Galgalo & 2 others v Republic (Criminal Appeal E172 of 2024)
[2026] KECA 808 (KLR) (24 April 2026) (Judgment)

Neutral citation: [2026] KECA 808 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NYERI

CRIMINAL APPEAL E172 OF 2024

S OLE KANTAI, A ALI-ARONI & LA ACHODE, JJA

APRIL 24, 2026

BETWEEN

GALMA GALGALO ..... 1ST APPELLANT

DIID GALMA GALGALO ..... 2ND APPELLANT

HALKANO DUBA SASO ..... 3RD APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against the judgment of the High court at Marsabit (J.N.Njagi J) dated 4th October 2024 in HCCR CASE NO 6 OF 2019)

JUDGMENT

1. On 24th May 2019, peace in the little known village of Manyatta Konso Banchalle, in Marsabit Central Sub- County, within Marsabit County, was shattered by a hail of bullets. When the guns fell silent, Dahabo Hussein Guracha in count 1, Galgalo Roba Diba in count 2 and Askuno Roba Diba in count 3 lay dead. The following investigations led to the arrest and arraignment of the three appellants — Galma Galgalo, Diid Galma Galgalo, Halkano Duba Saso, and one Jasko Diko Wario—for three counts of murder, contrary to Section 203 as read with Section 204 of the Penal Code in the High Court of Kenya at Marsabit.

2. The appellants pleaded not guilty to the charges, and the prosecution called a total of 12 witnesses to prove their case. We summarise the prosecution case here below to bring the appeal into perspective.

3. PW1 AHG , a 16 years old school boy, testified that he first heard the sound of gunshots coming from his uncle's homestead some 20 metres from his home. He was in the process of opening the door to go outside at about 5.30pm, but he quickly shut it and he, his mother, and little brother tried to find places to hide in their two roomed house. The intruders broke open the wooden window and rained

bullets inside the house hitting his mother in the head and on the left leg before they forced the door open and entered.

4. Thereafter when the villagers came to the house they found that the mother, Dahabo Hussein Guracha had died from the gunshot wounds. PW1 testified that he knew the 1st and 2nd appellants. That they were father and son and were his neighbours but the person he saw at the scene was the 3rd appellant. Further, that this attack on a village belonging to a people of the Gabra tribe was carried out in retaliation for an attack that was carried out on a Borana village a week before. He did not see the faces of the attackers but he heard the voice of the 3rd appellant while they were still outside and the voice of the 1st appellant while they were inside the house.

5. PW2, Isaak Hussein a boda boda rider and brother to PW1, testified that he was asleep alone in his uncle's house when he heard gun shots coming from his other uncle's house at about 6.00 am on the morning of 24th May 2019. He crawled under the bed and hid. He was saved by the fact that his uncle had locked him inside the house when he left. The intruders assumed that the house was unoccupied and left when they saw the padlock on the door.

6. PW2 did not see any of the appellants at the scene but he heard the 3rd appellant telling the others in Borana language that that was enough before they left. He had known the 1st appellant as a neighbour for 8 years. After the attack, PW2 remained in hiding until neighbours came and let him out. He went to his home and found that his mother and two brothers had been shot and his mother had died.

7. The testimony of PW4 Adano Salesa was that when he heard a commotion outside his house a few minutes past 6.00 am on the morning in question, he armed himself with a spear and went out of the house. He saw four men in police uniform carrying rifles. Three of them were seated at the gate of Dhahabo (deceased in count 1). They beckoned to him and cautioned him to remain quiet and move nearer.

8. Upon realizing that they were not police officers, PW4 jumped over the fence and fled, shouting to his family to lock the door. The intruders fired three shots at him and missed. He ran into the house of Abdu Rogicha and called his brother by telephone to alert the police. He stated that out of the four accused persons who were in court when he testified, he had only seen the one he identified as Alkano Jarso and it is not clear which of the accused went by that name.

9. PW5, Wato Diba, a retired KDF officer, and a neighbour to the deceased in count 1, was on his way back home from the mosque where he had attended early morning prayers on the morning of infamy, when he received news of an invasion in his rural home. He proceeded to the scene and found three persons already dead from gunshot wounds. They included his neighbour's wife (deceased in count 1) and his sister-in-law and nephew in counts 2 and 3 respectively. Other casualties had been taken to hospital. He identified the bodies of his sister-in-law and nephew for purposes of post-mortem examination. He did not witness the attack.

10. Chuchi Roba, a 12 year old class six pupil, testified as PW6. He was at home on the ill-fated morning with his mother Halima and two brothers preparing to go to school, when there came a knock at their door. Suddenly, the door was kicked down and six men entered the house with guns blazing and shot the mother and her sons as they pleaded for their lives to be spared. PW6 was shot but was still conscious as the intruders left before he passed out. He regained consciousness in Kenyatta National Hospital the following day and remained there for a year undergoing treatment. His little brother was also admitted in hospital with him. At the time of his testimony, he had been discharged from hospital but could only walk with the support of crutches.

11. PW6 testified that five of the six intruders were known to him because they had been his neighbours since his childhood. He had been to their home numerous times. He testified that Galma, the 1st appellant, shot his mother and elder brother. Diid Galma, the 2nd appellant, shot him in the left leg, Halkano Duba Saso, the 3rd appellant shot a bullet that embedded itself in his chest. A man known as Doyo Tuni who also shot him and Doyo Buke who shot his little brother in the head were not in court. On cross examination however, he said he could not tell which of the assailants shot him in the back.

12. PW7, Fatuma Ali Guracha, a class 8 pupil at NYS school, testified that on 24th May 2019, she was at home with her mother Halima, her brothers Hussein and Abdi at 6.00 am, preparing to go to school, when she heard the sound of gun shots. Her brother Hussein, who had gone to the kitchen, came running back and locked the door. She heard people telling them to open the door, and she identified the voice as that of one Alkano Duba Saso. Shortly,, the intruders broke the door and one of them extended his hand in to the house and fired three shot from his gun without hitting anyone.

13. PW7 peeped through a gap in the door and saw a man called Doyo Tuni holding a stone. The intruders broke the door and entered the house. The witness identified Alkano Sasso, Doyo Tuni and Boke Diba, neighbours who used to visit her home. Unlike her brother PW6 her testimony was that it was Alkano who shot her mother several times and one Doyo Tuni who shot her brother Galgalo Hussein.

    Someone shot her brother in the leg but she did not see who it was. Her mother died on the spot and her two brothers were taken to hospital and they recovered.

14. PW8 Guyo Roba a.k.a. Toto was 5 years old at the time of the incident and 8 years when he testified. He witnessed his mother and his brothers Galgalo and Chuchi being shot. His mother died on the spot. He saw the 1st, 2nd and 3rd appellants at the scene.

15. PW9 Dr Steve Makori Sereti performed the external post - mortem examination on the bodies of the three deceased persons on 24th May 2019. He estimated the time of death of the three victims to have been approximately 6- 8 hours.

16. On the first body identified to be that of Askuno Roba Dida, the Dr made the following findings:

    a. Entry wound on the left humerus on the lateral side with an exit on the medial aspect.

    b. Entry wound on the left lateral chest with no exit wound.

    c. Fracture of the humerus where the bullet passed.

    d. A burst anterior culverin the upper 2/3 of the head – with an open wound with no visible entry.

    He concluded that death was due to several head injuries and a penetrating chest injury due to gunshot wounds.

17. The second body was identified by Wato Diba as that of Galgalo Roba Diba, a 13 year old boy. Upon examination, the PW9 made the following findings:

    a. Multiple entry wounds on the supra clavicular on the right side anterially in to the chest;

    b. Mid-clavicular;

    c. Entry at T11 on the left side – horazic level – intermedially;

d. Exit wound to the occiput, 8cm wide, with brain tissue herniating.

He concluded that death was due to severe head injury and penetrating chest injury due to gunshot wounds

18. The third body was identified by Fatuma Kuracha as that of Dhahabo Hussein, a female aged 32 years old. Upon examination, the PW9 found as follows:

a. Entry wound anterior abdomen midline with no exit wound.

b. Laceration about 8x8cm on the left aspect of the left distal leg.

c. Laceration 5x6cm medial aspect left leg.

His conclusion was that death was due to severe haemorrhage due to a penetrating injury to the abdomen.

19. PW9 stated that he estimated the degree of accuracy of the findings on the first and second bodies at 90% and the third body at 60-70% because he did not do internal examinations due to the religious and cultural beliefs of the victims. He produced the post mortem reports in evidence.

20. PW10, Chief Inspector Kenneth Chomba, a Ballistics Expert examined 70 spent cartridges collected from the scene of the shooting and concluded that they had been discharged from four different variances of firearms of the A-K 47 calibre. The firearms from which the cartridges were discharged were not submitted for examination. He compiled and produced the report in evidence.

21. PW11, Corporal Samuel Gichuki was in the team that visited the scene and investigated the murders. In the first house he saw bullet holes in the door. The door itself was broken down and inside the house they recovered the bodies of Galgalo Roba the victim in count 2 and his mother Askuno Roba, the victim in count 3. Both bodies had gunshot wounds. They also found two young boys who turned out to be PW6 and Toto Roba the sons of Askuno Roba. They had also been shot but were still alive and were evacuated to Marsabit Referral hospital.

22. In the second home, some 50 metres away, the door had been kicked in and was lying on the living room floor. The body of a woman who was identified by her daughter as Dhahabo Hussein Guracha (the victim in count 1), was also on the floor. In the third home, they found Mohamed Guracha Wako who had survived the attempt on his life by jumping over the fence. His door too had bullet holes. They subsequently arrested the 1st appellant and his three sons from their home about 100 metres from the three homes that were attacked.

23. PW12 was Peter Muchunu, a Clinical officer attached to Marsabit County Referral Hospital during the pertinent period. He filled a P3 form for one, Abdi Hussein on 8th January 2020. He had been attended to on 24th May 2019 by his colleague and the X-Ray taken indicated that he had sustained a fracture. PW12 noted a healed scar in the middle of his right foot about 8 months. He concluded that the probable weapon used was a penetrating one.

24. At the close of the prosecution case, the three appellants were placed on their defence. They each elected to give a sworn defence. The 1st appellant Galma Galgalo denied the offence and stated that when he heard the sound of gunshots on the fateful morning, he fled and took cover in his farm from where he was arrested two days later on 26th May 2019. He was therefore, not at the scene of the crime.

25. The 2nd appellant, Diid Galma galgalo testified that he was at his home in Shauri Yako village on the morning of 24th May 2019. His brother called and told him to go to their father the 1st appellant's farm

at Wario Guyo village some 9- 10 kilometres away and retrieve a motorbike that was left behind when the father was arrested. He and his friends went to Wario Guyo village but were arrested before they retrieved the motorbike.

26. All that the 3rd Appellant Halkano Dub Saso recalled of the fateful morning was that he was in his home at Malka Lokole village and it was his sister who informed him that she could hear the sound of gunshots coming from the direction of the 1st appellant's village. He did not go to the scene of crime. He was arrested on 22nd August 2019.

27. At the close of the case, Njagi J considered the evidence before him and in a judgment dated 4th October 2024 he found that the prosecution had proved their case against each appellant. He convicted them and sentenced the 1st appellant to fifteen (15) years' imprisonment, the 2nd and 3rd appellants to twenty-five (25) years' imprisonment each.

28. Dissatisfied with that judgment, the appellants preferred the present appeal. In a joint Memorandum of Appeal dated 22nd January 2025, they ground their appeal on the contention that the learned Judge of the High court erred in law and in fact:

    i. By failing to establish whether the conditions of lighting and identification were safe for positive identification;

    ii. By convicting the appellants in reliance of medical evidence that was inconclusive as to the cause of death.

    iii. By placing undue reliance on the testimony of PW6 and PW8, who were children of tender years, despite their evidence being inconsistent, unreliable, contradictory and lacking corroboration.

    iv. By relying on the ballistic evidence of PW10, which did not establish any nexus between the appellants and the commission of the offence.

29. The appellants filed written submissions dated 23rd June 2025, through the firm of M/S Wambui Mwai and Associates Advocates. They urge that their conviction was based on unsafe evidence of identification, principally arising from the testimony of PW6 and PW8, who were children of tender years. They argue that the alleged identification by PW6 was at dawn aided by electric lighting, yet the trial court failed to interrogate the quality of that lighting, including its intensity, position, and sufficiency, as well as the size and nature of the room and house.

30. The appellants rely on the principles governing visual identification in difficult conditions as stated in Stephen Jirongo Shicheti & Another v Republic (2019) eKLR. They also refer to Wallen Nyando Makomere v Republic [2016] eKLR, to emphasize that identification at dawn must be tested with the greatest care in line with the guidelines in Republic v Turnbull [1976] 3 All ER 549, and must be watertight to sustain a conviction. Reliance is also placed on the case of Maitanyi v Republic [1986] KLR 198, where the Court underscored the necessity of ascertaining the nature, intensity, and position of the light relied upon for identification. The appellants contend that these settled principles were not applied by the trial court.

31. The appellants further submit that the trial court failed to consider the real possibility of error, even in cases of alleged recognition. They point to material inconsistencies in the testimony of PW6, including contradictory statements as to who entered the house first, his admission that he did not know what clothes the assailants were wearing, and his acknowledgment that he was in a state of fear. These

contradictions, they argue, undermined the reliability of the purported recognition, particularly given the prevailing circumstances.

32. In addition, the appellants contend that PW8 gave conflicting accounts regarding whether the incident occurred at 6:00 a.m. or 8:00 a.m., and whether identification was aided by electric light or sunlight, further weakening the prosecution case on identification. The appellants argue that these contradictions created unresolved doubt as to the conditions under which identification was made. This, the trial court failed to adequately address, notwithstanding the heightened risk of error inherent in the testimony of frightened child witnesses.

33. On the medical evidence, the appellants submit that it failed to conclusively establish the cause of death. That PW9 admitted that he did not conduct internal examination on the bodies, or retrieve any bullets from the bodies. Further, that he lacked essential equipment, was not a pathologist and he conceded that he could not definitively determine the progression of the bullets in the bodies. That he only provided percentage estimates of the cause of death and the inconclusive and speculative nature of his evidence was insufficient to meet the legal threshold to prove the cause of death, a fundamental ingredient of the offence of murder.

34. Regarding corroboration, the appellants challenge the trial court's finding that the evidence of PW6 and PW8 was corroborated by PW4. They submit that PW4 described the assailants as being dressed in police uniform, while PW8 stated that the perpetrators wore ordinary clothes, and PW6 could not recall their attire at all. These inconsistencies, it is argued, demonstrate that PW4 was not describing the same assailants identified by PW6 and PW8, and therefore did not corroborate the evidence of the children.

35. The appellants further submit that the ballistic evidence tendered by PW10 did not establish any nexus between them and the offence. PW10 testified that no firearms were submitted for examination. He only examined fired cartridges. In the absence of recovered firearms, the appellants argue that it was impossible to conclusively link the cartridges to any weapon they had allegedly used. They further submit that it was unclear from the evidence of PW11 where the cartridges were recovered from, raising the possibility that they may have resulted from stray bullets. This, the appellants urge weakened the probative value of the ballistic evidence.

36. Lastly, the appellants submit that they were subjected to double jeopardy, having allegedly compensated the victims' family through an alternative justice mechanism and thereafter being sentenced to custodial terms. They argue that the invocation of an alternative justice system ought to have been considered by the trial court and that, in the circumstances, the imposition of custodial sentences was unjustified. On the totality of the evidence and the applicable legal principles, the appellants urge the Court to allow the appeal, quash the convictions, and set aside the sentences.

37. Mr. George Murithi, learned Senior Assistant Director of Public Prosecution (SADPP), filed written submissions dated 24th June 2025 on behalf of the respondent. Counsel urges the Court to discharge its mandate on first appeal in accordance with the settled principles in Okeno v Republic [1972] EA and Kamau Mungai v Republic [2006] KLR.

38. The respondent submits that, to secure conviction for the murders, the prosecution was required to prove three essential ingredients beyond reasonable doubt. That is: the fact and cause of death of the deceased; that the death resulted from unlawful acts or omissions on the part of the appellants; and, that the unlawful acts or omissions were committed with malice aforethought as defined under Section 206 of the Penal Code.

39. The respondent submits that the prosecution satisfactorily proved the fact and cause of death of the deceased persons. Eye witnesses testified to having seen the deceased being shot and saw their lifeless bodies. PW9 corroborated this evidence upon conducting post-mortem examinations on the three bodies and concluding that death in each case was due to penetrating gunshot injuries.

40. Regarding the identification of the perpetrators of the offence, the respondent submits that it was by recognition and the evidence was cogent and consistent. PW1 testified that he heard and recognized the voice of the 3rd appellant and saw him when the door was opened. That he heard the voice of the 1st appellant instructing the others to leave and PW2 corroborated his testimony in all material respects.

41. The respondent submits that PW4 testified that he had known the 1st appellant for over fifteen years and recognized his voice on the material day. That he also saw the 3rd appellant together with others who shot at him as he escaped, only for him to return and find the deceased persons dead. PW6 and PW8, both minors, also testified that they identified the appellants as the persons who attacked them and killed their mother and brother on the material morning.

42. The respondent concedes that there were some inconsistencies in the testimonies, particularly regarding the number of attackers, but argues that these were minor and arose from the traumatic circumstances under which the minor witnesses testified. He refers to the decision of Joseph Maina Mwagi v Republic, Criminal Appeal No. 73 of 1993, and Thomas Mwambu Wenyi v Republic, Nyeri Court of Appeal Criminal Appeal No. 21 of 2015, where the Court held that not every discrepancy is fatal, and that an appellate court must consider whether such inconsistencies occasion prejudice to the accused within the meaning of Section 382 of the Criminal Procedure Code. The respondent argues that the discrepancies in the present case were inconsequential and did not weaken the prosecution case.

43. With respect to malice aforethought, the respondent submits that the manner of killing clearly demonstrates the requisite intent for the offence of murder. He makes reference to the case of Karukenya & 4 Others v Republic [1987] KLR, where this Court held that malice aforethought under Section 206 (a) of the Penal Code may be inferred from evidence showing an intention to cause death or grievous harm. The respondent asserts that the fact that the deceased were shot multiple times, with seventy spent cartridges recovered at the scene, irresistibly points to an intention to kill or cause grievous harm.

44. The respondent submits that the appellants' defences were mere denials and that the evidence tendered by the witnesses they called was rightly rejected by the trial court as untruthful. On the totality of the evidence, the respondent urges the Court to find that the prosecution proved its case beyond reasonable doubt and dismiss the appeals.

45. By a signal dated 25th May 2025, sent from Nyeri G.K. Prison, the Court was informed that Galma Galgalo the 1st appellant had died while undergoing treatment at Marsabit Referral Hospital. His appeal therefore abated and this appeal is therefore, in respect of the 2nd and 3rd appellants.

46. The appeal came before us for plenary hearing on 25th June 2025. The two appellants were present in Court via the virtual platform, with Ms Wambui Mwai learned counsel appearing for both of them. Counsel made brief oral high lights restating their written submissions. Mr Murithi SADPP and Mr. Moria learned counsel appeared for the respondent. They relied entirely on their submissions.

47. This is a first appeal and our mandate on first appeal was well captured in Okeno vs. Republic [1972] EA 32, as follows:

> " An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya vs. R. [1957] E.A. 336) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (Shantilal M. Ruwala v. R., [1957] E.A. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters v. Sunday Post, [1958] E.A. 424."

48. We have therefore, considered the rival arguments before us in light of the expanse of our mandate as set out above. The appellants were charged under Section 203 of the Penal Code which provides as follows:

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

49. For this conviction to be sound under Section 203 of the Penal Code, the prosecution was required to prove beyond reasonable doubt, that it was the appellants who, by an unlawful act or omission, caused the death of the deceased and that they did so with malice aforethought.

50. We first examine whether the evidence of identification and recognition, particularly that of PW6 and PW8 who were children of tender years, was safe, credible, free from the possibility of error, and properly corroborated.

51. The conviction of the appellants was anchored substantially on the evidence of visual identification and alleged recognition. The star witnesses were PW6 and PW8, both children of tender years. They claimed to have identified the appellants during a violent and traumatic attack that occurred at dawn. Evidence of visual identification, whether of a stranger or by recognition, carries an inherent risk of mistake and can cause miscarriage of justice if not subjected to rigorous scrutiny.

52. In Cleophas Otieno Wamunga v Republic [1989] KLR 424, the Court of Appeal cautioned that:

> " Evidence of visual identification in criminal cases can bring about miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimize this danger. Whenever the case against a defendant wholly depends or to a great extent on the correctness of identification... the Court must warn itself of the special need for caution..."

53. This approach is consistent with the well-known principles in R v Turnbull [1976] 3 All ER 549, which has been repeatedly adopted and applied by Kenyan courts. The Turnbull guidelines require a trial court to interrogate the lighting conditions, distance, duration of observation, obstructions, and the mental state of the witness before acting on the evidence of identification.

54. In the present appeal, PW6 testified that identification occurred at dawn and was aided by electric lighting. However, the record does not disclose that the trial court interrogated the quality of that lighting, its intensity, position, or whether it sufficiently illuminated the assailants' faces. There was also no evaluation of the size, or layout of the house or room, in which the alleged identification took place.

55. This Court has consistently held that failure to interrogate such matters renders identification evidence unsafe. In Maitanyi v Republic [1986] KLR 198, the Court emphasized that it is not enough for a court to merely state that there was light. It must inquire into the nature, position, and strength of the light and satisfy itself that the conditions favoured positive identification.

56. PW6 admitted that he was in a state of fear. His testimony contained material inconsistencies, including contradictory statements on who among the intruders entered the house first and an admission that he could not recall what clothes the assailants were wearing. These contradictions were not peripheral. They struck at the reliability of the alleged recognition. The evidence of PW8 compounded the uncertainty by giving a conflicting account as to whether the incident occurred at 6:00 a.m. or 8:00 a.m., and whether identification was aided by electric light or sunlight. The trial court did not resolve these contradictions.

57. We are cognizant that identification by recognition is not immune from error. In Chiphoro v Republic [2014] eKLR, this Court reiterated that mistakes in recognition are possible, especially where conditions are difficult, and that such evidence must be tested with the same caution as identification of a stranger. The Turnbull guidelines themselves caution that while recognition may be more reliable than identification of a stranger:

> " ....mistakes in recognition of close relatives and friends are sometimes made."

58. The risk of honest but mistaken identification is further heightened where the identifying witnesses are children of tender years who have been exposed to extreme violence and who were testifying almost one year later. Section 124 of the *Evidence Act* provides that the evidence of a child of tender years, in criminal cases other than sexual offences, must be corroborated by independent material evidence implicating the accused person. The statutory relaxation of the corroboration requirement applies only to sexual offences, and only where the trial court records reasons for believing the child to be truthful. That exception has no application in a murder trial. This position has been affirmed by this Court in Thuo v Republic [2022] eKLR and related authorities.

59. Corroboration must be real and meaningful. It is not a matter of form. In Cherono v Republic [2021] eKLR, this Court l reiterated that corroboration must confirm, in material particulars, the evidence implicating the accused. In the present case, the trial court held that the testimony of PW6 and PW8 was corroborated by PW4. On re- evaluation, this Court is unable to agree. PW4 testified that the assailants were dressed in police uniform, PW8 said they were in ordinary clothes, while PW6 could not recall their attire at all.

60. These divergent descriptions raise serious doubt as to whether PW4 was describing the same perpetrators allegedly identified by PW6 and PW8. What the trial court treated as corroboration was contradictory evidence incapable of confirming the testimony of the minor witnesses. In Cheruiyot v Republic [2018] eKLR and Nyambura v Republic [2001] KLR 355, this Court quashed convictions where identification evidence was weak, and uncorroborated, and made under unfavourable conditions and the trial court failed to subject it to the necessary caution.

61. Applying these principles to the present appeal, we find that the evidence of identification and recognition by PW4, PW6 and PW8 was not free from the possibility of error. It was also not corroborated, and ought not to have been relied upon to found a conviction.

62. The second element is whether the medical and ballistic evidence conclusively established the cause of death and linked the appellants to the offence. Proof of the fact and cause of death is a fundamental ingredient of the offence of murder. While it is true that medical evidence need not be flawless or given

only by a pathologist, it must nonetheless establish the cause of death with reasonable certainty and must not be speculative. This Court ol in Ndungu v Republic [1985] KLR 487 underscored that where medical evidence is inconclusive or leaves room for conjecture, it cannot safely sustain a conviction for murder unless the surrounding evidence irresistibly points to the cause of death.

63. In the present case, PW9 stated that he did not conduct any internal examination on the bodies because of the religious beliefs of the community involved. He therefore, did not retrieve bullets from the bodies. He also testified that he lacked essential equipment to aid in the post -mortem examination and was not a qualified pathologist. He conceded that he could not definitively determine the trajectory or progression of the bullets. He could only offer percentage estimates as to the cause of death. However, from the submissions by counsel, the appellants did not dispute that he died of bullet wounds. The evidence from the prosecution witnesses was categorical that the deceased were shot.

64. The danger of courts filling evidentiary gaps through assumption was cautioned against in Republic v Cheya & Another [1973] EA 500, where the Court held that proof of cause of death must be grounded in evidence and not left to inference or conjecture. In our view, the trial court impermissibly glossed over the admitted limitations of PW9's evidence and treated tentative conclusions as conclusive proof.

65. The ballistic evidence did not cure these deficiencies. No firearms were submitted to PW10 for examination. He analysed only the spent cartridges. The evidence did not clearly establish where the cartridges were recovered or demonstrate the chain of custody satisfactorily. The possibility that the cartridges may have resulted from stray or unrelated gunfire was not excluded. In the evidence of the minors the assailants carried small guns while PW10 stated that the cartridges submitted for analysis had been discharged from four different variances of firearms of the A- K 47 calibre.

66. As stated in Kiarie v Republic [1984] KLR 739, circumstantial or expert evidence must point irresistibly to the accused and exclude all other reasonable hypotheses. That threshold was not met in this case. In Chengo Nickson Kalama v Republic [2015] eKLR, the Court of Appeal emphasized that forensic evidence must establish a nexus between the accused and the offence, and that where such linkage is absent, reliance on expert evidence to sustain a conviction is unsafe.

67. Taken together, the medical and ballistic evidence did not conclusively establish the precise cause of death or the participation of the appellants in the unlawful acts leading to the deaths. These gaps were not peripheral. They went to the very core of the prosecution case.

68. The third element is whether the prosecution proved beyond reasonable doubt the presence of malice aforethought. It is trite law that suspicion, however strong, cannot form the basis of a conviction. In Sawe v Republic [2003] KLR 364, the Court of Appeal held that where the evidence leaves gaps or raises reasonable doubt, those doubts must be resolved in favour of the accused. In the present appeal, the unsafe identification evidence, coupled with and ballistic evidence, left substantial unanswered questions as to the appellants' involvement.

69. The respondent urged that malice aforethought could be inferred from the manner in which the deceased were killed. While it is correct that malice aforethought may, in appropriate cases, be inferred from factors such as the nature of the weapon used and the manner of attack, that inference presupposes proof that the accused were the perpetrator. This principle was authoritatively set out in Rex v Tubere s/o Ochen [1945] 12 EACA 63. In the absence of credible proof placing the appellants at the scene as the killers, any discussion on malice aforethought becomes speculative. As the Court of Appeal observed in Anthony Ndegwa Ngari v Republic [2014] eKLR, where doubt exists as to who inflicted the fatal injuries, malice aforethought cannot be inferred.

70. Malice aforethought is not to be presumed merely from the fact of death. In Nzuki v Republic [1993] KLR 171, the Court emphasized that the prosecution must prove a specific intention or knowledge as contemplated under section 206 of the Penal Code. Similarly, in Joseph Kimani Njau v Republic [2014] eKLR, the Court held that violent conduct alone, without proof of the requisite mental element, is insufficient to ground a conviction for murder.

71. In the present case, once the evidence of identification and linkage is found wanting, there remains no firm evidential basis upon which to infer the existence of malice aforethought on the part of the appellants. The prosecution therefore failed to discharge its burden of proof beyond reasonable doubt.

72. Upon re-evaluating the record of appeal and the submissions, we find that the inconsistencies, evidentiary gaps, and unresolved doubts in the prosecution case were not minor discrepancies curable under Section 382 of the Criminal Procedure Code. They went to the root of the case and rendered the convictions unsafe.

73. Consequently, we find that the appeal has merit and is accordingly allowed. We quash the conviction and set aside the sentences. The appellants are set at liberty forthwith unless otherwise lawfully held.

DATED AND DELIVERED AT NYERI THIS 24TH DAY OF APRIL, 2026

S. Ole KANTAI

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JUDGE OF APPEAL ALI-ARONI

.....

JUDGE OF APPEAL

L. ACHODE

.....

JUDGE OF APPEAL

I certify that this is

a true copy of the original

Signed

DEPUTY REGISTRAR