



**Imbuka & 2 others v Republic (Criminal Appeal E150 of 2024)
[2026] KECA 616 (KLR) (13 March 2026) (Judgment)**

Neutral citation: [2026] KECA 616 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CRIMINAL APPEAL E150 OF 2024
MS ASIKE-MAKHANDIA, HA OMONDI & LK KIMARU, JJA
MARCH 13, 2026**

BETWEEN

PHILIP IMBUKA 1ST APPELLANT

CHRISTOSTOM ANAMI MULESHI ALIAS KUGA 2ND APPELLANT

KANUTI WOITI KHAKHAYANGA 3RD APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal against the Judgment of the High Court of Kenya at Kakamega (Chirchir, J.) dated 26th August, 2024 in HCCR No. 12 of 2020 consolidated with HCCR No. 70 of 2019)

JUDGMENT

1. The appellants Philip Imbuka, Christostom Anami Muleshi and Kanuti Woiti Khakhayanga were jointly charged with the murder of Alfred Ikambili Bihemo (deceased) contrary to Section 203 as read with Section 204 of the Penal Code.
2. They were alleged to have committed the offence on the night of 7th November 2019 at Makata village, Lunerere Sub-location, Isulu Location in Kakamega South Sub-County in Kakamega County.
3. The appellants pleaded not guilty to the charge and a fully-fledged hearing ensued. At the conclusion of the trial, the learned trial judge convicted the appellants and sentenced them to 35 years imprisonment. Dissatisfied, the appellant preferred the present appeal against that entire decision.
4. In a bid to prove their case against the appellants, the prosecution called a total of eleven (11) witnesses. The evidence that emerged from the trial was as follows: Elemina Mwabaka Ikambili, the deceased's wife who testified as PW1 stated that on the night of 7th November 2019, while the family was taking supper, the dogs began barking. The deceased stepped outside to investigate and was immediately



- attacked with a panga. Their son Dancun Shitsama (PW2), also went out and was similarly attacked. PW1 followed but narrowly escaped injury. She did not see the attackers' faces as one had concealed his face with clothing. She observed that one of the assailants wore a red long-sleeved top and gumboots. She later learnt that her husband had succumbed to the injuries.
5. On cross-examination, she conceded that she had not previously known the appellants and that her description to the police was of a masked attacker wearing a red jumper and white gumboots.
 6. PW2's testimony was that he was the first to be attacked when he went outside at about 9.00 p.m. He was cut on the arm and raised an alarm, prompting the deceased to go out, whereupon the deceased was held by the neck, dragged outside and fatally cut with a panga. He stated that there were three attackers and claimed to have identified the 1st appellant by torchlight, noting that he wore a red jumper, white gumboots and a mask which left the eyes exposed. He admitted that he had not known the 1st appellant before, was never subjected to an identification parade, and did not see the 2nd and 3rd appellants.
 7. Judith Witambila Ikambili, PW3, the deceased's daughter, testified that she saw her father being dragged outside while she and PW1 struggled to secure the house after a panga was thrown towards them. She did not see the actual attack. She described one assailant as tall and of big built, wearing a red jacket and gumboots. Although she claimed to have identified the 1st appellant based on physique and prior acquaintance, she admitted in cross-examination that there was a blackout, the assailant's face was covered, she did not give his name to the police, nor was she called to any identification parade. She also stated that the 2nd appellant who had injuries was found on a motor cycle on the road, as the deceased was being taken to the hospital.
 8. Joseph Kashindi Vihengo, PW4, the deceased's brother, responded to screams by rushing to the scene, where he found the deceased lying injured outside his house. He was informed that two suspects had been arrested by members of the public, one of whom was the 2nd appellant. Sheila Alivitza Ikambiri, PW5 and Peter Lever Khayeke, PW6, the deceased's children, did not witness the attack; PW5 knew the 1st appellant and suspected a land dispute as the cause of the fatal attack, while PW6 identified the body for post mortem and confirmed multiple cut wounds.
 9. Boniface Shikholo Mutiti, the village chairman, testified as PW7, describing how he responded to the commotion that night, and found people gathered on the road. He arrested the 3rd appellant and handed him over to the police. PW9, a police officer, testified to receiving the 2nd appellant from members of the public, together with two motorcycles allegedly recovered near the scene.
 10. Douglas Ndoli, PW10, a Safaricom liaison officer, produced call data records and M-Pesa statements linking the accused persons' phone numbers, together with a certificate of electronic evidence. Corporal Micah Busieno, the investigating officer, testifying as PW11 told the trial court that investigations revealed constant communication between the appellants on the material night, recovery of motorcycles near the scene, and an M-Pesa transfer of Kshs.100 between the appellants, which he relied on to infer a common purpose. He conceded on cross-examination that identification descriptions varied and that he could not personally confirm the presence of the 1st appellant at the scene of crime.
 11. Placed on their defence, the three appellants gave sworn defences denying participation in the attack. The 1st appellant stated that he was at home at the material time and only had prior dealings with the 2nd appellant as a boda boda rider earlier in the day. The 2nd appellant admitted ferrying unknown passengers on instructions from the 3rd appellant but denied reaching the deceased's homestead or taking part in the attack. The 3rd appellant denied involvement, and stated that he merely linked the 2nd appellant with a request to transport clients.



12. Upon considering the evidence presented, the learned judge found that that the death of the deceased, and its cause had been sufficiently established as a penetrating head injury due to sharp force trauma following assault; that although there were variations on the evidence as to what actually took place that night, these were insignificant; the evidence on identification was wanting and could not form a basis for conviction, however, the circumstantial evidence pointed to the 1st appellant as the one who facilitated the transportation of the attackers; the call logs showed constant communication between the three appellants and one Alex Wenjeje, and the frequency increased towards the day of the murder, and even more so on the evening of the murder, a demonstration that they were working together with a common intention of eliminating the deceased; their general movement and conduct was inconsistent with that of innocent persons; and completely incapable of any other explanation upon reasonable hypothesis other than guilt.

Aggrieved by this outcome, the appellants contested the decision, listing the following grounds of appeal:

- a. There was no information that was read out to the accused persons that would have been the foundation of a sound trial before the High Court.
- b. The learned trial Judge erred both in law and fact, in failing to appreciate that the prosecution failed to establish the elements and ingredients of murder and hence failed to prove their case beyond reasonable doubt.
- c. The trial court erred both in law and in fact in failing to strictly apply and give directions in compliance with Section 200 of the Criminal Procedure Code (Cap 75) and hence there was a breach of the rights of the appellant to a fair trial as provided for under Article 50(I) of *the Constitution* which resulted in a mistrial.
- d. The Superior Court erred both in law and fact in admitting evidence in breach of the provisions of Section I06(B) of the *Evidence Act* (Cap 80) which prejudiced the Appellant's rights to a fair trial.
- e. The trial court erred both in law and fact in undertaking an interpretation of evidence that had been thrown at the face of the Court in the name of Safaricom call logs and hence the trial Judge used her own interpretation of the evidence to convict the appellants.
- f. The circumstantial evidence adduced by the prosecution did not establish all and singular the elements and of factors that could make such evidence reliable.
- g. The judgment of the learned trial judge doesn't comply and is not in line with the provisions of Section 169 of the Criminal Procedure Code and hence cannot be a basis of a sound conviction.
- h. The learned trial judge misapprehended and misconstrued the provisions of Section 333 (2) of the Criminal Procedure Code (Cap 75) on sentencing and hence did not make any remarks on the same.
- i. The trial court erred both in fact and in law in failing to consider the respective defences tendered by the Appellants and ended up considering the prosecution case in isolation.
- j. The trial court erred both in law and fact in shifting both the burden and incidence of proof to the appellants.

13. The sentence imposed upon and handed over to the appellant was manifestly harsh and excessive in the circumstances.



14. At the plenary hearing of the appeal learned counsel Mr. Onsongo and Mr. Momanyi were indicated as appearing for the 1st appellant, however Mr. Momanyi was unable to participate in the plenary due to technical challenges. He had nonetheless filed written submissions which we have considered. At the same time, Mr. Onsongo singularly appeared for the 2nd and 3rd appellants; whilst learned prosecution counsel Ms. Busienei appeared for the respondent. The appellants in their joint submissions condensed the issues for determination to the following:
- a. Whether the offence of murder was proved.
 - b. Whether there were material contradictions in the prosecution case, as to warrant resolving the matter in the appellant's favour.
 - c. Whether the appellants were subjected to a fair hearing.

