Case Number:	Criminal Appeal E011 of 2021
Date Delivered:	17 Dec 2021
Case Class:	Criminal
Court:	High Court at Garsen
Case Action:	Judgment
Judge:	Reuben Nyambati Nyakundi
Citation:	Yahya Ahmed Shee v Republic [2021] eKLR
Advocates:	A. M. Omwancha for the appellant Mr. Mwangi for the state
Case Summary:	-
Court Division:	Criminal
History Magistrates:	-
County:	Tana River
Docket Number:	-
History Docket Number:	-
Case Outcome:	Appeal allowed
History County:	-
Representation By Advocates:	Both Parties Represented
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA TA GARSEN

CRIMINAL APPEAL NO. E011 OF 2021

YAHYA AHMED SHEE Alias BASODE.....APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

Coram: Hon. Justice R. Nyakundi

A. M. Omwancha for the appellant

Mr. Mwangi for the state

J U D G M E N T

The appellant was arraigned before **Hon. T. A. Sitati (P.M)** at Lamu facing three (3) counts of Attempting to Rescue Contrary to Section 122(1) (b) of the Penal Code, 2 counts of Assaulting a Police Officer Contrary to Section 103(a) of the National Police Service Act No. 11 of 2011 and one count of Taking Part in a riot contrary to Section 80 as read with Section 36 of the Penal Code.

In count 1, 2 and 3 the appellant denied the charge of attempting to rescue contrary to section 122(1) of the Penal Code. The particulars were that on 2nd June, 2017 at Lamu Law Courts within Mkomani Location of Lamu West Sub-count of Lamu County joinly with others not before court by force attempted to rescue **Zamzam Mohamed Salim, Ali Mzee Ali** and **Inyathman Yusuf Ali alias Tima** who had been lawfully held under the custody of **CPL Kassim**, **PC Patrobas Kibet** and **PC Frederick Machini.**

In county IV and V the appellant denied the offence of assaulting a police officer Contrary to Section 103(a) of the National Police Service Act No. 11A of 2011 which particulars that on 2nd June, 2017 at Lamu Law Courts within Mkomani Location of Lamu West Sub-count of Lamu County jointly with others not before court assaulted **NO. 101457 PC Frederick Machini** and **NO. 108045 PC Musamali Ngecho** police officers who were at the time of the said assault in the due execution of their duties.

In Count VI, the appellant denied having committed the offence of taking part in a riot contrary to Section 80 as read with section 36 of the Penal Code with particulars being that on 2nd June, 2017 at Lamu Law Courts within Mkomani Location of Lamu West Sub-County of Lamu County jointly with other not before court took part in an unlawful riot.

The appellant was found guilty after a full trial in all counts and sentenced to four (4) years each for count 1, 2 and 3 and in count 4 and 5, a jail term of four (4) years each with an option of a fine of Kshs.400,000/= for each count and lastly in count 6, a jail term of 18 months.

The appellant was aggrieved with both the conviction and the sentence elected to appeal to appeal the matter and filed an appeal dated 12th April, 2021 highlighting several critical areas that he invites this Court to delve into so as to set aside the conviction and sentence. The grounds of appeal are couched as follows:

1. That the prosecution failed to lead evidence which prove the appellant's guilty beyond a reasonable doubt.

2. That the charge sheet was fatally defective.

3. That there is no established connection between the rioters and the appellant.

4. That no record, report/or explanation has been tendered concerning the alleged two (2) rioters who were shot by the police during the riot.

5. That there is no evidence on the alleged charge of assault of police officer by the Appellant since none of the assaulted police were put to take the stand or made statement implicating the appellant.

The appellant was represented by **Mr. Omwancha** and **Mr. Korir** and subsequently by **Mr. Njuguna** who are all Advocates of the High Court of Kenya. The DPP's case was prosecuted by **Mr. Erick Mutua** and **Mr. Eddie Kadebe** who are all prosecution Counsels.

FACTS:

PW1, NO.102146 PC Patrobas Kibet testified that on the material date he was at the scene of crime when the incident transpired. It was after he had escorted remandees back to Lamu police station at around 5:00pm when they went back to Lamu law courts to provide additional strength to the other officers who had prisoners destined for Hindi GK Prison and met with commotion at Lamu Police Station. Upon arrival at the court building, the officers found about 40 members of the public. In an attempt to escort out the prisoners, CPL Kassim requestion the members of the public to give way but they refused to abide.

Shortly after that, another group of about 50 civilians showed up at the court area and began to stone officers thereby injuring **PC Machini** on the back. The Civilians also attempted to snatch away the convicts but the officers fired into the air to disperse the crowd and contain the situation. The same worked as it prevented the crown from rescuing the prisoners before the police retreated back into the court building and requested for additional officers from Lamu Police Station. The backup officers arrived and they managed to escort all the convicts back to the prison safely.

Upon cross-examination, **PC Kibet** confirmed that there were many people at the scene on the material day and he did not positively identify the appellant as one of the perpetrators of the alleged offence. **PW2; NO. 101459 PC Frederick Machini's** testimony basically corroborate that of PW1 save for the part he confirms that three of the civilians were shot and injured by the police in the process of dispersing the alleged riot.

PW3; Amos Masha testified he was a security guard at Lamu Law Courts on the material date. He stated that he saw the police pleading with members of the public to let the police escort the remandees back to the prison. When he heard the commotion he immediately locked the court doors. When he was in the corridor walking towards the door of the building he heard loud gunshots. This prevented him from reaching outside. He returned back to the court room and took cover. He then saw remandees being brought back into the courtroom he had taken cover. After about 30 minutes of taking cover with the remandees and prisoners, additional police officers got to the building and secured the situation. Upon Cross-examination, he stated that from his position inside the building he could not see what was taking place outside and therefore he did not identify the appellant herein at the scene.

PW4 Clinical Officer Madi Sheyumbe, of the King ahd Hospital produced the P3 form for **PC Frederick Machini** as P.Ex.1 and P3 form for **Paul Ngecho** as P.Ex. 2. PW4 testified that both patience suffered soft tissue injuries probably caused by stones during an attempt by youths to rescue prisoners. While **PC Machini** was hit at the back, **PC Ngecho** was bruised on the elbow and in both cases the officers suffered actual bodily harm.

PW5 NO. 89080 Constable Leon Ocholla the investigating officer in the matter testified that on the 3rd of June, 2017, he was instructed to investigate this matter. He noted that on the material date, a group of 50 to 60 youth invaded the Lamu Courts building in an attempt to rescue 14 prisoners who were being escorted out of the court building. Amongst the prisoners were three person who had been convicted by the court that day:

1. Zamzam Mohamed who had been charged with, tried and convicted on and sentenced to 20 years imprisonment for trafficking of narcotics.

2. Nyathman Yussuf who had been charged with, tried and convicted on and sentenced to 5 years imprisonment for narcotic offences.

3. Ali Mzee Ali who had been charged with, tried, convicted and sentenced to 10 years imprisonment for trafficking of narcotics.

(PW5) added that he recorded witness statements of various witnesses which in summary stated that the appellant led the rescue attempt in which 2 police officers were stoned by the youths on the one hand and 2 youths got shot and injured by the police on the other hand. **(PW5)** visited the injured civilians at the Lamu Hospital where they were receiving treatment. Bullet lugs were removed from the 2 youths and handed over to **PC Ocholla** by the doctor for production in court as exhibits. He also received the 2 AK-47 riffles that had been used to shoot the 2 youths. He prepared an Exhibit memo form dated 28th June 2017 and forwarded the items used in the shooting incident (rifles, bullets, lugs and magazines) to the ballistics until in Nairobi for analysis. Analysis reports were prepared showing that the 2 rifles had discharged live bullets. Inspector Kitalia recovered a knife with a wooden handle outside the Lamu Law Courts and gave it to **PC Ocholla.** The recovery scene was the same one where the rescue attempt had been made.

The accused person was then arrested and charged as presently while his accomplices remained at large. In support of the case, **PC Ocholla** produced the following exhibits:

(a) P.Ex. 3 an AK-47 rifle with police serial numbers marked "AY1"

(b) P.Ex.4 an AK-47 rifle serial numbers marked "BY1"

(c) P.Ex.5 – an empty magazine marked "BY2"

(d) P.Ex.6- an empty magazine marked as "BY2"

(e) P.Ex.7A & 7B – 24 rounds of ammunition 7.62mm special caliber and 7.67 special caliber rounds of ammunition.

(f) P.Ex.8 – 4 Spent cartridges marked "BW1 – BW4"

(g) P.Ex.9- silver metallic bullet slug/fragment marked "BX"

(h) P.Ex.10- Ballistic Expert report dated 4th July, 2017

(i) P.Ex.11- knife recovered from the crime scene.

He therefore had the suspect arraigned in court and charged with the present offences. Upon cross-examination, **(PW5)** stated that the appellant was present at the scene of crime, from the written statement of **PC Patrobas Kibet**, it was recorded that the appellant was the leader of the group that attacked the police with a view to rescue the three convicted prisoners; in the written statement of **PC Machini,** it was recorded that he also saw the appellant in the group that attacked the police. It was established that the appellant was a principal offender jointly with the other youth, that the appellant had specifically tracked the convicts' with a view to rescue them the police custody; that he did not attempt to disarm any of the officers of their riffles; no video recordings of the incident were taken at the material time and that at the time of the incident, the accused was an aspirant for the position of Member of the County Assembly.

Upon re-examination, **(PW5)** stated that his investigation based on the witnesses' accounts showed that the appellant was the leader of the group that attacked the police while attempting to rescue the convicts. It was added that the appellant was properly a principal offender as a counsellor, aider and abettor of the crime.

PW6 NO.235124 Inspector Alfred Mbalanyi a Ballistics and forensics examiner who examined some of the exhibits herein under the Exhibit Memo From received the following on 30th June, 2017:

(a) 2 AK-49 riffles with police serial numbers.

(b) 47 rounds of ammunition

(c) 2 detachable magazines

(d) 4 spent cartridges

The examination confirmed that each riffle had been used to fire 2 rounds. The examiner also confirmed that the rounds of ammunition were live ones and that the magazines in question belonged to the 2 rifles and fitted perfectly. He also confirmed that the riffles were in good mechanical condition. **(PW6)** then affirmed the correctness of the ballistics report in court and produced it as P.Ex.11 together with the test cartridges that were used in test firing the 2 riffles at the laboratory.

PW7 NO. Paul Musamoni Ngecho of the Mokowe Police Post's evidence is similar to that of **(PW1)** and **(PW2)** save for the part he testified that as the team began to lead out the prisoners and remandees a large crowd of civilians led by an aspiring politician blocked the police officers and the prisoners. The prisoner spoke to the crowd with the rallying call: *"Taqbir! Taqbir!"*, the crowd of 50 to 60 youth responded: *"Allahu Akbar! Allahu Akbar!"*. Further that while the politician led this group, a second group went round and behind the officers while armed with pangas, sticks and stones.

As soon as the politician finished making his rallying call then stones and objects began to fly against the police. **PC Ngecho** was hit on the right elbow with a stone and was temporarily disabled and so he could not fire his gun. His colleagues fired their guns to prevent the rescue of prisoners and to prevent the situation from getting out of control. He took refuge in the court building. Later, a large reinforcement joined the team and ended the chaos before safely escorting all the remandees to Lamu Police Station for processing. **(PW7)** confirmed that the politician was personally known to him at the time of the incident. He clearly saw the accused person leading the youths in an attempt to force the release of the convicted persons from lawful custody.

PW8; 65432 Sergeant Kassim Salim 'testimony was basically similar to that of **(PW7)** save for the part he testified that he asked the members of the public who had the way to clear the way and give his team a safe passage. The crown responded that there could be no problem as he could still lead out the prisoners midway through the crowd. **SGT Kassim** rejected the crowd's suggestion and ordered them to leave. He pushed them away to make way for the team behind. Using physical force, the officers succeeded in clearing the way. Then he went back to call the team to escort out the prisoners from the building.

The team managed to get out of the building and began to make its way onwards. **(PW8)** saw the earlier crowd standing at a distance. The appellant was still with them. No sooner had the police began to make their way onwards then the hostile crowd pounced on the officers. The hostile youths intermixed with the convicts and began snatching them out of the hand of the police. This prompted **(PW8)** to command his officers to separate the convicts from the crowd and retreat into the court building. The police had use great force to succeed in separating the convicts from the intermingled youths.

During this encounter, the appellant directly charged at PW8 and railed against **(PW8's)** command to his officers to separate the convicts from the crowd. The appellant directly questioned **SGT Kassim** as to why he had ordered the youths to be pushed away. At that time, the accused person was a MCA aspirant and held great sway over youths and the people generally.

When the crowd saw that the appellant had started to physically resist the officers' efforts to secure and lead back the convicts into the building, the hostile youths became very agitated. The appellant them on using words *"Taqbir!" Taqbir!"*. PW8 who is a Muslim understood the words *"Taqir! Taqbir!"* as rallying call in God's name. **(PW8)** pointed out that it was it was the appellant's direct confrontation to him that sparked off and triggered the crowd youth into physically tussling for the convicts. The appellant was at a very close position to PW8's.

When the prisoners and convicts saw the appellant and others making efforts to rescue them, the prisoners and remandees became very courageous and began to struggle against the police and to wiggle out of the officers' hands. It was the quick reaction of the police that prevented a prison break as the police fired off their guns and retook the prisoners before leading them back into the building. In the process, two officers were stoned and two youths were shot by the police. The rescuers led by the appellant also showered the police with blinding sand but the officers acted quickly to prevent the situation from deteriorating beyond control. Further that the gunshots dispersed the youths into different directions. The appellant also fled the scene but he was later arrested and brought to court. The officers recorded their respective statements. On cross- examination and re-examination, the witness maintained his position. That marked the end of the prosecution case.

The defence case was anchored on six witnesses.

DW1 Yahya Ahmed Shee alias **Basode** gave a sworn testimony and basically denied all the charges levelled against him. In his

defence, he was an MCA aspirant at the time the incident transpired. On the material day he went to his shop up to 6pm. He received a call around the same time from **Mohamed Yussuf** who informed him that Yussuf's relative had just been convicted and sentenced to a lengthy term by the then magistrate. As a political aspirant he decided to buy food and make arrangements for delivery to the prisoners as it was the Ramadhan month. He then waited for the convicts to pass by the seafront so that he could give them the food but the convicts delayed in passing by. This made him worry about the delay. Shortly afterwards, he saw the **Hon. Njeri Thuku** Magistrate passby. She found him breaking the fast with some youths.

It was Yusuf who informed him of the courthouse. The appellant then dashed to the court house from Hapa Hapa Hotel where Hon. Njeri had bypassed him. On his way to the courthouse, he bumped into 3 elders (names withheld). When he approached KANU area next to the court he heard the shouts of , *"Taqbir! Taqbir!"* This made him to even rush faster. No sooner had he gotten to the crowd then he was kicked to the ground to dodge a bullet aimed at him when the police fired off their guns. The bullets missed him and hit Mohamed Yussuf and **Abdul** while **Abdul** was struck to the head by the bullets, **Mohammed** was grazed on the ribeage.

He averred that he did not know the convicted persons personally and he had no kinship relations with any of them. He added that he not summoned an group to cause mayhem at the court premises. He told the court that prior to the material date, he had no history of attending court sessions as he had no cases in court.

He asserted that the filing of the present matter against him was necessitated by the former County Governor **Issa Timamy** who did not want him to succeed in his quest to becoming an MCA. At the time, he was a youth leader for the TNA party an opposition party and the then serving County Governor **Timamy**, the said governor lost the seat in the elections that followed. He added that he was a strong opponent of Governor **Timamy.**

He averred that after the youths were injured, he personally ferried **Abdul** to the Lamu County Referral Hospital for medical attention. On their way there, Adbul whispered to him that the police were looking for him (the appellant). He told the court that he had no interest in breaking the law to make his own life difficult.

Upon cross-examination, the following evidence emerged. That after the incident, he was elected the MCA for Mkomani Ward, **PC Patrobas Kibet (PW2)** who was a court orderly at the time of the incident was as the date of **PC Patrobas'** testifying in court deployed to the County Assembly where the appellant was the majority leader and later the chief whip. That **Yussuf** called the appellant informing him that Yussuf's sister had been convicted, Governor **Timamy** did not conduct the criminal proceedings and did not participate in the criminal trial, that he did not influence the trial, it was true that he was in the crowd when the first shots rang out, that **Madi Yussuf Mohamed** got struck to the head by a bullet, the said **Madi Yussuf Mohamed** was in the middle with the police, the appellant dropped to the ground to dodge the police bullets.

In re-examination, **PC Kibet** was deployed as a bodyguard to the county assembly speaker and he denied holding the then court process at hostage for political mileage.

DW2 Mohamed Abdul-Qadir testified that on the material date, around 4pm, he was near the Richland officers by the seafront when he took the break from the Ramadhan fast. He recalled hearing loud gunshots from the direction of the court. He also recalled seeing the accused person alone heading towards the court direction. When question by the DPP, **(DW2)** admitted that he did not witness the actual events outside the court buildings.

DW3 Hassan Mohamed Hassan gave an account to **(DW1).** He affirmed that he was the one was sent by **(DW1)** to buy food for the Muslim faithful who were at the HapaHapa Restaurant where the accused person and **(DW2)** used to break the fast with other youths. Shortly afterwards, he saw the said learned magistrate **Njeri** passing by. He then handed over to the appellant the food packages which was to be taken to the convicts at the court premises.

Upon Cross-examination, **(DW2)** admitted not having visited anywhere near the court house hence he did not witness the events that transpired there,

DW4 Mohamed Awadhi Hassan stated that he was with **(DW3)** at the restaurant around 5:30 when the said learned magistrate passed by. He accompanied **(DW3)** to buy the food packages and handed them over to the appellant and the appellant told him that he was taking the food to the convicts. Upon cross examination, **(DW4)** admitted that he did not know the movements of the appellant after he was given the food packages.

DW5 Abdul Latif Abdalla Mohamed testified that on the material date his aunt Nyathumani was convicted and sentenced to 5 years imprisonment. He went to the court house to bit his farewell to her before she could be moved cross the Indian Ocean commence her jail time. He arrived at the court building at 6:18pm. He decided to visit the nearest mosque and pray since it was past 6pm for the evening prayer. After his prayers ended, he stepped out of the mosque near the court. No sooner had he stepped out of the mosque than chaos broke out near the court building. Suddenly, he lost his consciousness and did not know what followed next as he only gained his consciousness and found himself at the King Fahd Hospital undergoing treatment. He learnt that he had been hit on the head. He showed he court a graze mark on his head.

DW6, Mohamed Yusuf Ali testified that on the material date his sister than **Nyathumani Yussuf** had gone to the Lamu Law Courts for the delivery of delivery of judgement in her case. DW6 left his house at 5pm and made his way to the court. On arrival, he found that the magistrate had already risen and left the building. He tried to get close to his convicted sister but was prevented by the police guarding the convicts. After having failed to get close to her, he opted to go to the nearest mosque to pray.

Upon finishing his prayers, he stepped out of the mosque and bumped into a chaotic situation with yelling and shouting renting the air. There were many women outside the court house. He also bumped into the appellant at the scene but before he could utter a single word to the appellant, he heard three loud gunshots making him feel a sharp sting to his pelvis area. Then he lost his consciousness. He stated that he did not recall hearing the appellant shouting, *"Taqbir! Taqbir!"*. He asserted that the appellant attempt to rescue the sister to **(DW6).**

Upon cross-examination, the witness gave the following evidence. He admitted that he was struck on the pelvis by police bullets, Abdul Latif also struck by police bullets to the left side of the head, while outside the court building that material day, he spoke with the accused person about the conviction of his sister, that evening, he did not meet the appellant at any other place other than outside the court house. Further, he denied having participated in the rescue attempt outside the premises, while claiming that the gunshots were from the rear exist away from the line of fire but still got hit he existed the mosque from the rear exit away from the line of fire but still got hit by the bullets which made their way around the mosque which the square shaped.

Submissions.

The appellant submitted through his **Advocate, A. M. Omwancha**. He submitted that the prosecution failed to prove its case against the appellant to the required stand of proof, proof beyond reasonable doubt. That the charges put up under count 1, 2 & 3 for the offence of attempting to rescue contrary to Section 122(1)(b) of the penal code are unsupported, unverified and/or unproven beyond reasonable doubt. **Mr. Omwacha** noted that this case was decided merely on the basis of circumstantial evidence and little caution was exercised to preclude miscarriage of justice. He further argued that the three primary prosecution witness notably; PW-1; PW-2; and PW-3 tendered testimonial evidence that out rightly exonerated the appellant herein.

Learned Counsel, **Mr. Omwancha** argued that the prosecution put forth a biased assumption of associating the appellant with several heinous crimes against security forces within Lamu County committed by the terrorist group namely, Al-Shabaab. He further stated that the allegation is defamatory, derogating and offensive with feeble support to lean on. His view is that the learned trial magistrate erred in law and fact in accepting and admitting the evidence of the arresting officers who arrested the appellant on the gang related crimes in which no other person from the entire crowd was arrested nor charged and therefore failing to clear the question on how the appellant was singled out. Counsel labelled the error miserable as the learned magistrate neglected and or disregard the truthful testimonies of PW-1, PW-2 and PW-3 whose evidence did not clearly implicate the Appellant but vindicated him.

The learned counsel for appellant further lamented that the law in Kenya as entrenched in the Constitution in terms of Article 50(2)(a) that an accused person is presumed innocent until the contrary is proved. He cited the Section 107 of the Evidence Act Cap 80 of the laws of Kenya, which whoever desires any court to give judgement as to any right or liability dependent on the existence of facts which he asserts, must prove those facts exist. Counsel further relied on the case of Appeal stated in **Pius Arap Maina v Republic (2013) eKLR** where it was held that the prosecution must prove its case beyond reasonable doubt and any evidential gaps in the prosecution case raising material doubts, must be in favour of the accused. Learned counsel listed the following particulars of doubt:

1. That the charge sheet is fatally defective.

2. That there is no established connection whatsoever between the rioters and the appellant.

3. That no record, report and/or explanation was tendered concerning the alleged two rioters who were shot by police during the riot.

4. That there is no established connection whatsoever between the rioters and the appellant.

5. That there is no evidence that demonstrates how the appellant used force in the alleged charge of attempting to rescue.

6. That no other person was arrested and charged among the multiple parties in the alleged riot raising questions about the truthfulness of the entire charges,

7. That there is no evidence on the alleged charge of assault of police officer by the appellant since none of the assaulted police were put to take the stand and/or made statement implicating the appellant.

8. That there is no evidence tendered before court by the prosecution with respect to existence of the alleged criminal cases and offences committed by the alleged convicts for the offence of attempted rescue.

9. That the defect of the charge sheet materially affected the entire proceeding during trial.

Mr. Omwancha submitted that the abovementioned issues established several reasons for doubt. It is submitted that the accused is convicted on alleged charges that do not filter through the sieving premises pertaining to burden to burden and standard of proof. Individually and cumulatively, the aforementioned list reveals a wide lacuna that defeats the legal burden of proof. It is unsafe to permit to permit and/or pass the evidence tendered by the prosecution as one beyond reasonable doubt and therefore, he invited the court to allow the appeal and further quash the both conviction and sentence meted out by the learned trial magistrate.

The counsel for the appellant further submitted that the appellant was unjustly made to take plea on a fatally defective charge sheet which was drawn and prepared in manifest contravention of the provisions of Section 134 and 135 of the Criminal Procedure Code, CAP 75 laws of Kenya. He submitted that the trial magistrate erred in law and fact by failing to admit and consider the glaring defects of the charge sheet and dealt on the guilty verdict ought to have been unsustainable since it was pegged on a defective charge sheet contrary to the laid down cardinal provision of law.

On the allegation of attempting to rescue, Counsel submitted that the same is unfounded. Further that there was absolutely no evidence tendered in court by the state counsel to demonstrate the existence of the alleged criminal cases by way of proper citation of the cases except for unverified testimony by **(PW5)** that there were sentences meted out on the three individuals as alleged in court 1, 2, and 3 of the charge sheet. It is counsel's view that it was indeed a gigantic error at law to disregard the fact that the state counsel failed to demonstrate, exhibit and explicitly state, identify, itemize and/or give a citation of the alleged criminal cases in his judgement in order to satisfy the ingredients and requirement of Section 122(1) and (b) of the Penal Code CAP 63 Laws of Kenya under which the Appellant was charged.

Counsel further argued that the charge sheet refers firmly and conclusively to the offence of attempt to rescue under the aforementioned proviso as one where the accused person acts physically and not imaginary. Further that it is needful to appreciate that no evidence was adduced by the prosecution to the effect that the appellant herein was entirely involved in the riot of any other manner as to satisfy the ingredients of the offence.

Mr. Omwancha also submitted on the question of contradictions, discrepancies and inconsistent evidence by led by the prosecution witnesses. It is submitted that the learned trial magistrate erred in Law and fact when he failed to appreciate that the cogency of the testimony of the prosecution witnesses especially PW1, PW2 and PW3 whose evidence did not incriminate the appellant by all means possible. That the prosecution heavily relied on mere hearsay and rumors that the rioters were under incitement by the appellant herein without any scintilla of evidence to that effect.

It is argued by the counsel for the appellant that arresting the appellant 10 days after the incident was unwarranted save for what is called political rivalry that sought to label the appellant as an enemy to the public, a threat to peace and security cumulatively aimed at tainting his name and further destroy his political ambitions. Further that no concrete investigation was conducted that led and pointed out to the appellant's arrest considering the fact that **(PW1), (PW2)** and **(PW3)** stated that they never spotted the appellant among the rioters on that fateful day. It is argued that there is no explanation as to why he was not immediately arrested and that no

single party to the riot was apprehended on the day of riot.

It was therefore argued that the prosecution failed to establish its case against the appellant beyond reasonable doubt. Counsel humbly submitted that in the spirit of justice, the appeal be allowed, the conviction and sentence be set aside.

The learned counsel for respondent submitted that the charge sheet cannot be said to have been defective as the charges levelled against him did not in any way prejudice him and that the appellant understood the charging facing him based on the nature of the cross examination mounted by his defence. It is submitted that there was no duplicity of charges. Basing on the appellant's cross-examination of the prosecution witnesses and his defence, he did not find any difficulty in understanding the numerous counts that he faced.

Furthermore, it is submitted that there were no material contradictions as the contradictions raised by the appellant are minor discrepancies which cannot go to the root of the case. The learned counsel submitted that the appellant's conviction and sentencing is justified as he is a principal offender as contemplated in terms of the Penal Code, Evidence and several authorities cited, which I have all considered. It is submitted that the prosecution proved its case against the appellant beyond reasonable doubt. On sentencing, the Respondent submits that the trial court sentence was justified and squarely within the bounce of the discretion of the court.

Determination

The Court of Appeal in **Okeno v R {1972} EA 32 and Kiilu & Another v R {2005} 1KLR 174,** held that:

"The duty of the first appellate court is to re-examine, rehear, scrutinize and evaluate the evidence on record by the trial court in order to draw its own conclusions and findings. In doing so it has only to bear in mind that the trial court had the advantage to observe the demeanor and credibility of witnesses."

In this appeal, I have considered the submissions of both counsel and the cited authorities for and against the appeal. It now my task to re-evaluate the evidence with a view to come up with my own findings on the issues raised by the appellant.

Identification of the Perpetrator

At the heart of this matter is the question as to whether the prosecution tendered cogent and credible evidence in respect of the identification of the appellant as the perpetrator of the offences he is charged with herein. The same point shall deal with the issue of contradictions, discrepancies and inconsistent evidence as raised by the appellant. This issue is important because it affects each and every count that the appellant was charged with herein since all the charges against the appellant stem from the same factual background. In particular, **(PW1)** and **(PW2)** are both police officers who were actively involved in the incident that transpired on the material day. They gave the exact same account of the sequence of events which transpired on the material date. Both witnesses averred that they did not see the appellant among the rioters on the material date.

The evidence of **(PW1)** and **(PW2)** is fundamentally contradicted by the evidence of **(PW7)** and **(PW8)** who are also police officers who were actively involved in the incident. Both witnesses were candid that the appellant was not only present at the scene but he was the leader of the rioters. In addition, **(PW8)** alluded to the fact that he had a direct confrontation with the appellant who question him as to why he had ordered the youths to be pushed away. He further lamented that it was the appellant's direct confrontation that sparked off and triggered the crowd youth into physically tussling with the police with a view to snatch the convicts.

Mr. Omwancha argued that the arrest of the appellant ten (10) days after the incident supports the narrative that his arrest was politically motivated and that it is aimed tainting his name in a view to destroy his political ambitions. In opposition to the appellant's view, the Counsel for the state submitted that despite the prosecution having called a total of eight witnesses in support of its case, the appellant is attempting to mislead the court by picking out statements from selected prosecution witnesses and considered them in total isolation and disregard to the rest of the statements made by other prosecution witnesses.

The law on identification is now well settled as stated by the Court of Appeal in the cases of **Wamunga v R CR Appeal No. 20 of 1982, Stephen Ndungu v R CR Appeal No. 147 of 2005.** The degree of reliance that could be placed on her evidence quite

properly must meet the threshold and guidance outlined in **R v Turnbull {1976} 3 ALL ER 549** where **Lord Widgery C.J** held:

"First, whenever, the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused which the defence alleges to be mistaken, the Judge should the jury of the special need for caution before convicting the accused in reliance to the correctness of the identification or identifications. In addition, he should instruct them as the reason for the need for such a warning and should make some reference to the possibility that a mistaken witness can be a convincing one and that a number of such witnesses can all be mistaken. Secondly, the Judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have the accused under observation" At what distance" In what right" Was the observation impeded in any way, as for example by passing traffic or a press of people" Had the witness ever seen the accused before" How often" If only occasionally, had any special reason for remembering the accused" How long elapsed between original observation and the subsequent identification to the police. Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and the actual appearance."

The same court in **Maitanyi v R {1986} KLR 198** held:

"The strange fact is that many witnesses do not properly identify another person even in daylight. It is at least essential to ascertain the nature of the light available. What sort of light, its size and its position relative to the suspect, are all important matters helping to test the evidence with the greatest care. It is not a careful test if none of these matters are unknown because they were not inquired into."

In light of the foregoing principles, I shall subject the evidence of **(PW1)** and **(PW2)** against that of **(PW7)** and **(PW8)** to a fresh scrutiny and evaluation to establish the cogency and credibility of their evidence in consonant with the principles in **Wamunga (Supra), Matainyi (supra) and Turnbull Case (Supra)** case.

In my view, in respect of the question of identification, the contradicting testimonies of **(PW1)** and **(PW2)** vis-à-vis that of **(PW7)** and **(PW8)** are crucial as the testimonies of the former removes the appellant from the scene of crime and the later places the appellant at the scene of crime on the material date. The incident was alleged to have transpired in brought day light. All the four witnesses whose testimony is in question were present at the crime scene from the beginning to the end of the incident. **(PW8)** stated with utmost certainty that he had a confrontation with appellant at the crime scene, which confrontation escaped the eyes of **(PW1)** and **(PW2)** despite having been present at the scene and actively involved together with **(PW7)** and **(PW8)** at the same time.

This is regardless of the fact that the offence was allegedly committed in broad daylight and the conditions which prevailed at the scene of crime when the four witnesses whose testimonies on identification of the appellant are in disparity, were the same.

Furthermore, no evidence was tendered by the prosecution seeking to illustrate the positions upon which the four officers whose evidence is in question were standing in during the incident. It is not for the court to assume for instance that **(PW1)** and **(PW2)** who testified that they did not identify the appellant were at the rear of the scene or were hindered by something unknown and **(PW7)** and **(PW8)** were at the front hence they were able to identify the appellant. It is rather the duty of the prosecution counsel to clear the doubt emanating from such contradiction. To add, this stems from the duty charged with the prosecution counsel to tender credible and sufficient evidence which support the guilt of the accused or appellant beyond a reasonable doubt.

In the same vein I am also inclined to comment of the evidence of **(PW8)** who alluded to the allegation that the appellant was the ring leader of the marauding youths and that he played the role of convening them to the court premises for the common purpose of causing the havoc that result in the present charges. **(PW8)** was the claimed that he was the officer in command at the court premises on the material day. He arrived at the court premises in the morning and did not leave until the incident was completely suppressed in the evening. In that respect, he couldn't have seen the appellant playing the lead role of convening the youths and bringing them to the court premises. It is a moot point which ought to have been brought to clarity. **(PW8's)** on this score is nothing but speculation. Without any ounce of independent corroborative evidence to support **(PW8's)** allegation, this piece of evidence is not anything to go by.

No identification parade was conducted. To me, it is therefore apparent that the evidence on identification of the appellant was indeed problematic for the reasons stated hereinabove. The findings of the learned magistrate were therefore erroneous and the attached weight to convict the appellant unsustainable.

Attempting to Rescue.

In count one, two and three, the appellant was charged with the offence of attempting to rescue contrary to Section 122(1) (b) of the Penal Code. The provisions of Section 122(1) provides as follows:

"122. Rescue

(1) Any person who by force rescues or attempts to rescue from lawful custody any other person—

(a) is, if the last-named person is under sentence of death or imprisonment for life, or charged with an offence punishable with death or imprisonment for life, guilty of a felony and is liable to imprisonment for life; and

(b) is, if the other person is imprisoned on a charge or under sentence for any offence other than those specified above, guilty of a felony and is liable to imprisonment for seven years; and

c) is, in any other case, guilty of a misdemeanour.

(2) If the person rescued is in the custody of a private person, the offender must have notice of the fact that the person rescued is in such custody."

The **9th Edition of the Black's Law Dictionary** defines ***'rescue'*** as follows:

"1. The act or an instance of saving or freeing someone from danger or captivity.

2. The forcible and unlawful freeing of someone from arrest or imprisonment. A rescue signifies a forcible setting at liberty against law, of a person duly arrested. It is necessary that the rescuer should have knowledge that the person whom he sets has been apprehended for a criminal offence, if he be in the custody of a private person; but he be under the care of an officer, then he is to take notice of it at his peril."

The definition of the term ***"attempt"*** is encapsulated in terms of Section 388 and 38i of the Penal Code in the following terms:

388. Attempt defined

(1) When a person, intending to commit an offence, begins to put his intention into execution by means adapted to its fulfillment, and manifests his intention by some overt act, but does not fulfill his intention to such an extent as to commit the offence, he is deemed to attempt to commit the offence.

(2) It is immaterial, except so far as regards punishment, whether the offender does all that is necessary on his part for completing the commission of the offence, or whether the complete fulfillment of his intention is prevented by circumstances independent of his will, or whether he desists of his own motion from the further prosecution of his intention.

(3) It is immaterial that by reason of circumstances not known to the offender it is impossible in fact to commit the offence.

The question to ponder, therefore, is whether the prosecution proved the offence of attempting to rescue against the accused to the required standard of proof in criminal matters, to wit, proof beyond reasonable doubt. The evidence as adduced by prosecution witnesses suggest that there was a surging group of youths who made efforts to snatch away the 3 convicts who were under the care of several police officers. It was averred by the prosecution that there were over 60 youths who physically intermingled with the security team and attempted to pull away the prisoners. Particularly, **(PW8)** stated that he shouted orders to his officers to retreat into the court building to foil the rescue attempt. According to **(PW8),** it was the appellant who shouted at him to let go of the convicts.

It was also averred that it took the use of maximum force and firearms to neutralize the attempt by the group youth to rescue the

convicts. This resulted in the shooting of two civilians who later came to court as **(DW5)** and **(DW6).** In his testimony, the appellant does not deny having been at the scene of the crime and he admitted having escaped being shot by a whisker by ducking to the ground as he was in direct line of fire of the police shots.

The evidence of **(PW1)** and **(PW2)** was that they both did not see the appellant participate in the incident. Their position or physical location at the scene during the incident was not ascertained. Thus whether they were in the vanguard or was he in the rear-guard. The learned trial magistrate in his analysis of the piece of evidence attempted to cure the gap left out by the prosecution witnesses regarding their positions at the crime scene. It is not for the court to make assumptions or adverse inferences which favor one party and the expense of the opposing party. The onus of proving the guilt of the appellant completely resides with the prosecution. It was therefore incumbent upon the prosecution to clear that gap by way of clarifying how some witnesses failed to see the appellant partaking in the attempt to rescue and other witness managed to see him. The identification of the appellant happened under similar conditions for all the witnesses and in broad day light.

Furthermore, another point which discounts the prosecution evidence is that there is no single witness that pinpointed the steps taken by the appellant in which shows the appellant's intention to rescue prisoners from police custody. The prosecution also led evidence which names several persons who are believed to be the convicts that the group of youth that caused havoc intended to set at liberty but however there is nothing before me which shows that the named person are actually convicts. To prove the claim that the alleged convicts were actually convicts, the prosecution could have simply furnish the trial court with the judgements in which they were convicted and convicted of which offences. That is particularly important since the same determines the sentence of the appellant upon conviction.

In light of the foregoing reasons, I find the prosecution to have failed to provide sufficient evidence to prove the guilt of the appellant beyond reasonable doubt.

Riot Charges

The second issue to ponder is whether the prosecution proved the allegation that the appellant participated in a riot beyond reasonable doubt. The **9th Edition of the Black's Law Dictionary, page 1441** defines "riot" as:

"an assemblage of three or more persons in a public place taking concerted action in a turbulent and disorderly manner for a common purpose."

In terms of the penal code, the term riot is defined as follows:

78. Definition of unlawful assembly and riot

(1) When three or more persons assemble with intent to commit an offence, or, being assembled with intent to carry out some common purpose, conduct themselves in such a manner as to cause persons in the neighbourhood reasonably to fear that the persons so assembled will commit a breach of the peace, or will by such assembly needlessly and without any reasonable occasion provoke other persons to commit a breach of the peace, they are an unlawful assembly.

(2) It is immaterial that the original assembling was lawful if, being assembled, they conduct themselves with a common purpose in such a manner as aforesaid.

(3) When an unlawful assembly has begun to execute the purpose for which it assembled by a breach of the peace and to the terror of the public, the assembly is called a riot, and the persons assembled are said to be riotously assembled.

The punishment of riot is encapsulated in terms of Section 80 of the Penal Code, Cap 63. That provision states as under:

80. Punishment of riot

Any person who takes part in a riot is guilty of a misdemeanor.

The evidence of record suggest that there were over 60 youths for the common purpose of rescuing three convicted drug traffickers. The appellant's defence was that he arrived at the scene after the police had already dispersed the group of youths. PW8's testimony was that he made efforts to tell the youths to disperse peacefully but they refused to disperse. Despite this vivid account by the prosecution witness that there were approximately more than 60 youths at the scene of crime, the appellant was the only person who was apprehended in connection of the offence of having participated in a riot.

The definition of riot in terms of Section 78 of the Penal Code requires that the rioters be three or more with intent to carry out a common purpose. Even after the investigations were conducted and completed, no other rioters were brought to book and charged in respect of the present charges. The appellant alone, in the absence of his alleged accomplices, cannot therefore be able to sustain a conviction and sentence in respect of the offence of having participated in a riot. It points to poor investigations by the investigating officer herein.

Unlawful Assault on Police Officers.

The third issue to ponder is whether the prosecution proved the assaulting police officers in the due execution of their duties. Section 103(a) of the law as follows:

"103. Assault in the execution of duty

Any person who-

(a) Assaults, resist or willfully obstructs a police officer in the due execution of the police officer's duties;

(b) …...

(c) ……

……commits an offence and shall be liable to a fine not exceeding 1 million shillings or to imprisonment for a term not exceeding ten years to both."

There is no direct evidence that the appellant participated in the hurling of stones towards police officers. **PC Machini** and **PC Ngecho** were assaulted by the stones which were hurled by the said group of youths. There is no evidence that the appellant was heard or seen ordering or counselling the group of youths to throw stones at the police officers. With the identification and participation of the appellant in the alleged riot already in question, the charge on assaulting police officers cannot be founded. Neither can the cognate offence of unlawful resistance to the police in due execution of their duties suffice. There is no explanation by the investigating officer as to why the other alleged perpetrators were not apprehended but the appellant alone.

Duplicity of the Charges.

Mr. Omwancha in his submission behalf of the appellant stated that the charge sheet was fatally defective. The prosecution is of the view that there are six counts of specific offences each with particulars describing the alleged contravention of the law. Further that none of the counts as drafted contain more than one offence as to make it difficult for the appellant to understand the nature of the charges that he was facing. In **P. Kiage** now (Judge of Appeal) Essentials of Criminal Procedure by Law Africa Publishing Limited at page 78 duplicity of a charge has been described as follows:

"Any count that charges within it more than one specific offence is said to be bad for *duplicity.* It is also said to be *duplex*. It is a fundamental mistake and not normally curable. See Kasyoka v Republic [2003]KLR 406.The reason for this is that when a charge is duplex and an accused person goes through a trial, the fairness of the process is fundamentally compromised as it is not clear to him what the exact charges that confront him are. As a result, he may not be able to prepare a proper defence and this is clearly prejudicial and may amount to a failure of justice."

In light of the above description of the meaning of a duplex charge, the charged framed against the appellant cannot be said to be duplex as each count carried one offence. However, I am of the view that the charge sheet against the appellant was not duplex but

overloaded in the sense that that it had multifarious counts against the appellant involving different aspects of the criminal law. As was stressed in the case of **John Kamau Kinyanjui v Republic [2004] 2KLR 364,** the test to be applied to determine whether a charge is overloaded is whether or not the counts preferred against the accused person prejudice or embarrass him in the presentation of his defence by their sheer numerosity.

The view of this court is that the appellant was prejudiced by the multiple charges since the particulars, of offence of all the six charges were the same. One wonders how one person assaults a police officer, participates in a riot and attempts to rescue prisoners all at the same time with the particulars of offence remaining the same. Further, it is inconceivable that the appellant could plead guilty to some of the counts and not guilty to other counts since the same facts support all the counts. In my view, the sheer multiplicity of the charges prejudiced his presentation of his presentation of his plea and defence.

A glance at the counts preferred against the appellant, logic gives the impression that the intention of the police was to make sure that the appellant goes to jail in one way or another, for reasons only known to them. And this was to be achieved by charging the appellant with every offence in the book while the ideal scenario would have been to charge him with or two counts. The enthusiasm with which the police presented the charges can be attributed to the fact that they were heavily involved in the matter and some of their own were complainants. The enthusiasm has however had the bounced back and unpleasant effect of watering down the entire case.

In the case of **Peter Ochieng vs Republic (1985) KLR 562**, it was held:

"It is undesirable to charge an accused person with so many counts in one charge sheet as this may occasion prejudice. It is proper for a court to put the prosecution to its election at the inception of the trial as to the counts upon which it wishes to proceed."

For the above reasons, I hereby allow the above appeal by the appellant and quash the conviction and the sentence of the trial court. Having found that the appellant was prejudiced by the multiple counts/charges arising out of the same facts. The appellant is hereby set free unless he is otherwise lawfully held.

Orders Accordingly.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 17TH DAY OF DECEMBER, 2021

.....

R. NYAKUNDI

JUDGE

In the presence of

1. ……...

2. ……