Wakhanu v Director of Public Prosecution (Criminal Appeal E074 of 2024) [2025] KEHC 9070 (KLR) (25 June 2025) (Judgment)

Neutral citation: [2025] KEHC 9070 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KAKAMEGA

CRIMINAL APPEAL E074 OF 2024

S MBUNGI, J

JUNE 25, 2025

BETWEEN

AMOS WAKHANU ..... APPELLANT

AND

THE DIRECTOR OF PUBLIC PROSECUTION ..... RESPONDENT

(Being an Appeal from the Judgment of Hon A. Odawo principal Magistrate in Kakamega CMCR No. E972 Of 2021)

JUDGMENT

Introduction

1. The Appellant was charged with conspiracy to prevent free disposition of property contrary to section 395[c] of the penal code. The particulars of the offence were that on the 18th day of May 2021 at Musavale village in Nambacha Sub-location within Navakholo sub-county jointly with others not before court conspired to prevent ALFRED WAKWOBA from the free and lawful disposition of his property namely land L.R Bunyala/Nambacha/1680.

2. Secondly, the appellant was charged with the offence of cutting down crops of cultivated produce contrary to section 334[A] of the Penal Code. The particulars were that on the 18th day of May 2020 at Musabale village, Nambacha sub-location, Navakholo sub-county within Kakamega County, jointly with others not before court, the appellant willfully and unlawfully cut down crops of cultivated produce[sugarcane] valued at Kshs. 40,400/- the property of ALFRES WAKWOBA MUSUNGU.

3. During trial the prosecution called five witnesses who testified in support of their case. The appellant was placed on his defence and the defence called nine witnesses. The trial magistrate considered all the evidence adduced and found the Appellant guilty of both offences and proceeded to sentence him to a fine of Kshs. 40,000/- and in the alternative 6 months in prison for each count.

B. Facts at Trial

4. PW1 was Wakwoba Alfred Musungu, the complainant. He stated that he was the registered owner of Bunyala/Namacha/1680 which he purchased in 2012. He told the court that the land was jointly owned by many people and produced a land sale agreement in court. He stated that he had planted sugarcane in the 4.0 Hectares piece of land. He recalled being called by the area chief on 17.05.2022 who informed him that the district surveyor would visit to mark boundaries the following day 18.05.2022. However, he did not turn up. The chief called him warning him that the accused persons intentions on the land. The accused persons however dispersed upon being advised by the chief. That the accused persons later came back with a private surveyor and subdivided his land into three portions and planted euphobia. They slashed his mature sugarcane which was valued at Kshs. 40,400/- by an Agricultural officer from Navakholo. PW1 stated that he recorded a statement at Navakholo. The photographs were produced as exhibits.

5. On cross examination, he stated that he visited the land thrice and did a search before purchase. He further stated that L.R Parcel 1107 immediately bordered his land. He further stated that at the time of purchase, was not told that the neighbors were relatives. He submitted that there had been criminal cases and civil cases concerning the land.

6. On re-examination by court, he stated that the date of the land sale was 13.08.2012 and that the sellers were family members to Robert Wafula who had passed on. He also stated that an injunction order was issued restraining the 9th accused from interfering with the land.

7. PW2 was Abukabar Khakandi Waziri, the caretaker of PW1's land. He testified that on 18th May 2021, he went to check on the complainant's land as part of his routine duties. Upon arrival, he noticed that boundary wires had been cut and a crowd had gathered at the scene. He specifically saw the 7th accused who warned him to leave or risk being harmed. He also overheard threats from others in the group. Out of fear, he fled and promptly informed PW1 [Alfred Musungu] of the situation.

8. On cross examination, He testified that all the accused persons were present and identified them by name and clothing, as best as he could recall. He also mentioned that the accused persons later held a party after the incident.PW2 confirmed that he had been employed by PW1 as a caretaker since 2016 and that he had assisted in planting the sugarcane in question. He referred to the photographs [PMFL 3] and the agricultural valuation report [MFI 4], which documented the damage. He admitted that PW1 had called him to record the statement and that PW1 was not present at the time of recording.

9. In re-examination by court, he reiterated that he saw the accused persons destroy sugarcane and was first warned by the 7th accused, followed by the appearance of the 1st accused, which prompted him to flee due to fear for his safety.

10. PW3 was Charles Jokinda Tembo. He recalled that while on his way home on the material day, he saw people cutting sugarcane while putting markings and one of them attempted to hire him to assist in marking boundaries. He identified several accused persons including Winstone, Hamisi, and Amos, and noted that the destruction was purportedly to create a footpath.

11. In cross-examination, he stated he stayed about 1½ kilometers away and had no personal relationship with Alfred. He had first passed the land at 8 a.m. and saw no activity, but on returning at 11 a.m., he observed the destruction for about 3½ hours. He described the tools the accused were carrying and mentioned two surveyors at the scene. He also confirmed interacting with Waziri but clarified that he had not initially disclosed this in his statement.

12. In re-examination, he stated that he remained at the scene knowing arrests would follow due to the damage.

13. PW4 was Richard Masivo Kitere. He testified that on 18th May 2022, he was on his way to Shiongo when he encountered a group of about 16 people, including all the accused persons, on Alfred's land. They were marking boundaries, planting euphobia, and cutting sugarcane. He identified all accused persons by name and attire and noted the presence of a former area chief, David Wakhisi. He also mentioned calling the farm manager, Waziri, who informed him he had been chased from the scene.

14. On cross-examination, he admitted to being related to the accused persons and aware of a prior land dispute involving the same parties. He also acknowledged that his statement had discrepancies and that Alfred was present at the police station when he recorded it.

15. In re-examination, he reaffirmed witnessing the destruction and boundary marking and stated he had no personal conflict with the accused.

16. PW5 was Benard Wechuli, the Agricultural Officer from Navakholo Sub-County. He testified that on 26th March 2021, he visited the complainant's land following a letter from the OCS. He assessed the damage and found that the sugarcane crop had been destroyed across approximately a quarter-acre. He estimated the loss at 10 tonnes valued at Kshs. 40,000 and produced the agricultural assessment report in court.

17. During cross-examination, he admitted he had not been shown any ownership documentation or photographs, and that he relied on the complainant to identify the land. He acknowledged coming from the same area but stated he did not know the parties personally.

18. In re-examination, he clarified that the destroyed crop was mature sugarcane, approximately 20 months old.

19. PW6 was No. 110155 PC Simon Kututi, the Investigating Officer attached to Navakholo. He testified that the complainant, Alfred W. Mungu, reported crop damage. He visited the scene with a police team and observed cut sugarcane and subdivided land on parcel Bunyala/Nambacha/1680. He took photographs and produced them as exhibits [MFI 3a–d], along with a certificate [exhibit 5]. He noted a house and graveyard had been put up by one of the suspects, Winstone. He also obtained documents from the Land Registrar, including a title deed, mutation form, search certificate, and land sale agreement, which were produced in court as exhibits. He referred to a court order [Exhibit 2] issued on 22/10/2021 in Kakamega Misc. E027/2021, consolidated with E031/2021 and E034/2021, permanently injuncting the accused from interfering with the land.

20. On cross-examination by Ms. Akinyi, PW6 confirmed that the complaint was made on 18/5/2021 and arrests occurred about two weeks later. He admitted civil disputes over the land existed and were ongoing. He acknowledged one suspect, a former chief, was not charged and had fled to Uganda. A meeting had been held at the 1st accused's home, but no photos were provided to substantiate this. He referred to a boundary dispute addressed by the Land Registrar, which was resolved after the criminal case had been filed.

21. On cross-examination by Mr. Mukavale, PW6 said the offence was reported on 18/5/2021, and the accused were charged on 9/6/2021. He acknowledged a prior criminal case [2027/2012] where the 9th accused was acquitted. Though civil disputes followed, he lacked final decisions. He agreed the offence under investigation was conspiracy, not forcible detainer. He admitted that the Land Registrar was not involved in the investigation and that the complainant brought the case after a civil suit.

