

**IN THE COURT OF APPEAL
AT ELDORET**

(CORAM: MATIVO, GACHOKA & KORIR,

JJ.A.) CRIMINAL APPEAL NO. E121 OF 2022

BETWEEN

STEPHEN MOYOYI CHEMEN.....APPELLANT

AND

REPUBLIC.....RESPONDENT

*(An appeal from the Judgment of the High Court at Bungoma (S.N. Riechi, J.)
delivered on 29th July 2021*

in

HCCRC No. 26 of 2014)

**JUDGMENT OF THE
COURT**

1. The appellant, Stephen Mayoyi Chemeni, alongside three others, were charged with five counts of murder contrary to **section 203** as read with **section 204** of the **Penal Code**. In count one, they were charged with murdering Mary Chesang on 2nd March 2008 at Embakasi village in Trans Nzoia County. In the second count, they were charged with murdering Sofia Chepteck on the same day and place as count one. Count three was with respect to the murder of Titus Kipyego at the same place and time as count one. Count four concerned the murder of Samuel Kibet, while count five was in respect to the murder of Moses Mbuya under similar circumstances.

2. The appellant and his co-accused pleaded not guilty to the charges. A trial ensued, pitting seven prosecution witnesses and three defence witnesses, including the appellant. At the end of the trial, Riechi, J. returned a conviction against the appellant, while his co-accused were acquitted. The appellant is now before us, challenging both the conviction and the sentence on the grounds that the offence was not proved and that the sentence is harsh and excessive.

3. As this is a first appeal, the law commands us to reconsider the evidence on record before arriving at our independent conclusion. However, in doing so, we must be alive to the fact that we did not have the benefit of hearing and observing the witnesses testify, and we must take that fact into consideration in our determination. In this regard, we associate ourselves with the holding of the Court in **Dickson Mwangi Munene & Another vs. Republic [2014] eKLR** 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.”

4. In living to the foregoing requirement, we will first rehash the evidence adduced at the trial before undertaking our own analysis and determination of the matter.

5. The prosecution called 7 witnesses to the stand. **Robinson Mbuya**, who testified as **PW1**, stated that on the night of 2nd March 2008 at around 2:00 a.m., he was hiding in a bush near his home in Embakasi Village due to the post-election violence, when he witnessed a group of people, including the three accused persons whom he recognized, enter his home. They forcefully entered his grass-thatched house, shot his wife, Mary Chesang, and then set the house on fire, resulting in the deaths of his wife and three of his children, including Samuel, Kipyego, and Sophy Mbuya. His testimony was that the deceased persons were burnt beyond recognition. He also stated that, as his wife was shot, he heard her scream twice. **PW1** stated that he remained in hiding until about 5:00 a.m. when police officers arrived. He insisted that although it was dark, he was able to see the assailants clearly from the light of the burning house and was able to identify the accused persons, including the appellant, whom he stated he had known for about a year prior to the incident.

6. At the time, **Sarah Chepkimoi (PW2)** was 12 years old. She recalled that on the night of 3rd March 2008, at around 2:00 a.m., as she was asleep alongside her mother, Mary Chesang, and her siblings, they were woken up by people who demanded that they open the door. When her mother did not comply, the assailants kicked the door and started shooting. She stated that she saw the appellant shooting while one Robin Kirui Lawendi (co-accused) shouted in Kiswahili: "*tokeni maumbwa tunataka*

nyinyi," meaning "*come out you dogs, we want you*". She also stated that she heard

Wycliff Kecha Chemiati (another co-accused) say they wanted all of them. She testified that she managed to escape from the house unnoticed past Robin Kirui Lawendi and the appellant, where she hid approximately 20 meters away. She stated that from her hiding place, she saw the appellant and his co-accused persons set the house on fire and took a cow before leaving. According to her testimony, she was aided by the light from the burning house and their voices to recognize the assailants as they were her neighbours. She further stated that her mother and other siblings who failed to escape perished in the fire. She reported the matter at 5.00 a.m. when the police arrived, and that the appellant, who fled the scene, was arrested in 2014.

7. **PC Frasto Onyango Kieseri (PW3)** stated that on 6th March 2008, while attached to DCI, Kitale, he was directed to take over investigations into a murder incident that had occurred on 2nd March 2008 at Embakasi Village in Trans Nzoia County, where 13 people had been shot dead. Upon taking over the investigations, he accessed the forms in respect of post-mortem examinations on the deceased persons, who included Mary Chesang, Titus Kipyegon, and Sophy Mbuya, conducted by Dr. Mungoi of Kitale Hospital. He testified that even though he did not visit the scene himself as other officers had already done so, he recorded statements from **Robinson Mbuya (PW1)**, who had lost five family members, and Stephen Nyoka, who had lost three family members, and both witnesses provided him with the names and nicknames of the suspects, including that of

the appellant and

those charged with him. He handed over these names to his colleague, PC Mwananche, who subsequently arrested the appellant, while he himself arrested other individuals who were charged in a separate case before Kitale High Court related to the same killings.

8. According to **PC David Kipchumba (PW4)**, a scenes of crime officer then attached to DCI Kitale, on 30th March 2008 at 9:00 a.m., he proceeded to Embakasi Village in Kiswai Division following a murder incident where 12 people had been killed on the night of 2nd and 3rd March 2008 by the Land Defence Force militia. He stated that those who were targeted were families of those suspected of giving information to the police. Upon arrival at the scene in the company of senior officers, he was informed that the deceased persons were from the Mbuya and Kipandi families. He proceeded to take 20 photographs using an analogue camera, capturing images of the burnt houses inside, where five bodies had been burned beyond recognition. Later, he supervised the printing of the photographs at DCI headquarters, prepared a report, and, being a gazetted scenes of crime officer, produced the photographs and report as exhibits in the trial.

9. **Dr. Phaustine Shitote (PW5)**, a medical officer stationed at Kitale Referral Hospital with six years of experience, produced several post-mortem reports on behalf of his colleague Dr. Mgooi. She confirmed that she was well-versed with Dr. Mgooi's

handwriting and signature. For Samuel Mbuya, the report indicated a

completely burnt body of a child, with the cause of death being severe burns (produced as Exhibit 1A). Moving to Mary Chesang, the findings showed 100% severe burns as the cause of death (Exhibit 1B). In Kibet Mbuya's case, the report indicated a child's body severely burnt (marked as MF1 2). Then there was the report in reference to Salome Cherotich, where the findings revealed fractured ribs on the left side, with the cause of death being severe haemorrhage secondary to gunshot wounds (Exhibit 1C). Finally, with regard to Abel Kiptoo, the post-mortem showed two gunshot wounds, a perforated abdomen, massive haemorrhage, and a fractured pelvis, with the cause of death being severe haemorrhage secondary to gunshot wounds (Exhibit 1D). In cross-examination, **PW5** acknowledged that while the bodies of Mary Chesang and Samuel Mbuya sustained 100% burns, making facial recognition impossible, identification could be established through bone structure and teeth, though the reports did not specify what methods were used for identification.

10. **PC Julius Mwananje (PW6)** stated that while attached to DCI Kitale, he was handed a police file by PC Gigenge, the original investigating officer, who was going on transfer in 2012. After taking over the investigations on 24th February 2014, he established that the appellant and his co-accused had already been arrested by police officers from Kitale Police Station, assisted by Kenya Police Reservists. He recorded further statements from witnesses and subsequently preferred the

charges against the appellant and his co-accused. In cross-examination, he confirmed

that he took over a file in which statements had already been recorded and that he recorded only one additional statement. He also conceded that the investigation diary did not show that he took further statements and that he was not present during the arrests. He testified that he did not conduct an identification parade because the witnesses were neighbours who knew the accused persons prior to the incident.

11. **Justine Chemisto (PW7)** on her part testified that on 3rd March 2008 at around 2:00 a.m., she was in her house when she heard people opening her cowshed. She stated that her husband was shot through the door when he tried to extinguish a fire the intruders had started. He witnessed approximately five people wearing both civilian clothes and green uniforms enter her house, and she was shot in the abdomen, causing her intestines to protrude. She observed the assailants and specifically identified Wycliff Kecha Chemiati being someone she knew from the neighbourhood and the appellant among the attackers. She further stated that two days before the attack, she had seen a jerrycan of petrol being taken to the appellant's house. It was also her evidence that during the attack, her children, Dorcas and Abel, were shot with Dorcas dying instantly and Abel later dying in hospital, and that Gideon was cut on the abdomen and died, while she survived and was taken to hospital.
12. In his defence, the appellant testified as **DW3**, stating that he resided in Kisawai and denied all five counts of murder,

explaining that during the tribal clashes in Mt. Elgon, **Robinson Mbuya (PW1)** approached him in June 2007 to rent a house to his brother, who had fled the area and paid him two months' rent. In July 2007, his tenant was killed, and he subsequently discovered leaflets circulating alleging that he was a member of the Saboot Land Defence Force responsible for trouble in Mt. Elgon. This prompted him to report to Chief Chemengich, who was later killed after receiving death threats. As a result, he left his home in Embakasi in November 2007 and relocated to Matumbai in Endebess, where he remained throughout 2008. He denied being at Embakasi village on 2nd March 2008, when the offences occurred, stating that he returned to Mt. Elgon in July-August 2008 and eventually returned to Embakasi in 2009. He stated that in 2014, a clan elder requested him to accompany him to Kitale Police Station, where he was arrested alongside his co-accused. He stated that although **PW2**, who was his neighbour's daughter, knew him well, she did not mention him in her first report to the police or in the proceedings in Kitale HCCR 8/2009, which proceedings he relied upon in his defence.

13. When the matter came up for hearing before us, the appellant was virtually present from Kibos Maximum Prison. Principal Prosecution Counsel, Mr. Okak, appeared holding Mr. Yusuf's brief. Even though counsel for the appellant did not appear, the appellant asked the Court to rely on the submissions already filed by his counsel.

14. In the submissions, counsel for the appellant argued that the prosecution failed to prove the offence of murder beyond reasonable doubt, particularly the crucial element of malice aforethought as defined under **section 206** of the **Penal Code**. Counsel submitted that the post-mortem reports produced were inconsistent with the testimonies of **PW1** and **PW2** as to the cause of the deaths of the deceased persons. On the issue of identification, counsel submitted that the trial court erred by relying on the evidence of **PW1** and **PW2**, asserting that the subsisting conditions were not favourable for the identification of the appellant. Counsel faulted the trial court, arguing that it failed to exercise the requisite caution in examining the recognition evidence, particularly the voice identification. To buttress this submission, counsel relied on **Wamunga vs. Republic [1989] KLR 424** for the proposition that identification evidence must be examined carefully to ensure favourable circumstances free from error. Counsel referred to **Daniel Atemia Spiendi vs. Republic [2019] eKLR** for the factors to be considered in assessing the quality of identification evidence. Additionally, counsel referred to **Karani vs. Republic [1985] KLR 290** for the need for caution before voice identification can be used to convict. The case of **Anjononi & Others vs. Republic (1976-80) 1 KLR 1566** was referenced to highlight the principle that recognition depends on personal knowledge of the assailant.

15. Counsel further submitted that the prosecution's case was

replete with material contradictions and inconsistencies that rendered

the evidence unreliable. Buttressing this argument, he referred to the evidence of **PW1**, **PW2**, and **PW3**, arguing that the witnesses differed as to the date of the incident, the number of fatalities, and the period of the appellant's absence from the area. Counsel faulted the trial court for failing to call crucial corroborative witnesses, including Joan Chelagat, Emma Chemutai, and Esther Chelimo.

16. Regarding the appeal against sentence, counsel invoked the Supreme Court decision in **Francis Karioko Muruatetu & Another vs Republic [2017] eKLR** to challenge the mandatory nature of the sentence, arguing that, even if the conviction was to be upheld, the 25-year term was harsh in the circumstances. It was therefore counsel's plea that the appeal be allowed as prayed.
17. For the respondent, counsel submitted that the prosecution presented compelling evidence directly linking the appellant to the crime and that the evidence met the threshold for conviction. Affirming the credibility of the circumstantial evidence as presented, counsel referred to **Kariuki vs. Republic [1984] KECA 79 (KLR)**, urging that it formed a complete chain and irresistibly points to the guilt of the appellant. Regarding the burden of proof, counsel contended that while the prosecution bears the ultimate burden, the defence failed to introduce any reasonable doubt regarding the appellant's involvement. Counsel maintained that the evidence

adduced by the prosecution attained a high degree of probability but not necessarily certainty.

18. Rejecting the appeal against the sentence, the respondent submitted that the 25-year imprisonment term fell within the appropriate legal range for the offence of murder and was reasonable. Counsel referred to **Wanjema vs. Republic [1971] EA 493** and **Paul Kamau Macharia vs. Republic [2003] KECA 127 (KLR)** for the proposition that sentencing is at the discretion of the trial court and an appellate court should not interfere with the sentencing discretion of a trial court unless it is shown that the court acted on a wrong principle or overlooked some material factor. Additionally, the respondent cited **Omuse vs. Republic [2009] KECA 440 (KLR)** to emphasize that sentences should be proportionate to the offence and take into account both aggravating and mitigating factors, ensuring that the sentence serves justice, deters future crimes, and rehabilitates the offender. The respondent maintained that the trial court properly exercised its discretion within the legal framework and that the conviction and sentence should accordingly be upheld.

19. We have carefully re-evaluated the evidence on record and the submissions by counsel. The appellant was convicted on count one only, the murder of Mary Chesang. The trial court acquitted him on counts two to five for lack of proof of the fact and cause of death. Therefore, the issues for our determination are whether the prosecution proved the offence of murder against the appellant beyond reasonable doubt and whether the

sentence of 25 years imprisonment was harsh and excessive.

20. **Section 203** of the **Penal Code**, under which the appellant was charged, defines the offence of murder as follows:

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

Therefore, for the court to return a conviction on a charge of murder, the prosecution must prove beyond reasonable doubt the fact of death, the cause of death, that the death was caused by an unlawful act or omission on the part of the accused, and that the unlawful act or omission was accompanied by malice aforethought as defined under **section 206** of the **Penal Code**.

21. There is no dispute regarding the fact of death and its cause. The deceased, Mary Chesang, died on the material night. The cause of death, as established by the post-mortem report produced by **PW5** and admitted as Exhibit 1B, was 100% severe burns. The appellant does not seriously contest these facts.

22. The core issue for determination is whether the appellant was positively identified as one of the people who caused the death of the deceased. The evidence against the appellant is primarily that of recognition by **PW1** and **PW2**, who testified that they knew the appellant prior to the incident. **PW1** stated that the appellant was his neighbour for three years. **PW2**, on the other hand, testified that the appellant was their neighbour and that she knew him well. **PW7**, although talking of killings in respect of other persons, identified the appellant as one of her assailants. The trial court, in

its judgment, carefully analyzed the evidence of identification by **PW2** and made a distinction between the appellant and his co-accused persons. While the court found that the identification of the 1st and 2nd accused persons was not free from error, it was satisfied that the recognition of the appellant by **PW2** was positive and reliable.

23. We have re-evaluated the evidence of **PW2, Sarah Chepkemoi**, who was 12 years old at the time of the incident. She testified that she was inside the house with her deceased mother and siblings when the assailants struck. She saw the appellant shooting. She heard the 1st accused speak and the 2nd accused also speak. She managed to escape and hide approximately 20 meters away, from where she saw the appellant and his co-accused set the house on fire. She identified the appellant by recognition, as he was her neighbour, aided by the light from the burning houses and his voice.

24. The appellant's counsel has cited **Wamunga vs. Republic** (supra) for the proposition that identification evidence must be examined carefully to ensure favourable circumstances free from error. In **Mburu vs. Republic [2024] KECA 1448 (KLR)**, the Court addressed the question of identification as follows:

“31. ... Identification of an accused in criminal cases is always a pivotal question and whenever it arises, the trial court has to satisfy itself that the suspect was positively identified. The rationale for this cautionary approach is that identification evidence

should not be accepted unless it has been rigorously tested. This is because the fundamental aim of eyewitness identification evidence is to reliably convict the guilty and to protect the innocent.

32. The common law recognizes categories of identification evidence because the potential dangers of identification evidence differ between the categories. One is Positive Identification, which is evidence by a witness identifying a previously unknown person as someone he or she saw on a prior relevant occasion. Another category is Recognition Evidence, which is evidence from a witness that he or she recognizes a person or object as the person or object that he or she saw, heard or perceived on a relevant occasion.

33. It is also important to mention that the robbery in question took place at night, therefore as was held by this Court in Nzaro vs. Republic [1992] 2 KAR 212, (Hancox CJ, Gachuhi and Cocker), the evidence of identification or recognition at night must be watertight to justify a conviction. (See also Kiarie vs. Republic [1984] KLR 739)."

25. We agree with the above position, and we have ourselves considered the evidence within that spectrum. The incident occurred at night, but **PW2** explained that light from the burning houses allowed her to see the attackers. She was not a stranger to the appellant, and she knew him well as her neighbour. Her evidence was consistent and remained unshaken even during cross-examination. The trial court, which had the advantage of observing her demeanour, found her to be a

credible witness. We take cognizance of the age of **PW2**, but we find corroboration of

her testimony in the evidence of **PW1**, which, though not analyzed by the learned Judge in the judgment, clearly identified the appellant as one of the attackers. We therefore find no reason to disturb the finding of the learned Judge on the identification of the appellant.

26. Still on the issue of identification, the appellant's counsel relied on **Karani vs. Republic [1985] KLR 290** to point out that evidence of voice identification should be received with caution. We agree with this statement of the law. However, in this case, the identification of the appellant was not solely by voice. **PW2** saw the appellant shooting and recognized him from the light of the burning house. And, so did **PW1**. The voice evidence was merely corroborative. Moreover, the appellant himself conceded that **PW2** knew him well as she was the daughter of his neighbour. In **Anjononi & Others vs. Republic [1976-80] 1 KLR 1566**, this Court held that recognition of an assailant is more satisfactory and reliable than identification of a stranger because it depends on personal knowledge. We are therefore satisfied that the recognition of the appellant by **PW1** and **PW2** was positive and free from the possibility of error.

27. On the alleged contradictions in the prosecution's case, we have examined them and find that they are minor and do not go to the root of the prosecution's case. The case of **Esekon & Another vs. Republic [2024] KECA 262 (KLR)** is an instance when the Court

was called upon to render itself on the question of discrepancy in the prosecution evidence. In that case, the Court held that:

“In our view, the contradictions identified by counsel for the appellants in her submissions were trivial in nature and did not go deep into the root of the case and were therefore not fatal to the prosecution case at all. It must be recalled that sometime witnesses testify long after the incident. Discrepancies are bound to occur as witnesses will always have distinct recollection of any occurrence. Some people are blessed with elephantine memory and can easily recollect events that happened ages ago as if those events happened yesterday. Others suffer from fragile memories and their recollection of events can only be equated to the legendary forgetfulness of a warthog. A combination of the evidence of persons with diverse abilities of recollection can easily give the impression of inconsistency but even in such circumstances, the Court must still consider that which is of relevance to the fact in issue while disregarding those trivial discrepancies that alter not the foundation of the case.”

28. Counsel for the appellant pointed to the discrepancy regarding the date of the offence. Two dates were flouted. While some witnesses referred to 2nd March 2008, others alleged that the offence took place on 3rd March 2008. In our view, this was not a discrepancy as the attack occurred on the night of 2nd and 3rd March 2008. With regard to the difference in the number of fatalities reported with **PW3** talking of 13 killed and **PW4** testifying about 12 victims, we deem this immaterial, as it does not discount the fact that the deceased, Mary Chesang, died. Similarly, the discrepancy as to

how long the appellant went missing after the offence is immaterial, as that was post the offence.

29. The appellant also faults the trial court for not calling Joan Chelagat, Emma Chemutai, and Esther Chelimo as witnesses. It is trite law that the prosecution is not obliged to call a plethora of witnesses to prove its case. **Section 143** of the **Evidence Act** is clear that no particular number of witnesses is required to prove any fact. Additionally, the discretion to decide which witnesses to call remains with the prosecution. The foregoing position was articulated by the Court in **Julius Kalewa Mutunga vs. Republic [2006] eKLR** that:

“As a general principle of law, whether a witness should be called by the prosecution is a matter within their discretion and an appeal court will not interfere with the exercise of that discretion unless, for example, it is shown that the prosecution was influenced by some oblique motive- see Oloro s/o Daitayi & others vs. R. (1950) 23 EACA 493.”

30. In **Omukanga vs. Republic [2023] KECA 430 (KLR)**, the Court reiterated thus:

“...We further point out that a party desirous that adverse inference be made owing to the failure to call certain witnesses should, as a matter of good practice, identify the various aspects of the case that, in the view of that complaining party, the uncalled witnesses would have shed more light on. It is also important for the party to establish a link between the uncalled witnesses and the set of evidence. In our view, anything short of this, would amount to mere speculation not actionable by the

courts. The alleged

oblique motive should be visible from the record or the evidence by itself.”

31. We therefore find appellant’s plea that the prison gates be set open for his release on the basis that the prosecution failed to call certain key witnesses lacks merit. The prosecution's evidence sufficiently established the charge against the appellant. Furthermore, the appellant has not clearly identified the alleged gaps and has also not shown how the alleged uncalled witnesses would have clarified any uncertainties in the evidence. Essentially, all necessary aspects of the trial were adequately addressed. Just like the trial court, we are satisfied with the evidence adduced, and we see no basis for interfering with the conclusion of the trial court on the identification of the appellant.
32. On the element of malice aforethought, we find that it was established by the evidence. Malice aforethought can be inferred from the nature of the act committed. Setting fire to a house with people inside demonstrates an intention to cause death or grievous harm. The appellant's actions in participating in the attack on the deceased's house, shooting at the occupants, and setting the house on fire clearly evince malice aforethought within the meaning of **section 206** of the **Penal Code**.
33. In the premises, we find that the prosecution proved its case against the appellant beyond reasonable doubt. The trial court's

conviction of the appellant for the murder of Mary Chesang in count one was safe and is hereby upheld.

34. Turning to the appeal against sentence, we note that the appellant was sentenced to twenty-five (25) years imprisonment. Under **section 204** of the **Penal Code**, the offence of murder carries a mandatory death sentence. However, following the Supreme Court decision in **Francis Karioko Muruatetu & Another vs. Republic (2017) eKLR**, the mandatory nature of the death sentence was declared unconstitutional, and courts now have discretion to impose an appropriate sentence commensurate with the circumstances of the case. In determining the appropriate sentence, the trial court considered the appellant's status as a first offender and the mitigation offered. However, the court also considered the seriousness of the offence. The appellant participated in a brutal attack on a family, setting fire to a house with the deceased inside, resulting in her death by 100% burns. The respondent has cited **Wanjema vs. Republic [1971] EA 493** and **Paul Kamau Macharia vs. Republic [2003] KECA 127 (KLR)** for the principle that sentencing is a discretion of the trial court and that an appellate court should not interfere with the sentencing discretion of a trial court unless it is shown that the court acted on a wrong principle or overlooked some material factor. We have considered the sentence imposed. The trial court had the advantage of hearing the facts of the case and the mitigation offered. The sentence of 25 years imprisonment, in our view, was neither harsh nor excessive given the gravity of the offence. We dare say that indeed it is lenient considering the brutal and

savage manner in which the appellant acted. It is

within the range of sentences that this Court has upheld in similar circumstances. We, therefore, find no basis to interfere with the sentence.

35. The upshot of the foregoing is that the appeal is hereby dismissed for lack of merit. The conviction of the appellant by the High Court for the murder of Mary Chesang (count one) is upheld, and the sentence of twenty-five (25) years imprisonment is affirmed.

Dated and delivered at Eldoret this 10th day of April 2026.

J. MATIVO

.....
JUDGE OF APPEAL

M. GACHOKA C.Arb, FCIArb

.....
JUDGE OF APPEAL

W. KORIR

.....
JUDGE OF APPEAL

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

Signed
DEPUTY REGISTRAR