



**Anyula v Republic (Criminal Appeal 30 of 2019)
[2025] KECA 68 (KLR) (24 January 2025) (Judgment)**

Neutral citation: [2025] KECA 68 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CRIMINAL APPEAL 30 OF 2019
HM OKWENGU, HA OMONDI & JM NGUGI, JJA
JANUARY 24, 2025**

BETWEEN

RICHARD TANDASI ANYULA APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal from the Judgment of the High Court of Kenya at
Kakamega (Sitati, J.) dated 9th May, 2016 in HCCRC No. 14 of 2012)*

JUDGMENT

1. The appellant, Richard Tandasi Anyula, was the accused person in the trial before the High Court in Kakamega High Court, Criminal Case No. 14 of 2012. He was charged with the offence of murder contrary to section 203 as read with 204 of the Penal Code. The particulars of the offence were that on 10th March, 2012, at Shidodo location in Kakamega East District within Western Province, the appellant together with others not before court, murdered Benson Musava (deceased).
2. The appellant pleaded not guilty and a fully-fledged hearing ensued. At the conclusion of the trial, he was convicted and sentenced to twenty (20) years imprisonment.
3. The appellant was aggrieved by that decision and has lodged the present appeal. In his Memorandum of Appeal, the appellant raised two (2) grounds of appeal, which are that:
 1. The learned trial judge erred in points of law and fact by failing to evaluate the evidence as a whole and observe that the prosecution never proved their case beyond reasonable doubt.
 2. The learned trial judge erred in law and fact by failing to appreciate the appellant's defense.
4. Consequently, the appellant prayed that the appeal be allowed and the sentence be set aside, the conviction quashed and he be released from custody.



5. The evidence that emerged from the trial through eight (8) prosecution witnesses was as follows.
6. Memble Mwangangi was in her house in Mirenjo village at around about 9.30pm on 09/03/2012 when the deceased stopped by. The deceased was worried that there was a plot to assault him and Collins (PW3) on suspicions that they had stolen some polythene paper. Memble testified in the trial as PW4. She advised the deceased to go and report the matter to the village elder but in response, the deceased said that it was late and he was afraid that he could meet with those who wanted to assault him on the way. Shortly afterwards, a group of three people known to her namely, Stephen, Richard (appellant) and Wycliffe, arrived at her house. The group had also taken “custody” of one Collins (PW3), who they went with them to PW4’s house. Even as PW4 pleaded with the group to go and report the matter to the village elder, they began assaulting the deceased. She saw Wycliffe hitting the deceased with a stick and together with the group of people he came with, took him away whilst assaulting him.
7. When they left his house, PW4 went to the appellant’s home and told his parents what had happened. Thereafter, he went to look for the group of people who had taken the deceased and found them at a road junction near the deceased’s homestead. By this time, people had started streaming in at the scene to stop them from beating the deceased but the assailants chased them away.
8. Collins Chitavoi (PW3) confirmed PW4’s testimony about the group taking him into their custody. He told the court that on the material night between 8.30pm and 9.00pm, the group of people which included Stephen, Richard (appellant), Bernard Isabwa and Wycliffe (all of whom are his brothers) went to his house and told him to come out; and then asked his wife to close the door. At the time, they were looking for the deceased who they learnt was at PW4’s house after Richard made a phone call to confirm. He testified that the group carried sticks from guava trees which they used to beat him and the deceased at a junction near both their homes. The group accused them of stealing Stephen’s polythene paper that he had used for covering building blocks. Later that night, after severe beatings, they were told they could go home. One Anthony took PW3 home. Whilst Kevin and Hillary took the deceased to his house.
9. PW3’s wife, Jackline Muhoncha, testified as PW2. She confirmed PW3’s testimony that a group of people who included Richard (the appellant) and Anthony – both her brothers-in-law, went to their house on the material day and took her husband, then told her to close the door. She said that later that night at 11.00pm, PW3 was brought back home by Anthony.
10. Alex Kitai testified as PW5. He told the court that on the material night at about 9.30pm, he heard someone screaming and realized that it was his cousin. He went up to a road junction and saw Stephen, Wycliffe and Isabwa assaulting the deceased using rungunus and had formed a circle around him. When they saw him, Stephen told him to go away. He then went home and informed his parents what had happened but they told him to go and sleep. The following morning, he learnt that the deceased had died.
11. Kevin Ikutu was PW6. He testified that on the material night at about 11.00pm, one Stephen (who is different from the Stephen who has been said to have assaulted the deceased and Collins) told him to go and see the deceased. Upon reaching a junction, he saw the deceased, who was his brother, lying helpless and unconscious on the ground. At the scene, he also saw Stephen, Wycliffe, Isabwa and the appellant; who informed him that the deceased had stolen a polythene paper used for covering bricks. The group of four tore a paper from a book and told the deceased to sign it and state that he would return the stolen item. However, the deceased said that he was hurt and will not sign. On hearing the deceased’s response, they started beating him again and later told PW6 to take him home and that the following morning, he should take the deceased back to them. PW6 took the deceased home but unfortunately the following morning, he succumbed to his injuries.