22. On re-examination, he emphasized the offence was criminal trespass and conspiracy. He confirmed the land belonged to the complainant, that damage occurred, and that the accused entered the land forcefully. He also admitted the chief accused had fled to Uganda and had not yet been arrested.

23. The court considered the evidence adduced by the prosecution and found that they had made out a prima facie case against the accused and placed him on his defence.

C. Defence Case

24. Winstone Wakhanu Wafula the 3rd Appellant. He stated that the 4th Accused, was his uncle while the others were his neighbors. He stated that the complainant had bought land from three sellers, and took him to court on allegations that DW2 had forcefully occupied his land, to which he was acquitted. He further states that DW1 referred them to court, and he obtained judgment in his favor vide MCELC E033 of 2021 where PW1 was the defendant. He stated that there was also ELC E027 of 2021 where orders were issued. He told the court that the District Land Surveyor was to resurvey the land due to errors on the map and acreage on the ground. However, this has not been done.

25. In cross examination, he stated that parcel No. 1107 belongs to them whereas parcel No. 1680 belongs to the complainant. He further conceded that they already had land issues by the time the complainant came to the land.

26. In reexamination, he told the court that he went to court since Daniel wanted to exhume the remains of his mother who is buried in parcel No. 1107.

27. Osborn Wakhanu the 2nd appellant, testified that he only assisted in burying the mother of the 9th accused and denied any involvement in the destruction of property. He noted that multiple cases were ongoing concerning the land.

28. Amos Moses Wakhanu the 1st appellant, stated he was unaware of the charges until after his arrest. He denied cutting sugarcane and confirmed the ongoing land disputes made peaceful living difficult. He asserted that parcel No. 1107 was their family land, purchased in 1964.

29. The trial court considered the evidence adduced and found the accused guilty on both counts.

30. In sentencing, the prosecution submitted that the accused persons were first offenders.

31. Mr. Mukavale for the appellants in the lower courts trial, submitted that the appellants were all first-time offenders, mostly elderly or middle-aged, and closely related—uncles and nephews from the same family. The accused persons had attended court diligently since 2021 and had been in custody for a week post-conviction. They pleaded for leniency and a non-custodial sentence, citing confusion over land boundaries and the familial nature of the dispute.

32. The appellants were fined each Ksh. 40,000 per count, and in default, to serve six [6] months imprisonment per count, with sentences to run consecutively. The accused were directed to compensate the complainant for the loss incurred, with liberty for the complainant to pursue the matter through a civil suit.

D. The Appeal

33. The Appellants being dissatisfied by the conviction and sentence filed this petition of Appeal dated 08.07.2024 on the following grounds:

34. That the learned Magistrate erred in law and fact in convicting the appellant when the prosecution had not proved their case beyond reasonable doubt as required by law.

35. That the learned Magistrate failed to adhere to rules governing criminal hearing thus occasioning injustice to the appellant.

36. That the learned Magistrate failed to take into account of the evidence of the defendants.

37. That the court failed to apply the rule of alibi which was raised by the appellant.

38. The appellant prayed that the appeal be allowed and sentence be set aside.

39. On 01.10.2024, The court directed that merits of this Appeal be canvassed by way of written submissions.

Appellant's Case.

40. Vide submissions dated 18th February, 2025, the appellants submitted that none of the two charges were proven beyond reasonable doubt.

41. In respect to the first charge under Section 395[c], the appellant submitted that the essential elements of the offence were not established by the prosecution. Specifically, they argued that the prosecution failed to show that there was an attempt by the complainant to dispose of land parcel number Bunyala/Nambacha/1680. According to the appellant, no evidence was adduced indicating an actual or intended sale, hence no obstruction or prevention of disposition could have occurred. The absence of such evidence he submitted was fatal to the prosecution's case and rendered the conviction on this count unsustainable.

42. On the second charge under Section 334[a] of the Penal Code, the appellant raised several points of challenge. Firstly, he argued that the charge was defective as it was framed under a non-existent provision—Section 334A—whereas the proper section is 334[a]. This mistake he submitted made the charge bad in law.

