

THE COURT OF APPEAL

AT MOMBASA

(CORAM: MURGOR, LAIBUTA & NGENYE, JJ.A)

CRIMINAL APPEAL NO. E005 OF 2023

BETWEEN

ISAAC GAKENA NDERITU.....APPELLANT

AND

REPUBLIC.....RESPONDENT

***(An Appeal from the Judgment of the High Court
of Kenya at Malindi (R. Nyakundi, J.) delivered
on 14th April, 2023***

***in
HCR Case No.02 of 2020.)***

JUDGMENT OF THE COURT

The Appellant, Isaac Gakena Nderitu, was charged before the High Court sitting in Garsen with the offence of murder contrary to ***Section 203*** as read with ***Section 204*** of the ***Penal Code***. The information was that, on 9th April, 2020 at Nyangoro area, Witu Division Lamu West Sub-County within Lamu County, he murdered ***Jackson Wangangi Kalie (deceased)***.

The Appellant pleaded not guilty and the matter proceeded

to hearing where the prosecution called four witnesses.

Testifying at the hearing, **Paul Ndisho PW1**, a resident of Nyangoro, stated that, on the evening of 9th April 2020 at about 7:00 p.m. while at home with his family, his neighbour Bethuel came to inform him that a fight had broken out near his fence and that someone had been badly injured. He immediately rushed to the scene where he found the deceased lying on the ground in great pain and bleeding from the stomach. Together with other neighbours who responded to his call, they took the deceased to Witu Hospital for treatment.

On the way, the deceased, who was still conscious, complained of pain in his stomach and spoke intermittently to PW1. Upon arrival at the hospital, the deceased urged him to lodge a report with the authorities. PW1 left him at the hospital and went back home. The following day, he sent a woman known as Fero to deliver milk and clothes to the deceased, but she later informed him that the deceased was no longer in the ward. Shortly thereafter, PW1 learned that the deceased had succumbed to his injuries.

At around 2:00 p.m. that day, he received a telephone call confirming the death, and was asked if he had seen the Appellant.

The Appellant appeared later, and was persuaded by PW1 to accompany him to the police station. On their way, they encountered police officers who arrested the Appellant. PW1 later recorded his statement and accompanied the deceased's brother to the mortuary.

In cross-examination, PW1 stated that the deceased had told him that it was the Appellant who inflicted the injuries on him. He confirmed that the fight took place at the deceased's residence, and that a woman named Regina was present, even though she did not record a statement.

Bethwel Pamba, PW2, a farmer residing in the same locality, was with his friend Vincent Mutinda on the same night of 9th April 2020. At around 7:45 p.m., his friend requested him to escort him home since he was unfamiliar with the area. On the way, they met a woman known as Mama Jane, also referred to as Mama Chapati, who told him that there had been a fight between Gakena (the Appellant) and Mwangangi (the deceased). PW2 accompanied her to the scene where he found Kenga seated on a chair and Mwangangi lying on the ground bleeding from the stomach and appearing to be in pain. When he inquired about the cause, Mama Jane explained that the two men had been in a fight. The deceased himself asked PW2 to help him report to the police, saying that only the government could come to his assistance. PW2 then rushed home and telephoned PW1, who arrived at the scene on a motorcycle and later contacted the police. The

deceased was taken to the police station and subsequently to hospital where he later died from his injuries. PW2 identified the Appellant in court as the person he had seen that night, saying that it was not very dark and he had known him for about a year.

During cross-examination, PW2 confirmed that both Gakena and Mwangangi were present at the scene when he arrived. The deceased was lying on the ground, bleeding and complaining of stomach pain, while the Appellant was seating nearby. He also mentioned that several other individuals, including Vincent, Mama Jane, Komora and Franco, were present or informed of the incident, although none of them recorded statements. PW2 estimated that the distance between his home and the Appellant's home was about 300 metres. He stated that he was able to identify the Appellant by both sight and voice since the area was not very dark. He did not know the cause of the fight, but was told it was "over nothing."

Dr. Kimani Samuel PW3, a medical doctor attached to Mpeketoni Sub- County Hospital, conducted a post-mortem examination on the body of Jackson Kalic on 14th April 2020. He noted that the deceased's stomach was swollen while the head, neck, and chest appeared normal. Internally, all other organs were intact except the stomach, which contained a large amount of fluid and showed a rupture consistent with blunt force trauma. He concluded that the cause of death was blunt force trauma to

the abdomen resulting in rupture of the stomach, or abdominal peritonitis and subsequent bacterial infection, perimolysis leading to death. He produced the post-mortem report dated 14th

April 2020. The doctor stated that the injuries were not consistent with a natural cause but with forceful impact by a blunt object.

In cross-examination, Dr. Kimani explained that he could not specify the exact weapon used, but added that delayed medical intervention could have contributed to the infection that caused death.

On 14th April 2020, **PC Solomon Akwoyo No. 78593, PW4**, attached to the DCI, Witu office, was directed to investigate the death of the deceased, who was reported to have died while undergoing treatment at Witu Health Centre. After visiting the health facility to confirm the deceased's death, he proceeded to Nyangoro village where he recorded statements from PW1 and another witness. The witnesses led him to the home of the Appellant, who was arrested, escorted to Witu Police Station and charged with murder. PW4 stated that no murder weapon was recovered during the investigation, but one Regina, who had allegedly witnessed the altercation, fled the area and could not be traced. He confirmed that the deceased had identified the Appellant as his assailant before he died.

When placed on his defence, the Appellant denied

committing the offence of murder, but acknowledged that they were friends with the deceased for some time prior to the incident; that, on the material day, the deceased passed through his home to answer a call of nature leaving his bag in his custody; and that he

saw two young people and a lady. It was the two young men who reported to the police that he had fought with the deceased. He denied the occurrence of such a fight alluded to by the young people. He only noticed that the deceased did not reach the toilet as he was lying next to the facility. He therefore denied the offence in totality.

The trial court, upon evaluating the evidence, found the fact of death to be undisputed; that the medical evidence of Dr. Kimani, PW3, established that the deceased suffered fatal abdominal injuries caused by blunt force trauma, leading to rupture of the stomach and internal bleeding; and that the postmortem findings were consistent with a violent assault, and the court accepted them as credible proof of both the death and its cause.

On the question as to who caused the injuries, the trial Judge carefully analyzed the testimonies of PW1 and PW2, who were among the first people at the scene, and found that, although there was no direct eyewitness to the assault itself, the circumstantial evidence placed the Appellant as the last person seen with the deceased alive and severely injured. The court

reasoned that the proximity in time and location between when the deceased was last seen with the Appellant and when he died left no other reasonable explanation than that the Appellant inflicted the injuries. The Judge noted that the Appellant failed to

offer a credible alternative explanation for how the deceased sustained such harm, reinforcing the inference of guilt.

The court further considered the element of malice aforethought which was established by the deliberate blow to a vital organ leading to rupture and demonstrated a clear intent to cause death or grievous harm. He held that the absence of a weapon did not lessen the finding of malice aforethought since the medical and circumstantial evidence together established deliberate infliction of fatal injuries.

Consequently, the court convicted the Appellant for the offence of murder contrary to **Section 203** as read with **Section 204** of the **Penal Code** and imposed a sentence of 28 years' imprisonment effective from 21st April 2020.

Aggrieved, the Appellant has filed an appeal to this Court on grounds: that the learned trial Judge was in error in failing to appreciate that there was no common intention in the killing of the deceased person; that the learned trial Judge failed to appreciate that there were massive contradictions and variances in the evidence; and that he also failed to consider his defense.

When the appeal came up for hearing on a virtual platform,

learned counsel **Ms. Adoyo** appeared for the Appellant and learned prosecution counsel **Mr. Sirma** appeared for the Respondent.

In his submissions, counsel for the Appellant submitted on two principal grounds: first, that the learned Judge was in error in finding that the Appellant had malice aforethought and failed to consider the absence of common intention in the killing of the deceased; and secondly, that the learned Judge failed to properly consider and evaluate the Appellant's defence.

On the first ground, counsel submitted that the prosecution failed to prove that the Appellant possessed the requisite intent to kill or cause grievous harm as required under **Section 206** of the **Penal Code**. It was argued that the evidence adduced by the prosecution witnesses did not establish any deliberate intention, plan, or premeditation on the part of the Appellant to harm the deceased. In particular, PW1 and PW2 merely testified that there had been a fight between the Appellant and the deceased, but neither could explain the cause of the fight or identify any weapon used. Counsel stressed that, even during cross-examination, PW2 stated that the two "were fighting over nothing." It was further submitted that under **Section 206** of the **Penal Code**, malice aforethought can only be inferred from circumstances showing an intention to cause death or grievous

harm, knowledge that death was likely to result, or intent to commit a felony; that in the present case, none of these circumstances were proved. Counsel relied on the case of **R vs Tubere s/o Ochen [1945] 12 EACA 63** for the proposition that the court must consider the nature of the weapon used, the part

of the body injured, and the conduct of the accused when determining the existence of malice aforethought. Since no weapon was recovered and no direct evidence of the assault was led, counsel maintained that the learned Judge was wrong to find an inference of malice aforethought from the injuries alone.

Counsel further submitted that the prosecution failed to prove any common intention between the Appellant and the deceased to engage in a fight leading to death; that the evidence suggested a spontaneous disagreement rather than a planned or deliberate act. Moreover, the prosecution failed to call critical witnesses—particularly Regina Veneni, the neighbour who first reported the altercation—thereby leaving significant gaps in the chain of evidence; that Regina’s testimony would have been crucial in establishing how and why the fight started, yet she neither recorded a statement nor appeared in court. The investigating officer also admitted to having been unable to trace the witnesses.

Turning to the second ground, counsel submitted that the learned Judge failed to adequately consider the Appellant’s sworn defence; that the Appellant had denied murdering the deceased

and explained that he was his friend, and had come to his compound to relieve himself but collapsed near the toilet. The Appellant stated that he saw two young men and a woman at the scene, who later reported to the police that he had fought with the deceased. Counsel pointed out that the Appellant's behaviour was consistent with innocence, since

he did not flee from the scene and voluntarily accompanied PW1 to the police station where he was arrested.

It was further submitted that the entire prosecution case was based on circumstantial evidence, yet the chain of circumstances was incomplete and full of inconsistencies. Counsel highlighted that no one witnessed the alleged fight, the murder weapon was never recovered, and the investigating officer did not establish how the deceased sustained the fatal injuries. The prosecution, he argued, failed to prove that the chain of events unerringly pointed to the Appellant's guilt to the exclusion of all other reasonable hypotheses.

Counsel also questioned the reliability of the evidence, pointing out that the timelines of events was unclear, the testimonies as to when the fight occurred were contradictory, it was unclear who reported the incident first, and whether the deceased was first taken to hospital or to the police station. These inconsistencies, he argued, should have been resolved in favour of the Appellant.

In conclusion, counsel submitted that the trial court misdirected itself by convicting the appellant on insufficient and

circumstantial evidence, and by failing to consider his defence and the evidential gaps in the prosecution case.

In response, learned prosecution counsel, **Mr. Sirima**, appearing for the Director of Public Prosecutions, opposed the appeal and urged this Court to

uphold both the conviction and sentence entered by the High Court. Counsel submitted at the outset that the Appellant was solely charged with the offence of murder under **Section 203** as read with **Section 204** of the **Penal Code**, and that the evidence adduced by the prosecution was consistent, cogent, and sufficient to sustain the conviction; and that the testimonies of PW1 and PW2 clearly identified the Appellant as the person responsible for assaulting the deceased, who later succumbed to his injuries.

On common intention, counsel clarified that the prosecution did not rely on joint participation or common purpose since the Appellant was charged as an individual offender; and that the circumstances of this case did not call for the doctrine's application, as all the evidence pointed to the appellant acting alone.

As to the alleged inconsistencies, counsel submitted that any variations in the witnesses' testimony were minor and did not affect the substance of the evidence. The cases of **Mohammed & Another vs Republic [2018] KECA 743 (KLR)** and **Joseph Maina Mwangi vs Republic (Cr. App. No. 73 of 1993)** were cited for the

proposition that discrepancies are inevitable in witness testimony, but only become fatal when they create doubt as to the guilt of the accused. In the present case, it was submitted, the inconsistencies were insignificant and did not weaken the overwhelming evidence linking the Appellant to the deceased's fatal injuries.

On the question of the Appellant's defence, counsel submitted that the Appellant had denied the offence, alleging that the deceased, who was alleged to be intoxicated, fell into a hole near the toilet and injured himself; that his defence was both implausible and inconsistent with the medical evidence that the deceased suffered blunt force trauma to the abdomen resulting in rupture of the stomach and internal bleeding. Counsel argued that these injuries could not reasonably have resulted from a mere fall as claimed by the Appellant. Counsel contended that the trial court properly evaluated the Appellant's defence against the totality of the evidence and correctly dismissed it.

Turning to the elements of murder, counsel submitted that the prosecution had proved each of the three ingredients beyond reasonable doubt, the death of the deceased, the unlawful act causing that death, and the presence of malice aforethought; that the deceased who was found with severe abdominal injuries after being assaulted by the Appellant subsequently died whilst receiving treatment in hospital; and that the postmortem by PW3 established the cause of death as blunt force trauma consistent with a violent assault. Counsel submitted that malice

aforethought could be inferred from the manner and severity of the attack, the part of the body targeted, and the Appellant's conduct after the assault. In particular, counsel emphasized that, after viciously assaulting the deceased, the Appellant sat calmly on a chair as the victim lay on the ground in

agony; that his indifference to the deceased's condition demonstrated an intention to cause grievous harm or death; that the prosecution had proved its case against the Appellant beyond reasonable doubt; and that, therefore, the Court should not interfere with the conviction and sentence.

This being a first appeal, this Court is mindful of its duty as the 1st appellate court. This duty was well articulated by this Court in **Erick Otieno Arum vs Republic [2006] eKLR** as follows:

“It is now well settled, that a trial court has the duty to carefully examine and analyse the evidence adduced in a case before it and come to a conclusion only based on the evidence adduced and as analyzed. This is a duty no court should run away from or play down. In the same way, a court hearing a first appeal (i.e.) a first appellate court) also has a duty imposed on it by law to carefully examine and analyze afresh the evidence on record and come to its own conclusion on the same but always observing that the trial court had the advantage of seeing the witnesses and observing their demeanour and so the first appellate court would give allowance for the same”

In the case of **Chiragu & another vs Republic [2021] KECA 342 (KLR)**, this

Court stated that:

“However, before we grapple with grounds of appeal aforesaid, we must remind ourselves that this being a first appeal from the judgment of the High Court, by dint of section 379 of the CPC and guidance provided in the famous case of Okeno V. R. [1972] EA 32, we are expected to subject the entire evidence tendered in the trial court to fresh and exhaustive examination so as to reach our own independent conclusions as to the guilt or otherwise of the appellants. In doing so, we must however give

due allowance to the fact that we neither saw nor observed the witnesses as they testified. Accordingly, we must give way to the findings of facts and demeanor of witnesses by the trial court. See also Erick Otieno Arun V. Republic [2006] eKLR. In undertaking this exercise, we must of necessity go over the evidence presented before trial court albeit in summary.”

Having considered the record of appeal, the Judgment of the High Court, and the rival submissions of learned counsel for both parties, this Court is of the view that the appeal raises a number of key issues for determination. They are:

i) whether the Appellant was responsible for the unlawful death; ***ii)*** whether a common intention was established; ***iii)*** whether there were contradictions and evidential gaps in the prosecution’s case; ***iv)*** whether the prosecution failed to call crucial witnesses; ***v)*** whether the failure to adduce the alleged murder weapon was fatal; ***vi)*** whether the learned trial Judge properly considered the appellant’s defence; ***vii)*** whether the prosecution proved malice aforethought; and ***viii)*** whether the sentence of 28 years’ imprisonment was lawful and proportionate taking into account the guidance in the Supreme Court decision in ***Francis Karioko Muruatetu vs Republic [2017] eKLR*** and the reduction of time

spent in custody from the period of imprisonment under **Section 333(2)** of the **Criminal Procedure Code**.

The ingredients that constitute the offence of murder are set out under

Section 203 of the **Penal Code**, which provides that:

“Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.”

From a plain reading of this provision, it follows that the prosecution must establish that the accused was criminally involved in the deceased’s death; that the act or omission in question was unlawful; and that the accused acted with malice aforethought.

In the case of ***Anthony Ndegwa Ngari vs Republic [2014] eKLR***, this Court

distilled these statutory elements into the three essential ingredients that the prosecution must prove beyond reasonable doubt to secure a conviction for murder, namely:

“(a) the death of the deceased and the cause of that death;

(b) that the Appellant committed the unlawful act which caused the death of the deceased; and

(c) that the Appellant had malice aforethought.”

See also ***Republic vs Nyamongo [2025] KECA 639*** and

Nyaga vs Republic [2025] KECA 1280 (KLR).

It is a fundamental principle of criminal law that the burden of proving an offence lies squarely upon the prosecution, which must establish each of the afore-stated elements beyond

reasonable doubt. This principle is codified under **Sections 107, 108** and **109** of the **Evidence Act** which collectively stipulate that the burden of proof lies upon the party who asserts the existence of certain facts —

in this case, the prosecution. This burden does not shift to the accused at any stage of the proceedings.

The death of the deceased was not disputed and was established by the evidence of all the prosecution witnesses and the postmortem examination report produced in evidence by PW4, Dr. Kimani Samuel attached to Mpeketoni Sub County Hospital.

The Appellant was known to the prosecution witnesses and was therefore identified through recognition.

Turning to the unlawful act of causing death, the learned Judge found that the prosecution case turned on the circumstantial evidence that was adduced. And in concluding that the unlawful act was proved, the Judge had this to say:

“Given the evidence available, particularly the testimonies of PW1 and PW2 I am satisfied that a reasonable tribunal or court properly directed inevitably finds that beneath the circumstantial evidence, the accused murdered the deceased in the present case. PW2 evidence in furtherance of 107 (10 (sic) of the Evidence Act appropriately and squarely places the accused at the scene. It is a matter of ordained evidence from PW2, that on visiting the scene, the deceased was asleep with multiple injuries to the abdomen as the

accused sat on the chair next to the deceased.”

Indeed, there was no direct evidence showing how the deceased was injured, and therefore, did the circumstantial evidence surrounding the

deceased's death point unerringly towards the Appellant as the person whose unlawful act led to the deceased's death?

This Court held in the case of **Sawe vs Republic [2003] KLR 364** that:

“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 upon. 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 remain with the prosecution. It is a burden which never shift to the party accused.”

Since there was no direct eyewitness account of the assault, the Judge invoked the “last seen” doctrine and reasoned that the proximity in time between when the deceased was last seen with the Appellant and when he was found fatally injured created a compelling inference of guilt.

PW2's evidence was that he found the Appellant seating on a chair next to the deceased who lay on the ground bleeding and complaining of abdominal pain. The Appellant stated that the deceased who was his friend had come to the toilet to relieve

himself. It was therefore not in dispute that the Appellant was the last person to be seen with the deceased.

Given the circumstances, **Section 111(1)** of the **Evidence Act** places the burden upon an accused person to explain any fact that lies peculiarly within his

knowledge. In the context of murder, where an accused is proved to have been the last person seen with the deceased before death, he bears a duty to offer a reasonable and satisfactory explanation as to how the deceased met his death. Failure to do so allows a court to draw an adverse inference.

The Supreme Court of Nigeria in the case of **Haruna vs Attorney General of the Federation [2012] LPELR-SC.72/2010** succinctly articulated the rule, holding that:

“Where a person is last seen with the deceased and the circumstantial evidence points irresistibly to no other conclusion, the presumption arises that he bears responsibility for the death. In such cases, it becomes incumbent upon the accused to explain the fate of the deceased; in the absence of such explanation, both the trial and appellate courts are justified in inferring guilt.”

This principle has also been consistently invoked by this Court. In the case of **Kimani vs Republic (Criminal Appeal No. 41 of 2022) [2023] KECA 1390 (KLR)**,

the Court reaffirmed that the “last seen alive” doctrine operates where the deceased was last seen in the company of the accused before death, thereby creating a strong presumption of

responsibility which the accused must rebut by providing a plausible account. Similarly, in **Dida Ali Mohammed vs Republic, Nakuru Criminal Appeal No. 178 of 2000 (UR)**, the Court emphasized that the accused alone was in a position to explain what transpired after he was last seen with the deceased. His failure to do so, coupled with other surrounding

circumstances, led the Court to the inescapable conclusion that he was the perpetrator.

In the case of **Moingo & Another vs Republic [2022] KECA 6 (KLR)**, this

Court reiterated that, while the burden of proof in criminal cases remains squarely on the prosecution, the “last seen” doctrine imposes a duty of explanation upon the accused in homicide prosecutions. Where such an explanation is lacking, and the circumstantial evidence is consistent and unbroken, the court is justified in inferring that the accused was responsible for the death. The same principle was recently affirmed in the cases of

Ngono vs

Republic (Criminal Appeal No. 24 of 2016) [2024] KECA 757 (KLR); and **Kamau**

vs Republic [2024] KECA 1193 (KLR).

In the present case, PW2 saw the Appellant sitting next to the deceased who was lying on the ground bleeding and holding his stomach. According to the medical evidence, the deceased suffered from a ruptured stomach caused by blunt force trauma. When the evidence that the injuries the deceased sustained is considered alongside the medical report, there is no doubt that

the injuries were caused by a blow or blows to the stomach. The Appellant as the last person to be seen with the deceased did not explain how the deceased sustained the injuries. Having failed to provide any credible explanation, the only inference that could be made was that the Appellant was responsible for the injuries that

led to the deceased's death. In the result, we agree with the learned Judge that the circumstantial evidence which placed the Appellant at the scene, as the last person seen with the deceased and who failed to provide a plausible explanation as to how the deceased sustained the injuries, all pointed unerringly to him (the Appellant) as the person responsible for the deceased's death.

On the contradictions, counsel for the Appellant argued that the prosecution witness evidence was contradictory because the timelines of the events as they occurred were unclear, in particular, when the fight took place; it was also unclear who reported the incident first, and whether the deceased was first taken to hospital or to the police station first. Counsel contended that the inconsistencies should have been resolved in favour of the Appellant.

In the case of ***Richard Munene vs Republic [2018] eKLR***, this Court

described the nature and effect of contradictions or inconsistencies in the evidence of the prosecution witnesses thus:

“Contradictions, discrepancies and inconsistencies in evidence of a witness go to discredit that witness as being unreliable. Where contradictions, discrepancies and inconsistencies

are proved, they must be resolved in favour of the accused.

It is a settled principle of law however, that it is not every trifling contradiction or inconsistency in the evidence of the prosecution witness that will be fatal to its case. It is only when such inconsistencies or contradictions are substantial and fundamental to the main issues in

question and thus necessarily creates some doubt in the mind of the trial court that an accused person will be entitled to benefit from it.”

In the case of ***Dickson Elia Nsamba Shapwata & Another vs The Republic, (Criminal. Appeal. No. 92 of 2007)***, the Court of Appeal of Tanzania addressed the issue of discrepancies and stated:

“In evaluating discrepancies, contradictions and omissions, it is undesirable for a court to pick out sentences and consider them in isolation from the rest of the statements. The Court has to decide whether inconsistencies and contradictions are minor, or whether they go to the root of the matter.”

A review of the alleged inconsistencies does not lead us to conclude that they were material or that they in anyway prejudiced the Appellant. What is clear from the prosecution evidence is that a fight occurred between the Appellant and the deceased, the deceased was injured, the assault was variously reported, and the deceased was taken to hospital where he succumbed to his injuries. The contradictions were therefore immaterial and did not go to the root of the prosecution’s case. This ground has no merit.

On the question as to whether the prosecution failed to call key witnesses, such as Regina Veneni who first reported the altercation to testify, a consideration of the evidence discloses that reference was made by PW1 and PW4 to one Regina Veneni, who was alleged to have been present at the scene during the altercation. However, having referred to her, PW4 also stated that

she had disappeared without a trace, which was the reason that she did not testify. Since she could not be traced, it was through no fault of the prosecution that she did not testify. In any event, the prosecution witnesses who testified sufficiently proved the prosecution's case beyond reasonable doubt. This ground is therefore without basis.

On the failure of the prosecution to produce the murder weapon, this Court has variously stated that this was not fatal. In the case of **Ekai vs Republic [1981] KLR 569**, the Court held:

“That failure to produce the murder weapon of itself was not fatal to a conviction. The Court found that even in the absence of the murder weapon, the post mortem report had established beyond reasonable doubt that the injury from which the deceased died had been caused by a sharp bladed weapon.”

Similarly, this Court in the case of **Karani vs Republic [2010] 1 KLR 73**

delivered itself thus:

“The offence as charged could have been proved even if the dangerous weapon was not produced as exhibit as indeed happens in several cases where the weapon is not recovered. So long as the court believes, on evidence before it, that such a weapon existed at the time of the offence, the court may still enter and has been entering

conviction without the weapon being produced as exhibit”.

In the instant case, the witnesses who went to the scene saw the deceased lying on the ground bleeding whilst holding his stomach and writhing in pain. The medical evidence indicated that the deceased suffered a ruptured stomach

as a result of blunt force trauma. The evidence that the deceased was holding his stomach and was in pain, when considered together with the finding that the deceased's stomach was ruptured, was sufficient to show that the Appellant's unlawful act was the cause of the injuries that led to the deceased's death. Nothing therefore turned on the failure to produce the murder weapon. This ground also fails.

On application of the doctrine of common intention, the evidence showed that it was the Appellant and no other that inflicted the fatal injuries on the deceased. For this reason, it was inapplicable to the circumstances of this case. This ground is also without merit.

Next, the Appellant faulted the trial court for allegedly failing to consider his defence that the deceased fell into a hole near the toilet and injured himself. Our reevaluation of the High Court's Judgment shows that, when the learned Judge considered the medical evidence that indicated that the deceased sustained a ruptured stomach caused by brutal force, and the Appellant's defence, and that the deceased fell into a hole, the Judge rejected the defence and rightly so having concluded, that the fatal

injuries could not have resulted from a mere fall. We would further add that no reference was made to the existence of a hole nearby and, given that the Appellant made no effort to assist or seek immediate assistance for the deceased who was severely injured, we find

that the learned Judge rightly dismissed the defence as incredible and self-serving. This ground also fails.

On malice aforethought, under **Section 206** of the **Penal Code**, malice aforethought is defined 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.”

In the case of ***Hyam v DPP [1975] AC 55***, the Court held *inter alia*, that:

“Malice aforethought in the crime of murder is established by proof beyond reasonable doubt when during the act which led to the death of

another the accused knew that it was highly probable that, that act would result in death or serious bodily harm.”

Additionally, in the case of **Bonaya Tutut Ipu and Another vs R, [2015] eKLR** this Court cited with approval the persuasive authority of the Ugandan

Court of Appeal case of ***Chesakit vs UG, Criminal Appeal 95 of 2004*** where that

Court held:

“In determining 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.”

In the instant case, it goes without saying that the vicious nature of the assault, and the location of the injuries inflicted, indicate that the attack was aimed at causing the victim grievous harm or death which supported the inference of malice aforethought. We are satisfied that the learned Judge was right in so holding.

Upon re-evaluation of the evidence and the law, we come to the conclusion that the learned Judge properly analyzed the facts, applied the applicable legal principles of circumstantial evidence that established a complete chain pointing irresistibly to the Appellant as the perpetrator responsible for the deceased death. As a consequence, we are satisfied that the conviction was safe.

With respect to the sentence, the trial court imposed a

sentence of 28 years' imprisonment after due consideration of the Appellant's mitigation, the probation report, and the time spent in custody under **Section 333(2)** of the **Criminal Procedure Code**. It was within the lawful discretion of the court and

consistent with the principles set out in the case of **Francis Karioko Muruatetu &**

Another vs Republic (supra) and, accordingly, we have no basis upon which to

interfere with the sentence.

In sum, the appeal against the conviction and sentence is lacking in merit and is accordingly dismissed. Accordingly, we uphold both the conviction and sentence in the Judgment of the High Court at Malindi (**R. Nyakundi, J.**) delivered on 14th April 2023.

It is so ordered.

Dated and delivered at Mombasa this 27th day of February, 2026.

A. K. MURGOR

.....
JUDGE OF APPEAL

DR. K. I. LAIBUTA Carb, FCI Arb.

.....
JUDGE OF APPEAL

G.W. NGENYE-MACHARIA

copy of the original

Signed

***I certify that
this is a True***

DEPUTY REGISTRAR

