Imbwaka & 3 others v Republic (Criminal Appeal 83 of 2019) [2025] KECA 92 (KLR) (24 January 2025) (Judgment)

Neutral citation: [2025] KECA 92 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 83 OF 2019

HM OKWENGU, HA OMONDI & JM NGUGI, JJA

JANUARY 24, 2025

BETWEEN

WINSTON IMBUKWA IMBWAKA .... 1ST APPELLANT

CYRUS IMBUSI MUSHIRA .... 2ND APPELLANT

NICKSON SHITANDA SHIVACHI .... 3RD APPELLANT

BENSON MUSHIRA LIYAI .... 4TH APPELLANT

AND

REPUBLIC .... RESPONDENT

(An Appeal from against the conviction from the Judgment of the High Court of Kenya at Kakamega (Sitati, J.) dated 8th November 2017 in HCCRC No. 2 of 2013)

JUDGMENT

1. The appellants – Winston Imbukwa Imbwaka; Cyrus Imbusi Mushira; Nickson Shitanda Shivachi; and Benson Mushira Liyai – are 1st; 2nd; 3rd and 4th appellants respectively. At the High Court, they were charged with the murder of Geoffrey Moi (deceased) contrary to section 203 as read with section 204 of the Penal Code. It was alleged that on the 3rd day of July, 2012 at Mukulusi village, Murhanda location, Kakamega East District within the then Western province, they jointly murdered the deceased.

2. They pleaded not guilty and a trial followed. The prosecution called five (5) witnesses. The learned Judge found that the appellants had a case to answer. In their defence, they each gave sworn testimonies and called no witnesses. At the conclusion of the trial, the learned Judge found the charge proved beyond reasonable doubt, convicted the appellants and sentenced them to death.

3. The appellants are aggrieved by the conviction and sentence and have appealed to this Court against both. Before getting to their appeal, we will summarize the evidence that emerged at the trial court. This is because our obligation, as we will restate shortly, is to subject the evidence to a fresh re-evaluation.

4. Morris Otunga Shubakali (Morris) is the deceased's uncle. He testified as PW1. He told the court that on 03/07/2012, at around 1:00pm, he was taking his cattle to the river when he heard distressed screams coming from the deceased's home. He rushed in that direction, taking a short cut through the home of one Joshua Luseno. As he approached the deceased's homestead, he saw six (6) people coming from that home. The six were armed. Slightly worried for his safety, he paused, generally concealed at Luseno's homestead. He recognized all the six people. They included the four appellants. In court, he said that he saw:

> " Winstone Imbukwa carrying a panga; Imbusi was carrying a panga and a rungu on both hands; one Habshy was carring a slasher; One Shitandayi was carrying a panga; one Shiakali was carrying a panga and a rungu; and the last one was Benson Liyali who carried a panga."

5. When he went to the homestead, Morris found the deceased on the ground bleeding profusely with multiple cuts on his body. The deceased told him that some people had attacked him and headed down the road – the same road Morris had seen the six people who included the four appellants. Shortly thereafter, the deceased's mother emerged from the maize farm even as other members of the public came to respond to the screams.

6. When cross-examined about the names of the four appellants who he said he recognized on that day, Morris responded as follows:

> " I know the first accused as Imbukwa Charles. His father is Charles. I told the police that he is called Winny Charles. In my statement, I told the police that the second accused person is called Imbusi James as his father is called James...The third accused is Shitandayi Oddinga and the fourth accused is Benson Karoli."

7. Boniface Lubasu testified as PW2. He is a brother to the deceased. The typed record indicates that he said he recalled that on "03/07/2011 at 21:00pm" he was at his farm which is only 40 metres from the deceased's house when he heard the deceased screaming for help. He rushed to the scene. He first told the court that he found the deceased injured bearing several cut wounds and also saw six people leaving the home. Later on, he testified that he saw the six attacking the deceased. At first he said:

> " I saw 6 people as they were leaving our home. I know them as they are familiar people. I recall seeing Winny, carrying a slasher; Imbusi carryin a panga; Shitandayi with a panga; Benson with a slasher; Shiakhali had an iron rod and there was also the last one whose name I have just forgotten."

8. Later on, Boniface told the court:

> " I heard screams and came running home. The deceased was injured and had several injuries. He was inside his house. He was not even able to walk. I witnessed the first accused person cutting the deceased on the hand; the second accused cut him at the back with a panga. The third accused cut the deceased on the leg. The first accused cut the deceased on the head. The one[s] who aren't in court are Ishiakali and the one whose name I cannot recall.

When I saw the people cutting my brother, I had to run away for my safety as I screamed for help."

9. Regarding the identities of the appellants, the witness stated:

> " The people who attacked my brother are well known to me and they are the ones at (sic) the dock. The first accused is Winny; the second is called Imbusi; the third accused is called Shitandayi; and the fourth accused person is called Benson. The accused persons are our village mates and have lived and interacted (with us) since they were born."

10. In cross-examination, he said the following about the identities:

> " At the police station, I told the police that the first accused is called Winny Charles...I told the police that the second accused person is called Imbusi Khalima; the third accused person was (sic) called Shitandayi; and the fourth was (sic) Benson Avala Liraha."

11. The deceased's mother, Mayemula Mutola Malale (Malale), testified as PW3. She testified that she was at home at around "1:00pm on 03/07/2011" when some people came. They were armed with pangas and attacked the deceased. She thought she saw "around four of them". She testisfied that she saw:

> " .....Winny on that day. He was carrying a panga. He is the first accused in court. He is the one in the dock. The second accused in the dock was also present. He is called Imbusi and he carried a panga. The third person was also carrying a panga. He is called by a name I have just forgotten. The fourth accused person is called Benson and carried a panga and a rungu."

12. Dr. Dickson Mchana Mwalubindi testified as PW4. He is the consultant pathologist for Kakamega County. He testified on behalf of Dr. Roseline Malangachi who used to work under him, but had gone for further studies. Dr. Malangachi performed the autopsy on the body of the deceased at the hospital, then named Western Provincial General Hospital on 19/07/2012. Dr. Mwalubindi produced the post-mortem examination report filled out by Dr. Malangachi. It showed that the body was identified to Dr. Malangachi by France Shimenga and Robert Isangala. The body had five extensive cut wounds on the back and neck; left shoulder towards the back; on the left side on the shoulder. The other cut wounds were above the left eye and on the right fore arm. The doctor formed the opinion that the cause of death was excessive bleeding from the multiple cut wounds. Dr. Mwalubindi produced the autopsy report as evidence.

13. The final witness was the investigating officer who testified about the formal aspects of the case and his investigations, which involved being present at the post-mortem and recording statements.

14. Each of the appellants denied committing the offence and gave an alibi. The 1st appellant told the court that on 03/07/2012, he went to Ileho for work. He remained there until 4:00pm then went home arriving there at 5:30pm. It was not until the next day that he learnt that someone in the neighbourhood had been attacked and was in the hospital. He claimed that he was surprised when he was arrested many months later, on 03/04/2013 and accused of murder. He conceded that he knew the deceased. He claimed that PW1 (Morris) was his uncle whose family had a family dispute with his and that, therefore, he had a grudge.

15. The 2nd appellant equally testified that he had gone to work within Murhanda on 03/07/2012 and that he worked until 5:00pm when he went home, ate and slept. He claimed that he knew nothing about the attack and that he was only arrested many months later probably at the instigation of PW1 (Morris) who, he said, had failed to pay him after he worked for him some time in 2011.

16. On his part, the 3rd appellant told the court that on 03/07/2012 he was at Kakamega Forest working on his piece of land. He remained there until 4:00pm. He later learnt that one of his neighbours had been assaulted earlier that day.

17. The 4th appellant similarly testified that on 03/07/2012 at around 1:00pm he was working at a construction site within Kakamega until 5:00pm. He went home thereafter. He knew nothing about the attack on the deceased.

18. This is a first appeal. Our duty as a first appellate court was well laid out in Okeno -vs- Republic [1972] EA 32 thus:

> " 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."

19. With that obligation in mind, we have carefully considered the evidence that was before the High Court, the contending oral and written submissions made before us, and the law. 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.

20. 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.

21. Differently put, the prosecution was required to prove that the deceased died; that his death arose as a result of a direct consequence of an unlawful act or omission on the part of the appellants, and, if so, that the appellants committed the unlawful act or omission with malice aforethought.

22. Both the respondent and the appellants agree that the deceased died. Morris testified that he found the deceased badly injured outside his house and they took him to hospital where he succumbed to his injuries. Boniface's testimony was in accord. The autopsy report filled out by Dr. Malangachi and produced by Dr. Mwaludindi confirmed as much. The doctor opined that the cause of death was excessive bleeding as a result of the multiple cut wounds.

23. The real question in this case is whether it was the appellants who caused the multiple cut wounds and whether they did so with malice aforethought.

24. When the learned trial Judge considered the evidence presented at trial on this question, she analyzed it thus:

> "Now returning to the instant case, can it be said that the 4 accused formed a common intention to kill the deceased? From the evidence, the incident took place in broad daylight at about 1:00pm. At the time, Mayemula Mutola Malale, PW3, and who is the father to the deceased was at his home when the four accused arrived in the home in a group, armed with pangas and rungus. They did not waste any time and went straight to where the deceased was and started cutting him. According to PW3, each of the accused was armed with a panga. The deceased suffered serious cut wounds on the back and neck behind the left shoulder, on the side of the left shoulder and other extensive injuries above the left eye and on the right forearm. The deceased bled profusely and Dr. Mchana, who presented the post-mortem report told the court that the cause of death was excessive bleeding arising from those multiple cuts.
>
> Though PW2 got to the scene soon after the deceased had been seriously cut, he was able to see all the 4 accused armed with pangas and slashers. Both PW3 and PW2 had to run for their lives because the accused threatened to cut them as well.
>
> PW1, Morrise Otunga Shibakati, also met the 4 accused together with 2 others coming out of the compound of the deceased, armed with pangas. PW1 had heard the deceased screaming for help just before he ran to the home whereupon he met the accused coming out of the compound where the deceased was found lying down with cuts all over his body and bleeding profusely.
>
> From all the above, I am satisfied that all the 4 accused were properly identified at the scene as they randomly and seriously assaulted the deceased. It was day time and the parties knew each other well as they were neighbours. Whatever the motive for the attack is immaterial. As the accused moved together and descended on the deceased together cutting him seriously, their unknown intention was either to kill or to cause previous (sic) harm, to the deceased, their acts were unlawful and it is those acts that resulted in their death."

25. In their dissatisfaction with the High Court's judgment, the appellants have listed seven grounds of appeal. Reproduced verbatim from their memorandum of appeal, the grounds urge that the learned Judge erred in law and in fact:

    a. By convicting the appellants when the appellants were not positively identified.

    b. That the learned trial Judge erred in law and facts by convicting the appellants on relying (sic) on conflicting and contradictory evidence adduced by the prosecution witness (sic).

    c. That the learned trial Judge erred in law by not considering the appellants' alibi defence.

    d. That the learned trial Judge erred in law and facts in convicting the appellants when the prosecution failed to call crucial witnesses to prove its case.

    e. That the learned trial Judge erred in law and facts by failing to appreciate that the prosecution failed to establish the case beyond reasonable doubt.

    f. That the learned trial Judge erred in law and facts by convicting the appellants over a defective charge sheet/information.

    g. That the learned trial Judge erred in law and facts by failing to consider the mitigation raised by the appellants when sentencing them.

