Njeru v Republic (Criminal Appeal 97 of 2014)
[2025] KECA 1096 (KLR) (5 June 2025) (Judgment)

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REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NYERI

CRIMINAL APPEAL 97 OF 2014

JW LESSIT, A ALI-ARONI & GV ODUNGA, JJA

JUNE 5, 2025

BETWEEN

PETER NYAGA NJERU ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal from judgement of the High Court of Kenya at Embu (H.M Okwengu and J.N Khaminwa JJ.) dated 16th November 2005 in Criminal Appeal No. 67 of 2003)

JUDGMENT

1. The appellant, Peter Nyaga Njeru, was charged before the Senior Resident Magistrate, Embu, with two counts of robbery with violence contrary to section 296(2) of the *Penal Code*. The particulars of count I were that on the night of 8th to 9th May 2002 at Gikuuri Village, Gikuuri Sub-location of Runyejes in Embu District, the appellant, together with others not before court robbed Pastor Hezron Kariuki Muchira, two watches, one hammer, axe and Kshs. 950, all valued at Kshs. 2,800 and at or immediately before or immediately after the time of such robbery wounded the said Pastor Hezron Kariuki Muchira. The particulars of Count II are not relevant to this appeal since the appellant was acquitted on that count.

2. The appellant denied committing the offence, and a plea of not guilty was entered. At the trial, eight witnesses were called by the prosecution.

3. On the night of 8th and 9th May 2002, PW1, Hezron Kariuki Muchira, was at home with his wife, Justa Ruguru (PW2) and their house help, Ireme Mbere, when at 1.00 am they were attacked. By that time, PW1 had woken up to read the Bible and prepare notes for a meeting when he heard movement outside his house. Upon checking through the window, he saw people standing outside. The door of his home was then violently and forcefully hit with a stone and, by use of an axe, the people broke into the house. The attackers cut his arm twice on finger and near the wrist and hit him on the head and

mouth. He fell unconscious and later regained conscious while in hospital at 5.00 am. His wife, PW2, informed him that they were robbed of Kshs. 950, two wrist watches, a hammer and an axe, all worth about Kshs. 2,800. PW1 was, however, unable to recognize any of the attackers.

4. Justa Ruguru Kariuki (PW2), confirmed that on that night, they were attacked by about 10 people who broke open the door using axes. They took her and PW3 to a separate room from that where PW1 was and demanded money from them, but they did not give them. They were beaten, and her wristwatch taken and both herself and PW1 handed over to them Kshs. 950. The total value of the property taken was Kshs. 2,800. After that, some of the attackers left and went to attack a neighbour. One of the attackers, who left behind to guard them, also left. They later discovered PW1 unconscious with cut wounds and took him to the hospital. She was unable to recognise any of the attackers.

5. PW3, Irene Mbeere, was at that time asleep when she was awoken by the PW2. She then heard the door being hit and about 5 people entered the house. They took her and PW2 to a separate room from where PW1 was taken and were beaten up. One of the attackers, the appellant, who had been left behind to guard them as the other attackers proceeded to the neighbour's house and who had a torch started searching PW2's bag. Upon realising that PW3 was looking at him, he got annoyed and slapped her and told her to lie face down before leaving. According to her, it was during that time that their eyes met and she saw that he wore a red jacket and a green trouser. They then found that PW1 had been cut on the head and arm. According to her, the person who was left behind was tall, dark and with a small beard on the chin, wore green trousers a red jacket and had short hair. She identified the appellant at an identification parade at Runyejes Police Station. It was her evidence that the robbers took cash of Kshs. 950 from PW2's bag, two wristwatches, an axe and a torch.

6. PW6, Michael Kithaka Nguo, PW1's landlord, stated that during the attack on his tenants, he managed to hide himself in his hardware. The attackers, however, stole cash of about Kshs. 22,000/- and a mobile phone, but he was unable to see them. According to PW4, PC Stanley Irungu, PW6 reported the incident on 9th May 2002, after which, in the company of PC Waweru, they proceeded to PW1's house which they found had been broken into by thugs numbering 10. One of the robbers was described by PW3. During that time, they were with PW5 who was the Assistant Chief, John Njeru Charagu. In his evidence, they arrested three suspects and took them to the police station. On 12th May 2002, an identification parade was conducted at which the appellant was identified by PW3.

