



**REPUBLIC OF KENYA**

**IN THE SENIOR PRINCIPAL MAGISTRATE'S COURT AT MAKINDU**

**CRIMINAL CASE NO E321 OF 2022**

**REPUBLIC.....PROSECUTION**

**VERSUS**

**JOSEPH MUTIE KALII.....ACCUSED**

**JUDGMENT**

**THE CHARGE**

Joseph Mutie Kalii (hereinafter referred to as the accused person) is charged with the offence of attempted murder contrary to section 220(a) of the Penal Code. The particulars of the offence are that on 24/12/2021 at Kyanyungu in Kibwezi Sub-county within Makueni County, the accused person attempted to unlawfully cause the death of Wambua Peter by striking him with a piece of a sharp object on the back of the head and neck. The accused person denied the charge where after the matter was set down for hearing.

**THE EVIDENCE**

**The Prosecution case**

The Prosecution case was heard by another Magistrate who was subsequently transferred. When the matter was placed before me, directions were taken pursuant to section 200(3) of the Criminal Procedure Code and whereupon it was directed that the matter proceeds from where it had reached. The accused person had already been placed on his defence by the previous Magistrate. I will thus rely on the record as far as the prosecution case is concerned.

The prosecution called a total of four (4) witnesses in a bid to prove their case against the accused person. PW 1 Harun Wambua Peter (hereinafter referred to as the complainant) testified that on 24/12/2021 he was on duty as a security guard at about 8:00 pm. He then escorted his Manager home using a motor cycle. On his way back, he saw a person lying on the side of the road at the fence. He flashed the motor cycle lights and realised that it was the accused person who was known to him as a neighbour. The complainant slowed down. The accused person stood up and hit the complainant twice with an object on his head. The complainant lost consciousness. He regained while at Kibwezi hospital.

The matter was reported to the police where after the accused person was arrested and charged. The complainant testified that prior to the incident, the accused person had gone to their home and alleged that the complainant was having an affair with the accused person's wife and that he wanted the complainant out of the latter's home. That when the complainant went to the farm, the accused person asked him to leave his land. The accused person told him that he knew what he would do. After a week, the complainant was attacked. PW 2 James Mutuse Wambua testified that on 24/12/2021 at about 9:30 pm he was on his way home from the market when he found the complainant lying on the ground at Kimwati area. The witness realised that the complainant was bleeding from his head.

PW 2 went and informed the complainant's mother who took the complainant to hospital. According to PW 2, the complainant was

unconscious when he found him. PW 3 Police Constable Francis Musyoka testified that he was the investigating officer in the matter. That on 28/12/2021 at about 11:00 pm he was at Kibwezi police station when a case of attempted murder was reported. The investigating officer stated that the complainant was in hospital. The police officer visited the complainant at the hospital and when he was discharged, the complainant went to the police station and recorded his statement. According to the investigating officer, the complainant informed him that it was the accused person who had attacked him. PW 4 Doctor Blastus Kakundi produced the P3 form and other medical evidence in respect of the complainant.

### **The Defence Case**

At the close of the Prosecution case, the court found that the accused person had a case to answer and proceeded to place him on his defence. The accused person gave a sworn testimony and called three (3) other witnesses. The accused person testified that on 24/12/2021 he was at work during the day and returned home at 6:00 pm. That he stayed with his family until midnight where after he went to sleep. The accused person stated that he was at his house and not at the scene at the time of incident. That on 4/5/2022 he heard of the allegations that he had assaulted someone. The police went to where he was and arrested him. At the police post where he had been taken, the complainant and his family appeared and claimed that the accused person had assaulted the complainant.

That the complainant and his family asked the accused person to surrender a piece of land to them. The accused person declined and was later charged. The accused person maintained that he did not leave his house that night. That the complainant and his family had earlier on requested him to sell to them his land but the accused person declined. DW 2 Bosco Kalii testified that the accused person was his father. That on 24/12/2021 he was with his father at home from 6:00 pm to midnight. DW

3 Scholastica Munanye Mutie also stated that the accused person was her father and that on the material night, she was with him at home. DW 4 Angela Mutie stated that the accused person was her father. That on the material night, she was with the accused person at their home from 6:00 pm to midnight.

### **MAIN ISSUES FOR DETERMINATION**

From the evidence of both parties, it is not in dispute that the accused person and the complainant were well known to each other and were neighbours. Having considered the evidence on record, I find that the main issues for determination are as follows:

- 1) Whether the complainant was attacked and assaulted on the night of 24/12/2021;
- 2) Whether the complainant was injured as a result of assault;
- 3) Whether it was the accused person who assaulted and injured the complainant;
- 4) If so, whether the accused person intended to cause the death of the complainant;
- 5) Whether the prosecution has proven its case against the accused person to the required standard.

### **ANALYSIS AND DETERMINATION**

I have carefully considered the evidence on record as well as the law applicable. Section 220 of the Penal Code provides as follows:

***"Any person who—***

***(a) attempts unlawfully to cause the death of another; or***

***(b) with intent unlawfully to cause the death of another does any act, or omits to do any act which it is his duty to do, such act or***

**omission being of such a nature as to be likely to endanger human life,**

**is guilty of a felony and is liable to imprisonment for life.**

From the above provisions, I gather that the ingredients of the offence of attempted murder are as follows:

- a) The accused person must have attempted to cause the death of another;
- b) Such attempt must have been unlawful;
- c) The attempt must have been made with the intention to cause the death of the victim.

In the case of **Moses Kabue Karuoya v Republic [2016] eKLR**, Mativo J (as he then was) expressed himself thus:

**“Thus, for there to be an attempt to commit an offence by a person, that person must: -**

**a. Intend to commit the offence;**

**b. Begin to put his intention to commit the offence into execution by means which are adapted to its fulfilment. This means that the accused begins to carry out his intention to commit the offence in a way suitable to bring about what he intends to achieve;**

**c. Do some overt act which manifests his intention; that is, the accused performs an act which is capable of being observed by another (although it may not have been) and which in itself makes clear his intention to commit the offence,**

**But in fact, he does not commit the whole offence. For the offence of attempting to commit an offence to be proved, the prosecutor must prove each of those three elements beyond reasonable doubt.”**

In ***Cheruiyot v Republic [1976-1985] EA 47***, Madan JA, as he then was, quoting with approval ***R v Gwempazi s/o Mukhonzu [1943] 10 EACA 101***, ***R v Luseru Wandera [1948] 15 EACA 105*** and ***Mustafa Daga s/o Andu v R [1950] EACA 140***, stated as follows on the *mens rea* of attempted murder:

***“In order to constitute an offence contrary to section 220, it must be shown that the accused had a positive intention to unlawfully cause death...The essence of the offence is the intention to murder as it is presented by the prosecution.”***

Section 388 of the Penal code defines the term “attempt” as follows:

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

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

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

The *mens rea* for murder is malice aforethought. In my considered view, for the offence of attempted murder to suffice, the prosecution must prove beyond reasonable doubt that the accused person acted with malice aforethought. An attempted murder is a failed murder. According to section 206 of the Penal code, malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances:

- 1) an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;
- 2) knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;
- 3) an intent to commit a felony;
- 4) an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.

The only direct evidence indicating that the complainant was assaulted is that of the complainant himself. His evidence was that he was hit by an object. That it was the accused person who assaulted him. The discharge summary indicates as follows under the caption of brief history and physical examination:

***“Presented at level of consciousness & bruises after hx of a RTA”.***

The above is interpreted to mean that the complainant was taken to hospital with low level consciousness and bruises after a history of a road traffic accident. It is not clear who gave the history to the hospital staff since the complainant was not fully conscious when he was taken there.

There is sufficient evidence to show that the complainant was injured on the material night. However, there is conflicting evidence from the prosecution on what caused the injuries. The discharge summary indicates that he was injured as a result of a road traffic accident whereas the complainant alleges that he was assaulted. From the evidence of both the complainant and the accused person, there was bad blood between them as at the material time. Each one of them explained what led to the disagreement. The explanations were different. Where there is an existing grudge or bad blood between parties, the court ought to consider the evidence and in particular the prosecution evidence with great caution as

parties are known to resort to criminal sanctions in a bid to settle old scores. It is also to be remembered that existing grudges or disputes between parties are a recipe for chaos.

In the authority of ***Ayub Muchele v Republic [1980] KLR 44***, Trevelyan and Sachdeva, JJ held that:

***“Just as animosity is a factor which is properly to be taken into account where required, so is lack of animosity. We see nothing wrong in an appropriate case for the court to ask “What reason had the witness to lie” ...The fact that people have no grudge against someone does not mean that they cannot, at the same time, be mistaken or, for that matter, deliberately untruthful... There are spiteful people about.”***

Assuming that the complainant was assaulted on the material night, the million-dollar question is; did the assailant intend to kill the complainant? Intent is a notoriously difficult element to prove because it is locked in the accused person's mind. Intent can be inferred from either direct or circumstantial evidence or both. The complainant testified that prior to the incident, the accused person had alleged that the complainant had an affair with the accused person's wife. That the accused person went to the complainant's home and demanded that the complainant vacates. The complainant further stated that he met the accused person who stated that he knew what he would do. There is no evidence to show that the accused person made prior threats to kill the complainant.

Malice aforethought is an intention to cause the death of or to do grievous harm to a person, whether that person is the person actually killed or not. It is knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is

caused or not, or by a wish that it may not be caused. The intention may be inferred from the nature and extent of injuries sustained by the victim. The degree of injuries is established by medical evidence. In the P3 form, the degree of injury was classified as “harm.”

In the case of ***Republic v Luseru Wandera s/o Wandera [1948]*** **EACA 105**, the court held that an intent merely to cause grievous harm, whilst sufficient to support a conviction for murder, it is not sufficient to support a conviction under **section 208(1)** of the Uganda Penal Code for attempting unlawfully to cause death. The court was of the view that a conviction for this latter offence can only be supported by proof of a positive intention unlawfully to cause death. In analyzing the evidence at the trial, the court held that the circumstances may well have been that the appellant struck out wildly with the knife without any specific intent to kill or even to strike at any vital part of his assailants. The court held that the appellant was entitled to the benefit of any reasonable doubt in this respect and there was considerable doubt whether he used the knife with positive intent to cause death.

From the medical evidence, the injuries appear not to have been life threatening as they were classified as harm. There is no evidence to show that the accused person verbally threatened to kill the complainant. It is thus difficult to know whether the assailant intended to kill the complainant or merely cause him harm. It is my finding that the prosecution has failed to prove beyond reasonable doubt that whoever assaulted the complainant, if at all, intended to kill him. On that basis alone, the charge of attempted murder cannot stand. A charge of assault causing actual bodily harm would have been more appropriate.

For a case to be proven, there must be a link between the offence and the accused person. The incident is said to have happened at night and on the road, while it was raining. It is therefore paramount for the court to determine whether the accused person was positively identified as the assailant. The complainant stated that he was able to

recognize the accused person as his assailant. In the case of **Anzaya v Republic [1986] KLR 236**, the Court of Appeal sitting at Kisumu held that there is a danger in relying solely on the evidence of a single witness regarding identification, particularly when the identification is said to have occurred at night. In **Mwenda v Republic [1989] KLR 464**, the Court of Appeal held that whenever the case against an accused person depends wholly or substantially on the correctness of one or more identifications of the accused, special need for caution before convicting in reliance on the correctness of the identification is necessary.

The Court of Appeal in the case of **Marube & Another v Republic [1986] KLR 356** observed that in the evaluation of the evidence of the identifying witness, the court must ensure beyond all reasonable doubt that the witnesses were honest and unmistakable about their identification. In **Kiarie v Republic [1984] KLR 739**, the Court of Appeal was of the opinion that where the evidence relied upon to implicate an accused is entirely of identification, that evidence should be watertight to justify a conviction. A similar observation was made by the Court of Appeal in the case of **Wamunga v Republic [1989] KLR 424** where the court held as follows:

***“Where the evidence against an accused is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of conviction ”.***

In the English case of **R v Turnbull & Others, [1976] 3 ALL ER 549**, it was held that the factors for consideration by the court on the question of identification are as follows:

- i. The distance between the witness and the suspect when he had him under observation;
- ii. The length of time the witness saw the suspect; and

- iii. The lapse of time between the date of the offence and the time the witness identified the suspect to the police.

Further in the case of ***Simiyu & Another v Republic [2005] 1 KLR 192*** at page 195 the Court of Appeal observed:-

***“In every case in which there is a question as to the identity of the accused, the fact of there having been a description given and the terms of that description are matters of the highest importance of which evidence ought to be given first of all by person or persons who gave the description and purported to identify the accused and then by the persons or person to whom the description was given. The omission on the part of the complainants to mention their attackers to the police goes to show that the complainants were not sure of the attackers’ identity.”***

Similarly, in the case of ***Francis Kariuki Njiru & 7 others v Republic [2001] eKLR***, the same court held:

***“The law on identification is well settled as this court has from time to time said that the evidence relating to identification must be scrutinized carefully and should only be accepted and acted upon if the court is satisfied that the identification was positive and free from the possibility of error. The surrounding circumstances must be considered. Among the factors the court is required to consider is whether the eye witnesses gave a description of his or her attacker or attackers to the police at the earliest opportunity”.*** (Emphasis mine)

In ***Maitanyi v Republic [1986] KECA 39 (KLR)***, the Court of Appeal held as follows:

- 1) Although it is trite law that a fact may be proved by the testimony of a single witness, this does not lessen the need for testing with the greatest care the evidence of a single witness respecting

identification, especially when it is known that the conditions favouring a correct identification were difficult;

- 2) When testing the evidence of a single witness a careful inquiry ought to be made into the nature of the light available conditions and whether the witness was able to make a true impression and description;
- 3) The court must warn itself of the danger of relying on the evidence of a single identifying witness. It is not enough for the court to warn itself after making the decision, it must do so when the evidence is being considered and before decision is made;
- 4) Failure to undertake an inquiry of careful testing is an error of law and such evidence cannot safely support a conviction.

Being guided by the above authority, I hereby warn myself of the danger of relying on the evidence of a single identifying witness. Unfortunately, no inquiry was made by the then trial court into the circumstances under which the complainant was able to identify his alleged assailant. In his evidence in-chief, the complainant stated as follows:

***“.....as I was going back I saw Mutie lying on the side of the road at the fence. It was raining. I shone the bodaboda lights and noticed it was Mutie my neighbour. I slowed down and he hit me on my head twice and I lost consciousness. I did not see what he hit me with. I had slowed down, he stood on the side of the road. I identified him and I lost consciousness”.***

It is not clear for how long the complainant had his assailant under observation. Evidently, visibility was not clear. According to the complainant, the assailant was lying on the ground while it was raining. I doubt that the circumstances were conducive for a proper identification. It is not clear at what distance the complainant was able to identify his assailant. It is also not clear at what point the assailant, who was said to

have been lying down, stood up at the side of the road. If the assailant was lying down at the fence and later stood by the road side, it would mean that the motor cycle beam of light was not shining directly at him. The situation was made worse by the fact that it was raining. Visibility is poorer when it rains. From the testimony of the complainant, there is an indication that the incident happened so fast. The complainant even lost consciousness after the attack. I find that there was insufficient time and the circumstances were not conducive for a proper and positive identification. I doubt that the complainant could have positively identified his assailant.

In his defence, the accused person stated that he was at home with his family the whole night at the material time. Basically, the accused person raised the defence of alibi. In the case of **Chabah & Another v Republic [1988] KLR 1**, the Court of Appeal held that the onus is on the prosecution to displace the alibi after the defence raises it. In **Wong'oribe v R [1980] KLR 149** Madan JA (as he then was) in delivering the judgment of the court at page 151 letter G & H stated:

***"The defence of alibi was put forward for the first time some months after the robbery when the appellant made his unsworn statement in court. Even in such circumstances the prosecution or the police ought to check and test the alibi wherever possible. ....Udo Udoma CJ also said that, if the alibi had been raised for the first time at the trial, different considerations might have arisen as regards checking and testing it."***

In **Kiarie v Republic [1984] KLR 739**, the Court of Appeal held thus:

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

In the case of ***Karanja v Republic [1983] KLR 501***, the Court of Appeal had this to say:

***"Nevertheless, we agree with the observations of the Court of Appeal for Eastern Africa in R v Ahmed Bin Abdul Hafid (1934) 1 EACA 76, and with those of the former Court of Criminal Appeal in R v Little boy, [1934] 2 KB 413, that in a proper case the court may, in testing a defence of alibi and in weighing it with all the other evidence, to see if the accused person's guilt is established beyond all reasonable doubt, take into account the fact that he had not put forward his defence, or his alibi, if it amounts thereto, at an early stage in the case, and so that it can be tested by those responsible for the investigation and prevent any suggestion of afterthought".***

In the case of ***Kossam Ukiru v R [2014] eKLR***, the Court of Appeal held that the defence of alibi may be rejected as an afterthought when it is not raised at the earliest opportunity and where, when weighed against all the other evidence, it is established that the accused person's guilt has been established. The court observed thus:

***"We are fully alive to the principle that an accused person who sets up an alibi does not assume any burden to prove the same (see Karanja vs Republic [1983] KLR 501). In this case, however, the two courts below rejected the appellant's alibi defence on the basis first, that it had not been raised at the earliest opportunity in the proceedings and second, that weighing the defence with all the other evidence adduced, the appellant's guilt was established beyond all reasonable doubt. The appellant's complaint that his defence was not considered is therefore without merit and we reject it."***

Apart from testifying that he was not at the scene of the alleged crime at the time of incident, the accused person called witnesses to verify his allegations. It should be remembered that the accused person

bears no burden to prove the alibi. The onus is on the prosecution to displace the alibi. It is not clear whether the police recorded any statement from the accused person and whether the accused person raised the alibi at the time of his arrest. However, the record indicates that when the complainant was cross-examined by the accused person, he stated in part as follows:

***“You were not at home with your children”.***

The foregoing is a clear indication that the accused person intended to raise an alibi in his defence. The alibi does not have to be raised directly. It can be raised by necessary implication. I therefore find that the defence of alibi was raised at an early stage. It cannot be said that it was an afterthought. Apart from the accused person, three other witnesses gave evidence indicating that the accused person was at home at the time of incident.

Even after the alibi had been raised at the time of cross-examining the complainant, the prosecution did not adduce any evidence to rebut the alibi either by way of re-examination or other evidence. The investigating officer did not bother to address the accused person's presence at the scene of the alleged crime. He did not give evidence that would place the accused person at the scene. There is no evidence to show whether the investigating officer bothered to get an explanation from the accused person. As already stated, where an accused person raises the defence of an alibi, the prosecution has the duty to place the accused person at the scene of crime. Even assuming that the defence was raised for the first time during defence hearing, the prosecution would have invoked the provisions of section 212 of the Criminal Procedure Code which provide 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".**

My view is buttressed by the authority of **John Odera Omenda & another v Republic [2014] eKLR**, in which Majanja J held as follows:

**"The defences raised by the appellants were plausible and although they were raised for the first time during the defence, the duty of displacing or rebutting that defence lay on the prosecution. Indeed, the law affords the prosecution such an opportunity in section 212 of the Criminal Procedure Code (Chapter 75 of the Laws of Kenya)..... While the evidence of identification of the appellants by PW 1 and PW 2 may have sufficed, I am cautious to find that the prosecution satisfied the standard of proof in light of the appellant's defence which the trial court, respectfully, did not exhaustively weigh against the prosecution evidence to make a finding that it was displaced by it".**

Similarly, the Court of Appeal in the case of **Victor Mwendwa Mulinge v Republic [2014] eKLR** observed as follows:

**"But even assuming that the appellant raised the defence of alibi for the first time while in court, as rightly submitted by Mr. Oguk, pursuant to the provisions of Section 309 of the Criminal Procedure Code the prosecution could have sought leave to adduce further evidence in reply to rebut the appellant's defence".**

The provisions of section 309 of the Criminal Procedure Code are similar to those of section 212 save that the former applies to proceedings in the High court whereas the latter applies to proceedings in the Subordinate courts. The accused person does not have to establish that his alibi is reasonably true. All that he has to do is to create doubt as to the strength of the case for the prosecution. When the prosecution case is thin, an alibi

which is not particularly strong may very well raise doubts- see ***Uganda v Sebyala & Others [1969] EA 204.***

Given the circumstances of the case, there was need for an explanation, particularly from the investigating officer, indicating that the accused person was at the scene at the material time and that he had the opportunity to commit the offence. Having charged the accused person, the prosecution had a duty to show that the accused person's defence was not plausible. That could only be done by proper investigations and evidence of the same to be tendered in court.

Having analysed the evidence on record, I find that there is reasonable doubt as to whether the accused person was at the scene on the material day. It is possible that the accused person was at the scene but the prosecution evidence is not sufficient to rebut his allegation that he was elsewhere. The prosecution ought to have invoked the provisions of section 212 of the Criminal Procedure Code and adduced evidence rebutting the accused person's defence or allegations and placing him at the scene. With the totality of the evidence on record, I find it difficult to disregard the defence evidence on what transpired on the material day. It cannot be ruled out that the accused person was at home at the material time. His defence is probable.

### **Whether the prosecution has proven its case**

I have considered the accused person's defence bearing in mind that he shoulders no duty to prove his innocence. The gist of the accused person's defence is that he was framed up. It is the word of the complainant against that of the accused person, bearing in mind that the burden is on the prosecution to prove the allegation against the accused person beyond reasonable doubt. In ***Philip Nzaka Watu v Republic [2006] eKLR***, it was held that to find a conviction in a Criminal case, the trial court has to be satisfied of the accused person's guilt beyond reasonable doubt. On proof beyond reasonable doubt, the court stated in ***Stephen Nguli Mulili v Republic [2014] eKLR:***

***“It is not in doubt that the burden of proof lies with the prosecution. The locus classicus on this is the case of DPP V WOOLMINGTON, (1935) UKHL 1 where the court eloquently stated that the “golden thread” in the “web of English common law” is that it is the duty of the prosecution to prove its case. The Kenyan Courts have upheld this position in numerous cases. See FESTUS MUKATI MURWA V R, [2013] eKLR.”***

In the famous case of ***Miller v Ministry of Pensions [1947] 2 All ER 372***, Lord Denning stated with regard to the degree of proof beyond reasonable doubt:

***“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.”***

In ***Bakare v State (1987) 1 NWLR (PT 52) 579***, the Supreme Court of Nigeria emphasized on the phrase proof beyond reasonable doubt, stating:

***“Proof beyond reasonable doubt stems out of the compelling presumption of innocence inherent in our adversary system of criminal justice. To displace the presumption, the evidence of the prosecution must prove beyond reasonable doubt that the person accused is guilty of the offence charged. Absolute certainty is impossible in any human adventure, including the administration of criminal justice. Proof beyond reasonable doubt means just what it says it does not admit of plausible possibilities but does***

**admit of a high degree of cogency consistent with an equally high degree of probability.**" (Emphasis mine)

The standard of proof "*beyond reasonable doubt*" is grounded on a fundamental societal value determination that it is far worse to convict an innocent man than to let a guilty man go free. A reasonable doubt exists when the court cannot say with moral certainty that a person is guilty or that a particular fact exists. It must be more than an imaginary doubt, and it is often defined judicially as "*such a doubt as would cause a reasonable and prudent person, in one of the graver and more important transactions of life, to pause or hesitate before or taking the represented facts as true and relying and acting thereon*" (see **Clarence Victor, Petitioner 92-8894 v. Nebraska, 511 U.S. 1 (1994); Rex v. Summers, (1952) 36 Cr App R 14; Rex v. Kritz, (1949) 33 Cr App R 169, [1950] 1 KB 82 and R. v. Hepworth, R. v. Feamley, [1955] 2 All E.R. 918**). Beyond reasonable doubt is proof that leaves the court firmly convinced that the accused is guilty. Reasonable doubt is a real and substantial uncertainty about guilt which arises from the available evidence or lack of evidence, with respect to some element of the offence charged.

It is the belief that one or more of the essential facts did not occur as alleged by the prosecution and consequently there is a real possibility that the accused person is not guilty of the crime. This determination is arrived at when after considering all the evidence, the court cannot state with clear conviction that the charge against the accused is true since an accused may not be found guilty based upon a mere suspicion of guilt. The record indicates that the incident occurred on 24/12/2021 but the report was made at the police station on 28/12/2021 by the complainant's mother. The accused person was arrested on 4/5/2022, after a period of over four months from the time the report was made.

None of the prosecution witnesses testified that the accused person went into hiding after the incident. It is only the investigating officer who, upon being cross-examined by the accused person, stated that the accused person had escaped. That he looked for the accused person on

several occasions and that the accused person had switched off his phone. The explanation appears to have been an afterthought since the investigating officer did not state in his evidence in-chief that he had difficulties in arresting the accused person. The accused person and the complainant were neighbours well known to each other.

According to the complainant, they even worked at the same place. It would not have been difficult to arrest or even summon him promptly. I am aware that the police are in the habit of arresting suspects after the P3 form is filled, in such cases. The P3 form was filled on 16/3/2022 but the accused person was arrested after almost two months from that time. The circumstances of the case indicate that the complainant may not have been sure of who had attacked him. That could explain why the accused person was arrested months later yet he stayed in the neighbourhood and even worked at the same place with the complainant.

I cannot state with certainty that the complainant lied to court when he mentioned the accused person as his assailant. However, I am equally not certain that he positively identified the accused person as his assailant. There is a reasonable possibility that he could have been mistaken as to the identity of the assailant. I cannot rule out the fact that he could have been assaulted by another person other than the accused. In as much as I may want to believe the complainant's testimony, I find difficulties in dismissing the accused person's defence. Having analysed the entire evidence on record, I tend to feel that the accused person could be innocent, but I am just gambling on probabilities.

I may be wrong. I may be trying to return a guilty man to the community. The accused person's defence is not far-fetched. I have a reasonable doubt, and this is a safeguard that has enormous value in our system. I cannot declare that the accused person is innocent, but I have reason to believe that he may not be guilty. **Alan Dershowitz**, an American Lawyer and former Law Professor once said that Scientists search for truth, Philosophers search for morality and a criminal trial

searches for only one result: proof beyond a reasonable doubt. Has this proof been established? I think not.

It is possible that the complainant could have been assaulted by the accused person on the material night but with the kind of evidence on record, that remains a mere suspicion which cannot form the basis for a conviction. In the words of the Court of Appeal in the case of **Joan Chebichii Sawe v Republic [2003] eKLR**, suspicion however strong, cannot provide a basis for inferring guilt which must be proved by evidence. The prosecution must prove the case against the accused person beyond any reasonable doubt. The accused person is not under duty to prove his innocence. He may as well remain silent in defence. For avoidance of doubt, it is my finding that the prosecution has failed to prove its case against the accused person to the required standard.

### **DISPOSITION**

In view of the foregoing, I find that the prosecution has failed to prove its case against the accused person beyond reasonable doubt. Consequently, I hereby find the accused person **NOT GUILTY** and proceed to **ACQUIT** him of the offence of attempted murder contrary to section 220(a) of the Penal code.

**DATED, SIGNED AND DELIVERED IN OPEN COURT AT MAKINDU  
THIS 20<sup>TH</sup> DAY OF NOVEMBER, 2025.**

**Y.A SHIKANDA**

**SENIOR PRINCIPAL MAGISTRATE.**