12. Wilson Tom, the Assistant Chief, testified as PW1. He informed the court that on 10th March, 2012, at 9.30am, he received a call from one Imbirichi who reported that the deceased had been killed by his brothers. He went to the scene and found the deceased's body in house. He called the OCS Kakamega who sent the police to collect the body and take it to the mortuary.
13. Abdudek Sharif Mohid, was the investigating officer. He testified as PW7 and informed the court that he received a phone call from the area chief about the death of the deceased. Together with his colleagues, they went to the scene and took the body to the mortuary. Thereafter, he recorded witness statements and found out that the appellant, who had run away to Kambiri, was one of the assailants. He was later arrested and charged with the offence of murder.
14. The last witness was Dr. Dixon Mchana Mwahidindi, the consultant pathologist for Kakamega County General Hospital. He testified on behalf of Dr. Milka Olando who conducted the postmortem examination. He told the court that external examination of the deceased's body revealed that he had multiple non-extensive cuts on the left half of his chest, both upper limbs and his entire back, and that underneath the bruise were huge blood clots. Whilst the internal examination revealed that there was a clot on his 8th and 9th ribs; and his left kidney was injured. Dr. Milka concluded that the cause of his death was shock following physical trauma.
15. When he was placed on his defence, the appellant gave sworn testimony and called no witnesses. He denied the charge and said that on the material night at around 9.30pm, he heard people shouting, "thief, thief" from his neighbour PW 4's house, He went outside and followed the crowd together with one Jairus. They eventually saw the deceased and PW3 sitting on the ground; and it was alleged that they had stolen a canvas from Stephen Makatia. Shortly afterwards, the said Stephen arrived at the scene with Kevin Musava, brother to the deceased. Stephen then asked Kevin to explain what he had told him (Stephen). Kevin asked the deceased and PW3 where they had taken the canvas that they stole, but they did not answer him. Afterwards, Stephen Ashihundi assaulted the deceased on the legs using a small stick and it was then that the deceased and PW3 admitted to have stolen the canvas. Stephen Makatia then asked the crowd not beat the deceased and PW3 again and they were both let go.
16. According to the appellant, the deceased was not badly beaten. He added that the deceased was not an honest man and that two weeks prior to the incident, he had been released from prison.
17. The following day, his wife called him and told him to quickly go to the deceased home as he was dying. Upon arrival, he found the deceased had already died. He was surprised to be arrested and charged with the murder of the deceased.
18. The appeal was argued by way of written submissions by both parties. During the virtual hearing, learned counsel, Ms. Anyango, appeared for the appellant and learned counsel Mr. Chacha, Senior Prosecution Counsel, appeared for the respondent.
19. First, counsel for the appellant submitted that the appellant was convicted based on the testimony of PW3, PW4, PW5. She was however categorical that PW3's testimony was key as he was the one who was with the deceased while he was being assaulted. In this regard, counsel submitted that during cross examination, PW3 testified that the people who assaulted the deceased were Stephen and Wycliffe and that the appellant did not at any point assault the deceased. Counsel also submitted that during trial, the prosecution sought to have the instant matter consolidated with the case of Wycliffe; for the single reason that it was Stephen and Wycliffe, and not the appellant, who assaulted the deceased. However, the trial court declined to consolidate the two matters as the instant matter had considerably progressed and consolidation would have caused a delay.



20. Counsel also submitted that PW4 testified that when the deceased was fished from her house, it was Wycliffe who hit him with a stick and further, PW4 testified that at the junction, she never saw the appellant assault the deceased and neither did she see him carrying anything. In addition, counsel submitted that PW5 testified that at the junction, he saw a circle formed around the deceased as he was being assaulted with runkus. However, PW5 never stated how far he was from the assailants but admitted during cross examination, that it was dark and that immediately he reached the scene, one Stephen told him to go away.
21. Based on the foregoing, counsel argued that the record shows that the appellant never assaulted the deceased but the trial court held that the appellant and the others formed a common intention of assaulting the deceased. She opined that section 20 of the Penal Code provides that a principal offender includes the one who commits the offence, the one who aids or abets another person to commit the offence and the one who procures the other person who commits the offence.
22. Counsel cited *Liningushu & Others vs. Republic* [2005] 1 E.A. 229 and submitted that in the instant case, the appellant never assaulted the deceased and, therefore, he was not the principal offender and neither did he aid or abet in the assault against the deceased. Instead, it was Stephen and Wycliffe who assaulted the deceased and formed common intention to assault the deceased. Hence, common interest cannot be transferred to the appellant.
23. In the same breath, counsel argued that the prosecution did not prove its case beyond reasonable doubt as it failed to prove that the appellant had malice aforethought. In this regard, she relied on *Rex vs. Tubere s/o Ochen* [1945] IZ EACA 63; *Hyam vs. DPP* [1974] A.C; and *Ernest Asami Bwire Abanga alias Onyango vs. Republic* (CACRA No. 32 of 1990) for the proposition that malice aforethought can only be inferred where it has been demonstrated that the accused person knew that his act would result in death or grievous bodily harm.
24. She also relied on the Ugandan case of *Augustino Orete & Others vs. Uganda* (1966) E.A. 430. She submitted that the court in that case held that the prosecution failed to establish common intention in a situation where the deceased had been assaulted and in the process killed on suspicion of being a thief; and could not sustain a murder conviction but rather a charge of manslaughter.
25. Lastly, counsel submitted that the trial court failed to consider the appellant's defense that he was at the scene as a mere observer. To buttress this argument, she submitted that PW4 and PW6 admitted during trial that they never saw the appellant assault the deceased.
26. Opposing the appeal, the respondent submitted that the prosecution proved their case beyond reasonable doubt. The respondent argued that the cause of the deceased's death was the direct consequence of an unlawful act or omission on the part of the appellant who acted jointly with others not before court. He opined that the appellant was well aware of his action and the intended or likely consequence. Hence, it was his intention to cause grievous body harm and even death of the deceased as was proved by the medical report of PW8. For this proposition, the prosecution relied *Ali Salim Bahati & Another vs. Republic* [2019] eKLR, wherein the court was of the view that the vicious attack on the deceased was a clear indication that the intended consequences of the appellants actions, which was the death of the deceased. The court also held that the actions of the appellants equally established malice aforethought.
27. Lastly, counsel reiterated the testimonies of PW2, PW3, PW4, PW5 and PW6; and submitted that the trial court had the opportunity to see and hear them testify and found their testimonies to have been credible. He also submitted that identification was by recognition and the trial court found that PW3, PW4, PW5 and PW5 were relatives. Therefore, the identification by recognition was proper



as the appellant was placed at the scene of crime. Further, that the evidence was direct, consistent and corroborative; which evidence was not controverted and neither was it dislodged by the appellant during his defense.