   According to PW4, the appellant was not found with anything during the arrest.

7. According to the Assistant Chief, John Njeru Charagu (PW5), on 10th May 2002 at about 6.30 am, PW6 reported the incident to him. He proceeded to PW6's home, where they found the doors broken, and was informed that one of the complainants was in hospital. PW3 told him that she saw one man, tall, slim and clean-shaven on the head with a beard and that if she saw him, she could identify him. From that description, PW5 got the impression that the description fitted that of the appellant, a resident of his location, "who used to rob people around". He then led the police to the appellant, who was then at home and, on searching him, found none of the stolen items. They however found a red jacket with brown cuffs and waist band. They arrested the appellant and took the jacket.

8. The identification parade was conducted by PW7 I.P Martin Opiri after he explained to the appellant why he was brought at the station. According to him, the appellant was ready to appear but told him that the complainant knew him before. The parade comprised of nine men similar in appearance. The appellant was asked to choose a position. The witness was then called and she identified the appellant.

9. PW1 was examined by PW8, Dr. Stephen Maina, who testified that he had a cut on head, swollen upper and darkened eye lid, a cut on the right wrist joint and another on the right index finger involving the

tendon. He filed a P3 Form and estimated the age of the injury to be hours; the weapon being a sharp object, and he classified the injury as harm.

10. On being placed on his defence, the appellant told the court that on the morning of 8th May 2002, he prepared his children to go to school and went to work, taking a pump to go and spray his miraa. At about 11.30 am, he returned home to prepare lunch for his children. It was then that the Assistant Chief came and informed him that he had been mentioned in a robbery case and directed him to report to the OCS, Runyenjes Police station, where he was detained. In his evidence, this was not the first time the Assistant Chief took him to the police, since he had refused to work for him as a youth winger and to sell bhang for him recovered from smokers. He stated that a police officer by the name Irungu had taken his school fees. It was these differences with the authorities that instigated his arrest every time a crime was committed and reported.

11. The learned trial magistrate (J. Kiarie, SRM) on 4th July 2003, found the case against the appellant on Count I proved beyond doubt and convicted him. He was sentenced to death.

12. Aggrieved, the appellant appealed to the High Court, contending that it was a gross error admitting into evidence the identification of a single witness in unfriendly circumstances; overlooking the inconsistencies and contradictions in the prosecution's evidence; overlooking the fact that no one availed information as to where the alleged lamp which was being used by PW1 was or who inflicted the wounds upon him thus rendering the evidence of PW3 an afterthought and a fabrication; and in failing to prove the case beyond reasonable doubt as required in capital offences with mandatory death sentence.

13. In their judgment, the learned Judges of the High Court found: that the complainant and his family were attacked and robbed by a gang of robbers; that neither the complainant nor his wife were able to identify any of the robbers; that the evidence implicating the appellant was that of identification by PW3; that the circumstances were not favourable for a positive identification since the robbery occurred in the dead of the night and there was only the lighting of a torch; that such evidence should, on the authority of the case of Athman Galgalo Bijila and 4 Others v R Criminal Appeal (Msa) No. 236 of 2004, be tested with greatest care and must also be completely watertight before a court can convict on it; that in this case, although the light relied upon by PW3 to identify the appellant was from a torch, there was no specific evidence as to the strength or size of the torch; that the learned magistrate however considered the issue of sufficiency of the light exhaustively; that PW3 was quite categorical that she had seen one of the robbers during the robbery and could identify him if she sees him again; that she not only gave this information to PW4 and PW5 at the earliest opportunity but also gave them a description of the person she had seen and the clothing he was wearing and it was this description that led PW5 to suspect the appellant and to lead the police to arrest the appellant; that whereas there were inconsistencies between the evidence of PW4 and PW5 regarding the arrest of the appellant, the evidence of PW4 was not reliable as he appeared either to have withheld vital information or else not to have participated in the arrest of the appellant; that whereas the red jacket, that PW3 identified as having seen the appellant wearing, though marked, was not produced in evidence, the evidence of PW3 and PW5 on the description led to the arrest of the appellant; that the reliability of the identification of the appellant by PW3 was fortified by her picking out the appellant at the identification parade; that the identification of the appellant by PW3 was watertight and free of any mistakes; and that there was sufficient evidence to prove the charge against the appellant to the required standard and his defence was rightly rejected. The High Court dismissed the appeal in its entirety.

