

**IN THE COURT OF  
APPEAL AT KISUMU**

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

**CRIMINAL APPEAL NO. E038 OF 2021**

**BETWEEN**

**WYCLIFFE WAMALWA WAMELA.....1<sup>ST</sup>  
APPELLANT ELIUD WANGILA  
WAMELA.....2<sup>ND</sup> APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

*(Being an appeal from the judgment of the High Court of  
Kenya at Bungoma, (Aroni, J.) dated 2<sup>nd</sup> March, 2017*

**in**

**HCCRC No. 10 OF 2013)**

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**JUDGMENT OF THE**

**COURT**

[1] This is a first appeal against the conviction of and sentence meted out on **Wycliffe Wamalwa Wamela** and **Eliud Wangila Wamela**, “**the appellants**” by the High Court of Kenya at Bungoma, (Aroni, J.), in **Criminal Case No. 10 of 2013**. The appellants had faced the information charging them with murder contrary to **Section 203** as read with **Section 204** of the Penal Code. The particulars of the information were that on the 5<sup>th</sup> day of March 2012 at Musemwa

village within Bungoma County, they jointly murdered one, **Reuben Wanjala, “the deceased”**.

The appellants entered a plea of not guilty and soon thereafter their trial ensued.

[2] During the trial, the prosecution called several witnesses who narrated the events of the fateful day. Joseph Wafula Simiyu (PW1) was at home when he heard commotion from the road and upon rushing there, saw the deceased being assaulted by the appellants together with others and despite his intervention, the assault continued unabated until the village elder arrived. Calistus Juma Wamela (PW2) corroborated this account, stating that he too witnessed the appellants and others assaulting the deceased, who was bleeding and unable to walk. Mary Muthoni Wekesa (PW3) also saw the appellants among those who were assaulting the deceased and later learnt that they had even gone to the deceased's home where they continued assaulting him.

[3] Tobias Wanjala (PW4), the deceased's son, gave direct evidence of the second assault on the deceased by the appellants at their home, narrating how the appellants broke into the house, stripped the deceased naked, and continued to assault him. Benson Barasa (PW5), the village elder, confirmed that he found the deceased being assaulted by the appellants and others, and that he later learnt of his death following a second assault. Jennifer Nanjala (PW6), the

deceased's wife, saw her husband, injured and bleeding, and despite her efforts to raise funds to

take him for medical attention, she was unable to and he later passed on. PC Innocent Ijaka (PW7) confirmed receiving the report of the deceased's death and arresting the appellants. Dr. Haron Ombongi (PW8) tendered in evidence the postmortem report on the deceased which indicated that he had suffered a ruptured spleen with massive internal bleeding and opined that the cause of death was trauma. Finally, Martin Nyongesa (PW9) corroborated the accounts of PW1 and PW2, stating that he also saw the appellants among those assaulting the deceased.

[4] Put on their defence, the appellants denied involvement in the fatal assault of the deceased. They claimed that they were not present at the scene and that the witnesses had fabricated the allegations against them due to clan differences.

[5] The trial court, after evaluating the evidence tendered, found that the prosecution had proved the information against the appellants beyond reasonable doubt. It held that the testimonies of the eyewitnesses were consistent and credible, corroborated by medical evidence confirming the death and its cause. The defence was found to be a mere denial and did not displace the strong prosecution's case. The court concluded that the appellants, acting jointly with others, assaulted the deceased, causing injuries that led to his death.

Consequently, the trial court convicted the appellants and sentenced them to death.

[6] The appellants, aggrieved by the conviction and sentence are now before this Court on first appeal on grounds that: the prosecution failed to prove its case against them beyond reasonable doubt; there was no evidence directly linking them to the killing of the deceased; the trial court erred in finding that they participated in the crime; and that the trial court failed to consider the defence that they had advanced.

[7] The appeal was heard by way of written submissions with limited oral highlights. When called out, the appellants were represented by **Mr. Menezes B.**, learned counsel, whereas **Ms. Mwaniki**, learned Assistant Director of Public Prosecutions appeared for the respondent.

[8] Mr. Menezes B. submitted that the appellants were wrongly convicted for the information since the prosecution had failed to prove its case beyond reasonable doubt and that there was no direct evidence linking them to the death of the deceased. He contended that the trial court erred in finding that they participated in the offence, and further failed to consider the defence they had put forward. He maintained that the doctrine of common intention was not properly invoked, that contradictions in the prosecution's evidence created doubt, and that malice aforethought was not proved as required. He also submitted that the sentence of death imposed

upon the appellants was excessive in the light of the Supreme Court's decision in **Francis Karioko Muruatetu &**

**Another v Republic [2017] eKLR**, which declared the mandatory nature of the death sentence in murder cases unconstitutional. On these grounds, counsel urged this Court to allow the appeal, quash the conviction, and set aside or vary the sentence.

[9] Ms. Mwaniki in opposing the appeal submitted thus: the appellants were properly convicted of the offence and properly sentenced. That the prosecution had adduced sufficient evidence proving all the elements of the offence. That the death of the deceased was established through the testimony of PW6 and the postmortem report, which confirmed that the deceased died from massive internal bleeding secondary to a ruptured spleen caused by trauma.

[10] She further submitted that the unlawful acts of the appellants were proved by the direct evidence of PW1, PW2, PW3, PW5, and PW9, who witnessed the appellants and their accomplices assault the deceased, and by PW4, the deceased's son, who confirmed that the appellants later returned and assaulted the deceased again in their homestead. Counsel emphasized that this was a case of recognition rather than mere visual identification of a stranger, as the witnesses knew the appellants as neighbours as well as fellow clan members. Counsel cited **Anjononi & Others v Republic [1980] eKLR** where this Court held that recognition

is more assuring and reliable than identification of a stranger in difficult circumstances.

**[11]** On malice aforethought, counsel submitted that the appellants targeted vulnerable parts of the body of the deceased when assaulting him, and even threatened to burn his house. The conduct of the appellants before, during, and after the attack demonstrated premeditation and intent to cause grievous harm or death, consistent with the principles in **Republic v Tubere s/o Ochen [1945] 12 EACA 63.**

[12] Finally, on sentence, counsel noted that the judgment was delivered before the Supreme Court's decision in **Francis Karioko Muruatetu & Another v Republic (supra)**, and therefore urged that while the conviction was sound, the sentence may require to be reviewed to align with the current jurisprudence. In conclusion, counsel prayed that the appeal on conviction be dismissed but be allowed on sentence reconsidered only within the framework of the **Muruatetu** case guidelines.

[13] 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 observing the witnesses as

they testified

and noting their demeanor. This is the advantage that this Court does not enjoy and, in that regard, make due allowance for the findings of fact by the trial court. See **Okeno v Republic [1972] EA 32**.

[14] With the above in mind, the issues for determination in this appeal are whether the appellants were responsible for the death of the deceased; and whether the sentence imposed was appropriate in the circumstances.

[15] On the first issue, the prosecution adduced direct evidence from PW1, PW2, PW3, PW5, and PW9 who all witnessed the appellants assault the deceased in broad daylight. Further, PW4, the deceased's son, in his evidence confirmed that the appellants later returned to the deceased's home and continued with the assault. These witnesses were neighbours who knew the appellants very well and indeed they belonged to the same clan as the deceased. The assault was in broad daylight, making this a case of recognition rather than visual identification of strangers in difficult circumstances. In **Anjononi & Others v Republic (supra)**, this Court held that recognition of an assailant is more satisfactory, more assuring, and is more reliable than identification of a stranger because it is based on the witness's prior personal knowledge of the accused.

[16] In the light of the foregoing overwhelming evidence, the

appellants' defence that they were nowhere near the scene of crime  
and that they

had been framed with the case due to clan differences flies into thin air. PW8 conducted the post-mortem on the body of the deceased and opined that the cause of death was trauma. Accordingly, the death, the cause thereof and the perpetrators were proved by the strong prosecution evidence.

[17] On malice aforethought, **Section 206** of the Penal Code provides instances where malice aforethought may be inferred. Further, in **Republic v Tubere s/o Ochen (supra)**, the court held that malice aforethought can be inferred from the nature of the weapon used, the part of the body targeted, the manner of the attack, and the conduct of the accused before, during, and after the assault. The appellants repeatedly assaulted the deceased, targeting vulnerable parts of the body, and even went to his home and continued the attack on the deceased, stripping him naked and threatening to burn his house. This conduct demonstrates premeditation and intent to cause grievous harm or death, thereby satisfying the requirement of malice aforethought in terms of **Section 206** of the Penal Code

[18] On contradictions, the general rule is that minor contradictions in the prosecution's case are often disregarded by the courts unless they point to deliberate dishonesty or fundamentally undermine the

core of their case. If the inconsistencies are minor and don't affect the main

substance of the evidence, the court may still find the case proved beyond reasonable doubt. However, if the contradictions are significant and create reasonable doubt about whether the charges are proved, a conviction may not be safe and could be quashed. See **Nzaka v Republic [2016] eKLR**.

[19] On our part, we are satisfied just like the trial court that the alleged contradictions and or inconsistencies alluded to by the appellants regarding the exact times of the assaults and the number of assailants involved were minor and inconsequential. The core narrative remained consistent. The appellants were recognized by multiple witnesses as participants in the fatal assault, and the deceased died from injuries consistent with those assaults. In light of the foregoing, we are satisfied that the conviction of the appellants was safe.

[20] However, on sentence, we appreciate the Supreme Court decision in **Francis Karioko Muruatetu & Another v Republic (supra)**, which declared the mandatory nature of the death penalty in murder cases unconstitutional and thereby restored judicial discretion in sentencing.

[21] Considering the circumstances of this case, which was in the nature of mob justice (actually injustice), the gravity of the offence,

and the mitigating factors, we are persuaded that the sentence imposed though legal was nonetheless harsh and excessive. We are inclined to interfere

with it. We do so to the extent that we set aside the death sentence and substitute it with an imprisonment for a term of twenty-five years, to run from the date of arraignment before the trial court. The appeal therefore fails on conviction but succeeds on sentence to the extent stated.

**Dated and delivered at Kisumu this 13<sup>th</sup> day of March, 2026.**

**ASIK-MAKHANDIA**

.....  
**JUDGE OF APPEAL**

**H.A. OMONDI**

.....  
**JUDGE OF APPEAL**

**L. KIMARU**

.....  
**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**