Wamukoya & another v Republic (Criminal Appeal 152 of 2020)
[2025] KECA 1896 (KLR) (7 November 2025) (Judgment)

Neutral citation: [2025] KECA 1896 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 152 OF 2020

MSA MAKHANDIA, HA OMONDI & LK KIMARU, JJA

NOVEMBER 7, 2025

BETWEEN

ISSA ABDALLAH WAMUKOYA ..... 1ST APPELLANT

HAMSA ANANGWE MAKOKHA ..... 2ND APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an Appeal from the Judgment of the High Court of Kenya at Kakamega, (Sitati, J.) dated and delivered on 29{{^th}} November, 2019 and Ruling by W. Musyoka J, dated 20{{^th}} December, 2019 in HCCRC No. 31 of 2014)

JUDGMENT

1. This is a first appeal against the judgment of the High Court of Kenya at Kakamega by which it convicted Issa Abdallah Wamukoya and Hamsa Anangwe Makokha, hereinafter referred to as "the 1st and 2nd appellants" respectively on the information charging them with murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars being that on the 21st day of June, 2014, at Ejinja village, within Koyonzo sub-location, Matungu sub-county of Kakamega County, the appellants jointly murdered Ismael Watoto Wamukoya, hereinafter referred to as "the deceased".

2. The undisputed facts leading to this appeal were anchored on the testimonies of six prosecution witnesses. The prosecution's principal witness, Fauzia Anita Abdalla, PW1, the deceased's wife, testified that on the material day at around 7:30 p.m., she was inside her house with her grandchildren when she heard the 1st appellant outside ordering her "open, I want to kill your husband". She opened and upon seeing the appellants, she was alarmed and retreated back into the house and locked the door. Whilst in the house, she heard 1st appellant retreat towards his house while threatening that "I will kill somebody today". After sometime, the appellants returned and asked her whether the deceased had come home and when she answered he had not, they ordered her to call him on his mobile phone

but she declined and they once again left. Sometimes later they came back a third time and whilst at her house, the deceased arrived and asked them why they wanted to kill him. In no time, she heard a confrontation followed by 1st appellant declaring, "I am cutting you." Though she remained inside the house, she heard the sounds of a violent attack and later when she opened the door, she found her husband lying outside with multiple deep cuts on his head, hands, and back. She fled with the children to a neighbour's house screaming and thereafter proceeded to Matungu police station where she reported the incident.

3. Sgt David Gari, PW3, a police officer at the police station received the report and proceeded to the scene with other police officers. They found the deceased lying in a pool of blood and rushed him to St Mary's Mission Hospital, Mumias where he was pronounced dead on arrival. PW3 returned to the scene and arrested both appellants from their respective houses. Upon search of their houses a blood-stained panga and axe were recovered from the house of the 1st appellant but nothing was recovered from the house of the 2nd appellant. PW4, Cpl Moses Wanyama Wafula corroborated this account, stating that he accompanied PW1 and PW3 to the scene of crime and found the deceased critically injured. Later that night, PW1 reported that she had also been threatened by the 1st appellant, prompting the officers to return and arrest both appellants. Upon searching the 1st appellant's house, a blood-stained panga and axe were recovered therefrom.

4. Dr. Nyumbile Boniface Ndalu, PW5, conducted the postmortem on the body of the deceased after it was identified to him by PW2, Rehema Were Okumu. He opined that the cause of death was multiple organ failure resulting from the injuries which were consistent with an attack using a sharp object such as a panga.

5. PC Richard Tum, PW6, and the investigating officer of the case, interrogated the appellants who had already been arrested as aforesaid. He also recorded witness statements and facilitated the postmortem. He confirmed that the weapons recovered from the 1st appellant's house were blood-stained but admitted that no forensic analysis was undertaken. He also confirmed that no identification parade in respect of the appellants was conducted. He thereafter preferred the information against the appellants.

6. Put on their defences, the appellants elected to give sworn statements in which they merely detailed how they were arrested and ended up denying their involvement in the death of the deceased.

7. In its judgment the trial court found that the prosecution had proved its case against the appellants. That the evidence and in particular that of PW1 was credible as regards voice identification of the appellants and the recovery of blood-stained weapons in the 1st appellant's house. The court also concluded that the appellants acted in concert with a common intention to kill. In the end it convicted both of them of the offence. Upon the conviction, it sentenced each one of them to 35 years of imprisonment.

8. This appeal challenges both that conviction and sentence. Through their supplementary memorandum of appeal, they all appeal on the grounds that the trial court erred in law by: convicting and sentencing them on a defective information; relying on circumstantial evidence based solely on voice identification by a single witness; finding that the appellants acted with common intention in committing the offence; relying on exhibits that were not properly secured against possible interference; and by failing to find that the prosecution had not proved its case against the appellants to the requisite legal standard.

9. The appeal was heard solely by way of written submissions. When called out, the appellants were represented by Ms. Owiti, learned counsel, whereas Ms. Busienei, learned Assistant Director of Public Prosecutions appeared for the respondent.

10. Counsel for the appellants submitted that the trial court convicted the appellants on a defective information. That the information was incurably defective, as it omitted the phrase "jointly charged," thereby failing to properly frame the particulars of the offence. Counsel relied on the case of Jason Akumu Yongo v Republic [1983] eKLR, where the court held that a charge is defective if it misdescribes the alleged offence or fails to align with the evidence adduced. The appellant further cited the case of Isaac Omambia v Republic [1995] eKLR, to reinforce the point that particulars form an integral part of a valid charge sheet under Section 134 of the Criminal Procedure Code.

11. Counsel went on to submit that the trial court considered unreliable circumstantial evidence, and uncorroborated voice identification all of which failed to meet the threshold in convicting the appellants. Counsel challenged the reliance on voice identification by a single witness (PW1), arguing that the conditions were not conducive for such recognition. He cited the case of Samuel Awiti Karani v Republic [1985] KECA 44 (KLR), where the court held that identification by voice must be considered with caution, ensuring the witness was familiar with the voice and that the circumstances allowed for accurate recognition.

12. Similarly, in the case of Mbelle v Republic [1984] KLR 626, the court held that the voice must be clearly attributed to the accused, and the words spoken must be sufficient to support positive identification. In this case, PW1 failed to attribute any specific words to the 2nd appellant, and no voice identification parade was conducted to verify the voice recognition. Counsel also submitted that the prosecution failed to recover any murder weapon from the 2nd appellant's house, and no forensic analysis was conducted on the alleged exhibits that were recovered from the 1st appellant's house. In the absence of a signed inventory and lack of forensic analysis of the recovered exhibits, counsel maintained rendered the evidence regarding the exhibits unreliable.

13. Further, counsel contended that the prosecution failed to call a crucial witness, Farajani, who was allegedly present during the incident. PW1's testimony acknowledged Farajani's presence, yet his absence from the witness stand deprived the court of potentially exculpatory or corroborative evidence in favour of the appellants. Moreover, PW1 was uncertain whether it was the 1st appellant or Farajani who inflicted the fatal injuries, thereby undermining the reliability of her account.

14. On motive, the appellant submitted that no clear motive was established against the 2nd appellant. PW1's testimony only referenced a grudge between the deceased and the 1st appellant over tree sales, and did not implicate the 2nd appellant in the dispute.

15. Counsel therefore challenged the trial court's application of the doctrine of common intention under Section 21 of the Penal Code. He cited the cases of Dickson Mwangi Munene & Another v Republic [2014] eKLR and Solomon Mungai v Republic [1965] EA 363, where the courts held that common intention must be established through evidence of a shared unlawful purpose and coordinated conduct. That in this case, no such evidence was presented.

16. Finally, counsel submitted that the prosecution failed to discharge its burden of proof as required in criminal trials. Counsel reverted to the principles set out in the case of Miller v Minister of Pensions [1947] 2 AII ER 372, in emphasizing that the prosecution must but did not prove: the death of the deceased and its cause; that the death resulted from an unlawful act or omission by the appellants; and lastly that the act or omission causing the death was intentional with knowledge that death or grievous harm would result. In light of the foregoing, counsel prayed that the appeal be allowed in its entirety.

17. The appeal was opposed by the respondent's counsel. She outlined the factual background of the case, and submitted that the prosecution had established all elements of the offence of murder: That the death of the deceased and its cause was not in dispute. That PW1, PW3 and PW4 found him

bleeding outside his house. Subsequently both PW3 and PW4 took him to hospital, where he was pronounced dead upon arrival. PW5, the pathologist, conducted a postmortem and documented multiple deep cut wounds on the thigh, chest, hand, and head, including a comminuted skull fracture and brain laceration. He concluded that the cause of death was multiple organ failure and produced the postmortem report to that effect in court.

18. On identification, counsel relied on the evidence of PW1, who recognized the appellants by voice. PW1 lived in the same compound as the appellants, heard the 1st appellant threaten to kill someone and later heard both appellants outside her house asking about the deceased. Upon the deceased's arrival, PW1 heard a scuffle and the 1st appellant declare, "I am cutting you," followed by sounds of a panga striking something. She opened the door and saw the deceased bleeding profusely. The appellants had by them fled the scene. Counsel submitted that PW1's familiarity with the appellants and her clear recollection of their voices supported reliable identification by voice.

19. Counsel further submitted that a blood-stained panga and axe were recovered from the 1st appellant's house. Although PW6 did not subject the items to forensic analysis, PW5 confirmed that the injuries were inflicted with a sharp object such as a panga. Counsel argued that the recovery of these items, coupled with PW1's testimony supported the prosecution's case regarding the involvement of the appellants in the death of the deceased.

20. As to motive, counsel pointed to PW1's account of existence of a grudge between the 1st appellant and the deceased over the sale of life trees. Apparently, customers preferred to buy such tress from the deceased as opposed to theirs. The appellants' repeated threats and coordinated conduct demonstrated a shared intention to harm the deceased. Counsel cited the cases of Dickson Mwangi Munene & Another v Republic [2014] eKLR and Solomon Mungai v Republic [1965] EA 363, to posit that common intention may be inferred from the conduct and circumstances surrounding the commission of the offence and that in this case, the appellants were acting in concert given the many trips they made together to the deceased's house on the material day looking for him.

21. On malice aforethought, counsel argued that it was established by the nature and severity of the injuries suffered by the deceased at the hands of the appellants, the repeated threats to kill someone by the appellants, targeting the deceased's vulnerable part of the body indicated intent to cause death or grievous harm. Counsel cited the case of Ali Salim Bahati & Another v Republic [2019] eKLR, where the court held that a vicious attack with a sharp object was indicative of intent to kill and was sufficient to establish malice aforethought. She further submitted that the appellants made their intentions known, repeatedly stating that they would kill someone that evening, and that the phrase "I am cutting you" confirmed their intent to attack and kill the deceased.

22. On the alleged defective information, counsel submitted that the omission of the phrase "jointly charged" did not render it fatally defective. Indeed, the trial court extensively addressed the issue in its judgment, and eventually found that the omission had not occasioned any failure of justice, particularly as the appellants were represented by counsel throughout the trial and understood the nature of the information facing them. Concluding her submissions, counsel urged the Court to dismiss the appeal in its entirety.

23. This is a first appeal. As such, we are duty-bound to re-evaluate, re-analyze, and re-consider the evidence adduced before the trial court and draw our own conclusions, while bearing in mind that the trial court had the distinct advantage of seeing and hearing the witnesses and we should make allowance for that. See the case of Okeno v Republic [1972] EA 32.

24. Guided by this mandate, we now turn to the issues for determination, in this appeal which are fourfold. First, whether the trial court erred in convicting the appellants on the basis of a defective information.

Second, whether the trial court erred in relying on uncorroborated circumstantial evidence of voice identification by a single witness. Third, whether the trial court erred in finding that the appellants jointly committed the offence and acted with common intention. Fourth and finally, whether the prosecution proved its case against the appellants beyond reasonable doubt.

25. On the first issue, the law governing the framing of charges and or information is found in Section 134 of the Criminal Procedure Code, which requires that every charge or information state the specific offence the accused is charged with, along with any necessary particulars to give reasonable information about the nature of that offence. The purpose is to inform the accused about the charge against him so that he can prepare his defence and understand the allegations clearly. The appellants argued that the omission of the phrase "jointly charged" in the information rendered it incurably defective. In the case of Jason Akumu Yongo v Republic (supra), the court held that a charge is defective under Section 214(1) of the Criminal Procedure Code, if it misdescribes the alleged offence or fails to align with the evidence adduced. Similarly, in the case of Isaac Omambia v Republic (supra) the court emphasized that particulars form an integral part of a valid charge or information.

26. From the record however, we must point out that this issue was raised suo moto by the trial court itself. It was not an issue raised by any of the parties and canvassed before it nor had it been framed by the trial court as one of the issues for its determination. In fact, it comes at the tail end of its judgment. It was therefore in the nature of obiter dictum and no party should hog on it. Be that as it may, the trial court addressed this omission extensively and found that it did not occasion any miscarriage of justice, particularly as the appellants were represented by counsel throughout the trial. There was no misdescription of the information nor was the evidence led by the prosecution in support of the information at variance. The omission to our mind has more to do with form rather than substance. We also note that, neither the appellants nor their counsel ever raised any objection on the competence or otherwise of the information. We are therefore satisfied just like the trial court that no prejudice was occasioned to the appellants. In any event, the omission is curable under Section 382 of the Criminal Procedure Code.

27. On identification by voice, the law has been settled in the cases of Mbelle v Republic (supra) and Samuel Awiti Karani v Republic (supra). The Court of Appeal in the former case held:

> " In dealing with evidence of identification by voice, the court should ensure that: (a) the voice was that of the accused; (b) the witness was familiar with the voice and recognized it; (c) the conditions obtaining at the time it was made were such that there was no mistake in testifying to what was said and who had said it."

28. PW1 testified that she recognized the appellants by voice, having lived with them in the same compound for long and being familiar with their speech. After all they were deceased's nephews. She heard them declare on three occasions their intention to kill someone that night. And when they effected the act, she had the 1st appellant utter "I am cutting you," followed by sounds of a violent attack. Although she did not attribute any specific words to the 2nd appellant, her testimony placed both appellants at the scene shortly before, during and after the attack. While voice identification by a single witness must be treated with caution, the trial court warned itself of this danger but nonetheless found her evidence credible. We concur with that assessment.

29. The doctrine of common intention is codified under Section 21 of the Penal Code. It holds individuals responsible for a criminal act if they shared a prior understanding or agreement to commit it, or if a common intention developed during the course of the event. The liability extends to anyone who participates in or facilitates the act, even if they don't carry out the physical act themselves, provided their involvement was part of the shared plan. The intention is often inferred from the circumstances

surrounding the crime, such as pre-concert, pre-arrangement, or consistent behaviour among the parties involved.

30. In the case of Dickson Mwangi Munene & Another v Republic [2014] eKLR, the court held that common intention may be inferred from the conduct of the accused and the circumstances of the offence. The predecessor of this Court in in the case of Solomon Mungai v Republic [1965] EA 363 stated:

> "In order for this section to apply, it must be shown that the accused had shared with the other perpetrators of the crime a common intention to pursue a specific unlawful purpose which led to the commission of the offence."

31. In the present case, both appellants were seen together at the deceased's house, issued threats, and returned together shortly before the attack. The 1st appellant's utterance and the coordinated presence of both appellants support the inference of a shared intention. There was no evidence that throughout these encounters, the 2nd appellant ever tried to dissuade the 1st appellant from going full hog with the mission. Nor did he attempt to exonerate himself from unlawful activity that the 1st appellant was about to undertake. If anything, he seemed to urge him on. It should not be lost sight of the fact that they were brothers with similar grievances against the deceased. The trial court's finding that the duo acted with common intention was therefore well- founded. It matters not whether the 2nd appellant's role was passive or active in the whole imbroglio.

32. The appellants challenged the admissibility of the blood-stained panga and axe recovered from the 1st appellant's house, citing lack of forensic analysis and absence of a signed inventory. While the best practice requires proper documentation and forensic analysis of recovered exhibits, the absence of such does not automatically render the evidence inadmissible. In the case of Ali Salim Bahati & Another v Republic (supra), the court held that the nature of injuries and the recovery of weapons consistent with those injuries may support a conviction even in the absence of forensic testing, provided the chain of custody is reasonably established. PW3 and PW4 testified as to the recovery of the impugned exhibits which they later handed over to the investigating officer. PW6 testified as to how he kept the exhibits until he tendered them in evidence. There was no evidence of any interference with the exhibits from any quarters their non-forensic analysis notwithstanding. PW5 confirmed that the injuries were consistent with a sharp object such as a panga, being used. We are in the circumstances satisfied that trial court was entitled to rely on this evidence.

33. Finally, on whether the prosecution proved its case against the appellants beyond reasonable doubt, the prosecution was required to prove: the death of the deceased and its cause; that the death resulted from an unlawful act of omission or commission by the accused and that the act of commission or omission was intentional with knowledge that death or grievous harm would result.

34. The death, was confirmed by all the witnesses who testified. In fact, it is not in dispute. Suffice to add that PW3 and PW4 are the ones who rushed the deceased to St. Mary's Mission Hospital, Mumias after they found him bleeding profusely while lying on the ground just outside his house. The deceased was pronounced dead on arrival at the hospital. PW2 identified the deceased's body to PW5 for purposes of postmortem examination and confirmed that thereafter the body of the deceased was released to the family for burial. The cause of death was similarly not disputed. PW5 opined that it was due to multiple organ failure resulting from injuries consistent with an attack using a sharp object such as a panga.

35. The identity of the culprits was established through PW1's testimony and the recovery of the murder weapons from the house of the 1st appellant. The repeated threats, coordinated conduct, and severity of injuries inflicted on the deceased support a finding of malice aforethought under Section 206 of

the Penal Code. See again the case of Ali Salim Bahati & Another v Republic (supra), in which this Court held that:

> " The vicious attack on the deceased using sharp objects, coupled with the repeated threats issued prior to the incident, clearly demonstrated that the appellants intended the natural consequences of their actions, namely, the death of the deceased. This was sufficient to establish malice aforethought under section 206(a) and (b) of the Penal Code."

36. In conclusion, we are satisfied that the prosecution proved its case against both appellants to the requisite standard. The grounds of appeal lack merit. The sentence was legal. Accordingly, the appeal is dismissed in its entirety.

DATED AND DELIVERED AT KISUMU THIS 7TH DAY OF NOVEMBER, 2025.

ASIKE-MAKHANDIA

JUDGE OF APPEAL

.....

H.A. OMONDI

JUDGE OF APPEAL

.....

L. KIMARU

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR