



**Maisori v Republic (Criminal Appeal E048 of 2022)
[2023] KEHC 24028 (KLR) (19 October 2023) (Judgment)**

Neutral citation: [2023] KEHC 24028 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MIGORI
CRIMINAL APPEAL E048 OF 2022
RPV WENDOH, J
OCTOBER 19, 2023**

BETWEEN

EDWARD MARWA MAISORI APPELLANT

AND

REPUBLIC RESPONDENT

(An Appeal from original conviction and sentence by Hon. M. Obiero – Principal Magistrate in Migori Senior Resident Magistrate’s Criminal Case No. 31 OF 2019 delivered on 13/4/2022)

JUDGMENT

1. Edward Marwa Maisori, the appellant herein, was convicted by the SPM Migori on 25/4/2023 for the offence of attempted Murder, Contrary to Section 220 (a) of the *Penal Code*.
2. The particulars of the charge are That on 1/3/2020, at Alaxis Hotel within Migori town, Suna East, attempted to unlawfully cause the death of No. 111656 PC. Milton Mwanzi by shooting him on the chest using a firearm.
3. Upon conviction the appellant was sentenced to serve Thirty (30) years imprisonment.
4. The appellant is aggrieved by the whole Judgment of the trial court and filed this Appeal on 11/5/2021 Messrs Abisai and Company Advocates came on record for the appellant on 27/9/2022, Abisai and Company Advocate filed supplementary grounds of Appeal on 3/3/2023.
5. The grounds of Appeal are as follows:-
 1. That the court convicted the appellant despite material discrepancies and inconsistencies in the prosecution case;
 2. That the evidence on identification was unreliable and unfavorable;



3. That there were errors in the identification of the appellant;
 4. That the conviction was based on dock identification without any identification paade;
 5. That the evidence was insufficient to found a conviction.
 6. That the investigations were bungled.
6. The appellant therefore prays That the conviction be quashed and sentence set aside.
 7. This being a first appeal, it behoves this court to exhaustively re-examine all the evidence tendered before the trial court, evaluate and analyze arrive and at its own determination.
 8. This court should however make allowance for the fact That it neither saw nor heard the witnesses testifying in the trial court.
 9. This court is guided by the decision of *Okeno vs Republic* (1972) EA Page 36 where the court said

"An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya v. R., [1957] E. A. 336) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (Shantilal M. Ruwala v. R., [1957] E.A. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact That the trial court has had the advantage of hearing and seeing the witnesses, see *Peters v. Sunday Post*, [1958] E. A. 424."
 10. The prosecution called a total of eight witnesses. When called upon to defend himself the appellant testified on oath and called two other witnesses.
 11. In 2020, PW1 PC Milton Mwanzi was based at the District Criminal Investigation Migori (DCI) where he performed investigation duties. He was called to the office on 1/3/2021 at about 4:50pm by CPL Rotich for an emergency. He joined CPL Rotich and COL Chepkwony , PC Rupe , Abdul Aziz, Musau and William Omondi. The DCIO briefed them on A planned robbery at Alaxis Hotel in Migori Town by six armed robbers. They prepared, armed themselves as PC Musau tracked the robbers through a phone of one of the robbers. They proceeded to the hotel at 8:15pm. PC Musau kept them abreast of the robber's movements; their vehicle was parked near the wall of the hotel and they alighted and waited outside with the use of security lights at the hotel, they saw motor cycles arriving and stopped a few meters from the hotel. Four people dressed in jackets alighted and the two motor cycles rode off towards Migori town direction. One of the police officers ordered the four men to stop and one shot towards them; That at That time, many people were passing by; on the road PW1 stood on the left side of the vehicle while the other officers were on the right. On hearing the gun shot, people ran and he noticed one of the robbers running towards Kakrao, pretending to be one of the members of public; That the person looked elderly, dark complexion, of medium height and body physique and wore a blue jacket with grey trouser. Because of the presence of many people, PW1 did not shoot but followed the person fast and when about 10 metres away, the person turned, drew a gun from his jacket and shot at him on the right side of the chest and he fell and so did his rifle. The man and disappeared in the darkness.



