Republic v Nzioka & another (Criminal Case E001 of 2021) [2025] KEMC 138 (KLR) (9 June 2025) (Judgment)

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REPUBLIC OF KENYA

IN THE WAMUNYU LAW COURTS

CRIMINAL CASE E001 OF 2021

EP NABWANA, SRM

JUNE 9, 2025

FORMERLY REGISTERED AS

THE CHIEF MAGISTRATE'S COURT AT MACHAKOS

CRIMINAL CASE NUMBER E001 OF 2021

BETWEEN

REPUBLIC .... PROSECUTOR

AND

ALICE MUSUU NZIOKA .... 1ST ACCUSED

CHARLES CHEMA MUTHIANI .... 2ND ACCUSED

JUDGMENT

1. On 4th January 2021, the Accused persons were arraigned in Court and charged with the offence known as grievous harm contrary to section 234 of the *Penal Code*. The particulars of the offence were that on the 15th day of December 2020 at Kitooni Village, Mithini Sub-Location, Masii Location in Mwala Sub-County within Machakos County, the Accused persons unlawfully did grievous harm to Onesmus Kioko Mweu.

2. When the substance of the charge was stated to each Accused and ingredients thereof explained by the Court, each Accused denied the truth of the charge.

PART II: THE PROSECUTION'S CASE

3. The state called six witnesses.

4. PW1, Onesmus Kioko Mweu, recalled that on 15th December 2020 at around 2.30 pm, he went to his piece of land located at Kitooni Village in Masii and that before he got his piece of land, he passed by his neighbour named Stephen Mwau with whom they exchanged pleasantries. He testified that

upon arrival on his said parcel of land, he found the Accused persons and a labourer employed by the 1st Accused, erecting a fence on his said piece of land. He testified that he sought to know from the 1st Accused why they were erecting a fence on his land and that the 1st Accused retorted "hata ndio huyu amejilete." He testified that there was a boundary dispute before that date, which was pending resolution by the Assistant Chief in which he had Accused the 1st Accused of uprooting the sisal boundary between their two pieces of land and threw them into his piece of land. He testified that he was physically assaulted by the two Accused persons and particularly, that he was hit on the left side of the face using a shovel and he temporarily lost consciousness but regained it again. He narrated that the 2nd Accused sat on him and hit him on the head several times using fists and at some point, he tried to strangle him. He narrated that in the meantime, the 1st Accused used a shovel to hit him several times on his shoulders. He narrated that he lost consciousness once again. He narrated that after regaining consciousness again, he pleaded with them not to kill him and at that point, the 2nd Accused hit again using a stick while sitting on his chest. He narrated that the 1st Accused screamed attracting the attention on neighbours who came and milled around the scene. He narrated that one Muia was one of the first responders to arrive. He narrated that he called a County Commissioner who informed police and they came to the scene and took him to Masii Medical Centre for treatment. He narrated that he was referred to the Doctor's Plaza where he received further treatment. He testified that he lost one tooth and another sustained a crack. He also narrated that he suffered a swelling on the left cheek and another injury on the chest. He stated that an x-ray photo was taken on the head and chest. He stated that he also lost Kshs. 10,000 and a key in the fracas. He identified the x-ray photos for the mandible, chest and skull and their respective mandible, chest and skull x-ray Reports they were marked PMFI 1a, 1b, 1c, 2a, 2b and 2c, all dated 15th December 2020. He narrated that he reported to Masii Police Station. He identified the P3 form and it was marked PMFI 3. He narrated that he was also left with hearing problem and migraines. He identified the persons who assaulted him as the Accused persons herein and the labourer of the 1st Accused (not before this Court).

5. In cross-examination by the Accused, PW1 stated that he knew the Accused persons long before the incident since they were neighbours to the said piece land. He stated that he bought the piece of land. He stated that he did not know how the 1st Accused acquired her piece of land. He stated that they were in the process of pursuing title deeds. He stated that the land is subject to succession proceedings. He stated that they had raised money to finance the succession cause. He stated that the full parcel belongs to one person. He stated that the seller who sold him the piece of land is not the same seller who sold a piece of land to the 1st Accused. He stated that the 1st Accused's piece of land and his belong to cousins from the same clan. He stated that he could not tell who bought first, but he bought his on 9th October 2002. He stated that the 1st Accused was not erecting a fence on her piece of land but on his land. He stated that he had gone to see the progress of his crops for purposes of weeding. He stated that he arrived at 2.30 pm using a motor cycle. He testified that there was a boundary dispute before that date, which was pending resolution by the Assistant Chief in which he had Accused the 1st Accused of uprooting the sisal boundary between their two pieces of land and threw them into his piece of land. He stated that he had informed the village headman who is a witness in this matter and the assistant chief but the 1st Accused denied committing the act. He stated that he saw the 2nd Accused hitting him using a shovel and fists. He stated that the 2nd Accused sat on his belly and hit his head several times using fists. He stated that he lost consciousness temporarily and regained. He stated that he did not attack the Accused persons.

6. PW2, Stephen Musyoka Mwau, recalled that on 15th December 2020, he was at his home when at around 2 pm, PW1 came and togther with PW2's wife, they welcomed him and upon exchanging pleasantries, PW1 informed him that he was going to check his land. He narrated that PW1 left after

spending about 15 minutes in his home. He narrated that after PW1 left, he took a nap and later, his wife who had heard noise awoke him up and he rushed to the direction of the noise. He narrated that on arrival at the scene, he found PW1 bleeding from the nose and mouth. He stated that he did not see him being beaten but PW1 narrated to him the happenings. He narrated the police came and took PW1 away using a motor vehicle GKB 816H, Landcruiser. He stated that he did not accompany them. He stated that after they left, he inquired from neighbours who narrated how PW1 was assaulted by the Accused persons.

7. In cross-examination by the Accused, PW2 stated that he had known the 1st Accused from the 1990s. He stated that he did not hear the 1st Accused “ua mwizi”. He stated that he was not there when the incident started.

8. PW3, Henry Muia Kitavi, recalled that on 15th December 2020, while at his home which is near the scene, he heard noise at around 2.30 pm and rushed to the direction of the noise and found the 2nd Accused sitting on top of PW1 trying to strangle him and the 1st Accused beating PW1 using a spade and another mand beating PW1 using a metal rod. He narrated that he physically restrained the 2nd Accused and told him that PW1 was not a thief since they were shouting as much. He narrated that he injured PW1 on the cheek. He stated that he did not know the genesis of the assault. He narrated that he laid PW1 on the ground well since he was bleeding from the mouth and nose. He stated that he did not know the other man well.

9. In cross-examination by the Accused, PW3 stated that his land and that of the 1st Accused is about 700 metres apart. He stated that he reached the scene within about 2 minutes. He stated that he found people at the scene and the number swelled to about 20 people. He stated that in his witness statement, he did not give a list of the villagers who were present.

10. PW4, Amos Muli Mutua, informed this Court that he was the village manager at the material time and he recalled that on 15th December 2020, he received a phone call from the Assistant Chief I n charge of Mithini Sub-Location Ms. Pauline Mwende who informed him that there was a reported incident at the boundary of the PW1’s land and the 1st Accused and asked him to rush to the scene. He narrated that he rushed to the scene and directed the Accused persons to stop the exercise of erecting a fence until the boundary dispute is resolved. He narrated that he left for his house and after about 20 minutes, PW2 reached him on phone and informed him that PW1 had been assaulted. He narrated that he rushed to the scene and found PW1 on the ground bleeding from the mouth, surrounded by a crowd. He narrated that upon inquiry, he was informed by PW1 that he had been assaulted by the Accused persons. He narrated that he directed the police officers to the scene and they picked PW1 and took him to hospital.

11. In cross-examination by the Accused, PW4 stated that he was sent by the assistant chief. He stated that he used a bodaboda to get to the scene. He stated that he returned a second time from his house which is about 500 metres away from the scene and found a crowd of about 25-30 people surrounding PW1. He stated that he did not witness the assault.

12. PW5, Mr. Philip Njaramba, the Senior Clinical Officer attached to Masii Hospital, informed the Court that he was in Court to produce a P3 Form which had been filled by one Jackson Mutia, a clinical officer who examined PW1 and filled a P3 Form. He testified that he was familiar with the signature and handwriting of the maker. He stated that the trouser of PW1 had blood stains; he had a swollen and black left eye with swelling extending to the left jaw region which was tender to touch with loss of the lower premolar tooth of the lower left dentine; multiple soft tissue injuries extending from exterior to posterior chest region and the left rib cage region which were tender to touch; and minor abrasions o the right upper limb at the posterior aspect. He formed an opinion that the injuries were 3 days old

and a blunt object must have been blunt and that he sustained grievous harm. He produced the P3 Form as exhibit 3. PMFI 1a, 1b, 1c, 2a, 2b, and 2c were produced as Exhibits 1a-2c. He stated that there was no significant injury on the mandibular area since there was no fracture of the mandible bone.

13. In cross-examination by the Accused, PW5 stated that he was not the maker of the report. He stated that the injuries were consistent with assault. He stated that the PW1 lost a tooth.

14. PW6, PC Henry Omosa, attached to Masii Police Station was the Investigating Officer. He narrated that upon considering the evidence, he concluded that there was sufficient evidence to charge and proceeded to charge the Accused for grievous harm.

15. In cross-examination, PW6 stated that he was not given the title deed to the land. He stated that he was not investigating a land case. He stated that he did not require the complainant to avail land ownership documents. He stated that he did not recover the spade.

Part III: The Defence

16. In her sworn statement, DW1, the 1st Accused, recalled that on 15th December 2020, she did not occasion grievous harm upon the complainant as alleged. She testified on 15th December 2020, in company of her son, the 2nd Accused and a labourer named John Musyoki, they went to her piece of land which she had occupied since 1997, which borders that of the complainant, to erect a fence. She narrated that after erecting the fence, she left and went home and at around 2 pm, while at her home which is near the piece of land, she heard a voice shouting "you stupid people, who gave you permission to put a fence on my land?" She narrated that the complainant, Onesmus Kioko Mweu, started to remove the poles which they had erected and when he was unable to remove even one, he started to kick the labourer who then fled from the scene. She narrated that the complainant then turned to the 2nd Accused and hit him using a fist and hit her on the left hand using a stick and that her small finger picked a swelling. She narrated that he pushed the 2nd Accused to the ground and when he fell on the ground, he sat on him and she screamed for help. She narrated that people rushed to the scene and complainant fled from the scene and crossed over to his piece of land. She narrated that she got a chance to rush home and pick her porch to go and report the incident to the police. She narrated that she finally reported to the police at Masii and issued with a P3 Form which she took to Masii Level 4 Hospital and it was filled after examination. She identified the P3 Form and treatment notes and they were marked DMFI 1 and 2. She narrated that on 2nd January 2021, they were arrested. She denied the allegation that they occasioned grievous harm upon the complainant. She narrated that the piece of land belongs to her late father and is subject to High Court Succession Cause Number 291 of 2016. The documents in the said succession cause were marked DMFI 3.

17. In cross-examination, DW1, the 1st Accused, stated that she knows the complainant and that the complainant acquired his piece of land in 2002. She stated that she saw him on 15th December 2020. She stated that on 15th December 2020, the complainant was in her piece of land and not in his piece of land. She stated that she was given the piece of land by her mother. She stated that she has no title deed over the piece of land. She stated that the succession cause is active. She stated that there was no injunction. She stated that they did not go to the chief. She stated that it was the complainant who assaulted her and her son, the 2nd Accused. She stated that the complainant kicked her on her left hand. She stated that she was treated on 15th December 2020. When she was asked to read the P3 Form, she read "the right hand and the approximate age of the injury was 2 days." She insisted that she was treated on the same day. She stated that there is no survey report over the boundary. She stated that none of the neighbours who turned up after she screamed is a defence witness in this matter. She stated that no government vehicle came to the scene.

18. DW2, the 2nd Accused denied occasioning grievous harm upon the complainant. He narrated that on 15th December 2020, in company of her mother and John, they were erecting a fence on her mother's piece of land and at about 2 pm, the complainant came and started insulting them "stupid" and tried to remove the poles but he was unable. He narrated that he kicked John and his mother asked them to step aside. He narrated that the complainant pushed him to the ground and hit him with a fist leading him to land on the ground. He narrated that when neighbours came, they found the complainant pinning the 2nd Accused on the ground and helped in letting him free after which he rushed to Masii police station where he lodged a complaint. He narrated that he was issued with a P3 Form which was filled after examination at Masii Hospital. He identified the P3 Form and treatment notes and they were marked DMFI 4 & 5 respectively. He testified that he sustained injuries on the hand. He narrated that the land they were fencing belongs to them. He denied occasioning grievous harm upon the complainant.

19. In cross-examination, DW2 stated that he had a pliers and he stated the could not recall whether he had shovel. He stated that John had a hammer and that there was a wheelbarrow. He stated that the complainant used insulting language "you stupid people, what are you doing in my land?" He stated that he attempted to remove the poles. He stated that he had no survey report. He stated that he was assaulted by the complainant. He conceded that the P3 Form indicated that the injuries were 2 days old.

20. DW3, John Maingi Musyoki, recalled that on 15th December 2020, together with the Accused persons, they were fencing the 1st Accused's piece of land using a barbed wire. He recalled that at around 2 pm, a person unknown to him came and started insulting them as "stupid". He narrated that he slapped him and pushed the 2nd Accused to the ground. He narrated that the complainant held the 2nd Accused by the neck and at that point, he fled. He narrated that he also kicked the 1st Accused.

21. In cross-examination, DW3 stated that they had no wheelbarrow. He stated that the 2nd Accused had a pliers and there was no shovel and no spade. He stated that the 1st Accused was in the house.

22. DW4, Ojijo Witham, a lawyer serving as the Court administrator of Machakos Law Courts came and produced proceedings in High Court Succession Number 261 of 2016. He stated that the name of the 1st Accused appears as one of the potential beneficiaries.

23. In cross-examination, DW4 stated that the matter is still pending hearing and determination.

24. By consent, MDFI 1-4 were produced as Defence exhibits 1-4.

25. In his written submissions dated 23rd September 2024 and filed on even date, Mr. Mutia of Mutia JM & Associates Advocates, instructed by the Accused persons, submits that emanating from the evidence it is not in dispute that on 15.12.2022, the two Accused persons together with a casual labourer were going about that day's business in their ancestral land where they are beneficiaries. It is argued that the complainant did not bring any document of ownership to show that he is the owner of the land. It is further argued that the alleged offence having allegedly been committed in a land that the complainant claims to own, he had a responsibility to show that he was lawfully there, and that "otherwise, he can on (sic) be a trespasser and transgressor who is not entitled to the protection of the law." Learned Counsel submits that during cross-examination of PW1, PW1 confirmed that he did not have any title deed to the land and the registered owner of the parcel is deceased. It is submitted that the witnesses who were called in support of the PW1's evidence were not present at the scene where the incident allegedly occurred and that the medical officer who produced the P3 Form was not the one who treated the complainant.

26. It is submitted that the Accused persons testified and called two witnesses to support their case. It is submitted that the 1st Accused testified that DW3 was putting up a fence, assisted by the 2nd Accused,

when they were attacked by the complainant. It is submitted that DW3 testified that he ran away but the 2nd Accused was not lucky. It is submitted that the witnesses testified that the 1st Accused went to rescue the 2nd Accused and also ended up being assaulted by the complainant. It is submitted that the two Accused persons reported the incident at Masii Police station and were referred to Masii Health Centre for treatment and that the P3 forms and treatment notes were produced as Defence Exhibits 1-4. It is submitted that DW4, a Court Administrator from Machakos Law Courts, produced the set of pleadings for Estate of Joseph Nzioka Ngwili which show the 1st Accused is a beneficiary in the estate.

27. Learned counsel proposes that the only question for determination is whether the prosecution has proved the case against the Accused persons beyond reasonable doubt. In this connection, it is argued that all the six prosecution witnesses were inconsistent, untruthful, gave weak evidence and failed to link the two Accused persons to the charge of grievous harm and only gave scanty evidence bringing up evidence that points to a clear set up to implicate the two Accused persons. It is submitted further that the P3 Form for the complainant shows that he reported his case on 15.12.2020 at 1700 hours, while the report by the Accused persons was made on 15.12.2020 at 1620 hours. It is submitted further that the treatment notes for the complainant show that he was treated on 18.12.2020 at Masii Health Centre and there is no explanation offered why he had to wait to go to be treated 3 days later, if he was injured. It is argued that this fact alone raises doubts and suspicions as to whether the Complainant was indeed injured. It is submitted that the prosecution made no effort to avail weapons used in the alleged commission of the offence. It is submitted that Onesmus Kioko Mweu (PW1) claimed that he was assaulted by three people using a shovel and a mattock but the weapons claimed to have been used remain key in this case to enable Court to believe that there was “a fight” and that such material/or items were used during the commission of the offence alleged. It is submitted that the prosecution’s evidence through PW1 was that he was attacked by three people including the two Accused persons, using two weapons (mattock and shovel) but the witness did not tell the Court how the said two weapons were used on him by the alleged three attackers at the same time. It is argued in this connection that the complainant did not come out clear on which attacker used which weapon during the assault. This Court is urged to find that the complainant failed to demonstrate to the Court and therefore should not be believed at all. Regarding PW3, it is submitted that he reached at the scene late and only tendered hearsay evidence gotten from a small child and that he did not see any weapons used in assaulting the complainant. Clearly, he gave evidence which he heard from a child who was not called as a witness. This Court is urged to find that the evidence of such a witness is weak and should be disregarded by this Court.

28. It is submitted further that the circumstances surrounding this case according to the covering report, borders a boundary dispute between the complainant and the two Accused persons and that the Accused persons were legally in their land when the complainant attacked and claimed the land is his. It is argued that during the hearing, the complainant failed to avail any evidence in Court to show that he owns the said land which he claimed to have been the scene of the incident or any evidence that he owns any land nearby and that in the absence of such evidence relating to ownership of the subject land, this Court is urged to find that this fact remains an allegation on the part of the prosecution.

29. Regarding PW6, it is submitted that upon cross-examination, it was established that the investigating officer did not visit the scene and that he did not identify the items used in the alleged commission of the offence. Further, it is submitted that PW6 did not confirm who the owners of the land which is central to this charge and that the only excuse was that he was not investigating on issues of land and its ownership. It is argued that ownership of the land is very central the charge since the complainant’s position is that the Accused persons were fencing his land.

30. Regarding PW5, it is submitted that he testified and produced the P3 Form but upon cross-examination, he confirmed that he was not the one who treated the complainant and the two Accused persons who were treated at Masii Health Centre. Further, it is submitted that he was not able to answer whether the two Accused persons were treated at Masii health Centre, the same facility that treated and issued treatment notes to the Accused persons as well. It is submitted that the same doctor also produced x-rays in attempt to suggest that there was a lost tooth by the complainant during the fracas but the doctor did not come out clearly on whether his field cuts across and performs duties of a dentist. This Court is urged to find that the issue of a lost tooth is not clearly demonstrated to this Court and that the initial treatment notes relating to the lost tooth were not availed to the Court and not enough light was shade to explain the age of the x-ray. It is submitted that the complaint claims to have visited different health facilities the first one being Masii Health Centre and Machakos Doctors Plaza where x-ray relating to the lost tooth was done and that the two doctors were to be availed to shade enough light especially the dentist where x-ray was done. In this regard, reliance is placed upon Republic v Nicodemus Muthiani Munyoki [2020] eKLR, and submitted that the Court held that it was necessary for initial treatment notes to be produced where the medical officer who treated the complainant and the one who filled the P3 form were not the same. Further reliance was placed upon Okoth Abongo v Republic [2000] eKLR; P N W v Republic [2017] eKLR; and Douglas Kamwaka Maina v Republic [2016] eKLR.

31. This Court is thus urged to find that the charge has not been proven beyond reasonable doubt and acquit the Accused persons under section 215 of the *Criminal Procedure Code*.

Part IV: Points for Determination

32. Commending themselves for determination, gleaning from the charge and defence, are three questions to determine as follows:

    i. First, whether the prosecution has proved beyond reasonable doubt that the complainant sustained grievous harm on 15th day of December 2020, at Kitooni Village, Mithini Sub-Location, Masii Location in Mwala Sub-County within Machakos County.

    ii. Second, whether the prosecution has proved beyond reasonable doubt that the act or acts which caused the said grievous harm were committed by the Accused Persons. The subsidiary question in this connection - arising from the defence - is whether failure to recover and produce the alleged weapons which were allegedly applied by the Accused persons to occasion the grievous harm afore-concluded is tantamount to failure to lay an unassailable nexus between the grievous harm asserted and the Accused persons and whether this failure is ultimately fatal.

    iii. Third, whether the act or acts which led to the grievous harm were unlawful?

PArt V: Analysis of the Law; Examination of Facts; Evaluation of Evidence; And Determination

33. The legal burden of proof (onus probandi incumbit ei qui dicit, non ei qui negat) is the duty placed on the shoulders of a party in a dispute to provide sufficient proof and justification for the position taken. In criminal cases, this duty (otherwise originally known as brocard ei incumbit probatio qui dicit, non qui negat) is on the shoulders of the prosecution. It essentially means that the legal burden of proof rests on who asserts, not on who denies. This said legal burden draws impetus from a fair hearing principle now enshrined in Article 50(2)(a) of *the Constitution* that a person Accused of an offence ought to be presumed innocent until proven guilty. See sections 107, 108 and 109 of the *Evidence Act*.

34. What then amounts to proof? In the Australian case of Britestone Pte Ltd vs. Smith & Associates Far East Ltd [2007] 4 SLR 855, which has been adopted in Kenya in inter alia Paul Thiga Ngamenya v Republic [2018] eKLR, V.K. Rajah, JA expressed a view that "The Court's decision in every case will depend on whether the party concerned has satisfied the particular burden and standard of proof imposed on him. Since the terms proved, disapproved and not proved are statutory definitions contained in the *Evidence Act*. The term proof whenever it appears in the *Evidence Act* and unless the context otherwise suggests, means, the burden to satisfy the Court of the existence or non-existence of some fact."

