Mwati v Republic (Criminal Appeal E028 of 2024)
[2025] KEHC 15324 (KLR) (29 October 2025) (Judgment)

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REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

CRIMINAL APPEAL E028 OF 2024

DKN MAGARE, J

OCTOBER 29, 2025

BETWEEN

SIMON MURAYA MWATI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

1. This is an appeal from the conviction and sentence meted out on 4.4.2024 by the Hon. D.N. Bosibori (SRM) in Mûkûrwe'inî SPMCCRC No. E335 of 2023.

2. The Appellant was charged with two counts of robbery with violence contrary to section 296(2) of the Penal Code. The particulars of the charge in Count I were that on 5.8.2023, at 2030hrs at Kabogo Village Kaharo sub location in Mûkûrwe'inî sub-county of Nyeri County, the Appellant robbed Nancy Nyambura Warui of two pairs of rubber shoes valued at Ksh. 800/=, a pair of leather shoes valued at Ksh. 400/=, a piece of bar soap valued at Ksh. 40/=, half kilogram of meat valued at Ksh. 200/= and Irish potatoes valued at Ksh. 50/= and while armed with a piece of wood at the time of such robbery.

3. The Appellant was also charged in Count II with robbery with violence contrary to section 296(2) of the Penal Code. The particulars of the charge in Count II were that the Appellant on 5.8.2023, at 2030hrs at Kabogo Village Kaharo sub location in Mûkûrwe'inî sub-county of Nyeri County, jointly with another not before court robbed Eunice Njeri Gikonyo of two pairs of rubber shoes valued at Ksh. 800/=, a pair of leather shoes valued at Ksh. 400/=, a piece of bar soap valued at Ksh. 40/=, half kilogram of meat valued at Ksh. 200/= and Irish potatoes valued at Ksh. 50/= and while armed with a piece of wood at the time of such robbery occasioned her actual bodily harm. This count was withdrawn and reinstated at some stage at the tail end of the hearing. I shall revert on the procedure used to reinstate the charge.

4. The Appellant filed a petition of appeal dated 6.6.2024 and amended on 19.5.2025 setting out the following grounds of appeal:

    a. That the trial court erred in both law and in fact in convicting the appellant when the Respondent failed to identify the Appellant at the scene of crime as perpetrator.

    b. The trial court erred in both law and in fact in failing to find that there was no weapon used as to impute robbery with violence.

    c. The trial court erred in law and in fact in failing to find that there was no recovery of stolen property in possession of the Appellant.

    d. The trial court erred in law and in fact in failing to find that the complainant and his attackers were strangers.

    e. That the trial court erred in law and in fact in meting out a harsh sentence of death which was manifestly excessive as per the circumstances of this case.

5. The amendments introduced the grounds that the learned magistrate wrongly placed the burden of disapproving the prosecution's case on the Appellant. The appeal was also grounded that the identification of the Appellant by recognition was improper and unfounded.

Evidence and Proceedings

6. PW1 was Eunice Njeri Gikonyo. She testified that she knew the Appellant as her customer in her mother's Agrovet shop since February 2023. On 5.8.2023, she was leaving from work while with her mother Nancy Nyambura Warui, from their agrovet at Kaharu village. It was around 8 pm and she had a rechargeable bulb. Nancy Nyambura Warui was 3 meters behind PW1 and had a spotlight. She saw the appellant squatting near a live fence beside the road. He wore a cap and black clothes.

7. According to the complainant, she saw the appellant holding a stick approximately one metre long, which was later produced in court as an exhibit. On seeing him, she immediately alerted her mother, who also spotted the appellant as he was getting up from where he had been. Startled, the complainant ran, and in the process, the items she was carrying fell to the ground. These included a bulb, potatoes worth Kshs. 50/=, two pairs of her mother's rubber shoes, two pairs of her own shoes, and the keys to their agrovet shop.

8. As she tried to flee, someone pulled her from behind, causing her to slip and fall. She testified that the man struck her on the bridge of the nose, resulting in a nosebleed. In the confusion that followed, she was unable to make out the physique of the person who attacked her. The assailant then ran off into a nearby bush. She screamed for help, and her husband, Edward Warui, who was nearby, came to her aid. She informed him that it was the Appellant who had attacked her, and together they went back to where her mother was. Her mother, however, had not been attacked.

9. The complainant stated that they later proceeded to Kaharu Police Station to report the incident and were referred to the hospital for treatment. She nevertheless admitted that she could not be sure that it was indeed the Appellant who assaulted her. According to her, the scene was chaotic, and it was the Appellant's mother who identified him at the time. She was categorical that she did not know for certain whether the Appellant was the person who attacked her.

10. On cross-examination, the complainant (PW1) reiterated that she could not tell if the Accused was the one who assaulted her. She stated that she had been holding a bulb during the incident and that she lost all the items listed in her testimony.

11. PW2, Nancy Wambura Warui, testified that she was the mother to PW1 and that she knew the Appellant, whom she identified as Muraya. On the fateful day, at about 8:30 p.m., she and PW1 left their agrovet shop for home. It had rained the previous day and the road was slippery. She wore rubber shoes and carried two additional pairs in a paper bag. PW1's shoes were also in the same bag.

12. PW1 suddenly shouted that there was someone ahead. A person, who was on PW2's left side, rose up, and she saw him. He was wearing a cap. When he started approaching them, they tried to run away but slipped and fell. She observed that the man was holding a stick and was raising it as he advanced towards them. PW2 saw him bend down to pick up some of the items PW1 had dropped while fleeing. Alarmed, she screamed, attracting members of the public who quickly responded to their rescue. A crowd gathered at the scene, and in the process, a toy pistol was recovered from the spot.

13. Later she was treated and allowed back. The witness went to work the following day, though she was in pain. When the appellant was sighted, he was arrested. She was told to identify the appellant and stated it was him. On a different day they visited the appellant's home and nothing was recovered. She stated she remembered the accused's face vividly as she laid down.

14. On cross-examination, PW2 stated that she was able to see the Appellant's face by the light of the bulb she was carrying. She, however, stated that she did not witness PW1 being physically attacked. The stick that was produced was recovered from the scene. She stated that items fell. The bread was recovered. The carrier bag was at home. The said bread was consumed by the family.

15. PW3, Edwin Nganga was the clinical officer attached to Mûkûrwe'inî Hospital. He stated that he examined PW1 and had a report prepared by his colleague at the hospital. He recognized the signature and handwriting of his colleague, Simon Kungu. They had worked together for three years. He produced a medical report and notes dated 5.08.2023 for PW1, then aged 21 years. She had been hit on the face by a sharp object. On cross examination, the patient had deep cut on the nasal bridge secondary to assault. Her clothes were blood stained. It was his stated case that he was not aware whether PW2 received any treatment. The wound was said to be caused by a sharp object.

