REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CRIMINAL APPEAL NO. E061 OF 2024

MAKARIUS MAIGE OMETE ……

……APPELLANT

VERSUS

REPUBLIC……

..RESPONDENT

JUDGMENT

1. This is an appeal from the conviction and sentence meted out by the Hon. P. K Mutai on the Kisii Chief Magistrate's Court criminal case no. E1321 of 2020. The appellant was charged with others not before the court, with three counts, that is:
    a. Robbery with violence under section 295 and 296 (2) of the Penal Code.
    b. Arson contrary to Section 332(a) of the Penal Code.
    c. Malicious damage to property contrary to Section 339(7) (g) of the Penal Code

2. The particulars of the count of robbery with violence contrary to section 296(2) of the Penal Code were that Appellant, with others, before the court on 31.07.2020 at Raganga Market, Raganga Sublocation, in Kitutu Central Sub-County, in Kisii

County, jointly with others not before the court, while armed with crude weapons, namely, rungus, pangas, and stones, robbed Edwin Mokaya Nyakundi of the following properties (as per the list attached) valued at Ksh. 1,200,000, and at the time of the robbery, used physical violence against the said Edwin Mokaya Nyakundi.

3. There was no list attached to the charge sheet. The weapons are also not described as dangerous. I shall address this later in the judgment.

4. The particulars of the second count, Arson contrary to Section 332(a) of the Penal Code, were that Appellant, with others, before the court on 31.07.22020 at Raganga Market, Raganga Sublocation, in Kitutu Central Sub-County, in Kisii county, jointly with others not before the court, willfully and intentionally set fire to the dwelling house of Edwin Mokaya Nyakundi valued at Ksh. 2,500,000/=.

5. The particulars of the third count, Malicious damage to property contrary to Section 339(7)(g) of the Penal Code, were that Appellant, with others, before the court on 31.07.22020 at Raganga Market, Raganga Sublocation, in Kitutu Central Sub-County, in Kisii County, jointly with others not before the court, willfully and unlawfully, maliciously damaged a machine, being motor vehicle registration number

KCL 541L Toyota Probox, white in colour valued at Ksh. 520,000/=, the property of Edwin Mokaya Nyakundi.

6. The appellant was convicted on all three counts. The eight other accused persons were acquitted for lack of evidence under section 215 of the Criminal Procedure Code. The court sentenced the appellant to 15 years' imprisonment for each count. The sentences were to run concurrently. This prompted this appeal

7. The Appellant filed a petition of appeal dated 3.05.2024, setting out one ground of appeal, which is repeated 9 times in different nomenclature. The ground is a challenging conviction only to the extent that it was not based on evidence tendered in court. Related to this is the question of disregard of defence evidence tendered, which was said to be watertight.

Enhancement

8. At the beginning of the appeal hearing, the court notified the appellant that the sentence under count 1 is a death penalty. The state had requested an enhancement to the death penalty, and the court was to consider the evidence and, if the appellant was guilty of the said offence, enhance the same to the death penalty. The appellant indicated that he understood. So was the position taken by his legal advisor. This promise, therefore, hangs on the hearing like a Damocles' sword.

Submissions

9. Parties filed detailed submissions. The appellant filed submissions dated 08.09.2025. The appellant submitted that his evidence was cogent and was not shaken on cross-examination. They identified one issue for determination, that is, whether the prosecution proved its case beyond reasonable doubt. The first point of departure was that none of the prosecution witnesses identified the appellant. This was, according to the appellant, the evidence of PW1 and PW2, who did not see any of the accused persons.

10. They submitted that at the time of the alleged offence, the complainant was hiding under the bed while the wife was hiding in a thicket. They questioned why there was no identification parade since the alleged offence was committed at night by persons not well known to the appellant. They submitted that the recognition and identification of the appellant as an essential element were not proved.

11. Secondly, they submitted that there was no proof of the existence of the property that was burnt. There was no sale agreement, title deed, or search of the house or vehicle, including the logbook. They also stated that the values of the properties in counts, one, two, and three are KSh. 1,200,000, KSh. 2,500,000/= and Ksh. 520,000/= was not proved.

12. Regarding count 1, they submitted that it was a duplex charge. Reliance was placed on section 134 of the Criminal Procedure Code. The same was set out in extension as follows:

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

13. They stated that the court must not have two or three offences in one charge sheet. Reliance was placed on the case of **Hassan Jillo Bwanamaka & another v Republic [2018] KEHC 2065 (KLR)** and **Joseph Njuguna Mwaura & 2 others v Republic [2013] KECA 541 (KLR).**

Respondent's Submissions

14. The respondent filed submissions wherein the respondent urged the court that the duty of the court was settled in the case of **Okeno v Republic [1972] EA 32** at pg. 36. They wrongly attributed the decision to a predecessor of this court. This court has no predecessor since 1897 when it was first established. The decision was made by the former East Africa Court of Appeal, which stated as follows in regard to the duty of the Court on a first appeal:

> “An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya v. R., [1957] E. A. 336) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (Shantilal M. Ruwala v. R., [1957] E.A. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters v. Sunday Post, [1958] E. A. 424.”

15. On duplex, they relied on the case of **Simon Materu Munialu v Republic [2007] KECA 149 (KLR)**, where the court of appeal[R.S.C Omolo, J.W. ONYANGO OTIENO and W. S. Deverell JJA] posited as follows:

> The ingredients that the appellant and for that matter any suspect before the court on a charge of robbery with violence in which more than one person takes part or where dangerous or offensive weapons are used or where a victim is wounded or threatened with

actual bodily harm or occasioned actual bodily harm is section 296(2) of the Penal Code.

16. They submitted that the appellant was properly identified by PW2 and PW3, who indicated what the appellant was doing, and security lights identified what he was doing. They stated that the appellant was correctly identified and that there was a common intention as provided under section 21 of the Penal Code. Reliance was placed on the cases of **Solomon Mungai v. Republic** [rg6S] E'A' 363 and **Rex v Tabulayenka and Others (Consolidated Criminal Appeals Nos. 162, 163, 164 and 165 of 1942) [1943] EACA 14** (1 January 1943, where the former East African Court of Appeal [Sir Joseph Sheridan, CJ. (Kenya), Sir Norman Whitley, C.J. (Uganda) and Mark Wilson, Ag. C.J] held as follows:

> And the following passage from the judgment of this Court in Rex v. Okute and another, 8 E.A.C.A. 78 at p. 80, is particularly apt on the question of common intention:
>
> Where several persons together beat another, then, though each may have a different reason, and though some may join in the beating later than others, it is plain that all have what the law calls a 'common intention', which does not necessarily connote any previous concerted agreement between them".

17. It was thus submitted that common intention may be inferred from their presence, their actions, and the omission of any of them to dissociate himself from the assault. This statement, though, was in the commentary and not on the original decision.
18. The respondent invited me to differ with the 5-judge bench of the Court of Appeal by holding that the appellant states that the first charge was duplex, having been charged under sections 295 and 296 of the Penal Code. The Court of Appeal in **Paul Katana Njuguna vs Republic (2016) eKLR** further explained that the offence of robbery with violence includes the elements of the offence of robbery, and if the particulars of the charge sheet show the elements of the offence of robbery with violence which are proved, then this is a defect that is not fatal and can be cured by this Court under section 382 of the Criminal Procedure Code. This is an invitation that has dire consequences and will not be accepted in view of the doctrine of stare decisis. Only the Supreme Court can accept such an invitation. It is the same contempt. I will treat the invitation to refer to an earlier decision where the court of appeal had been invited to settle the position on duplex.
19. Reliance was placed in the case of **Paul Katana Njuguna v Republic [2016] KECA 207 (KLR)**, the court of appeal [Kihara Kariuki, P.C.A, Okwengu & Azangalala, JJ.A] held as follows regarding duplex.:

> Having considered the law on duplicity as it has evolved, can we say that the charge as framed in the

appeal before us was so defective as to have occasioned a failure of justice? Can it be said with any certainty that the said defect is incurable under Section 382 of the Penal Code. We observe that the offence under Section 295 and 296 (2) were not framed in the alternative. So, following the decision in Cherere s/o Gakuli -v- R (supra) Laban Koti -v- R. (supra) and Dickson Muchino Mahero v R. (supra), the defect in the charge herein is not necessarily fatal.

