Kamau & 3 others v Republic (Criminal Appeal E040, E039, E041 & E042 of 2022 (Consolidated)) [2025] KEHC 546 (KLR) (28 January 2025) (Judgment)

Neutral citation: [2025] KEHC 546 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

CRIMINAL APPEAL E040, E039, E041 & E042 OF 2022 (CONSOLIDATED)

DKN MAGARE, J

JANUARY 28, 2025

BETWEEN

LYDIA WANJIRU KAMAU ..... 1ST APPELLANT

JANE WAHITO KARIENYE ..... 2ND APPELLANT

JEMIMAH NJERI KIBURI ..... 3RD APPELLANT

HANNAH WAITHERA WAWERU ..... 4TH APPELLANT

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

1. This appeal arises from the Judgment of the trial court, Hon. D.N. Bosibori, Resident Magistrate in Mûkûrwe'inî PMCCRC No. E032 of 2022. The appeal is against conviction and sentence. I had hitherto given different judgment dates, only to realise that the matters are related. The court on 14/11/2024 mentioned the matters for consolidation, which was duly done.

2. The Appellants were charged with two offences. The first count was grievous harm contrary to Section 234 of the Penal Code. The particulars were that on 28/11/2021 at Kaharo Village in Mûkûrwe'inî Subcounty within Nyeri County the Appellants with 2 others before the court and others not before the court, unlawfully did grievous harm to Grace Wakanyi Gatheru. The Appellants were the 2nd, 3rd and 4th Accused persons in the trial court.

3. The second count was malicious damage to property contrary to 339(1) as read with 339(2) of the Penal Code. The malicious destruction was in relation to the dwelling house of the victim in Count I, Grace Wakanyi Gatheru. The particulars were that on 28/11/2021 at Kaharo Village in Mûkûrwe'inî Subcounty within Nyeri County, Appellants with 2 others before the court and others not before the court, destroyed the dwelling house of Grace Wakanyi Gatheru using claw bars and pieces of wood.

4. The first accused died during the pendency of the appeals. The Appellants were arrested on 30/1/2022 and arraigned in the lower court on 31/1/2022. The Appellants were arraigned in court and denied both counts.

5. A plea of not guilty was consequently recorded on 31/1/2022. The Appellants were released on cash bail of 20,000/= alternative to bond of Ksh 100,000/= with a similar surety. The matter was mentioned in chambers on 28/3/2022, where it was allocated to D.N. Bosibori for hearing and final disposal. When the matter was placed before the new trial court the Appellants confirmed to have received prosecution witness statements and documentary evidence.

6. The trial started in earnest on 19/4/2022. A total of 12 prosecution witnesses testified. The Appellants were put on their defence. A total of 11 defence witnesses testified, making a total witness list of 23. It is encouraging that the court took evidence of all these witnesses in a short period between April and June and was able to deliver a judgment within 60 days.

7. The trial court found all the accused guilty and sentenced them to 5 years imprisonment for count 1 and 20,000/= fine default one month imprisonment. On count 2, the court stated, in a rather tautological way that the fines to run consecutively while the imprisonment to run concurrently. Right of appeal on conviction and sentence 14 days. As usual the court did not comply with section 333(2) of the Criminal Procedure Code, which I shall revisit shortly.

8. The Appellants lodged appeal numbers E039 of 2022, E040 of 2022, E041 of 2022 and E042 of 2022. All the Petitions of Appeal were identical in every aspect. Each of the Appellants raised the following grounds, which we have edited slightly to remove tautology:

    a. The learned trial magistrate erred in law and fact in evidence that proved that the Complainant was a victim of mob attack.

    b. The learned trial magistrate erred in law and fact in convicting the Appellant when she was not identified as a perpetrator.

    c. The learned trial magistrate erred in law in convicting the Appellant on contradictory evidence.

    d. The learned trial magistrate erred in law and fact in permitting evidence to be tendered before the Appellant was supplied with statements which evidence was recorded after other witnesses had tendered evidence.

    e. The learned trial magistrate erred in law in failing to find that the prosecution did not prove its case to the required standard and convicting against the weight of evidence.

    f. The conviction was against the weight of evidence.

    g. The sentence imposed in the circumstances of the case was excessive.

9. Subsequently, the high court released the Appellants on bail pending appeal, this appeal.

Evidence

10. The prosecution called a total of 12 witnesses at the trial. The defence called a total of 11 witnesses in support of their case. The prosecution produced a total of 14 exhibits as follows:-

    a. Medical examination report, P3 filled on 10/12/2021.

    b. Discharge summary from Mûkûrwe'inî district hospital dated 3/12/2021.

c. Exhibit 3(a-k) – photographs of damaged house, windows and doors (10).

d. Certification of crime scene photographic images by D. Chege, of the directorate of criminal investigations, Nyeri Crime Scene Investigations.

e. Exhibit memo dated 29/11/2021.

11. No exhibits were produced by the defence.

12. The stated opened the trial by calling Grace Wakanyi Gatheru, the Complainant as PW1. She stated that Antony Githiga Nyaga (Nyaga), Jemimah Njeri Kiburi (Njeri), Lydiah Wanjiru Kamau (Wanjiru), Jane Wahito Karienye, (Wahito) And Hannah Waithera Waweru (Waithera) are all neighbours. She had known them for various length of time. She stated that she knew the appellants. Nyaga was a shamba boy in the village. Njeri was a negihbour in her village while she had known Wanjiru for 15 years as village mate, neighbour and shopkeeper. She stated that she had known Wahito for 20 years. The same for Waithera.

13. It was PW1's testimony that on the fateful day, 28/11/2021 at 8 pm, she was relaxing in her living room after dinner. All of a sudden, her door was knocked and she inquired who it was but there was no answer. The door was then hit harder after about 10 minutes, with what she thought was a metal rod. The perpetrators ordered her to open the door but, understandably, she declined. She saw Njeri and Wanjiru through the bedroom window. She also saw Njeri, Wanjiru, Wahito and Waithera. It was her evidence that she peeped through the window and saw the Appellants with other people.

14. She continued that Waithera and Nyaga broke the door to her house. Wahito was pelting stones on the roof. One Kihara and Nyaga entered the house. It was her evidence that the entire door worthy Kshs. 20,000/- was damaged together with a window valued at Kshs. 10,000/-.

15. Further that one Kihara and Nyaga entered the house. She stated that "he hit me near a window." The pronoun is not related to the plurality of the duo. The witness stated that she stood between the kitchen and living room. She closed toilet doors. Kihara, while armed with a stick, pulled her and directed her out of the house. It was her case that Wanjiru tripped her and she fell. Wanjiru beat her on the back, fell and faced up. She continued being hit by Wanjiru in the ear, as she lay on her stomach, as the rest joined in the beating. She was beaten on the head mostly and the hands which she used to block the beating.

16. Kihara and Nyaga thereafter pushed her to the road, about 100 m away. It is on the road that she met Anne Wanuhi who hit her with a stick. Anne Wanuhi indicated that the complainant should tell where she took the child, Shirleen Wambui, a two-year-old daughter to Jackson Muchoki. This child had died a few days before. Jackson Muchoki was Anne Wanuhi's son.

17. The complainant testified that she was accused by Wanjiru that she was a devil worshipper. Wanjiru kicked the witness in the stomach using her feet and asked the witness to leave as she was a witch and a devil worshipper. Nyaga and Kihara beat her until she became confused and lost consciousness. She woke up and found herself in Mûkûrwe'inî Hospital admitted in a ward. She was thereafter transferred to Nyeri PGH. She had sustained injuries to her ear and the right eye. She had various injuries to her legs, hands, thighs and hands in addition to the stomach. She regained consciousness on 29/11/2021, the following day, a time she could not recall.

18. She testified that on being discharged, she reported to Mûkûrwe'inî Police Station. Subsequently she had a P3 filled on 10/12/2021. She had been admitted until 6/12/2021. She identified exhibits showing damage to the house as Pexhibit 3(a- k). She stated that she could not hear or see properly as a result of the injuries. Her three fingers could not be folded. At the time of testimony, the right eye had a wound that had not healed. This was 6 months later.

19. She was unable to carry out household chores. She denied killing Shirleen. It was her case that the Appellants and others were not justified in beating her. It was her case that Anne used to chase her as she was unmarried and Anne did not want her to stay at the parent's home.

20. On cross examination by Nyaga, she stated that she knew him well. Nyaga used to ferry her using a motor cycle. She stated that accused used Kiswahili to disguise himself at the time of the incident. It was her testimony that there was light and as such he could see Nyaga well. She stated that Nyaga hit her on the head and the hand. This was both in the house and outside the road. He did not slap her.

21. When cross examined by Njeri, she stated that she was not beaten by a mob but the 5 accused including Njeri. She stated that Njeri swung a stick so that the witness could not get close to the window. She stated that she was in the living room but left after the door was hit. The witness further stated that she left the bedroom after Njeri damaged the window and the curtains fell. She stated that there were lights which were later switched off and as such she only identified the 3 Appellants, Nyaga, Waithera and Kihara.

22. She also identified Anne by the roadside as there was moonlight. It was her evidence that she could not flee as her house had all windows damaged. Njeri hit her on the head and back while Kihara and Nyaga assaulted her at the road. She stated that it is at that point that Wanjiru was wondering why she was not dying and as such she was a witch. It was her case that the search for the child was done together and even at the funeral no one assaulted her. She stated that on the fateful day, the witness met Njeri as Njeri left for church but Njeri did not chat her up, though they greeted.

23. On being cross examined by Wanjiru, she stated that her house was not broken into when she travelled to Nairobi. It was her testimony that Wanjiru tripped the witness using a 1m stick. When she fell on the stomach, Wanjiru hit her on the head. According to her, the rest of the crowd did not beat her.