12. Because of the many gun shots, his colleagues could not hear him call for help, but he was rescued after about 10 minutes, was taken to hospital and next day, was flown to Nairobi hospital where he was admitted in ICU for four days where it was found That his 3rd, 5th ribs were fractured and spinal cord. On 4/6/2020, the DCIO informed him That investigations had begun in the case and he recorded his statement That two robbers were killed at the scene while two escaped. On 26/5/2020, he went to Migori Referral Hospital where his P3 form was filled. On 24/4/2021 the DCIO informed him That the person who shot him had been arrested. He travelled to Migori to attend on identification parade on 25/4/2021 but he alleged That when the parade was prepared, the suspect refused to take part because at the time of arrest he had been photographed by one of the police officers.
13. PW 2 CPL Chepkwony of DCI Migori was with PC Mwanzi and others when they received instructions to intercept robbers at Alaxis hotel. They went to the hotel about 8:00pm and took up different positions; That suddenly, they saw six people wearing heavy jackets. CPL Rotich challenged them to surrender and shot in the air but the people shot and shooting ensued for about 20 minutes and it was chaotic; That two of the robbers were shot dead; That one of the robbers had AK 47 and another with a home made gun; That they got information That one of the robbers was Edward Marwa Maisori and they started looking for him at his home. Later, he got information That the appellant was arrested in a raid at his home. PW2 did not see who shot PW1.
14. PW3 CPL Luke Rotich of DCI Migori was part of the team That was sent to Hotel Alaxis by the DCIO. He said That they had phone numbers and names of the robbers which were given to PC Musau to track them ie Sokoro – 072xxxx290 and 078xxxx745; Chacha 0100xxxx99; Masau 0725xxxx51 and 0784xxxx00 also known as Kirambo. He is the one who mobilized the team to prepare to intercept the robbers; That PC Musau continued to track the robbers till they reached Migori and he informed them; That at bout 8:00pm motor cycles stopped near the hotel with two passengers each and were wearing scarfs; That the motor vehicles rode away. The place was well lit. The people walked towards the gate and he challenged them to identify themselves but they dispersed and one took out a black gun and so did his colleagues who fired and so did PW3; That there was exchange of fire for sometime and one of the robbers ran towards the road as he shot at his colleague.
15. After the shooting stopped, he learned That PW1 had been shot and he organized to have him taken to hospital. He remained at the scene as the two men who were challenged had been fatally injured; That person with the AK 47 had 16 rounds of ammunition; the other with a black gun was a home made gun and had a rungu with a nut. The two fallen suspects were found to be Sokoro and Daniel Mwita. They got information That Kirambo and Chacha escaped. Later, he learned That the appellant had been arrested.
16. Justus Bahati Mwina (PW4) is a Clinical officer based at Migori Hospital. He examined PW1 and filled the P3 form on 26/5/2020. He found a visible healing wound on the right shoulder joint; a scar on the right shoulder joint; a scar on the right lateral chest wall at 6th intercostal spur due to an operation.
17. PW5 PC William Omondi of DCI Migori was one of the officer who received instructions to lay ambush for robbers at Alaxis Hotel. He reiterated That PC Musau was monitoring the movements of the robbers; That they went to the Hotel at 8:00pm after which two motor cycles arrived. Two men alighted from each ; That CPL Rotich challenged the people to stop and surrender but instead, they started shooting and one suspect ran away. The other 3 men ran towards Alaxis Hotel; It is PC Mwanzi and Chege who chased the suspect who ran; That the suspect removed and shot PC Mwanzi. The offices were unable to return fire because there were many members of public at the scene and motor cycle riders; That the suspect escaped as they were left to attend to PC Mwanzi. He picked PW1s rifle



and they took him to hospital. He described the suspect who shot PW1 as dark, tall, built and That it was the appellant.