28. We have carefully evaluated the evidence before the trial court. We have also considered the appeal before us, the rival submissions of the parties and the authorities cited in support of the opposing positions.
29. This being a first appeal, our duty as the first appellate court is well laid out in *Okeno -vs- Republic* [1972] EA 32.

“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] 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.”

30. We will analyze the appeal with this obligation in mind. The appellant is aggrieved by the judgment of the High Court in which he was convicted of murder contrary to section 203 as read with section 204 of the Penal Code. The question that we must determine is whether the ingredients of the offence of murder were established.
31. The ingredients of murder were identified by this Court in *Anthony Ndegwa Ngari v Republic* [2014] eKLR as follows:

“...that the death of the deceased occurred; that the accused committed the unlawful act which caused the death of the deceased; and that the accused had malice aforethought.”

See also *Joseph Kimani Njau v Republic* [2014] eKLR.

32. It was, therefore, incumbent on the prosecution to prove that the deceased died; that her death arose as a result of a direct consequence of an unlawful act or omission on the part of the appellant, and, if so, that the appellant committed the unlawful act or omission with malice aforethought.
33. The fact of the death of the deceased is not in doubt. Literally, all the witnesses at the trial confirmed that they knew about the death: PW1 got a call and went to the scene and saw the body; So did PW7, the investigating officer. PW2; PW3; PW4 and PW6 – all relatives to the deceased – testified that he had died. So did the appellant in his defence. Finally, PW8 produced a post- mortem report which confirmed that the deceased had died as a result of shock following physical trauma. In short, the death of the deceased was firmly established.
34. The contested questions are whether the appellant was caused the death of the deceased; and whether he did so with malice aforethought.



35. Regarding the first question, it is instructive to quote the learned Judge’s analysis of the evidence that was before her on this question. She stated:

“According to Membo, the accused was in the company of two others, namely Stephen and Wycliffe when the group removed the deceased from his (Membo’s) house as they also assaulted him. The next day, the deceased died. In his testimony, Collins told the court that he was in the company of the accused, Stephen, Benard Isabwa and Wycliffe, when they went to Membo’s house and removed the deceased therefrom. The accused and the other brothers took both deceased and Collins to the road junction and beat the duo with sticks from guava trees. The next day the deceased died from the beatings he had received at the hands of his brothers among them the accused....

From all the above testimonies, I am satisfied that the accused was present at all stages from the time the group looked for the deceased from his house, then to Membo’s house when they fished the deceased out and up to the junction where they thoroughly beat the deceased. I am also satisfied that the accused and others had a common intention of assaulting the deceased, which they did. In brief, the identity and intention of the accused were not in doubt. There was moonlight and all the people involved in this matter are brothers/cousins who could easily recognize each other.”

36. We have quoted the learned Judge’s analysis in extenso because it comprehensively disposes the lead argument the appellant has pursued on appeal. The appellant argued, quite ponderously, that his conviction should be vacated because none of the witnesses claimed that they saw him specifically beating the deceased. The appellant seems to suggest that his complicity in the unlawful action ended with the beating of Collins and not the deceased. The appellant argues that since the witnesses only explicitly said he was seen assaulting Collins (and that includes Collins himself), it was wrong to convict him of the murder of the deceased.
37. Regarding the doctrine of common intention, the appellant argues that the intention of the other members of the group that participated in the assault cannot be imputed on him because he was neither a principal offender nor an abettor of the crime of assaulting the deceased.
38. The appellant’s arguments both mislead on the facts and misread the law on common intention. The trial record is quite clear that the appellant was part of the group that went to Collins’ (PW3’s) house and fished him out. He was also part of the group that went to Membo’s house and fished out the deceased. The identification of the appellant in both places is by recognition since PW2, PW3, and PW4 are all relatives to the appellant. There was also moonlight which aided the witnesses in recognition.
39. After the group took both Collins and the deceased into “custody”, they frogmarched them to the junction where the viciously assaulted them using sticks from guava tree. This is what Collins testified:

“Richard made a phone call. We went to the Mable’s house and they removed the deceased. The group had sticks from guava tree. They took us from Mable’s house as they said the owners will complain. They took us upto a junction near our home and started beating us. Even Bernard, Richard- [that is the appellant] and Wycliffe were assaulting us. My other brother called Kitale came and inquired why they are beating us and they told him to mind his own business.”

40. This is direct evidence that the appellant was not only a core participant in the plot to round up Collins and the deceased, but also to assault them for the alleged theft of canvas paper. This is also direct



evidence that Richard participated in the actual assault of the duo. It is true that in cross-examination, Collins stated that:

“When my other brother came to enquire why we were being beaten, it is Stephen who told him to mind his business. Those who assaulted us were four. Two were assaulting me while the other two were assaulting Benson [Deceased]. Benson was assaulted by Stephen and Wycliffe. I was assaulted by Richard and Bernard.”

41. The appellant latches on this and the fact that neither PW4 nor PW6 actually said they saw the appellant specifically assaulting the deceased, to make the argument that the evidence shows that the appellant only assaulted Collins (PW3).
42. This argument must fail for two reasons. First, read in context, it is quite obvious that Collins testified that all four assailants variously assaulted both him and the deceased. The first excerpt from his testimony reproduced above is clear about that. Second, even if, in fact, it is established that Richard only assaulted Collins as his colleagues assaulted the deceased, he would still be guilty of the murder of the deceased by operation of the doctrine of common intention.
43. The record is quite clear that Richard participated in fishing out the two victims from Collins’ and Membo’s houses. Indeed, he is the one who made a call to confirm that the deceased was in Membo’s house. There is no doubt that the group had a common intention. The intention was, at the very least, to assault Collins and the deceased as punishment for what the group thought was theft of the canvas paper. The act to assault the duo is an unlawful act and each of the participating members of the group is accountable for the crime as if they committed it alone. Here, the death of the deceased was a probable consequence of the common intention of all the members of the group. Since the appellant jointly devised a joint intention to execute an unlawful action, to wit, the joint assault of Collins and the deceased, the appellant must be held accountable for all offences which are committed while executing the common plan even if he did not specifically assault the deceased. This is because the appellant knew or ought to have realized that the assault on the deceased would likely result from the common plan he was party to.
44. This latter analysis not only responds to the appellant’s submissions on common intention but also disposes the question whether the appellant had malice aforethought in committing the offence. As the learned Judge concluded, the manner of the assault left no doubt that the participants intended, at the very least, to cause grievous harm to the deceased. Since under section 206(a) of the Penal Code this satisfies the requirement of malice aforethought for murder, and since that intention is ascribed to all the members of the group who acted with common intention, it follows that malice aforethought was established in the present case.
45. Lastly, the appellant complains that his defence was not considered. It is true that in her analysis the learned Judge does not specifically address the appellant’s defence which was that he had joined members of the public when he heard a commotion at the junction but that he never participated in assaulting the deceased or Collins. The learned Judge had summarized the defence earlier on in the judgment and we do not think the fact that she does not explicitly refer to it in her analysis of the evidence means that she ignored it. Indeed, we explicitly find that the defence was outrightly displaced by the cogent and compelling evidence of PW2; PW3; PW4; and PW6. As we analyzed above, the cumulative reading of the testimonies of the three is that the appellant was not only part of the group that went to fish out Collins and the deceased from Collin’s and Membo’s house, he also participated in their assault as a key member of the group of four, that included Stephen; Wycliffe; and Bernard.



46. In the end, therefore, we are satisfied that the conviction of the appellant was safe and we hereby affirm it. In doing so, we dismiss the appellant’s appeal in its entirety.

47. Orders accordingly.

DATED AND DELIVERED AT KISUMU THIS 24TH DAY OF JANUARY, 2025.

HANNAH OKWENGU

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JUDGE OF APPEAL

H.A. OMONDI

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JUDGE OF APPEAL

JOEL NGUGI

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR

