



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL DIVISION- MILIMANI COURT
CRIMINAL APPEAL NO. E172 OF 2023

ALEX OLABA MAHAGA.....
.....APPELLANT

VERSUS

REPUBLIC.....
.....RESPONDENT

*(Being an Appeal from the conviction and sentence
at the Chief Magistrate's Court Milimani
Cr. Case No. E542 of 2021 judgment delivered on
10th May 2023 by Hon. SRM G. Onsaringo)*

JUDGMENT

BACKGROUND

1. The Procedural facts of the instant appeal are as follows;
 - a) The present matter emanates from **CM Criminal Case E542 of 2021** where the Appellant was/is charged with Conspiracy to murder c/s Section

224 of the Penal Code & Conspiracy to defeat justice contrary to Section 117(c) of the Penal Code.

- b) The offences arose from **MCSO 27 of 2020** Republic vs Alex Mahaga Olaba & Lawrence Frank Wanyama.
- c) The Applicants filed **Criminal Revision E 108 of 2021** (Consolidated with Criminal Revision No 334 of 2021) Ruling by Hon G.Nzioka LJ delivered on 10/6/2020. At the time an appeal in Court of Appeal was pending.
- d) **CM No 10 of 2018** Republic vs Lawrence Frank Wanyama & Alex Mahaga Olaba were heard convicted and sentenced to serve 15 years imprisonment.
- e) The Appellants filed **Criminal Appeal No 184 of 2019**, the appeal was heard and determined Judgment was delivered on 30th June 2020, the Court declared a mistrial and ordered retrial.
- f) Retrial was conducted in **CM Criminal Case SO 27 of 2020** and in the instant matter CM. Criminal case **E542 of 2021** the accused was charged with the offence of conspiring to murder and defeat justice and was convicted and sentenced to

serve 6 years imprisonment in Count 1 and 2 years imprisonment and sentence was to run concurrently.

g) High Court **Criminal Revision No E203 of 2023** was withdrawn on 20th February 2023 and Revision file closed. Hence the present Appeal on Judgment of E542 of 2021.

TRIAL COURT PROCEEDINGS

PWI: JACKLINE AMIMO SWORN

2. On 17/4/2021 PW1 was at her place Arboretum road and she received a call from a number that she did not have. The person asked for Wendy. Wendi is her daughter. PW1 told him that she was not with Wendy. PW1 told him she was Wendi's mother. PW1 was informed that there was a call involving Wendi's case. This is/was the rape case. Wendy had been raped. PW1 told him that Wendi is in the house and she was informed that there was a plot to eliminate Wendy. She was shocked. PW3 informed her that somebody had approached him to eliminate Wendi and he had paid Kshs.10,000/= . He told her they could meet at the stage and come with two policemen, so that he could tell them

what he had been told. She suggested to him they meet at Kilimani Police Station.

3. On the said day 17.4.2021. PW1 went to Kilimani Police Station. When she arrived he was already there. She called him and he was at the Police Station. He introduced himself as Mr. Wachira. That is when he told me that one of the Rugby players had approached him so as to eliminate Wendi and he had been given a deposit of Kshs. 10,000/= . The whole amount to be paid was to be Kshs. 100,000/-. He was to carry out that act before the next hearing of the Rape case. The rape case was to be heard on 22/4/2022. After he briefed her, while at the station with PW3, they went to report the matter. Mr. Wachira (PW3) recorded a statement.
4. There were two Rugby players who had been charged in the Rape case. The person who had approached Wachira was one Olaba. Wachira has a car wash. They normally go there. Olaba used to go and meet him at the Carwash. Olaba is/was seated at the dock.
5. **Cross-Examination by [Advocate for Accused person] Oduk**

PW1 recorded a statement at the police station. It was on 21/4/2021. She was in Court before. She knew the effect of taking an oath. She was not aware what is perjury. She received a phone call and could not recall the number. She was called by Mr. Wachira.

The first time he called he told her that he had been approached by one of the Rugby player to eliminate Wendi. One Rugby player was mentioned. She resided at Arboretum State House Girls Quarters. The closest Police Station is Kileleshwa. She went to Kilimani Police Station since they were handling the initial Rape case.

6. Mr. Wachira told her that she could go with two police officers. Mr. Wachira told her he had been given Kshs. 10,000/=. She was not present when the amount was given. She thought he was given the amount.
7. On 17/4/2021 a report was made. She did not know the OB number. She did not know the name of the car wash. She was informed it is next to Sifa Apartments. She did not know whether Olaba had a car. Both, that is Olaba and the other Rugby guy used to go there to wash a vehicle.

8. Mr. Wachira told her that the Accused gave him her number. They got from the first case. The Accused had earlier called her, including his relatives.
9. The Accused was planning to eliminate her daughter. Her daughter was raped and they were planning to eliminate her. She did not know how the amount of Kshs. 100,000/= was to be disbursed.

**PW2 - POLICE CONSTABLE NO. 219591
IBRAHIM MOHAMMED SWORN**

10. He was/is based at Kilimani Police Station DCI - office
11. On 22/4/2021 while he was at the office. He was summoned by DCIO in order to carry out an operation within Makadara area of which an informer came to the office reporting that he was hired by one Mr. Olaba in order to carry out an elimination mission.
12. He was directed to act as an undercover cum hitman so that they could arrest the culprit in this matter. He disguised his look as a police officer, he met Mr. Wachira, the informer at their office then he communicated to the Accused so that we could meet at a restaurant at Makadara Area. He

communicated to the Accused and promised to meet them at 1600 hours in a restaurant. They arrived at the restaurant at exactly 1600 hours, but our client did not arrive on time. When he said client he meant Mr. Olaba who came around 40 minutes later. Mr. Wachira (PW3) identified Mr. Olaba who sat in the next table and then joined them. They discussed the plan on how to execute the murder. We discussed about the payment. Mr Wachira had earlier talked to Mr. Olaba and had agreed on Kshs. 100,000/- so as to execute the murder. When he joined them he demanded that he would not execute the act without payment.

13. While at the table he texted his colleague Police Constable Otieno, the investigating officer to come quickly because Mr. Olaba was in hurry to leave as he had no money to give/pay.

14. He was informed by Mr. Wachira where the target was living was at State House Girls Quarters. When Police Constable Otieno arrived, they were arrested and handcuffed. They were taken to Kilimani Police Station. He was an undercover Police Officer and Wachira was an informer. Mr. Olaba was present before the Court and seated at the dock.

Cross-Examination by Cliff Oduk

15. He was a police officer for about 25 years now. He recorded one statement which was about 2 pages. He recorded the statement on 23/4/2021. There was discussion on Kshs.140,000/- but it was between Mr. Wachira and Mr. Olaba. knew nothing about the said amount.
16. When they met at the restaurant he discussed with Mr. Olaba of the payment of Kshs. 100,000/= . No single cent was paid to him. The restaurant was in Makadara. He was sent by the DCIO Kilimani one Fatuma Hadi. He do not know what is entrapment. He did not know the person to be killed. He had never met Mr. Olaba prior to when they met at a restaurant. He had not met Mr. Wachira before. He was in court as a witness to the case.

PW3: NELSON WACHIRA MWANGI SWORN.

17. He worked at a car wash. The car wash, is at Highrise (Nyayo) and he washed vehicles.
18. On 14th April 2021, he was handling his duties. He worked until in the evening. At around 5.20 p.m. one of a customers who used to come with a Black Rav 4. On that day he came on foot

and he talked to me. He asked him to assist him. He told him he had a rape case in Court. He told him that he wanted the witness to be eliminated. He indicated he would pay Kshs, 100,000/-.

19. He meant that he wanted the witness to be killed. He told me that the down payment was Kshs. 10,000/- and he would pay him in the evening. They walked to Madaraka Strathmore University and he entered an ATM and withdrew some money. They entered into a nearby building and went to the basement, there were hotels, shops and boutique. They sat down and he gave him Kshs. 10,000/- and told him to go and look for people who can kill someone. They departed and went separate ways.

20. PW3 told him that the witness resided near Statehouse Girls. When he received the money he was not comfortable. He did not use that money.

21. On 17th April 2021, he received a message from Olaba and he sent him a number and told him whenever he was comfortable he would call using that number. His phone number was 0752 he could not remember the other digits. He told him to send him Wendi's number and he sent the number with a name Wendi Kemunto.

22. He called the said number and a lady picked up the same. When she picked up he called her Wendi, and the response was that she was not Wendi, but her mother. He asked her if they could meet as he want to inform her something. He told her it related to Wendi's case which was in Court.
23. She told him she was not nearby and was fearful. He suggested they meet at the police station. They met at Kilimani Police Station. He told her what Olaba told him concerning the case of Wendy. They met first before reporting to the station.
24. They entered the DCI - Offices and found an officer by the name Otieno. He informed him what Olaba wanted. He told him to be close to Olaba so that he does not escape. He advised him to inform him to top up the amount. He tried to meet him (Olaba) but they never met at first. Thereafter on 22/4/2021 an officer by the name Otieno asked whether he could meet Olaba and talk to him.
25. Otieno linked him with another officer called Ibrahim. He called Olaba and asked him whether they could meet and talk, so that he could add some money. When he called Olaba he told him

he was a little bit busy and suggested they meet in the evening

26. They were to meet at Madaraka, the same place where he gave him the money. They met with Olaba and he was together with PW2 PC I Mohammed. They met first with the officer, and after a few minutes Olala arrived at the meeting point

27. When Olaba arrived they started negotiating with Olaba on how he could top up the amount. He indicated that he did not have money to top up, but he said he could give them the Kshs: 100,000/- first thereafter he could top up after the mission had been accomplished.

28. While they were discussing policemen arrived, one of them was officer Otieno and I do not know the other officer. That is how he was arrested. He was given Kshs. 10,000/-in (1,000) denominations. MFI -1 (i-x). The said Olaba was/is seated at the dock.

Cross-Examination by Oduk

29. He used to work at a car wash. It is known as Boys Car Wash. He was still working there. He was not the owner of the car wash. The owner is known

as Daseka. They are about 10 people. He had never been to Court before. He understood the nature of an oath.

30. On 13th April 2021, he was at work, they had a record of the cars washed. They indicated the vehicle numbers plates. They did not indicate the names of the people, but they concentrated on the vehicle registration details.

31. There were many people who passed at the car wash. He recorded his statement on 17th April 2021. In the statement identified the Accused as "**Budaa.**" Today, he referred him as Olaba. He used to know his friend whom they used to come with at the garage. The friend was the owner of the vehicle. He used to refer the friend as "**Kenya One**". He was a man. He had washed the vehicle for "**Kenya One**" for a period of four months

The vehicle was a "Rav 4" It was Black in colour. I do not remember the number plate. In their records, the number plate should be there. He did not have any record of the car wash.

32. He told him that he had a rape case in Court. He did not have the particulars of the same. He told him to look for people who they could come together and perform the task.
33. He did not know how to perform the task which had been proposed. He took the money but he could not deliver he wanted to know his seriousness. He was not given Kshs. 100,000/=. The ATM was located outside Strathmore. He did not know the bank. He was on the other side of the road. That was the money that he was given. When he received the money, he placed the same in his pocket. He used to wash the vehicle for "Kenya One" in 2019. He did not know whether he was in Kamiti. He did not know what is "Mboka."
34. Olaba sent him a text message. He sent Wendi's number. He could not exactly remember Olaba's number. It was 0740-something he could not recall. He could not remember Wendi's number. He called Wendi but it was the mother who picked the same. The person to be contacted was supposed to be Wendy. He knew Wendy by photo identification. Olaba showed him the same.

The Accused showed him the photograph which was on his phone.

35. They met with the officer at a Police Post. He is known as Ibra. At the police station, he recorded a statement and thereafter Mama Wendy followed. He was not given any OB number. The vehicle which was being washed at their car wash belonged to (friend) "Kenya One and not "Budaa." (Accused)

He did not have "Kenya One's" number. They were at "Mada" when they met. Strathmore is at Makadara. He had have not crammed his mobile phone number. He Knew his identity card number off head. There is a Police Post at Highrise.

36. When he called Mama Wendy, she told him they were to meet at Kilimani Police Station. He was not given any promise. They were arrested on 22nd April 2021, they were the three of them.

That is "Budaa," (Accused) Ibrahim (PW2) and himself (PW3). He knew Ibrahim when they met. It was at that point that he knew he was a police officer. He later discovered he was a police officer attached to DCI Kilimani.

37. Their meeting with "Budaa" was to negotiate on how he will enhance the money and plan on the elimination of Wendy. He could identify Wendy based on the photo that he was shown. The officer Ibrahim had not seen Wendy's photo.

38. He first introduced Ibrahim as the Head of Watchmen. He could not recall Ibrahim's number. Officer Otieno is the one who gave Ibrahim his number. The plan was to stage a robbery and thereafter eliminate Wendy.

39. The plot was that she should not attend Court to testify. He did not know the date. He was told she resides near State House Girls. They had not set the time for the robbery. They were to use a gun for the same. He told him he had found people with a gun for the mission to be accomplished.

40. The officer (Ibrahim) was the one present, but there was no gun. He was giving Olaba the confidence that there was a gun. Olaba is the person who had planned. On his arrest, it was Ibrahim and Otieno who were the ones who planned the same.

The officers planned for the Accused to be arrested. He was successfully arrested. The money

he took to the station is before Court. He did not record the serial numbers of the same.

DEFENCE

DWI Alex Mahaga Olaba Sworn

41. On his Defence DW1 stated that he was a Former Rugby player as well as a student at Strathmore University. He played for Strathmore University and Kenya Harlequins. He played for Kenya Harlequins before. He had a different matter before a different Court. Sexual Offence No. 27 of 2020. Previously there was another matter Sexual Offence No.10 of 2018. In regard to Sexual Offence No.10 of 2018, he went through the trial process and he was convicted for 15 years. On Appeal, the High Court directed a re-trial be held. This led to Sexual Offence No. 27 of 2020. He had been attending Court whenever required.

42. This matter arises from the other matter, he was being accused in trying to eliminate the main witness in Sexual Offence No. 27 of 2020. The name of the witness is Wendy Kemunto. The said Wendy Kemunto did not testify. He was arrested on 22nd April 2021, on this particular day he was in Busia County at around 4 AM.

He was to travel to Nairobi and looked for public vehicles but he found none. Luckily, he found a private vehicle.

43. On this particular day, there was as matter Sexual Offence No.27 of 2020. The mater was being mentioned virtually. His lawyer sent him the link and he joined the same. Subsequently, he travelled to Nairobi. He arrived in Nairobi at around 1.30 p.m. and he was to meet the Strathmore Head Coach by the name Louis Otieno. He was coming to talk to him over rejoining rugby, since he had been in prison. He talked to the coach nicknamed "Fathe" who informed him that he would be at the Strathmore Training grounds at 5 pm.

The Strathmore training grounds is at Madaraka, "Strathmore Sports Complex. He did not manage to meet him that day.

44. On the same day, he left Highrise to Madaraka. He walked all the way.

On the way at an estate/place known as Akila (2), someone waved him down from behind, he saw a young man that he was not familiar to but he stopped.

He introduced himself as a Rugby player and he inquired where he was going and he told him. The way he talked he seemed like someone who knew him. He inquired whether he wanted to rejoin Rugby, and from his questions seemed to know that he was from prison. He informed him that he was also looking for a better club to join. He suggested they could join the same club and play together. They talked as they were headed to Akila. Behind them was an elderly person with a young man.

They caught up with them. He greeted them and the young man introduced him as his friend.

45. Thereafter it started raining. They hurried so as to get shelter on the road. They got into Siwaka Plaza, it is a building that has stalls. They got there and sat down, and no sooner had they sat down than he saw the elderly person who was behind them was trying to make a call but later hang up.

