time of the commission of the crime.

168. The appellants were not strangers to the complainants. Their alibi that they were not at the scene at the material time was not disproved or unraveled by the prosecution. It bears repeating that the prosecution witnesses did not place the appellants at the scene of the offence on the material date and time.

Conclusions and orders

169. The upshot is that trial court did not properly evaluate the evidence on identification or recognition as required in law in order to eliminate any possibility of mistake or mistaken identity.

170. The trial court erred in placing too much premium on the previous incidents as constituting motive without really establishing the connection amongst those incidents, the offences at hand- mens rea and actus reus, and the appellants. Identification was key here.

171. It was not therefore, safe to found a conviction on evidence which did not positively identify the appellants as the persons who attacked the complainants and destroyed their properties. The manner the investigations were done is wanting as important scientific tools such as dusting the items found at the scene for finger prints was not done. The omission denied the evidence of crucial witnesses such as the complainants and the dog handler, the power, punch and grace required in criminal law, thus, creating a reasonable doubt as to the guilt of the appellants. The doubt on whether they were at the scene at the material time is resolved in favour of the appellants.

172. The prosecution did not, therefore, prove its case against the appellants in all the charges beyond reasonable doubt.

173. When conviction is routed, sentence is the big note that falls by the way side.

174. Accordingly, the conviction as well as the sentence are hereby quashed and set aside respectively. Each of the appellants to be forthwith set at liberty unless otherwise lawfully held.

175. Orders accordingly.

176. Right of appeal explained.

DATED, SIGNED, AND DELIVERED AT KILGORIS THROUGH MICROSOFT TEAMS ONLINE APPLICATION THIS 4TH DAY OF APRIL, 2024.

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HON. F. GIKONYO M.

JUDGE

In the presence of: -

Ms. Bosibori for the 1st appellant

O. M. Otieno for the 2nd – 6th Appellants

Isaboke for the respondents

Dr. Aukot and Wasuna for the victims

Leken C/A