We are in agreement that the afore-going aptly summarizes the issues for determination.

15. In support of the appeal, it is submitted for the appellants that the prosecution proved the fact and cause of death through the post-mortem report, which established that the deceased died from a penetrating head injury due to sharp force trauma, an unlawful act within the meaning of section 203 of the Penal Code. However, the remaining elements of murder were not proved to the required standard.
16. It is submitted that the case against the appellants substantially depended on visual identification under difficult circumstances which did not meet the cautionary threshold set out in *R vs. Turnbull* [1976] 3 All ER 551 and as restated by this Court in *Cleophas Otieno Wamunga vs. Republic* [1989] KLR 424. It is argued that PW1 and PW3 did not see the attackers' faces, while PW2's alleged identification of the 1st appellant was based solely on torchlight and the appearance of the assailant's eyes despite the assailant being masked, a mode of identification that was unsafe and unreliable.
17. It is further submitted that no prosecution witness positively placed the 2nd or 3rd appellants at the scene of crime, while the investigating officer conceded that the appellants did not match the descriptions given by witnesses, no weapons or blood-stained clothing were recovered, and no motive was established. The inconsistencies in the witnesses' descriptions of the attackers' clothing and appearance were material and went unresolved, contrary to the guidance in *John Mutua Munyoki vs. Republic* [2017] eKLR and *Paul Kania Gitari vs. Republic* [2016] eKLR.
18. It is in light of the weak identification evidence and unresolved contradictions, that it is contended that the prosecution failed to discharge its burden of proof beyond a reasonable doubt as articulated in *Woolmington vs. DPP* [1935] AC 462, *Philip Nzaka Watu vs. Republic* [2016] eKLR and *Stephen Nguli Mulili vs. Republic* [2014] eKLR. It is further submitted that consistent with the reasoning in *Mutai & another vs. Republic* [2022] KEHC 10472 (KLR), the benefit of doubt ought to have been resolved in favour of the appellants that ultimately malice aforethought was not established, and the offence of murder was not proved beyond a reasonable doubt therefore.
19. In rebuttal, the respondent maintained that all the elements of the offence of murder were proved to the requisite standard; that the death of the deceased and its cause were conclusively established through the post-mortem report produced by consent, which confirmed that death resulted from a penetrating head injury caused by sharp force trauma following an assault. Further, that the body of the deceased was positively identified by PW4 and PW6.
20. It is argued that although the prosecution witnesses were unable to positively identify the assailants due to the prevailing circumstances, the prosecution relied on circumstantial evidence. Applying the



principles set out by this Court in *Abanga alias Onyango vs. Republic* (Cr. App. No. 32 of 1990), it was submitted that the circumstantial evidence formed a complete and unbroken chain pointing irresistibly to the appellants' guilt.