16. On cross examination, he stated that the medical reports do not identify the assailant. He stated that if the witness was hit with a stick, the same would be a blunt object.

17. PW4 was Edward Warui Kifaru. He was a bodaboad rider. PW1 was his wife and PW2 was his biological mother. His father told him that his wife was screaming. He dashed towards the direction of the screams and saw 2 people carrying spotlights. He saw PW1 and her face was full of blood. She had an injury to the right side of the nose. They went to police station but were referred to the hospital. On cross examination, he testified that he did not witness the incident.

18. PW5 was No. 256002 PC Michael Ndereba of Kaharu Police Station. He was the arresting officer. He was called on 7.08.2023 by PW6 saying PW1 had phoned him that they had sighted the attacker. He visited the agrovet and found the two complaints and PW3, husband to PW1. He proceeded to Kigiri bar and arrested the appellant. He called the duo who identified the appellant. He recorded the witness statements with the help of PW6. He had visited the scene with PW6 on 5.8.2023 and found PW1 in a vehicle crying. They found a plastic toy gun. The said plastic toy gun was on the left side of the road as one walks downstream. They also found a bulb and a stick next to each other. The nearby bushes were disturbed as people had stepped on them. They recorded PW1's statement as PW2 was unconscious.

19. It was his evidence that PW2 had no marks on the head. She was bleeding profusely. PW1 was okay, but complained of pain in the legs. They gathered information that someone charged from the bush and was sighted by Eunice. Nancy held light against him while Eunice fled. Nancy tripped and fell. She was screaming as she fled. The person attacked Eunice with a stick. He was identified as a light skinned

person with a black cap. On the said night, PW1 and PW2 did not name the Appellant as perpetrator. They seized the black cap from the accused after arrest. Investigations, according to him zeroed down on the Appellant as perpetrator and he was arrested and charged.

20. On cross examination, he stated that the gun was on the lower side towards their home. A torch was near a bulb. It was alleged that the incident took place at 8 pm. On arrival at the scene, it had been tampered with.

21. Nancy was not issued with a P3 as she was not assaulted. She did not see a loaf at the scene. She did not tell if Eunice carried luggage on the said day but the complainants had luggage on the day. She also could not tell who dropped the luggage. It was her evidence that the accused had been seen with a cap during the incident and that was the reason for seizure of the black faded cap during the arrest. They stated that the ladies described the assailant and PW1's husband identified him as a former classmate. The description was not given.

22. He stated that Eunice fled downhill and was attacked, therefore they assumed there was a second person. Nobody saw the irony in this kind of testimony, at a criminal trial where a death penalty was on the table. There is no room for assumptions in criminal law and practice.

23. PW6 was No. 260403 PC Gideon Ngetich, the investigating officer in the matter. He was called by a person who alerted him that he was attacked on the road. He sought assistance. He requested PW5 to accompany him to the scene at Kambogo village. They walked with handcuffs and no riffles. This appears to be a rather safe way to respond to a robbery. He found a girl in a vehicle and large crowd at the scene. Members of the public showed them a stick and a gun that turned out to be a plastic toy gun. The girl in the vehicle was PW1 while the woman she was with, was her mother in-law. PW1 was being held by PW3 when they met. The incident was then minuted in the OB. He recovered a toy plastic gun at the scene.

24. He continued that PW2 narrated how they closed their shop at 8 pm. PW2 was carrying goods in a carrier bag, that is, three pairs of shoes, soap, potatoes (Solanum tuberosum). At that time Eunice had a rechargeable bulb while Nancy had a torch, when they saw a person in a squatting position. The said person charged at the two ladies, where PW2 dropped the luggage she had and ran downhill. She could not tell what hit her on the face. The attacker allegedly fled.

25. There was no need to describe the appellant to the husband or police, being a person, they knew.

26. The witness stated that he did not prepare an inventory of goods revered. He gave values of trinket and trifling goods that were allegedly stolen, all valued at Ksh. 1,490/=. He stated that the complainants are not the ones that provided the stick to the witness. Eunice is said to have clearly seen part of the back and bag. He did not dust the gun since the scene had been tampered with. The appellant was not identified before the arrest and no identification parade was carried out. It was stated that Nancy fell but was not assaulted by the robbers. He continued that the man who was squatting did not speak or harm the complainants in any way. The witness confirmed that he did not record statements from the members of the public or take inventory of items seized. He stated that Nancy fell and was injured on the leg but did not tell what hit her.

27. The witness continued that shortly thereafter the witnesses described him as a brown man who usually buys gunny bags from them. PW2 was recalled to testify after the charge sheet was amended. She testified that the toy gun was seized at the scene of crime near where PW1 fell. The appellant used to visit her shop often and she knew him.

28. The count that had been withdrawn on 6.6.2023, was re-introduced at this very stage. On recall, PW1 also testified that PW2 gave the spotlight to the police on the fateful night. She did not see PW2 fall or the appellant carrying a bag.

29. DW1 was the Appellant. On 28.10.2022, he was with his father working on power saw at Gikondi. He knew PW1 and PW2 since 2023. They operated a shop at Kaharu selling animal feeds and sacks. The Appellant stated that he had dreadlocks for 2½ years. On 5.8.2023, he went to buy avocados from farmers at Gakera. He returned home at 5 pm. His mother sent him to buy cattle salt at Kaharu Market. He did not find it and so visited Mûkûrwe'inî to buy it. He also went to Double Star Club and watched Manchester United football until 9.45 pm. He was not involved in any robbery alleged. On cross examination, he told the court that he was not at the scene of the incident.

30. After all the witnesses had testified, the state amended the charge sheet amidst protest that the amendment creates confusion to the appellant. The court nevertheless allowed the same. The amended charge sheet added and occasioning her actual bodily harm at the end of the count.

31. Subsequently the court found the appellant had a case to answer. In making that finding the court stated as follows:

> 10. In the instant case, the testimony and credibility of each of the witnesses called by the Prosecution have been evaluated against the charges facing the accused and the issues raised by the Defence during cross-examination of prosecution witnesses. From the evidence placed before me, and having considered the relevant legal authorities, provisions, and principles, I am satisfied without saying much at this stage for obvious reasons that the test of a prima facie case has been met by the Prosecution to warrant the Accused person to be called upon to answer. The test to be applied here is as elucidated under Section 306 of the Criminal Procedure Code and buttressed by the legal principles in the cited authorities. The upshot of all these is that the Accused person has a case to answer and is hereby called upon to answer the charge as per the steps outlined under section 306(2) as read together with section 307 of the Criminal Procedure Code.
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> 11. The rights and options to elect from under section 306(2) are hereby explained to the accused.

32. It is not lost on the court that the two sections in which the court relied had no relevance to the case before her. The two sections are provided under part VI of the Criminal Procedure Code. The two sections apply to the High Court only. They provide verbatim as follows:

> 306 (2) When the evidence of the witnesses for the prosecution has been concluded, the court, if it considers that there is evidence that the accused person or any one or more of several accused persons committed the offence, shall inform each such accused person of his right to address the court, either personally or by his advocate (if any), to give evidence on his own behalf, or to make an unsworn statement, and to call witnesses in his defence, and in all cases shall require him or his advocate (if any) to state whether it is intended to call any witnesses as to fact other than the accused person himself; and upon being informed thereof, the judge shall record the fact.
>
> 307(1) The accused person or his advocate may then open his case, stating the facts or law on which he intends to rely, and making such comments as he thinks necessary on the evidence for the prosecution; the accused person may then give evidence on his own behalf and he or his advocate may examine his witnesses (if any), and after their cross-examination and re-examination (if any) may sum up his case.

33. The proper sections to comply with are sections 210 and 211 of the Criminal Procedure Act. They provide as follows:

(1) At the close of the evidence in support of the charge, and after hearing such summing up, submission or argument as may be put forward, if it appears to the court that a case is made out against the accused person sufficiently to require him to make a defence, the court shall again explain the substance of the charge to the accused, and shall inform him that he has a right to give evidence on oath from the witness box, and that, if he does so, he will be liable to cross-examination, or to make a statement not on oath from the dock, and shall ask him whether he has any witnesses to examine or other evidence to adduce in his defence, and the court shall then hear the accused and his witnesses and other evidence (if any).

(2) If the accused person states that he has witnesses to call but that they are not present in court, and the court is satisfied that the absence of those witnesses is not due to any fault or neglect of the accused person, and that there is a likelihood that they could, if present, give material evidence on behalf of the accused person, the court may adjourn the trial and issue process, or take other steps, to compel the attendance of the witnesses.

Submissions

34. The Appellant filed undated submissions dated 19.5.2025 by which it was submitted that he was convicted on mistaken identity. That the alleged source of light was not proved to be sufficient to identify the Appellant. Reliance was placed on the case of Simiyu & Anothers v R (2005) eKLR. It was also submitted that the Appellant was not identified at the scene of crime and he was home at the time of the alleged offence.

35. He cited Republic v Kabogo s/o Wagunyu 23(10 KLR (50) to submit that identification was inadequate. On mistaken identify, he also relied on John Muriithi Nyaga v Republic CRA No. 201 of 2007.

36. The Respondent also filed submissions dated 4.8.2025. It was submitted that the Respondent proved the ingredients of robbery with violence under Section 296(2) of the Penal Code.

37. The Respondent submitted that the elements of the offence of robbery with violence were proven beyond reasonable doubt. The Appellant was positively identified by the prosecution witnesses and placed at the scene on the material night. Reliance was placed on Oluoch v Republic 1985 KLR where it was submitted that the Court of Appeal fortified the ingredients of the offence of robbery with violence and held as follows:

Robbery with violence is committed in any of the following circumstances:

1. The offender is armed with any dangerous weapon and offensive weapon

2. The offender is in the company of one or more persons

3. At or immediately before or immediately after the time of robbery the offender wounds, beats, strikes or uses other violence to any person.

38. The Respondent thus submitted that all the grounds raised by the Appellant are not supported in fact and in law. The grounds raised are mere attempt to mislead the court and are a misrepresentation of facts of what transpired during the trial process.

Analysis

39. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand. The duty of the first appellate court remains as set out by the former Appeal for Eastern Africa in the case of Pandya -vs- Republic [1957] EA 336, where the court emphasized that it must reconsider the evidence, evaluate it itself, and draw its own conclusions while bearing in mind that it did not have the opportunity to see and hear the witnesses. the court expressed itself as hereunder:

> On a first appeal from a conviction by a Judge or magistrate sitting without a jury the appellant is entitled to have the appellate court's own consideration and views of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the witnesses before the Judge or magistrate with such other material as it may have decided to admit. The appellate court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises which witness is to be believed rather than another and that question turns on manner and demeanor, the appellate court must be guided by the impression made on the Judge or magistrate who saw the witness but there may be other circumstances, quite apart from manner and demeanor which may show whether a statement is credible or not which may warrant a court different.

40. In criminal cases, the standard of proof is beyond reasonable doubt and it was due to this that Mativo, J (as he then was) in Elizabeth Waithiegeni Gatimu vs. Republic [2015] eKLR expressed himself as hereunder:

> To my mind the rule that the prosecution may obtain a criminal conviction only when the evidence proves the defendant's guilt beyond reasonable doubt is basic to our law. It is necessary that guilt should not only be rational inference but also it should be the only rational inference that could be drawn from the evidence offered taking into account the defence offered if any. If there is any reasonable possibility consistent with innocence, it is the duty of the court to find the defendant not guilty...Having considered the circumstances of this case, the prosecution evidence and the defence offered by the appellant, I am not persuaded that the conviction was justifiable and that this is a case where the accused ought to have been given the benefit of doubt. To give an accused person the benefit of doubt in a criminal case, it is not necessary that there should be many circumstances creating the doubt(s). A single circumstance creating reasonable doubt in a prudent mind about the guilt of an accused is sufficient. The accused is entitled to the benefit of doubt not a matter of grace and concession, but as a matter of right. An accused person is the most favorite child of the law and every benefit of doubt goes to him regardless of the fact whether he has taken such a plea. Reasonable doubt is not mere possible doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence leaves the mind of the court in that condition that it cannot say it feels an abiding conviction to a moral certainty of the truth of the charge.

41. Reasonable doubt needs not reach certainty, but it must carry a high degree of probability. It was held by the Court of Appeal in Moses Nato Raphael vs. Republic [2015] eKLR as doth:

> What then amounts to reasonable doubt? This issue was addressed by Lord Denning in Miller v. Ministry of Pensions, [1947] 2 ALL ER 372 where he stated:-'That degree is well

> settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence of course it is possible, but not in the least probable, the case is proved beyond reasonable doubt, but nothing short of that will suffice.'

42. The issue in this case is whether the prosecution proved is case to the required standards. Most oft quoted English decision by Viscount Sankey L.C in the case of H.L. (E) Woolmington vs. DPP [1935] A.C 462 pp 481, comes in handy in describing the legal burden of proof in criminal matters, that;

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

43. The appellant as an accused, enters the proceedings of criminal nature presumed innocent. He is thus the darling of the law. Any doubt is to be given to him and not the state. The standard is set so high to avoid innocent people being convicted. In the case of R vs. Lifchus {1997}3 SCR 320 the Supreme court of Canada explained the standard of proof as doth: -

> The accused enters these proceedings presumed to be innocent. That presumption of innocence remains throughout the case until such time as the crown has on evidence put before you satisfied you beyond a reasonable doubt that the accused is guilty...the term beyond a reasonable doubt has been used for a very long time and is a part of our history and traditions of justice. It is so engrained in our criminal law that some think it needs no explanation, yet something must be said regarding its meaning. A reasonable doubt is not imaginary or frivolous doubt. It must not be based upon sympathy or prejudice. Rather, it is based on reason and common sense. It is logically derived from the evidence or absence of evidence. Even if you believe the accused is guilty or likely guilty, that is not sufficient. In those circumstances you must give the benefit of the doubt to the accused and acquit because the crown has failed to satisfy you of the guilty of the accused beyond a reasonable doubt. On the other hand you must remember that it is virtually impossible to prove anything to an absolute certainty and the crown is not required to do so. Such a standard of proof is impossibly high. In short if, based upon the evidence before the court, you are sure that the accused committed the offence you should convict since this demonstrates that you are satisfied of his guilty beyond reasonable doubt.

