IN THE COURT OF APPEAL AT KISUMU

(CORAM: ASIKE-MAKHANDIA, OMONDI & KIMARU, JJ.A.)

CRIMINAL APPEAL NO. 91 OF 2021

BETWEEN

FARICE KHISA PEPELA……APPELLANT

AND

REPUBLIC……RESPONDENT

(Being an appeal from the judgment of the High Court of Kenya at Bungoma, (Aroni, J.) dated 19th March, 2018

in

HCCRC No. 15 OF 2013)
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JUDGMENT OF THE COURT

[1] This is a first appeal from the judgment of the High Court of Kenya at Bungoma (Aroni, J.) delivered on 19th March 2018 in Criminal Case No. 15 of 2013, in which the appellant, **Farice Khisa Pepela**, had faced information charging him with murder contrary to **Section 203** as read with **Section 204** of the Penal Code. The particulars of the information were that on 10th July 2013 at Ngwelo village in Sitikho Location, Bungoma East District, within Bungoma County, he murdered **Solomon Wanjala** and **Amos Wekesa, "the**

1st and 2nd deceased”,

respectively. He entered a plea of not guilty to the information but after full trial, he was convicted and sentenced to fifteen years imprisonment.

[2] The prosecution called several witnesses to establish the events of the fateful evening. Catherine Nasimiyu Wesonga (PW1) between 7.30 and 8.00 p.m. on the material day, heard screams of “thieves, thieves” coming from the main road. She rushed there and upon reaching the scene, saw a crowd gathered assaulting both deceased persons. One, Dishon Wanyonyi, stepped in to stop the crowd from assaulting the deceased further to no avail. He had a torch which he flashed and she was able to identify the appellant among those assaulting the deceased with sticks. She knew the appellant very well as he was a neighbour. She later heard on the radio that the deceased persons had died as a result of the assaults.

[3] On the same day and time, Martin Wekesa Wanyama (PW2) received information that the deceased were being assaulted. He hurried to the scene and found the deceased already dead, with a crowd gathered around. He did not identify any of the assailants but confirmed that the bodies were later taken to Webuye Sub-County mortuary. Nicholas Marwa Wasike (PW3) was with both deceased

coming from watching a football match when they were descended upon by the appellant,

Dishon Simiyu, Bobby Simiyu, Peter Wekesa Katialile and others with pangas and axes. They were then tied together and beaten, but he managed to escape.

[4] Jentrix Masibo (PW4), the mother of the 1st deceased, stated that her son had left home to collect a book from his friend, the 2nd deceased. Later that evening, she was informed that some people were being beaten at Ngwelo shopping centre. She proceeded to the scene, but before reaching there, she was told by her husband that the 1st deceased had been killed. She later saw the body at the mortuary with cuts on the mouth. Esther Nasambu Wanyonyi (PW5), the mother of 2nd deceased, received a call from PW1 informing her that her son had been killed. She went to the scene later and found that the bodies had already been evacuated to Webuye Sub-County mortuary.

[5] On his part, Ferdinand Wanjala Makhanu (PW6), the father of the 2nd deceased, was informed by the Assistant Chief of the area that his son had been killed. He later saw the body at the mortuary with multiple cuts on the head, shoulder, and legs, and noted that, the deceased had been stripped naked. Dr. Cleophas Wekesa Kubasu (PW7) produced the postmortem report prepared by Dr. James Mukabi in respect of the 2nd deceased. The report indicated multiple

cut wounds on the head, chest bruises, lacerations on the abdomen, and

penetrating injuries on the limbs. He opined that the cause of death was head injury secondary to assault.

[6] CIP Robert Oloo Otieno (PW8) received a report of the two deaths.

He went to the scene, where he found a crowd of people and the bodies of the deceased with multiple injuries. He stated that PW1 identified the appellant among those who participated in the assault whom he thereafter arrested and subsequently charged with the offence. His further investigations revealed a case of mob justice (injustice) on the basis that the deceased were suspected to be violent criminals who had terrorised the whole village.

[7] In his defence, the appellant denied involvement in the incident. He claimed that he was at home listening to the radio when he heard reports of the deaths. He went to the scene but was not allowed near the bodies. He was later arrested at night and subsequently charged with the offence he knew nothing about. He claimed he was framed for the offence.

[8] The trial court, after carefully considering the entirety of the evidence, concluded that the prosecution had discharged its burden of proof of the offence beyond reasonable doubt. It noted that the testimonies of PW1 and PW3 were direct, credible, and placed the appellant squarely at the scene of the crime as an active participant

in

the mob assault. Indeed, PW1 was emphatic that she saw the appellant assaulting the deceased persons with sticks. Her identification of the appellant was by recognition since he was her neighbour. That PW3, who was himself injured during the incident, gave a detailed account of how the appellant, together with others, attacked the deceased, describing the weapons used and the sequence of events at the scene of crime. The court found these accounts consistent and corroborated by other witnesses, including PW5 and PW6, who confirmed that the deceased were last seen alive in the company of the appellant and others and were later found dead with multiple injuries. The court also relied on the medical evidence presented by PW7, which report confirmed that the deceased sustained multiple cut wounds, penetrating injuries, and severe head trauma, with the cause of death being head injury secondary to assault. This medical evidence, in the court's view, aligned with the eyewitness accounts and established the unlawful acts that led to the deaths.

[9] On the defence by the appellant, the trial court observed that the appellant merely denied involvement and claimed either that he was not present at the scene of crime or that he had been framed. It held that the defence was unconvincing, lacked corroboration,

and did not displace the strong and consistent prosecution case. The court further

addressed the issue of contradictions raised by the defence, particularly regarding the time of the incident and the number of assailants. It found that while minor discrepancies existed, they were not material enough to displace the strong prosecution case.

[10] In the final analysis, the trial court held that all the elements of murder had been proved. Consequently, the appellant was convicted of the offence and sentenced to 15 years imprisonment.

[11] The appellant aggrieved by the conviction and sentence, is now before this Court on appeal impugning the decision of the trial court on the grounds that it erred in law and fact by: convicting him despite the crucial absence of a post-mortem report in respect of one of the deceased; relying on weak, inconsistent, and unreliable identification evidence, especially in a mob setting; attributing malice aforethought and individual culpability to the appellant within a chaotic mob scenario without sufficient evidence; and imposing an excessive and harsh sentence without considering the appellant's mitigation.

[12] When the appeal was called out for hearing, the appellant was represented by **Mr. Menezes B**., learned counsel, while **Ms. Mwaniki**, learned Assistant Director of Public Prosecutions appeared for the respondent. Both counsel elected to rely entirely

on their written

submissions which they had filed and exchanged in arguing their respective positions in the appeal.

[13] Mr. Menezes B. submitted that the appellant's conviction and sentence was unsafe and unlawful. He argued that the trial court erred in convicting the appellant on both counts despite the absence of a post-mortem report for one of the deceased. He contended that proof of death and its cause is a fundamental ingredient of murder, citing **Republic v Andrew Muecha Omwenga and Kamau v Republic (Criminal Appeal 90 of 2020)** which emphasized the critical role medical evidence plays in murder cases, and **Rex v Bachumira [1936] EACA 40** where a conviction was quashed for lack of medical proof linking the death to the suspect's action.

[14] He further submitted that the trial court relied on weak, inconsistent, and unreliable identification evidence in a chaotic mob setting. He pointed out that PW1's testimony was contradictory and based on torchlight identification at night, while PW3 admitted he only knew some of the assailants and not the appellant specifically. He relied on **Wamunga v Republic [1989] KECA 47 KL***R* and **Republic v Turnbull [1976] 3 All ER 549**, to posit that courts should approach evidence of visual identification under difficult

conditions with great circumspection.

[15] He argued that the failure to call Dishon Wanyonyi, a key witness who had attempted to stop the assaults, was fatal to the prosecution's case, citing **Bukenya & Others v Uganda (1972) EA 349** and **Jacob Muthee & 8 Others v Republic [2013] eKLR**, where it was held that failure to call crucial witnesses invites adverse inference in favour of the accused.

[16] On malice aforethought, counsel submitted that the trial court wrongly attributed collective intent to the appellant without proving his individual role or specific intent. He argued that mere presence in a mob does not establish malice aforethought, citing **Section 206** of the Penal Code and **Republic v Tubere s/o Ochen [1945] 12 EACA 63** in support thereof. He also relied on **Girish Akbarasab Sanavale & Another v State of Karnataka** to emphasize that common intention must be proved by individual conduct and cannot be inferred from group dynamics alone. He maintained that the appellant's defence was improperly disregarded.

[17] Finally, counsel submitted that the fifteen-years imprisonment imposed on the appellant by the trial court was harsh and excessive in the circumstances. That the trial court failed to consider mitigating factors of the appellant such as being a first offender,

sole breadwinner, and caretaker of his siblings. Counsel relied on the Supreme Court

decision in **Francis Karioko Muruatetu & Another v Republic [2017] eKLR** and its subsequent directions in **Francis Karioko Muruatetu & Another v Republic; Katiba Institute & 5 Others (Amicus Curiae) [2021] eKLR**, which emphasized consideration of mitigation factors in sentencing in murder cases. In the ultimate he urged the Court to allow the appeal, quash the conviction and set aside the sentence or in the alternative reduce the sentence to time served or to a lesser custodial term.

[18] In opposing the appeal, Ms. Mwaniki submitted that the appellant was properly convicted and sentenced. She argued that the prosecution had proved all the essential elements of the offence.

[19] On the first element, counsel submitted that there was clear evidence that both deceased died. PW3, an eye witness, recounted how the appellant together with others accosted the deceased after a football match, assaulting and cutting them, leading to their deaths. PW1 identified him as her neighbour. The postmortem report produced for 2nd deceased confirmed death from head injuries due to assault, while PW8 testified that he collected both bodies at the scene, observed multiple injuries, and was present during the postmortem where the doctor confirmed that the

deceased succumbed to injuries inflicted upon them by the appellant and his cohorts.

[20] On whether the appellant caused the deaths, counsel for the respondent submitted that PW3, who was himself a victim of the assault, gave direct evidence of how the appellant and others attacked him and his friends with pangas and axes, resulting in the deaths. PW1 corroborated this account, and the medical evidence confirmed the cause of death. Counsel emphasized that every homicide is unlawful unless justified, and in this case the appellant had no lawful excuse for his actions.

[21] On identification, counsel submitted that PW1 and PW3 positively recognized the appellant as one of the assailants. PW1 testified that she saw the appellant assaulting the deceased with the aid of torchlight and recognized him as her neighbour. PW3, who was attacked alongside the deceased, testified that he knew the appellant by appearance as his aunt's neighbour and saw him armed with a panga during the assault. Counsel relied on **Anjononi & Others v Republic [1980] eKLR**, where this Court held that recognition of an assailant is more satisfactory and reliable than visual identification of a stranger in difficult circumstances.

[22] On malice aforethought, counsel submitted that **Section 206** of the Penal Code defines circumstances under which malice aforethought can be inferred and the facts of this case satisfied

those

requirements. PW3 narrated how the deceased were cut repeatedly with pangas and axes, PW8 confirmed that the bodies had multiple injuries, and the postmortem report showed penetrating brain injuries. Counsel also relied on **Republic v Tubere s/o Ochen (supra)**, which set out factors attributable to malice aforethought as being the nature of the weapon used, the part of the body targeted, the severity of the injuries as well as the conduct of the accused before, during, and after the incident would all point to premeditation and therefore satisfy malice aforethought. This was the case here!

[23] On sentence, counsel submitted that the fifteen-year jail term imposed on the appellant was lawful and within the discretionary powers of the trial court, and consistent with the principles laid down in **Francis Karioko Muruatetu & Another v Republic; Katiba Institute & 5 Others (Amicus Curiae) (supra)**. She ultimately urged this Court to dismiss the appeal in its entirety.

[24] This is a first appeal. As a first appellate court, our duty is to re-evaluate the evidence afresh, weigh the conflicting accounts, and draw our own conclusions, while bearing in mind that the trial court had the distinct advantage of seeing and hearing the witnesses and appreciate their demeanor which credit should be

given to. See **Okeno v Republic [1972] EA 32.**

[25] Having carefully considered the record, the respective submissions of counsel, the authorities cited and the law, the only issue for determination is whether the appellant was correctly and properly found guilty on the information of murder. The death of the deceased and the cause thereof is not in doubt. Indeed, the appellant does not dispute this fact. His point of departure is that he was nowhere near the scene and or that he was framed for the offence. However, he does not explain why he was framed. Besides, there is overwhelming evidence placing him at the scene of crime. The evidence of PW1 and PW3 in this respect is critical. We see no reason just like the trial to disbelieve the events of the fateful day as narrated by these witnesses. We are therefore satisfied, just like the trial court that the appellant was amongst those who assaulted and fatally injured the deceased. However, the circumstances of this case reveal that the deaths occurred in the context of mob justice, with a large crowd involved and the appellant identified as one among several participants in the fatal assault of both deceased.

[26] This Court has consistently held that where the evidence shows participation in an unlawful assault but does not establish individual malice aforethought beyond reasonable doubt, the proper

conviction should be manslaughter contrary to **Section 202** as read with **Section**

205 of the Penal Code. In **Republic v Tubere s/o Ochen (supra)**, the court held that malice aforethought must be inferred from the nature of the weapon used, the part of the body targeted, and the conduct of the accused, but in chaotic mob settings attribution of specific intent to an individual must be approached with caution.

[27] On our independent evaluation of the evidence and the circumstances obtaining during the commission of the offence, we are satisfied that the prosecution proved unlawful participation by the appellant in the fatal assault of the deceased, but the element of malice aforethought was not established to the required standard. In our view, though the death was unlawful, it was not premeditated. It was a spontaneous act and a case of mob psychology. The offence disclosed given the circumstances is one of manslaughter contrary to **Section**

202 as read with **Section 205** of the Penal Code. We therefore substitute the conviction for murder with one for manslaughter contrary to **Section 202** as read with **Section 205** of the Penal Code.

[28] On sentence, we note that the appellant was a first offender, with family responsibilities, and has already served a substantial custodial term since his conviction in 2018.

[29] In the circumstances, and taking into account the time already served, we find that the period spent in custody sufficiently meets the

ends of justice. We therefore reduce the sentence to the term already served, and order the appellant's release forthwith unless otherwise lawfully held.

Dated and delivered at Kisumu this 13th day of March, 2026.

ASIK-MAKHANDIA

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JUDGE OF APPEAL

H.A. OMONDI

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JUDGE OF APPEAL

L. KIMARU

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JUDGE OF APPEAL

I certify that this is a
true copy of the original

DEPUTY REGISTRAR