



REPUBLIC OF KENYA



**KENYA LAW**  
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**Republic v Kaumbuthu & 2 others (Criminal Case 304 of 2020)  
[2024] KEMC 104 (KLR) (13 June 2024) (Judgment)**

Neutral citation: [2024] KEMC 104 (KLR)

**REPUBLIC OF KENYA  
IN THE GITHONGO LAW COURTS  
CRIMINAL CASE 304 OF 2020  
AT SITATI, SPM  
JUNE 13, 2024**

**BETWEEN**

**REPUBLIC ..... PROSECUTOR**

**AND**

**JEDIEL MWENDA KAUMBUTHU ..... 1<sup>ST</sup> ACCUSED**

**FESTUS MUTUMA ..... 2<sup>ND</sup> ACCUSED**

**NATHAN KIREA ..... 3<sup>RD</sup> ACCUSED**

**JUDGMENT**

1. In Count I, the 3 accused persons denied the charge of arson contrary to section 332(a) of the *Penal Code*. The particulars were that on 20<sup>th</sup> March, 2020 at 2am at Nturiuru village, Gatimbi location of Imenti Central Sub-County of Meru County, they jointly and wilfully set fire to the dwelling house of Joel Mwirigi valued at Kshs 100, 000/=.
2. In Count II, the 3 Accused persons denied the charge of grievous harm contrary to section 234 of the *Penal Code*. The particulars were that on 20<sup>th</sup> March, 2020 at 2am at Nturiuru village, Gatimbi location of Imenti Central Sub-County of Meru County, they jointly and wilfully did grievous harm to Joel Mwirigi.
3. In Count III, the 3 Accused persons denied the charge of assault occasioning actual bodily harm contrary to section 251 of the *Penal Code*. The particulars were that on 20<sup>th</sup> March, 2020 at 2am at Nturiuru village, Gatimbi location of Imenti Central Sub-County of Meru County, they jointly and unlawfully assaulted Harriet Kananira.
4. The DPP's case was conducted by Prosecution Counsel Kimathi Kibiti while the Accused persons were represented by Mr. Victor Igweta, Advocate.



## The Dpp's Case

5. PW1 Joel Mwirigi told the court that on 20<sup>th</sup> March, 2020 his wife Harriet Kananira woke him up saying that she could smell gas in the house. He got up and also smelt the gas although he never used cooking gas in his house. He told the court that no sooner had he gotten up and gone to the main door of their wooden house than he found flames engulfing the house. He dashed back and tried to venture out through the wooden window but was stopped by 3 men armed with knives and pangas. He thus returned to the room. One of the men called put his wife saying that they had no issue with her and she should get out of the house.
6. His wife sped out of the burning house and got scorched to her hands and ears by the raging flames. He gathered courage and made his way out of the house through the same wooden window and instantly recognized the 3<sup>rd</sup> Accused person standing close by armed with a panga. He saw that the 3<sup>rd</sup> accused person had no masks to conceal his face and this face was visible clearly from the bright flames which were spreading in and around the house. The 3<sup>rd</sup> accused was his former neighbour.
7. Suddenly, the 3<sup>rd</sup> accused person cut him on the finger using the panga but together with 3 men escaped when they saw neighbours rushing to the scene in response to his wife's screams since she had fled moments ahead of him. He told the court that he got burnt on the right side of his body.
8. PW1's father was one of the first responders and assisted the complainant to be transported to Nkubu Mission Hospital before transfer to Meru Level V Hospital where he was admitted, treated and later discharged. He recorded his witness's statement afterwards. He later learnt from his wife that a burnt gas cylinder had been found at the scene.
9. The complainant added that there was a land dispute over the subject land where he had lived over 9 years. The 1<sup>st</sup> accused person was well known to him as a neighbour while the 2<sup>nd</sup> accused person was a brother-in-law. He affirmed that he did not see the 1<sup>st</sup> accused person at the scene. He only recognized the 3<sup>rd</sup> accused person.
10. In cross-examination, the following emerged:
  1. The complainant briefly wrestled with the 3<sup>rd</sup> accused person Nathan After Nathan cut him using a panga.
  2. The wrestling caused the 3<sup>rd</sup> accused person to drop a piece of cloth that the 3<sup>rd</sup> accused person was using as a mouth covering.
  3. During the brief wrestling, the complainant saw the 3<sup>rd</sup> accused person from the close body contact under the light from the bright flames that shone around the scene.
  4. The bright flames were close by the window as the complainant jumped out and got scorched on his right side of the body.
  5. Weeks earlier, the complainant had tried to block the 1<sup>st</sup> accused person from collaborating with the complainant's father to sell PW1's land and this had generated a grudge between the complainant and the 1<sup>st</sup> accused person.
  6. The fire started outside from a low point of the building.
11. In re-examination, it emerged that the complainant positively recognized the 3<sup>rd</sup> Accused Nathan who was close by the window before the fire engulfed the timber house.



12. PW2 Harriet Kananira wife to PW1 told the court that on 20<sup>th</sup> March, 2020 at 2am she got up after smelling petrol and gas in the house. She then awakened her husband (PW1). Both then went to the living room to check out the source of the smell whereupon fire burst out from the direction of the main door of the living room and the kitchen. This made them to dash towards the wooden window to escape through it.
13. When PW1 opened the wooden window, he saw 3 men who had covered themselves. One of them whom she instantly recognized as her neighbour Nathan (3<sup>rd</sup> accused in this case) cut her husband on the fingers while another whose voice she recognized as that of her brother-in-law Mutuma shouted that she could get out through the window as they had no interest in her. This gave her a moment to jump put through the open window but she got burnt on the hands and ears as she made her escape through the window.
14. As she got through the window, she left the 2<sup>nd</sup> accused Mutuma standing guard armed with a panga. She then passed the 1<sup>st</sup> accused Jediel who was also there but he did not utter a word to her as she fled the scene screaming loudly as she ran towards her father-in-law's house for help since the house was ablaze.
15. PW2 added that when she got to her father-in-law's house, he accompanied her back to the burning house in order to rescue PW1. When they got to the gate, the intruders threw stones at them to prevent their entry but when more neighbours showed up, the 3 men ran off. She got treated and was discharged before reporting to the police.
16. In cross-examination, the following came to light:
  1. PW2 instantly recognized her brother-in-law Mutuma's voice when he ordered her to jump out of the burning house saying that they had no interest in her.
  2. The 1<sup>st</sup> accused person Jediel had armed himself with a stick.
  3. The 2<sup>nd</sup> accused person had no panga but had worn a black coat and a black marvin.
  4. The 3<sup>rd</sup> accused person was armed with a panga.
  5. She did not know who cut her husband as she jumped out of the window while the assailant had covered his face.
  6. The main door had been locked from outside with padlocks preventing their escape.
  7. The 1<sup>st</sup> accused person and the complainant had personal differences emanating from a prior court case.
17. In re-examination, PW2 affirmed that she instantly recognized the 2<sup>nd</sup> accused person Mutuma from his voice. She confirmed that she recognized him out of the 3.
18. PW3 Wilson Mugira told the court that he was a neighbour to the 2 complainants and the 1<sup>st</sup> and 2<sup>nd</sup> accused persons but the 3<sup>rd</sup> accused person was a stranger to him. He added that on 20<sup>th</sup> March, 2020 he was woken up by loud screams coming from the direction of PW1 and PW2's house. He rushed over and saw that the house had been set on fire from outside.
19. At the scene, he found the 1<sup>st</sup> accused person Jediel standing on the verandah between the kitchen and the chimney that led to the sitting room. He noted that the 1<sup>st</sup> accused person Jediel was holding a white bottle containing a liquid. When he got close to the house, he shouted out PW1's name to see if he was inside the house but the 1<sup>st</sup> accused person flushed out a panga and chased PW3 away from the scene.



20. He instantly recognized 1<sup>st</sup> accused person from the bright flames that lit up the area when he got close to the 1<sup>st</sup> accused person.
21. After being chased away, he raised an alarm thus awakening more neighbours who assisted him to put out the fire using twigs while others took the injured couple to the hospital.
22. In cross-examination, the following emerged:
  1. PW3 recognized the 1<sup>st</sup> accused person only when he found him standing by the kitchen door armed with a panga and this was on the side of the house.
  2. PW3 did not go to the other side of the house to see who was there as an accomplice to the 1<sup>st</sup> accused person.
  3. The 1<sup>st</sup> accused person chased PW3 away when PW3 called out the complainant's name urging to leave the burning house.
  4. PW3 did not see either the 2<sup>nd</sup> or 3<sup>rd</sup> accused persons.
  5. PW3 arrived at the moment that the 1<sup>st</sup> accused person was pouring an unknown liquid on a Meko gas cylinder close to the kitchen.
  6. The 1<sup>st</sup> accused person was wearing jeans trousers, a white jumper and had a cap on.
  7. He saw the 1<sup>st</sup> accused person use a match box to light up the Meko cylinder before chasing PW3 away.
  8. The 2<sup>nd</sup> accused person was arrested at the scene by the father to the complainant.
23. In re-examination, he confirmed that he saw the 1<sup>st</sup> accused person holding match-box, a plastic bottle and as Meko gas at the kitchen-side of PW1's house when PW3 arrived at the scene.
24. PW4 DR. James Kihumba produced the P3 Forms and discharge summary for PW1 and PW2 confirming that PW1 suffered grievous harm from severe inhalational burns and 80% degree burns to the body, shoulder, chest and abdomen while PW2 suffered actual bodily harm from light burns to both ears and hands. His evidence was unshaken in cross-examination.
25. PW5 S/NO. 67988 PC Daniel Chumo testified as the Investigating Officer from Nkubu Police Station. PC Chumo told the court that he was assigned the matter by the OCS following the lodging of a complaint by PW2 and PW1 about the arson and resultant burn injuries to their persons.
26. PW5 visited the scene and observed that the subject house was 3 roomed and made of timber. The timber house and its contents including clothes, utensils and the furniture had been burnt up. He recovered a 6kg gas cylinder and 2 fingers that had been chopped off from PW1's hands. He photographed the scene and visited the victims in hospital where they were receiving treatment where he saw that they suffered dry flame burns to different degrees.
27. After their discharge, he issued them with P3 Forms which were duly filled. He then recorded the witnesses' statements. After due inquiries, he arrested the 3 accused persons and produced them in court as presently. In support of his role, he produced the following as exhibits in the case:
  1. Exhibit Memo Form dated 6<sup>th</sup> July, 2020 forwarding the photographs.
  2. Certificate of photographic production dated 6<sup>th</sup> July, 2020.
  3. 9 photographs showing the scenes from various angles and the charred remains.



28. In cross-examination, the following came to light:
- i. PC Chumo arrested the 1<sup>st</sup> and 2<sup>nd</sup> accused persons while the 3<sup>rd</sup> accused person was arrested by other officers.
  - ii. PW2 had mentioned 3 suspects as involved and when the police showed up, the police found 2 of the named suspects hence the arrest of the 1<sup>st</sup> and 2<sup>nd</sup> accused persons.
  - iii. The 1<sup>st</sup> accused person was arrested that same day of 20<sup>th</sup> March, 2020 at the scene of the crime when he had shown up much later after the fire had been put out.
  - iv. From PW1's interview, it was the 3<sup>rd</sup> accused person who actually slashed and chopped off PW1's fingers.
  - v. Initially, the complainant's parents were arrested at the scene after the fire had been put out but they were released without charge.
  - vi. PW3 Wilson Mugira recognized the 1<sup>st</sup> accused person and saw the 1<sup>st</sup> accused person set the cylinder on fire.
  - vii. The 2<sup>nd</sup> and 3<sup>rd</sup> accused persons went underground for months but were later traced and arrested.
  - viii. The 2<sup>nd</sup> accused person was the one who called PW2 out of the house urging her to step out as they had no interest in PW2.
29. In re-examination, PC Chuma affirmed that the assaults and arson occurred simultaneously from the joint actions by the 3 suspects. At the end of his testimony, the DPP closed their case whereupon the Court ruled that the 3 accused persons had each a case to answer. They were put to their defence.

### **The Defence Case**

30. DW1 Jediel Mwenda Kaumbuthu gave sworn defence. He denied the charges. He told the court that he lived 100metres from PW1's and PW2's house. He told the court that on 20<sup>th</sup> March, 2020 at around 2am he responded the loud screams from his neighbour's house. On arrival, he found the house on fire while the PW1 and PW2 were inside. He added that he together with neighbours put out the fire using soil, twigs and water before rescuing the injured PW1 and taking him to hospital using Stephen Muthee's vehicle. He added that he saw PW1's father at the scene during the rescue mission. After the fire was subdued at 2am using water from pipes, he went back to his house but returned to the scene during the daylight only to be arrested by police as he watched the burnt remains of the house.
31. After his arrest, he was given cash bail and set free but re-arrested and brought to court. He denied any criminal participation in the crime. Afterwards, he saw the other 2 co-accused being joined to the case yet he had not collaborated with them.
32. While admitting that he had personal differences with PW1, he denied that he was driven by the said differences to commit the crimes.
33. In cross-examination, the following came to light:
1. PW1 was cut while he had not yet exited the house.
  2. DW1 admitted that he had a grudge with PW1.



34. In re-examination, he stated that he found PW1 outside the house already cut and that he was not actuated by a grudge to cause any harm to PW1.
35. DW2 Festus Mutuma Mwitwa told PW1 was his brother-in-law having married his sister Peninah Gaicugi. He added that on the night of 20<sup>th</sup> March, 2020 at 2am he was 4kms away from the scene of the alleged arson and did not participate in any crimes. He visited the scene on 21<sup>st</sup> March, 2020 after learning that PW1 who was his brother-in-law had been injured and his house burnt overnight of 20<sup>th</sup> March, 2020 but could not visit him in hospital due to the then COVID-19 restrictions. DW2 stated that PW1's father and mother were arrested as suspects but released without any charges.
36. He denied any role in the crimes saying that he only came to know PW1 in court. He added that he was taken by shock to be arrested after a year and enjoined to the case.
37. In cross-examination, the following came to light:
1. His house was 4kms away from the complainants' house.
  2. He admitted that it was a contradiction for him to say that he only came to know PW1 in open court and in the same vein claim that he had known PW1 earlier having paid dowry to PW1's family during his marriage to PW1's sister.
38. DW3 Nathan Kiria Magaju gave sworn defence denying the charges. He told the court that PW1 was well known to him as someone who grew up with him in the same village and further as someone against whom he had complained previously in a criminal case involving money. He explained that he had lent the sum of Kshs 5, 000/= to PW1 in 2019 but the borrower defaulted causing the parties to agree that PW1 repays in kind using poles but this again fell through after PW1 reneged on this. Instead, PW1 offered him a gas cylinder which DW3 took and shortly thereafter got arrested and charged with stealing that gas cylinder.
39. Further, that he was found guilty of stealing the gas cylinder, convicted and placed on probation. It was after this conviction that he got arrested and framed up for this case by PW1. In his defence, he stated that on 20<sup>th</sup> March, 2020 he was in Kaongo 15KMS from PW1's home recuperating from his injuries following an earlier road traffic accident but came to learn of the arson after 2weeks. In support of the defence, he produced 3 X-ray photos as exhibits.
40. He added that 2 years later, PW1 led CPL Njagi and other officers to his home and effected his arrested for reasons best known to PW1 and that is when he came if the arson.
41. In cross-examination, the following came to light:
1. He stated that he suffered fractured limbs and had metal implants.
  2. He admitted that it was a contradiction for him to state on the one hand that he came learn of the arson after 2weeks and the other hand say that he only learnt of the arson when he got arrested 2 years.
  3. He stated that it was in Criminal Case 661/2019 that he was prosecuted and convicted for theft of gas cylinder.
  4. He emphasized that he only came to know of 1<sup>st</sup> and 2<sup>nd</sup> accused here in court.
42. DW4 Ngaruni Thuguri father to PW1 told the court that as of 20<sup>th</sup> March, 2020 the complainant lived 30metres from his house. He stated that on the material night at 2am he woke up to the screams of



- Harriet (PW2) and on stepping out, he saw PW1's house ablaze. He told the court that he went to wake up the 1<sup>st</sup> accused to assist in rescuing PW1.
43. DW4 stated further that the 1<sup>st</sup> accused person agreed to accompany DW4 to the house where he himself kicked down the door giving PW1 an escape route. DW4 stated that after PW1 came out he did not check on PW1 who vanished but he himself went to fight the fire alongside the 1<sup>st</sup> accused person using water from jerry-cans.
44. In his testimony, he stated that PW1 was an illicit brewer and that PW2 was not his real wife. He pointed out that although he forgot the names of his (DW4's) 2 wives he nonetheless recalled the names of his 4 children as Karega, Mwirigi (PW1), Gaicugi and Muringo. He pointed out that the 2<sup>nd</sup> Accused had married one of his daughters.
45. In cross-examination, the following crystallized:
1. It was true that PW2 made loud screams that awoke him.
  2. On his arrival at the scene, he found PW1 inside the burning house.
  3. 1<sup>st</sup> accused person was his nephew.
  4. 2<sup>nd</sup> accused person was his son-in-law.
  5. He said that he did not see the cuts on PW1 since he was concentrating on fighting the fire.
  6. It was true that the burnt out shell of the gas cylinder was at the scene.
  7. He said that the source of the water used to put out the fire was water stored in the house of PW1. He emphasized that no other water was used to put out the fire other than the water in the jerrycans inside the house of PW1.
  8. DW4 confirmed that there was no pipe that provided water used to put out the fire.
  9. He denied knowing who Harriet was but affirmed that he only knew Kananira.
46. In re-examination, he affirmed that the 1<sup>st</sup> Accused person assisted in dousing out the fire.
47. DW5 Stella Nkuena mother to the 1<sup>st</sup> Accused (Jediel) told the court that she was awakened by a woman's loud screams on the material night. She added that she stepped out with the 1<sup>st</sup> accused person and as they went over towards the burning house, they bumped into DW4 (Ngaruni) who himself was headed there. She stated further that on arrival at the scene, it was the 1<sup>st</sup> Accused person (Jediel) who kicked down the door to rescue PW1 who was stuck inside. After being rescued, PW1 was taken to hospital by one Muteithia.
48. In cross-examination, the following came to light:
1. When the fire broke out at PW1's house, DW5 was watching a local TV program called Sultana with the 1<sup>st</sup> accused person in her house.
  2. DW5 denied that Sultana as a television programme was first aired in the year 2022.
  3. Only banana leaves were used to put out the fire and no jerry-cans of water were involved.
  4. She affirmed that there was no broken pipe that provided water to douse out the fire.
  5. She admitted that PW1 was scorched by the fire.



6. She denied the assertion by the DPP suggesting that she wasn't at the scene on the material night.
49. In re-examination, she insisted that she was present at the scene on the material night.
50. DW6 Peninah Gaichungi wife to the 2<sup>nd</sup> accused told the court that on the material night of 20<sup>th</sup> March, 2020 she was with DW2 in their house 4kms away from PW1's house. She added that she only learnt of the arson on 21<sup>st</sup> March, 2020 and saw the 1<sup>st</sup> accused (jediel) and her father who is also father to PW1 aboard the police land cruiser under arrest. He later bailed him out as well as her mother using Kshs 10,000 Cash-bail. A year later, her husband was arrested and enjoined to the case yet he had not ventured out of house on the night of 20<sup>th</sup> march, 2020. She confirmed to the court that the 1<sup>st</sup> accused person was well known to her as a neighbour while the 3<sup>rd</sup> accused person was well known to her as a cousin and that the 3<sup>rd</sup> accused person had a legal tussle with PW1 over money.
51. At the end of the defence testimonies, the defence lodged written submissions dated 16<sup>th</sup> May, 2024. In summary the defence contended as follows:
  1. The DPP had not proved all the elements of the respective counts.
  2. PW1 as a complainant stated that he did not identify the 1<sup>st</sup> and 2<sup>nd</sup> accused person. He only affirmed seeing the 3<sup>rd</sup> accused person.
  3. It was unclear whose voice had been identified by PW1
  4. While PW3 claimed that he saw the 2<sup>nd</sup> accused person pouring a liquid at the scene, the said liquid was not stated to be either flammable or inflammable.
  5. It was submitted that the 2<sup>nd</sup> accused person was just a god-hearted neighbour who was responding to put out the fire.
  6. The only reason that made PW1 to mention the 3<sup>rd</sup> accused to the police was due to their grudge but not because PW1 had seen the 3<sup>rd</sup> accused at the crime scene.
52. The duty of this Honourable Court is to determine whether or not the DPP has proved the charges beyond any reasonable doubt in the light of the defences raised by the accused persons. This duty is imposed by sections 107 and 108 of the *Evidence Act* which state:
  107. Burden of proof
    - (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
    - (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.
  108. Incidence of burden

The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.



## Issues For Determination: Proof Of The Elements Of Each Offence In The 3 Counts

### A. Count I: Arson

53. The 3 accused persons have been charged under Section 332 of the [Penal Code](#) which provides as follows:

332. Arson

Any person who wilfully and unlawfully sets fire to –

- (a) any building or structure whatever, whether completed or not; or
  - (b) any vessel, whether completed or not; or
  - (c) any stack of cultivated vegetable produce or of mineral or vegetable fuel; or
  - (d) a mine, or the workings, fittings or appliances of a mine,
- is guilty of a felony and is liable to imprisonment for life.

54. In this line of evidence, as regards the 1<sup>st</sup> Accused person, PW1 was emphatic that he did not spot the 1<sup>st</sup> accused person as PW1 made his escape through the window from the burning house. The proved evidence was that the suspects had locked the house from outside to prevent escape through the door hence the resorting to the window. The fact of locking up the door from the outside proved the intentionality of the planned arson and possible killings of the occupants in the house.

55. Similarly, PW2 affirmed that she did not see the 1<sup>st</sup> accused person. The failure by PW1 and PW2 to spot the 1<sup>st</sup> accused person was consistent and tallied with the evidence of PW3 (Mugira) who affirmed that the 1<sup>st</sup> accused person was strategically positioned at the other side of the house out of view of the escape window used by PW1 and PW2 to egress from the burning house. This consistency, therefore satisfied the court that PW1 had been truthful when he said that from his position of the escape window, he did not see the 1<sup>st</sup> accused person. The fact that PW1 and PW2 had not seen who had set the house on fire, however, was not the end of the DPPs' case because that issue was answered by the testimony of PW3 (Mugira) who saw who had done it.

56. Of the 3 main witnesses (PW1, PW2 and PW3) it was only PW3 who saw and recognized the 1<sup>st</sup> accused person meaning that this was the evidence of a single witness and therefore the court must closely analyse the evidence to satisfy itself that the evidence was credible and truthful beyond doubt. In making this analysis, the court was guided by the authority of *Mohamed Boru Guyo v Republic* [2022] eKLR (Njagi j.) where the learned Judge held that:

57. The law is that the court can convict on the basis of oral or circumstantial evidence. More so, the court can convict on the basis of the evidence of a single witness if it believed that the evidence was trustworthy. All that the court is required to do is to warn itself of the dangers of convicting on the evidence of a single witness and convict if it is fully satisfied that the evidence points to the culpability of the accused. The Court of Appeal in *Chila v. Republic* (1967) E.A 722 articulated this position and held that:

“The Judge should warn ... himself of the danger of acting on uncorroborated testimony of the complainant, but having done so he may convict in the absence of corroboration if he is satisfied that her evidence is truthful. If no such warning is given, then the conviction will normally be set aside unless court is satisfied that there has been no failure of justice.”



58. The direct evidence against the 1<sup>st</sup> accused person was that of PW3 (Mugira). Mugira's tested evidence was that he heard the screams of PW1 and dashed over to the scene. This means that as he arrived at the scene, the house was aflame and burning and the bright flames enabled him to see clearly. PW3 had approached the house as a first responder and found the 1<sup>st</sup> accused person at the other side of the house away from the window which PW1 and PW2 used to escape from the burning timber house.
59. The photographs produced in court show that the house had been torched from 2 distinct positions and one of these positions is consistent with where PW3 probably found the 1<sup>st</sup> accused person standing guard to ensure that the house went up in flames completely. He saw the 1<sup>st</sup> accused person with a match box and with a bottle containing an unknown liquid. The cylinder which probably had been used to gas up the house before it was torched was close by the 1<sup>st</sup> accused person and was later recovered by the investigating officer who produced it in court as an exhibit.
60. The further tested evidence against the 1<sup>st</sup> accused person was that he personally chased off PW3 from the scene and this was moments before the arrival of other neighbours and responders. During this close encounter amidst the huge flames, the witness positively recognized the offender who ordered him out of the scene. Recognition of the 1<sup>st</sup> accused person was strong evidence. In *Tipapek Kimiti Alias Ole Lemurinka –v- Republic (2006)eKLR (Githinji, Onyango-Otieno & Deverell JJ.A)* it was held as follows:

“The entire evidence that was before the two courts below clearly shows that the appellant was convicted on the evidence of a single witness on identification or recognition together with his confession in an inquiry statement he made to IP Kimathi. It is now trite law that when the evidence before a court of law is mainly that of a single witness on identification, the court has to be extra careful before entering a conviction. That need for extra care is not reduced even when the evidence is that of recognition for there may be cases where even people who know each other very well may still make mistakes. In such circumstances, the court needs to see if there is other evidence to lend assurance as to guilt of the suspect before it, before it can enter conviction. In the well known case of *Abdalla bin Wendo and Another v. R. [1953] 20 EACA 166* the predecessor to this Court stated as follows:

Subject to certain well known exceptions, it is trite law that a fact may be proved by 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 a 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 probability of error.”

61. In the case of *R. v. Turnbull [1976] 3 All ER 519* at page 522 Lord Widgery C.J. stated that:

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

62. In dismissing the appeal, the learned judges went on to hold:

From what we have stated above, we do feel that both the subordinate court and the superior court proceeded on sound law when they accepted the evidence of recognition that was before them. The same evidence of Munyara was clearly buttressed by other circumstances



that left no doubt whatsoever that the appellant was involved in the commission of the offence.”

63. From this line of evidence, the court noted that PW1 and PW2 had been truthful in saying that the 1<sup>st</sup> accused person’s position vis a vis the escape window was out of their line of sight. The court found their testimony corroborated by PW3 who affirmed without any doubt that he found the 1<sup>st</sup> accused person positioned out of the line of sight of the escape window. PW3’s evidence was itself corroborated by the investigating officer’s photographs and the recovered gas cylinder which PW3 had specifically stated as having seen positioned close to the 1<sup>st</sup> accused person during the arson attack.
64. A further analysis of the evidence shows that the attack took place at around 2am. The house was dark and there were no security lights outside. The only source of light was the huge flames and tongues of fire that were consuming the house. The flames were so strong and bright that they scorched PW1 and PW2 on the ears, arms, body and limbs and from this source of light which was very strong and close to the scene, the court is satisfied that the PW3 had sufficient means to see the 1<sup>st</sup> accused person whom he knew personally. It was about recognition and not identification of a stranger.
65. As was proved by PW1 and PW2 they were woken up by the smell of gas in their house. As is common knowledge, cooking gas ordinarily packed in 6kgs cylinders for domestic cooking contains gas which has a distinct strong smell to enable detection by users in case of leakage. The court’s view is that the detection of the smell by PW1 and PW2 which it reached their sleeping room by osmosis corroborated what PW3 had seen as he arrived at the house which had already caught fire: he saw a gas cylinder close by the 1<sup>st</sup> accused person who was watching the house go up in flames. He specifically that the 1<sup>st</sup> accused person had a match box, a stick and that the 1<sup>st</sup> accused person was wearing jeans trousers, a white jumper and had a cap on.
66. In answer to the foregoing, the 1<sup>st</sup> accused person raised a defence of alibi which evidently was at a very late stage of the case and was clearly an afterthought.
67. Quite apart from the belated alibi which this court treats as an afterthought, the defence placed reliance on untruthful defence witnesses who contradicted each other in an irreconcilable way thereby giving credence to the belief that they were untruthful and not worthy of belief. On the one hand, DW1 swore that the fire was put out using water from a broken water pipe but this was contradicted by DW4 who insisted that only water from jerry-cans was used and this was further contradicted by DW5 who said that no water was used as the responders used banana leaves only without more.
68. The other irreconcilable contradiction related to the competing claims that DW4 AND DW1 brought down the door to rescue PW1. This was in itself a lie because both PW1 and PW2 had jumped out through the wooden window under and there was no way that they could have possibly been rescued through the door for it was unnecessary in the first place.
69. The final nail to the defence coffin was when the court found that DW5 was wholly untruthful in her testimony and not worthy of any credit when she purported to give support to the alibi defence of her son the 1<sup>st</sup> accused person. The DPP caught her in the lie during the cross-examination when she was being questioned about the Sultana TV Series. In her answers, she had told the court that she was watching Sultana TV Series at that time. This was in the year 2020. The lie emerged when it was discovered that Sultana which is a local TV drama series about a young lady born into a royal family but living in abject poverty actually began airing in Kenya in mid-2022 after the end of another local TV series known as ZORA on Citizen TV. Therefore, it was a lie to DW5 to swear that as of 2020 the local TV series Sultana had begun to air in Kenya when in reality it began in mid-2022. The court took



judicial notice of matters of local notoriety in accepting this line of evidence under sections 59 and 60 of the Evidence Act which provides:

59. Facts judicially noticed  
No fact of which the court shall take judicial notice need be proved.
60. Facts of which court shall take judicial notice.
  - (1) The courts shall take judicial notice of the following facts –

...

(O). All matters of general or local notoriety;

With the foregoing, and taking the warning that this was the evidence of a single recognizing witness and having analysed the totality of the surrounding evidence, this Honourable Court is satisfied that the 1<sup>st</sup> accused person was the principal offender who actually set alight PW1 house after swamping it with gas from a 6kg cylinder. In the result, the court finds that the 1<sup>st</sup> accused person is guilty as charged and is convicted under section 215 of the Criminal Procedure Code. Right of appeal is 14 days.

### **Arson Against The 2<sup>Nd</sup> And 3<sup>Rd</sup> Accused Persons**

70. The linkage of the 2<sup>nd</sup> and 3<sup>rd</sup> accused persons was by their joint and concerted action since they were together with a common intention with the 1<sup>st</sup> accused person who was the principal offender. They took different positions at the scene to execute specific criminal acts:

- a. The 1<sup>st</sup> accused person gassed the house using the 6kg cylinder which had cooking gas, poured an unknown liquid to perpetuate the fire and struck the matchstick that lit up the fire.
- b. The 2<sup>nd</sup> accused person lured PW2 out of the house so that PW1 could be roasted alive and alone in the timber house. This act of luring PW2 out of the house by calling her to come out gave PW2 an opportunity to voice-recognize the 2<sup>nd</sup> accused person who was her brother-in-law and this was moments before the house was torched completely. Further, when PW2 jumped out through the window, she was able to see and recognize the 2<sup>nd</sup> accused person. Therefore, both on voice and visual recognitions, PW2 positively proved the presence and participation of the 2<sup>nd</sup> accused person in the crime. In *Jeremiah Mathengi Mathinyo V Republic* [2007] eKLR (M.S.A. Makhandia J as he then was) it was held that

As already stated P.W.1 categorically stated that he recognised the appellant by his voice. There is no doubt at all that during the episode the appellant spoke severally both to P.W.1 and P.W.2. Evidence of voice recognition is admissible. In the case of *Mbelle v/s Republic* (1984) KLR 624, the court of appeal laid down guidelines as regards admissibility of evidence of identification by voice as follows:-

“..... In dealing with evidence of identification by voice the court should ensure that:

- (a) The voice was that of the accused
- (b) The witness was familiar with the voice and recognised it.
- (c) The conditions obtaining at the time it was made were such that there was no mistake in testifying to what was said and who said it ...”



- c. The 3<sup>rd</sup> accused person cut up and maimed PW1 when PW1 made efforts to escape through the window from the burning house. The evidence against the 3<sup>rd</sup> accused person was direct and overwhelming since PW1 wrestled down the 3<sup>rd</sup> accused person and uncovered his face during the close body combat as PW1 attempted to flee the flames.
71. Their respective defences of alibi were manufactured at the tail end of the case and the court regards such evidence as afterthoughts created to obfuscate issues in court and therefore did not dislodge the DPP's evidence. The High Court authority of *Republic v Julius M'mario Marungu* [2018] eKLR (R.P.V. Wendoh J.) held as follows:

The accused raised an alibi in his defence that he was busy harvesting and selling miraa at Muringene and Kimongoro and that he returned home at 10.00 p.m. An alibi defence means that accused was not at the scene where the deceased was murdered but elsewhere. When an accused person raises an alibi defence, he does not assume any duty to prove its truth. The burden always remains on the prosecution to prove its case against the accused beyond reasonable doubt. In the case of *Karanja v Republic* (1983) KLR 501 the court held that the burden of proving the falsity, if at all, of an accused's defence of alibi lies with the prosecution. The court also held that the court may, in testing the defence of alibi, weigh it against all the evidence adduced to see if the accused's guilt is established beyond all reasonable doubt and that if an alibi is raised late in the defence, the court should take into account the fact that the alibi defence was put forward at a late stage of the case that it cannot be tested by those responsible for investigation and prevent the suggestion that it is an afterthought.

72. In *Kiarie v Republic* (1984) KLR the Court of Appeal said:

"An alibi raises a specific defence and an accused person who puts forward an alibi in 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 a court a doubt that is not unreasonable.."

During the prosecution case, there was no indication that the appellant intended to raise an alibi. The alibi was raised for the first time during the defence. It is in the cross examination that accused alleged to have been with one Moses Kabui on the fateful day but after the defence was allowed an adjournment to call the said Moses, he was said to be deceased. The prosecution was therefore never accorded any opportunity to investigate the said alibi. During cross-examination of the accused by the prosecutor, he also raised another defence that he was framed by PW1 and PW5 for having given evidence in cases against them. PW1 and PW5 testified in court and no such allegations were put to them for them to answer. Clearly, these were afterthoughts. In fact had the prosecution not questioned him, he was not going to make the above allegations. I find that the alibi defence does not introduce any doubt in the prosecution in any way and I dismiss the defence as an afterthought and untrue."

73. A similar view on the alibi was taken by the Court of Appeal in *Athuman Salim Athuman v Republic* [2016] eKLR (Makhandia, Ouko & M'inoti JJ.A.):

"The principle has long been accepted that an accused person who wishes to rely on a defence of alibi must raise it at the earliest opportunity to afford the prosecution an opportunity to investigate the truth or otherwise of the alibi. Way back in 1939 in *R. V.*



Sukha Singh S/o Wazir Singh & Others (1939) 6 EACA 145, the former Court of Appeal for Eastern Africa upheld the a decision of the High Court in which it was stated:

"If a person is accused of anything and his defence is an alibi, he should bring forward that alibi as soon as he can because, firstly, if he does not bring it forward until months afterwards there is naturally a doubt as to whether he has not been preparing it in the interval, and secondly, if he brings it forward at the earliest possible moment it will give prosecution an opportunity of inquiring into that alibi and if they are satisfied as to its genuineness proceedings will be stopped".(See also R. V. Ahmed Bin Abdul Hafid (1934) 1 Eaca 76 And Wang'ombe V. Republic [1976-80] 1 KLR 1683).

The Supreme Court of Uganda, in Festo Androa Asenua V. Uganda, Cr. App No 1 OF 1998 made a similar observation when it stated:

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

74. This Honourable Court adopts the legal principles set out by the superior courts on the question of alibi and makes the finding that the respective alibis by the 3 accused persons herein were not only belated but were also hollow and untruthful in the light of the irreconcilable contradictions in the defence mixed with the open lies by the defence witnesses. The alibis are dismissed as unworthy of credit.

75. Related to this is that whenever persons act in concert in the coordinated execution of a criminal course of action, the court is required to assess their criminal liability through the lenses of section 21 of the [Penal Code](#) which was extensively analysed by the Court of Appeal in Dickson Mwangi Munene & another v Republic [2014] eKLR (Nambuye, Maraga & J. Mohammed, JJ.A) discussed the principles of common intention thus:

52. The law is well settled on the definition and in what circumstances common intention can be inferred if it is not express or obvious. Common intention is deduced where there are two or more parties that intend to pursue or to further an unlawful object or a lawful object by unlawful means and so act or express themselves as to reveal such intention. It implies a pre-arranged plan. Although common intention can develop in the course of the commission of an offence, it is normally anterior in point of time to the commission of the crime showing a pre-meditated plan to act in concert. It comes into being, in point of time, prior to the commission of the act.

53. Section 21 of the [Penal Code](#) defines common intention as arising:-

"When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence."

This provision has been interpreted and the doctrine of common intention dealt with by our courts in several cases. In Solomon Mungai v. Republic [1965] E.A. 363, the predecessor of this Court held that in order for this section to apply, it must be shown that the accused had shared



with the other perpetrators of the crime a common intention to pursue a specific unlawful purpose which led to the commission of the offence charged.

In *Njoroge-Vs-Republic*, [1983] KLR 197 at p. 204, the Court of Appeal stated that:-

“If several persons combine for an unlawful purpose and one of them in the prosecution of it kills a man, it is murder in all who are present whether they actually aided or abetted or not provided that the death was caused by the act of someone of the party in the course of his endeavours to effect the common object of the assembly.”

As to its proof, referring to its earlier decision in *R-Vs- Tabulayenka s/o Kirya* (1943) EACA 51, it continued to state that:-

“The common intention may be inferred from their presence, their actions and the omission of either of them to disassociate himself from the assault.”

56. As we have stated, common intention does not only arise where there is a pre-arranged plan or joint enterprise. It can develop in the course of the commission of an offence. In *Dracaku s/o Afia Vs R* [1963] E.A.363 where “there was no evidence of any agreement formed by the appellants prior to the attack made by each” it was held that “that is not necessary if an intention to act in concert can be inferred from their actions” like “where a number of persons took part in beating a thief.”
76. The foundation of section 21 of the *Penal Code* is actual section 20 of the *Penal Code* which provides as follows:
20. “Principal offenders.
- (1) When an offence is committed, each of the following persons is deemed to have taken part in committing the offence and to be guilty of the offence, and may be charged with actually committing it, that is to say
- (a) every person who actually does the act or makes the omission which constitutes the offence;
- (b) every person who does or omits to do any act for the purpose of enabling or aiding another person to commit the offence;
- (c) every person who aids or abets another person in committing the offence;
- (d) any person who counsels or procures any other person to commit the offence; and in the last-mentioned case he may be charged either with committing the offence or with counselling or procuring its commission.
- (2) A conviction of counselling or procuring the commission of an offence entails the same consequences in all respects as a conviction of committing the offence.”
77. In response to the DPP’s evidence about their action in concert, the 3 accused persons gave alibi defences. After weighing their respective defences which collapsed as explained above, it is the considered judgement of this Honourable Court that under section 20 of the *Penal Code*, the 2<sup>nd</sup> and 3<sup>rd</sup> accused persons are guilty of arson as aiders and abettors in equal measure as the principal arsonist who was the 1<sup>st</sup> accused person. While motive was not an element of the offence, it was proved that the accused persons were motivated by pre-existing grudges that they individually harboured against PW1. Each of the accused person is convicted of arson under section 215 of the *Criminal Procedure Code*. Right of appeal is 14 days.



## **B. Count II Grievous Harm Against Pw1**

78. The P3 Form dated 11<sup>TH</sup> May, 2020 and the Discharge Summary dated 27<sup>th</sup> March, 2020 proves that the PW1 suffered burns to the anterior neck, burns to the left chest-wall and left lateral abdomen as well as dry flame burns to the left shoulder and left upper-limbs consistent with dry flames. It was also proved that he suffered complete amputation of the 2<sup>nd</sup> and 3<sup>rd</sup> hand digits. Photos 4 and 5 prove the complete amputation of the fingers of the complainant. These injuries amounted to maim as per the expert opinion of Dr. Kihumbu which opinion is affirmed by the court as it is well supported by the evidence.
79. The actual inflictor of the maim was the 3<sup>rd</sup> accused person but as this Honourable Court has found, he was acting in concert with the 1<sup>st</sup> and 2<sup>nd</sup> accused persons in the common intention of doing harm to the complainants and they succeeded in the criminal mission. As evaluated during the analysis of the evidence on count 1 regarding recognition, recognition, alibis and credibility of witnesses, all the 3 accused persons are guilty as principal offenders and each of them is convicted under section 215 of the [Criminal Procedure Code](#). Right of appeal is 14 days.

## **C. Count III Assault On Harriet**

80. The Court of Appeal in Ndaa -v- Republic (1983)eKLR (Hancox JA, Chesoni & Nyarangi Ag. JJ.A) set out the ingredients of the charge of assault occasioning actual bodily harm as constituting the following:
- a. Assaulting the complainant or victim.
  - b. Occasioning actual bodily harm.
82. The P3 Form dated 11<sup>th</sup> May, 2020 proves that PW2 suffered bilateral burns to the ears. In the same way, as the medical evidence of Dr. Kihumbu proved, the complainant suffered actual bodily harm from dry flame burns which scorched her ears and arms. The actual inflictor of the burns was the 1<sup>st</sup> accused person although she did not see him at the time but as this Honourable Court has found, he was acting in concert with the 3<sup>rd</sup> and 2<sup>nd</sup> accused persons in the common intention of doing harm to the complainants and they succeeded in the criminal mission. As evaluated during the analysis of the evidence on count 1 regarding recognition, alibis and credibility of witnesses, all the 3 accused persons are guilty as principal offenders and each of them is convicted under section 215 of the [Criminal Procedure Code](#). Right of appeal is 14 days.

**DATED, READ AND SIGNED AT GITHONGO LAW COURTS THIS 13<sup>TH</sup> DAY OF JUNE, 2024**

**HON.T. A. SITATI**

**SENIOR PRINCIPAL MAGISTRATE**

**GITHONGO LAW COURTS**

Present

Dpp Kibiti

All 3 Accused Persons

Ronny And Joan Court Assistants

Court: judgement delivered.