18. PW6 PC Job Mwita of DCI Migori is the current investigating officer, having taken over from one James Mwangi who has retired. He recalled That on 24/4/2021 while in company with DCI officers led by Stephen Mutuli they went to the home of Edward Marwa Maisori to look for the gun That was used in shooting PW1. They found the appellants wife Roseline, Thomas Mwita Nyangi, a visitor, Jackson Nyangi and Enock Chacha all visitors; That Thomas admitted to having a gun with 15 rounds of ammunition. A search in the house yielded no results. He prepared an inventory which each of those present except the appellant signed. They went to Kehancha to the house of Evelyn Robi, the appellant's wife but a search did not yield any results. He prepared a parade but the appellant declined to take part in the parade.
19. PW7 DR. Lawi Ochieng based at Nairobi West Hospital produced the complainants discharge summary PEXhibit 3; That PW1 was admitted at the hospital with a gunshot injury to the shoulder. He found PW1 sustantined broken ribs with blood in the chest. The spine and abdomen were also injured.
20. PW 8 PC Mathews Arupe was on 1/3/2020 in the team That went to lay ambush for robbers at Hotel Alaxis. The DCIO discussed with the officers how to prepare for the robbery. They proceeded to the Hotel at about 9:20 p.m to lay ambush; That the six robbers arrived after about 10 minutes on two motor cycles with four passengers; That motor cycles left and CPL Rotich challenged the four people to stop but they opened fire. The people refused to surrender when challenged by PC Rotich and two were killed. He said That he was close to PC Mwanzi, when PW1 was shot and was able to see the appellant when he shot at them. Photographs of the scene were taken. The appellant was not arrested at the scene, but escaped till his arrest in May 2021.
21. PW1 did not know the appellant before.
22. When called upon to defend himself, the appellant testified on oath. He recalled the on 1/3/2020, he was at his home at Bukira carrying out his farming activities with his wife and children and nephew; That they worked from 5;00pm till 10pm. They did likewise next day from 7;00am till 11;00am. He denied being in Migori on the said date but at home; That is on 24/4/2021 police officers arrived at his house and found him with three visitors; That they surrendered and Thomas Mwita Nyangi who was armed give out his fire. The police conducted a search and photos taken and returned to him after two weeks.
23. DW2 Everlyne Robi, appellant's wife also stated That on 1/3/2020, she was at home with appellant and children harvesting maize and he never left.
24. DW 3 Joseph Obote Marwa the appellants neighbour also recalled That on 1/3/2020 he went to assist the appellant prepare maize till 10:00p.m when he went to sleep.
25. Mr. Abisai counsel, filed submissions which he highlighted. The main thrust of the appellant's submission is the identification of the appellant as the offender.
26. In grounds 1 and 2, counsel argued That the evidence of PW5 and PW8 who purported to have seen the appellant at the scene was inconsistent and contradictory because their description of the appellant did not tally. In any event, they never described the person they had seen in the police statements; secondly, when PW1 purported to describe the manner of dress of the appellant, PW2 stated That each of the two of the Persons were wearing scarfs and PW3 , PW5 and PW8 all gave different descriptions of what the suspect were; That the witnesses PW1, PW2, PW3, PW5 all gave different accounts of what happened at the scene; That all the witnesses agreed That the scene was chaotic and That the trial



- magistrate should have asked how somebody would have been able to see the suspect as he ran away shooting; That PW1 who was close to the suspect claimed to have seen him for two seconds which was too short to identify someone one year later.
27. Counsel relied on the decision of *Charles Maitanyi vs. Republic* (1985) 2 KAR 25 where the court set down some of the principles to be considered when dealing with evidence of visual identification.
 28. In his submissions counsel said That the main complaint is ground 4, That no identification parade was conducted to confirm That the suspect was the culprit; That the court relied on dock identification for all the three prosecution witnesses; That the dock identification was done over one year since the incident and it was not possible for the witnesses to remember the suspect without an identification parade. Counsel further urged That there was no aorta of circumstantial evidence That linked the appellant to the offence and relied on the decision of *Gabriel Njoroge vs. Republic* (1982-89) 1 KAR 1134 where the Court of Appeal held That evidence of dock identification is worthless, unless preceded by an identification parade. Counsel also cited the case of *Valentine Maloba & 2 Others vs. Republic* (2021) eKLR where it was held That an identification parade should be held where a stranger to the witness and they should be given a chance to identify on a parade. Counsel also relied on *Christopher Kamau Mbugua vs. Republic* (2006) eKLR and *Walter Amolo vs. Republic* (1991) 2 KAR 254. It was also submitted That some of the witnesses did not give a description of the suspect prior to the arrest.
 29. The other ground was That the investigations were bungled in That several witnesses did not testify e.g PC Musau who collected intelligence; That the telephone numbers were known yet PC Musau never testified to prove the nature of intelligence report he received; That none of the phone numbers were linked to the appellant; That the initial investigation officer John Mwangi did not testify. Counsel relied on the case of *Bukenya & others vs. Uganda* (1972) EA 549 where the court held That the prosecution should call such witnesses as are relevant to the case but not call a superfluity of witnesses.
 30. Mr. Kaino opposed the appeal and filed submissions. He denied That the identification was dock identification but That the witnesses saw the appellant at close range; That the alibi defence did not dislodge the prosecution evidence. Relying on *R vs. Turnbull & others* (1973), 3 ALL ER 549 where the court gave guidelines to courts on what to consider in a case of identification under unfavourable conditions; That the appellant refused to participate in the parade and it cannot be said That the prosecution failed to conduct a parade. He denied That there were any discrepancies in the prosecution evidence; That the evidence on record was sufficient to prove the charge and it was unnecessary to call the other witnesses.
 31. The appellant faced a criminal charge of attempted murder and therefore the prosecution had the duty to prove the said charge beyond any reasonable doubt. The term beyond reasonable doubt was defined in the case of *Woolmington vs. DPP* (1935) AC 462 PP482 as follows:

“Throughout the web of the English Criminal Law one golden thread is always to be seen, That it is the duty of the prosecution to prove the prisoner’s guilt subject to what I have already said as to the defence of insanity and subject also to any statutory exception. If at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given either by the prosecution or the prisoner, as to whether [the offence was committed by him], the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle That the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained.”



32. [*Halsbury Laws of England*](#) 4th Edition defines beyond reasonable doubt burden as follows:

"The legal burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party's case. If at the conclusion of the trial he has failed to establish these to the appropriate standard, he will lose. The legal burden of proof normally rests upon the party desiring the court to take action; thus a claimant must satisfy the court or tribunal That the conditions which entitle him to an award have been satisfied. In respect of a particular allegation, the burden lies upon the party for whom substantiation of That particular allegation is an essential of his case. There may therefore be separate burdens in a case of with separate issues."

33. In [*JOO vs. Republic*](#) (2015) eKLR, Mrima J said:-

"However, it also remains a cardinal duty on the prosecution to ensure That adequate evidence is adduced against a suspect so as to uphold any conviction. The standard of proof required in criminal cases is well settled; proof beyond any reasonable doubt hence this case cannot be an exception. This Court holds the view That it is better to acquit ten guilty persons than to convict one innocent person."

34. The legal burden defined above is what the prosecution must establish in this case i. e. beyond reasonable doubt. It all started with the ambush laid by the DCI officers who included complainant (PW1) following information That there was a planned robbery at Alaxis Hotel in Migori. The ambush was at night at about 8:00p.m The courts have generally held That evidence of single identification under unfavourable conditions must be tested with the greatest care before a conviction is entered. See [*Charles Maitanyi vs. Republic*](#) (1985) 2 KAR 75.

35. The case of [*Turnbull vs.*](#) (1976) 3 all er 549, the Court of Appeal of England gave some guidelines on how courts should admit evidence of identification in unfavourable conditions. The court said:-

"... 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 reorganize someone whom he knows, the jury should be reminded That mistakes in recognition of close relatives and friends are sometimes made."

See Criminal Appeal 23 of 2018 [*Denmis Kiprotich Moikt vs. Republic*](#) (Bungoma)

36. It is not in dispute That there were other passersby at the scene of the shooting. PW1 told the court That he could not shoot the person he was pursuing because of the presence of many people who were running for their safety. PW2 said the scene was chaotic. PW5 also told the court That they could not shoot at the suspect because there were many people, and motor cycle 'boda boda' riders at the scene. PW8 told That court the same.

37. The appellant contends That the prosecution evidence leading to the conviction of the appellant was contradictory. According to PW1 he saw one of the suspects join the people who were scampering for



safety walking away and he decided to follow him. From the narration of the events, by PW1, he was alone when pursuing the suspect. In fact, after he was shot, he said That, he fell down and so did his gun. To confirm That PW1 was alone his testimony is as follows he said “I called for help but my colleagues could not hear me due to the said from gun shots. After about two minutes, I took the gun and I laid on it so That somebody could not take it. I called for help after about 10 minutes CPL Chengo and PC William Omondi heard me and they came and rescued me. This narration of the events totally contradicts PW5’s and PW8 testimony.