39. We appreciate that Section 296 (2) of the Penal Code creates the offence of robbery with violence or aggravated robbery. In our view, the offence of robbery must first be demonstrated before proceeding to demonstrate the ingredients provided in Section 296 (2) of the Penal Code. As a corollary to this proposition, an accused person facing those charges would in defence seek to demonstrate that no offence of robbery was committed and that the ingredients alleged under Section 296 (2) were absent or were not demonstrated by the prosecution.

20. The court does not wish to paddle through the appeal court controversies, save to add that they are binding on it. Though the charge is duplex, the duplex is not the main point of departure. It is my wish that the question will be settled upstairs.

21. They submitted that in the present case, the appellant was able to cross-examine all the witnesses extensively, meaning that he understood the charges that he was facing. The appellant was even represented at the trial. Reliance was placed on **Makau & another v Republic** (criminal appeal e037&e038 of 2023 (Consolidated)) 2025 KECA (KLR) 661 (11TH April zoz5) (Judgment).

22. On Sentence, it was submitted that the appellant was thus sentenced to a lesser sentence than what is stipulated in section 296(2) of the Penal Code. Given the loss and the violence that was inflicted upon the person of the complainant, his family, and the property, it is proper that the appellant is sentenced in accordance with the provisions of the law. They prayed that the Appeal be found without merit and be dismissed in its entirety.

Evidence and Proceedings

23. The Appellant was the 8th accused. The appellant appears to have taken plea on 7.9.2020. However, the language that follows does not indicate who took plea. The proceedings are as follows:

> Before N.S Lutta - CM
> Prosecutor Mr kiano
> Court assistant Mr. Ngare
> 8 accused's present
> Mr Godia for the 4th, 6th and 8th accused person

Mr. Wesonga for the 7th accused.

signed

court

Charge was read out and explained to the accused persons in the language they understand. Interpretation in English to Kiswahili who replies:

Count 1: Si ukweli

Count 2: Si ukweli

Count 3: Si ukweli

Court: plea of not guilty entered, bond of KSh. 400,000 each with surety of cash bail of Ksh. 30,000. Mention on 22.09.2020 in court for a hearing date.

24. There is no evidence on who took a plea or did not take a plea. The file was consolidated with 1238 of 2020, with 1321 of 2020 being the main file. After consolidation, there does not appear to be a plea for any new consolidated charge sheet.

25. The matter was placed before the Hon. P.K Mutai, who proceeded straight to a hearing. He did not bother to have the accused take plea for either the original charge sheet or the consolidated one. There does not appear on record a charge sheet for Alice Kwamboka Arori, who was the accused in 1454 of 2020, included in the file.

26. Despite not having taken a plea, the case proceeded on 1.07.2021. The 8th accused person was absent and not

represented. Evidence given on the said date is not thus relevant to the case against the appellant. There was no order dispensing with his appearance. On 18.11.2021, 7 accused persons took plea on a consideration sheet. The eight accused persons did not take a plea. On 5.4.2022, accused numbers 2, 3, and 4 were absent, while accused 1, 5, 7, 8, and 9 were present.

27. On 2.08.2022, the second accused was absent while others were present. The court ordered the case to proceed notwithstanding his absence. It appears that the matter started *de novo* with a new PW1, Edwin Mokaya Nyakundi testifying as PW1.

28. He stated that he was a mechanic. He stated that he was involved in an accident. He hit a motor cycle. The motorcycle was damaged. They talked to the chief. One person wearing a helmet came with the chief. When he went out, he saw his motorcycle on fire. People went into his house and ransacked it. Another lit a gas cylinder in the sitting room. One person hit him on the head, and he managed to get out. He was pleading. He was rescued and taken to the hospital. The house was burnt. He stated that he could see Justus, whom he hit with his vehicle. At this point, the court ought to have noted that robbery with violence was not tenable as the attack was on the complainant for hitting the first accused. The violence was not meant to aid in stealing. This was purely

a mission to destroy. Secondly, the goods were not stolen but burnt.

29. On cross-examination, he stated that he did not produce the title deed for the land. He stated that he knew the first accused and the appellant. He did not know who took what items. He also did not see who lit the gas. He stated that he bought the vehicle for Ksh. 450,000/=. He also did not know who destroyed the fence or whether they had a panga.

