



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CRIMINAL APPEAL NO. 110 OF 2019

RONALD KIPLETING KIRUI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the conviction and sentence in Kapsabet Criminal Case No. 3572 of 2016 by Hon. Dolphine Alego, SPM and Hon. P. W. Wasike, SRM, delivered on the 25 May 2019)

JUDGMENT

[1] This appeal arises from the Judgment of **Hon. D. Alego, SPM** in **Kapsabet SPM's Criminal Case No. 3572 of 2016: Republic vs. Ronald Kipleting Kirui**. The appellant had been charged before the lower court with the offence of attempted murder contrary to **Section 220(b)** of the **Penal Code, Chapter 63** of the **Laws of Kenya**. The particulars of the charge were that on the **27 November 2016**, at Baraton Trading Centre in Chemundu Location within Nandi County, he attempted to unlawfully cause the death of **Mercy Chelagat** by stabbing her on the neck using a knife.

[2] The appellant denied the charge and in proof thereof the Prosecution called 5 witnesses before the lower court. Ultimately, having heard both the Prosecution and the appellant's defence, the learned trial magistrate found the charge proved beyond reasonable doubt and recorded a conviction against the appellant. The Judgment was read on behalf of **Hon. Alego** by her colleague, **Hon. Wekesa, SRM**, on **6 May 2019**. Thus it was **Hon. Wekesa** who thereafter passed the sentence of 20 years' imprisonment on the appellant on **25 May 2019**.

[3] Being aggrieved by the decision of the lower court, the appellant filed this appeal through the law firm of **M/s Rotich, Langat & Partners, Advocates** on **4 July 2019** against both conviction and sentence on the following grounds:

[a] That the learned trial magistrate erred in fact and in law by convicting and sentencing the appellant on the basis of insufficient prosecution evidence before the court;

[b] That the learned trial magistrate erred in law and in fact in failing to consider the appellant's *alibi* that was not controverted by the Prosecution; and in sentencing the appellant on the basis of insufficient evidence;

[c] That the learned trial magistrate erred in fact and law in convicting and sentencing the appellant based on the prosecution evidence which was full of material contradictions and insufficient identification of the appellant which ought to have been resolved in favour of the appellant;

[d] That the learned trial magistrate erred in fact and law in failing to arrive at a safe decision that the prosecution failed to discharge its statutory duty by failing to prove all the ingredients of attempted murder within the meaning of **Section 220(b)** as read with **Section 388(1)** of the **Penal Code**;

[e] That the learned trial magistrate erred in law and fact in passing a conviction and sentence that is manifestly unsafe in the circumstances of this case, and the prevailing law as interpreted in the case of **Abdi Ali Bare vs. Republic** [2015] eKLR;

[f] That the learned trial magistrate erred in law and fact in rendering a Judgment that is self-contradicting and relying on issues not tendered in evidence which rendered the conviction and sentence unsafe;

[g] That the learned trial magistrate erred in law and fact in sentencing the appellant for a term of 20 years which is too harsh in the circumstances;

[h] That the learned trial magistrate erred in fact and in law by failing to find and rule that this was a clear case of mistaken identity;

[g] That the learned trial magistrate erred in fact and in law in failing to warn the appellant on the seriousness of the offence he was facing and advising him to take up legal counsel and or providing a *pro bono* state funded advocate to assist the accused in his defence, which failure renders the proceedings a mistrial;

[h] That the learned trial magistrate erred in law and fact in failing to consider the mitigation and probation/pre-sentence report in favour of the appellant, but instead used it against him by holding that he was not remorseful for an offence he never committed.

[4] Thus, the appellant prayed that his appeal be allowed, the conviction and sentence set aside, and that he be set free. In the alternative, he prayed that the Court be pleased to order a retrial of the case. The appeal was urged by way of both written and oral submissions. **Mr. Rotich**, learned Counsel for the appellant relied on his written submissions filed herein on **28 August 2019**; while Counsel for the State, **Ms. Mokuia**, made her oral response on **30 January 2020**. In the submission of **Mr. Rotich**, the prosecution had the obligation to prove that:

[a] the appellant had a positive intention to kill the complainant;

[b] the appellant positively planned his intention to kill the complainant; and,

[c] the appellant did an act using a knife to execute his intention to kill as stated in the charge sheet by stabbing the complainant in his execution of his intention to kill.