24. On cross examination by Wahito, she stated that she saw Wahito beat her. Wahito also pelted stones on the complainant's house. It was her evidence that she could not know if people responded to her cries for help. According to her she was confused due to the beating. She only saw the accused who were close by. She stated that she had no familial relationship with the deceased child.

25. On cross examination by Waithera, she stated that she had known her for 10 years and not 28 years. It was her testimony that she saw Waithera pelting her house with stones. It was her case that Waithera assaulted her outside the house.

26. On lights, she stated that there was light in the sitting room and security light was switched off when the two men entered the house. She stated that she did not know how Richard Wahome assisted her, since she had lost consciousness. She stated that she had no familial relationship with Shirleen and had just come back from Nairobi when she was assaulted. She wondered why Waithera, who was her friend assaulted her. She stated she had no grudge against Njeri, Wanjiru, Wahito and Waithera.

27. On reexamination, she stated that there was a mob at home but only the 3 Appellants; Nyaga, Waithera and Kihara assaulted her. It was her evidence that Kihara was at large. Surprisingly they were fellowshipping in the same church, although in cornerstone sect before she switched to another sect known as revelation church.

28. PW2, Richard Wahome Muhoko said that he knew Nyaga, Njeri, Wanjiru, Wahito and Waithera as well as the Complainant as his neighbours at Giteri area. He knew Nyaga who attended Kaharu Catholic Church with the witness. Nyaga was employed as a shamba boy and the witness had known him for 5 years then, for someone who resided in Nairobi. Njeri was a neighbbour 2 parcels away, that is about 100m away.

29. Wanjiru is a neighbour but married elsewhere. The witness and Wanjiru's grandfather share a father. Wanjiru is married at Gakera School, 200m away. He testified that Wahito resides near Gakera School. However, the witness used to see her in the village for many years. Waithera is a neighbour, that is Waithera's husband is a neigbour for 5 years now and her home is 100m away.

30. The witness had known PW1 for over 40 years. She remained with two children after one passed on. Her children stayed in Nairobi. It was his evidence that PW1 was separated from her husband and so stayed in her parents' home in the village. He testified that on 28/11/2021 at midnight, someone, who he later recognized as PW1, came to his compound at around midnight and lay next to one of his bedrooms outside on the wall. He notified John Karuki, a neighbor who came and they called Mûkûrwe'inî Police Station following which 6 police officers came and picked PW1.

31. On cross examination, it was the case of PW2 that he did not know if the complainant was assaulted as they did not talk. Other accused including the other Appellants, did not cross examine the witness.

32. PW3 John Githaiga Kariuki testified that he resides at Kaharo area and works as a casual labouror. He stated that the Complainant and Nyaga, Njeri, Wanjiru, Wahito and Waithera were neighbours. He testified that on the material day, 28/11/2021, he led the police to the PW1's home after they asked to be directed but she was not home. It was his evidence that fuses had been removed from the lights in the home of PW1. After one hour, PW2 called him and informed him that PW1 was at his home. PW3 went and indeed found PW1 in the said home. However, PW1 was breathing as if she was in pain and had been rained on. Her eyelid was swollen. He called the police back and they took PW1 with them. They also asked for a phone number from Esther Waithegengo and called the area chief.

33. The police were called, who instructed the witness to remain at the scene until they showed up, which they duly did. He was only cross examined by Njeri. On cross examination by Njeri, he stated that PW1 was not stable. The witness thought that PW1 brought herself there. It was his evidence that PW2 heard a bang before he saw PW1. From his evidence it was clear that PW1 summoned the last subconscious energy and dragged herself to PW2's home. The Swahili call it kujikokota while my people call it gotinana. It was walking in a subconscious state. Be it as it may, PW2 started a series of events that will eventually lead to the charges before the court. She was in a pain induced stupor which nevertheless allowed her to rescue herself while in an excessively deep state of unresponsiveness.

34. PW4 was Esther Githiagani Kariuki (Esther) who testified she knows the 5 accused persons; that is, Nyaga, Njeri, Wanjiru, Wahito and Waithera. According to her, Nyaga was a bodaboda rider. The witness had used his services from time to time. She stated that Njeri was a neighbour, who stays 200m away. She continued that Wanjiru was a village mate who stays 500m away while Waithera stayed 300m away. She recalled that PW2 and PW3 called her as they were her immediate neighbors and wanted assistance to follow them to Richard's home.

35. Esther duly went to PW2's home where she found PW1 lying on the ground facing down with face injuries and swollen eyes. They alerted PW3 who had earlier been alerted that the police were looking for PW1. The police arrived about 2 am and carried PW1 away to hospital. She then identified all the accused persons, that is; Nyaga, Njeri, Wanjiru, Wahito and Waithera.

36. On cross examination by Njeri, she stated that they waited for the police from 11 pm to 2 am. The witness stated that they did not assist PW1. They had earlier called one Mama Carol but her phone was off. The other Appellants and accused did not cross examine her.

37. PW5, Joel Kamau Chege was the chief of Thandu, since 2007 and was PW1's Chief. It was his evidence that PW1 resides at Mukangu village within Kaharu in his jurisdiction. He stated that Nyaga, Njeri, Wanjiru, Wahito and Waithera also resided in that location.

38. PW5 stated that on 28/11/2021, at around 9.30 pm he received a phone call from Peter Kanyinge Njoroge, one of the residents at his location. He stated that the report indicated that a mob had invaded PW1's home and attacked her. The witness had not been aware of the incident. He advised that the witness calls the police.

39. On his part the witness called the area Assistant Chief, John Kinyua Mwangi and alerted him of the incident. PW3 also called shortly thereafter, and reported the incident and advice to call the police was handed down. The witness gave PW3 contacts of 3 police officers. He thereafter alerted one of the two callers, that is PW3 or Peter Kanyinge Njoroge. The callers did not identify the attackers.

40. According to the witness, later the police came and took PW1 away. He stated that his home was 7 km away. After the assistant chief failed to update him, he proceeded to the locus in quo a month later. He visited PW1 a month later. He noted the window panes were broken, there was no one at PW1's home, so he did not go around the house. He did not get time to interrogate the neighbours or extended family members. He was not cross examined by Nyaga, Njeri, Wanjiru, Wahito and Waithera.

41. PW6 was one Terasisio Kinyua. He is a brother to PW1. He knew the accused persons as her neighbors. Nyaga was a rider while Njeri was a village mate and a relative, since her father and the witness's father are relatives. He stated that Wanjiru stays opposite their home, 20m away. He continued that Wahito was PW1's friend and her home is 300m away. The witness had known her since childhood. Waithera was identified as a neighbobur in the ancestral home with a house just 20m away.

42. He stated that on 28/11/2021, his son Patrick Kihara called and informed him that PW1 had been attacked at her home at 8 pm. He was in Githunguri. He called neighbours to establish what was going on. He called James Kamau Maina a neighbour to ask if the attack was over. Kamau informed him that the attackers had not removed her from the house. Other neighbours were not picking calls. He called Kamau again who updated him that PW1 was taken out to the road. The following day, he visited PW1 at Mûkûrwe'inî Hospital in the morning and saw her swollen hands and eye. She had been taken to hospital by the police.

43. On cross examination by Njeri he stated that Gatheru, his son saw the attackers. He was 18 years old. The witness did not, of course see Njeri commit the offences.

44. On cross examination by Wanjiru he stated that they are neighours with Wahito but she is married elsewhere. He stated that he stated some people had been arrested in his statement, thus meaning all the 5 arrested persons. Nyaga and Wahito did not cross examine. On cross examination by Waithera, he stated that Anne wamuyu's son declined to speak to the witness. He did not identify the attackers.

45. PW7 was Patrick Kihara Kinyua who stated that PW1 was his aunt, a sister to his father, PW6. He knew Nyaga, Njeri, Wanjiru, Wahito and Waithera to be his village mates. He stated that he stayed with his mother Peris Wamuyu, 40m from PW1's home. PW1 had a permanent house, with glass panes at the windows. According to him, his father resides in Githunguri, Kiambu.

46. He was a student at Kaharo Secondary School. He knew Nyaga as a bodaboda rider at Kaharo Trading Centre but did not know his home. Njeri was a cousin and neighbour. He knew her since he was born. Her home is 100m away from their home. Wanjiru on the other hand, is a shopkeeper near her home. And their homes are 250m apart. It was his evidence that he had known her since he was young. Wahito was a village mate and was known to him since childhood. He is from a different village but the witness saw her in their village. Her home is 230m from their home. Waithera was a village mate known to the witness from birth.

47. He stated that on 28/1/2021, he left Kaharo trading centre and got home at 8 pm. He heard doors and windows to PW1's house being banged. He saw Nyaga, Njeri, Wanjiru, Wahito and Waithera and others all about 20 people pelting stones on the house of PW1. Nyaga and Njeri were breaking window panes using pieces of firewood. Wanjiru, Wahito and Waithera were also doing the same, breaking window panes. He was in their living room, when he heard the bang. He left alone to the scene and left the mother at home. He noted that the bangs were from PW1's home. He went to grace's doorstep. He found Nyaga holding a crow bar trying to break the door. He was with Njeri who was banging the door with pieces of wood.

48. Wahito and Waithera were holding firewood but were not banging. The assailants broke the door in his presence. All the assailants went in when the door opened. Nyaga, Njeri and Wanjiru pulled PW1 outside her house. They started beating her on the back, neck and back using pieces of wood. She was blocking the blows using her hands. The rest also beat PW1 but he only identified Nyaga, Njeri, Wanjiru, Wahito and Waithera. The attackers escorted PW1 50m from her home and pushed her to the road.

49. PW1 fell after 8 minutes. She was beaten for 14 minutes. The beatings made her fall. He followed the crowd. PW1 had injuries all over the body. He witnessed them assault PW1 with pieces of wood. There was moonlight. It was his evidence that there was no one at the road when the assailants took PW1 there. He was present throughout the ordeal. The crowd left. PW1 woke up after 10-15 minutes and went to PW2's home. Only 10 people were left behind after the crowd left. The people who remained behind were strangers whom the witness had not seen before. He testified that PW1 went to PW2's home, which is 150m from the road. He followed her to PW2's home. She got to PW2's home and fell down. He was then alone with 5 people he could not recognize.

50. PW2 got out and spoke to Esther. PW2's wife and daughter were present. He could not understand why PW2 and PW4 did not mention his presence. He stated that later the police came and collected PW1. About 5 police officers carried PW1 to the vehicle. He did not identify himself to the police as they could have blamed him for not assisting PW1. He hid at the fence from 10 pm. He thereafter went home. The 5 people who were around also left as PW1 headed to PW2's compound. He went to visit PW1 at Mûkûrwe'inî district hospital. He went to visit PW1 together with his mother Esther, Esther's sister and PW1's children. She was bandaged, with swellings over her body and eyes. She could not hear well or her voice was low.

51. PW7 continued that PW1 told them that the people who were beating her were accusing her of killing Shirleen. He knew that PW1 had a good relationship with the accused, although he did not know whether they were relatives. It was his evidence that PW1 used to fellowship with Njeri, Wahito and Waithera at cornerstone church at Giteri before PW1 left and joined her sister's church. It is no wonder that Holy Scriptures ordain that not everyone that calls upon the Saviour will enter into the kingdom of heaven but only those that do the will of God.

52. The witness identified all the accused persons and stated that he had no grudge against them. He was returning home when he heard a bang at the Complainant's door and he saw the accused persons beating the complainant. He was present throughout the ordeal. They also forced her to the road side and continued to beat her. He did not know why the beat her. He went to Grace's house the next day and noted it was damaged.

53. On cross examination, he reiterated that he knew Nyaga, Njeri, Wanjiru, Wahito and Waithera and identified them as the people who beat PW1. He had asked why they were beating her aunt only to be beaten with a stick. He feared for his fragile life. He stated that he did not flee though he did not see any member of the extended family. He stated that at the roadside when PW1 identified Wanjiru, who is

her friend, Wanjiru pushed PW1 to the ground and stepped on her. According to him, security lights were switched off a few minutes after PW1 was pushed outside her house.

54. On cross examination by Nyaga, he stated that he had known Nyaga as Gitaka for one year. Though he called his father, he did not tell PW6 that he had been chased from the scene. He stated that he saw Nyaga with a crow bar trying to break the door.

55. On cross examination by Njeri, he stated that he stayed for 10 minutes after the bang and left the mother at home. He was concered about PW1 but was hit on the back with a piece of wood when he stepped out to confront the crowd. He stated that Njeri hit the panes and the door too. He stated that he asked Nyaga, Njeri, Wanjiru, Wahito and Waithera to stop assaulting PW1. Nyaga had a piece of wood initially but when the witness went round, he found him with a crow bar. He stated that Nyaga, Njeri and Wanjiru went into PW1's house while Wahito and Waithera stood at the door.

56. He stated that Njeri held PW1 with left hand and held a piece of wood on the right hand. The witness stated that Nyaga, Njeri, Wanjiru, Wahito and Waithera and Daniel Kihara were beating. He continued that PW1 fell in PW2's compound and hit iron sheet. All these time PW7 was trailing PW1. He heard PW3 being called. He stated that he recorded his statement recently as he travelled to Nairobi after sitting for KCSE after April 2022.

57. On cross examination by Wanjiru, PW7 stated that he saw Wanjiru outside the compound banging the door and window panes. He could see as there was security lights inside and outside the house. He recalled calling PW6 before PW7's phone went off. He stated that he could not identify the rest of the crowd as he did not recognize them. He stated that he was travelling with PW1 hence he could not see the police for the first time.

58. On examination by Wahito, he stated that he could not help PW1 as he could not fight off 20 people. He stated that a crow bar was used to break the door, while the rest, that is Njeri, Wanjiru, Wahito and Waithera had pieces of firewood.

59. On cross examination by Waithera, he stated that she had firewood that was about 1½ m long, which she hit PW1 with. He stated that PW2 stepped out when PW1 fell with a bang. In re-examination, he stated that he knew Nyaga and his home. He called PW6 but his phone went off. He confirmed that Nyaga, Njeri, Wanjiru, Wahito and Waithera were at the locus in quo. He saw Njeri assault PW1. He stated that PW1 identified Wanjiru as 'wa Kamau'. He also saw Daniel Kihara break PW1's door and beat PW1, though he was not in court.

60. PW8 was Edwin Nyaga, a clinical officer from Mûkûrwe'inî Hospital. He has graduated from KMTC in Clinical Medicine in 2005. He prepared a P3 form for PW1 on 3/12/2021. PW1 had a history of being admitted to the said hospital after a mob attack on 29/11/2021. She was attacked with bare hands and sticks and sustained fractures of the upper limbs, bruises on the head, swollen eye with inability to open. She was admitted to hospital on 29/11/2021. X-rays revealed broken phalanges on both hands. She was managed by antibiotics and Mannitol, which is used for heavy injuries. She was given a back slap for broken phalanges and plaster of Paris at the back of broken limbs to align bones to seal.

61. The degree of injury was classified as maim. She could not use upper limbs. The injuries were life threatening. He also produced the discharge summary. She was to require physiotherapy to help her heal. She was not likely to perform her normal duties.

62. Nyaga did not cross examine him. Njeri cross-examined him where he stated that PW1 was hit on several spots but the rest of her body was not serious. Despite being warned, the rest did not cross examine the witness.

63. PW9 was Cpl. Samson Bett [Cpl. Bett] attached to Muthuthînî Police Post in Mûkûrwe'inî. He was the arresting officer. He was assisted with PCs Korir and Munga. That the complainant's son led the police to the accused persons and they arrested them after introducing themselves and informing of the purpose of arrest.

64. On cross examination by Nyaga, Cpl. Bett stated that he arrested Waithera first. On cross examination by Njeri, he stated that he was sober during the arrest. He arrested Njeri from her home, near a fence. She was arrested around midnight as the last suspect. On cross examination by Wanjiru, he stated that, she was the fourth suspect to be arrested. On cross examination by Wahito, he stated that they arrested her at night when they could find her. On cross examination by Waithera, he stated that they were arrested between 10 pm and 1.30 am. On re-examination, he stated that Daniel Kihara was tipped off and fled.

65. PW10 was Cpl. Josephat Mulu [Cpl. Mulu] attached to DCI Mûkûrwe'inî police. He was the investigating officer. It was his summarized testimony that he conducted investigations. He state that on 28/11/2021, he visited the scene together with his colleagues, DIOCS IP Makuthu, Cpl. Kasite PC, Sasi and PC Kitili as driver. They visited the scene at 10 pm. They did not find anyone at PW1's home but noted PW1's huge house was damaged. The door was damaged, the window panes were broken, and as a result photographs were taken. They left to search for PW1. They were later informed that she had gone to a neighbour. He was escorted to Mûkûrwe'inî Hospital. PW2 had called the station. Cpl. Kasite and PC Mwikali ferried her to hospital the same day before midnight. She was treated for 7 days at Mûkûrwe'inî hospital.

66. Later Cpl. Mulu recorded his statement as narrated by him in chief. He issued her with P3 form on 10/12/2021. The same was returned and the doctor ascertained that the injuries were serious. PW1 identified the attackers who were arrested on 31/1/2022 and charged. He produced the photographs on behalf of Senior Sergeant Chege (SSgt Chege) and certificate date 17/2/2021. The witness described the damages in details. He also identified the P3 and discharge summary, which had hitherto been produced by PW8.

67. On cross examination by Nyaga, SSgt Chege stated that PW7 identified Nyaga. On cross examination by Njeri, he stated that PW1 had not reported the suspicion on killing of Shirleen. PW1 identified all accused persons. It was his evidence that PW7 recorded his evidence recently and it was then that the witness was able to get hold of him. When he recorded the statement from Grace, she was traumatized and did not say anything about PW7. However, PW6 had in his statement recorded on 5/1/2022 referred to PW7.

68. On cross examination by Wanjiru, he stated that he did not investigate the death of Shirleen. He stated that had Anne Waruri been involved, he was still to charge her. To the witness, PW1 and PW7 identified them well. On cross examination by Wahito, he stated that PW1 told him that Anne Waruri was at the scene. On cross examination by Waithera, he stated that he had no evidence linking PW1's extended family for the attack. He was not told that PW1 and Anne Waruri did not go along well. It was his testimony that the door was dented by a crow bar.

69. On cross examination by court, he stated that no one was willing to implicate PW1 in killing of Shirleen. Most witnesses were not forthcoming. The witness undertook to investigate Anne Waruri and act according to the evidence. He stated he did not know where 'Wa Caro' was that night and Grace did not implicate her or Josphat. On re-examination he stated that PW7 was at the scene and identified the assailants.

70. PW11 was James Kamau Maina who testified that Nyaga, Njeri, Wanjiru, Wahito and Waithera were known to him. Nyaga is unknown to him but he sells at a butchery in Kaharo centre but the witness did not know his name. The rest were his neighbors. He knows them as 'Wa Kamau', 'Wa Karinye' and 'Mama Maina' for Wanjiru, Wahito and Waithera. He stated that Kihara is a neighbour. Waithera was a wife to the witness's brother.

71. On the material day, he heard PW1 scream, took a torch and stepped out. He heard things being pelted on the roof. He was screaming for 'Wa Carol', her sister in law to help her. He lit a torch and got to PW1's gate. He was insulted as a fool and a dog. As a fool, he went back to his house and stood by his house. Later, Gatheru Kinyua, a son to Wa Caro and Kinyua Gatheru, went to his home to tell him of the attack and asked to assist PW1. The witness called Kinyua Gatheru, PW6 who requested that PW7 sleep at PW1's home. PW7 went to the house and never left. The witness stated that he was with his children until morning. He stated that around 9 pm, a motor cycle came to the village.

72. He stated that he did not hear PW7 come out at night. He said he had no grudge against anyone, Grace or the accused persons. On cross examination by Nyaga, he stated that Nyaga worked at a butchery. On cross examination by Njeri, he stated that PW7 slept in the house unless he left when the witness was asleep. He stated that it is possible he saw the appellants and others before coming to the house. On cross examination by Wanjiru, he stated that PW7 could not have identified the attackers unless it was before. On cross examination by Waithera, he stated that he was with Waithera when they were insulted and Waithera did not step out again.

73. On reexamination, he stated that the incident took one hour. He stated that Waithera could not have been seen by PW7. She left for her house as he asked children to go to the house. He could not recall whether PW7 was present when Waithera showed up.

74. PW12 was Josephat Kimani Kiburi who testified that he was a quarry miner, and a cousin to PW1 as her father and his father are stepbrothers. He did not know Nyaga as he had seen him for the first time. Njeri was his youngest sister while the witness was the eldest brother. He stated that Wanjiru's father and the witness's father are cousins and have known each other since childhood. Wahito was a neighbour and PW1's church mate and friend. Waithera was known to the witness as Mama Maina. He had known her for 10 years since she was married to the village. PW1 stays with 2 sisters in-law, that is; Wa Caro and Mama Wambui.

75. On the material day, PW12 stated that he arrived home at about 8.30 pm. The Complainant was his cousin and they stayed in the vicinity. He heard screams from the complainant's home and also heard several people speak. He went though he was drunk. A man directed him to go back to where he came from when he asked what was going on. He stated that his statement was not read back to him and it contains falsehoods. He did not see Grace beg attackers to stop attacking her.

76. He saw a police vehicle going to Grace's home. He did not know why the police visited the scene. He was told that Grace had been attacked by boda boda riders. He could not tell if Grace was beaten as he did not go to the scene. He did not see any accused person as they directed a spotlight on him. PW12 was obviously lying as it is not possible to be at the scene without knowing what was going on. The witness was recanting a statement he made, possibly because he was lying from the outset; he was one of the attackers. But his evidence is entirely worthless. The police will be right to pursue him as a perpetrator and for giving false information to the police.

77. On cross examination by Nyaga, the witness stated that he did not know Nyaga. He stated that a statement about Waithera in the prosecution witness statement was full of lies. On cross examination by Wajiru, he stated that Wanjiru is married far off and her home is not near PW1's. On cross

examination by Wahito, he stated that he did not see her in the scene, as he did not go there. On cross examination by Waithera he stated that he had not seen her quarrel with her.

78. He did not see Grace as Kihara and Nyaga stopped attacking him. [Of course he did not know Githaka]. On cross examination he stated that he did not see the attackers or gate to the scene on the fateful day. The court noted that the witness lowered his voice and faced away in examination in chief, raised his voice in cross examination and lowered the same on re-examination. In short, the witness was lying and was doing so for the sole benefit of the accused.

79. The Prosecution closed its case. The trial court then considered the case and established a prima facie case and called the accused persons to defend themselves.

80. The court placed the Appellants on their defence. Upon complying with Section 211 of the Criminal Procedure Code, Nyaga opted to give unsworn evidence while Njeri, Wanjiru and Wahito opted to give sworn evidence. Waithera opted to remain silent. Nyaga stated that he was to call one witness, same as Wahito. Njeri was to call 2 witnesses while Wanjiru was to call 3 witnesses. Waithera was calling no witness. The court gave 3 consecutive days for hearing of witnesses between 13/06/2022 and 15/06/2022.

81. On the first hearing date Nyaga opted to give unsworn evidence alone, without calling a witness. He stated that he knew PW1. He did not commit the offence. That he was alone at his workplace where he was a herdsman taking care of the farm and so did not leave to participate in the offence on the material night. He only came to know PW1 in court.

82. Njeri gave sworn evidence as DW2 stating that on the material date she went to church in the morning at 9.00 am and later at 2 pm, she and other members of the church visited Besi's mother at Kibucho. Njeri, her husband and Wanjiru left at 1700hrs and left the husband behind. She was with Mama Shiko and her husband. They met with PW1 who greeted them. They responded and that is when she realized that PW1 was around. She had relocated after the burial of the deceased child Shirleene and went home, milked cows, prayed and slept leaving the husband and children up. She was told that motor cycles had come from an abandoned house, which was 50m from PW1's home.

83. According to Njeri, she slept and did not even know of the ordeal PW1 went through until the next morning when Wa Caro briefed her. On cross examination, it was her case that they were friends with the complainant until when the complainant moved from their common church after the death of the child. No one implicated the complainant for the death of the child.

84. Njeri called her husband Peter Kiburi as DW3. He testified that they went to church in the morning, went to visit the sick and returned at 6 pm. She was with Wanjiru, Mwangi Wanjohi and his wife. Njeri milked the cow and escorted the visitors and came back shortly as the witness fed cows. They watched some preaching and Njeri slept as he stepped out shortly and came back. He saw motor cycles from a distance about 50m away where people ordinarily meet for campaigns. Never knew of the ordeal until the next morning. On cross examination, he testified that some people were passing on motorbikes on the subject night but he thought they were people heading to campaigns that used to happen in an adjacent premises. He heard a motor vehicle pass and was not bothered as this was a normal path for motor vehicles. He did not hear the incident until morning.

85. On cross examination, he stated that he did not know Nyaga but knew the rest as they hail from the same village. He wanted to help his wife, hence his testimony. On the fateful day, they milked cows at 6pm only, while ordinarily they milk at 3.20-4.20 am, 11 and 2-3 pm daily. He stated that it was not normal to see over 20 motor cycles in that road as it was on the fateful night. He thought the motor cycles were campaigns, though he did not hear any loud speakers.

86. He stated that he did not see PW1 on the fateful day. He stated that though Grace is extended family, he did not visit her at hospital or at home. He confirmed that PW1 was assaulted as the doctor testified but PW1 had lied that she saw grace.

87. On the following day, Njeri called DW4, Francis Mwangi Maina as her witness. He stated that on 28/11/2023, at 8.30 am (appears to be pm) he passed by Wanjiru's shop and bought supper. He made tea but after a few minutes he heard noise from the outside. PW1 started crying as noises increased. The power at PW1's home was switched off. The Complainant's home is opposite his home. He called Kaharo Police Post and the officers came after a few minutes. On cross examination, he could not tell what transpired during the assault but he visited PW1's home in the next morning. He also did not know the attackers.

88. Wanjiru testified as DW5. She stated that she went with Njeri in the afternoon to Kibutio area to pray for an elderly sick lady and got there at 2 pm and headed home. They were offered tea by Njeri but declined as it was late. She milked and gave her and another milk. They walked downhill and met PW1 who greeted them. They proceeded home as Njeri went to her home. She operated her shop from 7 pm up to 8.00 pm. Mrs. waithaka came and bought some provision. She went home and slept until morning.

89. On cross examination, Wanjiru stated that she had 3 children who live in the same compound with her. She stated further that Anne Nyambura keeps her stock in Wanjiru's shop. It was her case that the house was so far that she could not hear of the ordeal. She did not witness the unusual number of motor cycles or hear any screams.

90. Wanjiru called her minor son, PM, as the next witness who testified as DW6. The minor gave unsworn evidence and was cross examined. He stated that they went to church in the morning. The mother went to Kabuto area for prayers while the witness and 2 siblings came back vide boda boda. Wanjiru came back at around 7 pm, where there were customers in the shop. At 9 pm she came and they did their normal prayers. Anne left and they slept.

91. On cross examination, it was his case that Wanjiru was in her house at 9 pm on the material day and in fact they prayed until 10 pm. He did not hear any screams from PW1's home. He stated that Mama Dina (Anne) closed shop at 9 pm, kept her wares and left.

92. Wanjiru called Anne Nyambura who is her friend as DW7. She testified that she went to church then left for the market. At 5 pm customers were waiting for Wanjiru who had locked her shop. She called Wanjiru who later came at 7 pm, having stated earlier that she was in prayer sessions. She sold her wares until 9 pm and kept them at the shop. The witness left Wanjiru with her children and Mama Shiro, a neighbour and left for home.

93. On cross examination, DW7 stated that she came to testify to assist the friend. She stated that she closed shop first then assisted Wanjiru to close hers. The witness prevaricated on who closed their shop first. Initially she stated Wanjiru closed first, then she stated that it is her (DW7), who closed first. She stated that she did not know what Mama Karis and Wanjiru did when she left. She stated that PW1's house is 100m from Wanjiru's home. She stated that she heard 3 days later, that PW1 had been attacked but was not bothered.

94. Wanjiru called a teacher from Gekera Primary School, Felistas Eli Mwangi as DW8. She stated that on 28/11/2021, she went to church and went back at 2 pm, where she relaxed until 10 pm when she slept. She stated that she resided in the same compound with Wanjiru. She was with Wanjiru from 8 pm then went home after shop closed and stayed until 10 pm. On cross examination, it was her case that they prayed together with Accused 3 until 10 pm on the material day. She did not know PW1 but did not

think that Wanjiru was in PW1's home. On re-examination, she however said that PW1 resides one kilometer from Wanjiru's home.

95. Wahito testified on oath as DW9 stating that she left for work on 28/11/2021 at 7 am until 5 pm. She went home and reached at 6 pm where she met her son Gilbert Gikondi and grandson A.K. It was her testimony that she was with her family in her house until 9.30 pm when she went to sleep. She did not hear about the ordeal until the next morning. She left for work to sell coffee at 6.00 am and went back home a 5 pm. She denied the charges.

96. On cross examination, she stated that she did not go near PW1's home as she slept at 9.30 pm. She stated that the son slept in a detached house. She stated that PW1 lied that Wahito assaulted her. She stated that she did not visit her friend at home or at hospital.

97. Wahito called her adult son, Gilbert Gakondi as DW10 who testified that his mother, Wahito left work at 7 am. They watched news until 7 pm. Wahito cooked until 7.30 pm and served supper. They took supper for one hour until 9.30 when they slept in their respective houses. On cross examination, he stated that he had come to testify to help her mother as he loved her. He stated that he did not know that PW1 was attacked, or heard the noise from PW1. He stated that if Wahito left without alerting him, he could not know.

98. Waithera changed her mind and gave sworn evidence as DW11. She left for church in the morning and later did some tailoring until 6 pm. She fed hens and goats until 6 pm. She cooked form 7 pm. It was her case that on the fateful day at 8 pm, she was cooking. She heard someone shout, Wa Caro, help me. Wa Caro was a neighbour and a sister in law to PW1.

99. She went to PW11's home and found him and his wife Wairimu, 2 grandchildren, and daughter come back hastily and told them to go back to their houses. She went into the main house and locked her house, while fearful. She slept without eating. After an hour she heard motor cycles come ridden uphill. The motor cycles seemed so many. She did not hear something else as she slept. She prepared fodder for cows and went to inquire what happened the previous night. PW11 told her PW1 was attacked.

100. On cross examination, she stated that PW11 was her brother-in-law, the husband's brother. She stated that she could not help PW1 as PW11 had ordered them to go back to the house. She stated that she heard PW1's voice. She heard the complainant call Caro for help. The Complainant was her friend and they attended the church together. She had altercation with the pastor and left the church. She was her successor in that church. She stated that this altercation was the reason the charges were trumped against her. She did not beat the complainant or visit her in the hospital, given the past history.

Submissions

101. The Appellant filed submissions 11/3/2024. It was submitted that the critical elements of the crime were not proved beyond reasonable doubt as there was no recognition of the Appellants in all the matters from the mob that allegedly attacked the complainant.

102. The Appellant also submitted that there were discrepancies and inconsistencies in the evidence by the prosecution. Therefore, it was submitted that the testimony and evidence of the prosecution witnesses lacked credibility.

103. On sentencing, it was submitted that the sentence was excessive.

104. The Respondent did not file submissions.

Analysis

105. It is however disturbing that the court found the appellants had a case to answer in compliance with Section 306(2) as read with Section 307 of the Criminal Procedure Code. This was a misdirection, though not fatal. I also note the ruling on a case to answer is 5 pages long. This is a recipe for misdirection.

106. Firstly the case to answer is segmented per the court. Section 306 and 307 of Criminal Procedure Code are sections applicable to the high court under the heading, Procedure in trials before the High Court.

107. The proper sections are 210 and 211 of the Criminal Procedure Code. They fall under Part VI – procedure in trials before subordinate courts provisions relating to the hearing and determination of cases starting from Section 202 and terminating at Section 221. Section 210 of Criminal Procedure Code provides as doth:

> If at the close of the evidence in support of the charge, and after hearing such summing up, submission or argument as the prosecutor and the accused person or his advocate may wish to put forward, it appears to the court that a case is not made out against the accused person sufficiently to require him to make a defence, the court shall dismiss the case and shall forthwith acquit him.

108. Only section 210 requires summing of evidence. If there is a case to answer, it is necessary to comply with Section 211 of the Criminal Procedure Code, which states:

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

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

109. The section requires that if it appears to the court that a case is made out against the accused person sufficiently to require him to make a defence, the court shall again explain the substance of the charge to the accused. It then sets forth the procedure for placing that accused on his/her defence. Only when acquitting is the court required to give reasons. Otherwise, the court should indicate that there is a prima facie case. There is no need for a treatise. The Kenyan courts have heavily relied on the legal principles in the celebrated case of R.T. Bhatt v Republic [1957] EA 332 – 334 & 335 to define what constitutes a prima facie case. The court of Appeal of Eastern Africa stated thus:

> "Remembering that the legal onus is always on the prosecution to prove its case beyond reasonable doubt, we cannot agree that a prima facie case is made out if, at the close of the prosecution case, the case is merely one which on fully consideration might possibly be thought sufficient to sustain a conviction. This is perilously near suggesting that the court

would not be prepared to convict if no defence is made, but rather hopes the defence will fill the gaps in the prosecution case. Nor can we agree that the question whether there is a case to answer depends only on whether there is some evidence irrespective of its credibility or weight, sufficient to put the accused on his defence. A mere scintilla of evidence can never be enough, nor can any amount of worthless discredited evidence."

110. Sir Udo Udoma JSC while sitting with Obaseki, JSC and Bello, JSC of Nigeria Supreme Court in the case of GREGORY GODWIN DABOH & Another v THE STATE (SC.402/1975) [1977] NGSC 18 (27 May 1977) discussed the issue when a no case submission may be upheld as follows:

> " Before, however embarking upon such exercise, it is perhaps expedient here to observe that it is a well known rule of criminal practice, that on a criminal trial at the close of the case for the prosecution, a submission of no prima facie case to answer made on behalf of an accused person postulates one of the two things or both of them at once:
>
> Firstly, such a submission postulates that there has been throughout the trial no legally admissible evidence at all against the accused person on behalf of whom submissions has been made linking him in any way with the commission of the offence with which he has been charged which could necessitate his being called upon for his defence.
>
> Secondly, as has been so eloquently submitted by Chief Awolowo, that whatever evidence there was which might have linked the accused person with the offence has been so discredited that no reasonable court can be called upon to act on it as establishing criminal guilt in the accused person concerned; and in the case of a trial by jury that the case ought therefore to be withdrawn from the jury and ought not to go to them for a verdict.
>
> On the other hand, it is well settled that in the case of a trial by a jury, no less than in a trial without a jury however slight the evidence linking an accused person with the commission of the offence charged might be, the case ought to be allowed to go to the jury for the findings as judges of fact and their verdict.
>
> Therefore, when a submission of no prima facie case is made on behalf of an accused person, the trial court is not thereby called upon at that stage to express any opinion before it. The court is only called upon to take note and to rule accordingly that there is before the court no legally admissible evidence linking the accused person with the commission of the offence with which he is charged.
>
> If the submission is based on the discredited evidence, such discredit must be apparent on the fact of the record. If such is not the case, then the submission is bound to fail."

111. The court should thus avoid the pitfall of expressing itself in a long ruling at this stage. The defects however, did not go to the substance of the case. The same were also not raised.

112. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand. The duty of the first Appellate court remains as set out in the Court of Appeal for Eastern Africa in Pandya -vs- Republic [1957] EA 336 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 differing from the Judge or magistrate even on a question of fact turning on the credibility of witnesses whom the appellate court has not seen."

113. Appellants, on a first appeal are entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and the function of this court is not merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions. The duty is for the court to make its own findings and draw its own conclusions having regard that the trial court had the advantage of hearing witness evidence and observing their demeanour. In the case of Okeno v Republic [1972] EA 32 at 36 the East Africa Court of Appeal stated on 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."

114. The standard of proof is on beyond reasonable doubt. 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."

115. The burden of proof is on the state. In case there is doubt, such doubt is to be resolved in favour of an accused person. The principle is that the prosecution must prove the guilt of an accused. 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."

116. The legal burden of proof remains constant throughout a trial and does not shift to the accused. Halsbury's Laws of England, 4th Edition, Volume 17, paras 13 and 14 posit as follows:

> " 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."

117. The standard of proof required in such cases was addressed by Brennan, J in the United States Supreme Court decision in Re Winship 397 US 358 {1970}, at pages 361-64 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."

118. The Appellants were charged with 2 counts; that is malicious damage and grievous harm. The offence of grievous harm is established under section 234 of the Penal Code as doth:

> Any person who unlawfully does grievous harm to another is guilty of a felony and is liable to imprisonment for life.

119. Section 4 of the Penal Code provides that grievous harm means any harm which amounts to a maim or dangerous harm, or seriously or permanently injures health, or which is likely so to injure health, or which extends to permanent disfigurement, or to any permanent or serious injury to any external or internal organ, membrane or sense.

120. The court set out the correct test for proof of the offence as set out in Section 231 of the penal code as follows:

> 231. Acts intended to cause grievous harm or to prevent arrest

Any person who, with intent to maim, disfigure or disable any person, or to do some grievous harm to any person, or to resist or prevent the lawful arrest or detention of any person-

a. unlawfully wounds or does any grievous harm to any person by any means whatever;

b. or unlawfully attempts in any manner to strike any person with any kind of projectile or with a spear, sword, knife or other dangerous or offensive weapon; or

c. unlawfully causes any explosive substance to explode; or

d. sends or delivers any explosive substance or other dangerous or noxious thing to any person; or

e. causes any such substance or thing to be taken or received by any person; or

f. puts any corrosive fluid or any destructive or explosive substance in any place; or

g. unlawfully casts or throws any such fluid or substance at or upon any person, or otherwise applies any such fluid or substance to the person of any person, is guilty of a felony and is liable to imprisonment for life.

121. The proper test for grievous harm is proof of the following beyond reasonable doubt as set out in Uganda *v Akaka (Criminal Appeal No. 8 of 2015*) [2019] UGHCCRD 12 (28 February 2019), where Mubiru, J stated:

> 14. For the respondent to be convicted of the offence of Doing grievous harm contrary to section 219 of The *Penal Code Act*, the prosecution had to prove each of the following essential ingredients beyond reasonable doubt; 1. The victim sustained grievous harm. 2. The harm was caused unlawfully. 3. The accused caused or participated in causing the grievous harm.

122. PW8 confirmed that the injuries sustained were maim. Maim amounts to grievous harm according to Section 4 of the Penal Code. The injuries suffered were caused by bare hands and sticks. The complainant sustained fractures of the upper limbs, bruises on the head, swollen eye with inability to open. She was admitted to hospital on 29/11/2021. X-rays revealed broken phalanges on both hands. She was given a back slap for broken phalanges and plaster of Paris at the back of broken limbs to align bones to seal. She was managed on antibiotics and Mannitol, which is used for heavy injuries. PW8 classified the injuries as maim.

123. The court will be satisfied, if one ingredient of grievous harm is proved and not necessarily all that are set out in Section 231 of the Penal Code. This was more eloquently set out in the case of John Oketch Abongo v Republic [2000] eKLR where the Court of Appeal (Chunga, C.J., Akiwumi & Owuor, JJ.A.), posited as doth;

> We are of the opinion that the presence of any one of these ingredients would suffice to disclose grievous harm. Here, we are satisfied that the complainant's injury did amount to dangerous or serious injury to health both of which are ingredients contained in the definition.

124. Grievous harm is the most serious injury outside murder and allied offences. The P3 and the evidence of all witnesses was succinct that the injuries suffered were life threatening. At some stage someone was wondering why PW1 was not dying.

125. The injuries sustained by PW1 kept her in hospital while admitted from 29/11/2021 to 06/12/2021. The complainant had fractures of the phalanges and bruises. Her eyes were injured with inability to

open, being treated with serious drugs for heavy injuries. The court observed that the complainant could not move her hands. The injuries were permanent. From the victim assessment impact statement almost a year later, the complainant had not recovered.

126. PW8 testified that the complainant, PW1 sustained attacks and was taken to the hospital on 29/11/2021. Both her phalanges were broken and was managed by special drug, Mannitol and antibiotics. For the unschooled, is a diuretic that assists to make urine in order to lose salt and excess water from your body. The drug is also used to treat swelling of the heart, kidney, or liver disease, around the brain or eyes. The injuries were life threatening. The fracture made PW1 not to completely hold her hand. I therefore find and hold that the injuries sustained rise to the status of grievous harm.

127. The second question was whether the injuries were caused unlawfully. None of the parties stated that she suffered injuries while playing. It was common ground that PW1 was attacked. The only dispute was whether the Appellants caused this or not. The harm must not be caused by play or activity that the parties agreed to. For example, if a person attends a bull fight and is gored, he cannot be said to be unlawfully harmed.

128. The consent of the victim was crucial as stated in the case of Gerald Wathiu Kiragu v Republic [2016] eKLR, where the court referred to the case of R versus Luseru Wandera s/o Wandera, Republic versus Luseru Wandera s/o Wandera (1948) EACA 105 where, the court held that though the attempt to murder was not proved against the appellant, the court was entitled to presume that the appellant knew and intended the natural and probable consequences of an assault committed by him with the knife and that those consequences were likely to cause grievous harm; the court thus sustained the conviction under section 220(1) of the Code of wounding with intent to cause grievous harm. By parity of reasoning, the appellant ought to have been convicted for the offence of unlawful wounding rather than attempted murder.

129. The actions that resulted in the injury of PW1 were thus unlawfully caused. The next and last question will be whether, each of the Appellants participated in the commission of the offence.

130. Nyaga, Njeri, Wanjiru, Wahito and Waithera are the Appellants. Given the death of Nyaga, I shall exclude him from the analysis, except where there is need for completeness. I shall however not pronounce myself on the guilt or otherwise of Nyaga.

131. Njeri and Wanjiru were identified by the complainant. They hit the windows with sticks. They destroyed the house, while light was on. She had an opportunity to see them and for extended periods of time. Further, Wanjiru tripped the complaint at close proximity. Wanjiru, who was a dear friend first hit PW1 on the back. She fell and faced up when Wanjiru hit her ears while claiming PW1 was a devil worshipper.

132. PW1 was consistent on the role of Njeri. PW1 spoke to her friend, now friend to Wanjiru. Njeri was there from the very beginning. There is however, nobody called a mob. It is a group or gang. Appellants cannot hide behind a group being amorphous. It does not also require that the prosecution assign each blow to one or the other member of the group or gang. It is enough that they participated in beating the complainant. It shall not be necessary to prove that while others were soft in their beating or assault, some other person used excess force. That will be necessary only to the extent of looking at the heinousness of each actor at sentencing level.

133. It is important that proof of participation by any of the Appellants, however minute their roles, connotes proof of the crime. One does not need to have the actual person who inflicted the blow that resulted in the change of injuries from harm to grievous harm. A common intention is inferred in that respect and, each of them is deemed to have committed the offence as stated in the case of Kipngetich &

2 others v Republic (Criminal Appeal 20 & 19 of 2019 & 140 of 2017 (Consolidated)) [2021] KEHC 447 (KLR) (4 March 2021) (Judgment), where the court posited as follows:

> The scope of the doctrine on common intention as defined under section 21 of the Penal Code as provided for herein is to the effect:
>
> > " When two or more persons from a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence."
> >
> > The provision squares well with the following passage in the case of Njoroge in the case of Njoroge v Republic 1983 KLR 197 and Solomon Munga v Republic 1965 EA 363 where both courts held as to the elements on the principle of common intention thus. "If several persons combine for an unlawful purpose and one of them kills a man, it is murder in all who are present whether they actually aided or abated or not, provided that the death was caused by act of someone of the party in the course of the endevours to effect the common object of the assembly."

134. It is not clear what role Waithera and Wahito carried out at this point. The witness in cross examination of PW1 did not fully enunciate the role of Wahito. PW1 stated that Wahito was pelting stones outside. She stated that Wahito assaulted her outside where Kihara and Anne were. Wahito is said to have hit her hands. On the other hand PW2, PW3 and PW4 gave history on the recovery of PW1. PW9 and 10 placed the homes of the assailants adjacent to the locus in quo.

135. PW5 as the area Chief was either incompetent or evasive. An incident of this magnitude could not occur when he was 7 km away and he simply visits, tiptoeing, one month later, to see one side and not visit the scene or interrogate even the village elder. It is no surprise the Assistant Chief failed to update him. His evidence does not add any value to the case of both parties, except confirm that the malicious damage occurred. It is surprising that these kinds of offences could occur without bothering the Chief.

136. His evidence and conduct does not show that he was holding his office as a public trust to be exercised in a manner that is consistent with the purposes and objects of *the Constitution*, to demonstrate respect for the people and bring honour to the nation and dignity to the office or promote public confidence in the integrity of the office. He was underwhelming in a more profound way than should have been and had absolutely no idea why he was the area Chief. He saw no evil, heard no evil and spoke no evil. He let the public down.

137. PW6 gave evidence that lay the basis for evidence of PW7. He did not appear to have had bad blood with the Appellants or Nyaga. He was however, clear that Nyaga was a rider. His frantic effort to have PW1 helped did not bear much fruit. He gave a vivid description of locations of homes of the Appellants. He called PW11, who told him of the attack but stated that the attackers had not removed her from the house. Later, he stated that the police were around at about 11 pm. He also described the injuries. He also stated that his wife disappeared. On cross examination he stated that PW7 was pushed off.

138. The actions by PW7 were a nadir of human cruelty and utter disregard of human suffering. There was absolutely no regard to human life. There was no attempt either by this witness or the 5 strangers to help the hapless PW1. It reminds me of an eternal pessimist, Thomas Hobbes who in his 1651 political

treatise, Leviathan described life outside of society as solitary, poor, nasty, brutish, and short where he believed that people are naturally selfish and wicked with a natural tendency to be violent and brutal.

139. From PW7's conduct, it is important to follow up whether, the witness was a false one or complicit in the attack. His conduct cannot, even bearing in mind the age, be excused, if he was there. Though the Appellants protested the inclusion of PW7 by writing a late statement, it is expected for a boy of 18 years not to wish to be involved in the traumatic events of that day. He may have run away like he did on the eventful day.

140. He took a strength of courage, missing in PW5 to face the Appellants who are her relatives. He was consistent that Njeri and Wanjiru were breaking the door. He stated that Wahito and Waithera were at the locus in quo but were not banging. They had sticks but calling PW1 to come out. I t is Nyaga, Njeri and Wanjiru who pulled PW1 out. When he stated that they all beat her, it is not certain whether it is the 3 named or all the 5 accused persons.

96. I find that Njeri and Wanjiru were properly identified. The identification of the 2 as the assailants for both offences left no doubt whatsoever. PW7 was candid that he did not know the rest of the crowd. He was not shaken on cross examination. He was not an afterthought. To expect PW1 to recall everyone on the sight is to demand too much. There was no evidence contradicting his testimony.

141. The defence set up by Njeri does not amount to alibi as she was a few metres from the locus in quo. As at 8.30 pm she was doing nothing. She offered no tangible defence or any raison d'etre for being implicated at the scene.

142. On the other hand evidence of PW12 was not useful. At least he confirmed that Wanjiru was Wa Kamau. He recanted his statement where he had identified all the 5 accused persons; that is the 4 Appellants and Nyaga. He is a person of interest on the offence at hand. He did not see all persons of interest at the scene and as such his evidence is not credible. He recanted his evidence to help his relative. However, such worthless evidence does not place or remove anyone from the scene. The Attempt to assist his sister Njeri boomeranged on him.

143. The evidence of DW3 did not remove Njeri from the locus in quo. DW3 admitted he testified to help the wife. Unfortunately, that is not a valid reason for giving evidence. It should be true in fact. The conduct of both DW2 and DW3 is inconsistent with their innocence. They were up by 8 pm, when banging started. They were dead silent on this.

144. Francis Mwangi Maina, DW4, Njeri's neighbor, allegedly called the Chief, PW5. The Chief was neither asked of this or testified on the call. The Chief testified over persons; PW3, Peter Njoroge, and the Assistant Chief. This call is thus phony. He also stated to have called police who came but never came back.

145. However, it is a different person who called. PW5 testified that he was called by Peter Kanyinge Njoroge, John Githaiga Kariuki, and PW3. DW4 is not one of the people who called PW10. The witness was thus a false witness. There is no evidence from even other defence witnesses which corroborated his story. Surely this story should have been put to PW7 to deny or confirm.

146. The evidence of PW7 was wrongly rejected. In any case, the rejection did not affect the evidence of other witnesses. The court correctly warned itself of the evidence of the complainant as a single identifying witness.

147. The court erred in dismissing the alibi raised by Wahito and Waithera on ground that it was raised late. This is no longer good law. In the case of Thomas Patrick Gilbert Cholmondeley v Republic[2008] eKLR, the Court of Appeal Omolo, O'kubasu & Onyango Otieno, JJ.A posited as follows:

> It would clearly be contrary to the spirit if not the letter of our Constitution to lay down a principle that the prosecution is entitled to demand and receive in advance a disclosure of evidence from well-heeled Kenyans but not from the poor and vulnerable. We reject any such distinctions being introduced in the criminal justice system. We think there is merit in the complaints raised by the appellant in grounds one, four, five, six and seven of the grounds of appeal.

148. The Court of Appeal in the case of Richard Munene v Republic [2018] eKLR stated as follows;

> 'It is a settled principle of law however, that it is not every trifling contradiction or inconsistency in the evidence of the prosecution witness that will be fatal to its case. It is only when such inconsistencies or contradictions are substantial and fundamental to the main issues in question and thus necessarily creates some doubt in the mind of the trial court that an accused person will be entitled to benefit from it.'

149. In Argut v Republic of Kenya (Criminal Appeal 205 of 2017) [2023] KEHC 2690 (KLR) (28 March 2023) (Judgment), Matheka J stated as follows:

> Yes, there are authorities about the time an accused person can raise an alibi. However the letter of the law states that the moment an accused person raises an alibi the prosecution can seek an adjournment to go and bring evidence to challenge it. That is what the law says. My view is that it is upon the prosecution to take advantage of that provision of the law and seek to dislodge the alibi. Whether it is too late in the say can only emerge when the prosecution has sought to dislodge the alibi as provided for by the law. The law recognizes that until an accused person is put to his defence he does not have to say anything about his case. So did the Appellant's alibi defence create doubt in the prosecution's case? I say so. The Appellant testified that he was not at the scene at the time the assault allegedly happened. He said he was at the office from morning till 3 p.m. DW2 and DW5 who were his co-employees corroborated this position. The complainant stated that she was assaulted at around 1 pm and her witness PW2 confirmed she witnessed the same.

150. It must be remembered that the burden of disproving an alibi is on the prosecution. In Kiarie vs Republic [1984] KLR the Court of Appeal held:

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

151. The prosecution has a law to dislodge an alibi. It is in the books and cannot be ignored. Section 309 of the Criminal Procedure Code, provides that:

> 'If the accused person adduces evidence in his defence introducing new matter which the advocate for the prosecution could not by the exercise of reasonable diligence have foreseen, the court may allow the advocate for the prosecution to adduce evidence in reply to rebut it.'

152. If Wahito and Waithera introduced a defence that could not be foreseen, the prosecution ought to have invoked Section 309 of the criminal procedure code. Unlike Njeri and Wanjiru, whose interaction was

for a long time, it appears that the involvement of Wahito and Waithera was fleeting. A witness may recognize them but still be mistaken. For waithera her evidence was corroborated by the prosecution witness, PW11. However tenuous that evidence was, it was not impeached. The court cannot disregard prosecution evidence favouring an accused. If the prosecution thought that evidence was sexed up, then he ought to have applied to declare the witness hostile.

153. Wanjiru places herself at home after 5 pm. It comes out clearly that Wanjiru, and Njeri met PW1 by chance and mobilized for her beating. The so-called church meeting the afternoon was a planning meeting. Farmers don't forget to milk their cows, unless something juicier came up. DW6 stated he was helping his loving mother. That is all I wish to comment on this given that the witness was a minor.

154. It was surprising that Anne Wambura was not charged. PW1 placed her in the locus in quo. She confirmed she was with Wanjiru. Her evidence, as the court below indicated was not believable. She was prevaricating. She wished to keep a shop open but closed it before 9 when she went there.

155. After hitting her on the back, Wanjiru stepped on the complainant who identified her as Wa Kamau. They were known to each other and there was no possibility of error. He also heard Wanjiru calling the witness. She had no grudge with complainant, and though related, did not bother to see what happened. Her defence sounded hollow and did not displace cogent evidence against her.

156. Njeri and Wanjiru were up close and candid with the complainant. Wanjiru stepped on her. The duo got her out of the house while there was light. The interaction was longer and more profound. The chances of error were eliminated. PW7 equally knew the parties. In relation to Njeri and Wanjiru, the facts irresistibly point to the guilt of the said Appellants. There are no co-existing circumstances that will show the Appellants' innocence. In the case of Ahamad Abolfathi Mohammed and Another v Republic [2018] eKLR, Court had this to say on circumstantial evidence:

> " However, it is a truism that the guilt of an Accused person can be proved by either direct or circumstantial evidence. Circumstantial evidence is evidence which enables a court to deduce a particular fact from circumstances or facts that have been proved. Such evidence can form a strong basis for proving the guilt of an Accused person just as direct evidence. Way back in 1928 Lord Heward, CJ stated as follows on circumstantial evidence in R v Taylor, Weaver and Donovan [1928] Cr. App. R 21:
>
> > 'It has been said that the evidence against the Applicant is circumstantial. So it is, but circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which, by intensified examination is capable of proving a proposition with the accuracy of mathematics. It is no derogation from evidence to say that it is circumstantial."

157. Having rejected PW7's evidence which contradicted PW11's evidence, it is doubtful that there was evidence linking Wahito to the crimes charged. The evidence of PW1, as regards Wahito and Waithera was that: -

> I also saw accused 4 (Wahito) and accused 5 (Waithera) too...
>
> Accused 4 (Wahito) was pelting stones on my roof alongside accused 5 (Waithera)
>
> On cross examination by Wahito she stated:
>
> I saw you through the window as you pelted stones at my house.
>
> While on cross examination by Waithera, she stated as follows: -

You assaulted me outside the house and accused 1 beat me.

158. The link with Wahito and Waithera was too tenuous. The evidence was too fleeting to have a link to the crime. The witness was not in a position to identify the 2, who were not near. She could sincerely be mistaken. I do not find that Wahito was properly identified.

159. Wahito did not meet any of the other Appellants during the day. She placed herself at home. She did not visit PW1 since she was busy. The son also stated he came to testify to help the mother. His evidence is also not useful. However, he did not create the story of motor cycles.

160. Waithera took a dangerous defence. A defence that placed her in the locus in quo. However, her evidence had a natural tinge to it. She already had differences with PW1 having differed in church. The difference was also admitted by PW1.

161. However, her story flowed. She heard the events occurring and went to help, albeit not directly. Her brother-in-law, returned her to the house, that is James Kamau. She followed mama Wairimu and met James. She went to the house, not because she did not hear, but was ordered to do so. She was shocked, knew something bad was going on. She did not sleep immediately. She heard motor cycles after one hour. Her lack of help was due to James telling her to go back. She narrated the raison d'etre for not going to Grace's home.

162. This was due to past issued arising from church. The only person who could corroborate her evidence was James Kamau. He had already testified as PW11. He also heard the same call for help from Wa Caro. He tried, placed PW7 at his home. PW11 enjoyed a cordial relationship with PW1 but did not visit. He knew more than he was telling. In view of his evidence, it is thus possible that PW11 was misleading Waithera to go and sleep as he finished his assignment. PW11 confirmed that he was with Waithera when the action occurred.

163. In the circumstances, I find that the evidence against Waithera had created some doubts. Her defence was consistent with prosecution evidence. Though PW11 was not entirely truthful, on cross examination he was able to place Waithera outside the locus in quo.

164. The court must treat with caution evidence of a single identifying witness. We had 2 identifying witnesses but I shall review the circumstances differently. In Wamunga vs. Republic (1989) KLR 424 the Court posited as hereunder:

> It is trite law that where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility or effort before it can safely make it the basis of a conviction."

165. The end result is that I find mixed results. The identification of Wahito and Waithera was unsafe. I therefore give them a benefit of doubt. On the other hand, there is no doubt on Njeri and Wanjiru. Their appeals on conviction are untenable. Accordingly the said appeals are dismissed.

Sentence

166. On sentence, the court gave one month for malicious damage to property or 20,000/=. She was however, tautological about it as the sentences were made both concurrent and consecutive. One of the two must fall as the sentences have to be clear.

167. In dealing with the issue as to whether the sentences should run consecutively or concurrently, recourse must be had to the law. These kinds of sentences have been addressed in part under Section 14 of the

Criminal Procedure Code and for offences committed during the currency of an existing sentence or before sentencing for a previous conviction, Section 37 of the Penal Code. To begin with, it provides that it is lawful for a person who is convicted at one trial for two or more distinct offences, the court may sentence him, for those offences, to commence the one after the expiration of the other in the order the court may direct, unless the court directs that the punishments shall run concurrently. The said section states as follows:

> (1) Subject to subsection (3), when a person is convicted at one trial of two or more distinct offences, the court may sentence him, for those offences, to the several punishments prescribed therefor which the court is competent to impose; and those punishments when consisting of imprisonment shall commence the one after the expiration of the other in the order the court may direct, unless the court directs that the punishments shall run concurrently.
>
> (2) In the case of consecutive sentences, it shall not be necessary for the court, by reason only of the aggregate punishment for the several offences being in excess of the punishment which it is competent to impose on conviction of a single offence, to send the offender for trial before a higher court.
>
> (4) For the purposes of appeal, the aggregate of consecutive sentences imposed under this section in case of convictions for several offences at one trial shall be deemed to be a single sentence.

168. On the other hand, Section 37 of the Penal Code provides that where a person after conviction for an offence is convicted of another offence, either before sentence is passed upon him under the first conviction or before the expiration of that sentence, any sentence, other than a sentence of death, which is passed upon him under the subsequent conviction shall be executed after the expiration of the former sentence, unless the court directs that it shall be executed concurrently with the former sentence or any part of that sentence. The said section provides as follows:

> 37. Sentences when cumulative Where a person after conviction for an offence is convicted of another offence, either before sentence is passed upon him under the first conviction or before the expiration of that sentence, any sentence, other than a sentence of death, which is passed upon him under the subsequent conviction shall be executed after the expiration of the former sentence, unless the court directs that it shall be executed concurrently with the former sentence or any part thereof: Provided that it shall not be lawful for a court to direct that a sentence of imprisonment in default of payment of a fine shall be executed concurrently with a former sentence under subparagraph (i) of paragraph (c) of subsection (1) of section 28 or of any part thereof.

169. It must however, be conceded that sentencing is a complex arena and the court below must as a corollary seek guidance from the sentencing guidelines paragraphs 2.3.21 to 2.3.30. Nevertheless, the court sitting on review does not have the same jurisdiction as the court sitting on appeal. Section 37(4) of the Penal Code provides for the consideration of the total length of the cumulative sentences.

Subject to subsection (3), when a person is convicted at one trial of two or more distinct offences, the court may sentence him, for those offences, to the several punishments prescribed therefore which the court is competent to impose; and those punishments when consisting of imprisonment shall commence the one after the expiration of the other in the order the court may direct, unless the court directs that the punishments shall run concurrently.

170. In Peter Mbugua Kabui vs Republic [2016]eKLR, the Court of Appeal stated as follows:

> " As a general principle, the practice is that if an accused person commits a series of offences at the same time in a single act/transaction a concurrent sentence should be given. However, if separate and distinct offences are committed in different criminal transactions, even though the counts may be in one charge sheet and one trial, it is not illegal to mete out a consecutive term of imprisonment.
>
> The sentencing policy guidelines provides guidance in sentencing and provides. I have also considered the Sentencing Policy Guidelines which contain specific provisions on whether a court should impose consecutive or concurrent sentences. The Guidelines provide as follows:
>
> 7.13 Where the offences emanate from a single transaction, the sentences should run concurrently. However, where the offences are committed in the course of multiple transactions and where there are multiple victims, the sentence should run consecutively."

171. The sentence to malicious damage to property creates an untenable imbroglio that should not be found in sentencing. Clarity of sentence is paramount, even though, the discretion to impose concurrent or consecutive sentences lies in the court.

172. There can be no sentence with internal contradictions. In meting out concurrent and consecutive sentences, the court must make up its mind. It cannot prevaricate and second guess itself.

173. Sentencing guidelines provide for Concurrent and Consecutive Sentences. In particular, where the offences emanate from a single transaction, the sentences should run concurrently. However, where the offences are committed in the course of multiple transactions and where there are multiple victims, the sentences should run consecutively.

174. There are however, sacrosanct rules for which no derogation is expected. In the case of imprisonment in default of payment of a fine, the sentence cannot run concurrently with a previous sentence. In other words, imposition of a fine must always lead to a consecutive sentence. Policy directions in paragraphs 23.7 to 23.9 of the guidelines usually suffice.

175. In considering the sentences the court is guided by the policy guidelines No. 37.7 where, the use of a weapon to frighten or injure a victim; the more dangerous the weapon, the higher the culpability. In this case, they used heavy weapons like pieces of sticks to unleash untold violence, which in effect created serious physical or psychological effect on the victim. Further, the offence was committed by a gang or group.

176. In this case, the attackers targeted a solitary and vulnerable elderly woman accusing her of killing a child, Shirleen. There was a clear intention to commit a more serious offence of murder, which ended up as grievous harm. The assailants committed the offences with wanton and flagrant disregard to the right to life and property and used immense violence and caused life changing damage to PW1 and her house in furtherance of the two offences. The violence lasted over an hour. It was meted out in a grossly inhuman and degrading manner.

177. The court considered mitigating circumstances to warrant a more lenient penalty than would be ordinarily imposed in their absence. Other than being first offenders, there were no serious mitigation given. The court gave 5 years out of possible life imprisonment. By all standards, the sentence was very

lenient. It did not reflect the severity of the offence and was a slap on the wrist. Unfortunately, there is neither a cross appeal nor a notice to enhance. The same cannot be disturbed.

178. On the sentence on malicious damage to property, the penal code provides for a sentence of section 339(2) which provides as follows:

> (2) If the property in question is a dwelling-house or a vessel, and the injury is caused by the explosion of any explosive substance, and if—
>
> (a) any person is in the dwelling-house or vessel; or
>
> (b) the destruction or damage actually endangers the life of any person,
>
> the offender is guilty of a felony and is liable to imprisonment for life.

179. A person who commits any of the two offences is guilty of a felony and is liable to imprisonment for life. The 2 appellants were each sentenced to 5 years and one month. The facts from the lower court file show that the sentence is actually a slap on the wrist. In the case of K- VS – REPUBLIC (NBI) CRIMINAL APPEAL NO.248 OF 2014(C.A) (2015) eKLR, the Court of Appeal had the opportunity to interpret S.20(1) of the *Sexual Offences Act*. The court stated as follows:-

> ...The inference is that the proviso does not create a minimum sentence. The phraseology and wording in the proviso is that the accused shall be liable to imprisonment for life.
>
> What does "shall be liable" mean in law". The court of Appeal for East Africa in the case of OPOYA – V – Uganda (1967) EA 752 had an opportunity to clarify and explain the words "shall be liable on conviction to suffer death". The court held that in construction of penal laws, the words "shall be liable on conviction to suffer death" provide a maximum sentence only; and the courts have discretion to impose sentences of death or imprisonment.

180. The court is entitled to mete out the sentences. The cumulative effect does not change much. Nevertheless, it is to be remembered that there can be no fine and concurrent sentence in default. These are two sentences. I therefore set aside the sentence of malicious damage to property.

181. Though the sentence given was light, I have not been called to enhance the same, which I could gladly have done as the sentence does not reflect the heinousness of the offence. I shall therefore order that the sentence for malicious damage to property run consecutive with the sentence for grievous harm. I set aside the fine imposed and leave the term sentence.

182. There are no materials that the court ignored in giving the sentence. The Appeal on sentences is thus untenable, except as aforesaid. It must be recalled that the Court of Appeal in the case of Ogolla s/o Owuor vs. Republic, [1954] EACA 270 pronounced itself on this issue as follows:

> " The Court does not alter a sentence unless the trial Judge has acted upon wrong principles or overlooked some material factors."

183. Appeal on the 5-year sentence for grievous harm is dismissed for lack of merit.

184. Sentence for malicious damage to property contrary to 339(1) as read with 339(2) of the Penal Code of Ksh. 20,000/= in default one month imprisonment and for the of fine of Ksh.20,000/= to run consecutively while the default, one month imprisonment to run concurrently is set aside as the same is illegal. In lieu thereof, I direct that the sentence for malicious damage shall be for one month.

185. The sentence in count I for grievous harm contrary to Section 234 of the Penal Code and count II for malicious damage to property contrary to 339(1) as read with 339(2) of the Penal Code, being 5 years and one month respectively shall run consecutively.

Order

186. In view of the foregoing, I make the following orders:

a. Appeal number E040 of 2022 - Jane Wahito Karienye is allowed on both conviction and sentence. She shall be set free forthwith unless otherwise lawfully held.

b. Appeal number E041 of 2022 - Hannah Waithera Waweru is allowed on both conviction and sentence. She shall be set free unless otherwise lawfully held.

c. Appeal number E039 of 2022 - Lydia Wanjiru Kamau and Appeal Number E042 of 2022 - Jemimah Njeri Kiburi are dismissed on conviction.

d. The sentence of 20,000/= in default one month imprisonment and for the fine of Ksh.20,000/= to run consecutively while the default one month imprisonment to run concurrently is set aside as the same is illegal. In lieu thereof, I direct that the sentence for malicious damage shall be for one month. The two sentences shall run consecutively.

e. The sentences against Jemimah Njeri Kiburi shall run from the date of arrest on 30/1/2022 excluding the period she was on bond from 31/1/2022 to 29/8/22 and from 2/03/2023 to 28/1/2025.

f. The sentences against Lydia Wanjiru Kamau shall run from the date of arrest on 30/1/2022 excluding the period she was on bond from 31/1/22 to 29/8/2022 and from 2/03/2023 to 28/1/2025.

g. Right of appeal 14 days.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 28TH DAY OF JANUARY, 2025. JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of: -

Ms. Atina for the State

Mr. Kiminda for the Appellants

Appellant 1-4 – Both present

Court Assistant – Jedidah