Jabu v Republic (Criminal Appeal E074 of 2023)
[2025] KECA 2220 (KLR) (19 December 2025) (Judgment)

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REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MOMBASA

CRIMINAL APPEAL E074 OF 2023

AK MURGOR, KI LAIBUTA & GW NGENYE-MACHARIA, JJA

DECEMBER 19, 2025

BETWEEN

BWANA MKUU ALWAN JABU ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the Judgement of the High Court of Kenya at Mombasa (M. Muya, J.) dated and delivered on 29th July, 2016 in Criminal Case No. 12 of 2013)

JUDGMENT

1. History is replete with the rise of extremist political insurgency groups with different ideologies, the clamour for cessation and the right to self-determination from National Governments.

2. To highlight but just a few of the political separatist movements in different regions, in Africa, the Sudan Liberation Movement led the separatist campaign from Sudan to form South Sudan. In Europe, the Catalan/Cataloni Independence Movement has consistently sought separation from Spain by virtue of being an English-speaking region. On the Asian front, the Moro National Liberation Front is a separatist movement in Southern Philippines that continues to agitate for separation from The Philippines. Closer home, the Mombasa Republican Council (the MRC), was an emboldened movement often characterised by violence in their aggressive clamour to cede the Coastal Region from Kenya. We hasten to add that the Movement was proscribed (when?) by the Government. However, its resurgence prior to the national general elections of 2013 brought havoc and death as will be seen in the events leading to this judgment. Suffice it to note that the appellant was a self-confessed member of the MRC.

3. In as much as the proponents connote secession to be a peaceful and legitimate withdrawal from an independent State, history attests that, it, often leaves a bloody trail and loss of lives. In his book, 'Secession as an International Phenomenon: From America's Civil War to Contemporary Separatist

Movements', American historian Don H. Doyle referred to what the 16th President of The United States of America, Abraham Lincoln (1809 - 1865) stated in 1861 about secession. President Abraham Lincoln likened secession to a metaphor of a husband and wife who may go their separate ways after a divorce, but for squabbling nations, much as they have divorced from one another politically, they must still cohabit territorially as follows:

> "A husband and wife may be divorced and go out of the presence and beyond the reach of each other, but the different parts of our country cannot do this. They cannot but remain face to face and intercourse, either amicable or hostile, must continue between them."

4. While the appeal before us does not concern the arguments for or against secession, we found it necessary to set out the background on the practice of secession as the criminal charges laid against Jabiri Ali Dzuya (the 1st accused), Bwana Mkuu Alwan Jabu (the appellant), Antony Mwatela Mughendi (the 3rd accused), Badi Said Kassim (the 4th accused) and Omar Salim Juma (the 5th accused) being members of the MRC, originated from their belief in the ideology of secession of the coast region from Kenya.

5. After the promulgation of the 2010 Constitution, Kenyans looked forward to conducting peaceful elections following the tragic outcome of the 2007 general elections. The general elections next following were scheduled for 4th March 2013 and all responsible agencies prepared to undertake their respective roles so as to ensure that the country had a conducive environment so that patriotic citizens could exercise their democratic right to vote peacefully. However, the appellant and his co-accused persons suspectedly had other intentions which led to the unfortunate demise of four (4) police officers, and were charged with four counts of murder. The Information dated 24th May 2013 particularised the offences as follows:

COUNT I

1. Jabiri Ali Dzuya 2. Bwana Mkuu Alwan Jabu 3. Antony Mwatela Mughendi 4. Badi Said Kassim 5. Omar Salim Juma On the 3rd day of March 2013, at Jomvu area within Miritini in Kilindini District within Mombasa County, jointly with others not before court murdered No. 217778 Senior Superintendent of Police Otieno Owouri.

COUNT II

1. Jabiri Ali Dzuya, 2. Bwana Mkuu Alwan Jabu 3. Antony Mwatela Mughendi 4. Badi Said Kassim 5. Omar Salim Juma On the 3rd day of March 2013 at Jomvu area within Miritini in Kilindini District within Mombasa County, jointly with others not before court murdered No. 230655 Chief Inspector Salim Kimutai Chebii.

COUNT III

1. Jabiri Ali Dzuya, 2. Bwana Mkuu Alwan Jabu 3. Antony Mwatela Mughendi 4. Badi Said Kassim 5. Omar Salim Juma On the 3rd day of March 2013 at Jomvu area within Miritini in Kilindini District within Mombasa County, jointly with others not before court murdered No. 42978 Police Constable Stephen Maithya.

COUNT IV

1. Jabiri Ali Dzuya, 2. Bwana Mkuu Alwan Jabu 3. Antony Mwatela Mughendi 4. Badi Said Kassim 5. Omar Salim Juma On the 3rd day of March 2013 at Jomvu area within Miritini in Kilindini District within Mombasa County, jointly with others not before court murdered No. 52076 Police Constable Andrew Songwa.

6. A perusal of the record of appeal shows that there was another Criminal Case No. 24 of 2013 of which we have no Information on the record as put to us. The record shows that, initially, three accused persons took plea on 19th March 2013 on two counts, and each of them pleaded not guilty to the two counts.

   On 29th May 2013, the instant Criminal Case No. 12 of 2013 (which is subject of the impugned judgment) was, on an application by the prosecution, consolidated with Criminal Case No. 24 of 2013, thereby adding the number of the accused persons in the Information to 5 as indicated hereinabove. This leads us to conclude that Criminal Case No. 24 of 2013 was in respect of 2 accused persons.

7. Upon consolidation of the charges on 29th May 2013, the 1st, 3rd, 4th, 5th accused persons and the appellant pleaded not guilty to all four counts. The hearing ensued with the prosecution calling a total of thirty (30) witnesses whose evidence we have summarised as below.

8. PW1, No. 202511447 Sgt John Karani Maree; PW2, No. 667216 PC Josphat Mwatela; PW4, No. 94025568 PC Agambo Nyanga Ndwiga; PW7, No. 64715 CPL Thomas Mirumba; PW9, No. 00813939 AP Eliud Kipchumba; PW3 No. 77368 Sgt. Josephine Mwangemi; and PW19, SSP. Catherine Irungu, testified with respect to the events which took place on 3rd March 2013 that led to the gruesome murders of the four police officers. We shall refer to these witnesses as 'the Police Officers' where applicable. We hasten to add that PW3 was mistakenly recorded as PW13, yet there is a PW13 on record who bears a different name. We conclude that this error was typographical.

9. The Police Officers were based at Changamwe Police Station. On 3rd March 2013, they were summoned by the then Officer Commanding Station (the OCS), Chief Inspector Kimutai Chebii (the deceased in respect of Count II), for a security briefing on the upcoming general elections of 4th March 2013. They were informed by the OCS that there were some armed people who intended to disrupt the general elections. They were advised to arm themselves, and were thereafter dispatched on patrol duties along the Mombasa Highway and different polling stations

10. At around 9.00 p.m. they were informed of a group of armed men who had the intention of disrupting the elections set to take place the following day. Some of the Police Officers went to arm themselves.

11. According to PW1, Sgt John Karani Maree, himself, together with the OCS and the OCPD went to patrol along the railway line. He testified that it is then that they came face to face with a group of armed men; that a gunfire exchange ensued; that the OCPD, Otieno Owouri (the deceased in respect of Count I) told them to withdraw since they were overpowered; that, by this time, they had reached the KTDA area; that, when the police officers sensed danger, they attempted to take cover to save their lives; and that PW1 heard PC Songwa (the deceased in respect of Count IV) saying 'they are cutting me.' PW1 further testified that he witnessed people cut the OCS's leg; that, together with APC Ndwiga, PC Kipchumba, PC Chebon and PC Maithya (the deceased in respect of Count III), PW1 attempted to escape into a bush but, since PC Maithya was aged, the gang caught up with him and attacked and killed him; and that, at around 4.00 a.m., they were able to retrace their steps whereupon they stumbled on the bodies of PC Maithya and the OCPD Otieno Owouri, who had been killed the previous night.

12. PW1 went on to testify that he later came to learn that he had also been shot in the leg; that he later learnt that a bullet had lodged in his leg, but that it could not be surgically removed because of its location. He further testified that the gang that attacked them was wearing ribbons on their heads; that, since it was at night, the Police Officers were not able to identify them. PW1 stated that the first batch of the attackers comprised of about 30 to 50 people, but were later reinforced by a group of about 200 people.

13. In cross-examination, PW1 stated that they were attacked at Jomvu.

14. PW2, PC Josphat Mwatela, testified that he was in the company of PW7, CPL Thomas Mirumba; that they were deployed to Miritini-Jomvu area near KTDA; that, just after 5.00pm, they heard gunshots within Miritini, Caltex and KTDA areas; that they then saw two people running and stopped them; that they asked them why they were running and demanded that they identify themselves; that they surrendered; that one of them, Jabir Ali Dzuya, the 1st accused person, had a machete which fell from his clothes; that Jabir was wearing a ribbon; that they also recovered other ribbons from his pockets; that they also arrested the appellant who was in the company of the 1st accused; and that the 1st accused had ribbons, amulets, a national identity card and an MRC membership card.

15. PW4, PC Agambo Nyanga Ndwiga, testified that he was also in the company of the OCS; that they met a motorcyclist who informed them that there were people lying on the ground near the railway line, and that they were armed with machetes and rifles; that they went near KTDA, and that, at the food stalls, he saw some people crouched down wearing ribbons on their heads; that he tried to scare them away but, after a short while, he heard gunshots; that the group of people were chanting war songs; and that, after realising that they were outnumbered, they decided to retreat and run away to save their lives.

16. PW9, AP Eliud Kipchumba, was in the company of PW1 and the deceased OCPD and OCS; that they were at the railways on patrol; that, suddenly, they heard gunshots from behind and rolled to the ground; that he attempted to shoot back at their attackers, but that his rifle malfunctioned; that he saw PW1 being shot and the OCS's leg being cut; that he decided to save his life by wading through a puddle of water. He stated that the people who were attacking them wore ribbons on their hands and heads.

17. As for PW13, Sgt. Josephine Mwangemi, she had already reported at Miritini Primary School when, at around 10.45 p.m., she received information from PC Chepsergon that there were armed persons with bows and arrows spotted at Kombani area; that, together with other officers, they went into hiding, but that the group of the armed youth saw them and started shooting at them; and that they then saw people carrying dead and injured bodies. She testified that around 60 people attacked their polling station.

18. PW19, SSP. Catherine Irungu, was the then deputy OCPD, Changamwe Police Station. She testified that she and AP Richard Ireri were deployed to man Changamwe Constituency. At around 10.30 p.m., the DCIO called her and informed her that they had heard gunshots around Miritini; that another call came from CPL Mwangemi who informed her that they had been attacked; that he called the OCPD who did not answer to the call; that the same case applied on calling the OCS; that she deployed AP Ireri and other officers to Miritini, the place of attack; that she also proceeded to Miritini together with other officers; that they then went to Kombani area near KTDA where they found the body of CPL Maithya lying on the ground with cuts on the face; that she also saw the body of the OCS, CIP Chebii, which had multiple cuts on the legs and hands; that the body of PC Songwa was lying some 4 -5 metres away while of the OCPD, Otieno Owouri, was lying under a tree with cut wounds on the hands and head; and that the OCPD had his pistol still tacked on his body while that of the OCS was missing.

19. PW19 further testified that they tried to comb out the area in an attempt to smoke out the attackers; that, at the railway junction of Miritini and Nairobi- Mombasa Highway, they came across a body of a male adult who had a ribbon on the head;

> that this was about 1 kilometer from where police officers were killed; that they also recovered another body of a man aged 20 to 30 years; that two suspects were arrested, namely Jabir Ali Dzuya (the 1st accused) and one Bwana Mkuu (the appellant); that the 1st accused

was arrested while in possession of a panga which had blood stains while Bwana Mkuu had a National Identity Card and an MRC membership card; and that, when she enquired from other police officers, she was informed that a group of 11 people had attacked them.

20. PW7, Cpl Thomas Mirumba, the OCS's designated driver of the day, while corroborating the evidence of PW2, testified that he was in the company of PW2 when at around 5.00 p.m. he was asked to go on a patrol. He drove towards KTDA, Miritini, and arrived at Jomvu in the company of PC Mwatete and Godana; that, after about 20 minutes, he heard gunshots near KTDA; that they then saw two people running and asked them to stop and identify themselves; that they searched them and recovered a machete from one of them; that the two were wearing ribbons; that he later came to learn that it was Jabir Ali Dzuya (the 1st accused) who had the machete; and that the other man was the appellant who was arrested with his National Identity Card and an MRC membership card.

21. PW5, Patricia Mumbua, was the wife to the deceased PC Maithya. She identified the body of the deceased on 6th March 2013 during the post mortem exercise that was conducted by a Dr Onyango.

22. PW6, No. 844086 PC Geoffrey Ouma of DCI office headquarters at Mombasa and a scene of crimes' officer, was called to the scene of the murders within Changamwe at Miritini on 4th March 2013. He found the bodies of CPL Maithya, PC Songwa, OCS Salim Chebii and OCPD Owour; that, 2 kilometers away, he found a body of a civilian; and that he took a total of 45 photographs of the scene and the general view of the bodies. He produced the report of the photographs as Exhibit No. 22 and a Certificate as Exhibit No. 33.

23. PW8, Levis Songwa, a son of the deceased PC Songwa, was called to identify the body of his father for purposes of a post mortem exercise that was conducted on 6th March 2013 at Pandya Hospital in Mombasa.

24. PW10, David Karanja, a boda boda operator, testified that, on 3rd March 2013, two passengers asked him to take them to Jomvu Chamunyu at around 11.00 p.m.; that, upon arrival, they re-routed to Kikombani to the home of Anunda, one of his passengers; that he stood outside with the other passenger by the name of Walter Otieno (PW11) while Anunda entered his home; that, shortly thereafter, they saw a formation of people on the road heading towards KTDA; that the people were wearing white ribbons and armed with machetes and clubs; and that one of their leaders was armed with a rifle.

25. PW10 recalled that he had the telephone numbers of two police officers, that is PC Ndegwa and PC Mwatete; that he called them to inform them of what he had seen; that he went back to his place of work at Changamwe, and later to the police station where he met PC Mwatete; that, as he returned to his work, he came across a man who had been shot by police; that beside him was a knife and a red ribbon; and that the injured man identified himself as Katana. He identified photograph No. 26 as that of the injured man he found on the road.

26. PW11, Walter Otieno entirely corroborated the evidence of PW10, save to add that the young men they saw were armed with machetes; that some had no shirts while others wore vests; that they were in adorned ribbons on their heads; and that he also heard some gunshots coming from the KTDA direction.

27. PW12, Samson Ndume, testified that he knew Badi Said Kasim and Omar Salim Juma, the 4th and 5th accused persons respectively; that he had been a member of the MRC from 2011 after being introduced to it by the 4th accused person, who was also the Chairperson of the Nuru Branch; that he joined the group after he was informed that there would be equitable distribution of wealth in the Coastal region after the up- country people had been evicted; that, upon registration, he was issued with a membership

card; that he had attained the position of Assistant Secretary of the branch; and that he did not vote in the general elections because members of the MRC were not supposed to vote.

28. PW12 further testified that, on 1st March 2013, before the general elections, there was an MRC members' meeting, and in attendance was the appellant; that there used to be oath- taking by MRC members, but that he refused to take part in the activity; that the 4th accused explained to him that a witchdoctor would give them tablets which, when taken would make one invisible; that they were also given amulets to ward off any 'evil' that might befall them; and that he did not meet with other MRC members after the elections.

29. PW13, Hussein Ali, testified that, on 3rd March 2013 at 2.00 a.m., he was asleep in his home when he was called and informed that one Mshahame Ali Odundo had arrived home with gunshot wounds on the leg and chest; that he was a registered member of MRC, but that he had fallen out with them; that MRC members were opposed to voting in the general elections; that Mshahame died half an hour later; that he informed the assistant chief about the death and who in turn told him to report to the police station; that, after a report was made, the body was taken to Coast General Hospital; that, just before the elections, there had been an oath taking ceremony which took place in Mshahame's compound; and that, on the fateful night, he had heard gunshots which came from the KTDA direction. PW13 also stated that police were handed over two mobile phones which were recovered from Mshahame's house and subsequently given to Athman Mwawira and Athman Mdoe, who did not have mobile phones.

30. PW14, Bakari Ali, a younger brother to Mshahame, was called to identify his body on 4th March 2013 at Coast General Hospital before the post mortem was conducted.

31. PW15, Athman Toi Mweru, a fisherman at Ngare Baharini, testified that Abdalla Ali Kitondo was a colleague in the fishing industry; that, at some point in time, his mobile phone got damaged by water; that Abdalla Ali brought him a Samsung phone to use in the meantime before he bought another one; that, on 13th May 2013, he was arrested and escorted to CID offices to explain where he got the mobile phone he was using; that he disclosed that the phone had been given to him by Abdalla Ali; that Abdalla Ali was summoned and confirmed the information; and that he later learnt that the phone belonged Bwana Mkuu, the appellant herein, but whom he did not know.

32. PW16, Athman Mwawira testified that one Abdalla Kitondo gave him a mobile phone to use since his had a problem; that he was later arrested and charged with being in possession of stolen property; and that he thereafter got information from the police that the phone he was gifted with belonged to Jabir, the 1st accused person.

33. PW17, William Nzai Sonja testified that one Mohamed Ndenye Nzai was his cousin; that the said Mohammed had disappeared from 3rd March 2013); that his wife informed him (PW17) that he had gone to the mosque but had not returned; that they filed a report of a missing person; and that they later found his body at the mortuary with gunshot wounds, which they identified for purposes of a post mortem.

34. PW18, Lanson Chuma, a casual labourer at Changamwe, testified that he knew Omari Salim, the 5th accused person as they had worked together for 10 years as 'jua kali' artisans; that he last saw him on 28th February 2013; and that, on 31st April 2013, he learnt that he had been arrested.

35. PW20, Karisa Katana, testified that he was a brother to one William Katana, now deceased; that he had last seen him in February 2013; that the search for him led him to the Coast General Hospital where his body was lying; that the body was adorned with a red ribbon on the head and black ribbons on the hands and legs; and that he identified the body for the purpose of a post mortem.

36. PW21, CPL Peter Mulati of Changamwe CID Office performing investigation duties recalled that, on 4th March 2013, he was asked by the OCS to go and search for a man who was said to be hiding at Nuru Mosque; that he was accompanied by two other police officers; that they found the 3rd accused person who was wearing a blood-stained vest, but that he had no injuries; and that the vest was seized and sent to the Government Chemist for analysis. He identified the vest which he found the 3rd accused wearing.

37. PW22, Lawrence Kinyua Muthuri who worked with the Government Chemist and specialised in DNA profiling, testified that he received a total of 31 items for purposes of sampling and analysis. Among the items were: grey stones, brownish twigs and soil samples which were collected from the respective scenes where the bodies of the 4 deceased police officers were found; blood samples of William Katana, Ali Kitoto, Mohamed Dara Ngenje and Mshahame Ali (all deceased); a bedsheet that covered the body of Mshahame Ali; underpants of William Katana; a t-shirt and rubber shoes of Mohamed Dara Ngenje; a vest that was moderately stained with blood, and which was worn by the 3rd accused; and a blood-stained panga.

38. PW22 testified that, after analysis, he found that the item marked 'J1 - a vest', was moderately stained with human blood; that 'J1' did not generate a DNA profile from the blood sample taken from the deceased PC Stephen Maithya; and that the DNA of the blood stains found on item 'KI', a machete (panga) matched the blood of PC Stephen Maithya.

39. PW23, Nuri Juma Gunda, a brother to the 5th accused person, testified that he last saw the 5th accused in February 2013; and that, sometime in March 2013, he (the 5th accused), in the company of the 4th accused, went to visit their mother, only for them to be arrested on 21st March 2013 and taken to Kwale court.

40. In cross-examination, PW23 stated that the 4th and 5th accused persons were arrested while in possession of a panga.

41. PW24, SP Jacob Chelimo from the Diplomatic Police Unit, identified the body of OCS Chebii, his brother, prior to the post mortem conducted on 7th March 2013; and that the body had several injuries, including a huge cut on the head with a missing skull and cut wounds on both hands and legs.

42. PW25, No. 80914 PCF Samuel Kamiti from CID Kilifi, was one of the interrogating officers. He recalled that, on 8th March 2013, while at the former CID Headquarters in Mombasa, together with Mr. Kamlkus, a Senior Superintendent of Police, Chief Inspector Mauline, Sergeant Onyango and CPL Karisa, they interrogated the 1st accused person; that the 1st accused volunteered to take them to several scenes, among them an oathing venue and his house at Rabai where he claimed that his MRC membership Card was; that they found his wife one Selian; that they did not recover anything related to the MRC; and that they therefore proceeded to his second home in Kikombani.

43. PW25 testified that, at Kikombani, they recovered several items, among them being: a National Identity Card; Safaricom sim cards for numbers 0708110667 and 0726797682; an ODM political party membership card; Postbank cash card; NIC debit card; an Elector's card; several bank debit cards; the then mobile phone subscriber Zain card number 892544033/12091368873; a booklet for MRC; a dirty white vest; one fresh blood stained trouser; and the clothes that the 1st accused was then wearing. PW25 produced an inventory of these items which he and his colleagues signed.

44. PW25 further testified that the scene where the oath was taking place was near the home of Ali Kitundu, who had been killed. At this scene, they recovered two black ribbons, two red ribbons and a razor blade. They were informed that the witchdoctor who was administering the oath was one Stephen Karisa Kadzuya alias Zora Zora; that they went to the home of Karisa at Mariakani from where

they recovered: 22 small earthen pots; three bottles; gourds with shells of snails; small axes; black and red ribbons; snake skins; six different clothes tied in oval shape; three necklaces; a bunch of sticks tied with black and red ribbons; an M-pesa register form in the name of Karisa Kadzuya; and a bag and a knife. He prepared an inventory which he and CPL Karisa signed. He produced the inventory as PEXH No. 23.

45. PW26 Dr. Mgali Mbuko, a Pathologist based at Coast General Hospital, conducted the post mortems together with Dr. Maswabi of the four deceased police officers.

46. As to the postmortem of PC Stephen Maithya, which was conducted on 23rd March 2013, PW26 noted that: the head was deformed by multiple machete cuts from the chin and body(sic); the upper and lower jaws were severed; there were slash wounds in the trunk and lower legs; stab wounds on the abdomen; blood on the trachea; and the stab wound perforated the intestine. He formed the opinion that the cause of death was due to sharp traumatic head injury.

47. The autopsy report of PC Songwa was conducted on 7th March 2013. It was noted that: there was a 6cm cut on the left side of the head extending to the skull; he was deformed by multiple fractures; there was a bruise around the right eye; there was a stab wound on the left side of the chest along the rib cage; big blood clot at the back of the head; and minor slash wounds on both hands. His findings were that the injuries were caused by both sharp and blunt weapon, and that the cause of death was traumatic head damage.

48. The autopsy of OCPD Otieno Awour was conducted on 6th March 2013. PW26 noted as follows: the body had multiple machete cuts at the back of his head with some brain matter missing; long machete cut on the mouth; multiple deep cuts on both hands; and multiple slash wounds on the trunk. He opined that the cause of the death was traumatic head injury.

49. As to the autopsy of OCS Chebii which was also conducted on 7th March 2013, it was noted that: the body had six machete cuts to the head which had gone through the skull severing half of the head and brain; the deep machete cuts on the legs fractured both arms; and cuts on the left hand. He concluded that the cause of death was severe sharp trauma to the head.

50. PW26 produced the four post mortem reports as exhibits.

51. In cross-examination, PW26 confirmed that blood samples of the deceased officers were extracted, although he did not know what the result of the analysis was.

52. PW27, No. 554772 PC Arthur Kennedy attached to CID Changamwe was among the group of police officers appointed to investigate cases related to the MRC. He testified that the MRC was a group of people in the coastal region who wanted to secede from the larger Republic of Kenya; and that they were therefore opposed to the 2013 general elections. Additionally, they had filed cases in court whose substratum was the agitation for the secession; that they claimed to have over 2000 members; and that they referred to their Chairman as the President

53. In his interview of witnesses, PW27 learnt of the oath-taking incidences, and that some exhibits had been recovered from the homes of the 1st accused and the appellant, including: the appellant's National Identity Card and MRC Membership card; witchcraft paraphernalia; and red, white and purple ribbons; that the machete was fairly new and had faint blood stains on it; that the appellant did not deny that he was part of the MRC, and that he was recruited by the 4th accused person, who took him through oath-taking ceremony at Katanga Juu; and that the 3rd accused had a stained shirt, which he claimed was soiled by Guinness beer.

54. PW27 also testified that the appellant led them (Police Officers) to the house of one Badi Saidi Hassan, but that they did not find him; that they took a photograph of his driving license; and that he was later arrested together with the 5th accused in Kwale by a joint force of regular and GSU police officers.

55. PW27 produced the postmortem reports of the three civilians, namely William Katana, Mohammed Nyale and Mshahame, who had been killed by police officers during the confrontation with MRC members; that their bodies had ribbons on the wrist and legs which resembled the ones that had earlier been identified in court. He produced the ribbons as exhibits in court.

56. PW27 also testified that he submitted the blood samples of the three deceased civilians to the Government Chemists for analysis in addition to stones, twigs and soil found on their bodies.

57. He stated that the 1st accused and the appellant recorded statements under inquiry by which they gave the telephone numbers of their leaders who had taken them through an oath- taking ceremony on 3rd March 2013 at Kilonga area in Miritini. He testified that the mobile phones recovered from Athuman Mwero, a Samsung and from Athman Mwawira, an Alcatel belonged to the appellant and the 1st accused respectively; that a report of the call records from the two mobile phones linked them to the oathing venue; that communication between the 1st accused and the appellant ceased immediately after the attack; that Badi Saidi (the 4th accused) was arrested around April 2013 in Kwale while in possession of pangas and axes; and that his mobile phone No. 0724124552 with IMEI No. 356273023875940 was last in communication on 3rd March 2013.

58. PW27 produced in evidence clothes recovered from the appellant and the other accused persons, and the post mortem reports of the deceased civilians.

59. He also testified that the civilians died during the confrontation with police officers at Miritini, KTDA area; that, although the attack was concentrated at KTDA, there were other isolated areas which witnessed skirmishes, including Chonyi AP Camp where an AP officer lost his life, and at Chumani Secondary School where an IRB (sic) official and a Police Inspector lost their lives; that he also scrutinized the court pleadings at Mombasa Law Courts by which the MRC members were agitating for cessation; and that they contained a list of 3200 MRC members; and that, among the members listed therein were the 1st and 4th accused, and a brother to the 2nd accused. He produced the list of the MRC members in evidence.

60. PW28, Dr. Irene Muramba, a pathologist at Coast General Hospital, produced three postmortem reports of the three deceased civilians. All the postmortems were conducted on 8th March 2013. As to the report of Mshahame Ali Kitondo, PW28 testified that he had several bullet wound injuries at the chest; an exit wound on the right back side which went through the 7th rib near the lungs; a secondary entry wound near the pelvic bones and the liver; blood on the right side of the lung; blood collection on the right kidney; and bullet track wound in the liver. The cause of death was established to be as a result of loss of blood.

61. As for Mohamed Dofe Mdara, the autopsy report showed that he suffered a bullet wound on the right shoulder, and which exited on the left side through the ribs leaving the lungs while, internally, there was blood on both sides of the thorax. The cause of death was opined to be haemorrhagic shock (blood loss).

62. Finally, as regards the post mortem report of William Katana, it was established that there was a bullet entry wound on the left side of the chest below the eighth rib, which exited through the right side below the buttocks. Internally, blood cavity (abdomen) raptured the spleen and intestines. The cause of death was found to be haemorrhagic shock.

63. PW28 produced the three post mortem reports as exhibits.

64. PW29, CPL Daniel Hamisi attached to Safaricom Law Enforcement Liaison Office processed the request for call data and Mpesa statements. He processed the data of four (4) handsets for the period between 28th February 2013 to 8th April 2013. He testified that, upon inspection of the phone model Alcatel IMEI No. 356080041701010, the analysis showed that the call data in the phone was registered with the mobile phone number 0708110667 in the name of the 1st accused, Jabir Ali Dzuya; and that there was a subsequent use of the handset by a different line, namely No. 0701482298 in the name of Athuman Mwawira (PW16).

65. On the report for the Samsung phone, Serial No. 357064038826210, it was established that the initial telephone number 0727033965 was registered in the appellant's name, and that and it was active up to 3rd March 2013; that, thereafter, the device was in activation by phone number 0727835584 registered in the name of Athman Mwero; that at 18:54 hours, it communicated with telephone No. 0724124552 belonging to the 4th accused for 14 seconds; that IMEI No. 356273023875940, which was registered under Badi Said Kassim's phone number No. 0724124552, received a call from the appellant at 18:24 hours; and that the call data established that the appellant, the 1st and 4th accused persons were around the same geographical location when they were communicating; and that, all three phones were switched off within 17 minutes at the same locality on 3rd March 2013.

66. PW29 produced the call data report accompanied by a Certificate that he is the one who investigated the call data in evidence.

67. PW30, Franco Shamba, worked for Telkom Kenya. His job entailed maintenance, project feasibility and data retrieval. He testified that he did a data retrieval for phone numbers 0412007745 so as to get its details from 1st February 2013 to 9th May 2013. The particulars of the phone owner was Omari Salim Mwamrisho. He established that the last communication to the number was on 3rd March 2013 at 19:43Hrs for a duration of 31 seconds through phone number 0711380479, and from 0721224552 at 1825 Hrs which call lasted for 19 seconds.

68. At the close of the prosecution's case, the learned Judge (Muya, J.), in his ruling dated 28th January 2016, found that the prosecution had established a prima facie case against all the accused persons except Anthony Mwatela Mghendi, the 3rd accused. He accordingly put the 1st, 2nd 4th and 5th accused persons on their defence while the 3rd accused was acquitted under Section 306(1) of the Criminal Procedure Code.

69. When put on their defence, each of the remaining accused persons gave sworn evidence. At this point, our focus is on the appellant's defence since it is his appeal that is before us.

70. The appellant, who testified as DW1, stated that he used to work with Fiaz Bakery at Mariakani, and that, in 2007, he was transferred from Changamwe to Mariakani. He testified that he sympathised with what transpired on the fateful day; that he was arrested on 3rd March 2012 at around 9.00 p.m. while he had parked his vehicle at Mariakani bus stage; that he was a member of the MRC, and that he joined the group after being persuaded by his wife; that they had been promised land; that he voted in the general elections on 4th March 2013; that he did not know the deceased civilians Matondo and Ali Mshahame; that he did not participate in the murders, nor did he ever arm himself with a view to kill police officers; and that he was not arrested in possession of any weapon, and that neither were his clothes soiled nor was he found with ribbons. He also denied that he was a participant in the MRC case that was in court. He added that the case which was between the government and MRC concerned the MRC agitating that "Pwani si Kenya" (Coast is not part of Kenya).

71. It was the appellant's testimony that he did not intentionally stop using his mobile phone on 3rd March 2013, but that it went off due to low battery; that his mobile telephone number is 0727033965 and that it is not one which ended with numbers 1965; and that, since his phone had a low battery, he did not use it on the fateful night. He further denied knowing any of the MRC leadership, and that he led the police to the house of Badi Kassim (the 4th accused), the Chairman of the Changamwe MRC Branch, or that he was arrested together with the 1st accused.

72. DW2, Eshad Jabu, the appellant's elder sister, testified that, on 3rd March 2013, the appellant was at home, and that she left home at 6.00 p.m. to visit a friend; that when she returned, she did not find the appellant at home; that she did not know if the appellant was a member of any organized group, and neither did she see the appellant with any offensive weapons on 3rd March 2013; and that it was her mother who called and informed her that the appellant had left for Mariakani.

73. The learned Judge (Muya, J.) rendered his verdict on 29th July 2016. He held that none of the witnesses saw the accused persons among the ones who attacked and killed the deceased persons; and that the prosecution's case was purely based on circumstantial evidence. As to the appellant's involvement, it was held that he was arrested together with the 1st accused by PW7 after gunshots were heard coming from the KTDA direction.

74. The trial Court also held that it was not a coincidence that, through telephone triangulation, the appellant and the 1st accused were found at the venue where the oath-taking was being administered; that the oath was administered so that those who took part in the attacks were protected from evil; that, it was immediately after the oath-taking ceremony that the mobile phones of the appellant and the 1st accused went off and, soon thereafter, the attacks took place; and that, therefore, the only inference he could draw was that of their guilt.

75. He also found that the appellant's defence did not weaken the strong circumstantial evidence tendered by the prosecution, or create doubt in his mind that the appellant was guilty.

76. In the end, the 4th and the 5th accused persons were acquitted while the appellant was accordingly convicted and sentenced to death.

77. It is his (the appellant) conviction that precipitated this appeal which is against both the conviction and sentence. It is hinged on 5 grounds of appeal by which he faults the learned Judge for erroneously:

> "i. basing his judgement on circumstantial evidence tendered in court by the prosecution witnesses who merely suspected that the appellant murdered the deceased without providing an iota of evidence of the motive behind the killing;
>
> ii. basing his judgement on circumstantial evidence tendered in court without proper finding that malice aforethought was not established;
>
> iii. basing his judgement on circumstantial evidence and suspicion which was weak;
>
> iv. basing his judgment on circumstantial evidence tendered in court and failed to consider the appellant's evidence yet it showed that the appellant had no motive to murder the deceased; and
>
> v. basing his judgement on circumstantial evidence tendered in court and gave a harsh and excessive sentence."

78. The appellant thus prays that: the appeal be allowed; the conviction be quashed; and the sentence be set aside.

79. When the appeal came up for virtual hearing on 19th May 2025, learned counsel Mr. Dido appeared for the appellant while learned Prosecution Counsel Ms. Nyawinda was present for the prosecution.

80. Mr. Dido highlighted the appellant's written submissions dated 8th March 2025. Counsel demarcated issues for determination to be: whether the offence of murder was proved; whether the circumstantial evidence relied upon by the prosecution, and whether the basis upon which the appellant was convicted was proved beyond reasonable doubt; whether this Court should interfere with the sentence; and whether the appeal is merited.

81. Referring to the ingredients which the prosecution should prove to warrant a conviction for the offence of murder, counsel submitted that there was no dispute as to the fact of the death of the deceased persons and the cause that led to their deaths. He contended that the dispute lay with allegation that the appellant was responsible for their deaths; that he (the appellant) gave a plausible alibi defence that he was not at the scene of the murders; that his sister (DW2) testified that, prior to his arrest, he had left her house; that he was arrested at Mariakani bus stage while he was on his way to work; that, having raised an alibi defence, the burden of proving the truth of the alibi does not shift to the accused, but remains on the prosecution to prove their case beyond reasonable doubt; and, for this proposition, reference was made to the case of Ssentalle vs. Uganda (1968) EA (as per Sir Udo Udoma, CJ.)

82. It was submitted that the position remains the same in Kenya as was held by this Court in the decision of Victor Mwendwa Mulinge vs. Republic (2014) KECA 710 (KLR) that the burden of proving the falsity, if at all, of an accused's defence of alibi lies on the prosecution; and that, under those circumstances, the appellant's arrest was questionable; and that, therefore, condemning him to the conviction of murder was not only unfair, but unjust.

83. As to the application of circumstantial evidence, and while relying on the superior court's decision in Mvita vs. Republic (2022) KEHC 3265 (KLR); The United Kingdom's decision in Teper vs. Republic (1952) AC; and this Court's decisions in Ahamad Abolfathi Mohammed & Sayed Mansour Mousavi vs. Republic (2018) KECA 743 (KLR) and Sawe vs. Republic (2003) (KECA) 182 (KLR), counsel submitted that circumstantial evidence must be taken cautiously and be narrowly examined; that, for a conviction to hold, the evidence must be firm and should form a complete and unbroken chain so that it unerringly point to nothing but the guilt of the accused.

84. Counsel contended that the fact that the appellant was a member of MRC did not, of itself, suggest that he was culpable; that the evidence of PW2 and PW7 to the effect that they apprehended the 1st accused and the appellant was marred with inconsistencies in their respective account of the events leading to the arrest; that their contradictory narratives were coupled with the absence of an independent corroborative evidence, such as entry in the Occurrence Book (the OB); that this undermined the credibility of the prosecution's case; and that, therefore, their evidence was not cogent, and that it severed the evidentiary chain necessary to sustain a reasonable conclusion of guilt against the appellant.

85. The appellant also relied on several decisions of the High Court, including Vincent Kasyula Kingo vs. Republic (2013) KEHC 281 (KLR); and Josiah Afuna Angulu vs. Republic CRA 227 of 2006 (UR) for the proposition that an appellate court should reconcile the discrepancies in the prosecution's case to make a determination as to whether they create doubt in the prosecution's case; that, where doubt is created, it should be resolved in favour of the accused person; and that the learned trial Judge erred by misapplying the circumstantial evidence that was not sufficient to warrant the appellant's conviction. We were urged to find for the appellant and accordingly quash the conviction.

86. On sentence, it was submitted that the death sentence meted out against the appellant was harsh and excessive; that, guided by this Court's decision in Yokongwa vs. Republic (Criminal Appeal No. 101 of 2016)[2022] KECA 897 (KLR), which cited with authority the Supreme Court decision in Francis Karioko Muruatetu & Others vs. Republic (2017) eKLR, we should consider the appellant's mitigation that he was the last born and the sole bread winner of his family and accordingly exercise leniency on him.

87. On behalf of the respondent, Ms. Nyawinda highlighted the respondent's written submissions dated 18th May 2025. She conceded that there was no direct evidence adduced against the appellant, but that the circumstantial evidence connecting the appellant to the murder of the four deceased police officers was sufficient to warrant his conviction.

88. Counsel cited the decision of Sawe vs. Republic (2003) (KECA) 182 (KLR), highlighting the factors which the court should consider in convicting an accused person based purely on circumstantial evidence; that the appellant admitted being a member of the MRC group and that, in any case, he was arrested with an MRC membership card; that sufficient evidence was adduced to prove that he was in the oath-taking ceremony; that MRC members who took oath were the ones who were deployed to disrupt the 2013 general elections; that Safaricom call-log report established that the appellant was at the venue where the oath was being administered; that the appellant was arrested alongside the 1st accused, and that the two were located at the same venue by mobile phone triangulation just before the attack took place; that, immediately thereafter, their phones were switched off; that the appellant did not explain how his mobile phone, a Samsung, was located at the home of one Mshahame where a witch doctor was administering the oath; that the appellant's phone was last deactivated at Mshahame's house where the oathing took place; that the appellant was arrested as he ran away from the scene of crime; that he was arrested in the company of the 1st accused who had a panga that killed PC Maithya; and that the appellant was in possession of red, black and purple ribbons; and that MRC members who were either killed or arrested adorned red and black ribbons.

89. It was submitted that, although no one saw the appellant committing the offence, the chain of events led to no other conclusion than that he participated in either the planning or the killing of the deceased persons; and that, applying the principles of common intention under Section 21 of the Penal Code, it is clear that the appellant acted in concert to commit an unlawful purpose in conjunction with other MRC members. The decision of the Ugandan Court of Appeal in Ismael Kiseregwa & Another CA Cr. Appeal No. 6 of 1978 was cited for the ingredients that constitute common intention, among them a common intention to pursue a specific unlawful purpose, which lead to the commission of an offence.

90. On the issue of the appellant's alibi defence, it was submitted that the appellant admitted in his defence that he was arrested on the date of the offence, the night of 3rd March 2013; that the evidence of PW2 and PW7 on how and when he was arrested was not challenged in defence; that, in any event, PW2 and PW7 arrested and held the appellant at Jomvu Police Booth, and that, therefore, failure to produce an OB report did not undermine the fact that the appellant was arrested on the date of the offence about a few metres from the scene of the murders; and that the learned Judge considered the appellant's defence and, in his view, it did not weaken the circumstantial evidence or raise any doubt in his mind that the appellant was guilty.

91. As to whether malice aforethought was established, it was submitted that the evidence of PW19, the pathologist, was that the body of PC Maithya had deep cuts on the face and was badly mutilated; that the body of OCS CI Chebii had multiple cuts on the legs and hands; that that of PC Songwa had deep cuts at the back of the head; and that the body of the OCPD Otieno Owouri had deep cut wounds; that from the nature of the weapons used and the injuries sustained by the deceased persons, there was

sufficient evidence to demonstrate that the appellant and his cronies had the sole intention to either kill or cause grievous harm to the deceased persons; and that, therefore, malice aforethought was proved beyond reasonable doubt.

92. On the issue of sentence, we were urged not to interfere with the death sentence that was meted out; that the Supreme Court in the case of Muruatetu & Another vs. Republic; Katiba Institute & 5 Others (Amicus Curiae) (2017) KESC 2 (KLR) did not outlaw the death penalty but, instead, it capped it as the maximum penalty for the offence of murder; that, given the circumstances under which the deceased persons met their deaths, being that two senior police officers of the rank of SSP and CI respectively and two junior officers were butchered in the hands of a criminal gang while undertaking their lawful duty of providing security during the elections, the death sentence was commensurate to the offence.

93. Counsel further submitted that the death penalty should serve as a deterrence to would-be offenders, more so any criminal gang that may be harbouring the intention of disrupting security in the country.

94. This being a first appeal, we are obligated under rule 31(1) (a) of this Court's Rules to re-appraise the evidence and draw inferences of fact. In John vs. Republic (2024) KECA 1406 (KLR) this Court held as follows with respect to our mandate on first appeal:

> " Our mandate involves revisiting the evidence presented to the trial judge, conducting an independent analysis thereof, and subsequently drawing our conclusions. It is, however, essential to acknowledge that we did not have the opportunity to witness or hear the witnesses firsthand and make allowance therefore."

95. Our mandate as a first appellate court was likewise reiterated in Dickson Mwangi Munene & another vs. Republic [2014] eKLR where it was stated that:

> "This being a first appeal, this Court is obliged to re-evaluate the evidence on record to determine if the trial court's decision was based on evidence and is legally sound. On matters of fact, as appellate court we have to bear in mind the caution that having heard and seen the witnesses testify, the trial court was better placed to assess their demeanor. We should therefore be slow to reverse the trial judge's finding of fact unless it is supported by the evidence on record."

96. We have considered the evidence on record, the respective rival submissions, the authorities cited by the respective parties and the law. The issues which fall for our determination are:

    a. whether the ingredients of the offence of murder were proved;

    b. whether the appellant was properly convicted based purely on circumstantial evidence; in other words, whether the learned Judge properly applied the circumstances under which an accused person, and in this case the appellant, can be convicted based purely on circumstantial evidence;

    c. if the answer to (b) is in the affirmative, whether the appellant had malice aforethought; and

    d. whether we should interfere with the death sentence meted out against the appellant.

97. First, from the appellant's grounds of appeal, it is clear that he does not dispute the fact of the death of the four deceased police officers and, as regards the cause of their deaths. Although he framed the issue as to whether the elements of the offence charged were proved as one of the questions for determination

in the body of submissions, he conceded the fact and cause of the death of the deceased persons. What he contests therefore is that he was responsible for their deaths.

98. That said, we think that it is still paramount to mention the elements that constitute the offence of murder. The prosecution can only nail an accused person for this offence where it establishes the death of the deceased and its cause, that the accused person is the perpetrator of the act leading to the deceased's death, and that the accused person had malice aforethought when he or she committed the acts that led to the death of the deceased person.

99. These elements were summed up by this Court in the case of Anthony Ndegwa Ngari vs. Republic (2014) KECA 424 (KLR) as follows:

> "For the offence of murder, there are three elements which the prosecution must prove beyond reasonable doubt in order to secure a conviction. They are: (a) the death of the deceased and the cause of that death; (b) that the accused committed the unlawful act which caused the death of the deceased and (c) that the accused had the malice aforethought."

100. The fact and the cause of the death of the deceased persons were confirmed by PW26, the pathologist who conducted the post-mortems on them. Before the respective post-mortems were conducted, the bodies were identified by close family members. The autopsy results mainly showed that the deaths of the deceased persons were as a result of deep cut wounds inflicted with sharp and blunt objects. The post-mortem reports were produced in evidence.

101. The trial of the appellant and four other accused persons was as a sequel of the violent attack on the deceased persons, which took place on the night of 3rd March 2013 at Miritini near KTDA. As the gory events happened in the middle of the night from around 9.00p.m., it is obvious that there would have been little or no visual identification of the perpetrators due to poor lighting. In other words, circumstances for appositive identification of the assailants was not conducive. This then lend credence to the fact that the prosecution's case was wholly based on circumstantial evidence, and which circumstantial evidence was also the basis of the conviction of the appellant. On his part, the appellant refutes that the circumstantial evidence as presented by the prosecution was sufficient to warrant his conviction.

102. As observed above, the autopsy results mainly showed that the deaths of the deceased persons were as a result of deep cut wounds inflicted with sharp objects of which one of them was recovered, being a machete (panga). We shall use the word machete or panga depending on the word used by a particular witness, or as circumstances dictate. The evidence of the prosecution is that the attackers were also armed with rifles.

103. The best evidence to convict an accused person on, is direct evidence since as defined by the Black's Law Dictionary, 10th Edition, "...is based on personal knowledge or observation, and that, if true, proves a fact without inference or presumption." However, this is not to say that circumstantial evidence is bad evidence, or is of low evidential value. It has been held that circumstantial evidence is as good as direct evidence, and may also be used to convict an accused person in the manner that direct evidence is applicable. It must nonetheless pass the muster test of forming a complete and unbroken chain of events that lead to no other conclusion than that the accused is guilty, thereby excluding other hypothesis. In the case of Ahamad Abolfathi Mohammed & another vs. Republic (2018) KECA 743 (KLR), this Court stated that:

> "However, it is altruism that the guilt of an accused person can be proved by either direct or circumstantial evidence. Circumstantial evidence is evidence, which enables a court to

deduce a particular fact from circumstances or facts that have been proved. Such evidence can form as strong a basis for proving the guilt of an accused person just like direct evidence. Way back in 1928 Lord Heward, CJ, stated as follows on circumstantial evidence in R

v. Taylor, Weaver & Donovan [1928] CR. App. R. 21:

> 'It has been said that the evidence against applicant is circumstantial. So it is, but circumstantial evidence is very often the best. It is evidence of surrounding circumstances which, by undesigned coincidence is capable of proving a proposition with the accuracy of Mathematics. It is no derogation from evidence to say that is circumstantial.'"

104. Further, in the case of Titus Musyoka Mutinda vs. Republic [2020] KECA 295 (KLR), the Court stated:

> " Nonetheless, there is no requirement in law that the guilt of a person must be proved by direct evidence alone. Circumstantial evidence can also sufficiently buttress the establishment of the guilt of an accused person as was held in the case of Musili Tulo v. Republic, Criminal Appeal No. 30 of 2013, where this Court pronounced itself as follows: -
>
> > '[C]ircumstantial evidence is as good as any evidence if it is properly evaluated and, as is usually put, it can prove a case with the accuracy of mathematics.'"

105. In this case, we are like-minded as was the trial court that the appellant could only have been convicted based on circumstantial evidence because there were no eye witnesses who saw the appellant killing the deceased persons.

106. For circumstantial evidence to hold, courts resort to reasoning by inference in which case they must consider two cardinal rules, namely: that the inference sought to be drawn must be consistent with proved facts; and that the proved facts should be such that they exclude every reason for inference save the one sought to be drawn. If they do not exclude other reasonable inferences, then there must be a doubt whether the inference sought to be drawn is correct.

107. The predecessor of this Court, the then Eastern Africa Court of Appeal in the case of R vs. Kipkering Arap Koske (1949) 16 EACA 135, laid down the principles a court should apply when convicting an accused person on the basis of circumstantial evidence as follows:

> " That in order to justify, on the 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 guilt and the burden of proving facts which justify the drawing of the inference from the facts to the conclusion of any other reasonable hypothesis of innocence is always on the prosecution and never shifts to the accused."

108. In Kahiga & Another vs. Republic (2023) KECA 110 KLR, this Court, while referring to the findings in Abanga alias Onyango vs. Republic Cr. App. No. 32 of 1990 (UR), (supra); and Sawe vs. Republic (supra), summarised the principles for basing a conviction on circumstantial evidence as follows:

> " a. The inculpatory facts must be incompatible with the innocence of the accused.

b. They must also be incapable of explanation upon any other hypothesis other than that of guilt of the accused.

c. There must be no other co-existing circumstances weakening or destroying the inference; and that

d. Every element making the unbroken chain of evidence that would go to prove the case must be proved by the prosecution."

109. The Botswana Court of Appeal in Ndumo vs. The State 1997 BLR 738 CA at 741-2, Tebbutt, JA. cautioned courts before drawing inferences on circumstantial evidence as follows:

> " Circumstantial evidence must 'always be narrowly examined'. Before drawing the inference of the guilt of an accused from circumstantial evidence, it is necessary for the court to be sure that there are no co-existing circumstances which would weaken or destroy the inference."

110. The evidence of PW2 and PW7 is what placed the appellant at the scene of the murders. The appellant argued that their testimonies was contradictory and, therefore, not sufficient to sustain a conviction against him.

111. The fact that PW2 and PW7 were both conducting patrols on the night of 3rd March 2013 was not refuted. On the events leading up to the arrest of the appellant, the two witnesses, inter alia, recounted as follows:

> PW2 No. 667216 PC Josphat Mwatela testified that: "At midnight the OCPD driver CPLA Marumbe (PW7) came and told us that the OCPD was with the OCS...He told us that the OCPD and OCS were in search of MRC Members who had been sighted at Miritini.....We later heard gunshots from Miritini Caltex and KTDA. There was silence. We saw two people emerging towards Shell BP. I and CPL Halkano and PW7 challenged them to stop. They surrendered raising their hands. The one in front was Jabir Ali Dzuya (accused 1). I saw a panga fall from his clothes...The second man was also found with ribbons. He is the second accused (the appellant) and a Kenyan Identity Card and amulets."
>
> PW7 No. 64715 Cpl Thomas Mirumba, on his part, testified that:
>
> > "Upon arrival at Jomvu I found PC Mwatete (PW2) and Godana. After 20 minutes i heard gunshots near KTDA. After several minutes we saw two people running. We stopped them and asked them to identify themselves. We searched them and put them in our vehicle on out vehicle, one of them had a panga which he had dropped down. I recovered the panga. He was also wearing a ribbon. I later came to know their names as Jabir ALI Dzuya (the 1st accused) and Bwana Mkuu (appellant)."

112. From the above analysis of the testimonies of PW2 and PW7, there was no contradiction as to the manner in which they arrested the appellant on the evening of 3rd March 2013. More importantly is the fact that PW2 and PW7 were on lawful patrol duties after being commanded to keep vigil following reports that there were people who wanted to disrupt the general elections. The contention that there was no independent corroborative evidence, such as the Occurrence Book (OB) Number so as to confirm where the appellant was arrested and subsequently booked, is a non- issue. The fact is that the evidence of PW2 and PW7 was corroborative and uncontroverted.

113. Even if, by chance, there were some discrepancies in the two witnesses' testimonies, or any other witness for that matter, the test is whether the discrepancies go to the root of the prosecution's case. This Court has consistently stated that, because discrepancies are bound to occur in evidence, the critical question is always whether the discrepancies are minor and inconsequential, or whether they are material so as to vitiate the prosecution case. In John Nyaga Njuki & 4 Others vs. Republic (2022) KECA 288 (KLR), this Court expressed itself as follows on the issue:

> " In certain criminal cases, particularly those which involve many witnesses, discrepancies are in many instances inevitable. But what is important is whether the discrepancies are of such a nature as would create a doubt as to the guilt of the accused. If so, then the prosecution would not have discharged the burden squarely on it to prove the case beyond any reasonable doubt. However, where discrepancies in the evidence do not affect an otherwise proved case against the accused, a court is entitled to overlook those discrepancies and proceed to convict the accused. The discrepancies in the evidence in the matter before us are in our view, of a minor nature considering the facts and circumstances of the case."

114. The appellant was arrested while attempting to run away from the scene where the murders took place. PW2 stated that they arrested him and the 1st accused while running away moments after gunshots silenced at around Caltex/ KTDA area. The panga that was recovered from the 1st accused had blood stains on it. It was subsequently subjected to forensic DNA examination against the blood samples of PC Stephen Maithya whose body was found lying near Caltex/ KTDA area.

115. PW22, Lawrence Kinyua Muthuri, who worked with the Government Chemist and specialised in DNA profiling, was responsible for doing the DNA analysis. He testified that he received a total of 31 items, among them a vest that was moderately stained with blood marked 'J1' and blood- stained panga which was marked as exhibit 'K1'. After analysis, he found that the item marked 'J1 - a vest', did not generate a DNA profile from the blood sample taken from the deceased, PC Stephen Maithya; that the DNA of the blood stains found on item 'KI' which was a machete (panga) matched the blood of PC Stephen Maithya.

116. According to PW26, Dr. Mgali Mbuko, the Pathologist who conducted the post mortems of the four deceased police officers, and in respect to the autopsy of PC Stephen Maithya, noted that the head was deformed by multiple machete cuts from the chin and body(sic); that the upper and lower jaws were severed; that there were slash wounds in the trunk and lower legs; that there were stab wounds on the abdomen and blood on the trachea; and that the stab wound perforated the intestine. He formed the opinion that the cause of death was due to sharp traumatic head injury.

117. In view of the foregoing, there is no doubt that the 1st accused person was directly responsible for the death of PC Stephen Maithya. The question is whether it can be inferred from the foregoing chronology of events that the appellant was also involved in killing the police officers.

118. The prosecution argued that the appellant was charged together with others as he was an accessory to the murders; that is to say that he aided or contributed to the death of the deceased persons. Section 21 of the Penal Code makes provision for the doctrine of common intention as follows:

> When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence.

119. In Eunice Musenya Ndui vs. Republic (2011) KECA 401 KLR, this Court enunciated the following principles in identifying the ingredients which form the basis of presumption of common intention under Section 21 of the Penal Code as follows:

> " 1) There must be two or more persons.
>
> 2. They must form a common intention.
>
> 3. The common intention must be towards prosecuting an unlawful purpose in conjunction with one another.
>
> 4. An offence must be committed in the process.
>
> 5. The offence must be of such a nature that its commission was a probable consequence of the prosecution of such purpose."

120. The courts have defined what constitutes common intention in numerous situations. For example, in this Court's decision in Dickson Mwangi Munene & Another vs. R (2014) KECA 774 (KLR), it was stated that:

> "Common intention does not only arise where there is a pre-arranged plan or joint enterprise. It can develop in the course of the commission of an offence. In Dracaku s/o Afia v R [1963] E.A.363 where "there was no evidence of any agreement formed by the appellants prior to the attack made by each" it was held that "that is not necessary if an intention to act in concert can be inferred from their actions" like "where a number of persons took part in beating a thief."

121. In R vs. Jogee (2016) UKSC8, the United Kingdom Supreme Court opined that:

> " In the language of the criminal law a person who assists or encourages another to commit a crime is known as an accessory or secondary party. The actual perpetrator is known as a principal, even if his role may be subordinate to that of others. It is a fundamental principle of the criminal law that the accessory is guilty of the same offence as the principal. The reason is not difficult to see. He shares the physical act because even if it was not his hand which struck the blow, ransacked the house, smuggled the drugs or forged the cheque, he has encouraged or assisted those physical acts. Similarly, he shares the culpability precisely because he encouraged or assisted the offence. No one doubts that if the principal and the accessory are together engaged on, for example, an armed robbery of a bank, the accessory who keeps guard outside is as guilty of the robbery as the principal who enters with a shotgun and extracts the money from the staff by threat of violence. Nor does anyone doubt that the same principle can apply where, as sometimes happens, the accessory is nowhere near the scene of the crime. The accessory who funded the bank robbery or provided the gun for the purpose is as guilty as those who are at the scene."

122. Section 21 of the Penal Code recognises that a person is liable for action in an offence not committed by him but by another person with whom he shared a common intention. The statutory provision lends recognition to the principle that if two or more persons intentionally commit an unlawful act, it is akin to each of them doing it individually. A common intention presupposes a pre-arranged plan of the accused person participating in the offence. The crucial test is that such plan must precede the act constituting an offence.

123. Common intention can be developed previously, or in the course of the occurrence of the offence and/or at the spur of the moment. The appellant took part in the oaths which were administered to supposedly make them invisible and immune to any attacks which might have ensued as a result of their disrupting the general elections. PW12, on his part, confirmed that the appellant took part in oathing; and that, after taking the oath, the witchdoctor who administered the oath gave them amulets to protect themselves from being visible so that any evil would not see or catch them. PW13 confirmed that the oath-taking ceremonies took place in the home of one Mshahame, who died from gunshot wounds; and that, after the ceremony, he heard gun shots coming from the KTDA direction.

124. It was also the evidence of PW2 and PW7 that the 1st accused and the appellant were arrested in possession of ribbons of various colours. PW20, a brother to one Karisa Katana, who was killed by the police during the attack, testified that, when he went to identify the deceased's body for the purpose of post mortem, he found it adorned with red ribbon on the head and black ribbons on the hands and legs. It was therefore clear that the MRC members who had been dispatched to conduct the attacks had ribbons as the identifying marks, and it is no wonder then that the appellant was also in possession of ribbons of various colours at the time of his arrest.

125. Through mobile phone triangulation, the appellant was located where the oathing took place. According to PW29, CPL Daniel Hamisi of Safaricom Law Enforcement Liaison Office who processed the call data and Mpesa statements, testified that he processed the data of four (4) handsets for the period between 28th February 2013 to 8th April 2013. He further testified that, upon inspection of the phone model Alcatel IMEI No. 356080041701010, the analysis showed that the call data in the phone was registered with the mobile phone number 0708110667 in the name of the 1st accused, Jabir Ali Dzuya; and that there was a subsequent use of the handset by a different line, namely No. 0701482798 in the name of Athuman Mwawira (PW16).

126. On the report for the Samsung phone, Serial No. 357064038826210, it was established that the initial telephone number 0727033965 was registered in the appellant's name, and that it was active up to 3rd March 2013. Thereafter, the device was in activation by phone number 0727835584 registered in the name of Athman Mwero; that, at 18:54 hours, it communicated with telephone No. 0724124552 belonging to the 4th accused for 14 seconds; that IMEI No. 356273023875940 which was registered under Badi Said Kassim's phone number No. 0724124552, received a call from the appellant at 18:24hours; and that the call data established that the appellant, the 1st and 4th accused persons were around the same geographical location when they were communicating; and that, all three mobile phones were switched off within 17 minutes at the same locality on 3rd March 2013.

127. It cannot be a coincidence that, after the oath-taking, the killings took place the following day. As observed above, the appellant was arrested alongside the 1st accused as they tried to escape from the scene of the murders. The weapon that was found with the blood of PC Maithya (the deceased in respect to Count III) was recovered from the 1st accused, and his arrest alongside the appellant was so soon after the sudden silence that followed the gunshots. PC Maithya and the rest of the deceased persons were all killed around the same vicinity. How then, can the appellant absorb himself from culpability?

128. Further, the appellant did concede in his sworn defence that he was an MRC member. Although he denied ever taking an oath, other MRC members who testified stated that the MRC members who took oath, majority of whom were youth, were dispatched to go and attack polling stations and ensure that the general elections did not take place.

129. For the appellant, he was at the venue where the oath ceremony was taking place; he was arrested as he ran away from the scene where the deadly killings took place; a panga was recovered from the 1st accused with whom he was arrested; and the blood on the panga matched that of one of CP Maithya. From these circumstances, no better conclusion can be drawn than that the appellant was indeed in the company of the 1st accused at the scene of the murders, and that he participated in equal measure in the murders of all the deceased persons. It matters not that the forensic evidence produced in court related only to PC Maithya. Critical is the fact that there was common intention to kill anyone who was to oversee the smooth running of the elections. The deceased police officers had been discharged to do exactly that; to ensure that the elections went on smoothly. Unknown to them, heavily armed MRC members had plotted to attack them. And, true to their oath that elections would not take place, they slashed to death the four police officers with machetes.

130. In finding the appellant culpable, the learned Judge held:

> "It cannot be a coincidence that the phones belonging to the first and second accused person (appellant herein) were last activated by their registered numbers on the fateful night of 3rd March 2013 at 2052 Hours and 1944 Hours respectively which act was simultaneous and barely seconds apart. There is evidence to the effect that the two phones were de-activated at the same time and at the same geographical location and they were later found in the same location which was in the house of one Mshahame Kitondo. This Mshahame Kitondo was one of the victims who was shot during the attack. There is evidence which is not contested that oathing for the Mombasa Republic Council Members were being conducted at his homestead. I am of the considered view that the evidence placed before the court in respect of the 1st and 2nd accused (appellant herein) points irresistibly to their guilt. I have considered their defence and I find it does not weaken the circumstantial evidence and /or provide doubts in the mind of the Court."

131. The above holding is a true account of the appellant's culpability. From the chronology of events that preceded the murders, the appellant cannot, for all intent and purposes, absolve himself from being an accessory to the murders.

From the ingredients of what constitute common intention as defined in Section 21 of the Penal Code, he was no less guilty than the person who took up the murder weapon and actualised the killing. Irrespective of whatever role that may have been assigned to him by the MRC leadership, the fact is that he was actively involved in insuring that the killers prevented the smooth running of the general elections. For being in the company of the 1st accused from whom a murder weapon was recovered, and for other reasons outlined above, an inference can be drawn that he participated in the murders, or that he had the requisite intent to participate in the murders.

132. We further observe that the appellant's alibi defence did not aid him at all. He stated that he did not know why he was arrested near Mariakani bus stop, and that since no murder weapon was recovered from him, the trial court improperly applied the doctrine of circumstantial evidence in convicting him. Nothing can be further from the truth as the chain of events of the circumstantial evidence was unbroken, and that it leaves no doubt to our minds that he was culpable.

133. Further, DW2, his sister, whom he called to apparently corroborate his alibi defence, failed to do so. She testified that the appellant was at home on the night before the murders; that she left home at around 6.00p.m. to visit a friend; and that, when she returned, she did not find the appellant. DW2 did not therefore account for the whereabouts of the appellant after 6.00p.m. The murders took place in the night of the fateful day when she could not tell where the appellant was.

134. In conclusion, we find and hold, just as did the learned Judge that, from the circumstantial evidence on record, the inculpatory facts are incompatible with the innocence of the appellant and incapable of explanation upon any other reasonable hypothesis than that of his guilt. We find that the evidence adduced by the prosecution was cogent, and that the chain of events was unbroken as to lead to any other conclusion than that the appellant participated in the murders of the four deceased persons. We therefore find that the appellant was properly convicted for the offence of murder under Section 203 of the Penal Code, and consequent to which we uphold his conviction.

135. Having settled the question of the appellant's culpability, we now grapple with whether he had malice aforethought when he participated in the killing of the deceased persons.

136. Malice aforethought is defined under Section 206 of the Penal Code as follows:

> 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.

137. In Nzuki vs. Republic [1993] eKLR, this Court had the following to say with regard to malice aforethought:

> " Without an intention of one of these three types, the mere fact that the accused's conduct is done in the knowledge that grievous harm is likely or highly likely to ensue from his conduct is not by itself enough to convert a homicide into the crime of murder. See the case of Hyam v Director of Public Prosecutions, [1975] AC 55.
>
> In an appeal such as the present one, any one of the intentions set out above is a necessary constituent of the offence of murder contrary to section 204 of the Penal Code and the burden of proving any such intention is throughout on the prosecution. No doubt, if the prosecution prove an act the natural consequence of which should be a certain result and no evidence or explanation is given, then the Court may, on a proper direction, find that the accused is guilty of doing the act with the necessary intent, but if on the totality of evidence there is room for more than one view as to the intent of the accused, the Court should direct itself that it is for the prosecution to prove the necessary intent to its satisfaction, and if, on a review of the whole evidence, it either thinks that that intent did not exist or it is left in doubt in respect thereof, the accused should be given the benefit of that doubt. Thus, where on a charge of murder the evidence does not exclude the reasonable possibility that an accused person killed the deceased by an unlawful act but without the intent necessary to constitute legal malice requisite to the proof of that offence, that killing would only amount

to manslaughter. See Rex v Steane, [1947] 1 KB 997; and Sharmpal Singh s/o Pritam Singh v R [1960] EA 762."

138. The post mortems of the deceased persons as conducted by PW26, Dr. Mgali Mbuko, a Pathologist, spoke volumes of the injuries the deceased persons sustained. The body of PC Stephen Maithya, the deceased in respect to Count III, had the head deformed by multiple machete cuts from the chin and body(sic); the upper and lower jaws were severed; there were slash wounds in the trunk and lower legs; stab wounds on the abdomen; blood on the trachea; and the stab wound perforated the intestine. He died as a result of sharp traumatic head injury.

139. As for the body of PC Songwa, the deceased in respect of Count IV, there was a 6cm cut on the left side of the head extending to the skull; he was deformed by multiple fractures; there was a bruise around the right eye; there was a stab wound on the left side of the chest along the rib cage; big blood clot at the back of the head; and minor slash wounds on both hands. The cause of death was traumatic head damage.

140. The body of OCPD Otieno Awour, the deceased in respect of Count I, had multiple machete cuts at the back of his head with some brain matter missing; long machete cut on the mouth; multiple deep cuts on both hands; and multiple slash wounds on the trunk. He died of traumatic head injury.

141. As for OCS Chebii, the deceased in respect of Count II, the body had six machete cuts to the head, which had gone through the skull severing half of the head brain; the deep machete cuts on the legs fractured both arms; and cuts on the left hand. It was opined that he died from severe sharp trauma to the head.

142. It is clear that the deceased persons died following vicious attacks with sharp and blunt objects which aimed at vital organs, mainly their heads, abdomen and limbs. This attests to the fact that the attacks were intended to specifically end the lives of the law enforcers so as to enable the MRC members to continue disrupting the elections. In the circumstances, we can only conclude that the prosecution established that the appellant had malice aforethought when he killed or aided in the killing of the deceased persons.

143. As regards the sentence, it is trite law that sentence is an exercise of discretion by the trial Court. An appellate court will not normally interfere with the sentence imposed by the trial court unless it is demonstrated that the trial court considered irrelevant matters or failed to consider relevant matters, or the sentence is excessively high or is altogether illegal. See Shadrack Kipkoech Kogo vs. Republic - Criminal Appeal No. 253 of 2003 (unreported), this Court sitting in Eldoret (Omollo, O'Kubasu & Onyango Otieno, JJ.A.) stated:

> " Sentence is essentially an exercise of discretion of the trial court and for this Court to interfere, it must be shown that in passing the sentence, the sentencing court took into account an irrelevant factor or failed to take into account a relevant factor or that a wrong principle was applied or short of those the sentence itself is so harsh and excessive that an error in principle must be inferred." (Emphasis added)

144. In Omuse vs. Republic (2009) KLR, 214, this Court (O'Kubasu, Waki, & Onyango Otieno, JJ.A.), laid down the principles to be considered in sentencing thus:

> " In Macharia vs R. (2003) EA, 559, this Court stated: 'The principle upon which this Court will act in exercising its jurisdiction to review or alter the sentence imposed by the court have been firmly settled as far back as 1954 in the case of OGOLA S/O OWOUR (1954) EACA, 270 wherein the predecessor of this Court stated: 'The Court does not alter a sentence on

the mere ground that if the members of the Court had been trying the appellant, they might have passed a somewhat different sentence and it would not ordinarily interfere with the discretion exercised by a trial Judge, unless as we said in JAMES VS R (1950)18 EACA, 147, it is evident that the Judge acted upon some wrong principles or overlooked some material factors. To this, we should also add a third criterion, namely that the sentence is manifestly excessive in view of the circumstances of the case (R VS SHERXHAWSKY (1912) CCA 28 TLR, 263.

Further, the law is that sentence imposed on an accused person must be commensurate to the moral blameworthiness of the offender and it was thus not proper exercise of discretion in sentencing for the Court to have failed to look at the facts and circumstances of the case in their entirety before settling for any given sentence. See AMBANI VS R (1990) KLR, 161.'" [Emphasis ours]

145. In handing down the death sentence, the learned Judge stated:

> "As submitted by the prosecution, the attacks were targeted on police officers who were overseeing the last general elections. The attacker on police officers who were overseeing the last general elections. The attacker on the officers was brutal and uncalled for. The agenda of the attackers was to stop the residents of Coast from voting. Any organization and/ or movement whose members in quest of perusing their ideas and listed agenda of subverting democratic processes to wit a denial of universal suffrage to its people and whose members or some of its members conceive plan and execute brutal murders of policemen while in line of their duty cannot in any civilized society be deemed to be or to pretend to be a legitimate organization. The accused persons have been found to have been in quest of carrying out other agenda which is an ..... to our constitution. The attacks on the officers was brutal and senseless. The offence of murder carries a mandatory sentence of death which I find the Accused persons deserve. Each is sentenced to suffer death as per law provided"

146. We are of a similar view as the learned Judge. Under the Judiciary Sentencing Policy Guidelines, 2023, the objectives of sentencing are: retribution, deterrence, rehabilitation, restorative justice, community protection, denunciation, reconciliation and reintegration. The murder of the police officers demonstrated the viciousness and callousness of the appellant and his co-perpetrators' determination to cause fear and mayhem. They killed the four police officers while on their lawful duties to keep law and order and ensure that a democratic and constitutional process of general elections went on smoothly. If such acts as the instant murders of law enforcers are not denounced and properly punished, it would send the wrong signal that law and order belong to the lawless. The death sentence was intended to send a message of denunciation of such callous murders and a deterrence to would-be offenders. A message must go out there that it is heinous to kill police officers while they are serving the Nation, and in this case, at a critical time of general elections. Consequently, we find no reason to interfere with the sentence meted out on the appellant, and accordingly uphold the death sentence imposed by the High Court.

147. The upshot of the above is that the appellant's appeal fails and is hereby dismissed in its entirety. We uphold both his conviction and sentence and accordingly affirm the Judgment of the High Court at Mombasa (Muya, J.) delivered on 29th July 2016.

148. Orders accordingly.

DATED AND DELIVERED AT MOMBASA THIS 19TH DAY OF DECEMBER, 2025.

A. K. MURGOR

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JUDGE OF APPEAL

DR. K. I. LAIBUTA CArb, FCIArb.

.....

JUDGE OF APPEAL

G. W. NGENYE-MACHARIA

.....

JUDGE OF APPEAL

I certify that this is the true copy of the original

Signed

DEPUTY REGISTRAR