[5] Counsel submitted that no single witness mentioned that the appellant had a knife which he used to stab the complainant, yet this was one of the most important pieces of evidence that had to be presented by the prosecution in order to discharge their burden of proof. He further submitted that no attempt was made by the prosecution to prove the ingredients of the charge; and that, to the contrary, the prosecution evidence exonerated the appellant when the complainant stated that she did not know why the appellant stabbed her as they were not in a relationship of any kind. Counsel relied on **Abdi Ali Bare vs. Republic** [2015] eKLR to support his submission that, in the absence of proof that the appellant was armed with a knife, the lower court erred in not finding that the charge of attempted murder had not been proved beyond reasonable doubt. He also took the view that the evidence relied on by the prosecution was at variance with the charge as laid; and therefore that the charge was defective.

[6] Counsel for the appellant also pointed out that since this incident occurred at night, at about 10.00 p.m., it was of extreme importance for the nature and intensity and duration of lighting be vividly explained so as to rule out mistaken identity. He relied on **Nyeri Criminal Appeal No. 75 of 2013: Elizabeth Kabura vs. Republic** for the holding that, before a court can return a conviction based on identification of any accused person at night and in difficult circumstances, such evidence must be watertight to justify a conviction. Hence, counsel urged the Court to find that, since no such evidence was presented before the lower court by the prosecution, the benefit of the ensuing doubt ought to have been resolved in favour of the appellant.

[7] On sentence, counsel for the appellant urged the Court to find the sentence of 20 years in prison to be harsh; and that had the accused been warned of the seriousness of the charge from the outset, he would have seen the necessity of engaging counsel to represent him or otherwise asked for a *pro bono* advocate to be appointed on his behalf by the trial court. Thus, **Mr. Rotich** urged the Court to allow the appeal, quash the appellant's conviction and set aside the sentence imposed on him by the lower court.

[8] **Ms. Mokuia**, learned counsel for the State opposed the appeal, contending that all the ingredients of the offence of attempted murder were duly proved by the prosecution, particularly the fact that the appellant targeted the complainant's neck with a sharp object. She urged the Court to find credible the evidence of the two doctors, **PW3** and **PW5** as to the nature and seriousness of the complainant's injuries and the fact that she had to undergo major surgery as well as ICU care to save her life. She took the view that there were no contradictions at all in the prosecution case; and that the appellant was positively identified, not as "**Ngash**" but as **Ronald**. Counsel further pointed out that it is significant that the appellant was arrested within one hour of the occurrence. She also submitted that no defence of *alibi* was raised by the appellant who only dwelt on the circumstances surrounding his arrest. Thus, **Ms. Mokuia** prayed for the dismissal of the appeal.

[9] I have given careful consideration to the appeal and taken into account the written and oral submissions made herein. I am mindful that, in a first appeal such as this, the Court is under obligation to reconsider the evidence adduced before the lower court and come to its own conclusions thereon. In **Okeno vs. Republic [1972] EA 32**, the Court of Appeal for East Africa expressed this principle thus:

"An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination ... and to the appellate court's own decision on the whole evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions...It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusion; 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..."

[10] Accordingly, I have gone through the evidence presented before the lower court. The complainant, **Mercy Chelangat (PW1)**, then a student at **Baraton University**, testified on **3 May 2017** and stated that on the night of **27 November 2016** at about 10.00 p.m., as she was walking to her room from the washroom, she looked back and saw the appellant following her. She asked him what he wanted but he did not respond, and kept on following her to her room. She again asked him what he wanted; and that the appellant asked her for her mobile phone, which he took and switched it off and then removed her sim card and inserted his own sim card in her mobile phone. That the appellant then stabbed her on the neck for no apparent reason. She added that she screamed and drew the attention of her neighbours who rushed her to **Jeremic Hospital**, before being transferred to **Mediheal Hospital**, where she was hospitalized for 1½ months. The complainant further told the lower court that the appellant was a person well known to her before this incident; and that he had known her as a hawker since she

joined **Baraton University**. She added that they were not friends and that she did not know why the appellant stabbed her.

[11] **Wilfred Mwaura Mugeku (PW2)**, a lecturer at **Baraton University** told the lower court that he was the Dean of Students at the time, and was therefore in charge of the affairs of the students, including the students who lived away from the campus. He told the court that he knew the complainant and confirmed that she was a student in **Baraton University**; and that she was living in rental premises about ½ km away from the campus. It was the testimony of **PW2** that, on the **27 November 2016**, he was woken up at about 10.30 p.m. by **Pastor Mariton**, the University's Assistant Chaplain, and informed that a student had been injured. He rushed to the institution's hospital, known as **Jeremic Hospital**, and found the complainant being wheeled out of theatre; and that he spoke to her and she mentioned her assailant as **Ronald**.

[12] **PW2** further testified that, although he did not know **Ronald**, he knew his parents; and so he proceeded to their home that night with police officers and woke up his parents. **Ronald's** mother then woke **Ronald** up and he was thereupon arrested and taken to **Kapsabet Police Station**. **PW2** also confirmed that the complainant was transferred to **Mediheal Hospital** in Eldoret where she was hospitalized in ICU initially, before her condition stabilized.

[13] **Joseph Kangogo (PW3)** told the lower court that he was the Medical Superintendent of **Nandi Hills District Hospital** at the time; and that in that capacity he examined and filled the P3 Form for **Mercy Chelagat**, an adult student at **Baraton University**, and came to the conclusion that she had suffered grievous harm, granted that she had sustained a deep cut wound on the neck. He produced the P3 Form as an exhibit before the lower court. **PW3** also mentioned that the examination was done jointly with **Dr. Ondiko**, the Surgeon at **Mediheal Hospital**.

[14] **Sgt. Luke Watenge (PW4)** who was the investigating officer testified on **9 November 2017** and stated that he was then based at **Kapsabet Police Station**; and that he was the investigating officer in the matter. He stated that he was on duty on **28 November 2016** when the complainant made a report that she had been stabbed by a person known to her; and whose name she mentioned as **Ronald Korir**. He further stated that, since the complainant was in pain and was talking with difficulty, he advised her mother who had accompanied her to first take her to hospital for treatment. He also stated that the suspect had already been arrested by the administration police based at **Baraton** and handed over to **Kapsabet Police Station**; and that although he visited the scene immediately, the weapon used was not recovered.

[15] The last prosecution witness was **Dr. Stephen Ondigo (PW5)**. He testified on **11 December 2018** and stated that he is a Surgeon based at **Moi Teaching and Referral Hospital** but also serves other hospitals in Eldoret. He testified that he attended to **Mercy Chelagat** who was admitted initially at **Mediheal Hospital** on **28 November 2016** with a history of having been assaulted by someone known to her. He noted that she was sick looking and had a stab wound on the anterior part of the neck measuring 5 cm and that her trachea was slit and was leaking. The patient was attended to by way of surgery and, although the patient stabilized and was discharged, she had to be readmitted for major surgery on **18 January 2017** after she developed difficulty in breathing. **PW5** prepared a detailed Medical Report in respect of the complainant which he produced as the **Prosecution's Exhibit 2** before the lower court. He confirmed that the patient was ultimately discharged on **26 January 2017**.

[16] In his defence, the appellant gave an unsworn statement and stated how, on **26 November 2016** he was woken up by his mother to have his dinner; but on going outside, he was arrested by two officers. That they inspected his bedroom but found nothing. He was then escorted to the police station and was later charged and taken to court. He further stated that he was at home the whole time on **26 November 2016**.

[17] The foregoing being the summary of the evidence presented before the lower court, the key issue to ascertain is whether the charge of attempted murder was proved by the Prosecution against the appellant beyond reasonable doubt. **Section 220 (b)** of the **Penal Code**, pursuant to which the charge was laid, stipulates that:

“Any person who with intent unlawfully to cause the death of another does any act, or omits to do any act which it is his duty to do such act or omission being of such nature as to be likely to endanger human life is guilty of a felony.”

[18] In the same vein, **Section 388** of the **Penal Code** defines “attempt” as follows:

(1) When a person, intending to commit an offence, begins to put his intention into execution by means adapted to its fulfillment, and manifests his intention by some overt act, but does not fulfill his intention to such an extent as to commit the offence, he is deemed to attempt to commit the offence.

(2) It is immaterial, except so far as regards punishment, whether the offender does all that is necessary on his part for completing the commission of the offence, or whether the complete fulfillment of his intention is prevented by circumstances independent of his will, or whether he desists of his own motion from the further prosecution of his intention.

(3) It is immaterial that by reason of circumstances not known to the offender it is impossible in fact to commit the offence.”

[19] Hence, in **Cheruiyot vs. Republic (1976-1985) EA 47** the position taken was that:

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

[20] Moreover, in the case of **Abdi Ali Bare vs. Republic** (supra), the Court of Appeal made it clear that, in cases of attempted murder, care must be taken to distinguish what otherwise would be acts of preparation to commit an offence and actual attempt to commit the offence.

Here is what the Court of Appeal had to say in this regard:

“...The more challenging question in a charge of attempted murder is the *actus reus* of the offence. Although a casual reading of Section 388 of the Penal Code may suggest that an attempt is committed immediately the accused person commits an overt act towards the execution of his intention, it has long been accepted that in a charge of attempting to commit an offence, a distinction must be drawn between mere preparation to commit the offence and attempting to commit the offence...”

[21] In the **Abdi Ali Bare Case** (*supra*), the Court of Appeal quoted the illustration employed by **Smith & Hogan** in their work, **Criminal Law, Butterworths, 1988 (6th Edition)**, at page 291 thus, to emphasize the distinction aforementioned as hereunder:

“D, intending to commit murder buys a gun and ammunition, does target practice, studies the habits of his intended victim, reconnoiters a suitable place to lie in ambush, puts on a disguise and sets out to take up his position. These are all acts of preparation but could scarcely be described as attempted murder. D takes up his position, loads the gun, sees his victim approaching, raises the gun, takes aim, puts his finger on the trigger and squeezes it. He has now certainly committed attempted murder...”

[22] In the light of the foregoing, the key elements that needed to be proved by the Prosecution before the lower court are:

[a] That the offender had a positive intention (the *mens rea*) to kill the complainant;

[b] That the offender took steps to execute his intention to kill by carrying out some overt act (*actus reus*) that was proximate to the commission of the offence; and,

[c] That the offender was positively identified to be the appellant herein.

[23] There was overwhelming evidence before the lower court to demonstrate that the complainant was stabbed and grievously wounded on the night of **27 November 2016** at about 10.00 p.m. She was rushed to **Jeremic Hospital in Baraton** for treatment before being transferred to **Mediheal Hospital** in Eldoret. The Dean of Students at **Baraton University, PW2**, confirmed this; and so did the investigating officer, **PW4**, to whom the complainant was presented that night in a discomfiting situation before she was taken to **Mediheal Hospital**, where the complainant was admitted for about two months. The Prosecution evidence in this regard was entirely uncontroverted. There is also credible evidence to demonstrate that the complainant had to undergo surgery twice, in a bid to ensure full and effective treatment and recovery from the injuries she sustained.

[24] As to the nature and extent of the complainant’s injuries, two doctors testified as **PW3** and **PW5**. In his evidence, **Dr. Stephen Ondigo (PW5)**, the surgeon who attended to the complainant at **Mediheal Hospital**, stated that the complainant had an injury to the proximal esophagus with leakage of food material into the left pleura; injury to the apical portion of the lung and injury to the trachea; and that a tube had to be inserted to be inserted in her chest to drain air and blood from the left pleura. His Medical Report shows that the complainant could not feed orally and had to be in ICU initially to supplement her oxygen intake, among other measures. There is no dispute or challenge as to the foregoing evidence.