30. PW2 was Merceline Kemunto who stated that she was at home with a young child. The husband came 50 minutes later. The area assistant chief came 20 minutes later with the appellant. He explained why he entered the house. He explained about the motorcycle that hit their motor vehicle. While the appellant was explaining, a stone was thrown on the iron sheet roof. There were shouts and hitting on the iron sheets and window panes the vehicle was destroyed. She called the assistant chief, who stated that he escaped after stones were hit and alerted the police. The witness tried to escape and moved with the child. Someone came with petrol and burnt the vehicle. She had escaped to the Kayapple fence and thereafter to a neighbour's home. People came with petrol and burnt the vehicle. The fire extended to the toilet and caught the house. She saw the appellant burning the car.

31. On cross-examination, she stated that the stone was thrown when they were outside. She did not know who threw it. She stated that the child told her that the chief escaped after being hit. She said that she was trying to escape. She identified the appellant as the person who directed stool at her. He stated that she did not see any of the accused persons take property.

32. PW3 was Simon Okeyo Mboba, an assistant chief of Raganga sublocation. He had received a report from a clan elder of an accident at Raganga Centre. He was told that a motorcycle and a motor vehicle collided. He engaged one of them. There were many people. The motorcycle belonged to the first accused in the case, while the vehicle belonged to the complainant. He was given one young man, and they proceeded to the complainant's home. While they were on site, the vehicle was hit. He found people throwing stones and hitting the motor vehicle.

33. He noted one Joseph Magari, Sokoro Menana, Maige Square, and Hillary Makori throwing stones. These were not in court, except the 8th accused, whom he said was Maige Square.

34. He stated that Maige Square hit the house with a club together with Hillary Makori. He had gone to the house to know how the accident occurred. he had been told that the

complainant's vehicle hit the first accused's motorcycle. He stated that he did not see the rest of the boda boda riders except the appellant herein.

35. PW4 was Sergeant Michael Otieno of Gesonso police station. He received a call from the OCS about an incident report on 21.07.2202 at 8 pm, alleging a mob injustice incident at the Reganda area. On getting closer, he found the mob had disappeared. They found a residential house on fire, and a vehicle was burning.

36. The suspects had also destroyed the banana plantation, and some stolen goods were recovered. He arrested the 5th and 7th accused persons. Others arrested the rest. They recovered a car battery, blankets, sheet covers, a StarTimes decoder, and assorted household utensils. He did not find any of the accused persons at the scene.

37. He stated that he was not aware of the goods that were stolen or destroyed. He did not witness the house being set on fire but saw it ablaze. He stated that he did not see anyone cutting banana plantations. He arrived at the scene at 10:00 PM. He did not know who cut the bananas or set the house on fire or the car.

38. PW5 was Inspector Irina Charles Chumba, OC- Crime at Mosocho police station. She received a call from the OCS that he had received a call from Chief Ngusero South, who

reported that a group of people had gone to a homestead in the Riganga area. They were to mobilize and proceed to the scene. They found 10 people running in different directions. The house, the toilet, and the motor vehicle registration number KCJ 541P were on fire.

39. They called the fire brigade to put out the fire. They went back to the scene at 3.00 am to investigate. He learnt that the complainant told them that as he was turning right, he brushed a motorcycle carrying a pillion passenger and overtook from the right. Of course, the complainant did not tell them he was to blame because he was turning carelessly. The complainant went home and found his family. [In context, this is what is known as a hit-and-run accident.]

40. People broke down the door and entered the compound, complaining that the complainant had hit a rider and a pillion passenger who were injured. The rowdy mob looted and destroyed property. They wanted to go to the bedroom, but he managed to escape. He stated that the first accused reported that a probox hit his motorcycle. They placed him in custody. He did an inventory, which he produced as Exhibit 3.

41. He stated that the complainant lost several goods. Some were found in possession of the third accused. He stated that the area assistant chief mentioned the appellant.

42. On cross-examination, the witness stated that though there was electricity, the lights were out they did not recognize any intruder. He said that no witness saw the vehicle or the house being set on fire. He stated that the complainant's wife identified the recovered items. He stated that there was no need for an identification parade.

43. PW6 was Daniel Nyameino, a senior clinician who examined the complaint on 2.08.2020. He had a history of physical assault, including a tender fresh wound on the head and multiple bruises on the back and chest. The injuries were likely to be from an accident and consistent with assault. This part of the evidence is hilarious. The complainant himself forgot, in his testimony, that he was injured and examined. It is this kind of evidence that brings disrepute to the medical profession. The words of Madan, J (as he then was), in **N vs. N [1991] KLR 685**, where he expressed himself in the following terms, come to mind:

> "I wish people would not tell me absurd and unbelievable lies. I feel disappointed if a lie told in court is not reasonable imitation of the truth and is not reasonably intelligently contrived. I wish people who tell lies before me would respect my grey hair even if they consider that my intelligence is not of high order. I wish the witness had not told me the most stupid of his lies, which both disappointed and made me feel intellectually insulted."

44. The accused persons were placed on their defence. The first accused stated that the complainant not only knocked him down but also assaulted him. Members of the public raised an alarm when he threw tear gas at the members of the public. Since he was epileptic, he could not stand the gas. He was taken to the hospital. He later reported to the Mosocho police station. The state did not find anything wrong with a civilian being in possession of tear gas.

45. The second accused stated he was arrested instead of his mother and was forced to confess. He did not commit the offence.

46. DW3, who was the second accused, stated that the area chief pointed at him as a threat, and he was arrested; he did not know what he was charged with.

47. The fifth accused testified as DW4. She stated that she had heard that people were being arrested. She was in a cowshed when she was arrested. She had gone to see a patient in a home. Some tablecloths were recovered, but they were not in their home.

48. The 6th accused testified as PW5. She stated that the police came with blankets. they asked which house was closer and were told it belonged to her brothers. The police officers told her that they recovered some blankets. She did not commit

the offence. they forced her to sign some document. She was not cross examined.

49. The 7th accused person testified as PW 6. He stated that he woke up early and went to the centre at Mosocho. He came back at 5 pm. He later heard screams. The chief came and told people to disperse. They went home. The seventh accused was told the police were looking for him. He went to the police station and was arrested. He was beaten and injured.

50. The appellant testified as DW2. He stated that he came from Mosocho on a Monday morning and wanted to inquire why his brother was arrested, and he was also arrested. He was not cross-examined. This is of particular importance as his evidence then remained uncontroverted.

51. The 9th accused person testified that she was called to the hospital to look after a patient for two days. the patient died. After the burial, she was arrested. She stated that she did not commit the offence.

52. PW9 was Palutia Kemuma Mosiara, a lawyer. She testified that the 6th accused was arrested at the witness's home, but the police arrested the 6th accused.

53. The second accused was neither present nor testified. He was acquitted in absentia. Nevertheless, proceedings for recovery of the bond amount ought to be undertaken to avoid accused persons going at large without any effect whatsoever.

Analysis

54. 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.

55. The duty of the first appellate court remains as set out in the Court of Appeal for **Eastern Africa in Pandya -vs- Republic [1957] EA 336** is as follows: -

> 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.

56. 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."

57. Reasonable doubt need 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.'"

58. 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."

59. 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.

60. Before acquitting the appellant shortly, I must address salient issues that were raised in this matter. The charge of robbery with violence was dead on arrival. it could not be sustained. For an offence of robbery with violence to occur, the violence or threat of violence must be intended for the stealing of the items to be stolen. However, if the theft is

independent of the assault, there can be no robbery with violence.

61. The undisputed evidence of the first accused, DW1, was that the complainant committed two atrocities against him. First, he hit him while he was lawfully on his motorcycle. To add insult to injury, and against all common sense, the complainant beat the victim, tear-gassed members of the public, and then strolled home as if nothing happened.

62. Further evidence was that the area assistant chief went to plead with him but was overpowered by members of the public. It was foolhardy to provoke ire among the public and expect no retaliation. The court does not condone violence. However, the appellant called this upon himself. He committed three crimes, all of which he went scot-free. First, he injured the first accused through careless driving. Secondly, he assaulted his victim, who was unfortunately epileptic. He then used tear gas, possession of which was illegal. The first accused could not stand the tear gas. He was taken to the hospital as a result. Members of the public descended on the complainant and set the vehicle on fire. The fire spread from the car to the toilet and eventually to the house.

63. With these settled facts, before going to the technical part, where is the robbery? section 296(2) 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.

64. There are three elements that must be shown to have occurred:
    a. Robbery
    b. If the offender is armed with any dangerous or offensive weapon or instrument.
    c. The violence
65. The second element creates four offences, that is:
    a. Is in company with one or more other person or persons, or,
    b. At the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person, or,

c. Immediately before the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person, or,
d. Immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person.

66. Three elements must be in conjunction with the robbery itself. If some are looting and have no violence or beats, strikes or use any other personal violence to any person without theft, then the offence is not complete. Though Nyameino said there were injuries, they did not arise from the alleged robbery. It must not be forgotten that the complainant had just been involved in a road traffic accident with the first accused. So, what did the company say on the use of violence?

67. What did the wife say about the same violence? The wife testified twice. For the first time, she sat, quite succinctly; she did not see any person who attacked the complainant. She only saw the second accused removing items. When she was testifying the second time, she had a Nineveh moment. She was able to see the 8th accused, the appellant herein. At that time, the assistant chief escaped after being hit. He has not preferred any charge. The husband escaped from the backdoor. He was not injured. The mob was not interested in the complainant but the destruction of the vehicle and probably the house. This then rules out robbery.

68. Robbery, as an offence, is created, and section 295 of the Penal Code provides 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.

69. However, robbery with violence is created under section 296(2) of the penal code.

70. There was no nexus between the items allegedly recovered, which PW9 stated were theirs, and the offence. The reality was that there was no robbery. this then leaves the second and third count. The court started on the wrong footing by concluding as a fact that the complainant's property was stolen. this is a false narrative, since none of the parties identified any stolen goods. The complaint was that they were either burnt or stolen. that is not evidence but speculation.

71. Before that, the court was made aware of a binding judicial precedent on charging duplex charges. The first one was the persuasive case **Hassan Jillo Bwanamaka & another v**

Republic [2018] KEHC 2065 (KLR), where P. Nyamweya J, as then she was, and D. O. Chepkwony, stated as follows:

> 20. On the first issue, the rule against duplicity provides that the prosecution must not allege the commission of two or more offences in a single charge in a charge-sheet. Such a charge is sometimes said to be 'duplex' or 'duplicitous'. The rule stems from two important principles: firstly, as a matter of fairness, a person charged with a criminal offence is entitled to know the crime that they are alleged to have committed, so they can either prepare and/or present the appropriate defence.
>
> 21. Secondly, the court hearing the charge must also know what is alleged so that it can determine the relevant evidence, consider any possible defences and determine the appropriate punishment in the event of a conviction.

72. The court notes that the case was a duplex since the appellant was charged both under section 295 and 296(2). There is binding precent that is, a five-bench decision of the Court of Appeal in **Joseph Njuguna Mwaura & 2 others v Republic [2013] KECA 541 (KLR),** where the court [Mwera, Warsame, Kiage, Gatembu & J. Mohammed JJ.A] stated as follows:

The Court then stated that section 295 of the Penal Code is merely a definition section, and held that:

‘Sections 296 (1) and 296 (2) of the Penal Code deal with the specific degrees of the offence of robbery and have been framed as such.’

We agree that this is the correct proposition of the law. Indeed, as pointed out in Joseph Onyango Owuor & Cliff Ochieng Oduor v R (Supra) the standard form of a charge, contained in the Second Schedule of the Criminal Procedure Code sets out the charge of robbery with violence under one provision of law, and that is section 296. We reiterate what has been stated by this Court in various cases before us: the offence of robbery with violence ought to be charged under section 296 (2) of the Penal Code. This is the section that provides the ingredients of the offence which are either the offender is armed with a dangerous weapon, is in the company of others or if he uses any personal violence to any person.

The offence of robbery with violence is totally different from the offence defined under section 295 of the Penal Code, which provides that 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 to property in order to steal. It would not be correct to

frame a charge for the offence of robbery with violence under sections 295 and 296(2), as this would amount to a duplex charge.

73. The court agrees that the charge sheet was defective by dint of having a duplex charge. Further, there is no offence in law for being armed with crude weapons. The charge established is for being armed with dangerous weapons. The matter in this case does not turn on this, but it is essential that the elements of the charge mirror the charge.

74. The second aspect is whether the appellant was one of the assailants in the matter. It was agreed that the primary witnesses did not see the appellant. The second witness was prevaricating about whether he had seen the appellant. Such evidence is not of any probative value and must be dismissed.

75. The police actually contradicted PW2 on her postulation that she saw the appellant. It was clear from the evidence of PW5 that the assistant chief mentioned the appellant. PW3 stated that the appellant was Maige Square and was hitting the house with something that looked like a club. However, in the examination in chief, he had stated that the appellant was hitting the vehicle. He was 50 metres away at night. He allegedly went to the victim’s house with a young man. that young man was not called as a witness. Why could that be the case when the young man was crucial to the happenings?

76. This was not a water-tight case but a weak case, where identification was difficult. Why not call the young man, who could give evidence on what he saw? Section 143 of the Evidence Act (Cap 80 Laws of Kenya) provides as follows:-

> "No particular number of witnesses shall in absence of any provision of the law to the contrary be required for proof of any fact."

77. The prosecution is obliged to call all witnesses who are necessary to establish the truth in a case, even though some of those witnesses' evidence may be adverse to the prosecution's case. Where the prosecution fails to call such witnesses without a satisfactory explanation, the court is entitled to draw an adverse inference that the evidence of the uncalled witnesses would have been unfavourable to the prosecution. In **Donald Majiwa Achilwa and 2 other v R (2009) eKLR** the Court stated:

> "The law as it presently stands, is that the prosecution is obliged to call all witnesses who are necessary to establish the truth in a case even though some of those witnesses' evidence may be adverse to the prosecution case. However, the prosecution is not bound to call a plurality of witnesses to establish a fact. Where, however, the evidence adduced barely establishes the prosecution case, and the prosecution withholds a witness, the court, in an appropriate case, is entitled to infer that

had that witness been called his evidence would have tended to be adverse to the prosecution case. (See Bukenya & Others v. Uganda [1972] EA 549). That is, however, not the position here. We find no basis for raising such an adverse inference."

78. By failing to call as a witness, the young man who was both at the scene of the accident and in the complainant's home, it must be inferred that his evidence could have been adverse to the prosecution. In **Keter v Republic [2007] 1 EA 135** the court held inter alia:

"The prosecution is not obliged to call a superfluity of witnesses but only such witnesses are sufficient to establish the charge beyond any reasonable doubt."

79. PW2 did not identify any feature that placed the appellant on the scene. In a case where identification is difficult, it is crucial that the court caution itself against relying on a single identifying witness. In a South African case of **Malia v S (A20/2022) [2022] ZAFSHC 340; 2023 (1) SACR 438 (FB)** (25 November 2022), the high court in South Africa, [Mbhele, J et Mpama, AJ] sitting at Bloemfontein stated:-

> [20] The Supreme Court of Appeal further determined in STEVENS v S 2005 (1) ALL SA 1 (SCA) at para 17 that:
>
> "As indicated above, each of the complainants was a single witness in respect of the alleged indecent assault upon her. In terms of s 208 of the Criminal

Procedure Act 51 of 1977, an accused can be convicted of any offence on the single evidence of any competent witness. It is, a well-established judicial practice that the evidence of a single witness should be approached with caution, his or her merits as a witness being weighed against factors which militate against his or her credibility (see, for example, S v Webber 1971 (3) SA 754 (A) at 758GH)".

[21] In the case of S v RAUTENBACH 2014 SACR 1 (GSJ) the court expressed itself as follows: "The courts have on more than one occasion noted the difficulties and dangers associated with uncritically accepting the evidence of a single witness, especially one who may have every reason to implicate the accused, in convicting the accused. Thus the need to tread cautiously. However, there is no rule that the evidence, whether critical to the case or not, has to be rejected because it is that of a single witness. Only that it has to be treated with caution. Consequently, the State is entitled to rely on the evidence of a single witness, and the court is obliged to give due weight to it if the evidence is competent and compelling"

[22] The complainant was not only a single witness but also an identifying witness. It is trite that a court must exercise caution when dealing with the identity

of an accused. In the classic case of S v MTHETHWA 1972 (3) SA 766 (A) at 768 Holmes JA held:

"Because of the fallibility of human observation, evidence of identification is approached by the courts with some caution. It is not enough for the identifying witness to be honest: the reliability of his observation must also be tested. This depends on various factors, such as lighting, visibility, and eyesight; the proximity of the witness; his opportunity for observation, both as to time and situation; the extent of his prior knowledge of the accused; the mobility of the scene; corroboration; suggestibility; the accused's face, voice build, gait, and dress; the result of identification parades, if any; and, of course the evidence by or on behalf of the accused."

[23] [24] In S v NGCINA 2007(1) SACR (SCA) it was held: "The identification of the appellant as the armed robber is based on the evidence of a single witness. As correctly pointed out by DT Zeffert, AP Paizes and A St Q Skeen The South African Law of Evidence (2003) p 143, appellate Courts have frequently remarked upon the danger of relying on the identification of a single witness."

80. The evidence on the appellant was that he smacked the second witness. There was no charge related to this. While

addressing this aspect, the court did not warn itself of such evidence and circumstances of identification.

81. It must be noted that recognition is more important than identification. In **Anjoroni v Republic 1980 KLR 59** the court posited:

> "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."

82. In **Maitanyi v Republic [1986] KECA 39 (KLR)**, the court of appeal posited as follows:

> Although the lower courts did not refer to the well known authorities *Abdulla Bin Wendo & Another vs Reg* (1953) 20 EACA 166 followed in *Roria vs Rep* (1967) EA 583, it may be that the trial court at least did have them in mind. It is important to reflect upon the words so often repeated and yet bear repetition:-
>
> "Subject to well-known exceptions it is trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a

single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult. In such circumstances what is needed is other evidence, whether it be circumstantial or direct, pointing to guilt, from which a judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from the possibility of error.

83. Therefore, the court erred in failing to warn itself on the nature of the light, available conditions and whether the witness was able to make a true impression and description. The court did not take into account 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 the decision is made. Failure to undertake an inquiry of careful testing is an error of law and such evidence cannot safely support a conviction."

84. The evidence of identification was so weak as to be unsafe. This is compounded by the fact that the evidence of the appellant was not rebutted all. The court did not even consider the appellant's evidence. The standard used was so low that it even went below the civil standard of proof. We do not know which evidence the court was considering. The court had an omnibus consideration as follows;

> Having carefully evaluated the evidence, it is clear that PW2 positively identified the 8th accused as carrying a stool and PW2 while hitting the vehicle and house.

85. The consideration of the evidence is not on record. The court will thus not be able to know what was considered. As a court of record, the court is unable to go to the court's mind to see the consideration. It did not bother the court that neither witness could describe the clothes the appellant was wearing.

86. The appellant was successful that he was arrested when he went to inquire about the arrest of his brother. It was never inquired on which brother, where he was on the material night, or anything recovered to place him on the scene. The issue in this case is whether the prosecution proved is case to the required standards. Most oft quoted English decision of 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.''

87. 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."

88. 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."

89. It is even difficult to know who set the house on fire. The entire house and car were destroyed by fire; there was no other destruction. There was thus no evidence of malicious damage. What was done was basically arson. Who set the house on fire is still a mystery. The police appeared keen on going for the maximum damage, by invoking non-existent robbery with violence, which resulted in shoddy investigations of the only known offence committed on that fateful night, arson.

90. Where the conviction is based on circumstantial evidence, there must be a thorough evaluation of such circumstantial evidence so as to find that it is the appellant who committed the offence. On its application, 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."

91. 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 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."

92. 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.

93. 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.

94. 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.

95. The totality of the evidence was that the circumstances of the identification of the appellant were difficult. There was a melee involving a mob that was avenging the barbaric acts taken by the complainant. This happened at night, when the fleeting moments created difficult circumstances to identify the appellant. The conviction is therefore unsafe in all counts.

In the circumstances, the appeal against the conviction was allowed. Having found that the conviction was unfounded and set it aside, I see no utility in dealing with the issue of the sentence.

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

Orders

97. In the circumstances, I make the following orders: -

a) The Appeal on conviction and sentence is allowed. The conviction on all three counts and the sentence are set aside. All the charges against the appellant were not proved.

b) The Appellant is set free unless otherwise lawfully incarcerated.

c) 14 days right of appeal.

d) The file is closed.

DELIVERED, DATED and **SIGNED** at **NYERI** this **26th** day of **January, 2026.** Judgment delivered through Microsoft Teams Online Platform.

KIZITO MAGARE

JUDGE

In the Presence of: -

Mr. Kihara for the state

Mr. Chaungo for the Appellant

Appellant present

Court Assistant – Michael