14. The appellant was dissatisfied with that decision and appeals before this Court on 11 homemade grounds of appeal which, in our view, revolve around: the circumstances under which the appellant

was allegedly identified by PW3; the arrest of the appellant; the inconsistencies in the evidence of the prosecution; and the manner in which the identification parade was conducted.

15. We heard the appeal on this Court's virtual platform on 15th November 2022, during which the appellant was represented by learned Counsel, Mr Muchangi Gichungu, while learned counsel, Mr Mwakio held a brief for Mr Naulika for the respondent.

16. On behalf of the appellant, it was submitted that the test laid out in the case R v Turnbull & Others [1973] 3 All ER 549,regarding identification of a perpetrator was not satisfied; that there was no adequate time to enable PW3 see the faces of the attackers; that the circumstances prevailing at the time of the robbery were not favourable for a positive and correct identification of the robbers such that the witnesses were not even agreed on the number of robbers; that PW3 did not immediately inform PW2 that she saw one of the robbers; that based on the decision in the case of Paul Etole and Another v Republic [2001] eKLR, the identification by PW3 was not cogent; that there was no corroboration of the single witness evidence of PW3; that the identification parade was not properly conducted; that the appellant remarked that the witness knew him before; that the officer conducting the parade did not indicate whether there was description of the appellant before the parade and the age and gender of the persons in the parade was not indicated; that the decision in Simiyu & Another v R [2005] 1 KLR 192 provides that in every case in which there is dispute as to identity of the accused, the persons purporting to identify the accused ought to have given the description of the accused; that it was unsafe to base a conviction on identification parade which was not conducted in scrupulous fairness; that the jacket said to have been taken from the appellant's house was never produced as exhibit yet it was relied upon by the trial court as evidence; that no evidence was adduced to prove that the items alleged to have been stollen existed; that the complainant did not state that anything was stolen from him; and that the appellant having been in custody for 24 years, the Court should consider that he has been rehabilitated.

17. The respondent, in urging the Court to dismiss the appeal, submitted: that PW3 positively identified the appellant in during the robbery and in the identification parade; that the trial court, just like the High Court, did warn itself on the reliability of the evidence of a single identifying witness in such circumstances especially being at night and the only source of light was a torch held by the appellant; that there were no inconsistencies and/or serious contradictions and if there were any, they were minor procedural mishaps that were not fatal to the prosecution's case and no prejudice was caused to the appellant; that the prosecution's evidence was direct, reliable, overwhelming and sufficient as it placed the appellant at the scene of crime on the material date, place and time; that the prosecution's evidence corroborated each other in all material ways; and that the sentence meted out by the trial court was legal, lawful and is neither punitive nor excessive given the nature of the offence.

18. We have considered the material placed before us in this appeal. This being a second appeal, our mandate is limited by section 361(1)(a) to considering issues of law only as opposed to issues of fact that have been tried by the first court and re- evaluated on first appeal. As held in Njoroge v Republic [1982] KLR 388:

> " On a second appeal, we are only concerned with points of law and consider ourselves bound by the concurrent findings of fact arrived at in the courts below, unless shown to be based on no evidence."

19. It was similarly held in Karani v R [2010] 1 KLR 73 that:-

> " This is a second appeal. By dint of the provisions of section 361 of the *Criminal Procedure Code*, we are enjoined to consider only matters of law. We cannot interfere with the decision of the superior court on facts unless it is demonstrated that the trial court and the first

appellate court considered matters they ought not to have considered or that they failed to consider matters they should have considered or that looking at the evidence as a whole they were plainly wrong in their decision, in which case such omission or commission would be treated as matters of law."