Immediately, he said some two huge gentlemen who came straight to them. They greeted all of them and he was grabbed by his shoulder and put handcuffs on them, and told them to sit down.

46. One of the two gentlemen pulled out his gun and cocked it. That action scared the people who were around and they ran away. They sat there for about 40-50 metres and later escorted to an awaiting police vehicle.

They went to Kilimani Police Station and held in separate rooms. He managed to get a phone and called his Advocate Oduk and informed him that he had been arrested. As he was waiting for his lawyer, one of the guys who had arrested them came in and started interrogating him with threats: that he remains silent.

Later on his bond was cancelled and they went to the High Court for a Revision No. E108 of 2021 and consolidated with No. E334 of 2021. The decision of the High Court was that his bond was reinstated.

47. The allegations that he owns a motor vehicle are false. He has never taken any motor vehicle to a car wash. He did not withdraw any money from

any account, and he was just from prison and struggling financially.

He did not recall if there were bond terms conditions issued by the Court. He had never threatened any witness either directly or indirectly. He did not conduct himself in a manner to jeopardize any investigations.

CROSS-EXAMINED BY PROSECUTOR

48. On Cross examination by Prosecutor, DW1 stated that Sexual Offence No. 27 of 2020 was pending at Milimani Law Court. The first case was Sexual Offence No. 10 of 2018.

He stated that on 22nd April 2021 he was at Siwaka Plaza with two gentlemen. He met them randomly on the streets. That was PW2 and PW3.

49. PW2 indicated that he was a police officer and PW3 worked at a car wash. He had never met PW2 and PW3. He came to realize that he was being set-up. He could drive but he did not take the vehicle to the car-wash.

He had a Bank Account at NCBA Bank. He was placed in a cell and roughed up by Police Constable Otieno.

RE-EXAMINATION

50. On Re-examination DW1 stated that he had an account at NCBA. He had an ATM Card. He said he did not withdraw any money on 22nd April. After Sexual Offence No.10 of 2018 he was convicted and they were at Kamiti Prison. They were there for about one year.

51. He said did not know the Gentleman who was working at the car wash. He also said he did not know the elderly gentleman.

The reason for travelling to Nairobi was to meet the Strathmore coach on rejoining the Rugby team. He had discussion with the Car Wash guy on rugby only and nothing else. The issue of investigating officer harassing him was dealt by the High Court. The alleged witness who was to be eliminated, he only saw her at Milimani Court. He had never interacted with the mother of the purported witness.

PETITION OF APPEAL

52. On 5th June 2023, Alex Olaba the Appellant herein filed a Petition of Appeal and stated as follows:

1. That the Trial Magistrate erred in law and fact by failing to comply with the provisions of Section 224 of the Penal Code, Chapter 63 Laws of Kenya.
2. That the Trial Magistrate erred in law and fact by failing to
comply with the provisions of Section 117 of the Penal Code, Chapter 63 Laws of Kenya.
3. That the Trial Magistrate failed to address himself correctly on the law regarding conspiracy charges.
4. That the Trial Magistrate erred in law and fact by failing to consider that the alleged victim KA, neither recorded a statement nor was she a witness before the trial court.
5. That the Trial Magistrate erred in law and fact failing to consider that, no specific evidence was adduced in regards to the nature, time, manner and place that the alleged victim would be killed.
6. That the Trial Magistrate erred in law and fact by failing to consider that, no specific evidence was adduced in regard to the bank account and receipt in regard to the alleged money of Kshs. 10,000.
7. That the Appellant's conviction is against the weight of evidence. The Trial Magistrate erred in law and fact by ignoring or not weighing

sufficiently, and not judiciously appreciating the inconsistent and contradictory evidence of the Prosecution Witnesses.

8. The Trial Magistrate erred in law and fact by considering the Prosecution Witnesses who told numerous untruths, were cunning, unreliable and evasive, forgetful and contradictory on material aspects.
9. That the Trial Magistrate erred in law and fact in selectively impugning witnesses' evidence and then giving credence to testimonies and holding "irrelevant" evidence which was immaterial and unfavorable to the Appellant
10. That the Trial Magistrate erred in law and fact in admitting and relying on a generic Victim Impact Assessment Statement, adduced as evidence yet the alleged Interviewed victim KA was not part of the proceedings
11. That the Trial Magistrate erred in law and fact by failing to consider that, no specific evidence was adduced in regard to the alleged phone number 0740 by.....PW3.
12. That the Trial Magistrate erred in law and fact by failing to consider that, no evidence was adduced

to counter the Appellant's sworn testimony that he attended court in the Chief Magistrates Court at Milimani in Criminal Case No. Sexual Offence 27 of 2020.

13. That the Trial Magistrate erred in law and fact in not recording the proceedings in court correctly,
14. That the Trial Magistrate erred in law and fact in admitting hearsay evidence adduced by the Prosecution Witnesses.
15. That the Trial Magistrate erred in law and fact in relying and admitting entrapment evidence to convict and sentence.
16. The Trial Magistrate erred in law and fact by not taking into consideration that, the Prosecution failed to prove the charges of conspiracy to murder beyond reasonable doubt, as it did not prove the ingredients of the offence as required and provided for, in Section 224 of the Penal Code, Chapter 63 Laws of Kenya.
17. The Trial Magistrate erred in law and fact by not taking into consideration that the Prosecution failed to prove the charge of conspiracy to defeat Justice and interference with witnesses beyond reasonable doubt as it did not prove the

ingredients of the offence as required and provided for in, Section 117(c) of the Penal Code, Chapter 63 Laws of Kenya.

18. That the Trial Magistrate erred in law and fact by admitting inconsistent evidence and in lieu went to make personal observations that were not corroborated
19. That the Trial Magistrate erred in law and fact in not giving any adequate consideration and rejecting, ignoring and not appreciating the sworn and unchallenged evidence of the Appellant and not considering the Defence judiciously.
20. That the Trial Magistrate erred in law and fact by failing to appreciate the Appellant's filed submissions dated 27th February 2023 and 15th May 2023.
21. That the Trial Magistrate erred in law and fact by failing to consider the mitigation by the Appellant.
22. That the Trial Magistrate failed to consider that individuals "Kenya One and Fathee" Budaa! were not witnesses hence, convicting on such evidence was unfair and unjust to the Appellant.

23. That the Trial Magistrate erred in law and fact by failing to take into consideration the Appellant's defence before reaching the impugned verdict.

24. That the Trial Magistrate erred in law and fact in not addressing himself on the matter of burden of proof considered in criminal cases, and in particular conspiracy to commit murder and conspiracy to defeat justice.
25. That the Trial Magistrate erred in law and fact by failing to take judicial notice on the evidence that one would be in Bungoma in the morning and in the evening in Nairobi,
26. That the Trial Magistrate erred in law and fact by convicting the Appellant on extraneous circumstances.
27. That the Trial Magistrate erred in law and in fact by failing to take judicial notice that the Appellant never absconded any court proceedings at all as alleged by the Prosecution.
28. That the Trial Magistrate erred in law and fact by admitting the evidence of PW-3 which was contradictory, uncorroborated and untruthful since

he could not remember his ID. No. and the alleged phone number 0740.

29. That the Trial Magistrate failed to consider that no evidence was adduced to show that the Appellant knew and/or communicated to the alleged victim KA.

30. That the trial magistrate erred in law and fact in failing to consider section 169 of the criminal procedure Act, Chapter 75 laws of Kenya.

31. That the Trial Magistrate erred in law and fact by convicting the Appellant, while the conviction and sentence was unsafe.

53. **REASONS FOR THE APPELLANT' PRAYERS:**

- i. That the Appeal be allowed.
- ii. The conviction by the Trial Magistrate by Honorable. G. Onsarigo be set aside and sentence quashed.
- iii. Any other or further order that this Court May deem fair and just to grant.

APPELLANTS SUBMISSIONS

54. On 16th June 2025 the appellant herein, filed submissions and stated as follows:

ISSUES FOR DETERMINATION

It is the Appellant's humble submission that the issues for determination as follows:

- i. Whether the charge sheet was fatally defective?
- ii. Whether the Appellant proved its case beyond reasonable doubt on
 - a) conspiracy to commit murder?
 - b) conspiracy to defeat justice?
- iii. Whether the circumstances leading to the arrest of the Appellant amounted to entrapment?
- vi. Whether the Honorable Court should allow this appeal?

WHETHER THE CHARGE SHEET WAS FATALLY DEFECTIVE?

55. The Appellant submitted that, the essential ingredient in pores for the offence of conspiracy are:

1. The Appellant submitted that the Charge Sheet was fatally defective, as it neither disclosed who the complainant was, nor did the complainant record a statement or testify as a witness during the trial.
2. He stated that it is trite law that every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or

offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged.

3. Therefore, it is trite law that the complainant having not appeared in court during trial, the law provides for acquittal of an accused person for non-attendance by the complainant.
4. It is noteworthy that, despite not having disclosed who the complainant was, the court went ahead and relied upon the probation officer's victim impact assessment report. Trial Court Judgment
5. The Appellant submitted that, the essential ingredient to prove for the offence of conspiracy are:
 - i. That two or more people agree to put in effect a scheme whose ultimate aim would be the commission of a criminal offence, and
 - ii. Existence of an agreement to put into effect a course of conduct in furtherance of a criminal purpose.

6. In the case of **Jane Wambui Gakungu vs. Republic**, Hon. Lady Justice Ngenye Macharia (as she then was) held that:

" The rationale being that she could not commit the offence of conspiracy alone. I cannot agree more. The offence of conspiracy requires two or more persons to act in concert towards the attainment of a common goal.."

7. In the Court of Appeal case of **Evans Waweru Maina vs. Republic**, the Learned Judges held that:

***"The offence of conspiracy cannot exist without the agreement, consent or combination of two or more persons... so long as a design rests in intention only, it is not indictable, there must be agreement... Proof of the existence of a conspiracy is generally a matter of inference deduced from certain criminal acts of the parties accused, done in pursuance of an apparent criminal purpose in common between them.*"**

8. In the case of **Christopher Wafula Makokha vs. Republic**, Hon. Mr. Justice A. Mabeya held that:

"...it is clear that the prosecution must prove the existence of an agreement

between the accused and some other person to do the act".

9. In the case of **Nicholas Shivachi & Another vs. Republic**, Hon. Mr. Justice L. Kimaru (as he then was) held that:

"On re-evaluation of the evidence adduced before the trial court, in light of the submission made on this appeal, it was clear to the court that the prosecution failed to establish the essential ingredients of the charge of conspiracy. In the present appeal, no evidence was adduced by the prosecution to establish the existence of an agreement between the Appellants, either by themselves, or with others, to put into effect a course of conduct in furtherance of criminal purpose..."

10. Further, the Respondent failed to adduce evidence of call log data despite recovering the Appellant's phone and sending it for forensic analysis and therefore, could not link the Appellant to the offence.
11. The Appellant submitted that the Respondent's witnesses, could not remember the phone number!! that was allegedly used for communication between them and the Appellant.

12. Additionally, the photo of K. A that was allegedly shown to the Respondent's witness by the Appellant was not adduced in court.
13. Further, the Appellant submitted that the evidence by the Respondent was marred with inconsistency, contradiction and discrepancies.
14. For instance, the Appellant submitted that, PW-3 testified that he recorded his statement on 17th April 2022 which is almost a year later after the Appellant was charged.
15. Further. PW-2 and PW-3 gave contradicting evidence as to where they met the Appellant. According to PW-2, they agreed to meet at a restaurant in Makadara while according to PW-3, they met at Madaraka Strathmore Area.
16. It is the Appellant's submissions that the Respondent did not adduce evidence to show that indeed, the Appellant withdrew the alleged money of that particular amount from his bank account,
17. The Appellant submitted that the Respondent's witness could not remember the bank at which the alleged money was withdrawn despite alleging to be present when it was withdrawn by the appellant,

18. The Appellant submitted that there was no weapon adduced to show that there was a plan to execute the alleged conspiracy.

19. In the case of **Karamuki vs. Republic**, Hon. Mr. Justice William Musyoka held that:

"I have already concluded that the appellant was wrongly charged conspiracy, for he could not have conspired alone, and he should not have been charged alone.."

20. In the case of **Teresia Wanjiru Njoroge -versus- Republics**, Hon. Mr. Justice Fred A. Ochieng held:

"There is no evidence of any conspiracy to which the Appellant was a party. Therefore, I allow the appeal quash the conviction and set aside the sentence."

21. In **Mohamed Koriow Nur -versus- Attorney General**, Hon. Mr. Justice Warsame (as he then was) held that:

"Entrapment occurs when (a) the authorities provide a person with an opportunity to commit an offence without acting on a reasonable suspicion that this person is already engage in criminal activity or pursuant to a bonafide inquiry..."

22. In **Cyprian Nyakundi & another-versus- Director of Criminal Investigations & 2 others**, Hon. Mr. Justice Mrima held that:

"In this case, the involvement of the police went far beyond the limits of acceptable police conduct and investigations and right into the realm of entrapment. All the evidence intended to be relied on by the prosecution in the criminal case is on the entrapment."

23. In **R vs. Loosely**, Lord Nicholls of the House of Lords observed that:

" It is simply not acceptable that the state through its agents should lure its citizens into committing acts forbidden by the state and then seek to prosecute them for doing so. That would be entrapment."

FURTHER SUBMISSIONS BY THE APPELLANT

24. The aforementioned is consistent with the fact that no evidence was adduced to corroborate the allegation that the Appellant approached PW-3 at the car wash. There was no evidence of the vehicle's number plate, nor was the book allegedly containing records of vehicles at the car wash produced in court, In fact, even evidence of the existence of the car wash itself was not adduced.

25. Additionally, the Appellant submits that at the time PW-3 alleges the Appellant used to visit the car

wash, he was in custody at Kamiti Maximum Prison in connection with Chief Magistrate's Sexual Offence Case No. 27 of 2020, before a retrial was ordered by the High Court in that matter.

26. The Appellant submits that not only were the aforementioned allegations unproven, but the Respondent also failed to adduce a bank statement to show that the Appellant had a bank account, withdrew the alleged amount (if indeed he had an account), or to identify the specific bank and ATM. Furthermore, no CCTV footage from the said bank or ATM was produced in evidence,

27. In the case of **Robert Karanja Kamau-versus-Prosecution**", Hon. Lady Justice F. Muchemi held that:

"The prosecution must prove that the appellant conspired with others. After carefully evaluating the evidence, I am of the considered opinion that the prosecution failed to prove the offence of conspiracy against the appellant.

28. Additionally. PW-2 informed the court that there was a discussion between the Appellant and PW-3 on Ksh. 140,000/-, while according to PW-3, the alleged amount was

Ksh. 100, 000/-

29. The Appellant reiterates that all activities prior to the arrest were instigated by the police officers, including: (a) exerting pressure on PW-3 to arrange a meeting; (b) requesting the Appellant to top up the amount; (c) purporting to have found a hitman; and (d) demanding payment prior to the execution of the alleged crime.

30. In the case of **Mohamed Korior Nur -versus- Attorney General**, Hon. Mr. Justice Warsame (as then was) held:

"It is not acceptable that the State through its agents should instruct its citizens into committing acts forbidden by the law and there seek to prosecute them for doing so. That could be a misuse of State of power and an abuse of the process of the court. The court must refuse to convict an entrapped person not because his conduct falls outside the prescription of the statute but because even if his guilt is admitted, the methods and manner employed on behalf of the State to bring about the evidence cannot be countenanced."

31. The Appellant reiterates that the charge sheet was defective as it only identified the Complainant as K.A but the Complainant did not record a statement or testify as a witness in during trial,

35. In the case of **Joseph Omulasa Oyasi-versus-Republic**, Hon. Mr. Justice L Njagi (as he then was) held that:

"To the extent that the word "knowingly" is pivotal to a charge and that it is missing from the charge against the Appellant, I find that the charge was defective. For that reason, the conviction of the accused was improper and should not be allowed to stand"

36. In the Court of Appeal case of **Peter Ngure Mwangi -versus- Republic**, the Learned Judges held that: the charge sheet can be defective if it is in variance with the evidence adduced in its support".

RESPONDENTS WRITTEN SUBMISSIONS

56. On 26th June 2025 the Respondent filed submissions and stated as follows:

1. PW3 testified that he knew the appellant as "budaa" and that he had come several times with a friend to have their car washed at their carwash. That the appellant approached him with the intention to assist him to kill a witness. He stated

that he was paid Ksh. 10,000 as down payment for the work.

57. PW2 corroborated PW3's testimony that the appellant hatched a plan to eliminate the said witness and to that effect he as undercover police posed as the hitman. That the three met at Madaraka to discuss execution of the plan. That at the meeting they negotiated the price for the work and settled at Ksh. 100,000 and that while at the meeting the appellant was arrested.

58. PW4 who is the Investigating officer did produce a charge sheet that confirmed indeed the appellant together with another were facing a charge of Gang rape and the victim is the said witness who was to be murdered.

He said the testimonies were cogent and consistent and it is clear that there was intention to murder the witness.

59. The appellant also claimed the prosecution's evidence was marred with inconsistencies, contradictions and discrepancies. He has however failed to demonstrate the same because as a matter of fact, the prosecution witnesses gave cogent, consistent and credible evidence. The Trial

Court observed just as much (see pages 23 and 24 of the judgment) and we urge the court to find the same.

60. The Appellant also claimed that the circumstances leading to his arrest amounted to entrapment.

The Black's Law Dictionary Ninth Edition at page era defines entrapment as follows:

1. "A law-enforcement officers or government's agent inducement of a person to commit crime, by means of fraud or undue persuasion, in an attempt to later bringing criminal prosecution against that person."

2. The affirmative defence of having been so induced. To establish entrapment (in most cases) the defendant must show that he or she would not have committed the crime but for the fraud or undue persuasion."

61. This court in **Mohamed Koriow Nur v Attorney General (2011) eKLR** citing the case of **R v. Mack (1988) 2 S.C.R.903** Justice Warsame (as he then was) held that:

"Entrapment occurs when (a) the authorities provide a person with an opportunity to commit an offence without

acting on a reasonable suspicion that this person is already engaged in criminal activity or pursuant to a bona fide inquiry, and, (b) although having such a reasonable suspicion or acting in the course of a bona fide inquiry. they go beyond providing an opportunity and include the commission of an offence."

62. From the evidence of PW2 and PW3 it is clear that at the time they were meeting with the appellant, the appellant had already engaged in the criminal activities he was charged with and in fact, he had already made a down payment of Ksh. 10,000 to that effect. So that, PW2 who was the undercover officer only provided an opportunity for the appellant to fulfill his existing intent and did not induce him to commit the crimes.

63. Further, that there is a distinction between entrapment and legitimate undercover investigations. The same was held in the case of **Lydia Lubanga v Inspector General of Police & 4 others (2016) KLR** where Justice P. Nyamweya (as she then was) held that:

"Entrapment ought to be distinguished from instances where investigators use legitimate undercover investigations as

accepted methods of police investigations."

Consequently, we urge the court to find that the defence of entrapment in this case does not hold and therefore reject it.

WHETHER THE CHARGE SHEET IS FATALLY DEFECTIVE

64. Section 134 of the Criminal Procedure Code defines the parameters of framing a charge sheet, that:

"Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged."

65. We submit that both charges (count 1 and 2) met the requirements of Section 134 of the Criminal Procedure Code as the particulars therein give reasonable information for the appellant to have understood the nature of the offences charged. The appellant has not argued that the charges were duplex or the particulars did not give

enough information for him to have understood the charges

66. On the contrary, the appellant invites you to find the charge sheet defective for the reason that it did not disclose the complainant nor did the complainant record a statement. He urges the court to reject the invitation as the ground raised does not form the basis of rejection of a charge sheet.

That in any case, the charge sheet did contain the initials of the victim whose full names were disclosed in the course of the trial, (**see pages 43.50.52.53 of the proceedings**) therefore the appellant was not prejudiced. We urge you to find that the charges were proper and valid.

ANALYSIS & DETERMINATION

1. The Court considered the Trial Court proceedings & judgment various decisions by Courts on the same subject matter, Petition of Appeal and detailed written submissions by Appellant & Respondent respectively.

The issues that emerge for analysis and determination are condensed as follows;

- a) Whether the charges/charge sheet were/was defective?
- b) Whether the offences under Sections 224 & 117 of the Penal Code were proved correctly on the law regarding conspiracy?
- c) Did the Prosecution discharge the burden and standard of proof in this case? The Appellant alleged KA neither recorded a statement nor was she a witness in the Trial Court; no specific evidence was adduced as regards nature, time, manner and/or place that the alleged victim would be killed; the evidence about the bank account the Respondent failed to adduce a bank statement to show that the Appellant had a bank account, withdrew the alleged amount (if indeed he had an account), or to identify the specific bank and ATM. Furthermore, no CCTV footage from the said bank or ATM was produced in evidence, receipt in regard to the alleged money of Ksh 10,000/- and 'Kenya One' and 'Fathee' were also not called as witnesses and convicting on such evidence was unfair and unjust.
- d) Whether circumstances leading to the arrest of the Appellant amounted to entrapment.

- e) Did the Trial Court take into account, Appellant's Defense, Appellant's submissions of February & May 2023, Mitigation of the Appellant?
- f) Whether the conviction through Judgment under Section 169CPC and sentence were safe; that the Trial Court on relying on Victim Impact Statement, the Prosecution did not produce relevant documents and exhibits.
- g) The alibi by Appellant was not considered, that on day of meeting he was in the **CM SO 27 of 2020**. PW-3 alleges the Appellant used to visit the car wash, he submitted that he was in custody at Kamiti Maximum Prison in connection with **Chief Magistrate's Sexual Offence Case No. 27 of 2020**, before a retrial was ordered by the High Court in that matter.

2. **Whether the charges/charge sheet were/was defective?**

Article 50 2 (b) of the Constitution entails among others tenets of fair hearing;

the right to be informed of the charge, with sufficient detail to answer it.

Section 134 Criminal Procedure Code Provides;

Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged.

3. The Appellant deposed that the chargesheet herein is defective as it did not disclose the Complainant or an offence to accord him put in proper defense. The Statement of Offences and Particulars did not include any other person who the Appellant committed conspiracy to murder and conspiracy to defeat justice with.

4. The Appellant further submitted that the Accused person conspired on diverse dates jointly with others not before Court, to kill K.A. The prosecution never disclosed whom K.A. is and never recorded a statement or made a report that his/her life was in danger.

5. The Appellant relied on the case of **Daniel Lopeyek vs Republic 2022 eKLR** where Waweru J considered the charges preferred defective incurable by Section 382 CPC as the offence was not created by a specific statute as the section cited did not create the offence charged.

6. The Respondent submitted that the charge sheet was not defective and was in compliance with Section 134 CPC; the fact of referring to 'KA' in the Chargesheet or information full names were disclosed in the course of the trial, (see Record of Appeal Trial Court Proceedings and judgment at pages 43.50.52.53 of the proceedings) therefore the appellant was not prejudiced.

7. This Court considers the law on charge/charge sheet/information as follows;

In Peter Ngure Mwangi v Republic [2014] eKLR, the court stated and listed further grounds for holding charges defective. The court held that:

“A charge can also be defective if it is in variance with the evidence adduced in its support.” Quoting with approval from **Archbold, Criminal Pleading, Evidence and Practice (40th Edn)**, page 52 paragraph 53, the Court stated in **Yongo v R, [198] eKLR** that:

“In England it has been said: An indictment is defective not only when it is bad on the face of it, but also:

When it does not accord with the evidence before the committing magistrates either because of inaccuracies or deficiencies in the indictment or because the indictment charged offences not disclosed in that evidence or fails to charge an offence which is disclosed therein.

.....When for such reason it does not accord with the evidence given at the trial.”

8. From the Trial Court record, the evidence on record confirms the /charge/ case proceedings of CMCR E542 of 2021 arose from CMSO 27 of 2020. The Complainant therein was the subject /victim in the present case of conspiracy to commit murder C/S 244 of Penal Code and conspiracy to defeat justice C/S 117 of Penal Code.

9. The evidence of PW1 Jackline Amimo mother of the subject/victim Wendy stated that she received a call in relation to the said case involving her daughter. PW1 met the caller PW3 at the Police Station and later PW3 in the company of PW2 and the Appellant meeting after discussions resulted in his arrest.

10. From the above facts on record, the evidence on record reflects the Charge in question;

The Statement of offence; Conspiracy to murder c/s to Section 224 of the Penal Code.

The Particulars of offence; on diverse dates between 14/4/2021 & 22/2021 within Nairobi County, jointly with others not before Court conspired to kill K.A.

The Statement of offence; Conspiracy to defeat justice c/s to Section 117 of the Penal Code.

The Particulars of offence; on the 22/4/2021, at unknown location within Nairobi, jointly with others not before Court, interfered with the Trial process in S.O. 27/2020 by attempting to cause the death of key witness KA.

11. S.O. 27/2020 is the case that rape charges were preferred against the Appellant and another and the victim subject was/is Wendy and the matter was heard and completed and on appeal the High Court ordered a retrial during which the Trial commenced and subsequent activities led to the present appeal from the case before the Trial Court.

Section 382 of the Criminal Procedure Code provides that errors that are not prejudicial can be pardoned or amended.

“Subject to the provision’s hereinbefore contained, no finding, sentence or order

passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission, or irregularity in the complaint, summons, warrant, charge, proclamations, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under the Code, unless the error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question of whether the objection could and should have been raised at an earlier stage in the proceedings. “

12. In **Bernard Ombuna -Vs- Republic, CA 27 of 2018** the Court of Appeal upheld this test holding that: -

15. “In a nutshell, the test of whether a charge sheet is fatally defective is subjective rather than formalistic. Of relevance is whether a defect on the charge sheet prejudices the appellant to the extent that he was not aware of or at least he was confused with respect to the nature of the charges

preferred against him and as a result, he was not able to put up an appropriate defense.

The **Victim Protection Act**; a victim is defined as follows and protected in the following manner;

"victim" means any natural person who suffers injury, loss or damage as a consequence of an offence

8. Right to privacy and confidentiality

(1) A victim has a right to privacy—

(a) from the media, whether print, electronic or other types;

(b) from unreasonable intrusion from health professionals;

(c) of confidentiality of their communication with victim support service providers; or

(d) from any other person.

12. Victim impact statements

.....
(3) A victim has a right to present a victim impact statement in all cases where the court is to consider victim protection and welfare.

13. In these proceedings PW1 mother of the victim in S.O. 27 of 2020 confirmed that her daughter Wendy had a rape case after she was informed that a plot was hatched to eliminate her.

The particulars of offence Count 2 clearly state the Appellant/accused was alleged to have interfered with

the Trial process in S.O. 27/2020 by attempting to cause the death of key witness KA. The Appellant knew who the key witness was in the said Trial, he participated in the Trial and it was Wendy Kemunto.

14. As Victim, she was/is protected by the **Victim Protection Act** and her name(s)/identity was/ were anonymized (written in letters only) to protect information in compliance with the law; Section 8 of the Act. The Trial court proceedings and cross examination by his Advocate, the Court record confirms the Appellant's presence, heard the evidence adduced and cross examination by his advocate. Therefore, KA initialized, the Defense was not prejudiced or confused to prevent preparation of defense.

15. On the 2nd Limb is that KA did not record statement nor testify in these Trial Proceedings. The role of investigations and prosecution are the purview of Directorate of Investigations (DCI) Police; to conduct investigations and mount a case based on evidence availed and Office of Director of Public Prosecution (ODPP) to prefer charges/information and present evidence.

Section 143 of the Evidence Act provides;

‘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’.

16. In **Samuel Kagiri Njuguna v Republic [2016] eKLR** All that the prosecution is required to do is to call such a number of witnesses as it thinks is sufficient to prove its case. There was no basis laid to show as subject/victim in this case What Wendy Kemunto alias KA saw talked to/with, heard or did anything or witnessed anything to testify in these proceedings and therefore apart from being the subject and potential victim, she was not crucial or necessary as a witness to prove the case; the existence of **SO 27 of 2020** case was sufficient to lay the basis of the matter.

17. I find the Statements of Offences and Particulars of offences were sufficiently detailed to enable the Appellant prepare for Defense. The particulars spelt out key witness in SO 27 of 2020; a case ongoing where the Appellant was part of and participated in trial. As such no prejudice was occasioned to deny the Accused person preparing Defense as the charges had sufficient particulars/detail.

18. Thirdly, The Director of Public Prosecution (ODPP) has constitutional and statutory mandate to bring prosecution on behalf of the Republic. In a criminal trial, attendance by a Prosecutor lawfully appointed by the Office of the Director of Prosecution is construed to be representation of the DPP and the victim.

In the case of **Director of Public Prosecutions v Perry Mansukh Kansagara & 8 others [2020] eKLR** the Court held that

“....whenever a prosecution counsel appears in a matter his appearance must be construed to be on behalf of the DPP as complainant. In this case, therefore, due to the DPP’s presence at the hearing, section 202 of the Criminal Procedure Code was not applicable.”

19. In **DPP vs Nairobi Chief Magistrate’s Court & Another (2016) eKLR, Lenaola J** (as he then was) held that the DPP is the functional complainant for purposes of **section 202 of the Criminal Procedure Code.**

20. Therefore, on the issue of Wendy Kemunto testifying as Complainant and /or making report was served by DPP being the Complainant.

Whether the offences under Sections 224 & 117 of the Penal Code were proved correctly on the law regarding conspiracy?

Did the Prosecution discharge the burden and standard of proof in this case;

Okeno vs. Republic [1972] E.A 32 provides guidance that as first appellate court, the court is obligated to re-evaluate the evidence afresh, and make its own conclusions bearing in mind that it did not have the advantage of hearing and observing the demeanor of the witnesses as elaborated in the case

21. In **Moses Kathiari Rukungu - Vs- Republic [2018] eKLR** Hon. Majanja J held

“The essential ingredient to thus prove the offence of conspiracy to commit a felony is that two or more

people agree to put in effect a scheme whose ultimate aim would be the commission of a criminal offence. It will not matter that the criminal offence proposed to be done may be impossible to be undertaken.

.....

for the charge of conspiracy to commit a crime to be proved to the required standard

of proof beyond reasonable doubt, it must be established that the Appellants entered into an agreement with the aim of putting into effect a course of conduct that is in furtherance of a criminal purpose, which the agreement was intended to achieve.

22. Nicholas Shivachi Mboya & Joshua Litsululu Amutavi vs Republic HCT CR APP 243 of 2019 eKLR, Hon. L.Kimaru J (as he then was) the Court observed;

There was no evidence adduced by the prosecution to support the assertion that the Appellants, either singly or jointly, had communicated with the police officers who posed as hitman, and agreed on the facilitation fees, to enable the court reach determination that indeed such instructions were given..... In the present appeal, no evidence was adduced by the prosecution to establish the existence of an agreement between the Appellants, either by themselves, or with others, to put into effect a course of conduct in furtherance of a criminal purpose, namely the killing of the complainant. There was no evidence in form of communication data between the Appellants and the alleged

hitman to support the contention by the prosecution that the Appellants had conspired to kill the complainant. Other than the information allegedly received from an informer, there is no direct evidence connecting the Appellants to the alleged plot to kill the complainant. The prosecution was unable to prove the existence of a reason that would have motivated the Appellants, especially the 1st Appellant, to desire to eliminate the complainant.

23. In **Abdi & another v Republic (Criminal Appeal E033 of 2020) [2024] KEHC 8021 (KLR)**, the Court observed;

“167. Having evaluated the evidence adduced, I find that the Trial Court was well guided in its finding on conspiracy. The intention of the conspirators cannot be supported by direct evidence “for not even the devil knoweth the mind of man”. Conspiracy by its nature is an opaque offence heavily guarded and clouded.

168. It is not easy to find direct evidence and indeed part of commission the offence is to conceal the evidence. Thus, if the court were to insist on direct evidence per se, no one will be convicted of the offence. The

knowledge and involvement in the offence can be inferred from the conduct of the parties with a common desire to commit a criminal offence”

24. The prosecution under Section 107-110 of Evidence Act of Burden of Proof must prove beyond reasonable doubt, common intention between the Accused person and another (s) that depict knowledge, consent and/or agreement to act in concert to achieve desired or earmarked illegal or unlawful outcome.

25. The Trial Court Record confirms that on 17/4/2021 PW1 received a call from unknown number (PW3) who informed her that he called her about a rape case involving her daughter, Wendy, where a plot was hatched to eliminate her.

PW1 & PW3 both went to Kilimani Police station and further informed by PW3 the Informer that he was paid Ksh 10,000/- then the rest Ksh 100,000/- after the job was done.

26. PW3 stated that the Appellant showed PW3 the victim's photograph, gave PW3 the mobile number to call Wendy whom after calling instead her mother PW1 picked the call and talked to Wachira PW3.

27. PW3 stated that on 14/4/2021 he met with 'Budaa,' the Appellant at the Boys Carwash based in Nyayo High Rise Estate he arrived in a black Toyota Rav 4 and requested PW3 for help, that he had a rape case and he wanted the witness killed and would give him down payment of Ksh 10,000/-. They went to Madaraka Strathmore University and the Appellant withdrew from ATM some money. They entered a nearby building to the Basement and sat down. He told PW3 to look for people who could kill someone. PW3 was told that the person to be eliminated resided near State House Girls School. He later asked the Appellant for Wendy's number, he gave him and he called the number, the lady who picked and stated she was Wendy's mother.

28. PW3 told Wendy's mother PW1 that he wanted to tell her about her daughter's case in Court. PW1 was hesitant but agreed with PW3 to meet at Kilimani Police Station. PW3 was not comfortable with the assignment.

Upto this point, the Appellant and PW3 who posed as an accomplice were in concert and there was an agreement to work together with the Appellant towards eliminating a key witness in a rape case; Wendy who lives at State House Road. 29. Secondly, the Appellant already paid him Ksh 10,000/- to look for a hitman and

once the job was done; the payment of Ksh 100,000/- would be made. The intention by the Appellant was manifested by his conversation with PW3 and agreement reached by Appellant's payment and receipt by PW3 of Ksh 10,000/-.

30. PW3 was clear in his testimony on his engagement by the Appellant whom he knew before as he came to the Carwash with a friend '**Kenya One**' and brought the Black Toyota

Rav 4.

31. PW3 knew Appellant before this incident, as he brought his friend and the car for car wash, there seemed no basis for grudge ill motive bad faith or vendetta between them. This is because PW3 would not have known of any case in Court a rape case in Milimani Law Courts other than from the Appellant. Secondly, Wendy's number that he used to call Wendy but talked with her mother PW1 was from the Appellant and he called to talk to Wendy but her mother took the call and he explained the circumstances that made him call Wendy.

32. Thirdly, PW3 did not know Wendy, her mother PW1 before and that they lived on State House until he got

phone number from the Accused/Appellant and met PW1 at Kilimani Police Station.

33. Fourthly, the prosecution proved the existence of CMCR SO 27 of 2020 where the Appellant and another were on re-trial after successful appeal on earlier trial over the same charges where Wendy Kemunto; was main witness in a case of offence of gang rape; a reason that was sufficient motive to the Appellant, to desire to eliminate the complainant. It is evident that there was intent to kill Wendy and she was Complainant in SO 27 of 2020

34. On re-evaluation of the evidence on Trial Court record upto this stage, I am satisfied that the conspiracy to commit murder and defeat justice were already committed by the Appellant as his intention to eliminate Wendy was proved by his conversation with and to PW3 and followed by down payment of Ksh 10,000/- to get a hitman and after completion the sum of Ksh 100,000/- would be paid to PW3 and/or Hitman.

35. The Appellant submitted that he did not conspire with anyone and could not conspire alone. PW3 whom the Appellant approached was the agent/hitman and agreed on the assignment as PW3 received and accepted Ksh 10,000/- PW3 was uncomfortable with

the transaction and he reported to PW1 and Police the conversation with Appellant and met PW1 at Kilimani Police Station and made a report.

36. An accomplice's evidence must be corroborated by other evidence - In **Republic vs Jane Muthoni Mucheru & Isaac Nganga Wamburia alias Gikonyo HC 45 of 2018 NKR, High Court No.89 of 2016 Kiambu High Court Hon. J. Ngugi J** (as he then was) referred to the case of **Republic -vs- Taibali Mohamedbhai [1943] 10 EACA 60** where it was held;

***“what is required is that there should be independent testimony corroborative of the evidence of the accomplice in some material particulars implicating the accused (person) or tending to convict him with the crime with which he is charged. The principle is that if an accomplice is so corroborated not only may that part of his evidence which is corroborated be relied on, but the part which is not corroborated.*”**

37. PW3 was the Accomplice to the Appellant in discussing and agreeing to elimination of Wendy but at the same was the Informer to PW1, Wendy's mother. The evidence by PW3 was/is corroborated by the meeting PW3 arranged; on 22/4/2021 PW3 called

Accused/Appellant for a meeting to top up the money, he agreed to the meeting later in the day.

38. They met PW2, a Police Officer disguised as hitman, PW3 & the Accused, they discussed the money to be paid for the task and negotiated Ksh 100,000/- to Ksh 140,000/- as they did so, PW4 pounced on them and they were arrested and taken to the Police Station. The Ksh 10,000/- was kept as exhibit and produced as exhibit in Court during trial by PW4.

The Appellant contested these facts vide his Defense, in sworn Statement, he stated that he studied at Strathmore and was a rugby player. He was charged with another in S.O 27 of 2020 He was accused of trying to eliminate Wendi Kemunto, the main witness therein. He was arrested on 22/4/202, he came from Busia to meet the Rugby Coach Louis Otieno also known as 'Fathee' at Strathmore training grounds at 5 pm. As he walked towards Madaraka, he encountered a young man and talked of looking for better club and suggested playing rugby together. They were joined by an elderly man and it begun to rain they entered Siwaka Plaza. Shortly, thereafter, there was commotion and they were arrested. He denied he withdrew money from ATM and that he ever interfered with any witness.

39. The Trial Court considered the defense, observed PW3 carefully during his testimony and he came across as a candid witness and his testimony was cogent and consistent during cross-examination. (Pg 26 Judgment/Record of Appeal) This Court cannot challenge the Trial Court observation, as it did not see the witness or hear the evidence but relied on the Trial Court record. It is that Trial Court that witnessed the witness's demeanor and credibility of his evidence.

40. The direct evidence by PW1 PW2 & PW3 confirms that the Prosecution proved beyond reasonable doubt the commission of the offence of conspiracy to murder and defeat justice; as these witnesses did not know each other, they met interacted because of this case. Secondly, there was no evidence of malice vendetta of malice by any of the witnesses towards the Accused person.

