IN THE COURT OF APPEAL
AT KISUMU

(CORAM: NYAMWEYA, ACHODE & MATIVO,

JJ.A) CRIMINAL APPEAL EO88 OF 2021

BETWEEN

LUCAS MWITA MACHERA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Migori (Wendoh J.) dated 15th July 2021

in

HCCR case No. 10 of 2019)

****

JUDGMENT OF THE COURT

1. Lucas Mwita Machera the appellant, was charged with the offence of murder contrary to **section 203** as read with **section 204** of the **Penal Code** at Migori High Court. The particulars of the charge are that on 26th July 2019, along Nyabukarange – Ikerege Road, Wangisasa village, the appellant jointly with others not before the court murdered Festo Mwita Machera (the deceased).

2. The appellant denied the charge and the matter proceeded to full hearing with the respondent calling six witnesses to prove a case anchored on both direct eyewitness testimony

and

medical evidence, while the appellant gave unsworn evidence and was supported by one witness at the close of the respondent's case.

3. PW1, Margaret Nyahiri Mwita, the deceased's wife, testified that on 26th July 2019 at about 7:00 p.m, her husband left home to purchase medicine for their sick child. Shortly thereafter, she heard him scream and state that *"Jacob was killing him."* She rushed to the scene, approximately 50 meters away, armed with a torch. On arrival she saw the appellant, who is her uncle's son, with his two sons, John Mwita Machera (John) and Jacob Mwita Machera (Jacob), assaulting the deceased. The appellant was holding the deceased around the waist, while John restrained his hand and Jacob cut him on the hand. She raised an alarm, attracting other relatives to the scene. The deceased was rushed to hospital but was pronounced dead on arrival.

4. PW1 further testified that there existed a longstanding land dispute between the deceased and the appellant's family, and that she recognized Jacob as the appellant's son.

5. John Mwita Marwa (PW3), a brother to the deceased and nephew to the appellant, heard the screams from the road at about 8:20 p.m. He heard the deceased calling out for help, saying that Jacob was killing him. He rushed to the scene carrying a torch. He flashed his torch and saw the appellant holding the deceased around the waist, while his son Jacob

cut the deceased's right hand as the other son called John restrained the appellant. The assailants fled thereafter. He assisted in taking the deceased to hospital, where he was declared dead on arrival. PW3 later identified the body for post-mortem purposes and confirmed the existence of a land dispute between the two families.

6. Ghati Marwa Ng'era (PW4), the deceased's mother, also heard the deceased screaming for help, alleging that Jacob was killing him. She too rushed to the scene with a torch although there was moonlight. Her testimony was similar to that of PW1 and PW3 in so far as she saw the appellant holding the deceased around the waist, while Jacob cut the deceased's hand. She also saw John cut the appellant in the palm and force the hand backwards. She confirmed that PW1 was already at the scene and that there was a pre-existing land dispute between her family and that of the appellant. Further, that the appellant had previously threatened her and the deceased, particularly in relation to ongoing court cases.

7. Dr. Winda Victor Omollo (PW2), a medical doctor at Migori County Referral Hospital, conducted the post-mortem examination on the deceased. He observed deep cut wounds on the upper arm, left thumb, and waist joint. He noted that the brachial artery had been severed and that the injuries were inflicted using a sharp object. He concluded that the

cause of death was cardiorespiratory arrest due to excessive bleeding resulting from sharp force trauma.

8. Corporal James Olago (PW5), a Scenes of Crimes officer, received and certified the photographic evidence taken by another officer depicting the scene of the murder. He produced them as exhibits in court.

9. Sergeant Samson Kataka PW6, an officer attached to the Directorate of Criminal Investigations (DCI) Kehancha, visited Ikerege Health Centre where he observed the deceased's body having deep cut wounds on the shoulder, hand, and palm. He also visited and documented the scene of attack. He recorded witness statements, which consistently implicated the appellant and his two sons as the perpetrators. He subsequently arrested the appellant on 23rd August 2019. He too confirmed the existence of a longstanding land dispute between the appellant's family and that of the deceased.

10. The appellant on his part raised an *alibi* defence and denied any involvement in the offence. He stated that on 25th July 2019, a day prior to the incident, he travelled to Rapogi to attend a memorial ceremony for his grandmother and spent the nights of 25th and 26th July 2019, there. He returned home on 27th July, 2019 and proceeded to his place of work at a Health Centre and that is when he learnt of the murder incident. He denied any knowledge or participation in the offence. He maintained that he continued with his normal

activities until 26th August 2019, when he was arrested while chairing a meeting at the health facility. The appellant further asserted that he had been falsely implicated due to a longstanding land dispute, alleging that certain individuals sought to have him imprisoned in order to take over his land.

11. Nathan Senewa Omido (DW2), testified that he held a memorial ceremony for his deceased wife at his home in Rapogi on 26th July 2019 and the appellant, who is his son-in law, arrived on 25th July 2019 at about 6:00 p.m., attended the ceremony on 26th July 2019, and remained overnight, leaving on 27th July 2019. During cross-examination, DW2 conceded that he was unaware of key aspects of the appellant's personal circumstances, including the existence of the appellant's sons (alleged co-assailants) or the alleged land dispute.

12. In a judgment delivered on 15th July 2021, ***R. Wendoh J***. considered the evidence before her and found the appellant guilty of murder. She convicted him and sentenced him to serve twenty (20) years imprisonment, provoking the present appeal.

13. The appellant was aggrieved by the said decision and he filed the present appeal. In the grounds of appeal contained in his undated memorandum of appeal, he faults the learned Judge for:

i. *Convicting him based on visual identification without exercising caution on the nature of light available.*

ii. *Not observing that the appellant was arrested after a month of commission of the offence, yet he was known to the prosecution's witnesses.*

iii. *Basing the conviction on fictitious and framed up charges borne out of acrimony and vendetta that existed between the two families.*

iv. *Not considering the appellant's defence.*

14. The appeal was disposed of by way of written submissions. The appellant filed his undated submissions and in addition, the firm of M/s J.M. Nyagwencha & Co. Advocates filed submissions dated 14th July 2025 on his behalf. Ms. Ikol Esaba, the learned Senior Assistant Director of Public Prosecution (SADPP), filed submissions dated 12th August 2025 on behalf of the respondent.

15. The appellant submits that the conviction was unsafe as it was based on unreliable visual identification, under unfavourable conditions, without proper inquiry into the nature and adequacy of the lighting. That the alleged recognition was further undermined by the absence of supporting evidence such as voice identification and the failure to produce the torches said to have been used.

16. It is further argued that the prosecution case was marred by material inconsistencies, particularly in the testimonies of key witnesses regarding the time of arrival at the scene

and the

sequence of events. These contradictions, which went to the root of the case, were not reconciled by the trial court, thereby casting serious doubt on the credibility of the evidence relied upon to secure the conviction.

17. The appellant posits that the prosecution case was tainted by a family land dispute, giving rise to bias and fabrication of evidence. In his view the court did not adequately caution itself on the danger of relying on potentially biased evidence, especially in the absence of independent witnesses. He also faults the trial court for failing to consider his *alibi* defence and for effectively shifting the burden of proof onto him, contrary to the law. He further points to the unexplained delay in his arrest, despite claims that he is well known to the witnesses, and the failure to apprehend other alleged assailants. He argues that he was wrongly implicated.

18. In rebuttal, the respondent urges that the appellant was positively recognized by prosecution witnesses who knew him prior to the incident. It is argued that the offence occurred in the evening before complete darkness fell. Therefore, there was sufficient light to enable clear recognition. Counsel submits that the testimonies of key witnesses PW1, PW3, and PW4 are consistent and mutually corroborative as to the appellant's presence and role in the attack. Particularly, that the appellant held the deceased while his accomplices inflicted

fatal injuries. Further, that identification was by recognition, which is more reliable than mere identification of a stranger.

19. Addressing the alleged inconsistencies in the prosecution case, the respondent contends that any discrepancies, particularly regarding time, were minor and did not go to the substance of the case. It is submitted that such inconsistencies are natural in human recollection and do not render the evidence unreliable or the conviction unsafe.

20. On malice aforethought, the respondent argues that the nature of the injuries inflicted on the deceased, specifically the severe and deliberate cutting of the arm with a sharp weapon, demonstrates clear intention to cause death or grievous harm. The manner of attack and the weapon used are said to unequivocally establish the requisite *mens rea* for the offence of murder.

21. Regarding the delay in arrest, the respondent asserts that it was justified and did not prejudice the appellant. It is explained that the delay allowed for proper investigations and attempts to apprehend other suspects who had fled. Therefore, it did not weaken the prosecution case.

22. On the defence of *alibi*, the respondent contends that it was inconsistent, unsubstantiated, and an afterthought. It is argued that the appellant failed to provide sufficient details to enable investigation of the *alibi*, and that contradictions between his account and that of his witness further discredit

it. In any event, the respondent submits that the prosecution evidence placing the appellant at the scene effectively dislodged the *alibi*.

23. Finally, on sentence, the respondent submits that although the offence warranted a severe penalty given its brutality and the common intention of the attackers, the trial court exercised leniency by imposing a term of twenty years' imprisonment. The sentence is therefore lawful and within the court's discretion.

24. When the appeal came before Court for plenary hearing on 4th September 2025, the appellant was present and appeared virtually from Naivasha Maximum prison. ***Mr. Masolo,*** learned counsel, appeared for him holding brief for ***Mr. Nyagwencha*** learned counsel. He restated what he said were inconsistencies in the prosecution evidence, particularly regarding the time PW4 said she was at the scene. ***Mr. Mwangi*** learned prosecution counsel, held brief for ***Ms. Esaba,*** learned Senior Assistant Director for Public Prosecutions (SADPP,) for the respondent and relied entirely on the filed submissions.

25. Our mandate as the first appellate Court was articulated in the case of: **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 v r***

(1957) EA p.336) and to the appellate court's own decision on the evidence and draw its own conclusion. (Shantilal M. Ruwala v R (1957) E.A p570). It is not the function of the first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings 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 (1958) EA p.424."

26. Having carefully reconsidered the record, the grounds of appeal, rival submissions and the law, it is our view that the appeal turns on the following three issues:

    1) Whether there was proper identification,
    2) Whether the alleged inconsistencies adversely affect the respondent's case, and
    3) Whether the appellant's *alibi* defence was considered.

27. The burden of proof in criminal cases rests throughout upon the prosecution and does not shift to the accused person, save in a few statutory exceptions. On this, we revisit the often- cited English case of **Woolmington v DPP [1935] AC 462 at page 481** where it was stated as follows:

    "Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt subject to what I have

already

said as to the defence of insanity and subject also to any statutory exception…"

28. As stated earlier, the appellant was charged under **section 203** of the **Penal Code**. The section stipulates that:

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

29. It follows that for a conviction to be secured in a murder charge the respondent ought to prove the elements of murder beyond reasonable doubt. These elements were stated by the Court of Appeal in the case of **Anthony Ndegwa Ngari vs Republic [2014] eKLR** as follows:

> ***(a) the death of the deceased occurred;***
>
> ***(b) that the accused committed the unlawful act which caused the death of the deceased; and***
>
> ***(c) that the accused had malice aforethought.***

30. In our present case, it is undisputed that the deceased met his death through an unnatural and unlawful manner. The evidence from PW6 and PW2 demonstrates that the deceased was cut by a sharp object on his upper arm, hand, and waist joint causing him to bleed to death before he reached the hospital. What is in dispute is the identity of perpetrators. The appellant contends that he was not one of the perpetrators, while the respondent asserts that he was one of them.

31. The superior court satisfied that the identification was proper held as follows:

> *"PW4 also went to the scene with torches after they heard the deceased shouting for help. All the three witnesses stated that they shone their torches at the three people who had attacked the deceased and saw accused holding the deceased by the waist, John held the hand of the deceased and Jacob did the cutting. In addition, PW1, PW3 and PW4 all stated that they heard the deceased shouting for help and saying that Jacob was killing him. PW1 said she only knew one Jacob in the village, accused's son. The accused is not a stranger to the witnesses. They belong to the same family, PW4 said that accused is her brother's son and the deceased was her son. They are close relatives who lived together and it would not be difficult to recognize them under the light of a torch and at close proximity of 3 metres."*

32. The conviction of the appellant rested on recognition evidence by PW1, PW3 and PW4, who testified that they knew the appellant prior to the incident and placed him at the scene as one of the perpetrators.

33. The law on identification is not in doubt. It has been stated and restated in several judicial decisions by this Court and by the High Court. The Court should receive evidence on identification with the greatest circumspection, particularly where circumstances were difficult and did not favour accurate identification. Where evidence of identification rests on a single witness, and the circumstances of

identification

are known to be difficult, what is needed is other evidence either direct or circumstantial, pointing to the guilt of the accused persons from which the Court may reasonably conclude that identification is accurate and free from the possibility of an error. (See **Abdala Bin Wendo and Another v. Republic [1953] 20 EACA 166; Roria v. Republic [1967] E.A. 583;** and, **Raymond Hermes Odhiambo v Republic [2002] KECA 309 (KLR)).**

34. Additionally, in **Anjononi & Others v Republic [1980] KLR 59** this Court held that :

> "***...recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other."***

35. However, even in recognition the evidence must be examined with the greatest care, particularly where the conditions favoring correct identification were difficult. See **Wamunga v Republic [1989] KLR 424**.

36. In the present case, the evidence discloses that the incident occurred at twilight and all the witnesses had torches that they shone upon the assailants. The witnesses were near the assailants and gave a consistent account of the role played by the appellant namely, that he restrained the deceased while his accomplices inflicted fatal injuries. Further, the

recognition

was not by a single witness. It was corroborated by multiple witnesses whose testimonies were materially consistent.

37. The appellant has challenged the quality of the lighting and the circumstances of observation. However, the totality of the evidence shows that the witnesses had sufficient opportunity to observe the appellant. Their prior acquaintance with him significantly reduces the possibility of mistaken identity.

38. We are therefore satisfied that the evidence of recognition was cogent, consistent, and free from the possibility of error.

39. Turning to the issue of inconsistence and contradiction in the respondent's case. The appellant has placed a considerable stake on alleged contradictions, particularly regarding the time of the incident and the sequence of events. While the respondent maintains that the alleged discrepancies, particularly regarding time, were minor and did not go to the substance of the case.

40. Discrepancies are bound to occur where several people give an account on an incident. What is important is whether such discrepancies go to the substance of the case as to result in prejudice to the accused person. This Court in **Joseph Maina Mwangi v Republic [2000] KECA 282 (KLR)** observed as follows:

> ***"In any trial there are bound to be discrepancies. An appellate court in considering those discrepancies must be***

guided by the wording of

section 382 CPC, viz whether such discrepancies are so fundamental as to cause prejudice to the appellant or they are inconsequential to the conviction and sentence."

41. In the present case, the discrepancies cited relate primarily to the exact time witnesses arrived at the scene. In our view, this do not go to the core of the respondent's case, which is that the attack occurred at eventide, and the appellant was present and participated in the fatal assault. On the material particulars to wit: the identity of the assailants, the role of the Appellant, and the manner of attack, the witnesses were consistent.

42. Guided by **Joseph Maina Mwangi v Republic** ***(supra)***, we are satisfied that the alleged inconsistencies were minor, did not prejudice the appellant and did not render the prosecution case unreliable.

43. Next, the appellant contends that the trial court did not consider and evaluate his *alibi* defence. While the respondents contend that the *alibi* was considered and it did not raise any reasonable doubt. On this, we quote the pronouncement of the superior court *in extenso* thus:

"The accused said that he went to the memorial of his grandmother at Rapogi. The accused called DW2 to confirm the said alibi that indeed accused was at his home in Rapogi. However, what I found curious is that DW2 said accused went to attend the memorial of DW2's wife while accused claims to have gone to

attend the memorial of his grandmother. Surely, accused must have known whose memorial service he was going to attend. The contradiction in the evidence of the accused and DW2 is telling. What made it more curious is that PW1, PW3 and PW4 identified the other suspects at the scene of the murder as the two sons of the accused who have since disappeared. To this court's surprise DW2 denied knowing any of accused's other children except that his daughter is married to the accused. It seems DW2 did not know much about accused. He did not know that accused had even had a long-standing land dispute with PW4 and her family. Either PW2 came to the court to protect the accused or he does not know accused at all. I am more convinced by the testimonies of PW1, PW3 and PW4 that accused was at the scene of the crime with his two sons, that is the report that was made to the police on the next day. PW1, PW3 and PW4 placed the accused at the scene of crime and I am satisfied that he was one of the assailants. The alibi was an aforethought and untrue."

44. Once the appellant put forward an *alibi* the court was obligated to consider it alongside and in the context of the rest of the evidence tendered. In **Athuman Salim Athuman v Republic [2016] KECA 697 (KLR)** this Court had this to say regarding *alibi* defence:

"Although the appellant in this case put forth his alibi defence rather late in the trial, we cannot agree with counsel for the respondent that the alibi defence must be ignored. That defence must still be considered against the evidence adduced by the prosecution. Indeed

in GANZI & 2 OTHERS

<u>V. REPUBLIC</u> [2005] 1 KLR 52, this Court stated that where the defence of alibi is raised for the first time in the appellant's defence and not when he pleaded to the charge, the correct approach is for the trial court to weigh the defence of alibi against the prosecution evidence. In the circumstances of this appeal, we are satisfied that when weighed against the evidence of his identification at the scene which we now turn to consider, the appellant's alibi defence was completely displaced."

45. In the present case, as seen from the excerpt of the impugned judgment, the trial court considered the appellant's *alibi* defence. By parity of reasoning in **<u>Athuman Salim Athuman v Republic</u>** ***(supra)*** we agree with the learned trial Judge that when the appellant's *alibi* defence is weighed against the rest of the evidence adduced, the conclusion is inescapable that the *alibi* defence was effectively displaced.

46. The appellant also posits that the delay in his arrest undermined the respondent's case, while the respondent urges that the delay was occasioned by ongoing investigations and efforts to apprehend the other suspects who fled. In our view, delay in arrest is not, of itself, fatal unless it occasions prejudice or weakens the evidentiary basis of the prosecution case. In this instance, we are satisfied that the delay did not affect the quality of the evidence placing the appellant at the scene.

47. As we have determined that the appellant was one of the persons that committed the unlawful act that caused the untimely demise of the deceased. The question that follows is whether he harbored malice aforethought when he did so. Malice aforethought is described in **section 206** of the **Penal Code** as follows:

> ***"Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances:***
>
> 1. ***An intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;***
> 2. ***Knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;***
> 3. ***an intent to commit a felony;***
> 4. ***An intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony."***

48. The witnesses testified of deep cuts that were inflicted on the deceased's arm, hand, and waist with a sharp object. Indeed, the deceased succumbed to the injuries before he reached the

hospital. We find that the nature of the injuries visited upon the deceased is indicative that the appellant's intention was to cause the deceased death or, at the very least, to do him grievous harm. We therefore, find that malice aforethought was proved.

49. Ultimately, we find that the respondent proved its case beyond reasonable doubt. Therefore, this appeal is found to lack merit and is dismissed in its entirety. We affirm both the conviction and sentence.

Dated and delivered at Kisumu this 24th day of 2026.

P. NYAMWEYA
.....
JUDGE OF APPEAL

L. ACHODE
.....
JUDGE OF APPEAL

J. MATIVO
.....
JUDGE OF APPEAL

I certify that this is
a true copy of the original

DEPUTY REGISTRAR