44. The legal burden refers to the burden of proof which remains constant throughout the trial. It is the obligation of a party to establish the facts and contentions necessary to support its case, in this case the prosecutor. According to Halsbury's Laws of England, 4th Edition, Volume 17, paras 13 and 14:

> The legal burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party's case. If at the conclusion of the trial he has failed to establish these to the appropriate standard, he will lose.

> The legal burden of proof normally rests upon the party desiring the court to take action; thus a claimant must satisfy the court or tribunal that the conditions which entitle him to an award have been satisfied. In respect of a particular allegation, the burden lies upon the party for whom substantiation of that particular allegation is an essential of his case. There may therefore be separate burdens in a case of with separate issues.

45. The standard of proof required in such cases was addressed by Brennan, J. in the United States Supreme Court decision of in re Winship 397 U.S. 358 (1970), at pages 361–364, where he stated that:

> The accused during a criminal prosecution has at stake interests of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatised by the conviction...Moreover use of the reasonable doubt standard is indispensable to command the respect and confidence of the community. It is critical that the moral force of criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned.

46. PW2 was categorical that she saw the Appellant. There was bulb light. The Appellant was wearing a cap, and black clothes. He snatched the hand bag from PW1 which contained the stolen items. PW1 testified that she did not know who assaulted her and could not tell whether it was the Appellant.

47. The evidence of PW1 and PW2 was not supported by any eye witness. On his part, the Appellant maintained the he did not commit the crime and was wrongly identified as he was not at the scene of the crime at the time stated as 8.30p.m. It was his case that he went to buy cattle salt at Kaharu and did not find it, so he proceeded to Mûkûrwe'inî, where he ended up watching a football match in Double Star Club till 9.45 pm when he went home.

48. Further case of the Appellant was that he had known PW1 and PW2 before the alleged robbery incidence. The trial court found that the identification herein was by recognition and not identification. In Anjoroni v Republic 1980 KLR 59 the court thus:

> Recognition of an assailant is mere satisfactory, mere assenting, and mere variable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other

49. The evidence by PW6 was that the assailant charged towards the two ladies, whereupon PW2 dropped the luggage she was carrying and ran downhill. She was unable to tell what had struck her on the face. The assailant thereafter fled from the scene. At this point it must be clear and succinct that the offence of robbery was not shown from evidence, since the main ingredient in section 296(2) of the penal code was not shown to co-exist, that is the violence been related to the theft.

50. Section 296 of the penal code provides as follows:

    (1) Any person who commits the felony of robbery is liable to imprisonment for fourteen years.

    (2) If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons, or if, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death.

51. In the instance case, the complainant dropped the goods and fled. That is to say, the robbery never occurred. The assailant did not take the goods as part of the robbery. Even where violence is meted out, but not accompanied with robbery, then it is assault. On cross examination, he stated that the complainant was Nancy Warui. He seized the cap after the Appellant was arrested.

52. Robbery is defined in section 295 of the penal code as follows:

> Any person who steals anything, and, at or immediately before or immediately after the time of stealing it, uses or threatens to use actual violence to any person or property in order to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained, is guilty of the felony termed robbery.

53. Thus, stealing must be shown to have occurred. There was no theft. The complainants dropped their goods and fled. They recovered them and consumed the bread which was part of the goods dropped. The violence was not shown meant to, to use words of the statute, "use actual violence to any person or property in order to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained.

54. Any attack not meant to aid in stealing or cause the retention of stolen goods is not robbery but assault. The offence of assault with a dangerous weapon, or in the company of another person, must follow each other. Indeed, assault with intent to steal, is punishable by 5 years. Section 298 of the penal code provides as follows:

> Any person who assaults any person with intent to steal anything is guilty of a felony and is liable to imprisonment for five years.

55. Therefore, it is not every situation where assault is occasioned, even when accompanied with stealing that the offence of robbery with violence is proved. If a weapon is used, the weapon must be dangerous. It will be cavalier to classify every kind of weapon as dangerous. The state in our law is such that the offence of robbery with violence has been lowered to standards hitherto unexpected in criminal law. There must be prove at all times of the element of dangerous weapon. There are weapons, such as guns, knives and machetes, which are inherently dangerous. Other weapons must be shown to be dangerous. Otherwise sticks, pens and books may soon be classified as dangerous weapons. The question of dangerous weapon is not defined in statute. It is the duty of the prosecution, to prove, where a weapon is not intrinsically dangerous, that:

    a. A weapon, though not intrinsically dangerous, was from evidence dangerous in the circumstances of the case, on basis of evidence.

    b. A weapon that is not intrinsically dangerous caused life-threatening injuries.

    c. The injuries were occasioned where the assailants were in a group of two or more.

56. In the absence of such evidence, even where violence is used a non-dangerous weapon used, the offence must be reduced to simple robbery or an offence under section 298 of the penal code.

57. The witness, PW6 admitted easily that the scene was tampered with. The presence, in a later time of a plastic toy gun was thus not connected to the alleged offence. The failure to recover goods the first complainant threw on the ground and fled, ipso facto shows there was no theft. There was no evidence that anyone hit the first complainant as she was clear she does not know what hit her. The ladies allegedly pointed a torch to a man who was squatting by the roadside. Was the man helping himself and was startled by the torch? When the evidence was to the effect that he charged at the ladies, why didn't he harm PW2, who did not flee? PW1, stumbled and fell. Where she alleged to be injured and PW6 said she was injured, were worlds apart.

58. There was nothing stolen from PW2 and she was not attacked. It is not clear from the evidence who attacked PW1. There was no evidence of violence meted out to PW2. She was indeed not given a P3.

In the absence of the use of violence or a threat of violence, the second count was not proved. Further, the goods were carried by PW1. She threw them down. There was no one who took the goods or threatened to take any goods from PW2. Therefore, the court was simply wrong in finding count two to have been proved. The conviction in respect thereto is set aside.

59. In respect of PW1, she dropped the luggage. No threat of violence was made upon her to drop the goods. She saw someone squatting by the road side and shined a torch upon him. He allegedly charged upon them but did not inflict violence on the complainants. Nancy saw the man collect goods on the ground. He did not pick a phone Eunice had dropped. Nancy recovered bread and phone together with the bulb. He described the area as not having street lights. The complainants described the mother of the appellant and the village. They were led to the bar by PW3 to arrest the appellant. At the very earliest opportunity the appellant indicated that on the fateful day he left very early for home. When the appellant removed the cap, is when the two ladies identified him as Simon Muraya.

60. When the appellant removed the cap, it is when the two ladies identified him as Simon Muraya. This is crucial evidence, that the two ladies could not identify him with the cap on. Eunice was more candid that she did not know her attacker. The state knowing that the complainants had recognized the appellant by description, which they still could not give as it was dark, an identification parade is useful. The fact that PW3, led the police to a classmate, and game then the name of the assailant led to what we call in statistics, confirmatory bias. This is a human tendency to seek, interpret, favor, and remember information that supports or confirms one's existing beliefs.

61. It is not difficult to find that the trial court found the Appellant guilty when there was doubt as to whether the Appellant was indeed the person who committed the offence. The prosecution's case on all its fours was that PW1 and PW2 identified the violent robber on 5.8.2023 at 8.30pm as wearing black clothes and a cap and squatting at a live fence beside the road. The intensity of the light used to identify the Appellant at night was not tested in evidence and this court is in doubt whether the Appellant was identified beyond reasonable doubt. In the case of Paul Etole & another v Republic [2001] KECA 285 (KLR), the court of appeal [Gicheru, Lakha & Owuor, JJ.A] had this to say in respect thereof:

> The prosecution case against the second appellant was presented as one of recognition or visual identification. The appeal of the second appellant raises problems relating to evidence and visual identification. Such evidence can bring about miscarriages of justice. But such miscarriages of justice occurring can be much reduced if whenever the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused, the Court should warn itself of the special need for caution before convicting the accused. Secondly, it ought to examine closely the circumstances in which the identification by each witness came to be made. Finally, it should remind itself of any specific weaknesses which had appeared in the identification evidence. It is true that recognition may be more reliable than identification of a stranger; but, even when the witness is purporting to recognise someone whom he knows, the Court should remind itself that mistakes in recognition of close relatives and friends are sometimes made.
>
> All these matters go to the quality of the identification evidence. When the quality is good and remains good at the close of the accused's case, the danger of a mistaken identification is lessened: but the poorer the quality, the greater the danger. In the present case, neither of the two Courts below demonstrated any caution. This is a serious nondirection on their part. Nor did they examine the circumstances in which the identification was made. There was no inquiry as to the nature of the alleged moonlight or its brightness or otherwise or whether it was a full moon or not or its intensity. It was essential that there should have been an inquiry as to the nature of the light available which assisted the witnesses in making recognition.

> What sort of light, its size, and its position vis a vis the accused would be relevant. In the absence of any inquiry, evidence of recognition may not be held to be free from error.

62. The court in the above case referred to the case of Maitanyi v Republic [1986] KECA 39 (KLR), where the court of appeal [Nyarangi, Platt & Gachuhi JJA], while addressing the question of the identification, addressed itself as follows:

> It must be emphasized that what is being tested is primarily the impression received by the single witness at the time of the incident. Of course, if there was no light at all, identification would have been impossible. As the strength of the light improves to great brightness, so the chances of a true impression being received improve. That may sound too obvious to be said, but the strange fact is that many witnesses do not properly identify another person even in daylight. It is at least essential to ascertain the nature of the light available. What sort of light, its size, and it position relative to the suspect, are all important matters helping to test the evidence with the greatest care. It is not a careful test if none of these matters are known because they were not inquired into. In days gone by, there would have been a careful inquiry into these matters, by the committing magistrate, state counsel and defence counsel. In the absence of all these safeguards, it now becomes the great burden of senior magistrates trying cases of capital robbery to make these enquiries themselves. Otherwise who will be able to test with the "greatest care" the evidence of a single witness?
>
> There is a second line of inquiry which ought to be made and that is whether the complainant was able to give some description or identification of his or her assailants, to those who came to the complainant's aid, or to the police. In this case no inquiry of any sort was made. If a witness receives a very strong impression of the features of an assailant, the witness will usually be able to give some description. If on the other hand the witness says that he or she could not identify or recognise the person, then a later identification or recognition must be suspect, unless explained. It is for the magistrate to inquire into these matters.

63. Further, it was the stated case of PW6 that no inventory of recovered items was prepared. Coupled with the insufficient identification of the Appellant as described herein, I think the Appellant's defence of mistaken identity as supported by his consistent and credible evidence was insurmountable. The prosecution failed to prove a case against the Appellant. Section 296(2) of the Penal Code provides as follows:-

> If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons, or if, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death.

64. The trial court appears to have created its own facts. The evidence on record was that the complainant could not tell who assaulted her. However, the court introduced a new element by stating that the complainant's "visibility was impaired." This assertion was not supported by the evidence adduced and amounts to a phantom fact not borne out of the record. The proven fact was that the complainants did not see the appellant. Although PW2 alleged to have clearly seen the appellant, there was no evidence that he either harmed or spoke to her.

65. Recognition was only claimed after his arrest, when he allegedly removed his cap. The court, therefore, created its own version of events and improperly shifted the burden of proof to the appellant. The appellant had no duty to controvert evidence that was itself inconsistent and uncorroborated. I concur

with the appellant that the court shifted the burden of proof to the appellant. In the case of R vs. Lifchus {1997}3 SCR 320, the Supreme court of Canada explained the standard of proof as doth: -

> The accused enters these proceedings presumed to be innocent. That presumption of innocence remains throughout the case until such time as the crown has on evidence put before you satisfied you beyond a reasonable doubt that the accused is guilty...the term beyond a reasonable doubt has been used for a very long time and is a part of our history and traditions of justice. It is so engrained in our criminal law that some think it needs no explanation, yet something must be said regarding its meaning. A reasonable doubt is not imaginary or frivolous doubt. It must not be based upon sympathy or prejudice. Rather, it is based on reason and common sense. It is logically derived from the evidence or absence of evidence. Even if you believe the accused is guilty or likely guilty, that is not sufficient. In those circumstances you must give the benefit of the doubt to the accused and acquit because the crown has failed to satisfy you of the guilty of the accused beyond a reasonable doubt. On the other hand you must remember that it is virtually impossible to prove anything to an absolute certainty and the crown is not required to do so. Such a standard of proof is impossibly high. In short if, based upon the evidence before the court, you are sure that the accused committed the offence you should convict since this demonstrates that you are satisfied of his guilty beyond reasonable doubt.

66. The next issue was the discrepancies in the evidence of the witnesses. One witness claimed that pw1 was being held by the husband while at the same time another witness alleged that she was unconscious. The goods were thrown on the ground, carried away by the assailant, at the same time recovered and the carrier bag had bread which was consumed. The discrepancies in evidence were so humongous, that no reasonable tribunal properly informed of the facts could convict on the evidence.

67. The complainant saw a piece of wood which was not used. Pw5 and Pw6 believed there was another assailant. This was not borne out of evidence. Pw1 saw one person, whose physique they could not describe. Pw2, who tripped and fell did not know what hit her. Where was the other alleged person. From describing the physiques, they did not know to brown colour, to getting information on the assailant from pw3, the story of the complainants was not adding up. It may well that they were confused, but it cannot be that a party who was absent, giving a name to them then they remembered they knew him. They even had a name, which they could only give after arrest. On this, this court has to establish whether the alleged discrepancies and contradictions were fundamental as to cause prejudice to the Appellant. In Joseph Maina Mwangi vs. Republic CA No. 73 of 1992 (Nairobi) Tunoi, Lakha & Bosire JJA held:

> In any trial there are bound to be discrepancies. An appellate court in considering those discrepancies must be guided by the working of Section 382 of the Criminal Procedure Code, viz whether such discrepancies are so fundamental as to cause prejudice to the Appellant or they are inconsequential to the conviction and sentence.

68. The appellant was suspected as having committed the offence simply because the description marched that of PW3's classmate. The court was to have the clearest of mind and certainty that the Respondent had proved its case to beyond reasonable doubt before denying the Appellant liberty and life. The court forgot that, suspicion cannot be evidence. In the case of Faith Lucas V Republic [2008] KECA 267 (KLR), the court of appeal stated as follows:

> It has not been shown that the appellant's explanation was not plausible.

69. The evidence produced by the prosecution created doubt as to the guilty of the Appellant. Section 111 of the Evidence Ac provides as follows:

(1) When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, or qualification to, the operation of the law creating the offence with which he is charged and the burden of proving any fact especially within the knowledge of such person is upon him:

Provided that such burden shall be deemed to be discharged if the court is satisfied by evidence given by the prosecution, whether in cross-examination or otherwise, that such circumstances or facts exist:

Provided further that the person accused shall be entitled to be acquitted of the offence with which he is charged if the court is satisfied that the evidence given by either the prosecution or the defense creates a reasonable doubt as to the guilt of the accused person in respect of that offence.

(2) Nothing in this section shall—

(a) prejudice or diminish in any respect the obligation to establish by evidence according to law any acts, omissions or intentions which are legally necessary to constitute the offence with which the person accused is charged; or

(b) impose on the prosecution the burden of proving that the circumstances or facts described in subsection (1) of this section do not exist; or

(c) affect the burden placed upon an accused person to prove a defence of intoxication or insanity.

70. Therefore, once the primary facts are established, the Appellant bore the evidential burden to provide a reasonable explanation for his innocent which in my view he did. He provided an alibi to the investigating officer, at the time of arrest, including the club in which he was watching a very specific game. A look at the English premier league fixtures, would have shown the friendly march between Manchester united and Lens. It could have shown anything else. The appellant specifically indicated he was at double night club and left for home at 9:45 Pm. This was a foolproof alibi. It was not displaced.

71. The alibi in this case was disclosed way in advance. In any case, even if the alibi was to be disclosed at the defence, level, there are no bones broken. The court of appeal is divided on this point. However, not raising of an alibi in time is not fatal. Section 212 of the Criminal Procedure Code provides as follows:

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

72. The prosecution had a golden chance to displace alibi evidence by calling witnesses as the double star club in Mûkûrwe'inî but they failed. Such failure must be adversely inferred against the prosecution, that had the evidence been called it could have been against the prosecution case. In the case of Wachera v Republic [2025] KEHC 11843 (KLR), the high court posited as follows:

43. The court was wrong in blaming the appellant on having the alibi at the tail end. However, the court was correct in finding that these questions were not put to the witnesses. This is important since the offence occurred at home.

44.The court found that the appellant and the minor lived in the same house. The appellant was the perpetrator. In this case, there are no doubts on who the perpetrator was. It was the Appellant.

The appellant raised a defense of alibi. His defence was supported by witnesses. The state had an opportunity to call rebuttal evidence which they did not call.

73. The Court of Appeal [Asike Makhandia, Kiage & Otieno-Odek JJA] in Erick Otieno Meda vs. Republic [2019] eKLR while considering an alibi, observe that:

> In an alibi defence based on witness testimony, the credibility of the witness can strengthen or weaken the defence dramatically. A successful alibi defence entirely rules out the accused as the perpetrator of the offence. There is no burden of proof on the accused to prove an alibi. If there is a reasonable possibility that the accused's alibi could be true, then the prosecution has failed to discharge its burden of proof and the accused must be given the benefit of the doubt.

74. In the South African case of S -v- Malefo En Andere 1998 (1) SACR 127 (W) at 158 a - e the court set out five principles with respect to the assessment of alibi evidence:

a. There is no burden of proof on the accused to prove his alibi.

b. If there is a reasonable possibility that the accused's alibi could be true, then the prosecution has failed to discharge its burden of proof and the accused must be given the benefit of the doubt

c. An alibi must be judged on the basis of the totality of the evidence and the court's impression of the witnesses. (in Afrikaner).

d. If there are identifying witnesses, the court should be satisfied not only that they are honest, but also that their identification of the accused is reliable (betroubaar).

e. The ultimate test is whether the prosecution has furnished proof beyond a reasonable doubt, and for this purpose a court may take into account the fact that the accused had raised a false alibi.

75. The burden of proving the falsity of an alibi was addressed in case of Victor Mwendwa Mulinge –v- R, [2014] eKLR as follows:

> It is trite law that the burden of proving the falsity, if at all, of an accused's defence of alibi lies on the prosecution....

76. Consequently, it was the primary duty of the trial court, which it failed, to carefully analyze the contradictory evidence and determine which version of evidence, on the basis of judicial reason, it could prefer. In Erick Onyango Ondeng' vs. Republic [2014] eKLR, the Court of Appeal held that:

> The hearing before the trial court invariably entails consideration of often contradictory, inconsistent and hotly contested facts. The primary duty of the trial court is to carefully analyse that contradictory evidence and determine which version of the evidence, on the basis of judicial reason, it prefers. It is the trial court, when it comes to questions of fact, which has the singular advantage of seeing and hearing the live witness testify and being subjected to cross-examination, that time-honoured devise for testing the truth or correctness of evidence. Next is the first appellate court which by law, it is its bounden duty to re-consider, re-evaluate and analyse the evidence that was before the trial court, to determine whether, on the basis of those facts, the decision of the trial court is justified. (See OKENO VS REPUBLIC (1972) EA 32). It is in the above context that this Court has said time and again that it will defer to and respect findings of fact by the trial court as affirmed by the first appellate court after due re-evaluation and analysis, because the second appellate

court operates from the distinct advantage of not having seen or heard the witnesses. This Court will therefore not interfere with findings of fact by the two courts below unless it is demonstrated that the trial court and the first appellate court considered matters they ought not to have considered or that they failed to consider matters they should have considered or that looking at the evidence as a whole, the courts below were plainly wrong in their decision, in which case such omission or commission would be treated as matters of law.

77. The trial court failed in not holding that such magnitude of contractions, unless satisfactorily explained, will usually but not necessarily lead to the evidence of a witness being rejected. As was noted in Twehangane Alfred vs. Uganda, Crim App. No. 139 of 2001, [2003] UGCA, 6:

> With regard to contradictions in the prosecution's case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution's case.

78. The Respondent amended the charge sheet, amidst protest, that the amendment creates confusion to the appellant. It is noteworthy that, during the taking of evidence, there was an attempt to introduce new evidence. The trial court rendered a brief and rather cryptic ruling on the matter. There was no plea after the reintroduction of the charges that had been withdrawn by way of amendments. This fatally faulted the procedure. Section 214 of the Criminal Procedure Act which provides for variance between charge and evidence, and amendment of charge as not followed. The same provided as doth:

(1) Where, at any stage of a trial before the close of the case for the prosecution, it appears to the court that the charge is defective, either in substance or in form, the court may make such order for the alteration of the charge, either by way of amendment of the charge or by the substitution or addition of a new charge, as the court thinks necessary to meet the circumstances of the case:

Provided that—

(i) where a charge is so altered, the court shall thereupon call upon the accused person to plead to the altered charge;

(ii) where a charge is altered under this subsection the accused may demand that the witnesses or any of them be recalled and give their evidence afresh or be further cross-examined by the accused or his advocate, and, in the last-mentioned event, the prosecution shall have the right to re-examine the witness on matters arising out of further cross-examination.

(2) Variance between the charge and the evidence adduced in support of it with respect to the time at which the alleged offence was committed is not material and the charge need not be amended for the variance if it is proved that the proceedings were in fact instituted within the time (if any) limited by law for the institution thereof.

(3) Where an alteration of a charge is made under subsection (1) and there is a variance between the charge and the evidence as described in subsection (2), the court shall, if it is of the opinion that the accused has been thereby misled or deceived, adjourn the trial for such period as may be reasonably necessary.

79. It is however crucial to note that there is a disconnect between the what the advocate for the appellant raised as an objection and what appears to be a concession. The objection was on a spotlight that was

not identified by two witnesses when they testified. The response by Mr Kimumu related to a gun. The ruling was a misdirection, as if, the defence was not supplied with an inventory of items taken earlier, then it was an ambush. It is crucial that courts treat the right to fair trial, not as a decoration but a right that was fought for by sweat and blood. This was well articulated by the court of appeal, when pointing out inequalities between the state and the accused in the case of Thomas Patrick Gilbert Cholmondeley v Republic [2008] KECA 319 (KLR), where the court of appeal stated as follows:

That approach by the learned Judge creates the dangerous theory that what is convenient and would expedite the disposal of a matter is lawful. The proposition ignores the fact that the rights of an accused person are considered to be so important that they are protected under section 77 of *the Constitution*. Against whom are those rights protected? The answer to the question must be obvious. The rights can only be protected against those who have the unlimited capacity and resources to deprive individual Kenyans of their life, liberty, security of the person, freedom of conscience, freedom of expression, of assembly and of association. We know who is capable of locking up individual Kenyans in the Nyayo House Dungeons. We know who is capable of telling Kenyans: "If you rattle a snake you must be prepared to be bitten by it." It is the state who has the capacity to deprive individual Kenyans of their rights guaranteed by sections 70 to 82 inclusive of *the Constitution*. In the recent case of PAUL MWANGI MURUNGA V. REPUBLIC , Cr. Appeal No. 35 of 2006, (unreported) this Court, having cited the case of NDEDE V. REPUBLIC [1991] KLR 567, delivered itself as follows:-

> " The appellant in this case had been brought to court some thirty days after his arrest. It was one of those cases which were then called "The Mwakenya cases." The courts then chose to see no evil and hear no evil, and sought no explanation as to where the accused persons involved in those cases had been before being brought to court. The consequence of the silence on the part of the courts was the infamous -Nyayo House Torture Chambers. It is a history about which the courts of this country can never be proud of."

We would repeat these sentiments here to emphasize the point that the courts in the country in spite of their perceived previous failures, must now rigorously enforce and enforce against the state the fundamental rights and freedoms of the individual guaranteed by *the Constitution*. Those rights cannot and must not be allowed to be diluted by purported exercise of inherent powers by judicial officers allowing the state to claim reciprocal privileges. The state is the usual and obvious violator against whom protection is provided in *the Constitution* and it ought not to be allowed to claim the same privileges. We know the good Book says that in the end of times, the lion shall graze and lie peaceably together with the lamb. But our recent history is still too fresh in our mind and we in the courts must try to keep the lion away from the lamb. In other words there is not and there can be no question of reciprocal rights, or a level playing field or any such theory as between an accused person and the state. No statute gives the state such privileges, and *the Constitution*, wisely in our view, does not give the prosecutors such powers. They cannot be given through the inherent power of the court. Even in civil matters, there is a specific provision in the *Civil Procedure Act*, Chapter 21 Laws of Kenya, recognizing the existence of the inherent power of the court:-

"to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court." – see section 3A.

80. The court in Thomas Patrick Gilbert Cholmondeley v Republic [2008] (supra) problematized and contextualized the right of the accused not to be subjected to trial by ambush in the following words,

which have now been immortalized in criminal law and practice as cemented by articles 25 and 50 of *the Constitution*.

> "We think it is now established and accepted that to satisfy the requirements of a fair trial guaranteed under section 77 of our Constitution, the prosecution is now under a duty to provide an accused person with, and to do so in advance of the trial, all the relevant material such as copies of statements of witnesses who will testify at the trial, copies of documentary exhibits to be produced at the trial and such like items. If for any reason the prosecution thinks it ought not to disclose any piece of evidence in its possession, for example, on the basis of public interest immunity, they must put their case before the trial judge or magistrate who will then decide whether the claim by the prosecution not to disclose is or is not justified.

81. It is in this context that the court abhors trial by ambush, especially where the state, when its case is weakening, comes up with magic tricks and have some perceived dangerous weapons produced at the tail end of the case. It makes no sense, for a witness, to forget such fundamental issue as a gun having been found, and conveniently remember the same midstream. The courts must at all times avoid gangster type of trial, otherwise called trial by ambush. Even in civil litigation where rules are more relaxed, trial by ambush is frowned upon. In the case of Issa & another v Mbugua & 5 others [2022] KEELC 2851 (KLR), L Mbugua J, posited as follows in respect of similar machinations in a land matter:

The court had observed that the introduction of a witness statement at the 11th hour was akin to trial by ambush contrary to article 159 (2) of *the Constitution* and the overriding objective stipulated under section 1A of the *Civil Procedure Act*. This court also noted that no basis had been laid for admission of the said witness statement at that stage of the trial.

82. The court of appeal [Waki, Nambuye & Kiage JJ.A] had this to say on the right to a fair hearing in the case of Simon Githaka Malombe v Republic [2015] KECA 534 (KLR):

That said, the fair trial guarantees encapsulated in the provisions, namely the right of an accused person to be afforded adequate time and facilitated to prepare a defence, and to be informed in advance of and be given reasonable access to the evidence the prosecution intends to rely on have always existed. Section 77(2) (c) of the retired Constitution, recognized them. Indeed, the availability of witnesses statements to the defense has always been a fundamental facet of this guarantee and avoids the spectre of trial by ambush especially in a criminal case. The High Court, sitting as a Constitutional Court had in the case of Juma –Vs- Republic [2007] EA 461 reasoned as follows, and we agree;

> "We hold that the state is obliged to provide an accused person with copies of witness statements and relevant documents. This is included in the package of giving and affording adequate facilities to a person charged with a criminal offence..."

From the record before us, the appellant tried to exercise this right to access in advance the evidence of the prosecution but in vain.

83. The said court differently constituted in the case of Richard Munene v Republic [2018] KECA 186 (KLR)followed the above decision dealing with the right to a fair trial under Article 50(2) (c) and (j).

84. The court finds that the conviction of the Appellant was purely on fanciful evidence. There was no direct or circumstantial evidence connecting the appellant to the offence. circumstantial evidence is like any other evidence. Though it finds that its probative value is reasonable and not speculative, inferences to be drawn from the facts of the case, and, in contrast to direct testimonial evidence, it is

conceptualized in the circumstances surrounding disputed questions of fact, circumstantial evidence should never be given a derogatory tag. Jowitt's Dictionary of English Law, 4th Edition, states thus of circumstantial evidence:

> ...with circumstantial evidence, everything depends on the context: circumstantial evidence can sometimes amount to overwhelming proof of guilt, as where the accused had the opportunity to commit a burglary, and items taken from the burgled house are found in his lock-up garage, ... a fingerprint recovered from the window forced open by the burglar matches the accused's fingerprints, ... [or where there is] a ... DNA match between the accused's control sample and genetic material recovered from the scene of the crime ....
>
> This is why, way back in 1928, the English Court of Appeal asserted that circumstantial evidence is often said to be the best evidence. It is the evidence of surrounding circumstances which by intensified examination is capable of proving a proposition with an accuracy of mathematics.
>
> This is why, way back in 1928, the English Court of Appeal asserted that circumstantial evidence is often said to be the best evidence. It is the evidence of surrounding circumstances which by intensified examination is capable of proving a proposition with an accuracy of mathematics.

85. However, conclusive as it may be, as it has long been established, caution is always advised in basing a conviction solely upon circumstantial evidence. The Court should proceed with circumspection when drawing from inferences from circumstantial evidence. The court should also consider circumstantial evidence in its totality and not in piecemeal. As the Privy Council stated in Teper v. R [1952] AC at p. 489:

> Circumstantial evidence must always be narrowly examined, if only because evidence of this kind may be fabricated to cast suspicion on another.

86. To be the sole basis of a conviction in a criminal charge, circumstantial evidence should also not only be relevant, reasonable, and not speculative, but also the circumstances from which the conclusion of guilt is to be drawn should in the first instance be fully established. In the case of circumstantial evidence, the prosecution had the duty to fully establish the circumstances from which the conclusion of guilt is to be drawn in the first instance and, therefore, need for the trial court to ascertain that the facts sought to be relied on were proved individually.

87. Further on circumstantial evidence the threshold as stated in R vs Kipkering Arap Koske [1949] 16 EACA 135 is that such evidence must exclude co-existing circumstances which would weaken or destroy the inference of guilt. In Sawe vs Rep [2003] KLR 364, the Court of Appeal expressed that:

> In order to justify on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt. There must be no other co-existing circumstances weakening the chain of circumstances relied upon. The burden of proving facts that justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence remain with the prosecution. It is a burden which never shift to the party accused.

88. The next question is identification. Based on the above analysis, I find that the conviction was not supported. Especially where the gravity of the offence necessitated a higher degree of punishment, the court had to be clear that the ingredients of the offence were well met before convicting the appellant.

89. The offence of robbery was not disclosed. The state must guard against public spirited application of the law against the citizenly. The office of the director of the public prosecution was introduced as the sieve which was to guard against police enthusiasm in charging the most harmless behavior with the most heinous of crimes. It is supposed to be what the South Africans call (uMkhonto weSizwe) the spear of the nation. piercing injustices and having only guilty persons behind bars. The appellant has suffered for three years in prison custody suffering for an offence, which was clearly not committed.

90. It is surprising that the appellant was even put to his defence, especially in respect of count 2, where the police admitted there was no violence. This case is a plea to our parliament that thousands of people may be serving sentences for offences they never committed or with the paucity of definition of a dangerous weapon. This weaponizes Robbery with violence as a tool of choice for any malicious person, as was in this case, by PW3. The court flatly refused to believe PW1, who was at the scene that she could not recognize the appellant. It is a sad day.

91. The trial, incarceration and conviction and sentence of the appellant is an indictment of the justice system that is supposed to safeguard the rule of law and the right to fair trial it is anathema to good conscience and was not for the public good. It is an injustice that not even this judgment can remedy. A boy or man is picked from a club, on the basis of suspicion of PW3 tried, on a moving target where charges are filed and withdrawn at whims, and finally sentenced to death for an offence that did not even occur.

92. The court will set the appellant free with the words of the high court, C.B.Madan, CJ, D.K.S.Aganyanya and J.E.Gicheru, JJ in Stanley Munga Githunguri v Republic [1986] KEHC 44 (KLR) as doth:

> You have been beseeching the Court for Order of Prohibition. Take the order. This Court gives it to you.
>
> When you leave here raise your eyes up unto the hills. Utter a prayer of thankfulness that your fundamental rights are protected under the juridical system of Kenya.

93. The court notes that the trial court carried an impressively large research on definitions and ingredients of the offence but her own voice was lost. The ingredients were not connected to a seamless flow. This made a very painstaking reading as there were so many quotations, other being quotes within quotes. It could be more edifying to have a logical flow to enable parties, especially the Appellant, follow the decision. In order to aid a smooth learning curve, this decision shall be served on the trial court by the deputy registrar of the court and a record of the service be filed in the file.

Determination

94. In the circumstances I make the following orders: -

    a. The Appeal on conviction and sentence is allowed.

    b. The conviction and sentence are set aside.

    c. The Appellant is set free unless otherwise lawfully incarcerated.

    d. The file is closed.

    e. This decision shall be served on the trial court by the deputy registrar of the court and a record of the service be filed in the file.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 29TH DAY OF OCTOBER, 2025.

JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of: -

Mr. Kimani for the State

Appellant present in person

Court Assistant – Michael

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