41. The Appellant submitted that no specific evidence was adduced as regards nature, time, manner and/or place that the alleged victim would be killed; the evidence about the bank account the Respondent failed to adduce a bank statement to show that the Appellant had a bank account, withdrew the alleged amount (if indeed he had an account), or to identify the specific

bank and ATM. Furthermore, no CCTV footage from the said bank or ATM was produced in evidence, receipt in regard to the alleged money of Ksh 10,000/- and 'Kenya One' and 'Fathee' were also not called as witnesses and convicting on such evidence was unfair and unjust.

Further, the Appellant submitted that the evidence by the Respondent was marred with inconsistency, contradiction and discrepancies. PW2 referred to Makadara and PW3 Madaraka

42. The Court finds this a matter of semantics; the 2 names are almost similar and one maybe confused but meeting at a restaurant, and the Appellant coming to the restaurant and negotiations were undertaken until arrest by PW4 was at Madaraka.

43. With regard to evidence of particulars of the conspiracy to murder PW3 testified as follows; PW3 stated the Appellant told him of a rape case he had and wanted the witness eliminated. The witness resided near State House Girls. In cross examination PW3 stated that he identified Wendy from Photo he was shown and they were to stage a robbery and thereafter eliminate Wendy. The evidence on Trial Court record discloses a plan to eliminate the Witness. On the issue that Pw3 did not provide details evidence and CCTV of

the bank/ATM, his evidence was that they walked to Madaraka Strathmore University and [appellant] entered the ATM and withdrew some money. They entered the next building and went to the basement, there were hotels, shops and boutique. They sat down and gave him Ksh 10,000/- From these facts, PW3 would not have obtained Bank Name Details of withdrawal or CCTV as it is the Appellant who withdrew funds Ksh 10,000/- was produced as Exhibit by PW4. 'Kenya One' and 'Fathee' were friend and Coach of Appellant and not Prosecution witnesses and could not be availed.

44. Whether circumstances leading to the arrest of the Appellant amounted to entrapment.

Black's Law Dictionary, 10th Edition defined entrapment as follows:-

A law-enforcement officer's or government agent's inducement of a person to commit a crime, by means of fraud or undue persuasion, in an attempt to cause a criminal prosecution against that person;

The affirmative defense of having been so induced.

To establish entrapment (in most states), the defendant must show that he or she would not have committed the crime but for the fraud or undue persuasion.

45. The submission is that conviction on evidence obtained through entrapment is not sustainable. The accused fundamental rights had been violated during investigations which is procured through illegality. The evidence was also obtained through unconstitutional means and is self-incriminating.

46. During entrapment, the police exceed their mandate of investigating crime in a passive manner. The police take an active role and exert pressure or influence on the suspect to incite him to commit the offence.

47. In BRANNAN -VS- PEEK (1) KB 68, Lord Goddard held that :-

“It cannot be too strongly emphasized that unless, an Act of Parliament provides for such a course of conduct and I do not think any Act of Parliament does so provide, it is wholly wrong for a police officer or any other person to be sent to commit an offence in order that an offence by another person may be detected. That conduct is more reprehensible”.

Also see the case of R - VS- PETHIG (1977) 1 HZLR 448 where the court held that :-

“The question is whether the accused without encouragement would have committed the specific offences charged in the indictment.”

48. In the case of Mohamed Koriow Nur -Vs- Attorney General (2011)eKLR Warsame J(as he then was) explained that:-

“Essentially, entrapment is a complete defence and it does not matter that the evidence against the person is overwhelming or that his guilt was undisputed. The court must refuse to convict an entrapped person not because his conduct falls outside the proscription of the statute but because even if his guilt is admitted, the methods and manner employed on behalf of the State to bring about the evidence cannot be countenanced.

49. From the evidence, PW3 called PW1 and revealed the accused’s intention to eliminate her daughter. PW3 had already been paid down payment off Ksh 10,000/- by the Accused, for the job which proved the accused’s

criminal intention to commit the crime and PW3 seeking the second person/hitman. Further, the witnesses PW1 & PW3 lodged complainant at the Police station such that at the time of the meeting with PW2 and PW4, PW3 had in an earlier meeting with the Accused/Appellant discussed and agreed to eliminate Wendy. PW2 was present at the Restaurant with PW3 disguised as a hitman to meet the Accused/Appellant to arrest him.

50. PW4 testified that the girl's mother came to the DCI office where he was at the station and she reported the case which he recorded in OB No. 39/17/2021 at 1403 hours. PW3 also gave the Investigating Officer PW4 Ksh 10,000/= which he claimed to have been given by the Appellant. PW4 drew an inventory of 17/4/2021 with serial numbers of the notes marked A-J. After the investigations began PW2 joined PW3 as undercover hitman. PW2 & PW3 met the Accused/Appellant and he negotiated with PW3 on payment of money. PW3 did not receive any money but called PW4 who effected arrest of all of them PW2 PW3 and Accused/Appellant

I find that the intention of PW4 and his colleagues was to effect arrest of Accused/Appellant.

The Appellant took issue with the following areas of Prosecution case;

51. Wendy alleged KA neither recorded a statement nor was she a witness in the Trial Court; no specific evidence was adduced as regards nature, time, manner and/or evidence about the bank account and receipt in regard to the alleged money of Ksh 10,000/- and 'Kenya One' and 'Fathee' were also not called as witnesses and convicting on such evidence was unfair and unjust.

52. As considered above, Wendy had no hand in this matter and played no role instead she was the victim/subject in the matter. 'Kenya One' was known to the Accused person could not be traced and Accused did not call him as defense witness.

53. It is the same case as regards 'Fathee' is/was known to Accused only as he stated in his defense. By virtue of **Section 112 Evidence Act**, what is within knowledge of Accused he is at liberty to disclose. As to documents to confirm payment of Ksh 10,000/- to PW3 , he testified they went to ATM at Strathmore Madaraka and the Accused withdrew the money, the witness would not have details of his Account.

54. Did the Trial Court take into account, Appellant's Defense, Appellant's submissions of February & May 2023, Mitigation of the Appellant and conviction vide Judgment under Section 169CPC and sentence were unsafe; the Trial Court on relying on Victim Impact Statement, the Prosecution did not produce relevant documents and exhibits and the alibi by Appellant was not considered, that on the day of meeting he was in the **CM SO 27 of 2020.**

55. On 14/4/2021, the day the Appellant met PW3 he was in Kamiti Prison for S.O. 27 of 2020. This was raised in Supplementary Submissions for the 1st time not during trial cross-examination of PW3 and the Prosecution had no opportunity to prove the alibi. It is on record that there was S.O 10 of 2018 which was later set aside on appeal vide Criminal Revision Ruling E108 of 2021 of 10/6/2020 and retrial ordered that culminated to S.O 27 of 2020. Therefore, by 14/4/2021 the Appellant was out on bond in 27 of 2020 as stated in his Sworn defense that he was in custody in S.O.10 of 2018 for only 1 year.

56. The Appellant's Defense is contained Trial Court judgment Pg 158 -160 of Record of Appeal and considered at Pg 23 of the Trial Court judgment. Appellant's submissions although not specifically highlighted case-law referred to in the Judgment of the Trial Court was from the Defense detailed submissions. Mitigation by Appellant was considered alongside CRO report, he is a 1st Offender and Pre -Sentence Report that included views of the victim family and recommended custodial sentence. The Ruling on Sentence of 24/5/2023 considered both mitigating and aggravating factors as per Judiciary Sentencing Policy 2016 & 2023. Therefore, the sentence was granted upon consideration of Pre-sentence reports and submissions. I find sentence of 6 years instead of 14 years in Count 1 fair and 2 years instead of 5 years for Count 2 to run concurrently and 2 years Pre-sentence period served in custody be included in computing the sentence.

DISPOSITION

57. The Appeal is dismissed Conviction and sentence upheld.

**JUDGMENT DELIVERED SIGNED & DATED IN OPEN
COURT ON 30/10/2025 IN CRIMINAL DIVISION
MILIMANI VIRTUALLY/PHYSICALLY.**

**M.W.MUIGAI
JUDGE**

ORIGINAL