[25] **PW5** further testified that although the complainant made good progress and was discharged on **30 December 2016**, she was re-admitted on **17 January 2017** with difficulty in breathing and cough. A CT scan was done, which revealed left pleural effusion, which necessitated a major chest operation or thoracotomy. There is no doubt therefore that the complainant sustained life threatening injuries on the night in question; and therefore that the act of stabbing the complainant was sufficiently proximate in terms of what was necessary for purposes of the offence of murder.

[26] As to whether positive intention to kill was proved, Counsel for the appellant made heavy weather of the fact that, in her evidence the complainant conceded that she was not in any relationship with her assailant. According to him the motive was not established. However, it is trite that, in cases of attempted murder, the attempt itself is the main ingredient of the offence (see **R vs. Whybrow** [1951] 35 App Rep 141, per **Lord Goddard, C.J.**); such that the motive becomes immaterial. Hence, in appropriate cases, the intention to kill can be discerned from the nature and intensity of the attack. This is why in **Daniel Muthee vs. Republic Criminal Appeal No. 218 of 2005 (UR)** the Court of Appeal took the view, in a case where the victims succumbed to their injuries, that:

“When the appellant set upon the deceased and cut her with a panga several times and then proceeded to cut the young Allan in similar manner, he must have known that the act of cutting the deceased persons on the head with a sharp instrument would cause death or grievous harm to the victims. We are therefore satisfied that malice aforethought was established in terms of Section 206(b) of the Penal Code.”

[27] The facts presented before the lower court show that the stab was directed at the anterior part of the complainant’s neck and that it transected through her trachea and esophagus to the posterior blood vessels of the neck. In the P3 Form produced by **PW3**, a sketch was drawn in Section B of Part II that demonstrates that complainant’s assailant went for the jugular literally. Clearly, the person had the positive intention of unlawfully causing the death of the complainant, and I so find.

[28] I now turn to the hotly contested issue of identification, and the question whether indeed the appellant was positively identified before the lower court as the complainant’s assailant. The incident was said to have happened at 10.00 p.m. in the night; hence the need for a thorough examination and careful testing of the evidence of identification that was adduced before the lower court by **PW1**. It has long been acknowledged that cases of identification at night in difficult circumstances are fraught with the possibility of mistake or error. This was acknowledged thus by the Court of Appeal in **Hamisi Swaleh Kibuyu vs. Republic [2015] eKLR** as herein under:

“We are alive to the fact that even the most honest of witnesses can be mistaken when it comes to identification (see KAMAU versus REPUBLIC (1975) EA 139). In light of this, conviction on evidence of recognition or identification should only ensue when it is crystal clear and when there is no room for doubt, and hence possible error. The evidence must be beyond speculation or assumption and must positively and irresistibly point to the accused as the culprit.”

[29] What, then, is the proper approach for the trial court to take. The proposition put forth in R. vs. Turnbull & Others [1973] 3 ALLER 549, is instructive. There it was suggested 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?"

[30] Similarly, in Wamunga vs. Republic [1989] KLR 426, the same principle was restated thus:

"It is trite law that where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of conviction."

[31] How is this to be done? The Court of Appeal in the Wamunga Case offered some useful insights thus:

"It is at least essential to ascertain the nature of the light available. What sort of light, its size and its position relative to the suspect; are all important matters helping to test the evidence with the greatest care. It is not a careful test if none of these matters are known because they were not inquired into. In days gone by there would have been a careful inquiry into these matters, by the committing magistrate, state counsel and defence counsel. In the absence of all these safeguards, it now becomes the great burden of Senior Magistrates trying cases of capital robbery to make these inquiries themselves. Otherwise who will be able to test with the greatest care."

[32] A look at the testimony of PW1 before the lower reveals that, although the incident occurred at night, she was able to see and recognize the appellant who followed her up to her house; and that there were lights both outside and inside her house that enabled her to see and recognize the appellant her assailant. Hence, the issue to grapple with is the possibility of mistake or error on the part of the complainant. In particular, the appellant contended that he raised an *alibi* defence which the lower court did not pay any attention to.

[33] The record of the lower court reveals that that no inquiry, or such testing as discussed herein above, was ever made by the learned trial magistrate. She did not inquire as to the source or nature of the light that was available or its intensity. And, as posed in the Wamunga Case, who will carry out such testing if not the senior magistrates charged with the duty of handling such serious cases? And so, I have given specific regard to the evidence of identification in the light of the appellant's defence. It must be pointed out that there was no explicit assertion by the appellant that he was not at the scene when the offence is alleged to have occurred. He instead gave an account of his activities on **26 November 2016**; yet the incident was alleged to have happened on **27 November 2016**. That notwithstanding, and even assuming that he had in mind the night of his arrest, and that he by implication raised an *alibi* before the lower court, the question would be whether the prosecution evidence placed him at the scene of crime.

[34] In Kiarie vs. Republic [1984] eKLR, the Court of Appeal had the following to say in this regard:

"An alibi raises a specific defence and an accused person who puts forward an alibi as an answer to a charge does not in law thereby assume any burden of proving that answer and it is sufficient if an alibi introduces into the mind of the court a doubt that is not unreasonable..."

[35] Similarly, in Athuman Salim Athuman vs. Republic [2016] eKLR, the Court of Appeal held that:

"It is trite that by setting up an alibi defence, the appellant did not assume the burden of proving its truth, so as to raise a doubt in the prosecution case...The burden to disprove the alibi and prove the appellant's guilt lay throughout on the prosecution...the purpose of the defence of alibi is to account for so much of the time of the transaction in question as to render it impossible for the accused person to have committed the imputed act...the correct approach is for the trial court to weigh the defence of alibi against the prosecution evidence..."

[36] It is not altogether clear when this defence was first put forward for the first time. However, it is manifest that at no time did the Prosecution seek to avail itself of the benefits of **Section 309** of the **Criminal Procedure Code**, which provides that:

If the accused person adduces evidence in his defence introducing new matter which the advocate for the prosecution could not by the exercise of reasonable diligence have foreseen, the court may allow the advocate for the prosecution to adduce evidence in reply to rebut it.

[37] Thus, even assuming that the appellant raised his *alibi* for the first time in his unsworn statement of defence, nothing stopped the prosecution from availing itself of the opportunity to disprove the same. Indeed, in Joseph Waiguru Wang'ombe vs. Republic [1980] eKLR the Court of Appeal expressed the view that:

“The defence of alibi was put forward for the first time some four months after the robbery when the appellant made his unsworn statement in Court. Even in such circumstances the prosecution or the police ought to check and test the alibi wherever possible...To weigh one set of evidence with another set of evidence is not to remove the burden of proving that which has to be proved from the party charged with the proof of it...”

[38] The foregoing notwithstanding, having given consideration to the evidence presented before the lower court, it is manifest that, apart from the evidence of **PW1** that placed the appellant at the scene of crime, **PW2** testified that, upon receiving the report of the incident, he rushed to **Jeremic Hospital** and spoke to the appellant; and that she mentioned the name of her assailant as **Ronald**. It was on that account that **PW2** proceeded to the appellant’s home with law enforcement officers and had him arrested. The same information was given by the complainant to **PW4**. In fact, **PW4** stated that the complainant gave him the appellants full name as **Ronald Korir**.

[39] There was no dispute before the lower court that the complainant knew the appellant well prior to the incident and that they engaged in conversation at the time of the incident. Thus, having given careful attention to the entirety of the evidence, I am of the view that the appellant was positively identified and placed at the scene of crime by the evidence tendered; and therefore that his *alibi* was completely displaced by the Prosecution. Needless to mention that evidence of recognition is more reliable and reassuring than that of identification of a stranger. Hence, in **Anjononi & Others vs. Republic (1980) KLR 59** the Court of Appeal held that:

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

[40] As to whether failure by the Prosecution to produce the weapon used detracted from the prosecution case, authorities abound to the contrary. For instance, in **Ekai vs. Republic [1981] KLR 569**, it was held that:

“Failure to produce the murder weapon of itself was not fatal to a conviction. The Court found that even in the absence of the murder weapon, the postmortem report had established beyond reasonable doubt that the injury from which the deceased died had been caused by a sharp weapon.”

[41] The same viewpoint was adopted in **Karani vs. Republic [2010] 1 KLR 73** thus:

“The offence as charged could have been proved even if the dangerous weapon was not produced as exhibit as indeed happens in several cases where the weapon is not recovered. So long as the court believes, on evidence before it, that such a weapon existed at the time of the offence, the court may still enter and has been entering convictions without the weapon being produced as an exhibit.”

[42] Counsel for the appellant annexed some police statements to his written submissions in a bid to demonstrate that there was material contradiction in the evidence of the complainant in so far as she is said to have referred to the appellant by the name **“NGASH”**. In so far as Counsel did not seek leave for the adduction of further evidence as required by **Section 358** of the **Criminal Procedure Code**, those statements cannot be taken into consideration in this appeal as they were never produced before the lower court.

[43] With regard to the submission that the appellant was not warned of the seriousness of the charge or assigned legal counsel on *pro bono* basis, I am in agreement that it is indeed a critical component of a fair trial that the right to legal representation be accorded. **Article 50(2)(g) and (h)** of the Constitution are explicit that:

"Every accused person has the right to a fair trial, which includes the right:-

...

(g) to choose and be represented by, an advocate, and to be informed of this right promptly;

(h) to have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly;

[44] The Appellant complained that his rights under the aforesaid provisions of the Constitution were neither explained to him by the trial magistrate nor honoured by the trial court. His counsel accordingly submitted that that failure occasioned substantial miscarriage of justice warranting the declaration of a mistrial. Whereas the record of the lower court confirms the appellant’s assertions, it also shows that the appellant raised no such request. There is no indication that he was unable to conduct his own defence or that injustice would occur unless he was provided with counsel. Moreover, he was released on bond soon after his arraignment. He was therefore in a position to seek for and engage the services of a lawyer as he did on appeal. The reality is that it is not feasible for the State to provide legal aid to every accused person; and therefore priority has been given to those accused of capital offences. Hence in **David Njoroge Macharia vs Republic [2011] eKLR** the Court of Appeal expressed the view that:

“Art 50 of the Constitution sets out a right to a fair hearing, which includes the right of an accused person to have an advocate if it is in the interests of ensuring justice. This varies with the repealed law by ensuring that any accused person, regardless of the gravity of their crime may receive a state appointed lawyer if the situation requires it. Such cases may be those involving complex issues of fact or law; where the accused is unable to effectively conduct his or her own defence owing to disabilities or language difficulties or simply where the public interest requires that some form of legal aid be given to the accused because of the nature of the offence...We are of the considered view that in addition to situations where “substantial injustice would otherwise result”,

persons accused of capital offences where the penalty is loss of life have the right to legal representation at state expense.”

[45] The appellant was not facing a capital offence and therefore, in the absence of a specific request for legal representation, the lower court cannot be faulted for proceeding as it did. In the same vein, the submission by the appellant’s counsel to the effect that the lower court failed to take into account the appellant’s mitigation has no basis. The record shows that all the appellant had to say in mitigation was that **“I pray case be removed. That is all.”** That notwithstanding, the lower court deferred sentence and had to postpone sentence hearing on two more occasions while awaiting a Probation Officer’s Report, which apparently was not forthcoming.

[46] In the result, and having carefully re-evaluated the evidence adduced before the lower court, I entertain no doubt that the elements of the charge of attempted murder were proved beyond reasonable doubt against the appellant; and that his conviction was premised on a sound basis. Since **Section 220(b)** of the **Penal Code** provides for up to life imprisonment, it cannot be said that 20 years’ imprisonment is harsh, granted the aggravated nature of the injuries that the complainant sustained. The appeal is devoid of merit in my view and is accordingly dismissed in its entirety.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 5TH DAY OF MAY, 2020

OLGA SEWE

JUDGE