20. We are also guided by the decision in Adan Muraguri Mungara v R CA Cr App No 347 of 2007, where it was held thus:

> " As this court has stated many times before, it has a duty to pay homage to concurrent findings of fact made by two courts below, unless such findings are based on no evidence at all, or on a perversion of the evidence, or unless on the totality of the evidence, no reasonable tribunal properly directing itself would arrive at such findings. That would mean that the decision is bad in law, thus entitling this court to interfere."

21. As to what constitutes "matters of law" in relation to this Court's jurisdiction as the second appellate court, the Supreme Court in Gatirau Peter Munya v Dickson Mwenda Kithinji and 3 others [2014] eKLR characterised the three elements of the phrase "matters of law" thus:

> " (a) the technical element: involving the interpretation of a constitutional or statutory provision;
>
> b. the practical element: involving the application of *the Constitution* and the law to a set of facts or evidence on record; and
>
> c. the evidentiary element: involving the evaluation of the conclusions of a trial Court on the basis of the evidence on record."

22. As regards the evidentiary element, this Court held in Jonas Akuno O'kubasu v Republic [2000] eKLR that:

> " It is correct that on first appeal the appellant is entitled to have the appellate court's own consideration and view of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the material before the judge or magistrate with such other material as it may decide to admit. The appellate court must make up its own mind not disregarding the judgement appealed from but carefully weighing and considering it... On second appeal, it becomes a question of law as to whether the first appellate court on approaching its task, applied or failed to apply such principles."

23. The determination of this appeal must therefore be based on the above principles. We shall briefly visit the facts of the case purely to satisfy ourselves whether the two Courts below carried out their mandate as required in law.

24. The prosecution's case, in so far as the conviction of the appellant was concerned rested on the evidence of PW3 and it was evidence of identification. In the oft-cited case of R v Turnbull and Others (1976) 3 All ER 549, Lord Widgery C.J. had this to say:

> " First, wherever the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused which the defence alleges to be mistaken, the Judge should warn the jury of the special need for caution before convicting the accused in reliance to the correctness of the identification or identifications. In addition, he should instruct them as to the reason for the need for such a warning and should make some

reference to the possibility that a mistaken witness can be a convincing one and that a number of such witnesses can all be mistaken. Secondly, the Judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in any way, as for example by passing traffic or a press of people? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long elapsed between original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and the actual appearance?"

25. In James Tinega Omwenga v Republic [2014] eKLR this Court, while expressing itself on the evidence of a single identifying witness, held that:

> " We are of the considered view that the crux of this appeal is whether the evidence on identification was proper and safe to warrant the conviction of the appellant. This because from the evidence on record no one witnessed the incident and it is only M who testified that she was able to identify her attacker. It is a well settled principle that evidence of visual identification in criminal cases can cause miscarriage of justice if not carefully tested. Where reliance is placed on a single identifying witness to convict, the law requires the evidence on identification to be weighed with the greatest care. The court must satisfy itself that in all circumstances it is safe to act on such identification, particularly where the conditions favouring a correct identification are difficult... In this case, it is not in dispute that M was attacked at around 6:00 p.m. and that she was brutally assaulted. We are of the view that the circumstances that prevailed during the incident were difficult due to the brutality involved. We find that it was necessary for the two lower courts to test the evidence of identification with the greatest care. We find that the two lower courts did not correctly test the identification evidence. We say so because firstly, it was the prosecution's case that the incident took place at around 6:00 p.m in a thicket. Therefore, what was the intensity of light and/or degree of visibility in the thicket" The answer to the said question was imperative in determining whether the identification of the appellant was free from error and there wasn't a case of mistaken identity. The prosecution did not tender any evidence as to the intensity of the light in the thicket. Based on the foregoing we are unable to determine whether there was sufficient light at the scene to afford a positive identification of the assailant."

26. According to PW3, on the material night, she was asleep and was woken up between midnight and 1.00 a.m. by PW2. When she got up, she heard the door being hit, and they screamed before the door was broken by an axe and the attackers, about 5 in number entered and beat them up. According to PW3:

> " One had a torch. He started to look around in the room. I looked at him. He said that I had recognised him as he checked some items from a bag and torch light spread all over even to his face. He wore a red jacket and a green trouser. He then left...The accused had been left to guard us and he then went."

27. According to PW3, the appellant:

> " ...was tall, dark and with a small beard on chin and wore green trouser and red jacket and he had short hair."

28. This was not exactly the report PW3 made about the appellant when she reported to PW5 that she saw:

> " ..one man, tall, slim and clean shaven on the head with a beard."

29. Granted, minor discrepancies in evidence are expected. However, in cases where the conviction is based on identification by a single witness, in unfavourable circumstances, a description of the appellant by that single witness, in the first report, is important. Not only does it show consistency and avoid the possibility of the witness making up the story, but also to shows the witness' ability to identify the appellant in those circumstances since, as the Court appreciated in Paul Etole and Another v Republic (supra):

> " The prosecution case against the second appellant was presented as one of recognition or visual identification. The appeal of the second appellant raises problems relating to evidence and visual identification. Such evidence can bring about miscarriages of justice. But such miscarriages of justice occurring can be much reduced if whenever the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused, the Court should warn itself of the special need for caution before convicting the accused. Secondly, it ought to examine closely the circumstances in which the identification by each witness came to be made. Finally, it should remind itself of any specific weaknesses which had appeared in the identification evidence. It is true that recognition may be more reliable than identification of a stranger; but, even when the witness is purporting to recognise someone whom he knows, the Court should remind itself that mistakes in recognition of close relatives and friends are sometimes made. All these matters go to the quality of the identification evidence. When the quality is good and remains good at the close of the accused's case, the danger of a mistaken identification is lessened: but the poorer the quality, the greater the danger. In the present case, neither of the two Courts below demonstrated any caution. This is a serious non-direction on their part. Nor did they examine the circumstances in which the identification was made. There was no inquiry as to the nature of the alleged moonlight or its brightness or otherwise or whether it was a full moon or not or its intensity. It was essential that there should have been an inquiry as to the nature of the light available which assisted the witnesses in making recognition. What sort of light, its size, and its position vis a vis the accused would be relevant. In the absence of any inquiry, evidence of recognition may not be held to be free from error. As was said by this Court in Charles O. Maitanyi v. Republic Criminal Appeal 6 of 1986 (unreported):
>
> 'Of course, if there was no light at all, identification would have been impossible. As the strength of the light improves to great brightness, so the chances of a true impression being received improve. That may sound too obvious to be said, but the strange fact is that many witnesses do not properly identify another person even in daylight. It is at least essential to ascertain the nature of the light available. What sort of light, its size, and its position relative to the suspect are all important matters helping to test the evidence with the greatest care. It is not a careful test if none of these matters are known because they were not inquired into. In days gone by, there would have been a careful inquiry into these matters, by the committing magistrate, state counsel and defence counsel. In the absence of all these safeguards, it now becomes the great burden of Senior Magistrates trying cases of capital robbery to make these inquiries themselves. Otherwise who will be able to test with the "greatest care" the evidence of a single witness.'

> As we observed earlier, there was no real testing in this case. Had the evidence been thoroughly tested and analysed, we cannot feel sure that the lower courts would have inevitably convicted. We therefore find in the absence of any other evidence to support the correctness of the identification that the conviction cannot be supported. In the result, in our judgment, the quality of the identification evidence in this case was very poor and that there was no evidence of the nature to which we have referred which can be said to support the correctness of the identification. It follows, in our judgment, that there was a serious non-direction by both the lower courts. In these circumstances, we have no doubt that the second appellant's conviction was both unsafe and unsatisfactory. His conviction is also quashed, sentence set aside and we order that he also be set at liberty forthwith unless otherwise lawfully held."

30. In his judgement, emphasis was laid by the learned trial magistrate on the fact that the jacket (which he erroneously stated was produced as Exhibit 2) was recovered from the appellant. The High Court, on its part, found that:

> "...the circumstances were not favourable for a positive identification since the robbery occurred in the dead of the night and there was only the lighting of a torch...there is no specific evidence as to the strength of the torch or its size."

31. The learned Judges cited the case of Athman Galgalo Bijila and 4 Others v R (supra), where it was held that:

> "It is the law that such evidence should be tested with the greatest care and must also be completely watertight before a court can convict on it (see for instance Kamau v/s Republic [1975] EA 159, Republic v/s Ena Sebwato [1960] EA 174, Kiarie v/s Republic [1984] KLR 739). In testing the reliability of the evidence of identification at night in difficult circumstances, it is essential to make an enquiry of the relevant circumstances such as the nature of the light, the strength of the light, its size, its position relative to the suspect etc, see Maitanyi v/s Republic [1986] KLR 198."

32. In the case of Obwana & Others v Uganda [2009] 2 EA 333 the court expressed itself thus:

> "It is now trite law that when visual identification of an accused person is made by a witness in difficult conditions like at night, such evidence should not ordinarily be acted upon to convict the accused in the absence of other evidence to corroborate it...This need for corroboration, however, does not mean that no conviction can be based on visual identification evidence of a sole identifying witness in the absence of corroboration. Courts have powers to act on such evidence in absence of corroboration. But visual identification evidence made under difficult conditions can only be acted on and form a basis of conviction in the absence of corroboration if the presiding judge warns himself/herself and the assessors of the dangers of acting on such evidence."

33. The legal position on this issue is well illustrated in the case of Charles O. Maitanyi v Republic [1986] KLR 198 where the court held:

> "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 greatest care the evidence of a single witness respecting identification...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 the decision is made."

34. In this case, the source of light was a torch whose size and strength the learned Judges appreciated were not stated.

Nowhere in the learned trial magistrate's judgement is there an indication that he warned himself against the dangers of convicting the appellant based on the evidence of a single identifying witness. The period during which PW3 kept the appellant under scrutiny was not disclosed. It was PW3's evidence that she was new in the area and did not know the appellant previously. Whereas PW3 stated that she was able to see the appellant when the appellant realised she was looking at him and slapped her, telling her to face down, this evidence was not corroborated by PW2, who was with PW3 in the same room and who seemed to have awoken earlier than PW3.

35. The learned Judges, while appreciating that the jacket was not produced as an exhibit, stated that the failure to do so must have been due to the fact that:

> "...the prosecutor found himself in difficulties as there was no officer who came to explain where it was recovered from."

36. We are concerned about several salient issues in this appeal.

First, the learned Judges did not make any mention of the failure of the trial court to warn itself against the dangers of convicting on the evidence of a single identifying witness. Secondly, the learned Judges appreciated that there were inconsistencies between the evidence of PW4 and PW5 regarding the arrest of the appellant and recovery of the jacket and that while PW5 stated that he led the police officers to the house of the appellant, where they recovered a red jacket, PW3 denied that any such recovery was made. The learned Judges concluded that the evidence of PW4 in this regard was unreliable, and he appeared either to have withheld vital information or else to have not participated in the arrest of the appellant. This Court held in John Mutua Munyoki v Republic [2017] eKLR that where the variance in the evidence of the prosecution's witnesses is not minor, the failure by the first appellate court to resolve that variance may lend credence to the complaint by the appellant that his appeal did not benefit from the thorough, exhaustive and independent re-evaluation that he was entitled to exhaustively re-evaluate the same. In our view, the reconciliation of that variance ought to be on the basis of the evidence as presented by the prosecution itself.

37. Thirdly, the fact that the recovery of the red jacket was crucial to the prosecution's case is not in doubt. It was that evidence that was relied on by the learned trial magistrate as corroborating the evidence of PW3. That jacket was however not produced in evidence. Whereas, the prosecution may have had difficulty in producing it, the fact remains that it ought not to have been relied upon either by the trial court or the first appellate court. This Court in Kenneth Nyaga Mwige v Austin Kiguta & 2 Others (2015) eKLR distinguished between documents produced as exhibits and those marked for identification as follows:

> "The fundamental issue for our determination is the evidential effect of a document marked for identification that is neither formally produced in evidence nor marked as an exhibit. Is a document marked for identification part of evidence? What weight should be placed on a document not marked as an exhibit? ...The mere marking of a document for identification does not dispense with the formal proof thereof. How does a document become part of the evidence for the case? Any document filed and/or marked for identification by either party, passes through three stages before it is held proved or disproved. First, when the document is filed, the document though on file does not became part of the judicial record. Second,

when the documents are tendered or produced in evidence as an exhibit by either party and the court admits the documents in evidence, it becomes part of the judicial record of the case and constitutes evidence; mere admission of a document in evidence does not amount to its proof; admission of a document in evidence as an exhibit should not be confused with proof of the document. Third, the document becomes proved, not or disproved when the court applies its judicial mind to determine the relevance and veracity of the contents- this is at the final hearing of the case. When the court is called upon to examine the admissibility of a document, it concentrates only on the document. When called upon to form a judicial opinion whether a document has been proved or disproved or not proved, the court would look not at the document alone but it would take into consideration all facts and evidence on record. The marking of a document is only for purposes of identification and is not proof of the contents of the document. The reason for marking is that while reading the record, the parties and the court should be able to identify and know which document was before the witness. The marking of the document for identification has no relation to its proof; a document is not proved merely because it has been marked for identification."

38. The Court continued:

"Once a document has been marked for identification, it must be proved. A witness must produce the document and tender it in evidence as an exhibit and lay foundation or it authenticity and relevance to the facts of the case. Once this foundation is laid, the witness must move the court to have the documents produced as an exhibit and be part of the court record. If the document is not marked as an exhibit, it is not part of the record. If admitted into evidence and not formally produced and proved, the document would be hearsay, untested and unauthenticated account. In Des Raj Sharma –vs- Reginam (1953) 19 EACA 310, it was held that there is a distinction between exhibits and articles marked for identification; and that the term "exhibit" should be confined to articles which have been formally proved and admitted in evidence. In the Nigerian case of Michael Hausa –vs- The state (1994) 7-8 SCNJ 144, it was held that if a document is not admitted in evidence but is marked for identification only, then it is not part of the evidence that is properly before the trial judge and the judge cannot use the document as evidence. Guided by the decision cited above, a document marked for identification only becomes part of the evidence on record when formally produced as an exhibit by a witness. In not objecting to the marking of a document for identification, a party cannot be said to be accepting admissibility and proof of the contents of the document. Admissibility and proof of a document are to be determined at the time of production o the document as an exhibit and not at the point of marking it for identification. Until a document marked for identification is formally produced, it is of very little, if any, evidential value. In the instant case, we are of the view that the failure or omission by the respondent to formally produce the documents marked for identification being MFI 1, MFI 2 and MFI 3 is fatal to the respondent's case. The documents did not become exhibits before the trial court; they has simply been marked for identification and they have no evidential weight. The record shows that the trial court relied on the document "MFI 2" that was marked for identification in its analysis of the evidence and determination of the dispute before the court. We are persuaded by the dicta in the Nigerian case of Michael Hausa –vs- The state (1994) 7-8-SCNJ 144 that a document marked for identification is not part of the evidence that a trial court can use in making its decision. In our view, the trial judge erred in evaluating the evidence on record and basing his decision on 'MFI 2' which was a document not formally produced as an exhibit. It was a

fatal error on the part of the respondents not to call any witness to produce the documents marked for identification....."

39. Guided by the said decision, we find that the jacket had no evidential weight and ought not to have been relied upon.

40. In Roria v R [1967] E.A. 583 this Court remarked that:

> "In the present case the learned trial Judge thought Samaji an honest witness. We do not quarrel with his assessment of her honesty, but a witness may be honest yet mistaken, and in excluding the possibility of a mistake on her part, the learned Judge, with respect, erred in our view."

41. By not warning himself, the learned trial magistrate erred, and whereas, PW3 whose evidence he relied upon could well have been honest, the possibility of being mistaken, considering the prevailing circumstances, cannot be ruled out. The first appellate court did not appear to have addressed this aspect.

42. In light of the foregoing concerns, we find that the evidence against the appellant fell below the threshold set for conviction on the evidence of a single identifying witness. We, accordingly, allow the appeal, set aside the appellant's conviction and quash his sentence. We direct that the appellant be set free forthwith unless otherwise lawfully held.

43. We so order.

DATED AND DELIVERED AT NYERI THIS 5TH DAY OF JUNE, 2025.

J. LESIIT

.....

JUDGE OF APPEAL

ALI-ARONI

..... JUDGE OF APPEAL

G. V. ODUNGA

..... JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR