

**IN THE COURT OF APPEAL  
AT MALINDI  
(CORAM: MURGOR, LAIBUTA & NGENYE, JJ.A.)  
CRIMINAL APPEALS NO. E084 OF 2023 & E025 OF  
2024**

**BETWEEN**

**PETER BAYA NGUWA *alias* KANDILI.....1<sup>ST</sup> APPELLANT  
SAFARI KARISA NGALA.....2<sup>ND</sup> APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

*(Being an appeal from the Judgment of the High Court of Kenya at  
Malindi (R. Nyakundi, J.) delivered on 4<sup>th</sup> September 2023*

*in*

***HCCR Case No. 10 of  
2019)***

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**JUDGMENT OF THE COURT**

1. Before us are two consolidated appeals from the Judgment of the High Court at Malindi (R. Nyakundi, J.) dated 4<sup>th</sup> September 2023 in Malindi HC Criminal Case No. 10 of 2019 in which the 1<sup>st</sup> appellant, Peter Baya Nguwa, and the 2<sup>nd</sup> appellant, Safari Karisa Ngalia, were charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code.

2. The particulars of the offence were that, on 31<sup>st</sup> March 2019 at Ngamani Village, Vitengeni Location in Vitengeni Division within Kilifi County, the appellants jointly murdered Kahindi Tsumu Iha (the deceased). The appellants denied the offence whereupon the prosecution called 11 witnesses.

3. PW2, Jackline Mwenda, a cook and operator of a hotel at Kiberengani, testified that, on the material day, the appellants came to her hotel and ordered *Mnazi*, a traditional alcoholic drink made from fermented coconut sap synonymous with the Kenyan coastal region; that the deceased arrived at almost the same time and recognized the appellants as his grandsons; that he (the deceased) ordered a meal for them after which they continued to drink *Mnazi* until 3:00pm; that when the *Mnazi* was finished, the dark-skinned man, who had squinted eyes and wore a black cap, left to buy more *Mnazi* across the road; that, when he returned, PW2 informed him that the deceased had gone home; and that the two proceeded to the deceased's home.

4. According to PW2, the deceased later sent his children (PW5 and PW6) with a request that she (PW2) prepares food for two people; that PW2 proceeded to prepare the food and sent the children to deliver it to the deceased; that the children found the deceased lying on the ground; that the children left the food and returned to inform PW2 what they had witnessed; and that PW2 went to the scene and found the deceased lying on the ground with injuries.

5. PW5, Kahindi Zebedo, confirmed that, at around 6:30 pm on the material day, he came back home that evening with his sibling, PW6 - Sebu Kahindi, and found the deceased in the appellants' company; that the deceased sent them for food at the shops; and that, when they returned, they found the deceased having been killed and the cap worn by the 2<sup>nd</sup> appellant lying at the scene. PW6 gave a similar testimony. However, on cross-examination, PW5 and PW6 stated that, when they left home, the deceased was with the 2<sup>nd</sup> appellant.

6. PW1, Kadzo Chutu, the deceased's neighbour, testified that she was at home on the material day; that she saw the deceased

in the

company of the appellants, and that the 2<sup>nd</sup> appellant was wearing a cap; that she was having a meal at around 7:00pm when she heard screams from the deceased's house; and that she proceeded to the scene and found that the appellant had been killed.

7. Bendera Masha (PW3) testified that, on the material day at about 1:30pm, she was coming from a nearby well where she had gone to fetch water when she saw the appellants taking *Mnazi* at the *Mnazi* club; that one of the men who had a cap on approached her, and that she was able to identify him as a son of the deceased's sister Kalembwe; that she joined the men at the club for a short conversation and then left; that she saw the appellants again at about 3:00 pm walking around; that, later that evening at about 7:00 pm, she heard screams from the deceased's home; that she went to the scene and found the deceased dead; and that she saw the cap worn by the 2<sup>nd</sup> appellant at the scene.

8. PW4, Nyevu Mramba, a resident of the area, recalled that there was a land dispute between the deceased and one Karisa Fagio relating to tap water on the land; that, on the material day,

PW4 saw

two young men at the *Mnazi* club, one light-skinned and the other dark, and who later left for a different location followed by the deceased; and that he later learnt of the death of the deceased and went to the scene where he saw his body as well as the cap worn by the 2<sup>nd</sup> appellant.

9. Bernard Barasa (PW7), a *Bodaboda* operator, testified that, on the material day, he was hired by the 2<sup>nd</sup> appellant to drop him off somewhere; and that the 2<sup>nd</sup> appellant wore a cap that day.

10. PW8, Charles Kariba, testified that, on the material day, he was on his way back home at 6:00pm when he saw the deceased and two people whom he did not know having a conversation, the details of which he was not privy to; and that he later got information that the deceased had been attacked.

11. PW11, Senior Sergeant Wanjala Mariam, the investigating officer, went to the scene and recovered the murder weapon (a piece of wood) and a cap allegedly belonging to one of the suspects. He drew a sketch plan of the scene before escorting the deceased's body to the

mortuary. PW11 also recorded statements from witnesses, four of whom were confident that they could identify the suspects. In the course of the investigations, PW11 established that the motive for the offence had to do with a land dispute, and he subsequently arrested the appellants.

12. Dr. Ruth Nyangi (PW9) also testified and produced the post mortem report dated 11<sup>th</sup> April 2019 on behalf of her colleague, Dr. Bisha Salim, who had conducted the post-mortem examination at Kilifi County Hospital Mortuary. According to PW9, the examination revealed a fracture to the deceased's head involving the occipital and parietal bones with internal haemorrhage, and established that the cause of death was brain injury resulting in massive haemorrhage.

13. An identification parade was subsequently organized by PW10, IP Levi Kilima. At the parade, four witnesses (PW1, PW2, PW3 and PW7) identified the 2<sup>nd</sup> appellant while two of the witnesses (PW1 and PW2) identified the 1<sup>st</sup> appellant. The witnesses were in different rooms and did not communicate with each other. The appellants

were subsequently charged with the offence. PW10 produced the parade forms, which had been countersigned by the appellants.

14. After the close of the prosecution case, the court (R. Nyakundi, J.) found that the appellants had a case to answer and put them on their defence as a result of which the two elected to give unsworn statements.

15. The 1<sup>st</sup> appellant stated that, on the material day, he was having palm wine in the company of the 2<sup>nd</sup> appellant; that the deceased came and ordered chicken, which they shared; that, at about 4:00 pm, he (the 1<sup>st</sup> appellant) left the palm wine club aboard a motorcycle, leaving the 2<sup>nd</sup> appellant and the deceased; that it was only later that he learnt of the death of the deceased and the 2<sup>nd</sup> appellant's arrest. He denied murdering the deceased.

16. The 2<sup>nd</sup> appellant stated that, on the material day, he was out looking for charcoal to buy and resell to his customers; that he passed by the deceased's house and found that he had no charcoal;

and that he did not return to the deceased's house. He denied any involvement in his (the deceased's) death.

17. In its judgment dated 4<sup>th</sup> September 2023, the trial court (R. Nyakundi, J.) found that the prosecution's case was anchored on circumstantial evidence and eyewitness accounts that consistently placed the two accused persons with the deceased shortly before his death; that several of the witnesses described how the deceased was drinking and eating with the accused at a *mnazi* club and later at the location where the body was found; that PW1, PW2 and PW3 positively identified the appellants at the identification parade; that the post-mortem report produced by PW9 revealed that the deceased had suffered skull fractures and internal haemorrhage, which indicated deliberate and brutal force; and that the report supported a finding of malice aforethought in that the nature of injuries demonstrated intent to cause grievous harm. Consequently, the court rejected the appellants' unsworn statements, noting a lack of evidential support and inconsistency with the rest of the testimonies. Having weighed the evidence given in support of the charge and that of the appellants, the court was convinced beyond reasonable doubt

that the appellants were responsible for the deceased's death. Accordingly, the learned Judge convicted the appellants and sentenced each of them to 20 years imprisonment.

18. Aggrieved by the conviction and sentence, the appellants filed separate appeals, namely Criminal Appeal Nos. E084 of 2023 and E025 of 2024, which were subsequently consolidated. In support of their appeals, the appellants filed a joint Memorandum of Appeal dated 9<sup>th</sup> May 2025, which consolidated the 1<sup>st</sup> appellant's Memorandum of Appeal dated 12<sup>th</sup> September 2024 with the 2<sup>nd</sup> appellant's Supplementary Grounds of Appeal and Supplementary Memorandum of Appeal dated 11<sup>th</sup> November 2024. They prayed that their appeals be allowed, their convictions set aside and their sentences quashed on the grounds set out in their Comprehensive Memorandum of Appeal, namely that:

"1. THAT the learned trial Judge erred in law and in fact by failing to appreciate the contradictions, discrepancies and inconsistencies in the prosecution case.

2. THAT the learned trial Judge erred in law and in fact by failing to consider the testimony of PW-1, PW-2, PW-3 and PW-6 and that the

prosecution failed to discharge its burden of proof to the legal standard, threshold required, there was no material evidence placing the Appellants at the scene of the Murder contrary to Section 107 (1) and Section 109 of the Evidence Act.

3. THAT the learned trial Judge erred in law and in fact by failing to consider that the investigation officer PW-2 did not carry out any investigation linking the Appellants with the offence of Murder contrary to Section 35 (b) of the National Police Act.

4. THAT the learned trial Judge erred in law and in fact by failing to consider the burden of proof had not been proven beyond any reasonable doubt.

5. THAT the learned trial Judge erred in law and in fact by failing to consider that the Prosecution failed to prove the elements of *Mens Rea* and *Actus Reus*.

6. THAT the learned trial Judge erred in law and in fact by failing to consider that the Prosecution failed to prove the ingredients of malice aforethought to the legal standard required.

7. THAT the learned trial Judge erred in law and in fact by failing to appreciate the Appellants defence.

8. THAT the trial Judge erred in law and in fact by relying on circumstantial evidence without reasonable nexus to show that the Appellants committed the crime.”

19. We have considered the record of appeal, the rival submissions and the applicable law. Our mandate on a first appeal as set out in **rule 31(1) (a)** of the Rules of this Court is to reappraise the evidence and to draw our own conclusions. In principle, a first appeal takes the form of a rehearing (see **Ogaro v Republic** [1981] eKLR).

20. This being a first appeal, it is by way of a retrial and this Court, as the first appellate court, has a duty to re-evaluate, re-analyze and re-consider the evidence afresh and draw its own conclusions thereon. However, the Court should bear in mind that it did not see the witnesses as they testified and give due allowance for that.

21. It must be borne in mind, though, that scrutiny without more is not sufficient. The Court is mandated to undertake a fresh and exhaustive examination and reach its own decision on the evidence on record. In this regard, the Court in **Okeno v Republic** [1972] EA

32 set out the duty of a first appellate court in the following words:

***“An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and the appellate court’s own decision on the evidence. The first appellate court must itself weigh conflicting***

***evidence and draw its own conclusion. It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses."***

22. This cautious approach has deep roots in comparative common law jurisdictions as demonstrated in the decision of the Supreme Court of India in ***Ganpat v State of Haryana*** (2010) 12 SCC 59. 4.

where the Court set out the principles to be borne in mind by a first appellate court while dealing with appeals and stated thus:

***"a. There is no limitation on the part of the appellate Court to review the evidence upon which the order appealed against is founded and to come to its own conclusion.***

***b. The first appellate Court can also review the trial court's conclusion with respect to both facts and law.***

***c. It is the duty of a first appellate Court to marshal the entire evidence on record and by giving cogent and***

***adequate reasons may set aside the decision appealed against or the entire proceedings if they are flawed.***

***d. When the trial Court has breached provisions of the constitution or ignored statutory provisions, or misconstrued the law, or breached rules of procedure, or ignored crucial evidence or misread the material evidence or has ignored material documents, or in any manner compromised the accused rights to a fair trial or prejudiced the accused etc. the appellate court is competent to reverse the decision of the trial court depending on the materials in question.”***

23. Having carefully considered the record of appeal, the grounds on which it is anchored, submissions and the law, we form the view that the appeal raises two main issues, namely: (i) whether there was sufficient evidence to convict the appellants for the offence charged; and (ii) whether, before convicting the appellants, the learned Judge considered their defences.

**24.** In support of the appeal, counsel for the appellants, Ms. Maiga Sharon, filed comprehensive written submissions dated 12<sup>th</sup> May 2025, and which consolidated the contents of the undated written submissions filed by the appellants in person with the appellants’ supplementary written submissions dated 11<sup>th</sup>

November 2024. Counsel cited the cases of **Ahamad**  
**Abolfathi Mohammed and**

**another v Republic** [2018] eKLR for the proposition that, for circumstantial evidence to be used as a basis for a conviction or sentence, the circumstances must point to the accused as the perpetrators; that it must be so complete that there is no other reasonable conclusion; and that the prosecution must show that there are no other circumstances that could weaken the inference of guilt; the case of **Victor Owich Mbogo v Republic** [2020] eKLR cited for the proposition that, to determine whether malice aforethought has been established, the court ought to consider the weapon used, the manner in which it was used, the part of the body targeted, the nature of injuries inflicted, and the conduct of the accused before, during and after the incident; and the case of **Erickson Chengoli**

**Wanyonyi v Republic** [2018] eKLR for the proposition that the prosecution has to prove its case beyond any reasonable doubt, and that a court of law cannot act on mere suspicion no matter how strong.

25. When the consolidated appeals came up for hearing, learned

counsel, Ms. Mutua appeared for the ODPP and indicated that her colleague Ms. Angela Fuchaka (Senior Principal Prosecution Counsel)

had filed written submissions dated 8<sup>th</sup> November 2024, and that she would be relying thereon without having to make any oral highlights. However, it is noteworthy that the submissions referred to are neither on record as supplied to us nor on the CTS. Consequently, we did not have the benefit of considering any submissions by the ODPP.

26. We agree with counsel for the appellants that the burden of proof lay with the prosecution to justify conviction on the circumstantial evidence relied upon and that, to sustain a conviction, the inference of guilt must be incapable of reasonable explanation and incompatible with the appellants' innocence. Counsel took issue with PW9's testimony for allegedly failing to establish the identity of the weapon used to inflict the brain injury resulting in massive hemorrhage. According to counsel, there was no forensic evidence to link the deceased's death with any unlawful act on the part of the appellants, or to establish that the piece of wood recovered at the scene was the weapon used to inflict fatal injuries.

27. Counsel further contended that there was no evidence of violent struggle with the deceased leading to his death; that there was no DNA or other forensic evidence connecting the appellants with the murder weapon or with the deceased; that, even though the prosecution witnesses saw the appellants taking palm wine in the company of the deceased together with whom they walked away, none of them witnessed any violent struggle between them; that none of the witnesses saw the 1<sup>st</sup> appellant at the scene where the deceased was killed; and that the uncontested evidence that the 2<sup>nd</sup> appellant's black cap was recovered at the scene of crime did not of itself establish that he was responsible for the deceased's death.

28. According to counsel, the prosecution evidence was tainted with inconsistencies with respect to the exact time the appellants were seen together with the deceased at the palm wine club, the time when the three walked away, the time when the appellants went to the deceased's home, the precise time PW3 heard screams from the deceased's house; and the exact time when he was found dead with severe head injuries. In conclusion, counsel

submitted that the prosecution did not establish malice  
aforethought on the part of the

appellants; and that the prosecution failed to discharge the burden of proof beyond reasonable doubt and rule out any other circumstance that could weaken the inference of guilt, such as whether the deceased slipped, fell and injured himself, or that the deceased was attacked by another person to the exclusion of the appellants. On the basis of the foregoing submissions, counsel urged us to allow the appeal.

29. We take to mind, as did the learned Judge, the fact that there was no eyewitness account of the attack on the deceased's leading to his death. Accordingly, the prosecution evidence on the basis of which the appellants were convicted was circumstantial in nature. In this regard, the learned Judge had this to say:

*"... the ingredient [of] proof of death has been discharged by the prosecution beyond reasonable doubt... However, in law it [is] trite that what is necessary is to prove is that the accused's acts of omission or commission were a substantive or significant cause of the death [of the] deceased.*

*In the present case PW1, PW2, PW3, PW4, PW5, PW6, PW7 all testified to the events of 31.3.2019. The highlights being that the accused persons spent most of the time with the deceased earlier at Mnazi Club*

*and later on happened to share a meal brought by PW5 & PW6. Prior to the deceased's meeting his death, there is clear evidence from PW1, PW2, PW3, PW4, PW5, PW6 & PW7 he was alive with no evidence of ill health or grievous bodily harm. It [was] at the same scene where he enjoyed the company of the accused persons the screams emerged and some of the 1<sup>st</sup> responders visited the home only to confirm that he had been killed. Apparently, the accused persons could not be [seen] within the vicinity as even the police were alerted and made arrangements to collect the body to be taken to the Kilifi County Hospital. The analogy to be drawn from the prosecution case is hinged within the context of the following statement on the relevance and probative value of circumstantial evidence in a given scenario...*

*The prosecution case in this respect cumulatively establishes [that] the targeted criminal Acts were aimed at inflicting serious harm against the deceased. The accused persons were at all material times with the deceased between the Mnazi club of PW2 and subsequent scene of the crime as alluded to by PW5, PW6, and PW7. The element of intention to commit a dangerous Act which endangered life of the deceased is clearly manifested from the evidence of PW9 Dr. Nyangi of Kilifi County Hospital Mortuary... On this basis, the prosecution evidence as a whole in respect to the ingredient of unlawful Acts has been proved beyond reasonable doubt..."*

**30.** The threshold for securing a conviction based on circumstantial evidence was described by this Court in

**Sawe v Republic**

[2003] KECA 182 (KLR) thus:

***“22.... In order to justify, on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt. There must be no other co-existing circumstances weakening the chain of circumstances relied on. The burden of proving facts that justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution, and always remains with the prosecution. It is a burden, which never shifts to the party accused.”***

31. In **Abanga alias Onyango v Republic**, CR. App No. 32 of 1990

(UR), this Court held that:

***“It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests:***

***(i) the circumstances from which an inference of guilt is***

***sought to be drawn, must be cogently and firmly established, (ii) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused; (iii) the circumstances***

***taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else.”***

**32.** We also take to mind the cases of **Joan Chebichi Sawe v**

**Republic** [2003] eKLR; and **Dorcas Jebet Ketter and Another v**

**Republic** [2013] eKLR in which the Court approved the principle in

the case of **Kipkering Arap Koske v Republic** [1949] 16 EACA 135

and in which the predecessor to this Court set the threshold for the court’s acceptance and acting on circumstantial evidence as a basis for founding a conviction against an accused person; and

**Simon**

**Musoke v Republic** [1958) EA 915 where the Court reiterated the

same principle as follows:

***“... before drawing the inference of the accused’s guilt from circumstantial evidence the court should ensure that there are no other co-existing circumstances which would weaken or destroy the inference ....”***

**33.** Enunciating this principle with more clarity in **Odhiambo**  
**v**

**Republic** [2024] KECA 571 (KLR), this Court had this to say:

***“56. Whereas considered separately the circumstances may not necessarily lead to a verdict of guilty, the circumstances must be considered together, since as was held in the case of R v Hillier [2007] 233 A.L.R 63 and Shepherd v R [1991] LRC CRM***

**332:**

***‘The nature of circumstantial evidence is such that while no single strand of evidence would be sufficient to prove the defendant’s guilt beyond reasonable doubt, when the strands are woven together, they all lead to the inexorable view that the defendant’s guilt is proved beyond reasonable doubt. It is not the individual strand that required proof beyond reasonable doubt but the whole. The cogency of the inference of guilt therefore was built not on any particular strand of evidence but on the cumulative strength of the strands of circumstantial evidence.’”***

34. There was cogent evidence from PW1 to PW6 to the effect that the appellants were the last persons seen with the deceased before screams were heard from the deceased’s home and, immediately thereafter, the deceased body was found at the scene. PW5 and PW6 were the last to communicate with the deceased while in the company of the appellants. They testified

that the deceased sent them for food between 6:30pm and 7:00pm; that, when they left, the deceased was

with the 2<sup>nd</sup> appellant; and that, when they returned with the food shortly thereafter, they found his lifeless body and the cap worn by the 2<sup>nd</sup> appellant. In the circumstances, it was safe to conclude that the appellants were the last seen with the deceased.

**35.** Pronouncing itself on the doctrine of ‘last seen with’ in **Chiragu**

**& another v Republic** [2021] KECA 342 (KLR), this Court held that:

***“24.... Regarding the doctrine of “last seen with” we will revert to Nigerian case of Moses Jua V. The State (2007) LPELR- CA/IL/42/2006. The court, while considering the ‘last seen alive with’ doctrine held:***

***‘Even though the onus of proof in criminal cases always rests squarely on the prosecution at all times, the last seen theory in the prosecution of murder or culpable homicide cases is that where the deceased was last seen with the accused, there is a duty placed on the accused to give an explanation relating to how the deceased met his or her death. In the absence of any explanation, the court is justified in drawing the inference that the accused killed the deceased.’***

***In yet another Nigerian case considering the same doctrine, in Stephen Haruna V. The Attorney-General of***

***the Federation (2010) 1 iLAW/CA/A/86/C/2009 the court  
opined thus:***

***'The doctrine of "last seen" means that the law presumes that the person last seen with a deceased bears full responsibility for his death. Thus where an accused person was the last person to be seen in the company of the deceased and circumstantial evidence is overwhelming and leads to no other conclusion, there is no room for acquittal. It is the duty of the appellant to give an explanation relating to how the deceased met her death in such circumstance. In the absence of a satisfactory explanation, a trial court and an appellate court will be justified in drawing the inference that the accused person killed the deceased.'***

***Quoting from another jurisdiction, to be specific India, the courts there have developed the doctrine further. In the case of Ramreddy Rajeshkhanna Reddy & Another V. State of Andhra Pradesh, JT 2006 (4) SC 16 for instance the court held:***

***'That even in the cases where time gap between the point of time when the accused and the deceased were last seen alive and when the deceased was found dead is too small that possibility of any person other than the accused being the author of the crime becomes impossible, the courts should look for some corroboration.'***

***25. Locally, this doctrine has been invoked in the case of Republic v EEK [2018] eKLR .... We are persuaded by the holding in Indian case that even where evidence***

***establishes that an accused was last seen with the deceased before she met***

***her death, it is desirable to exercise caution and look for some other corroborative evidence.”***

36. In ***Marita v Republic*** [2023] KECA 580 (KLR), this Court also held that:

***“22. The Last Seen Doctrine essentially provides that if a person is the last one seen with the deceased just before his death or within a reasonable period of his death and no other person could have intervened in between them, then the presumption can be taken that he (the person who was last seen with the deceased) is the author of the crime causing the deceased’s death. In such a case, the burden of proof shifts to the person last seen with the deceased to negate this fact and if he is not able to give a lucid and sufficient explanation about his innocence then the presumption becomes even stronger. Ideally, for the Last Seen Doctrine to safely apply, the duration of the accused and deceased last seen together and the recovery of the dead body should be minimal. This rules out the possibility that another person intervened. In cases where there exists a significant time gap between the time the deceased was last seen with the accused person and the time when the body was recovered, the presumption is considerably weakened.***

***23. For the Last Seen Doctrine to apply, there must be***

***conclusive proof that the accused person was, in fact, last seen***

***with the deceased .... For a secure conviction to be safely based on the Last Seen Doctrine, the third parties who ostensibly saw the appellant with the Deceased needed to testify and have their testimonies tested on cross-examination.”***

37. The evidence of PW5 and PW6 was crucial as they were the last witnesses to see the deceased alive between 6:30pm and 7:00pm in the company of both appellants. However, when cross-examined, they stated that, by the time they left to get some food from PW2’s outlet at the deceased’s behest, the 1<sup>st</sup> appellant was not in the house at that moment in time. That explains why, on cross-examination, PW5 and PW6 stated that the person they left or last saw with the deceased was the 2<sup>nd</sup> appellant.

38. In our considered view, the 1<sup>st</sup> appellant’s statement that he left the deceased and the 2<sup>nd</sup> appellant at the club at around 4:00pm does not hold. Firstly, he admitted that he was in the company of the deceased and the 2<sup>nd</sup> appellant at PW2’s palm wine club where the three had shared a meal and took some *Mnazi* before the deceased left them and headed home.

Secondly, PW2 testified that the

appellants left soon thereafter and headed to the deceased home where PW5 and PW6 (the deceased's children) saw the three together before leaving for PW2's club to get some food for them only to return and find the deceased dead, a fact confirmed by PW2 to whom PW5 and PW6 returned to report what had happened; thirdly, PW1 testified that she had seen the deceased in the company of the appellants at his (the deceased's) neighbouring home that evening before she heard screams at about 7:00pm and, on going to inquire as to what was going on, found the deceased lifeless body and, even though the appellants were nowhere to be seen, the cap worn by the 2<sup>nd</sup> appellant had been left at the scene.

39. It is noteworthy that the distress call to which PW1 and PW3 responded at about 7:00pm came only moments after PW5 and PW6 had left for PW2's club to fetch food at the deceased's behest; that, taking to mind the totality of the prosecution evidence, including that of PW1, PW2, PW3, PW4, PW5, PW6 and PW8 (who had seen the three together as late as 6:00pm), we are left with no doubt that the deceased was in the company of the appellants between 3:00pm and

7:00pm, when he was killed and the cap worn by the 2<sup>nd</sup> appellant left at the scene.

40. Likewise, the 2<sup>nd</sup> appellant's uncorroborated defence to the effect that he spent the day in the neighbourhood looking for charcoal to sell was dislodged by the overwhelming prosecution evidence, which placed him in the company of the deceased between 3:00pm and 7:00pm at PW2's *Mnazi* club and later at the deceased's home where his cap was recovered at the scene where the deceased's body lay. To our mind, the recovery of the cap which the 2<sup>nd</sup> appellant wore throughout the day as well as the plank of wood believed to be the murder weapon compounded and established a complete and unbroken chain of evidence from which an inference can be drawn that the appellants were, without doubt, the ones who inflicted fatal injuries on the deceased.

41. In the circumstances, we are not persuaded by the defence counsel's argument that the appellants' conviction was unsustainable because no forensic or DNA examination was conducted to tie the murder weapon to either of the appellants.

To

our mind, the compelling circumstantial evidence that the appellants were the last persons seen with the deceased, and that the 2<sup>nd</sup> appellant's cap was found at the scene of murder speaks for itself and remained unshaken.

**42.** Addressing itself to the relevance of DNA or other forensic evidence in proof of a criminal charge In **David Kahura Wangari**

**v**

**Republic** [2016] KECA 22 (KLR), this Court held in no uncertain terms that:

***“DNA testing or forensic examination of a perpetrator of any offence is done in the course of investigations, but that is purely the choice of the investigating officers, and failure to do so particularly in this case did not affect the credibility of the evidence that was before the court.”***

43. We agree and find that the above cited pronouncement is applicable to the circumstances of this case.

44. Turning to the issue as to whether the prosecution sufficiently proved malice aforethought on the part of the appellants, the learned Judge held as follows:

*“The circumstances upon which the court can draw [an] inference on whether the homicide was committed with malice aforethought within the meaning of Section 206 of the Penal Code has no hard and [fast] rule save that the necessity of it is dependable upon specific facts of the case before the trial court... In the instant case the medical evidence in the form of a postmortem report was tendered in evidence by PW9 which is equally consistent with malice aforethought. The injuries against the deceased targeting the vulnerable part of his body being the head involving [a] compound skull fracture and subsequent internal hemorrhage is sufficient evidence that the perpetrators had only one objective to cause the death of the deceased. Therefore, malice aforethought accompanied the unlawful Acts executed by the accused persons...”*

45. Section 206 of the Penal Code provides:

**206. Malice aforethought**

***Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances—***

***(a) an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;***

***(b) knowledge that the act or omission causing death will probably cause the death of or grievous harm to some***

***person,***

**whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;**

**(c) an intent to commit a felony;**

**(d) an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.**

46. In **Robert Onchiri Ogeto v Republic** [2004] KECA 148 (KLR),

this Court held that:

**“The prosecution does not have to prove the motive for commission of any crime, neither is evidence of motive sufficient by itself to prove the commission of a crime by the person who possess the motive. See *Karukenyia & 4 Others v Republic* [1987] KLR 458. By section 206(a) of the Penal Code, malice aforethought is deemed to be established by evidence showing an intention to cause death or to do grievous harm.”**

47. In the same vein, this Court in **Bonaya Tutu Ipu & another v**

**Republic** [2015] KECA 335 (KLR) cited with approval the decision

of

the Court of Appeal of Uganda in **Chesakit v Uganda** CR App. No.95

of 2004 where it was held that:

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

48. As the learned Judge correctly concluded, the medical evidence produced by PW9 sufficiently demonstrated that the weapon used to repeatedly strike the deceased, the part of the body targeted, *to wit*, the head, and the severity of the injuries inflicted upon him, were undoubtedly intended to cause death or grievous harm, all of which establish *mens rea* or malice aforethought.

49. Having applied the afore-mentioned tests and principles of law to the evidence on record, we can only conclude that the learned judge correctly analyzed the circumstantial evidence

before him; that he did not misapprehend any aspect of that evidence; and that he correctly applied both the requisite tests and principles of law that

guide courts in admitting and acting on circumstantial evidence as the basis of a safe conviction against an accused person. In our considered view, the learned Judge arrived at the correct conclusion that the circumstantial evidence on record, when taken cumulatively, met the threshold for proof beyond reasonable doubt that the appellants murdered the deceased, and that such evidence could not be displaced by any of the defences raised by the appellants, or by other hypothesis giving rise to any doubt as to their guilt.

50. In conclusion, the circumstantial evidence having sufficiently linked the appellants to the deceased's death, the learned Judge cannot be faulted for convicting and accordingly sentencing them to what we consider to be a rather lenient prison term of 20 years.

51. Having considered the record of appeal, the impugned judgment, the grounds on which the appeal was anchored, the appellants' submissions, the cited authorities and the law, we reach the inescapable conclusion that the consolidated appeals fail and are hereby dismissed. Consequently, the judgment of the

High Court of

Kenya at Malindi (R. Nyakundi, J.) delivered on 4<sup>th</sup> September 2023 in HCCR Case No. 10 of 2019 is hereby upheld. Orders accordingly.

**Dated and delivered at Mombasa this 5<sup>th</sup> day of December 2025.**

**A. K. MURGOR**

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**JUDGE OF APPEAL**

**DR. K. I. LAIBUTA CARb, FCIArbs.**

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**JUDGE OF APPEAL**

**G. W. NGENYE-MACHARIA**

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**JUDGE OF APPEAL**

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

*Signed*  
**DEPUTY REGISTRAR**