43. Without prejudice to the above, the appellants submitted that the prosecution had failed to establish the necessary elements of the offence under Section 334[a]. He contended that the prosecution did not prove beyond reasonable doubt that the destroyed crops were cultivated produce belonging to the complainant, or that the accused persons unlawfully and willfully caused their destruction.

44. The appellants pointed to testimony from the complainant himself, who acknowledged that there were pending and unresolved civil disputes concerning the boundaries of the subject land; No clear boundary existed between his land and that of the appellants; Both parties had planted sugarcane on the adjacent parcels and that the appellant had previously been charged with forcible detainer over the same land and were acquitted.

45. The appellants further argued that the lack of a fixed boundary and the existence of overlapping claims created sufficient reasonable doubt as to the actual ownership of the destroyed crops. He asserted that the court ought to have demanded expert testimony from a surveyor to establish the precise location of the disputed crops, particularly given the history of boundary disputes and multiple pending civil suits.

46. In challenging the evidence of identification, the appellants submitted that the prosecution's key witness, PW2, despite allegedly being eyewitness, failed to record the names of the persons he saw committing the offence. This, he argued, undermined the credibility of his identification. He questioned how someone who knew the accused persons could fail to name them in their initial police statement.

47. He also cast doubt on the prosecution's valuation of the destroyed crops, arguing that PW5 gave no clear basis for the estimated value, especially considering different sugar companies offer different

prices. He further submitted that PW5 admitted to not being shown documents proving land ownership, thereby weakening the link between the complainant and the destroyed crop.

48. The appellants averred that the prosecution failed to disclose several material facts, including prior civil and criminal proceedings touching on the same parcel of land. He submitted that this concealment undermined the fairness of the trial and suggested a misuse of the criminal justice process to frustrate ongoing civil litigation.

49. The appellants relied on Section 17 of the Penal Code, and averred that his actions, if any, were justified as a defence of property. He submitted that this defence was not considered at all by the trial court, despite the evidence of boundary disputes and the fact that the complainant himself had lodged but failed in previous forcible detainer proceedings against the appellants.

50. On sentencing, the appellants submitted that the punishment imposed, being six months imprisonment or a fine of KES 40,000/-,plus compensation, was excessive, especially considering that this was a first offence for all the accused. He submitted that compensation without an apportionment among the accused was unjust and contrary to the principle against double jeopardy. They therefore urged this Court to allow the appeal, quash the convictions, set aside the sentences, and order their acquittal.

i. D. Analysis & Determination

51. This being the first appeal, this court is expected to re-evaluate the evidence tendered before the trial court and to come up to its own logical conclusion by taking into account the fact that it did not have the advantage of seeing and hearing the witnesses and their evidence and/or see their demeanor.

52. This court is guided by The Court of Appeal case of Okeno v Republic [1972] EA 32 where it was stated as follows: -

> " i. An appellant is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination 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. It is not the function of the 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 conclusions. Only then can it decide whether the magistrate's findings can be supported. In doing so, it should make an allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses".

53. In the case of Republic v Edward Kirui [2014] eKLR, the Court of Appeal quoted the Supreme Court of India case of Murugan & Another v State by Prosecutor, Tamil Nadu & Another [2008] INSC 1688 where the case of Bhagwan Singh v State of M. P. [2002]4 SCC 85 was cited as follows:-

> " i. The paramount consideration of the court is to ensure that miscarriage of justice is avoided. A miscarriage of justice which may arise from the acquittal of the guilty is no less than from the conviction of an innocent. In a case where the trial court has taken a view of ignoring the admissible evidence, a duty is cast upon the High Court to re-appreciate the evidence on appeal for the purpose of ascertaining as to whether all or any of the accused has committed any offence or not."

54. Clearly, there is an issue that must be addressed before everything else. In this case, the Respondent, who is usually represented by the Office of the Director of Public Prosecution [ODPP], has not filed any submissions. As a result, no one has responded to the appeal. This leads to the question: should the appeal be granted as unopposed and/or conceded? The answer is negative. While the ODPP has clearly abrogated its duty to pursue all criminal cases, which is a serious violation of the constitutional mandate vested upon it, this Court has a fundamental obligation to execute justice. In Odhiambo v Republic [2008] KLR 565, the court stated:

> " The court is not under any obligation to allow an appeal simply because the state is not opposed to the appeal. The court has a duty to ensure it subjects the entire evidence tendered before the trial court to clear and fresh scrutiny and re-assess it and reach its own determination based on evidence."

55. Having considered the lower court proceedings, the grounds of appeal, and the submissions filed, I isolate the following issues for determination:

    i. Whether the prosecution proved its case beyond reasonable doubt.

    ii. Whether the appellants' evidence was sufficiently considered by the trial court.

56. On the first issue, the prosecution failed to adduce evidence to prove the contents of the first charge according to Section 395[c] of the Penal Code. Disposition is defined in Blacks Law Dictionary as 'A deed of alienation by which a right of property is conveyed.' They neither proved that the land in question was to be disposed of nor that the appellants prevented such disposition. Accordingly, the first count fails for lack of sufficient proof.

57. Regarding the second count, the first issue raised by the appellants was that the charge was defective. The charge read "cutting down crops of cultivated produce contrary to section 334A of the Penal Code" instead of Section 334[a]. The question is, is the charge in the second count defective?

58. In Francis Zuriels Moturi v Republic [2022] KEHC 933 [KLR], the Court of Appeal held that:

    'A defective charge is one lacking sufficient detail to enable the accused to know the case against them. Such details include the wrongful act alleged, the date and time of the act, the complainant, and the law violated. The court held that defects in a charge must be manifest on the record and not derived from abstract interpretations, logic, or grammatical analysis. Courts are to adopt a realistic and pragmatic approach, not an abstract one.'

59. I have looked at the charge and being guided by the above authority, I find the defect in the charge sheet was minor and cannot impede the course of justice. I also take notice that the trial magistrate cited the correct section while giving the judgment and therefore the appellants were convicted and sentenced on the appropriate charge.

60. In considering whether the prosecution proved their case on this count beyond reasonable charge. The prosecution presented six witnesses. The first prosecution witness who is the owner of the said land gave his testimony and produced a title deed, a land sale agreement and a certificate of search to show that the land belonged to him. He was not at the scene.

61. Abukaba Khakandi Waziri who testified as PW2 said he was an employee of the complainant and on 18th May 2021 he went to check on the PW1's shamba , he noticed that some wires had been cut. He saw a crows of people , he moved closer the 7th Accused person told him to leave for he risked being cut. He left, he called his boss PW1 and informed him, he told him he had seen 2nd accused and the

other accused persons present. He further told the court that he assisted the complainant to plant the sugarcane.

62. On cross examination he said he knew nothing about the ownership of the land and when he was employed in the year 2016 he found his sugarcane already planted further he did not see the person who cut the wire. In re-examination he said he saw the accused persons destroying the sugarcane while instatement he said he gave only 3 names of the people he saw.

63. The third prosecution witness claimed to have seen the 8th, 3rd and 2nd accused cutting sugarcane and markings boundaries on the land, he also saw 2 surveyors. The fourth prosecution witness testified to seeing all the accused persons and others not before the court marking boundaries on the respondent's land. He was able to recount what each of the accused wore on that day. The fifth prosecution witness who is an agricultural officer testified that indeed the crops had been destroyed and that the destroyed crops amounted to Kenyan Shillings 40, 400.

64. In John Matiko & Another v Republic, Criminal Appeal No. 218 of 2012, the Court held that:

> " A trial court has a duty to weigh the evidence adduced in court by all the parties in totality and make a finding on the culpability or otherwise of the accused. Choosing to analyze the prosecution evidence and leave out that of the accused defense is a fatal mistake. It's a duty bestowed in every court to weigh one set of evidence [prosecution] against another [defense] before arriving at a conclusion. This is the basic calling of every Court without exception."
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> Based on this case, I will endeavor to look at the defense evidence and establish whether it was considered by the trial court.

65. The first appellant Amos Wakhanu, raised an alibi claiming to have in shop the whole day and further that there were several court cases in the respect of the land, which land was bought by his father in the year 1964 .

66. The 2nd appellant Osborn Wakhanu denied committing the offence and alleged that he was framed for assisting Winstone 3rd appellant in burying his mother in the Land Parcel No. 1107 and averred that there are several cases in court over the land.

67. So the 3rd appellant Winstone Wakanu Wafula denied not committing the offence and allegded that the case was a fame up us a result of the land cases in court. Which as a result of disputed in boundaries the acreage of the parcel of land on the map are different from the actual acreage of the ground.

68. I have gone through both the prosecution and the defence evidence. There are several things that the prosecution ought to have proved. First, they should have proved ownership of the land parcel Bunyala/Nambacha/1680. They ought to have also proved that the sugarcane that was destroyed belonged to the complainant and that they were planted by him.

69. In proving ownership of the land parcel Bunyala/Nambacha/1680, the prosecution brought forth a copy of Title deed and a certificate of search that showed that the land belongs to the complainant. Further, in the defence case, DW2, the third appellant Winstone Wakhanu clearly attested to the fact that the complainant is his neighbor and that he bought the land in 2012. On cross examination, the third appellant made it clear that his parcel of land is Bunyala/Nambacha/1107 and gave his title deed in court. He also stated that land parcel Bunyala/Nambacha/1608 belonged to the complainant.

70. The third appellant's position was attested to by DW7, the second appellant, Osborn Wakhanu and DW8, the first appellant, Amos Wakhanu who stated that their land parcel is Bunyala/Nambacha/1107.

71. On what amounts as clear evidence of ownership of land, the court shall rely on the land Act 2012, section 26 which states:

> " The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except
>
> a. on the grounds of fraud or misrepresentation to which the person is proved to be a party; or
>
> b. where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme."

72. It is therefore it is my view that the complainant by virtue of having a tittle deed in his name it is a prima facie evidence that he is the owner of land parcel Bunyala/Nambacha/1680.

73. However there are several cases in court challenging the exact acreage of the land. The prosecution needed to establish whether the destroyed sugarcane was within the confines of the land owned by the complainant for there is evidence that the other farms surrounding that land also has sugarcane and especially that PW2 the caretaker in cross-examination he admitted that he found the sugarcane planted when he was employed thus contradicting his earlier statement that he assisted the complainant in planting the sugarcane and further that the surveyors who were marking the boundaries were not called as witnesses to tell the court the exact area where the sugarcane was planted by the complainant.

74. Further the prosecution needed to prove that the destroyed sugarcane crop was destroyed by appellants willfully and unlawfully.

75. As to whether the destruction was willful and unlawful, according to the Black's Law Dictionary,

'Willful' means proceeding from a conscious motion of the will; intending the result which actually comes to pass; designed; intentional; malicious. It differs essentially from a negligent act. Willful acts are positive and intentional, as opposed to accidental or involuntary acts. The appellants consciously destroyed the sugarcane belonging to the complainant.

76. There is evidence that on the material day and time there were surveyors on the ground putting boundary marks between the parcels of land owned by the complainant and the adjacent parcels of land. There is no evidence to show that the destroyed sugarcane was not part of the sugarcane which was cleared to make way for the markings of the boundaries. The marking of the boundaries was a lawful exercise which was being done by surveyors therefore whoever cut the sugarcane could not be said to have cut them unlawfully.

77. Therefore the prosecution failed to answer the question whether

i. The sugarcane cut actually belonged to the complainant.

ii. Whether the sugarcane was not within the disputed area.

iii. Whether the sugarcane was cut to pave way for placement of boundary markings between the disputed parcels of land especially that the complainant was aware of the exercise.

78. This failure coupled with the defence tendered by the appellants, which defence was considered by the trial court contrary to assertion of the appellants creates doubt in the mind of this court and any slight doubt it always benefits the accused.

79. In Moses Nato Raphael v Republic [2015] eKLR, the Court of Appeal discussed the threshold of proof beyond reasonable doubt. It stated that: "What then amounts to "reasonable doubt" This issue was addressed by Lord Denning in Miller v. Ministry of Pensions, [1947] 2 ALL ER 372 where he stated: 'That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favor which can be dismissed with the sentence of course it is possible, but not in the least probable, the case is proved beyond reasonable doubt, but nothing short of that will suffice."

80. On the issue of evidence of alibi raised by the first appellant, it is the position of this court that When an alibi is raised late in the day and the prosecution has no chance to contest it, the alibi does not automatically stand. In such cases, the trial court must balance the alibi against all of the prosecution evidence. This position was emphasized by the Court of Appeal in Juma Mohamed Ganzi & 2 other v Republic [2005] eKLR as follows:

> " The trial Magistrate considered the case of each appellant separately. She weighed the defence of alibi of each appellant against the weight of the prosecution evidence. This is the correct approach where the defence of alibi is first raised in the appellant's defence and not when he pleaded to the charge"
>
> The most the trial magistrate could have done was to weigh the evidence of the appellants alibi to the case of the prosecution. The trial magistrate therefore did not error in failing to apply the rule of alibi as it was raised later in the case.

81. The burden of proof lies solely with the prosecution to prove the guilt of an accused person beyond reasonable doubt [See Woolmington v DPP [1935] AC 462 and Miller v Minister of Pensions [1947] 2 All ER 372]. This principle is entrenched under Article 50[2][a] of the Constitution, which guarantees the right of every accused person to be presumed innocent until the contrary is proved.

82. In the present case, the prosecution failed to discharge that burden. The trial court misdirected itself in placing reliance on insufficient evidence to sustain a conviction. The conviction, therefore, cannot be allowed to stand.

83. The conviction is squashed.

84. On sentencing, the appellants raised the claim of double jeopardy. It is trite law that the Double Jeopardy rule protects against a second prosecution for the same offence after acquittal, it protects against a second prosecution for the same offence after conviction and it protects against multiple punishments for the same offence.

85. The trial magistrate cannot be held to have erred in making an order for compensation because this is anchored on Section 31 of the Penal Code which provides:

    i. "Any person who is convicted of an offence may be adjudged to make compensation to any person injured by his offence, and the compensation may be either in addition to or in substitution for any other punishment."

86. This provision is usually read together with section 175 of the Criminal Procedure Code which provides for compensation.

87. In the case of Murungi & another v. Republic [2022] KEHC 18126 [KLR], the court stated thus:

    i. "The court has discretion to order compensation in addition to the punishment imposed or may be ordered as a substitution for any other punishment. It was therefore proper for the trial magistrate to order the appellant to pay compensation. Section 31 of the Penal Code must be read together with Section 175 [2] [b] of the Criminal Procedure Code which also deals with the question of compensation in criminal proceedings. It is this court's finding that Section 175 [2] operationalizes Section 31 of the Penal Code and provides the legal principles which should guide trial courts in exercising their discretion while deciding whether or not to order payment of compensation by a convict, in addition to any other punishment."

88. In this case, the trial court imposed a fine of Ksh. 40,000/= for each count with 6 months imprisonment in default for each accused person alongside compensation to the victim for the loss incurred and the victim was at liberty to pursue the same in a civil suit.

89. According to section 175 of the Criminal Procedure Code, where the compensation is ordered, it must be for an amount that the complainant can recover through civil proceedings. However, if the substance of the arguments is complex and would demand a hearing on quantum, the complainant should pursue compensation before a civil court.

90. Having quashed the conviction on both counts the sentence is hereby set aside , the appeal is wholly allowed. The appellants are acquitted under Section 215 of the Criminal procedure Code, they are set free unless lawfully held if they had paid the fine, the fine to be refunded to them.

91. This Judgment to apply to Criminal Appeal No. E075 OF 2024, Criminal Appeal No. E076 of 2024.

92. Right of Appeal 14 days.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT KAKAMEGA THIS 25TH DAY OF JUNE 2025.

S.N MBUNGI

JUDGE

In the presence of:

Court Assistant – Elizabeth Angong'a

Appellants absent.

Mr. Momanyi for the appellants present.

Ms. Osoro for ODPP present.