26. In combining the first two grounds of appeal, the first salvo the appellants fire against their conviction is that their identification was not positive and error free because the prosecution evidence was "contradictory, inconsistent and uncorroborated". The contradictions the appellants point to are the following:

    a. That Boniface (PW2) stated earlier on in his testimony that he arrived after the attack; and then seemed to change his evidence by testifying later that he saw the appellants attacking the deceased;

    b. That Morris (PW1) and Boniface (PW2) stated that the number of attackers were six while Malale (PW3) said that the attackers were four.

    c. That Morris (PW1) said the attack occurred on 03/07/2012 at 1:00pm; Boniface (PW2) said it occurred on 03/07/2012 at 21:00pm; while Malale (PW3) said it happened on 03/07/2011 at 1:00pm.

    d. That the witnesses gave different variations of the names of the appellants even though they claimed that they knew them since their childhood:

        i. The 1st appellant was referred to as Winstone Imbukwa by Morris (PW1); as Winny and Winny Charles by Boniface (PW2);

        ii. That the 2nd appellant was referred to as Imbusi James by Morris (PW1); as Imbusi Khalima by PW2; and simply as Imbusi by PW3 – while the official name of the 2nd appellant as per his national identity card is Silas Imbusi Mmbalia.

        iii. That the 4th appellant was referred to as both Benson Liyali and Benson Karoli by PW1; Benson Avala Liraha by PW2; and simply as Benson by PW3 while is original identification card shows that his name is Benson Liyay Mushira

    e. That the witnesses gave varying accounts about what weapons the assailants carried: that PW1 said the 1st appellant carried a panga while PW2 said it was a slasher; that PW1 said that the 4th appellant carried a panga while PW4 testified that it was a slasher while PW3 said the 4th appellant carried both a panga and a rungu.

27. The appellants argue that these contradictions prove that the testimonies of these key prosecution witnesses – who were the only identifying witnesses – were too unreliable to sustain a conviction. The appellants also argue that since the witnesses did not see the appellants participating in the attack as they all came or arrived after the incident, and the investigators should have organized an identification parade.

28. These complaints by the appellants must be seen against our jurisprudence on the question of discrepancies and contradictions in prosecution evidence. The test that the court utilizes on the effects of contradictions or inconsistencies on the prosecution case is a substantive one: it inquires whether the contradictions or inconsistencies in the prosecution evidence are to such an extent that a reasonable person would be left in doubt as to whether the charges were proved, or whether the contradictions (if any), are so material that the trial court ought to have rejected the evidence. Differently put, not every inconsistency, however small, introduces reasonable doubt to the prosecution case. See *Erick Onyango Ondeng' v Republic [2014] eKLR Criminal Appeal No. 5 OF 2013*.

29. We begin by noting that earlier on in this judgment we reproduced at length the crucial parts of the evidence given by the three identifying witnesses – Morris (PW1); Boniface (PW2) and Malale (PW3). We did so because we wanted to demonstrate that while their testimonies are not identical – and no

testimonies of any three witnesses who witnessed the same event are ever identical – the discrepancies are generally quite minor and can be accounted for by human frailties in recall or observation especially under stress. However, as analyzed by the learned trial Judge in the excerpt we have reproduced above, the testimonies leave no doubt at all that the witnesses were telling the truth about the events of the fateful day. The discrepancies do not, at all, go to the route of the charges and elements of the crime charged. This is especially true about the aspects of the evidence related to what weapons the witnesses said the appellants were carrying on the day of the incident; as well as the exact number of assailants. The discrepancies about date and time of the attack are, quite clearly, typographical or scrivener's errors either in recording or typing the record. The original handwritten notes from the trial show, for example, that the learned Judge indicated with respect to PW2 that the incident occurred at "01:00pm" but the typist read the first "0" as "2" because of the loop and slant in the learned Judge's handwriting. Consequently, the typist typed the time as as "21:00pm". This is an obvious scrivener's error. The discrepancy about the year – where both PW2 and PW3 state that the incident happened on 03/07/2011 while, in fact, they meant 03/07/2012 is also an obvious slip or error in speech; one which was obvious to the appellants since they each testified in their own defence by giving alibis about 03/07/2012.

30. Similarly, nothing comes out of the complaint that the witnesses used different permutations of the names of the appellants to identify them. As the respondent correctly argues, the differences in permutations does not, at all, effete the fact that each of the witnesses was categorical that they recognized the assailants. Indeed, this was not only identification by recognition which is stronger than that of a stranger; it was in broad day light at 1:00pm; and, additionally, the witnesses identified the assailants in their first report to the police hence giving the recognition evidence even more credence.

31. In our considered view, therefore, the identification evidence was airtight, and even after warning ourselves of the possibility of error and the dangers of identification evidence especially under difficult circumstances - as admonished by our case law – see Charles O. Maitanyi v R [1988-92] 2KAR 75 and Nzaro vs. Republic, 1991 KAR 212. Indeed, we have subjected the identification evidence to the greatest precaution suggested by this Court in Wamunga Vs. Republic [1989] eKLR:

> " It is trite law that where the only evidence against a defendant is evidence on identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of a conviction."

32. The only alleged contradiction that caused us some pause was that ascribed to PW2. As reproduced above, Boniface first implied that he arrived and saw the assailants leaving and that, therefore, he did not see the attack. He said:

> "I saw 6 people as they were leaving our home. I know them as they are familiar people." Later, he said: "I witnessed the first accused person cutting the deceased on the hand; the second accused cut him at the back with a panga. The third accused cut the deceased on the leg. The first accused cut the deceased on the head."

Does this seeming contradiction discount the evidence of PW2 as incredible? We think not. Reading his testimony in totality and in context, it would seem that when Boniface first heard the screams, he ran towards the homestead. As he approached it, he saw the attack in full swing from afar. He testified that he was afraid that he would also be attacked so he went into hiding and only emerged later when the attack had ended. It would seem that he saw the attack when he first approached the homestead after he heard the screams, went into hiding, and saw the attackers leaving when he approached the homestead a second time. As such, the seeming contradiction in his testimony is not a per se contradiction but the

product of inelegance in speech and recall. In any event, even if one completely discounted the evidence of PW2, the evidence of PW1 and PW3 is sufficient for identification or recognition purposes.

33. The appellants also complain that their alibis were ignored and were not investigated. They cite this Court's decision in Victor Mwendwa Mulinge v Republic [2014] eKLR for the proposition that even if the appellants raised the defence of alibi for the first time while in court, the prosecution could have sought leave to adduce further evidence in reply to rebut the appellants' alibi defence under section 309 of the Criminal Procedure Code. The fact that the prosecution did not utilize this procedural tool in the present case, the appellants argue, must mean that their alibis remained unrefuted and were, therefore, entitled to an acquittal.

34. It is true that accused persons do not assume the burden of proving their alibi; the prosecution bears the burden of proving all aspects of the charge beyond reasonable doubt – and this includes dislodging the accused persons' alibi defence. In Kiarie v R [1984] KLR this Court laid down the following principle:

> " An alibi raises a specific defence and an accused person who puts an alibi as an answer to a charge does not in law thereby assume any burden of proving that answer and its sufficient if an alibi introduces into the mind of a court a doubt that is not unreasonable."

35. However, it is also an established principle that where an accused person fails to disclose an alibi at a sufficiently early time to permit it to be investigated by the police, this is a factor which may be considered in determining the weight given to the alibi defence.

36. In R v Sukha Singh S/o Wazer Singh & Others [1939] 6 EACA 145, the predecessor to this Court stated:

> If a person is accused of anything and his defence is an alibi, he should bring forward that alibi as soon as he can because, firstly, if he does not bring it forward until months afterwards, there is naturally a doubt as to whether he has not been preparing it in the interval and secondly, if he brings it forward at the earliest possible moment it will give the prosecution an opportunity of inquiring into that alibi and if they are satisfied as to its genuineness, proceedings will be stopped."

37. The Victor Mwendwa Mulinge Case (supra) correctly held that the burden of proving the falsity of an alibi does not lie with the accused person, and that the prosecution can avail for itself the procedural tools in section 309 of the Criminal Procedure Code to bring in further evidence to dislodge the alibi defence. The holding in that case is not that in every case where the prosecution fails to trigger section 309 of the Criminal Procedure Code to bring further evidence to defeat the alibi defence, it would mean that the alibi defence prevails. Such alibi defence will only prevail where it successfully raises reasonable doubt about the probability whether it is the accused person who committed the offence. The trial court is expected to evaluate the evidence in its totality; to weigh up all the elements; and consider the inherent probabilities. In doing so, as aforesaid, the trial court is entitled to take an adverse view of the fact that an accused person failed to raise the alibi defence at the earliest opportunity.

38. In the present case, the learned Judge considered the alibi defences and found that they had been displaced by the evidence adduced by the prosecution. We agree with the learned Judge. The recognition evidence in the present case was so strong that it completely negated the alibi defences by the appellants especially taking into consideration the manner in which the appellants raised their alibi defence which was on the witness stand having not given any prior notice of the defence. In the present case, looking at the evidence in its totality, the prosecution eliminated any reasonable possibility that the alibi evidence is true.

39. Further, the appellants lament that key witnesses were not called to testify, and that this should have moved the court to draw adverse inferences against the prosecution. The key witnesses who were not called according to the appellants are: Dr. Roselyne Malangachi, the pathologist who performed the autopsy; IP Otieno (who first visited the scene); and the ten or so neighbours who responded to the screams by the deceased when he was attacked.

40. We note that Dr. Malangachi did not testify because she was not available. Instead, her supervisor, Dr. Mwaludindi, who was familiar with her handwriting produced the post-mortem examination report she had prepared. The defence did not object to the production; and they would have had little to stand on in such objection, anyway, since section 77 of the *Evidence Act* would have permitted the production of the autopsy report. Dr. Malangachi was, therefore, not an essential witness.

41. As for the other witnesses, the appellants have not demonstrated what crucial evidence they might have had which would have affected the verdict in the trial. The rule in criminal law is that the prosecution is required to call witnesses who will give evidence of sufficient probative value to establish its case beyond reasonable doubt. There is no requirement to call a multiplicity of witnesses in criminal trials. The rule is the opposite: the prosecution is only required to call a sufficient number of witnesses to establish a pertinent fact. Section 143 of the *Evidence Act* provides that:

> "No particular number of witnesses shall in absence of any provision of the law to the contrary be required for proof of any fact."

42. The correct legal position respecting the failure by the prosecution to call certain witnesses has been stated by this Court in Julius Kalewa Mutunga v Republic [2006] KECA 79 (KLR) thus:

> "...As a general principle of law, whether a witness should be called by the prosecution is a matter within their discretion and an appeal court will not interfere with the exercise of that discretion unless, for example, it is shown that the prosecution was influenced by some oblique motive."

43. The complementary rule is the one stated in the famous Bukenya vs. Uganda (1972) EA 549 where the predecessor to this Court held that:

> "The prosecution must make available all witnesses necessary to establish the truth, even though their evidence may be inconsistent. The court has the right, and the duty to call any person whose evidence appears essential to the just decision of the case. Where the evidence called barely is adequate the court may infer that the evidence of uncalled witness would have tended to be adverse to the prosecution."

44. The Bukenya exception (where the court will draw an adverse inference when a witness is absent), is only applicable where that witness was an essential one; and where the extant evidence is barely adequate to establish a particular fact. Neither of these conditions is present here: neither the police officer who visited the scene nor the multitude of people who responded to the deceased's screams but did not witness the attack on the deceased because they arrived after it had ended, were essential to establish the case against the appellant.

45. The final element in proving a murder charge is malice aforethought. The appellants claim that this was not proved at trial. It is difficult to understand their reasoning in its entirety but they seem to make two arguments: first that there was no evidence that the appellants had any grudge with the deceased;

and second, that no murder weapon was recovered. The appellants argue that these two points negate the presence of malice aforethought in the case.

46. Under Section 206 of the Penal Code, malice aforethought is defined as follows:

> " Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances-
>
> a. 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;
>
> b. 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;
>
> c. An intent to commit a felony;
>
> d. 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."

47. Malice aforethought is not the same as motive as the appellants seem to suggest. In the present case, the evidence showed that the appellants viciously attacked the deceased with weapons – cutting him at least six times and occasioning him extensive injuries that led to his death. That easily satisfies the ingredient of malice aforethought under section 206(a) of the Penal Code: there was a clear intention to cause grievous harm to the deceased.

48. We agree with the trial court that the nature of the injuries inflicted on the deceased (the extensive cuts) as well as the weapons used – pangas, slashers and rungus – are testament to the fact that the appellants had malice aforethought in committing the crime. In Republic v Tubere s/o Ochen [1945] 12 EACA 63, this Court acknowledged that in determining whether malice aforethought has been established the following elements should be considered:

> " The nature of the weapon used; the manner in which it was used; the part of the body targeted; the nature of the injuries inflicted either a single stab/wound or multiple injuries; the conduct of the accused before, during and after the incident."
>
> See, also, Republic vs. Ismail Hussein Ibrahim [2018] eKLR.)

49. From the evidence on record, the appellants cut the deceased with various weapons six times. The nature of the attack; the intensity of it; the parts of the body targeted; and the weapons used are sufficient to establish malice aforethought in this case.

50. Finally, on this point, we reiterate that our law does not require the murder weapon to be found and produced in court for a guilty verdict in murder to be sustained. The law only requires that each of the elements of the charged crime be proved beyond reasonable doubt.

51. The final point related to conviction raised by the appellants which we need to address is whether the information could be said to be fatally defective. As we understand it, the appellants say that the information was defective because it reveals that there were only four accused persons who committed the offence yet the testimonies of PW1 and PW2 revealed that there were at least six assailants. Yet, the appellants argue, the information did not contain the words "jointly with others not before the court."

52. The appellants are right that the evidence adduced at trial shows that there were more than four assailants. The question is whether the fact that the information did not use the magic words " jointly with others not before court", it is rendered fatally defective.

53. The question is whether the charge is fatally defective or the defect is one that is curable under section 382 of the Criminal Procedure Code. The section provides that:

> " Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice. Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings."

54. In our view, while we accept that the evidence at trial showed that the assailants numbered more than those named in the information, and that, therefore, the information should have, for technical adequacy, contained the words "jointly not with others before the court", we explicitly find that this omission did not occasion any prejudice to the appellants; and that the defect is eminently curable under section 382 of the Criminal Procedure Code.

55. The appellants also assailed the sentence imposed on them for being a mandatory death sentence which has since been declared unconstitutional by the Supreme Court in Francis Karioko Muruatetu & Another vs. Republic (2017) eKLR.

56. In sentencing the appellants, after receiving mitigation, the learned Judge ruled that:

> " The court has taken into account the mitigation factors given to the court on behalf of each of the accused persons. However, the present criminal regime governing sentencing for murder gives this court little discretion in the matter, though the court is well aware of the youthful ages of all the 4 accused.
>
> In the circumstances, each of the 4 accused is sentenced to suffer death as by law provided."

57. The respondent concedes that the sentence is for setting aside. It was imposed before the seminal decision in Francis Karioko Muruatetu Case (supra). In that decision, the Supreme Court declared the mandatory aspect of death sentence under section 204 of the Penal Code unconstitutional hence unshackling trial courts to conduct sentence hearings and impose an appropriate sentence after a conviction for murder.

58. In the present case, the learned Judge considered herself constrained by the mandatory sentence provided in the statute – and, indeed, the law stood as such at the time. Francis Karioko Muruatetu Case changed the law. For this reason, the mandatory death sentence imposed on the appellants must be set aside; which we hereby do.

59. Since the trial court record contains sufficient material – including the detailed mitigation by the appellants – it behooves us to pronounce the appropriate sentence. Looking at the circumstances of the offence; offender; and the victims, we have concluded that a sentence of thirty (30) years imprisonment for each of the appellants is appropriate in the present case. In doing so, we have considered the extreme youthfulness of the appellants; the fact that they were all first offenders; the fact that they

communicated their remorse during sentencing; and, finally, the fact that they each informed the court that they were family people.

60. The upshot is that the appeal against conviction herein is dismissed in its entirety. The appeal against sentence succeeds. The death sentence imposed on each of the appellants is hereby set aside. In its place, each of the appellants is sentenced to thirty (30) years imprisonment to be computed to begin on 13/10/2017 when the appellants were remanded in custody pending sentencing.

61. 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