21. We are urged to consider that the prosecution relied on the recovery of two motorcycles approximately 200 metres from the scene of crime, the arrest of the 2nd appellant nearby; his admission that he ferried the attackers who alighted and proceeded on foot towards the deceased's home; and the screams heard shortly thereafter. Further reliance was placed on call data records and M-Pesa statements produced by PW10, which showed payments of Kshs.100/- and Kshs.200/- by the 1st appellant to the 2nd appellant shortly before the attack, as well as frequent and unusual communication between the 1st appellant, the 3rd appellant and one Alex Wijenje before, during and after the incident. It is contended that these facts demonstrated coordination and common intention within the meaning of section 21 of the Penal Code.
22. On malice aforethought, the respondent submits that it was proved in accordance with section 206 of the Penal Code; the prior planning inferred from the phone records, the targeted and vicious nature of the attack, and the infliction of fatal head injuries with a sharp object were relied upon to show an intention to cause death or grievous harm. In support of this proposition reference is made to the case of *Ali Salim Bahati & another vs. Republic* [2019] eKLR, where a vicious attack was held to be indicative of malice aforethought.
23. Finally, the respondent submitted that the appellants received a fair trial, asserting compliance with section 200 of the Criminal Procedure Code, as reflected in the record, and that the evidence on record proved the offence of murder beyond reasonable doubt.
24. This being a first appeal, the Court's duty is to re-evaluate and reconsider the evidence on record and arrive at its own independent conclusions, while bearing in mind that it neither saw nor heard the witnesses testify, as set out in *Okeno vs. Republic* [1972] EA 32.
25. There is no dispute that the deceased, Alfred Ikambili Bihemo, died as a result of an unlawful act. The post-mortem report produced by consent of the parties established that the cause of death was a penetrating head injury due to sharp force trauma. The death and its cause were therefore proved beyond any doubt, satisfying the first ingredient of the offence of murder under section 203 of the Penal Code.
26. The central issue for determination is whether the prosecution proved beyond reasonable doubt that the appellants were responsible for the unlawful killing of the deceased, and whether malice aforethought was established.
27. The attack occurred at night and the visual identification evidence was therefore difficult. PW1 and PW3 did not see the assailants' faces, while PW2's identification of the 1st appellant was based on torchlight observation of a masked assailant. While this Court has consistently cautioned against reliance on such evidence as stated in *R vs. Turnbull* [supra] and *Cleophas Otieno Wamunga vs. Republic* [supra], each case must nonetheless be considered on its own peculiar facts.
28. In the present case, the prosecution did not rely solely on visual identification. The evidence against the appellants was largely circumstantial. Applying the principles in *Abanga alias Onyango vs. Republic* (Cr. App. No. 32 of 1990), the circumstantial evidence met the requisite threshold as notably, the 2nd appellant was arrested approximately 200 metres from the scene of crime shortly after the attack and admitted that he had ferried the assailants who alighted and proceeded on foot towards the deceased's homestead. Screams were heard almost immediately thereafter from the same direction, coinciding with the fatal attack.



- 29. Further, the call data records and M-Pesa statements produced through PW10 established sustained and unusual communication between the appellants and one Alex Wijenje before, during and after the attack, as well as monetary transfers from the 1st appellant to the 2nd appellant shortly before the incident. The explanations offered by the appellants for these transactions and communications were inconsistent and implausible with conduct of innocent persons. When taken cumulatively, this evidence formed an unbroken chain pointing irresistibly to the appellants’ participation in the offence and excluded any reasonable hypothesis consistent with their innocence.
- 30. The evidence demonstrated common intention within the meaning of section 21 of the Penal Code. The coordinated communication, facilitation of transport to and from the vicinity of the deceased’s home, and the conduct of the appellants before and after the incident point to a shared design to attack the deceased. Each appellant played a role that contributed to the execution of the common purpose, and each is therefore deemed in law to have committed the offence.
- 31. On malice aforethought, the nature of the injuries inflicted, the use of a sharp weapon, the targeting of the deceased’s head, and the force applied were sufficient to infer an intention to cause death or grievous harm, as contemplated under section 206(a) and (b) of the Penal Code. In *Mulefu alias Museveni & another vs. Republic* (Criminal Appeal 168 of 2018) [2024] KECA 1585 (KLR) (8 November 2024) (Judgment) it was held that the vicious manner and the targeted attack is a clear indicator of malice aforethought.
- 32. Regarding the lament on non-compliance with section 200 of the Criminal Procedure Code, the record demonstrates compliance and that the appellants through their respective counsel on 20th March, 2023 confirmed to Chirchir, J. who was taking over from Musyoka, J. that they wished the matter to proceed from where the last judge had left; as such no prejudice was occasioned to them.
- 33. Ultimately, we find that there is no basis for interfering with the findings of the trial court, as the prosecution proved its case against the appellants beyond reasonable doubt therefore, the convictions were safe. The sentences imposed were legal. We will not interfere with the same. The appeal thus lacks merit and is dismissed in its entirety.

DATED AND DELIVERED AT KISUMU THIS 13TH DAY OF MARCH, 2026.

ASIKE-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

