

**IN THE COURT OF APPEAL
AT ELDORET**

**(CORAM: MATIVO, GACHOKA & KORIR,
JJ.A.)**

CRIMINAL APPEAL NO. E112 OF 2022

BETWEEN

**MARTIN MUTUA MUSAU 1ST
APPELLANT PAUL WACHERE NDIRANGU
2ND APPELLANT PAUL WACHERE NJENGA
..... 3RD APPELLANT MARGARET MUTHONI .
..... 4TH APPELLANT**

AND

REPUBLIC.....RESPONDENT

*(An appeal from the Judgment of the High Court at Kitale (H.K.
Chemitei, J) delivered on 16th September 2020*

in

HCCR No. 1 of 2020)

JUDGMENT OF THE COURT

1. The appellants herein were charged with, and convicted for the offence of murder contrary to **section 203** as read with **section 204** of the **Penal Code**. The particulars of the offence were that on 29th December 2015 at around 2100 hours at Gitwamba village in Saboti Division within Trans Nzoia County, the appellants murdered Bernard Mwita Chepasa. Upon conviction, each appellant was sentenced to serve 20 years in

prison.

Dissatisfied with both conviction and sentence, the appellants lodged the present appeal.

2. During the pendency of this appeal, the second appellant died, and his appeal was marked as abated on 18th February 2026. As for the 1st, 3rd, and 4th appellants, they raise similar grounds of appeal and challenge the impugned judgment on the grounds that: they were not linked to the offence; common intention was not established; and there was failure to call a crucial witness.

3. This being a first appeal, we are invited to consider the evidence on record before arriving at our independent conclusion. However, in doing so, we must be alive and take into account the fact that, unlike the trial court, we did not have the benefit of hearing and observing the witnesses testify. In this regard, we will abide by 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. Living by the above dictum, we will restate the evidence adduced before the trial court before we undertake our own independent analysis and determination of this appeal. In putting up their case against the appellants, the prosecution called eight witnesses.

5. **Elizabeth Waithera Onyiego (PW1)**, a Government Analyst based at the Nairobi Government Chemist with a Master of Science in Chemistry and twenty years' experience, testified that on 15th January 2016, she received several items for analysis from Corporal Daniel Njoroge of the Directorate of Criminal Investigations (DCI), Kitale. The items included blood sample of the deceased Bernard Mwita Chepasa, a right foot gumboot, a blood sample of the 1st appellant, Martin Mutua Musau, a pair of trousers belonging to the 1st appellant, a blood sample of the 2nd appellant, Paul Wachere Ndirangu, and a pair of safari boots belonging to the 2nd appellant. She stated that upon conducting DNA analysis, she established that the gumboot and the safari boots were stained with blood whose DNA profile matched that of

the deceased, while the pair of trousers bore blood stains whose DNA profile matched that of the 1st appellant. She produced the report signed on 13th July 2018 as Exhibit 1.

6. **Mary Wanjiku Kariuki (PW2)**, a farmer residing at Gitwamba, testified that the deceased Bernard Mwita Chepasa was her neighbour. She stated that she purchased her land in 2013 from one John, a brother to the 1st appellant, but only gained entry and constructed a house on the land after obtaining a court order in 2015. She recalled that she knew no peace as she was threatened by the 1st, 2nd, and 3rd appellants, who told her she had bought a grave and not land. Although she reported the threats to the administration police, her complaint was not taken seriously, with the officers informing her that those were mere threats. Her evidence was that a week before the deceased died, she was chased by the 1st and 3rd appellants, who were armed with a panga. She also heard them threatening the deceased, but he remained courageous, and she advised him to be careful, especially at night. Speaking specifically to the material night of 29th December 2015, the witness stated that one Robert came and informed her that he

had found the deceased oozing blood on

the road, prompting her to go with police officers to the scene where they found the deceased bleeding from the throat with his neck severed and his hand chopped off, while his leg had also been cut and there was blood inside the gumboot on his right leg. She further testified that, following the incident, a DC's baraza was convened, at which the 3rd appellant attempted to run away but was arrested. She led the police to the 1st appellant and the 2nd appellant, who were also arrested. The 4th appellant was arrested from her place of business. She identified a pair of trousers which she stated belonged to the 4th appellant but were found in the 3rd appellant's house, as well as shoes which she recognized belonged to the 3rd appellant, as she used to see him wear them regularly. Upon cross-examination, PW2 stated that she was not present when the police recovered the items she had identified. It is important to note that although the information presented to the trial court listed the 4th appellant as the 4th accused person, the witness kept referring to the 4th appellant as a male.

7. **Robert Simiyu Chepkorom (PW3)**, a farmer from Kibomet who lived with the deceased, who was his nephew at

Gitwamba,

testified that the house they occupied belonged to the deceased's brother, who had purchased the land from John Wachere, a brother to the 1st appellant and an uncle to the 2nd, 3rd, and 4th appellants. Again, it is important to note that the witness referred to the 1st appellant, who was the 1st accused person at the trial, as a sister to John Wachere, the seller of the land. This notwithstanding the clear fact that the 1st appellant is a male. PW3 further testified that they did not live in peace, as the 1st, 2nd, and 3rd appellants constantly caused problems, chasing them with pangas and removing survey beacons whenever they attempted to survey the land. He recalled that on 25th December 2015, the 2nd and 3rd appellants warned him that a week would not pass before someone died over the land, and on 29th December 2015, as he was returning from his mother's house at night, he found the deceased lying on the road and, upon inspection, discovered that his neck was severed and he had sustained deep cuts, prompting him to call a neighbour and later the police, who took the body to Cherengany Mortuary. He identified the gumboots worn by the deceased that day. PW3 testified that he was present when the

police recovered the long

trousers belonging to the 4th appellant and the shoes of the 2nd appellant, his neighbour. We again note that the witness specifically referred to PW4 as a male.

8. **Irine Jepkemoi Chepkwony (PW4)** testified that she was the deceased's elder sister. She stated that she was present when her other late brother purchased the disputed land from John Henry Wachere in 2013, with full payment made in 2014. She recalled that during the survey exercise, they encountered the 2nd appellant, who threatened her, saying she should not set foot on the land, as it belonged to them. She further recounted that during the survey exercise, all the appellants came as a group and threatened to kill the vendor of the land, forcing them to disperse. When her brother, the purchaser of the land, died, they had to obtain a court order so as to bury him on the land with the protection of the chief and police officers, and that the 1st appellant later threatened to exhume the body. The deceased, who was left to guard the land, called her on 25th December 2015 and reported that he was being threatened by the appellants. Further, that they had made reports to the police about the ongoing threats.

9. **Julius Chepkwony Ndiwa (PW5)** stated that he was the deceased's uncle. He recalled that the deceased's brother had purchased half an acre of land from John Karanja, and upon his death in a road accident, the family resolved to bury him on that land. However, upon arrival, the 4th appellant, together with her children, chased them away, forcing him to summon John Wachere, who produced the title deed to prove ownership of the land. That after obtaining a court order and with the assistance of the chief and police officers, they constructed a house and buried the deceased's brother on 11th April 2015. He stated that after the said burial, the deceased, who was physically challenged, was left to reside on the land as a caretaker. PW5 further testified that in December 2015, a neighbour named Mary Wanjiru informed him that the 4th appellant (the witness referred to the 4th appellant as a male) had purchased a panga and threatened to kill her, and he advised her to report the matter to the police. It was further his evidence that on 30th December 2015 at midnight, he received a call from the police informing him that the deceased had been killed using a panga. Upon his arrival at the scene the

next morning, he found the deceased's

body, and the police took it to the mortuary. He noted that John Wachere assisted with the preparations for the burial, and during the funeral ceremony, he openly stated that the land was his and no one could stop him from selling it. While PW5 admitted he did not witness the killing and did not know who the killers were, he maintained that the appellants had previously threatened that no one would take over the shamba. In cross-examination, the witness referred to the person who was said by Mary Wanjiru as a female.

10. **Amos Kochilam (PW6)**, a police officer based at Gitwamba AP Patrol Base, testified that in December 2015, he was heading from Gitwamba market to the station when he encountered people conversing with APC Francis Sagale, who informed him that one Robert Simotwa had reported finding the deceased lying in a pool of blood while returning home. Acting on instructions from Inspector George Manyaka, he proceeded to the scene, accompanied by Sagale and other police officers. He recalled that at the scene, they discovered the body approximately five metres from the house, lying in a pool of blood with visible injuries to the neck, legs, and hands. He

further testified that, upon observing

the scene, he promptly called Inspector George Manyaka to report their findings. Kitale Police Station was alerted of the incident, and at around 2:00 am, police officers led by Inspector Kilangi arrived at the scene and took the deceased's body to the mortuary. He stated that he did not know the killers of the deceased.

11. **Dr. Patrick Mista (PW7)** testified that he conducted a post-mortem examination on the body of the deceased Bernard Mwita Chabasa at Cherengany Nursing Home Mortuary on 6th January 2016. He observed that the body was well preserved, with the estimated time of death being approximately one week prior. Upon examination, he documented multiple cut wounds numbering ten across various areas of the body, including the upper and lower limbs as well as the back, with a particularly severe deep cut wound on the neck that caused a complete severance of the spinal cord, artery, and jugular vein. PW7 concluded that the cause of death was severe multiple injuries and severe external haemorrhage. He produced the signed post-mortem report as Exhibit 2. He further testified that blood samples were taken from the body and clothing for DNA

analysis

to assist the investigating officer in identifying the perpetrators. The witness concluded his testimony by stating that the body was identified to him by Daniel Chepkwony and Leonard Ngeiywa prior to the examination.

12. The final prosecution witness was **Assistant Superintendent of Police Joseph Nzioka (PW8)**, an officer who at the time was the Deputy DCIO in Trans Nzoia. He testified that on the morning of 30th December 2015, he was alerted by his superior about a murder that had occurred the previous night at Gitwamba. He proceeded to the scene with Corporal Njoroge and commenced investigations. At the scene, he established that the deceased, who was physically challenged, had been residing on land belonging to his late brother, who had bought it from one John Karanja Wachere. He further discovered that during the funeral of the deceased's brother, the appellants had opposed the burial, and it was only after a court order was obtained that the burial took place. He also learned from PW2 that she, too, had been threatened with death after purchasing land from the same John Karanja Wachere. Additionally, he received information that the 4th appellant had been seen

sharpening a knife on a separate

occasion, although the panga used in the killing was never recovered.

13. Thereafter, he ordered the arrest of all four appellants and took them for mental assessment at Eldoret. He produced the mental assessment reports confirming that each one of them was fit to stand trial. He drew a sketch plan of the scene, which he produced as Exhibit P3. The witness confirmed that on 14th January 2016, Corporal Njoroge forwarded the exhibits to the Government Chemist for analysis, including the deceased's blood sample, the right foot gumboot, blood samples of the 1st and 2nd appellants, the 1st appellant's trousers, and the 2nd appellant's safari boots. He produced the gumboot, long trousers, safari boots, exhibit memo form, and a copy of the title deed for the disputed land parcel Saboti/Kiboroa Block 1/Gitwamba/271 as exhibits. On cross-examination, he admitted that there was no eyewitness to the killing and that the deceased was killed on a public path, but he maintained that PW2 had heard the appellants threatening the deceased prior to the killing.

14. Placed on their defence, each appellant gave sworn evidence.

The 1st appellant, Martin Mutua Musa, testified as DW1 and stated

that he resided at Gitwamba, where he did transport work using donkeys. He recalled that on 29th December 2015, at around 5:00 pm, he returned from his shamba, remained in his house with his family, and took dinner with them at around 7:00 pm before retiring to bed. He stated that the following morning, he went to the shamba with his donkeys to ferry potatoes and worked until 2:00 pm, after which he returned home and tethered his donkeys, only for police officers from Gitwamba Police Station to arrive and arrest him without informing him of the reason for the arrest. He recalled that after the arrest, he was transferred to Saboti Police Station and subsequently to Kitale Police Station, where his fingerprints were taken before being escorted to Eldoret for a mental assessment. He denied the offence and maintained that on the material night he was at home and did not see his co-accused. He admitted that he knew John Karanja, though he denied having any interest in the land where the deceased lived or having demanded any land from anyone. On cross-examination, he confirmed that PW2 Mary Wanjiku was a resident of Gitwamba, that the 2nd and 3rd appellants were his

brothers-in-law, while the 4th appellant was their aunt, and that they were all related.

15. The 2nd appellant, **Paul Wachira Ndirangu (DW2)**, testified that he was a driver residing at Gitwamba. He stated that on 29th December 2015, he carried out his normal matatu duties, plying the Saboti to Kitale route in motor vehicle registration number KBJ 327D Probox. He worked until 6:30 pm, then washed and parked the vehicle at the shopping centre before proceeding home, where he had dinner with his family at around 7:00 pm and slept by 8:00 pm. He further testified that the following day, upon reporting to his matatu business, he observed an unusual gathering at the centre and learnt that a chief's meeting was scheduled, but after approximately 30 minutes, police officers arrested him, and escorted him to his house where they conducted a search of his bedroom and sitting room without taking anything or informing him of the reason for the search. He was thereafter taken to Kitale Police Station, placed in the cells, his fingerprints taken, and later taken to Eldoret for a mental assessment. He denied meeting any of his co-accused on the material night. He further

testified that John Karanja Wachira

was his uncle and was still alive. Despite acknowledging that he knew the deceased, he maintained that he had never quarreled with him, and that the shamba in dispute belonged to his uncle. On cross-examination, he stated that: *“3rd accused is my cousin, 2nd accused is my brother-in-law and 1st accused is my aunt.”* He also denied that the shoes produced in court belonged to him, asserting that he had no interest in the land and that he resided on his uncle’s shamba.

16. On his part, the 3rd appellant, **Paul Wachere Njenga (DW3)**, testified that he resided at Gitwamba and worked as a boda boda rider, and on 29th December 2015, he was at his place with his wife and two children, where he took a bath at around 5:00 pm before having dinner and retiring to sleep. The following day, he proceeded with his duties as usual and, while heading to Gitwamba from Saboti, he encountered two police officers who stopped him, switched off his motorbike, and directed him to accompany them. He was placed in a police vehicle and taken to Gitwamba, whereupon he was asked to lead the police officers to his house. There, the officers conducted a thorough search but did not recover anything, and

he was subsequently taken to

Kitale Police Station and later to Eldoret for mental assessment before being charged with the offence, which he continued to deny. He maintained that he had no quarrel with the deceased and did not see him on the day in question. On cross-examination and re-examination, he acknowledged that his co-accused were his relatives, that John Wachere was his uncle, and that while he used to see the deceased in Gitwamba, he did not know him beyond that. He further denied that he had threatened PW2 Mary Wanjiru Kariuki, whom he recognised as someone he used to see at the trading centre, and he suggested that the witnesses were giving false testimony against him.

17. The last defence witness was the 4th appellant, **Margaret Muthoni (DW4)**, who testified that she resided at Gitwamba and operated a hotel. She recalled that on 29th December 2015, she was at her workplace feeling unwell and slept until the following day. She stated that while at her place of work, she instructed her daughter to cook meat, and after which, customers who later identified themselves as DCI officers came and were served. They arrested her, asked for her phone, and

requested her to lead them to her house, where they conducted a search of her

bedroom and toilet, but did not find anything. She was subsequently taken to Kitale Police Station and later to Eldoret for mental assessment. She denied the charge against her and maintained that although she knew the deceased as a resident of Gitwamba, she was not with the co-accused persons on the material night. She testified that John Wachere, her brother, was alive and that she had seen him at his house while she was on bond, and that she had no quarrel with the deceased. On cross-examination, she denied the testimony of PW2 and PW5, stating that PW2's evidence was false, that there was no land dispute, and that she had no reason to kill the deceased, adding that John Wachere was alive and that she had never differed with him or the deceased.

18. We heard this appeal on 18th February 2026 when learned counsel Mr. Ayieko appeared for the 1st and 3rd appellants and learned counsel Mr. Oburu represented the 4th appellant. Learned Assistant Director of Public Prosecutions, Mr. Okoth, was in attendance for the respondent. Counsel, while relying on their filed submissions, made brief oral arguments, which we highlight below.

19. For the 1st and 3rd appellants, counsel submitted that the conviction by the trial court was against the weight of the evidence as the charge of murder was not proved to the required standards. Counsel asserted that the evidence adduced did not satisfy the requisite threshold for conviction based on circumstantial evidence. Relying on the principles in **Sawe vs. Republic [2003] KECA 182 (KLR)**, counsel urged that inculpatory facts in this case did not establish the appellants' guilt. Relying on the holding in **Abanga alias Onyango vs. Republic - Criminal Appeal No. 32 of 1990** that for a conviction to ensue based on circumstantial evidence, the chain must be complete, counsel argued that in the instant matter, the chain was incomplete and left room for possible alternative conclusions other than the appellants' guilt.

20. It was submitted that the DNA evidence linking the 1st appellant's trousers to the deceased was of no probative value as it did not directly connect him to the killing, and that the *alibi* defences raised by the appellants ought to have been considered in light of the principle in **Wang'ombe vs. Republic [1976-80] 1 KLR 1683**

that an accused assumes no burden of proving an *alibi*, the onus remaining on the prosecution all the time to rebut the same.

21. On the application of the doctrine of common intention, counsel submitted that the learned Judge erred in invoking **section 21** of the **Penal Code** without evidence demonstrating that the appellants had formed a pre-arranged plan or concerted agreement to commit the offence. Citing **Solomon vs. R [1965] EA 363** and **Abdi Ali vs. R [1956] EACA 573**, counsel argued that common intention requires proof that the accused shared a criminal intention to pursue a specific unlawful purpose and that the offence committed was a probable consequence thereof, which could be inferred from presence, actions, and failure to disassociate from the assault. It was contended that no such evidence existed to implicate the 1st and 3rd appellants in any joint enterprise, and that the trial court's reliance on common intention was therefore misplaced. Counsel accordingly prayed that the conviction be quashed and the appellants acquitted, or in the alternative, that the sentence be varied downwards.

22. For the 4th appellant, counsel submitted that the trial court erred in convicting her on circumstantial evidence, arguing that the

evidence did not irresistibly point to her guilt, as no prosecution witness mentioned her having threatened the deceased nor placed her at the scene of the crime. Counsel also submitted that the panga allegedly used to commit the crime was not produced as an exhibit nor proven to be the murder weapon. Counsel relied on **Sawe vs. Republic** (supra) to submit that for a conviction to arise from circumstantial evidence, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis. According to counsel, the chain of circumstances was not complete. He maintained that suspicion, however strong, cannot provide a basis for inferring guilt. Regarding the 4th appellant's *alibi* defence, counsel referred to **Lioanda vs. Sebvala & Others [1969] EA 204** and **Wang'ombe vs. Republic [1976-80] 1 KLR 1683** to reiterate the principle that an accused assumes no burden of proving an *alibi* and only needs to create doubt as to the credibility of the prosecution's case. Disputing the finding that the 4th appellant had a common intention with her co-appellants, counsel relied on **Solomon vs. R [1965] EA 363**

and **Abdi Ali vs. R [1956] EACA 573** to argue that **section 21** of the

Penal Code requires proof of a shared criminal intention and a pre-arranged plan, which was absent in this case. Counsel therefore prayed that the appeal be allowed, the conviction quashed, and the 4th appellant acquitted.

23. In opposition to the appeal, counsel for the respondent submitted that the conviction was sound as the prosecution had adduced overwhelming circumstantial evidence satisfying the three tests established in **Abanga alias Onyango vs. Republic** (supra). Counsel relied on **Sawe vs. Republic** (supra) for the proposition that inculpatory facts must be incompatible with the innocence of the accused, which was not the case herein. He invoked the doctrine of common intention under **section 21** of the **Penal Code** as expounded in **Mohamed Dadi Kokane & 3 Others vs. Republic (Criminal Appeal Nos. 30, 31, 32 & 33 of 2015)** and submitted that the appellants' joint conduct in threatening the deceased over the land and the 1st appellant's blood-stained trousers and the 2nd appellant's blood-stained safari boots proved a common intention to prosecute an unlawful purpose. On the failure to call John Wachere as a witness, counsel cited **Bukenya &**

Others vs. Uganda [1972] EA 549 and section 143 of the

Evidence Act for the principle that the prosecution need not call every possible witness but only those sufficient to establish the facts, and that the appellants never challenged the witness's absence nor availed him, themselves. In specific response to the 4th appellant's grounds of appeal, counsel argued that circumstantial evidence, including her being seen sharpening a knife, opposing the burial of the deceased's brother, and planting maize on the disputed land, sufficiently linked her to the offence, and that the failure to recover the murder weapon was not fatal to the prosecution's case. Counsel for the respondent, therefore, prayed that the appeal be dismissed in its entirety for being unmerited.

24. We have carefully considered the record of appeal, the grounds of appeal, the submissions of counsel, the authorities cited, and the law. It must be clear from the outset that this judgment is only in respect of the appeals by the 1st, 3rd, and 4th appellants, the 2nd appellant's appeal having abated due to his demise. We identify the following issues for determination: first, whether the prosecution proved its case against any of the appellants or all them beyond reasonable doubt; second, whether the trial

court

properly applied the doctrine of common intention; third, whether the failure to call John Wachere as a witness was fatal to the prosecution's case; and if the conviction is sustained, whether the sentence of 20 years imprisonment was excessive.

25. It is common ground that there was no eyewitness to the killing of the deceased. Indeed, as was appreciated by the learned Judge, nobody stepped forward to say he or she saw the doer or doers of the evil deed. The prosecution's case, therefore, entirely rested on circumstantial evidence. The law on circumstantial evidence is well settled. We have reviewed the judgment of the trial court, and note that the learned Judge appreciated the principles underpinning the application of circumstantial evidence to return a conviction. We restate those principles by highlighting the holding of the Court in **Sawe vs. Republic** (supra), thus:

“In order to justify, on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt. There must be no other co-existing circumstances weakening the chain of circumstances relied on. The burden of proving facts that justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of

innocence is on the prosecution, and

always remains with the prosecution. It is a burden, which never shifts to the party accused."

26. As noted above, for circumstantial evidence to prove an offence, the inculpatory facts must be incompatible with the accused's innocence and incapable of explanation on any other reasonable hypothesis. The evidence on record reveals a longstanding land dispute over parcel number Saboti/Kiboroa Block 1/ Gitwamba/ 271, which had been sold by John Wachere to the deceased's late brother. Mr. John Wachere was a relative of the appellants. The evidence of **PW2, PW3, PW4, and PW5**, which we find to be consistent and credible, established that the appellants had repeatedly threatened the deceased and his family. **PW2** testified that prior to the killing of the deceased, the appellants had warned that no one would occupy the land and that someone would die within a week. These threats were made in the days immediately preceding the deceased's death.

27. Evidence was also led showing that the dispute over the land commenced before the original purchaser died, and that the house would be constructed and the burial would only take place pursuant to issuance of a court order. The appellants' hostility

towards the purchasers was therefore evident from the very beginning. This may have pointed to the appellants having a strong motive to eliminate the deceased, who was a caretaker of the disputed land. However, all that amounted to suspicion, and as was firmly held by the Court in **Sawe vs. Republic** (supra):

“The suspicion may be strong but this is a game with clear and settled rules of engagement. The prosecution must prove the case against the accused beyond any reasonable doubt. As this Court made clear in the case of Mary Wanjiku Gichira vs. Republic (Criminal Appeal No 17 of 1998) (unreported), suspicion however strong, cannot provide a basis for inferring guilt which must be proved by evidence.”

28. So, apart from the inference that could be drawn from the utterances of the appellants, what other evidence do we have on the record? We start with the forensic evidence of PW1, the Government Analyst. The DNA analysis conclusively proved that the blood stains on the gumboot (which the deceased was wearing) belonged to the deceased. In respect of the bloodstains on long trousers said to belong to the 1st appellant, the same matched the 1st appellant’s own blood profile. While the 1st appellant denied ownership of the trousers, PW2 and

PW3

positively identified the trousers as those they had seen the 1st appellant wearing.

29. We must, however, point out that the ownership of the pair of long trousers kept shifting depending on the person in the witness box. Nevertheless, the presence of the 1st appellant's blood on his own long trouser without any linkage to the deceased serves no evidentiary value. Furthermore, there was no witness who testified as to which appellant the pair of long trousers was recovered. Indeed, there is no iota of any testimony on record as to whether the 1st appellant or any of the appellants was found with injuries so that it can be inferred that such injuries were likely to have been sustained in the fight with the deceased. There is no other evidence to link any of the appellants with the death of the deceased.

30. In the appeal before us, there is a disturbing pattern as to the identity of the appellants. Trial courts must always appreciate that the evidence they record forms part of the record to be used by the appellate courts. When there are several accused persons being tried, the judicial officers and judges should take time to ensure that the accused persons in the dock appear in

the order

in which they appear in the charge sheet or information so that the appellate could can easily appreciate the accused person being referred to by a witness in their evidence.

31. In the appeal before us, we have pointed out the confusion in the testimonies of the witnesses as to what was recovered from which appellant. We have also demonstrated that there was confusion in the order in which the appellants stood in the dock vis-à-vis their appearance in the information. Linking any exhibit to a particular accused person, therefore, becomes difficult. For instance, it cannot be confidently held that it was the 4th appellant herein who bought and sharpened a panga. Crime is an individual responsibility, and whatever the number of accused persons before a trial court, the prosecution is required to establish the guilt of each accused person. All participants in a trial must ensure that each witness is clear on the exhibit(s) being identified and the nexus between the exhibit(s) and a particular accused person.

32. As we move to determine this appeal, we advert to the requirement that in a murder trial the prosecution must establish that a human being died, that the cause of death is

attributable

to an unlawful commission or omission of the accused, and that the accused had malice aforethought. Above all, the prosecutor must adduce evidence showing the hand of the accused in the death of the deceased. Absent any of these ingredients, the conviction of an accused cannot hold. That the deceased died of injuries inflicted by a human being or human beings is not in dispute. The evidence of the pathologist speaks loudly to that conclusion. However, the finding of the learned Judge that it was the appellants and no one else who caused the death of the deceased stands on shaky ground.

33. As already stated, suspicion alone, however strong, cannot form the basis for the conviction for an offence of murder. Here, the prosecution did not go the extra mile to demonstrate that the deceased could not have been killed by anybody else apart from the appellants. Yes, there were threats on the deceased by some of the appellants, but we would be lowering the standard and allowing the prosecution to abdicate its responsibility of proving a case beyond reasonable doubt by allowing the conviction to stand.

34. We will therefore allow the appeal on the ground that the prosecution failed to prove the case against the 1st, 3rd, and 4th appellants beyond reasonable doubt. Having so found, we find no reason to explore the remainder of the appellants' grounds of appeal. Consequently, the conviction of the 1st, 3rd, and 4th appellants is quashed, and their sentences set aside. Each of them shall be set at liberty unless otherwise lawfully held.

35. It is so ordered.

Dated and delivered at Nakuru this 24th day of April 2026.

J. MATIVO

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

M. GACHOKA C.Arb, FCI Arb

.....
JUDGE OF APPEAL

W. KORIR

.....
JUDGE OF APPEAL

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

Signed

**DEPUTY
REGISTRAR**