



REPUBLIC OF KENYA



**Thuo v Republic (Criminal Appeal 45 of 2013)  
[2022] KECA 461 (KLR) (18 March 2022) (Judgment)**

Neutral citation: [2022] KECA 461 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAKURU  
CRIMINAL APPEAL 45 OF 2013  
RN NAMBUYE, MSA MAKHANDIA & A MBOGHOLI-MSAGHA, JJA  
MARCH 18, 2022**

**BETWEEN**

**PAUL MAINA THUO ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(An appeal from the Judgment of the High Court of Kenya (R. P. V. Wendoh, J.) dated 31st January 2019 in Nakuru HC Criminal Case No. 45 of 2010)*

**JUDGMENT**

1. This is a first appeal arising from the judgment of the High Court of Kenya sitting at Nakuru in Criminal Case No. 45 of 2010 delivered on 14th January, 2013 by R. P. V. Wendoh, J.
2. The background to the appeal is that the appellant was charged before the trial court with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. The particulars of the information were that on the 11th April, 2010 in Narok North District within the Rift Valley Province, jointly with others not before court murdered AW. The appellant denied the charge prompting a trial in which the prosecution tendered evidence through eight (8) witnesses to prove the charge against the appellant while the appellant who gave sworn evidence was the sole witness in his defence.
3. The prosecution case was that on 11th April, 2010, PW5, LKK, father to the deceased left the deceased, PW2 and other younger children in the home while he escorted his wife with a sick child to Narok Hospital. He came back after two (2) days and found the deceased missing. On inquiring from PW2 who was the eldest of the other small children in the home as to the whereabouts of the deceased, PW2 informed him that the appellant and four others came to the house the very day PW5 left home with his wife for hospital and took her away. PW5 took no initiative to report the disappearance of his daughter to any authority nor inquire from the named persons as to the whereabouts of his daughter said to have left with them.



4. It was not until the 24th of April, 2010 when at around 6.00pm, PW4, William Mpatinga, the Chief of Olorropil Location, Olokiuto Division Narok received a call from a village elder by name Saningu informing him that they had sighted a body of a child in a bush and that some suspects allegedly linked to the murder of the said child had been arrested by members of the public who wanted to lynch them (suspects). PW4 instructed elder Saningu to guard the scene and dissuade members of the public from lynching the suspects.
5. On the next day, of 25th April, 2010, PW4 reported the incident to CPL Francis Siololo, PW6 of Olorropil APs Camp Narok who in turn reported the incident to Enegetia Police Patrol Base. They in turn reported the incident to Narok Police Station. The DCIO Narok Police Station in response to the report, instructed PW8, CPL Simon Simiyu who is the investigations officer herein to attend to the incident. CPL Simiyu visited the scene in the company of Paul Kiilu and CPL Paul Kulei of CID Narok scenes of crime among others.
6. On arrival at Olorropil, they were led to the scene by CPL Nterim of Enegetia Police Patrol Base while in the company of PW4, the area chief and others. They found the body of a female young girl with the lower part of the body naked while the head was covered with a jacket. A pant, and a skirt were besides the body. The body was rotten. It had also been infested with maggots and feasted on by wild animals. PW7 took photographs of the scene which were subsequently tendered in evidence as exhibits. They found appellant and, one, Peter held at the scene as suspects. Peter succumbed to injuries inflicted upon him through mob justice. PW8 interviewed potential prosecution witnesses, collected the appellant and the two deceased. The bodies were taken to the mortuary while the appellant was taken to the police station.
7. Post-mortem was carried out at Narok Hospital on the body of the deceased by Dr. Alan Soita PW1. It was identified to PW1 by SG, PW3 an uncle to the deceased. Observations made by the doctor on the body were that it was a body of a female of about 15 years. Most of it was decomposed with most organs missing, soft tissues stripped off the chest, internal organs missing due to decomposition and or eaten by wild animals. The head had been decapitated. PW1 formed the opinion that the cause of death was decapitation of the head resulting in excessive haemorrhage and nervous breakdown.
8. PW8 recorded statements from potential witnesses, including that of PW2 which placed the appellant at the scene of the murder causing him to be charged with the offence of the murder of the deceased. At the conclusion of the prosecution's case, the trial Judge ruled that the appellant had a case to answer and called upon him to defend himself. He gave sworn evidence denying any involvement in the murder of the deceased.
9. At the conclusion of the trial, the Judge analysed the record and found death proved through medical evidence tendered through PW1 the doctor who carried out post mortem on the body of the deceased and PW2, and PW5 who identified the deceased's body and her clothes at the scene.
10. On the identification of the perpetrator of the murder, the Judge appreciated that there was no eye witness to the murder of the deceased but relied wholly on the evidence of PW2, JK, a boy aged ten (10) years as basis for convicting the appellant for reasons we shall revert to at a later stage of this judgment.
11. On the appellant's complaint that crucial witnesses were never tendered to court to testify, the Judge took into consideration the decision of the predecessor of this Court in the case *Bukenya & Others vs. Uganda* [1972] E. A 549 pg 550 for the holding, inter alia, that the prosecution has no obligation to call a superfluity of witnesses but only those necessary and relevant for the proof of a charge against an accused person and dismissed appellant's complaint reasoning that evidence of those uncalled witness