38. PW5 claimed to have been with PW1 at the time PW1 was shot. He stated “ I myself, PC Mwanzi and Chengo chased the suspect who went away. While chasing him, he turned and shot PC Mwanzi. The suspect managed to escape. PC Mwanzi fell down. He told me to pick his rifle. I picked it. He was bleeding”. PW8 also claimed to have been with PW1. However, according to him, the suspect shot at PW1 once they were asked to surrender. According to him they were pursuing the suspect.
39. Though PW1 said he was actually pursuing the suspect who turned and shot him once, according to PW3, the suspect was shooting as he ran away. PW5 saw the suspect run then he turned to shoot PW1. PW8 on his part said That when he saw the appellant, he was armed and he shot at them and injured PW1. These narrations of the events of the scene are totally at variance. Even though it is not expected That each person will see as the other did, these variations are not reconcilable
40. From an analysis of the two versions by PW1, PW5 and PW8. It is doubtful whether they were together. PW1 who was shot knew what happened to him. He must have been alone as he chased the alleged suspect and others including PW5 and PW8 came to his aid later.
41. Having considered the Turnbull case the question is whether the witnesses present were able to identify the appellant.
42. The identifying witnesses purported to, identify the appellant in court which is dock identification. The courts have held That dock identification is worthless. In *Gabriel K. Njoronge vs. Relying* (supra) the court of Appeal said as follows:-

"A dock identification is generally worthless and court should not place much reliance on it unless this has been proceeded by a properly evidenced parade. Witness should be asked to give the description of the accused and the police should arrange a fair identification parade".
43. All the identifying witnesses did not know the appellant before this incident. He was a stranger to them. Each of them described the appellant differently or offered no description. PW7 said That the appellant did not wear anything on the head but That he wore a blue jacket, grey trouser was of dark complexion, elderly, medium height and medium weight and body physique. PW2 on the other hand stated That the two motor cycles had two persons each and each of the passengers was wearing a scarf; PW3 said appellant wore blue jacket, PW5 did not give any description and PW8 said That the suspect wore a grey sweater. Although it may be difficult to see all That one wore under such circumstances, yet the witnesses are many and one would have expected some consistency in the description of the suspect from some of the witness. A part from PW1 who gave a description of the suspect in his statement, all the others did not give a description of the suspect. The descriptions given in court are not of any consistence to court as the witnesses could be describing what they are seeing in court or what they heard later.
44. Although the defence is relying on the fact That no identification parade was conducted, PW1 told the court That he was called to attend a parade but the appellant refused to attend the parade alleging That a police officer had photographed him. The investigating officer, and PW1 the confirmed That the appellant refused to attend the parade. The appellant did not controvert PW1 and PW4’s evidence.



Refusal to attend a parade goes to cement the suspicion on the appellant. Ordinarily if asked to attend a parade an accused must attend a parade and if he has any objection to the conduct parade, if the objection must be recorded later. The appellant cannot have refused to attend a parade only to use it as a shield in his defence. An accused must allow the police to carry out their investigation as deemed by the law. Refusal to attend a parade is obstruction of justice aid. The refusal by Appellant to attend a parade goes to cast.

45. Be That as it may. No parade was conducted for all the witnesses. There is no evidence That another attempt at holding a parade was done with the other witnesses. So, without the parade, the question whether the appellant was positively identified as the assailant.
46. All the witnesses alluded to there having been security lights at the Hotel and street lights. PW1 told the court That he saw the Appellants for only two (2) seconds and was able to know him. In my view, That was a very short time for PW1 to be able to identify the same person who was a stranger to him, a year later. Interestingly though PW1 had said That there were street lights at the scene. Once he was shot, he said That the suspect “disappeared into the darkness.” It means there was darkness at the scene. The evidence That there were street lights and darkness are in total contradictions and the question then is whether there was sufficient light at the scene for the witnesses to see the suspect.
47. PW3 told the court That he saw the appellant wearing a blue jacket. He did not tell the court at what stage he saw the appellant or how far he was from the appellant.
48. PW5 who claimed to have been with PW1 said he was three meters from the appellant when he saw him but did not say for how long he observed him for the court to know whether he was able to identify the suspect.
49. PW8 told the court That there were lights at the scene but he did not tell the court how far the appellant was or far how long he had him under observation.
50. The law is very clear on the issue of contradictions and discrepancies in the evidence. It is trite law That unless inconsistencies are satisfactorily explained they will likely but not necessarily result in the evidence of a witness being rejected. In *Philip Nzaka Watu vs. Republic* (2016) Criminal Appeal No. 29 of 2015, the court said:-

“The first question in this appeal is whether the prosecution case was riddled with contradictions and inconsistencies of the magnitude That would make the conviction of the appellant unsafe.

However, it must be remembered That when it comes to human recollection, no two witnesses recall exactly the same thing to the minutest detail. Some discrepancies must be expected because human recollection is not infallible and no two people can perceive the same phenomena exactly the same way.

Indeed, as has been recognized in many decisions of this Court, some inconsistency in evidence may signify veracity and honesty, just as unusual uniformity may signal fabrication and coaching of witnesses.

Ultimately, whether discrepancies in evidence render it believable or otherwise must turn on the circumstances of each case and the nature and extent of the discrepancies and inconsistencies in question.”



51. Again in *Joseph Maina Mwangi vs. Republic* Criminal Appeal 73 of 1993, the court said:-

"In any trial there are bound to be discrepancies. An appellate court in considering those discrepancies, must be guided by the wording of section 382 of the criminal procedure code viz whether such discrepancies are so fundamental as to cause prejudice to the appellant or they are inconsequential to the conviction and sentences"

52. The discrepancies and contradictions in the identification of the suspect have not been explained and are too many and they go to the root of the identification of the appellant and cannot be wished away.

53. Having examined the testimonies of PW1, PW3, PW5 and PW8, this court is not satisfied That the witnesses satisfactorily identified the suspect who was a stranger to them. The appellant was a prime suspect especially That he declined to take part in a parade. What was he fearing? But the evidence on identification is disjointed contradictory and weak for the court to rely upon to found a conviction.

54. The appellant also complained That crucial witnesses were not called to testify. The law is clear. Section 143 of the *Evidence Act* provides That a fact can be proved by the evidence of one person unless a particular law specifies otherwise. It is also trite law That it is the discretion of the prosecution to call witnesses That are necessary and relevant to enable the court arrive at a fair determination. As held in *Bukenya vs. Uganda* (1972) EA 548, the court held as follows:

"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...

The prosecution's burden in regard to witnesses is to call witnesses who are sufficient to establish a fact. However it is not necessary to call all the people who know something about the case. The issue is whether those called are sufficient to aid the court establish the truth, whether the evidence is favourable to the prosecution or not."

55. If the prosecution does not call relevant witnesses, then it will be presumed That the evidence of That witness may have been adverse to the prosecution case.

56. In *Julius Kolewa Mutunga vs. Republic* in the court held:-

"As a general principle of law, whether a witness should be called by the prosecution is a matter within their discretion and an appeal court will not interfere with the exercise of That discretion unless, for example, it shows That the prosecution was influenced by some oblique motive."

57. The appellant complains That the evidence of one PC Musau who mentioned as was doing the surveillance was relevant but he was not called PC Musau was mentioned by nearly all the witnesses PW1, PW2, PW3, PW5 and PW8 That he long had the suspects' phone numbers and was tracking their movements on That night. I do agree with the appellant That PC Mwanzi was a crucial witness. He should have been called to testify to confirm what information he got and whether it linked the appellant to the suspects. Failure to call the said witness raises a presumption That his evidence may have been adverse to the prosecution case. No explanation has been given for the failure to avail him as a witness. I agree with the appellant's That the said witness has been left out for an oblique motive.

58. After analyzing all the evidence on record, this being a very serious offence whose sentence is life imprisonment upon conviction, the prosecution should have taken it seriously to avail all the evidence



relevant for the fair determination of the case. The case was half baked. The appellant remains a suspect and suspicion however strong cannot be a basis for a conviction. See *Sawe vs. Republic* (2003) I find That the trial court erred in returning a conviction based on scanty evidence full of gaps and doubts.

59. The conviction is unsafe. It is hereby quashed, sentence set aside and the appellant is set at liberty forthwith unless otherwise lawfully held. The appeal succeeds in its entirety.

DELIVERED, DATED AND SIGNED AT MIGORI THIS 19TH DAY OF OCTOBER, 2023.

R. WENDOH

JUDGE

In presence of; -

Mr. Kaino for the state

Appellant Present

Emma – Court Assistant