35. The legal burden of proof in criminal cases never leaves the prosecution's backyard, except in very rare occasions. In fact, acts or conduct or even legislation which has attempted to do has been sternly frowned upon. In Senator Johnstone Muthama vs. Director of Public Prosecutions & 3 Others [2020] eKLR, J. Lesiit, L. Kimaru & J. M. Mativo, JJ frowned upon section 96(a) of the *Penal Code* for shifting the burden of proof to the Accused and consequently declared it as offending the fair trial principle of being presumed innocent until proven guilty as enshrined under Article 50(2)(a) of *the Constitution* and the Constitutional guarantee against self-incrimination as enshrined under Article 49(1)(a)(ii), which act is further in flagrant violation of *the Constitution* which exempts, under Article 25 thereof, from limitation contemplated under Article 24 thereof of inter alia the fair trial principles enshrined under Article 50 thereof. The Court explained that the right to a fair trial was a norm of international human rights law designed to protect individuals from the unlawful and arbitrary curtailment or deprivation of other basic rights and freedoms, the most prominent of which were the right to life and liberty of the person. It was guaranteed under article 14 of the International Covenant on Civil and Political Rights (ICCPR). The fundamental importance of the right to fair trial was illustrated not only by the extensive body of interpretation it had generated worldwide but, by the fact that under article 25(c) of *the Constitution*, it was among the fundamental rights and freedoms that could not be limited or abridged.

36. Before I invoke an old English decision, it's instructive to observe that our criminal justice system did not start on a clean slate. Kenya built its legal system on the English common law system. In Peter Wafula Juma & 2 Others vs. Republic [2014] eKLR, F. Gikonyo and A. Mabeya, JJ, had this to say about the legal burden of proof in criminal cases: "Kenya adopted common law tradition and the position on legal burden of proof in criminal cases is as stated by Viscount Sankey L.C (ibid); the prosecution bears the legal burden of proof throughout the trial. In Kenya, a statutory provision which shifts the legal burden of proof in criminal cases is unconstitutional except is so far as it creates only evidential burden, relates to acceptable exceptions such as the defence of insanity, or other rebuttable presumptions of law. This law is consistent with and upholds the Constitutional right of the Accused; presumption of innocence, not to give incriminating evidence and to remain silent..."

37. In the English cause celebre decision in Woolmington vs. DPP [1935] A.C 462, Lords Viscount Sankey, Hewart, Atkin, Tomlin and Wright laid the golden thread (presumption of innocence) principle in criminal cases. Reginald Woolmington had shot his wife after falling out and was therefore charged with murder of his wife. Wilmington's defence was that he did not intend to kill his wife and thus lacked the requisite mens rea. He told the jury that he had planned to scare her by threatening to kill himself if she refused to return and reunite with him and in the process, he had attempted to show her the gun which discharged accidentally, killing her instantly. Swift, J. ruled that the case was so strong against Woolmington that the burden of proof was on him to show that the shooting was accidental. He was convicted and sentenced to hang. It was upheld on appeal to the Court of Criminal Appeal on the premise of the statement of law in Foster's Crown Law that if a death occurred, it is presumed to be murder unless proved otherwise. He appealed to the House of Lords. The issue brought to the

House of Lords was whether the statement of law in Foster's Crown Law, which the Court of Criminal Appeal applied, was correct when it said that if a death occurred, it is presumed to be murder unless proved otherwise. Viscount Sankey made a statement which was unanimously adopted by the rest in what has now come to be known as the 'Golden Thread' speech. At page 481, Viscount Sankey L.C. enunciated the law on legal burden of proof in criminal matters as follows: "Juries are always told that if conviction there is to be the prosecution must prove the case beyond reasonable doubt. This statement cannot mean that in order to be acquitted the prisoner must "satisfy" the jury. This is the law as laid down in the Court of Criminal Appeal in R. v. Davies (8 C.A.R. 211) the head-note of which correctly states that where intent is an ingredient of a crime there is no onus on the Defendant to prove that the act alleged was accidental. Through 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...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."

38. It bears underscoring that this golden thread principle is now enshrined in our Constitution of Kenya 2010, under Article 50(2)(a) thereof, as part of the wider package of fair trial principles and in that regard, the holding in that decision holds true in Kenya. In Mkendeshwo vs. Republic [2002] 1 KLR 46, the Court of Appeal enunciated thus: "In criminal cases the burden is always on the prosecution to establish the guilt of the Accused beyond any reasonable doubt and generally, the Accused assumes no legal burden of establishing his innocence."

39. However, in considerably limited instances, once the onus of proof placed on the shoulders of the prosecution by dint of sections 107, 109 and 110 of the *Evidence Act* and the incidence of burden contemplated by section 108 thereof, is discharged, the evidential burden of proof shifts to the Accused Courtesy of and the limited circumstances outlined under section 111 of the said Act. Section 111 of the *Evidence Act* provides thus: "When a person is Accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, or qualification to, the operation of the law creating the offence with which he is charged and the burden of proving any fact especially within the knowledge of such person is upon him: Provided that such burden shall be deemed to be discharged if the Court is satisfied by evidence given by the prosecution, whether in cross- examination or otherwise, that such circumstances or facts exist: Provided further that the person Accused shall be entitled to be acquitted of the offence with which he is charged if the Court is satisfied that the evidence given by either the prosecution or the defence creates a reasonable doubt as to the guilt of the Accused person in respect of that offence. (2) Nothing in this section shall - (a) prejudice or diminish in any respect the obligation to establish by evidence according to law any acts, omissions or intentions which are legally necessary to constitute the offence with which the person Accused is charged; or (b) impose on the prosecution the burden of proving that the circumstances or facts described in subsection (1) do not exist; or (c) affect the burden placed upon an Accused person to prove a defence of intoxication or insanity."

40. What is the standard of proof in criminal cases? In English cases of Re H (minors) sexual abuse; standard of proof {1996} AC 563 and 505 for the Home Department vs. Rehman {2003} 1 AC 153, which was adopted in Kenya in inter alia Paul Thiga Ngamenya vs. Republic [2018] eKLR, the House of Lords laid down a series of guiding principles on standards of proof for civil and criminal cases and their purport as follows: "(1). Where the matters in issue are facts, the standard of proof required in non-criminal proceedings is the preponderance of probability, usually referred to as the balance of probability. (2). The balance of probability standard means that the Court must be satisfied that the event in question is more likely than not to have occurred. (3). The balance of probability standard is

a flexible standard. This means that when assessing this probability, the Court will assume that some things are inherently more likely than others."

41. The standard required to prove a criminal case is evidence which convinces the Court beyond reasonable doubt. The doubt referred to in this standard is the doubt that can be given or a reason assigned as opposed to speculation. A person Accused of an offence is the most favourite child of the law. Adverting to the standard of proof in criminal cases, Mativo, J. says in Philip Muiruri Ndaruga vs. Republic [2016] eKLR that "To give an Accused person the benefit of doubt in a criminal case, it is not necessary that there should be many circumstances creating the doubt(s). A single circumstance creating reasonable doubt in a prudent mind about the guilt of an Accused is sufficient. The Accused is entitled to the benefit of doubt not a matter of grace and concession, but as a matter of right. An Accused person is the most favourite child of the law and every benefit of doubt goes to him. Reasonable doubt is not mere possible doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence leaves the mind of the Court in that condition that it cannot say it feels an abiding conviction to a moral certainty of the truth of the charge."

42. The purport of the words 'beyond reasonable doubt' which define the standard for proof of a criminal offence, has been attempted in manifold decisions of the superior Courts, locally and beyond. The locus classicus English case in this regard is the decision in Miller vs. Minister of Pensions [1947] 2 All ER 372, where Denning J. who holds that "Proof beyond reasonable doubt does not mean proof beyond a shadow of a doubt . . . If the evidence is so strong as to leave only a remote possibility in the defendant's favour, which can be dismissed with the sentence, 'Of course it is possible, but not in the least probable', the case is proved beyond reasonable doubt. But nothing short of that would suffice."

43. Also, in Walters vs. R [1969] 2 AC 26, approved in R vs. Gray 58 Cr. App. R. 177 at 183, Lord Diplock attempted to define 'reasonable doubt' as follows: "A reasonable doubt is that quality and kind of doubt which, when you are dealing with matters of importance in your own affairs, you allow you to influence you one way or the other."

44. What is the entry point in criminal trials? When hearing of the matter begins, the Court begins from a tabula rasa which is that the Accused is innocent and this state of affairs perpetuates itself throughout the trial proceedings until such time as the prosecution has put on the table evidence which satisfies the Court beyond reasonable doubt that the Accused is guilty. In 1997, the Supreme Court of Canada in R vs. Lifchus [1997] 3 SCR 320, suggested the following explanation: "The Accused enters these proceedings presumed to be innocent. That presumption of innocence remains throughout the case until such time as the crown has on evidence put before you satisfied you beyond a reasonable doubt that the Accused is guilty. ....the term beyond a reasonable doubt has been used for a very long time and is a part of our history and traditions of justice. It is so ingrained in our criminal law that some think it needs no explanation, yet something must be said regarding its meaning. A reasonable doubt is not imaginary or frivolous doubt. It must not be based upon sympathy or prejudice. Rather, it is based on reason and common sense. It is logically derived from the evidence or absence of evidence. Even if you believe the Accused is guilty or likely guilty, that is not sufficient. In those circumstances you must give the benefit of the doubt to the Accused and acquit because the crown has failed to satisfy you of the guilty of the Accused beyond a reasonable doubt. On the other hand, you must remember that it is virtually impossible to prove anything to an absolute certainty and the crown is not required to do so. Such a standard of proof is impossibly high. In short if, based upon the evidence before the Court, you are sure that the Accused committed the offence you should convict since this demonstrates that you are satisfied of his guilty beyond reasonable doubt."

45. The standard is such that, in William Blackstone's formulation (in his seminal work, Commentaries on the Laws of England, published in the 1765) states that "It is better that ten guilty persons escape than

that one innocent suffer." Blackstone holds a thesis that "All presumptive evidence of felony should be admitted cautiously; for the law holds it better that ten guilty persons escape, than that one innocent party suffer." Benjamin Franklin (in Benjamin Franklin, Works 293 (1970), Letter from Benjamin Franklin to Benjamin Vaughan [14 March 1785]), subscribes to the same school of thought (and thus echoes Blackstone's jurisprudence) and states that "It is better 100 guilty Persons should escape than that one innocent Person should suffer."

46. While defending British Soldiers who were charged with murder for their role in the Boston Massacre, John Adams also expanded upon the rationale behind Blackstone's Formulation when he stated that "It is more important that innocence should be protected, than it is, that guilt be punished; for guilt and crimes are so frequent in this world, that all of them cannot be punished.... when innocence itself, is brought to the bar and condemned, especially to die, the subject will exclaim, 'it is immaterial to me whether I behave well or ill, for virtue itself is no security.' And if such a sentiment as this were to take hold in the mind of the subject that would be the end of all security whatsoever."

47. And what is the volume of evidence required to prove a case and how is the evidence measured in civil cases? S.C. Sarkar in Hints of Modern Advocacy and Cross-examination (7th Edition, 1954, at page 16) reasons that evidence is weighed and not numbered. He argues that it is wrong to suppose that a point may be established if only a large number of witnesses can be called to prove it. Save for the requirement of corroboration under section 124 of the *Evidence Act*, this position ties well with section 143 of the *Evidence Act* which provides that "No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact." Section 124 of the Evidence requires that before an Accused is convicted, the Court satisfies itself that the evidence of the victim is corroborated but in sexual offences, a window and exception to the general rule has been provided to take care of situations where the only evidence available is that of the alleged victim of the offence, in which case the Court shall receive the evidence of the alleged victim and proceed to convict the Accused person if, for reasons to be recorded in the proceedings, the Court is satisfied that the alleged victim is telling the truth. The text of section 124 of the *Evidence Act* reads as follows: "Notwithstanding the provisions of section 19 of the *Oaths and Statutory Declarations Act* (Cap. 15), where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the Accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him: Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the Court shall receive the evidence of the alleged victim and proceed to convict the Accused person if, for reasons to be recorded in the proceedings, the Court is satisfied that the alleged victim is telling the truth."

48. The standard of proof, as I discern it, is that though be some doubt, it should be of such measure that it cannot affect a reasonable person's belief regarding whether or not the Accused is guilty. It does not therefore mean that the proof must be beyond a shadow of a doubt. If it were so, it would be so high a standard as to be practically unattainable. It certainly does not mean that every peripheral fact has to be established up to this standard.

49. Having discussed the broad framework within which this case will be determined, it's now time to embark on analysis of the law, examination and interrogation of facts and evaluation of evidence on each of the three questions, seriatim.

(i) Whether the prosecution has proved beyond reasonable doubt that the complainant sustained grievous harm

50. This is a question of both fact and law. Section 234 of the *Penal Code* provides that "Any person who unlawfully does grievous harm to another is guilty of a felony and is liable to imprisonment for life."

51. There are three elements of the offence of grievous harm as follows: (i) first, the victim must have sustained grievous harm; (ii) second, the harm must have been inflicted unlawfully; and (iii) third, the grievous harm must have been inflicted by the person Accused. See Pius Mutua Mbuvi vs. Republic [2021] eKLR, where Kemei, J. expressed the following as the ingredients of this offence: "14. I note that the appellant was charged under section 234 of the Penal code and that the same is the punishment section; the charge sheet ought to have indicated section 231 as read with section 234 of the *Penal Code*. For the appellant to be convicted of the offence of doing grievous harm c/s 231 as read with section 234 of The *Penal Code*, the prosecution had to prove each of the following essential ingredients beyond reasonable doubt; a. The victim sustained grievous harm. b. The harm was caused unlawfully. c. The Accused caused or participated in causing the grievous harm."

52. Section 4 of the *Penal Code* defines "harm" to mean "any bodily hurt, disease or disorder whether permanent or temporary." The same section 4 of the *Penal Code* defines "grievous harm" to mean "any harm which amounts to a maim or dangerous harm, or seriously or permanently injures health, or which is likely so to injure health, or which extends to permanent disfigurement, or to any permanent or serious injury to any external or internal organ, membrane or sense."

53. Gathering from the definition of grievous harm, the alternative components of grievous harm must be read disjunctively. An injury which meets this threshold can only be determined by expert evidence. In John Oketch Abongo vs. Republic [2000] eKLR, the Court of Appeal held that the several ingredients should be read disjunctively stating as follows: "We are satisfied that the complainant's injury amounted to grievous harm as defined in the *Penal Code*. The definition contains several ingredients of what constitutes grievous harm. We are of the opinion that the presence of any one of these ingredients would suffice to disclose grievous harm. Here, we are satisfied that the complainant's injury did amount to dangerous or serious injury to health both of which are ingredients contained in the definition."

54. Did the complainant suffer a maim or dangerous harm, or serious or a permanent injury to his health, or an injury which is likely affect his health or extend to a permanent disfigurement, or a permanent or serious injury to any external or internal organ, membrane or sense?

55. In order to prove this fact, the results of examination of the complainant by a relevant medical expert as reported in the said Medical Examination Report and the evidence adduced by the victim and the eyewitness are central.

56. In his said Medical Report (the prosecution exhibit 3), PW5 formed an opinion that the complainant sustained grievous harm. The said report indicates that the complainant lost his 2nd lower premolar tooth of the lower left dentine, as the dominant injury.

57. The Accused persons contested the fact that the complainant lost his 2nd lower premolar tooth of the lower left dentine. It was argued that this was contrived to falsely implicate the Accused persons to this offence. It is submitted further that the P3 Form for the complainant shows that he reported his case on 15.12.2020 at 1700 hours, while the report by the Accused persons was made on 15.12.2020 at 1620 hours. It is submitted further that the treatment notes for the complainant show that he was treated on 18.12.2020 at Masii Health Centre and there is no explanation offered why he had to wait to go to

be treated 3 days later, if he was injured. It is argued that this fact alone raises doubts and suspicions as to whether the Complainant was indeed injured. Further, it is submitted that the prosecution made no effort to avail weapons used in the alleged commission of the offence. It is submitted that Onesmus Kioko Mweu (PW1) claimed that he was assaulted by three people using a shovel and a mattock but the weapons claimed to have been used remain key in this case to enable Court to believe that there was "a fight" and that such material/or items were used during the commission of the offence alleged. It is submitted that the prosecution's evidence through PW1 was that he was attacked by three people including the two Accused persons, using two weapons (mattock and shovel) but the witness did not tell the Court how the said two weapons were used on him by the alleged three attackers at the same time. It is argued in this connection that the complainant did not come out clear on which attacker used which weapon during the assault. This Court is urged to find that the complainant failed to demonstrate to the Court and therefore should not be believed at all. Regarding PW3, it is submitted that he reached at the scene late and only tendered hearsay evidence gotten from a small child and that he did not see any weapons used in assaulting the complainant. Clearly, he gave evidence which he heard from a child who was not called as a witness. This Court is urged to find that the evidence of such a witness is weak and should be disregarded by this Court. It is submitted further that the circumstances surrounding this case according to the covering report, borders a boundary dispute between the complainant and the two Accused persons and that the Accused persons were legally in their land when the complainant attacked and claimed the land is his. It is argued that during the hearing, the complainant failed to avail any evidence in Court to show that he owns the said land which he claimed to have been the scene of the incident or any evidence that he owns any land nearby and that in the absence of such evidence relating to ownership of the subject land, this Court is urged to find that this fact remains an allegation on the part of the prosecution. Regarding PW5, it is submitted that he testified and produced the P3 Form but upon cross-examination, he confirmed that he was not the one who treated the complainant and the two Accused persons who were treated at Masii Health Centre. Further, it is submitted that he was not able to answer whether the two Accused persons were treated at Masii health Centre, the same facility that treated and issued treatment notes to the Accused persons as well. It is submitted that the same doctor also produced x-rays in attempt to suggest that there was a lost tooth by the complainant during the fracas but the doctor did not come out clearly on whether his field cuts across and performs duties of a dentist. This Court is urged to find that the issue of a lost tooth is not clearly demonstrated to this Court and that the initial treatment notes relating to the lost tooth were not availed to the Court and not enough light was shade to explain the age of the x-ray. It is submitted that the complaint claims to have visited different health facilities the first one being Masii Health Centre and Machakos Doctors Plaza where x-ray relating to the lost tooth was done and that the two doctors were to be availed to shade enough light especially the dentist where x-ray was done. In this regard, reliance is placed upon Republic v Nicodemus Muthiani Munyoki [2020] eKLR, and submitted that the Court held that it was necessary for initial treatment notes to be produced where the medical officer who treated the complainant and the one who filled the P3 form were not the same. Further reliance was placed upon Okoth Abongo v Republic [2000] eKLR; P N W v Republic [2017] eKLR; and Douglas Kamwaka Maina v Republic [2016] eKLR. This Court is thus urged to find that the charge has not been proven beyond reasonable doubt and acquit the Accused persons under section 215 of the *Criminal Procedure Code*.

58. Despite the heavy turbulent by the Accused persons against this particular fact, the medical evidence on record to the effect that the complainant lost his 2nd lower premolar tooth of the lower left dentine, as the dominant injury, was not successfully displaced. It should be underlined that the competence of the medical expert who made the report was not successfully questioned nor was the credibility of any of the expert successfully assailed. Also, the authenticity of the report was not brought into question.

Thus, the said report is authoritative in so far as the results of the nature and extent of injuries recorded in them.

59. Can the said injury be said to amount to harm in terms of section 4 of the *Penal Code*? This Court, having subjected the said injury to the definition of harm, without doubt, concludes that the injury, by any standard is a bodily hurt which amounts to harm within the meaning assigned thereto by section 4 of the *Penal Code*.

60. Can the said injury be said to be grievous harm in terms of section 4 of the *Penal Code*? This Court, having subjected the injury to the definition of grievous harm, reaches a conclusion that it amounts to grievous harm.

(ii) Whether the prosecution has proved beyond reasonable doubt that the act or acts which caused the said grievous harm were committed by the Accused persons. And of course, the subsidiary question in this connection - arising from the defence - is whether failure to recover and produce the alleged weapons which were allegedly applied by the Accused persons to occasion the grievous harm afore-concluded is tantamount to failure to lay an unassailable nexus between the grievous harm asserted and the Accused persons and whether this failure is ultimately fatal.

61. The *Penal Code* lists acts intended to cause grievous harm under section 231 of the *Penal Code* as follows: "Any person who, with intent to maim, disfigure or disable any person, or to do some grievous harm to any person, or to resist or prevent the lawful arrest or detention of any person— (a) unlawfully wounds or does any grievous harm to any person by any means whatever; or (b) unlawfully attempts in any manner to strike any person with any kind of projectile or with a spear, sword, knife or other dangerous or offensive weapon; or (c) unlawfully causes any explosive substance to explode; or (d) sends or delivers any explosive substance or other dangerous or noxious thing to any person; or (e) causes any such substance or thing to be taken or received by any person; or (f) puts any corrosive fluid or any destructive or explosive substance in any place; or (g) unlawfully casts or throws any such fluid or substance at or upon any person, or otherwise applies any such fluid or substance to the person of any person, is guilty of a felony and is liable to imprisonment for life."

62. This is a question of fact. In Daniel Manuthu vs. Republic, High Court Criminal Case Number 9 of 1998 (Unreported) Onyango Otieno J. cited in approval the case of Ramanlal Bhatt vs. Republic [1967] EA 332 and hastened to add that there must a nexus between the crime and/or offence and the Accused person(s). Principles governing criminal liability underscore that a Court of law should be persuaded with evidence of military precision and specificity regarding the identity of the perpetrator of an offence. For this reason, cautionary principles have been developed to guide Courts in handling evidence purporting to lay a nexus between the offence alleged and the perpetrator. Before criminal liability attaches, hence, the Court must caution itself accordingly and be satisfied beyond reasonable doubt that the perpetrator of the alleged offence has been properly and sufficiently identified beyond reasonable doubt. It is in this connection that the standard of identification evidence should rise to an altitude as not to be effortlessly impeached and brought down. As already discussed, of course, this onus lies on the shoulders of the prosecution.

63. Proof of this fact was anchored on the direct evidence of the complainant and PW3; and the circumstantial evidence of PW2.

64. Apart from denying the assertion that they occasioned the grievous harm afore-concluded, the Accused persons took a firm position that the failure to recover and produce the alleged weapons which were allegedly applied by them to occasion the grievous harm afore-concluded is tantamount to failure to

lay an unassailable nexus between the grievous harm asserted and the Accused persons, and that this failure is ultimately fatal.

65. No particular number of witnesses is required to prove a charge. Section 143 of the *Evidence Act* provides that "No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact."

66. However, proceeding on the edict of criminal law that it is better that ten guilty persons escape than that one innocent suffer, section 143 of the *Evidence Act* notwithstanding, corroboration is required in all criminal cases except a few instances like sexual offences where it can be obviated backed with cogent reasons. See the Proviso to section 124 of the *Evidence Act*.

67. In this regard, the manner of approaching evidence of visual identification was enunciated by Lord Widgery C.J, in the case which has now become the locus classicus in this regard, of R vs. Turnbull [1976] 3 All E.R. 549 at page 552 where his Lordship expressed himself as follows: "Recognition may be more reliable than identification of a stranger; but, even when the witness is purporting to recognise someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made." This test was adopted in Anjononi vs. Republic [1980] KLR 59, where it was held that recognition is better than identification of a stranger.

68. However, although recognition is stronger than identification of a stranger, its strength may also be diminished and compromised by an honest mistaken identity or honest error. And cognitive of this, a cautionary principle on this was laid down in Wanjohi & 2 others vs. Republic [1989] KLR 415, at pages 418-419, Platt, Gachuhi & Masime JJA (as they then were) rendered themselves as follows: "In these circumstances, where the attack was swift rendering Nelson unconscious, the possibility of correct recognition is remote. It may well be that Nelson appeared to be an honest witness, and that his failure to identify the appellants David and Peter indicated that he was not prone to exaggeration. But that was the situation in Roria v Rep [1967] E.A. 583 where at page 584 the Court of Appeal remarked: - "In the present case the learned trial Judge thought Samaji an honest witness. We do not quarrel with his assessment of her honesty, but a witness may be honest yet mistaken, and in excluding the possibility of a mistake on her part, the learned Judge, with respect, erred in our view." It will be said that recognition is stronger than identification. That may be so; but an honest recognition, but yet be mistaken. The trial Court did not observe this distinction. The Court was impressed by the demeanour of Nelson, and although the "identification" was made at night, the Court had no hesitation in accepting that evidence. The trial Court approached the problem from the wrong angle. The High Court set out all the principles laid down in Abdullah Bin Wendo v R (1953) 20 E.A.C.A 166; Roria v Rep. (supra) and Turnbull v Reg C.A.R. (1976) Vol. 63, P. 1132 at P. 1137 and thus realized that the vital question upon which there is special need for caution is the correctness of the identification, i.e excluding any mistake. Unfortunately, the High Court devalued this principle in the following passage: "The trial magistrate was impressed by the quality of this evidence and therefore omitted any reference to the possibility of the appellants' identification as mistaken, though such a reference might have been desirable. We do not think that the omission or error resulted in any failure of justice. That is, with respect, wrong. It is not that a reference to mistaken identification is desirable. It is the vital question. It is the vital question which has to be answered beyond reasonable doubt. Was the appellant recognized beyond reasonable doubt? Whether the error caused a failure of justice is the next step." {Emphasis supplied}

69. In the foregoing connection, before convicting an Accused, a Court should warn itself against the danger convicting on uncorroborated identification evidence of a single witness, especially if it is oral evidence. See Marie & 3 others vs. Republic [1986] eKLR; Gikonyo Kuruma & Another vs. Republic [1977] eKLR and Njeri vs. Republic [1979] eKLR. The need for caution was also reiterated by the

Court of Appeal for Eastern Africa in the case of Abdallah Bin Wendo vs. R 20 EACA 166 at page 168, where the Court expressed the following empathic view: "Subject to certain well-known exceptions it is trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification especially when it is known that the conditions favouring correct identification were difficult. In such circumstances what is needed is other evidence, whether it be circumstantial or direct pointing to guilt, from which a Judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from the possibility of error."

70. Further, in the Court of Appeal decision in Wamunga vs. Republic [1989] KLR 424 at pages 426-427, Masime JA, Gicheru & Kwach Ag JJA (as they then were) laid the following test of identification evidence: "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 a conviction."

71. Further, but not in derogation from the test laid in the Wamunga case, the Court of Appeal laid down guidelines to be applied in analysing identification evidence in Richard Mwaura Njuguna & Another vs. Republic [2019] eKLR, Karanja, JA, Visram & Koome, JJ.A (as they then were) while quoting with approval the locus classicus case in this regard of R vs. Turnbull & Others [1976] 3 All ER 549, stated: "First, wherever the case against an Accused depends wholly or substantially on the correctness of one or more identifications of the Accused which the defence alleges to be mistaken, the Judge should warn the jury of the special need for caution before convicting the Accused in reliance to the correctness of the identification or identifications. In addition, he should instruct them as to the reason for the need for such a warning and should make some reference to the possibility that a mistaken witness can be a convincing one and that a number of such witnesses can all be mistaken. Secondly, 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 the Accused under observation? At what distance? In what light? Was the observation impeded in any way, as for example by passing traffic or a press of people? 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 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 the actual appearance?"

72. See also Evans Odhiambo Anyanga vs. Republic [2015] eKLR, per Majanja, J.; Mwenda vs. Republic [1989] KLR 464, Masime JA, Gicheru & Kwach Ag JJA (as they then were); and Osiwa vs. Republic [1989] KLR 469, per Masime JA, Gicheru & Kwach Ag JJA (as they then were).

73. Faced with the visual and recognition evidence of the complaint only, this Court will turn to carefully and thoroughly analyze the direct evidence of PW1 and PW3 and the circumstantial evidence of PW2 who testified that although he did not see PW1 being assaulted by the Accused personas, upon arrival at the scene, he found PW1 bleeding from the nose and mouth.

74. Regarding the subsidiary question, the Accused persons argued that since no weapon was ever recovered from any of them and exhibited before this Court so as to link them to the grievous harm afore-concluded, this Court should find that the failure by the Investigating Officer is fatal and invited this Court to so conclude. The legal implication of non-recovery of weapons associated to asserted injuries is not a novel issue. Superior Courts have established and consistently restated an evidential principle to the effect that although recovery of a weapon alleged to have been applied to cause the asserted injury is significant, the failure to recover and exhibit in Court the weapon is not fatal, provided the act which occasioned the injury is proved beyond reasonable doubt to have been occasioned by the

person accused and that the medical expert evidence has established beyond reasonable doubt existence of the injury asserted. See for instance Ekai vs. R [1981] KLR 569, where the Court of Appeal held that failure to produce the murder weapon was not of itself fatal to a conviction and that as long as the post-mortem report had established beyond reasonable doubt the injury from which the deceased died. Similarly, in State vs. Okongo alias Samuel Juma Ogonda [2024] KEHC 3674 (KLR), where at paragraph *42* the High restated this principle as follows: "I have considered the evidence adduced herein. In my view, all the evidence adduced by the prosecution point to the accused person as the killer of the deceased. Despite the denial by the accused, I find no reason to doubt the testimonies presented by the prosecution witnesses PW1 and PW2 which testimonies corroborated each other. These two witnesses were at the scene and saw the accused and the deceased fight. PW1 was emphatic that he saw the two fight and that despite his intervention to separate the two, they continued fighting. That the accused had a panga during the fight and that the accused use the panga to cut the deceased. The injuries sustained by the deceased, according to the postmortem report, are consistent with the cuts using a sharp object such as a panga which, though not recovered, non-recovery of a murder weapon is not fatal to the prosecution's case." {Emphasis supplied}

75. See also similar holdings of the COA in three decisions namely Karani v R [2010] 1 KLR 73; Katana v Republic (Criminal Appeal 48 of 2021) [2024] KECA 463 (KLR) (12 April 2024) (Judgment); and Keino v Republic (Criminal Appeal 203 of 2020) [2024] KECA 710 (KLR) (21 June 2024) (Judgment).

76. This being an evidential question over which we look up to Indian Courts - the motherland of our *Evidence Act* - for persuasive guidance, perhaps it's instructive to add that the position held in Kenya, in regard to the subsidiary question, is congruent with the position held India. See for instance Ramvilas vs. State of M.P., AIR 2015 Supreme Court 3362, where the Supreme Court of India expressed a rendition that a conviction based on the oral testimonies of 6 eye witnesses who consistently spoke about the occurrence and the overt acts of the accused was safe to sustain a conviction even in circumstances where the murder weapon was not recovered. At paragraph *7*, the Court stated as follows: "Learned counsel for the appellant Mr. Ajay Veer Singh contended that the presence of appellant-Ramvilas at the scene of occurrence was doubtful as no 'katta' was seized from him nor any gun shot injury was found on the person of deceased-Bansilal. As observed by the High Court all the eye witnesses have spoken in one voice so far as carrying of 'katta' by appellant-Ramvilas and therefore his presence at the scene of occurrence cannot be doubted merely because no 'katta' was recovered from him. It has come out in the evidence that the appellant-Ramvilas had exhorted the other accused in attacking the deceased and also actually participated in the attack. As pointed out by the Courts below that the appellant-Ramvilas nowhere pleaded in his examination under Section 313 Cr.P.C. that he was neither present at the scene of occurrence nor involved in the incident."

77. I share the same judicial view (that although recovery of a weapon alleged to have been applied to cause the asserted injury is significant, the failure to recover and exhibit in Court the weapon is not fatal, provided the act which occasioned the injury is proved beyond reasonable doubt to have been occasioned by the person accused and that the medical expert evidence has established beyond reasonable doubt existence of the injury asserted).

78. That said and done, I now turn to the merits of the prosecution case in this regard. First, it's no doubt that the expert evidence presented by PW5 did establish the grievous harm as afore-concluded under question (i) above.

79. Second, having observed PW1, PW2 and PW3 undergoing examination-in-chief, cross-examination and re-examination, this Court found them consistent, free from material contradictions, and their demeanour was not questionable. This Court thus infers that they did not come across as incredible

witnesses or witnesses of questionable character. Consequently, having subjected their testimonies to the defence, this Court finds the prosecution evidence in this regard so strong and incapable of raising a reasonable doubt in the mind of this Court, which then leaves a remote possibility in favour of the Accused.

80. Third, although the incident occurred at around 1430 hours, coupled by the fact that PW1, PW2 and PW3 asserted that the Accused was known to them long before the incident, this Court infers that PW1, PW2 and PW3 were able to visually recognize and identify the Accused persons. This evidence was not shaken. In the circumstances, I find that the conditions were favourable not only for visual identification but also for recognition. This Court does not, thus, find any good cause emanating from the defence not to believe that the Accused persons were not correctly and sufficiently recognized and identified by PW1, PW2 and PW3. Consequently, this Court concludes that the said visual identification and recognition of the Accused was, to the highest extent, free from any possibility of error.

81. Fourth, the evidence of PW2 passed the threshold of circumstantial evidence. See the threshold and conditions laid down in R vs. Taylor, Weaner & Donovan (1928), 21, C.A., APP. R. 20, read together with R vs. Kipkering Arap Koske & Another [1949] Volume 16 at page 135; Bernard Otieno Okello vs. Republic [2019] eKLR; Abanga alias Onyango vs. Republic CA CR. A No 32 of 1990 (UR); R vs. Mdoe Gwede (2004) eKLR; Simoni Musoke vs. R (1958) EA 715; Nahashon Isaac Njenga Njoroge vs. Republic (1969) eKLR, et alia.

82. Wherefore this Court concludes that the prosecution has proved beyond reasonable doubt that the grievous harm afore-concluded was done by the Accused persons herein.

(iii) Whether the act or acts which led to the grievous harm were unlawful?

83. This is a question of both fact and law. Although applied by the *Penal Code*, the definition and/or meaning of "unlawful" or "unlawfully" has not been assigned by the *Penal Code*. The Interpretations and General Provisions Act has also not assigned the meaning thereof. Again, since this is not a word of art, it may not be safe to construe it in accord with its ordinary and natural meaning. I thus resort to secondary sources of law including decisional law.

84. Henry Black, in his magnum opus work known as The Black's Law Dictionary, Ninth Edition, at page 1678, defines the term "unlawful" in the following words: "… 1. Not authorized by law; illegal… in some cities, jaywalking is unlawful 2. Criminally punishable … unlawful entry 3. Involving moral turpitude … the preacher spoke to the congregation about the unlawful activities of gambling and drinking…"

85. The law and the *Penal Code* in particular suggests that some assaults are lawful if authorized by law and unlawful if not. For instance, effecting a lawful arrest or assault arising from a justified self-defence or defence of property or defence of family or assault arising from a qualified provocation or where the offender was under the age of eight years or in the event where the Accused was acting under compulsion from a third party, the law may deem such assaults lawful.

86. Was this assault lawful or unlawful? In other words, was the act authorized by law? To benefit from a lawful assault, the Court is of the considered opinion that it appropriately can be raised in Court in form of a preliminary objection before trial takes off or if trial has taken off, as a defence.

87. The prosecution having charged the Accused under section 234 of the *Penal Code*, the evidentiary burden of proving that the assault was lawful shifted to the defence, Courtesy of section 111 (1) of the *Evidence Act* which provides that "When a person is Accused of any offense, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, or qualification

to, the operation of the law creating the offence with which he is charged and the burden of proving any fact especially within the knowledge of such person is upon him: Provided that such burden shall be deemed to be discharged if the Court is satisfied by evidence given by the prosecution, whether in cross- examination or otherwise, that such circumstances or facts exist: Provided further that the person Accused shall be entitled to be acquitted of the offence with which he is charged if the Court is satisfied that the evidence given by either the prosecution or the defence creates a reasonable doubt as to the guilt of the Accused person in respect of that offence."

88. This Court takes cognizance that injuries alone cannot tell that the injured was the victim or the aggressor or the provoked or otherwise. Injuries can as well be occasioned to an aggressor or provoker in the course of repulsing the aggressor and reacting to an act committed by a provoker. The Accused failed to bring this assault within the exceptions to section 234 of the *Penal Code*, to qualify as an assault sanctioned by law.

89. Having so failed to discharge the said evidential burden (to the effect that the assault was sanctioned by law) under section 111 of the *Evidence Act*, this Court concludes that the grievous harm was unlawful.

Part VI: Disposition

90. Wherefore this Court finds the Accused persons guilty of the offence known as grievous harm contrary to section 234 of the *Penal Code*. The Accused persons are accordingly convicted therefor, under section 215 of the *Criminal Procedure Code*.

Written and Signed this 7th day of May 2025 by:

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C.N. ONDIEKI

DELIVERED, COUNTER-SIGNED AND DATED IN OPEN COURT AT WAMUNYU LAW COURTS THIS 9TH DAY OF JUNE, 2025

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P.E. NABWANA

SENIOR RESIDENT MAGISTRATE

In the presence of:

Prosecution Counsel:..............................

Advocate for the Accused Persons:.................

The 1st Accused:................................

The 2nd Accused:................................

Advocate Watching Brief for the Complainant:...............

Court Assistant:...............................