was irrelevant as it related to events that occurred long after the murder and therefore irrelevant to the issues in controversy before the Judge.

12. On circumstantial evidence, the Judge relied on the case of *Sawe vs. Republic [2003] KLR 364* on the threshold for relying on circumstantial evidence as basis for finding a conviction against an accused person and rendered herself as follows:

“In the instant case, the accused person called the deceased from her house on the night of 11/4/2010. The deceased was not seen again till her mutilated, decomposed body was found in a thicket about 10 days later. From the position of the body, it seemed she had been defiled before her head was slashed off. As found earlier, the accused had a duty to explain but instead his defence is a mere denial of the offence. The manner in which the body was found is in itself demonstration of malice aforethought. The head was severed off the deceased’s body, evidence that whoever committed the act wanted her dead. I am satisfied that it is the accused with others not before the court who committed the act. I find the accused guilty of the offence of murder as charged and convict him accordingly.”

13. The appellant was aggrieved and filed undated grounds of appeal, subsequently substituted with two grounds of appeal in a supplementary memorandum of appeal dated 30th September, 2021. These are that:

- 1) The Honourable Learned Judge erred in law and in fact by finding a conviction against the weight of the evidence on record and in total disregard of the glaring discrepancies, contradictions and blatant falsehoods in the evidence tendered by the prosecution witnesses.
- 2) The sentence imposed on the appellant is manifestly harsh and excessive in the circumstances.

14. For plenary hearing, learned counsel, Miss Kabalika holding brief for Mr. Orege appeared for the appellant who was also present on the virtual platform while learned counsel, Jecinta Kibiriu from the Office of Director of Public Prosecutions (ODPP) was in attendance for the State. The appeal was canvassed virtually through appellant’s written submissions and legal authorities fully adopted and highlighted by Miss Kabalika and oral submissions by Jecinta Kibiriu for the State.

15. Supporting the appeal, the appellant relies on the position taken by this Court in the case of *Michael Odbiamba vs. Republic [2005] eKLR* in which this Court vitiated a conviction handed down by the trial court against the accused therein based on uncorroborated evidence of minors and invites this Court to vitiate his conviction by the trial Judge based on the uncorroborated evidence of PW2. In his opinion, the Judge failed to appreciate that PW2 being a child of tender years, his evidence required corroboration as provided for in section 124 of the Evidence Act. The failure to call for corroboration in an instance where PW2 said he was neither a Christian nor a Muslim and therefore prone to telling lies was fatal to the prosecution’s case.

16. The appellant also relies on the decision in the case of *Charles Kibara Muraya vs. Republic Criminal Appeal No. 33 of 2001* for the holding, inter alia, that “the more serious the charge, the heavier the burden of proof on the prosecution” and faults the Judge’s failure to appreciate that in criminal proceedings, the burden is always on the prosecution to prove a criminal charge against an accused person beyond any reasonable doubt; and that an accused person has no duty or burden to establish his innocence. The appellant argues that since the prosecution case was hinged on circumstantial evidence, it was its duty to satisfy the threshold for relying on circumstantial evidence as basis for finding a conviction against him. His position is that PW2’s evidence wholly relied upon by the trial Judge to convict the appellant fell short of that threshold and therefore amounts to a contravention of his right to fair hearing enshrined in Article 50 of the *Constitution* of Kenya, 2010.



17. The appellant also relies on the case of *Ouma vs. Republic [1986] KLR* and faults the Judge for the failure to appreciate that his sworn defence was never ousted by PW2's evidence and should not have been ignored by the trial Judge. In his opinion, it created a doubt in the prosecution's case as to whether he perpetrated the crime and which doubt should have been resolved in his favour. The Judge is also faulted for the failure to appreciate that the close relationship he had with PW5's family would not have permitted him to commit the murder of the deceased and then remain within the vicinity.
18. Lastly, that in the absence of the prosecution carrying out a DNA on the body that was recovered at the scene, there was nothing to prove that indeed the remains recovered at the scene were those of the deceased. Neither was any DNA carried out on the items recovered at the scene of the murder to link him to the murder hence his assertion that the prosecution case was not proved beyond reasonable doubt against him.
19. On sentence, this Court was invited to interfere with the sentence in the unlikely event that the conviction by the trial court is affirmed in terms of the principle set by the Supreme Court of Kenya in the case of *Francis Karioko Muruatetu & Another vs. Republic [2017] eKLR*.
20. Opposing the appeal, learned counsel, Jecinta Kibiriu submits on behalf of the respondent that in their opinion PW2's evidence was solid and unshaken even on cross examination. He was firm that he knew the appellant very well. He had interacted with him and even conversed with him from close quarters. His evidence that he saw and heard the appellant talk on the night appellant and his cohorts led the deceased away, only never to return and for her decomposed body to be discovered in a thicket days later was properly relied upon by the trial Judge to convict the appellant. According to the State, the Judge properly appreciated that PW2 understood the nature of the oath and that his evidence was reliable. Counsel also submits that the trial Judge rightly invoked and applied section 111(1) of the *Evidence Act* and ruled that the appellant had not discharged the burden shifted on him to explain how the deceased met her death after it was established through the evidence of PW2 that it was him who was seen last with the deceased while alive. The trial Judge was therefore entitled in the circumstances to draw an adverse inference that the only reasonable conclusion to be drawn from the appellant's conduct was that the appellant had a hand in the murder of the deceased.
21. On the failure to carry out a DNA on the deceased's body, counsel submits that this default on the part of the prosecution was not fatal to the prosecution's case as the body recovered was sufficiently linked to the deceased by PW5, the deceased's father who identified the clothing recovered close to the body as those belonging to the deceased. PW3 an uncle of the deceased was also able to identify the body to the doctor as that of the deceased.
22. On sentence, the respondent submits that the sentence meted out against the appellant was proper considering the gravity of the offence, the age of the victim and the circumstances under which the deceased met her death and should not therefore be disturbed.
23. In reply to the prosecutions' submissions the appellant reiterated the position taken in his submissions in chief.
24. This being a first appeal, this Court is required to conduct a retrial, entailing an exhaustive appraisal and re-evaluation of the evidence. The Court is not merely called upon to scrutinize the evidence to see whether it supports the findings and conclusions of the trial court. It must weigh conflicting evidence, make its own findings and draw its own independent conclusion. See *Okeno vs. Republic [1972] EA 32* and *Kiilu & Another vs. Republic [2005] KLR 174*.
25. In re-appraising the evidence, the Court will however bear in mind and take account of the fact that it does not have the advantage that the trial court had of hearing and seeing witnesses as they testified.



As a general rule therefore, the Court will not interfere with the findings and conclusions of the trial court unless it is satisfied that they are based on no evidence or on a misapprehension of the evidence or that the trial court is demonstrably shown to have acted on wrong principle in reaching the findings it did. See *Joseph Kariuki Ndungu & Another vs. Republic* [2010] eKLR.

26. We have considered the above mandate in light of the totality of the record, issues that fall for our determination are as follows:
- 1) Whether elements for proof of the offence of murder were established to the required threshold.
  - 2) Whether the prosecution proved the charge against the appellant to the required threshold of proof beyond reasonable doubt.
  - 3) Whether the sentence meted out against the appellant by the trial court is excessive and therefore warrants interference by this Court in the event the trial court's conviction is affirmed.
27. Section 203 of the Penal Code spells out clearly that there are three elements which the prosecution must prove beyond reasonable doubt to secure a conviction for the offence of murder. These are; (a) the death of the deceased and the cause of that death; (b) that the appellant committed the unlawful act which caused the death of the deceased; (c) and that the appellant had harboured malice aforethought. See *Nyambura & others versus Republic* [2001] KLR 355. Starting with element (a) we are satisfied as did the trial court that the death of the deceased was proved through medical evidence tendered through PW1 who said the cause of the deceased's death was decapitation resulting in haemorrhage and nervous breakdown; and that of PW5 the father who identified both the clothes found besides the body and the body as those of the deceased, PW3 the uncle who identified the body to PW1 for post mortem examination.
28. On the elements of malice afore thought, our position is that these are well set out in section 206 of the Penal Code. It provides:
206. Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances –
- a) an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;
  - b) knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;
  - c) an intent to commit a felony;
  - d) an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.
29. In *Bonaya Tutut Ipu and another vs. Republic* [2015] eKLR this Court stated that “Malice aforethought” is the mens rea for the offence of murder and it is the presence or absence of malice aforethought which is decisive in determining whether an unlawful killing amounts to murder or manslaughter. Whether or not malice aforethought is proved in any prosecution for murder depends on the peculiar facts of each case. In *Moris Aluoch vs. Republic Cr. App. No.47 of 1996*) the court went



further and drew inspiration from a persuasive authority in the case of *Chesakit vs. Uganda CR App. No.95 of 2004* wherein the Court of Appeal of Uganda held thus:-

“In determining a charge of murder whether malice aforethought has been proved, the court must take into account factors such as the part of the body injured, the type of weapon used if any, the type of injuries inflicted upon the deceased and the subsequent conduct of the accused person.”

The court in *Moris Aluoch* case [supra] also drew inspiration from a decision of the predecessor of this Court in *Rex versus Tuper S/O Ocher* [1945] 12EACA63 wherein, it was held thus:-

“It (the court) has a duty to perform in considering the weapon used and the part of the body injured, in arriving at a conclusion as to whether malice aforethought has been established, and it will be obvious that ordinarily an inference of malice will flow more readily from the case, say of a spear or knife than from the use of a stick...”

30. We have applied the above threshold to the rival positions herein. We are satisfied that element (a), (b) and (c) of malice aforethought as provided for in section 206 of the *Penal Code* were satisfied by the prosecution borne out by the uncontroverted medical evidence that the death of the deceased was as a result of decapitation of the deceased's head resulting in haemorrhage and nervous breakdown. We therefore entertain no doubt in our mind that whoever carried out the decapitation of the deceased had only one thing in mind, to cause her death and did in fact cause her death.
31. On issue number 2, it was correctly held by the trial Judge that there was no eye witness to the murder of the deceased. The prosecution case was therefore hinged on circumstantial evidence. The threshold for basing a conviction of an accused person on circumstantial evidence is as was restated by this Court in the case of *Joan Chebichii Sawe vs. Republic* [2003] eKLR in which this court held, inter alia, as follows:

“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 on. 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 is on the prosecution, and always remains with the prosecution. It is a burden, which never shifts to the party accused.”

32. The circumstantial evidence that the trial court relied upon to convict the appellant was that tendered through the testimony of PW2 who the record is explicit that he was ten (10) years old as at the time he gave his testimony in court. The source of the information on his age was alleged to be his mother who never tendered any evidence in court. There was no other evidence on record confirming that age. It is however explicit that the trial Judge took 10 years to be the age of PW2. The Judge appreciated and correctly so in our view that she needed to comply with the prerequisites of section 19 of the Oaths and Statutory Declaration Act before receiving the evidence of PW2. The trial Judge indeed carried out the *voire dire* exercise and although PW2 said that he was neither a Christian nor a Muslim, the Judge found he was possessed of sufficient intelligence to understand the nature of the proceedings, the obligation to speak the truth and ruled that he should give sworn evidence which he did. The Judge gave reasons as to why she found PW2's evidence cogent and sufficient basis for finding a conviction. Notable of these was the fact that the appellant was well known to PW2. They had interacted as family members. Even conversed on the material night. According to the Judge, PW2's evidence that it was the appellant who kicked the door open and entered the one roomed house while the rest were left



outside was not shaken in cross-examination. Also that they lit a lamp “koroboi” whose light enabled him to recognize the appellant who left with the deceased, never to be seen alive hence the Judge’s finding that, that evidence was cogent.

33. The appellant’s attack on the manner the trial court evaluated PW2’s evidence and subsequently based his conviction on that evidence, was basically that the Judge fell into error when she failed to address the issue of want of corroboration for that evidence before acting on the same as basis for convicting him. That is why he invited this Court to adopt the position taken by this Court in the case of Michael Odhiambo vs. Republic [supra] in which this Court vitiated a conviction based on uncorroborated evidence of minors.

34. Section 124 of the Evidence Act provides as follows:

“Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act (Cap. 15), where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him:

....”

35. Our take on the construction of the above provision is that the general rule is that corroboration for evidence of children of tender years in criminal proceedings is mandatory. The only exception to the above general rule is in instances where the offence charged involves one of a sexual assault on the victim which was not the case herein. We therefore find and hold that the judge fell into error when she failed to address this aspect of the prosecution case and erroneously held that corroboration would have been called for if PW2 would have given unsworn evidence.

36. The other aspect of PW2’s evidence we find was not properly appreciated and or addressed by the trial Judge was the issue of the weight to be attached to the evidence of PW2 both as a child of tender years and as a single witness. The principles that guide the court on reception and acting on evidence of a single witness as basis for finding a conviction have now been crystallized by case law. We take it from the decision of the predecessor of this Court in the case of *Abdalla bin Wendo & Another v. Republic (1953) 20 EACA 166*:

“Subject to well known exceptions, it is trite law that a fact may be proved by the testimony of a single witness but that 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.”

37. Our take on the above case law is that there is need for the court to test with the greatest care the evidence of a single witness in criminal proceedings especially where there is demonstration on record that the prevailing conditions were not conducive for positive identification of the assailant. In the instant appeal, it is evident from the record that the incident occurred at night. In fact, PW2 gave the timing as 12.00midnight and then changed to 11.00pm. He alleges there was moonlight but did not expound on how that moonlight was of help to him considering that he was inside the one roomed house. There is no mention that there were openings through which the moonlight got through into the one roomed house. Neither did he ever mention that he got out of the one roomed house and made use of that moonlight in any way in connection with the issues in controversy in this appeal especially when he conceded in cross-examination, that he never mentioned this fact to the police.



38. We also find that the trial Judge did not inquire into as to which of the two older children in the house lit the “koroboi”, the intensity of the light given out by the “koroboi” or how far the “koroboi” was from where the appellant stood. What is however evident from the record is that what was of crucial importance to the trial Judge was the fact that the appellant was known to PW2. They had interacted before, being family members’ and local residents. The Judge also said that PW2 was categorical that he had even conversed with the appellant before and also on that day. From the reasoning of the Judge and without stating so explicitly, she took the above stated circumstances to be those favouring recognition of the appellant hence pinning responsibility to the appellant as the person last seen with the deceased while alive and who the Judge was entitled in law to call upon him to explain how the deceased who left with him while alive was found almost ten (10) days later dead with her head decapitated, half naked with her clothes besides her body besides.
39. In the case of *Anjononi & Others vs. Republic [1980] KLR 59 at page 60 par 4*, the Court expressed itself inter alia, as follows:
- “recognition of an assailant is more satisfactory, more assuring and more reliable than identification of a stranger because it depends upon personal knowledge of the assailant in some form or the other.”
40. In the case of *Kiarie vs. Republic [1984] KLR 737* this Court held, inter alia, that:
- “It is possible for a witness to be honest but mistaken and to a number of witnesses all to be mistaken, and where the evidence relied on to implicate an accused person is entirely that of identification, that evidence should be water tight to justify a conviction.”
41. In the case of *Karanja & Another vs. Republic [2004] KLR 140*, this Court also held, inter alia, that:
- “Evidence of visual identification in criminal cases should be examined carefully to minimize the danger of causing a miscarriage of justice and where identification of an accused person depends wholly or to a great extent on the correctness of one or more identification of the accused which he (accused) alleges to be mistaken, the court must warn itself of the special need for caution before convicting the accused in reliance on the correctness of the identification.”
42. See also the case of *Simiyu & Another vs. Republic [2005] 1 KLR 192* wherein the Court of Appeal went on further to hold, inter alia, that:
- “In every case in which there is a question as to the identity of the accused, the fact of there having been a description given and the terms of that description are matters of the highest importance of which evidence ought always to be given first of all by person or persons who gave the description and purport to identify the accused and then by the person or persons who gave the description and purport to identify the accused and then by the person or persons to whom the descriptions was given. Further that “the omission on the part of the complainants to mention their attackers to the police goes to show that the complainants were not sure of the attackers’ identity.”
43. We have applied the above threshold to the rival positions herein. Our take thereon is that going by PW2’s evidence that they had slept at 7.00pm. They were therefore woken up from sleep when their house was stormed, in our view, that in itself would have some impact on PW2’s senses of seeing and hearing. Whereas it may be true that there was some verbal communication and that the lamp was lit,



the question that arises is whether those conditions were conducive for positive identification. As we have already mentioned above, there is no evidence of the intensity of the light from the “koroboi”. There is also no evidence describing the dressing of the appellant when he stormed the house. It is also our observation that PW2 was categorical that only the appellant entered the house. There is no mention that PW2 ever got out of the house. Then we wonder how he came to know that those left outside and who there is no mention that they every conversed were the other two who PW2 had seen earlier in the day in the company of the appellant and also the same as those who resided with the appellant. In *Michael Kerue Wanjiru vs. Republic (2019) eKLR* this court had the following to say:

“It is evident that the conviction of the appellant was anchored on his identification by Stephen only. Therefore, the main issue for consideration in this appeal is whether the identification of the appellant by Stephen was safe to rely on. In *Abdalla bin Wendo v R (1953) 20 EACA 166*, the former Eastern Africa Court of Appeal cautioned that:

“A conviction resting entirely on identity invariably causes a degree of uneasiness.... The danger, is of course,

greater when the only evidence against an accused person is identification by one witness and although no one would suggest that a conviction based on such identification should never be upheld it is the duty of this court to satisfy itself that in all the circumstances it is safe to act on such identification....”

[11] In the House of Lords decision in *R vs. Turnbull and others (1976) 3 All E.R. 549*, which decision has been applied locally in many cases, Lord Widgery C.J. gave the following practical guidance on identification of an accused person:

“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.”

The court also observed as follows:

“According to Stephen’s evidence there was light where the people who robbed him were standing. However, Stephen did not state what kind of light it was, and where the light was situated. One is left wondering whether the light was electric light from a street light, or light from the shops which he claimed had not been closed, or light from a different source. Nor was any evidence given or enquiry made, with regard to the intensity of the light.”



44. There was no effort made by the trial court to interrogate the above conditions so as to remove any doubt about the identification of the appellant on the fateful night. Further, it is common practice that when the court relies on the evidence of a single identifying witness, it must warn itself on the dangers of so doing. This, the learned Judge did not do and which we find is fatal to the prosecution case. See *Michael Kerue Wanjiru vs. Republic* (Supra).
45. There was also complaint by the appellant that the burden of proof was erroneously shifted on him to prove his innocence. That is why the case of *Charles Kibara Muraya vs. Republic Cr. Appeal No. 33 of 2001 (NYR)* was cited to remind us that the more the serious the charge an accused person faces, the grater the demand on the prosecution to discharge the burden of proof beyond reasonable doubt. Secondly, that the correct position in law is that in criminal proceedings an accused person has no obligation to prove his innocence. Thirdly, the trial court has a duty to weigh an accused person's defence against the prosecution's evidence and give reasons as to why that defence is not sustainable.
46. In this instant appeal, the trial Judge expressed herself on the veracity of PW2's evidence as follows:
- “I have no reason to doubt that PW2 saw the accused with Hiram and Peter on the night they took away the deceased.
- .....
- The court appreciates that PW2 was a minor but his evidence was taken on oath. His evidence would only require corroboration if it was unsworn. The accused was the last person to interact with the deceased and under Section 111 of the Evidence Act, he was under an obligation to explain what happened to the deceased. Whereas the law is clear that the burden is always on the prosecution to prove a criminal case beyond any reasonable doubt, and the accused has no duty or burden establishing his own innocence, there are times when the law places a duty on the accused to explain certain facts particularly those peculiarly within his own knowledge. Section 111 of the Evidence Act Cap 80 Laws of Kenya which casts that burden on the accused provides as follows...”
47. From the above assessment and excerpts of the record, we reiterate the position taken above that it is evident that the trial Judge found PW2's evidence cogent hence being satisfied that the same had placed the appellant at the scene of the murder. That is why the Judge invoked the application of section 111(1) of the Evidence Act to shift the burden on to the appellant to explain what happened to the deceased after he and his cohorts allegedly took her away on the material night. It provides:
- 111(1) When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, or qualification to, the operation of the law creating the offence with which he is charged and the burden of proving any fact especially within the knowledge of such person is upon him:
- Provided that such burden shall be deemed to be discharged if the court is satisfied by evidence given by the prosecution, whether in cross-examination or otherwise, that such circumstances or facts exist: Provided further that the person accused shall be entitled to be acquitted of the offence with which he is charged if the court is satisfied that the evidence given by either the prosecution or the defence creates a reasonable doubt as to the guilt of the accused person in respect of that offence.
48. The position we take in resolving issue as to whether the Judge fell into error when she invoked the above provision to shift the burden of proof onto the appellant to explain what happened to the deceased after he was allegedly seen last with her while alive is that taken by this Court in the case of



*Douglas Thiong'o Kibocha vs. Republic [2009] eKLR*. This Court construed the above provision and expressed itself therein, inter alia, as follows:

“ .....

When Parliament enacted section 111 (1), above, it must have recognized that there are situations when an accused person must be called upon to offer an explanation on certain matters, especially within his knowledge. Otherwise, the prosecution would not be able to conduct full investigations in such cases and the accused in the event, will escape punishment even when the circumstances suggest otherwise. Section 111 (1), above, places an evidential burden on an accused to explain those matters which are especially within his own knowledge. It may happen that the explanation may be in the nature of an admission of a material fact”

49. In *Milton Kabulit & 4 Others vs. Republic [2015] eKLR* when similarly confronted, this Court had this to say:

“The role of a court confronted with such a conflict should not then be to seek to rely solely on such impugned evidence as a basis for founding a conviction against an accused person. It should instead look for and rely on some other evidence that tends to demonstrate the truthfulness of the impugned statements.”

50. Our take on the above exposition is that before invoking the application of section 111(1) of the Evidence Act to call upon an accused person to offer explanation on matters especially within his knowledge, such invocation must be based on cogent evidence adduced on the record forming basis for the court's conclusion that on the evidence as laid before the court there is sufficient demonstration that an accused person has special knowledge of the events being inquired into. In the instant appeal, those events were the murder of the deceased. The only evidence the trial court found as cogent to sufficiently link the appellant to the murder was that tendered through PW2 a child of tender years which evidence in law requires corroboration, and which principle of law the trial Judge misapprehended by erroneously holding that since PW2's evidence was given on oath, it did not require corroboration.

51. The correct position in law as we have already pointed out above is that evidence of PW2 being a child of tender years required corroboration whether tendered on oath or unsworn. Secondly being a single witness, the Judge needed to warn herself of the dangers of acting on such evidence of a single witness which test the Judge failed to properly appreciate and apply. We appreciate that the Judge gave reasons as to why she believed PW2 was truthful. That alone was not sufficient basis for convicting the appellant where the prosecution's evidence as already pointed out above was hinged on circumstantial evidence. The proper test that ought to have been applied by the Judge is that set in the *Sawe vs. Republic [supra]*, namely “in order for a court of law to draw out an inference of guilt the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation on any other hypothesis than that of his guilt.”

52. It is our view that the uncorroborated evidence of PW2 a child of tender years and a single witness and in respect of which the Judge failed to apply the test for admitting and acting on evidence of a single witness as basis for finding a conviction fell short of the threshold restated in *Sawe case [supra]* and should not have been acted upon as basis for convicting the appellant.

53. Once vitiated, there is no other evidence to link the appellant to the commission of the offence. His defence remains un-assailed and is therefore sustained. The above conclusion settles the issue



of conviction. We therefore find it imprudent to address the other remaining issues namely, alleged existence of discrepancies in PW2's evidence, failure to call witnesses and failure to conduct DNA.

54. In the result, we find merit in the appeal. It is accordingly allowed. The appellant is ordered to be set at liberty forthwith unless otherwise lawfully held.

**DATED AND DELIVERED AT NAIROBI THIS 18<sup>TH</sup> DAY OF MARCH 2022.**

**R. N. NAMBUYE**

.....

**JUDGE OF APPEAL**

**ASIKE- MAKHANDIA**

.....

**JUDGE OF APPEAL**

**A. MBOGHOLI MSAGHA**

.....

**JUDGE OF APPEAL**

*I certify that this is a True copy of the original*

*Signed*

**DEPUTY REGISTRAR**

