Ombati & 3 others v Republiv (Criminal Appeal 163 of 2019)
[2025] KECA 469 (KLR) (13 March 2025) (Judgment)

Neutral citation: [2025] KECA 469 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 163 OF 2019

HM OKWENGU, HA OMONDI & JM NGUGI, JJA

MARCH 13, 2025

BETWEEN

ERICK KIBOI OMBATI ..... 1ST APPELLANT

EDWARD MAUTI OBIERO ..... 2ND APPELLANT

EVANS OYONDI MAUTI ..... 3RD APPELLANT

JUSTIN NYAOSI OMBATI ..... 4TH APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Kisii (Majanja, J.) dated 20th May 2019inHCCRA Appeal No. 21 of 2015)

JUDGMENT

1. Erick Kiboi Ombati (Kiboi), Edward Mauti Obiero (Edward), Evans Oyondi Mauti (Oyondi) and Justin Nyaosi Ombati (Justin), the appellants before us, were arraigned before the High Court together with Henry Nyabuto Obiero (Henry) and Erick Mose Sibwoga (Sibwoga), for the offence of murder contrary to Section 203 as read with Section 204 of the *Penal Code*. According to the information, they were alleged to have jointly murdered Wilson Onami Nyatieno (herein deceased), on 18th January, 2015, at Kabiero Location in Gucha South Sub County within Kisii County.

2. During the trial, six witnesses testified for the prosecution, and each appellant gave an unsworn statement. There was one defence witness who also testified. The witnesses who testified for the prosecution were Phanice Kerubo Nyatieno (Phanice), who is wife to Justus Nyandago Nyatieno (Justus), a sister in law to the deceased and neighbour to Kiboi; Justus, a brother to the deceased and neighbour to all the appellants. Evans Nyatieno Omollo Okari (Okari), a cousin to the deceased and neighbour to all the appellants; David Makumba Miencha (David), a cousin to the deceased

and neighbour to all the appellants; Dr. Morebu Peter Momanyi (Dr. Momanyi), who produced in court the postmortem report prepared by Dr. Omari Nyabera (Dr. Nyabera), who performed the postmortem examination at Tabaka Mission Hospital Mortuary; and Sergeant Simon Wangombe (Sgt Wangombe), who was the investigation officer.

3. Following the trial, the learned Judge delivered a judgment in which he acquitted Henry but convicted the four appellants of the offence as charged and sentenced each to twenty years' imprisonment. The learned Judge made no finding in regard to Sibwoga who was indicated as deceased.

4. Being aggrieved, the four appellants lodged a joint appeal in this Court, against their conviction and sentence. The appeal is anchored on 7 grounds set out in a supplementary memorandum of appeal filed by their advocate, Lamech Nyamari, of Anunda Onsarigo & Nyamari, LLP Advocates.

5. In brief, the appellants faults the learned Judge for erring in law and fact: in convicting the appellants solely on viva voce evidence which was concocted and fraught with glaring inconsistencies, misrepresentation and falsehoods; in finding that the prosecution had proved its case beyond reasonable doubt while the evidence on record did not support such finding; in misdirecting himself by admitting the postmortem report which was prepared by a general practitioner and produced by a general doctor without establishing any basis; in disregarding the incomplete and unreliable investigations, and sustaining the serious charge of murder against the appellants; in convicting the appellants without proof of malice aforethought; in not finding that no proper identification was carried to identify the appellants and that the deceased's death was caused by a mob; and in sentencing the appellants to twenty years imprisonment which sentence was under the circumstances harsh, excessive and capricious.

6. In support of the appeal, the appellants' advocate filed written submissions in which he identified several issues for determination. These issues may be compressed into five. That is, whether the postmortem report was properly admitted in evidence; whether the appellants were properly identified as the persons who attacked and injured the deceased; whether the prosecution established mens rea in order to sustain the charge of murder against the appellants; whether all the ingredients of the charge of murder were proved to warrant conviction of the appellants; and whether the sentence of twenty years imprisonment imposed on each appellant was manifestly excessive, harsh or cruel.

7. The appellants submitted that the evidence of the prosecution witnesses was conflicting and inconsistent. For instance, Phanice claimed that all the appellants were her neighbours, but asserted that she never saw any of them kill or assault the deceased. Yet, Justus who was with Phanice at the material time, claimed that he saw the appellants attack the deceased. That the evidence of Justus regarding the injuries was not consistent with the postmortem report as Justus claimed that Kiboi cut the deceased on his right leg, while the postmortem report indicated that the cut was on the left leg. Justus also claimed that he saw Kiboi cut the deceased on the head two times, but the postmortem report shows that the deceased had only one cut on his head. In addition, Justus contradicted himself on whether Evans was present at the scene, but admitted that Edward was not at the scene. The appellants urged the Court to find that Justus was a witness who could not be trusted.

8. The appellants dismissed the evidence of Okari as hearsay, because he stated that he did not witness the death of the deceased. Similarly, the evidence of David was also described as irrelevant, as he stated that he could not tell who killed the deceased as he was not present at the scene of crime. In regard to the postmortem report, the appellants submitted that although Dr. Momanyi who produced the report, stated that the postmortem was done on 28th January, 2018, the report produced in court indicated the date as 25th January, 2018. The appellants argued that the authenticity of the postmortem report was in doubt as the report was not prepared by a pathologist. Finally, the appellants dismissed the evidence

of Sgt Wangombe as incomplete and shoddy, noting that he did not produce any photographs of the scene, or the weapon used to commit the alleged murder, nor did he submit any blood samples for DNA testing.

9. The appellants argued that the prosecution did not establish malice aforethought which is critical in sustaining a charge of murder. In addition, that the learned Judge irregularly shifted the burden of proof to the appellants, and misdirected himself on the holding in Eunice Musenya Ndui – CA Nairobi Criminal Appeal No. 534 of 2010 [2011] eKLR, concerning the five elements of common intention; that the evidence did not show who actually delivered the fatal blow to the deceased; nor was there any evidence to show how all the appellants participated in dealing the fatal blow to the deceased, and, therefore, there was no proof of actus reus nor was common intention proved. The appellants urged the Court to allow the appeal, quash the conviction and set aside the sentence that was imposed against the appellants.

10. On sentence, the appellants argued that the sentence imposed upon them was harsh and unjust, and should be reduced to ten years imprisonment, should the Court be inclined to maintain the convictions against them.

11. The respondent also filed written submissions that were duly prepared by Ms. Kitoto Victorine, a Principal Prosecution Counsel in the Office of the Director of Public Prosecutions (ODPP). Relying on Anthony Ndegwa Ngari v Republic [2014] eKLR, the respondent identified the elements of the offence of murder as proof of the following facts:

    i. that the death of the deceased occurred;

    ii. that the death was due to an unlawful act or omission;

    iii. that it was the accused who committed the unlawful act or omission which caused the death of the deceased; and

    iv. that the accused had malice aforethought.

12. The respondent submitted that the death of the deceased was proved by the evidence of Phanice and Justus, who saw the body of the deceased at the scene of crime; and David who saw the body at the hospital, having attended the postmortem examination and identified the body to the Doctor. On the cause of death, the respondent submitted that the postmortem report prepared by Dr. Omari, which was produced by Dr. Momanyi detailed the injuries which were found on the body of the deceased, and the opinion of Dr. Omari who identified the cause of death as an open head injury following a cut wound on the head.

13. The respondent submitted that Justus saw the appellants assaulting the deceased, and testified that they all rained blows on the deceased, until he fell down; that the attack occurred at 6pm before darkness had fallen; that Justus named each of the appellants as persons who were at the scene; that the appellants were all persons known to Justus; and that the appellants had just confronted Justus a few minutes earlier but he managed to escape and was able to observe the appellants actions from a distance.

14. The respondent argued that although Evans and David did not witness the actual assault of the deceased, they were also attacked by the appellants at the same scene of crime and were seriously injured; that Phanice, Justus, Evans and David, all mentioned the appellants as part of the group that assaulted them; these were persons who were well known to them; and that although Justus was the only identifying witness with regard to the attack on the deceased, Justus's evidence was to some extent corroborated by the evidence of Evans and David regarding the activities of the appellants. The

respondent relying on several authorities of this Court, submitted that a fact can be proved by the evidence of a single identifying witness, provided the Court treats the evidence with caution.

15. As regards common intention, the respondent submitted that the appellants all participated in beating the deceased and, therefore, common intention was proved. As for malice aforethought, the respondent argued that malice could be inferred under Section 206 of the *Penal Code*, because the evidence of the prosecution witnesses showed that the aim of the appellants in attacking the deceased was clearly to cause him grievous harm, and the nature of the injuries suffered by the deceased, which was a deep cut wound on the back of the head resulting in a skull fracture affecting the brain, showed that the appellant had the ultimate intention of eliminating the deceased.

16. On whether the medical report was properly tendered, the respondent relied on Section 77 of the *Evidence Act*, which allows a document to be produced by a witness familiar with the signature of the maker, where the maker is not available to produce the document. The respondent noted that the postmortem report was produced by Dr. Momanyi, a Senior Medical Officer at the Kisii Teaching and Referral Hospital who had worked with Dr. Omari who prepared the postmortem report, and Dr. Momanyi was familiar with Dr. Omari's handwriting and signature. The respondent urged the Court to find that the appellants were rightfully convicted as the prosecution case was proved beyond reasonable doubt, and that the sentence of twenty years' imprisonment imposed on each appellant was proper.

17. This being a first appeal, this Court is under a duty to re- evaluate the evidence, assess and weigh it as a whole, in order to arrive at its own findings and independent conclusion. In doing so, the Court has to take into consideration that it neither saw nor heard the witnesses testify. This duty was well set out by the predecessor of this Court in Okeno v Republic [1972] EA 32 as follows:

> " An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya v. R., [1957] 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."

18. Having carefully considered the record of appeal, the grounds on which it is anchored, the respective written and oral submissions and the law, the main issue that falls for determination in this appeal is whether the evidence adduced against the appellants was sufficient to prove the ingredients of the offence of murder; and if so whether the appellants had a common intention to cause the death of the deceased; and whether the sentence imposed against them was excessive.

19. Section 203 of the *Penal Code* provides for the offence of murder as follows:

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

20. Thus, to prove the offence of murder, the prosecution should establish the following three ingredients in order to secure a conviction; First, that the death of the deceased occurred; second, that the death was caused by an unlawful act of commission or omission by the accused, and third, that the accused

had malice aforethought in committing the said act or commission. (See Anthony Ndegwa Ngari v Republic [2014] eKLR)

21. In Roba Galma Wario v Republic [2015] eKLR the Court identified the ingredients of murder as follows:

> " For the conviction of murder to be sustained, it is imperative to prove that the death of the deceased was caused by the appellant; and that he had the required malice aforethought. Without malice aforethought, the appellant would be guilty of manslaughter, as it would mean the death of the deceased during the brawl was not intentional."

22. The evidence adduced by prosecution witnesses, was that on 18th January, 2015, at around 5:00 pm, a group of people, armed with pangas and rungus, invaded their village, threatened, and attacked everyone they came into contact with. Justus and his wife Phanice were among the persons who met the gang. Justus identified the four appellants, Henry and Sibwoga as having been among the gang. The gang threatened and chased Justus and Phanice who ran to their house. As the gang continued threatening Justus with pangas, and threw stones at the house, Justus escaped from the house through a window, leaving Phanice in the house. He hid behind some trees from where he was able to see the gang attack David who was passing by on his motorbike.

23. David identified all the appellants as having been among the people he met carrying pangas and rungus. The gang blocked David and hit him with pangas and rungus until he fell down. Okari who was passing by asked the gang why they were beating David. In response, Justin cut Okari's hand with a panga and Okari fell down. David then took Okari on his motorbike to Kenyanya hospital. As David was leaving the scene, he saw the deceased coming from the opposite direction, asking the gang why they were beating David. Justus who was still observing what was happening from his hideout, saw the deceased being attacked by the same mob, who rained blows on the deceased until he fell down. Kiboi then cut the deceased on the right leg and the gang members ran away. Justus came from his hideout and found the deceased with serious cuts. The deceased was rushed to Kenyanya hospital, but he succumbed to his injuries.

24. In their defence, each appellant gave an unsworn statement denying the offence. Kiboi testified that he was arrested and accused of harboring a schoolgirl, and was shocked to be charged with murder as he did not even know the deceased or Justin. Edward also explained that he was not involved in the murder. He recalled that on 18th January 2015, he was harvesting sugar cane to take to Ndhiwa factory. The lorry came at 5pm to collect the cane and he proceeded with it to the sugar factory. Later when he arrived home he learnt of what had happened when he was away.

25. Oyondi also explained that he only learnt that he was a suspect when he was arrested; that on the material day he was in his church where he was a youth leader. He stayed in the church until evening and only came home to find houses and sugarcane burning. Later he was arrested as a suspect.

26. Justin explained that he was sent by his father to check on his workmen who were ploughing sugarcane. He remained in the farm until evening, but his father did not come so he decided to go home. When he reached close to his home he found. He did not see his father from that time, so he went to stay with his aunt from where he was arrested.

27. Henry also explained that he was away having gone to visit his sister at Nyamarambe. He was away from 7am to 7pm, and when he came back to find people screaming and children crying for help from the direction of his home. He, therefore, decided to ran away. He sought refuge first at the home of one Mogeni Orwaru, and then one Bothwell Maramba. He denied seeing the deceased on the 18th January, 2015 or being involved in his murder.

28. The fact of death of the deceased is not substantially in dispute.

This was established by the evidence of Justus who witnessed the assault, Sgt Wangombe who saw the deceased's body at Kenyanya Sub County Hospital, and organized for the body to be taken to Tabaka Hospital Mortuary where the postmortem was done in his presence; David who identified the body to Dr Omari who carried out the autopsy; and the evidence Dr Momanyi who produced the postmortem report on behalf of Dr Omari.

29. Dr. Omari who conducted the post-mortem on the body of the deceased observed a deep cut wound running from the front to the back side of the head, a visibly fractured skull and brain tissue oozing from the cavity. He also noted a linear cut wound running from the front to the back of the right leg measuring 9cm. Internal examination revealed a cut on the skull measuring 21cm and the brain tissue was damaged and was bleeding. The doctor formed the opinion that the deceased died from an open head injury following a cut wound on the head. We have no reason to doubt Dr. Omari's professional opinion on the cause of death. The question for determination is who caused the injuries to the deceased, and whether there was malice aforethought.

30. The only eyewitness account of how the deceased suffered his injuries was that of Justus. The incident happened between 5:00 pm and 6:00 pm during the day and the light was sufficient enough for the witnesses to see what was going on. Justus placed the appellants at the scene of the murder. He testified to seeing the deceased approach the gang who immediately all attacked him, raining blows on him, until he collapsed. Justus identified Kiboi as the person who cut the deceased on the right leg. His evidence was not shaken on cross-examination as he maintained that the appellants were part of the gang that assaulted the deceased.

31. To determine whether the identification of the appellant is safe to rely on, the court must evaluate the evidence of the identifying witness to ensure the accuracy. In the English case of R. v Turnbull [1976] 3All ER 549, the Court stated as follows:

> "... the Judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witnesses have with the accused under observation? At what distance? In what light? Was the observation impeded in any way? As for example by passing traffic or a press of people? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance? .... Finally, he should remind the jury of any specific weaknesses which had appeared in the identification evidence. Recognition may be more reliable than identification of a stranger but even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistake in recognition of close relatives and friends are sometimes made.
>
> All these matters go to the quality of the identification evidence. If the quality is good and remains good at the close of the accused's case, the danger of a mistaken identification is lessened. But the poorer the quality, the greater the danger. In our judgment when the quality is good as for example when the identification is made after a long period of observation, or in satisfactory conditions by a relative, a neighbour, a close

friend, a workmate and the like, the jury can safely be left to assess the value of the identifying witness even though there is no other evidence to support it; provided always, however, that an adequate warning has been given about the special need for caution."

32. In Wamunga vs Republic [1989] KLR, 424, the Court of Appeal (Masime JA, Gicheru & Kwach Ag JJ A) applied the caution in R vs Turnbull (supra) as follows:

> " It is trite law that where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favorable and free from possibility of error before it can safely make it the basis of a conviction...
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> .....
>
> Evidence of visual identification in criminal cases can bring about miscarriages of justice and it is of vital importance that such evidence is examined carefully to minimize this danger. Whenever the case against a defendant depends wholly or to a great extent on the correctness of one or more identifications of the accused which he alleges to be mistaken, the Court must warn itself of the special need for caution before convicting the defendant in reliance on the correctness of the identification."

33. It was the evidence of Justus that the appellants were well known to him as they had been neighbors for a long time. The attack on the deceased happened between 5pm and 6pm when there was sufficient daylight. Justus stated that he could see all the assailants from where he was hiding, and he was able to recognize the appellants and see their actions. The evidence of recognition is ordinarily more reliable than identification of a stranger. This was stated by Madan, JA. in Anjononi and Others vs. Republic [1980] KLR that:

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

34. Similarly, in Peter Musau Mwanzia v. Republic [2008] KECA 92 (KLR) this Court (Tunoi, Bosire & Onyango Otieno, JJA) stated that:

> " We do agree that for evidence of recognition to be relied upon, the witness claiming to recognize a suspect must establish circumstances that would prove that the suspect is not a stranger to him and thus to put a difference between recognition and identification of a stranger. He must show, for example that the suspect had been known to him for some time, is a relative, a friend or somebody within the same vicinity as himself and so he had been in contact with the suspect before the incident in question. Such knowledge need not be for a long time but must be for such time that the witness, in serving the suspect at the time of the offence, can recall very well having seen him before the incident in question."

35. We are satisfied that Justus was able to clearly see and recognize each of the four appellants who were well known to him as neighbours in the same village. Moreover, the evidence of Justus on identification was corroborated by the evidence of Okari and David who were also attacked at the same place, by the same gang, and both of whom identified the four appellants as having been in the gang. Both were neighbors to the appellants and knew them well. The appellants having been recognized, and placed at the locus in quo, in the act of violently assaulting the deceased, Okari and David, their defences of

alibi were dislodged and the learned Judge was right in finding that they all participated in assaulting the deceased. In his judgment, the learned Judge addressed the evidence of identification as follows:

> " in light of the direct evidence of PW2, PW3 and PW4 placing all the accused within the vicinity of the offence, I reject their unsworn statements that they were not present. They were persons well known to the witnesses and the testimony of the witnesses was clear and gave a clear timeline on how the events unfolded on the material evening. The prosecution established beyond reasonable doubt that DW1, DW2, DW4, and DW5 were held to be attacking members of the Angasa family who were involved in a land dispute between the Nyaosi family. In my view, the common intention was fortified by the testimony of PW2 that he had met the gang armed that morning, they chased PW1 and PW2 while threatening them, assaulted PW2 and PW4, and then viciously attacked the deceased with blows and kicks when he went to inquire what was happening. The accused acted together to committing the unlawful act that led to the deceased's death."

36. We agree with the finding of the learned Judge, that the four appellants all assaulted the deceased and caused him serious injuries, which resulted in the death of the deceased. We do note that there were some contradictions and inconsistencies in the evidence of the prosecution witnesses. First, it is apparent that the evidence of Justus and that of Phanice was not the same. But that did not necessarily mean that there was any inconsistency in the evidence. Both Justus and Phanice explained that initially they were together when they were chased by the appellants, and they both went into their house, but Justus subsequently escaped through the window and watched what was going on from his hiding place behind the trees. Phanice who remained in the house was apparently traumatized and scared. She was not privy to what Justus observed outside the house. It was for this reason that she was not able to state who attacked the deceased or how the deceased was attacked. In addition, Phanice was not able to clearly identify the four appellants and contradicted herself in her evidence as to who exactly was present. This did not necessarily mean that Phanice lied, it is simply the effect of the trauma that she went through, that affected her recollection of the events. Consequently, we have not relied on her evidence with regard to identification, but have relied on the evidence of Justus, Okari and David, which in our view, was sufficient to establish that the appellants assaulted the deceased.

37. We note that there was inconsistency between the evidence of Justus on the one hand, and that of David and Okari on the other hand, regarding the injury that was suffered by Okari. While Justus said it was on the right leg, both David and Okari testified that it was on the left hand. This again can be explained by the fact that Justus was observing from his hideout, and by the time he left his hideout, Okari and David had rushed to hospital. In our view, the inconsistency does not detract from the fact that the four appellants assaulted the deceased, nor does it affect the credibility of any of the witnesses. There was overwhelming cogent evidence implicating the appellants.

38. The next question is whether in assaulting the deceased, the appellants had malice aforethought; and whether they had a common intention of causing the death of the deceased.

39. 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."

40. In Bonaya Tutut Ipu & Another v R, [2015] KECA 335 (KLR), this Court (Makhandia, Ouko, M'inoti, JJA) cited with approval the persuasive authority of the Ugandan Court of Appeal Chesakit v UG, Criminal Appeal 95 of 2004 stating:

> " It is in rare circumstances that the intention to cause death is proved by direct evidence. More frequently, that intention is established by or inferred from the surrounding circumstances. In the persuasive decision of Chesakit v UG, Criminal Appeal 95 of 2004, the Court of Appeal of Uganda stated that in determining a charge of murder whether malice aforethought has been proved, the court must take into account factors such as the
>
> part of the body injured, the type of weapon used, if any, the type of injuries inflicted upon the deceased and the subsequent conduct of the accused person. Earlier in Rex v Tubere s/o Ochen [1945] 12 EACA 63, the former Court of Appeal for East Africa stated thus on the issue 'It (the court) has a duty to perform in considering the weapon used and the part of the body injured in arriving at a conclusion as to whether malice aforethought has been established, and it will be obvious that ordinarily an inference of malice will flow more readily from the case, say, of a spear or knife than from the use of a stick..."

41. According to the postmortem report, the cause of death of the deceased was an open head injury following a cut wound on the head. The injuries recorded on the postmortem report which includes a deep cut wound running from the front to the back side of the head with a visible fractured skull, and brain tissue oozing from the cavity are indicative of a vicious assault on the deceased's head, leading to the conclusion that the injuries were intended to either maim or cause death. Consequently, malice aforethought can be inferred under Section 206(a)(b) & (c) of the *Penal Code*.

42. Under Section 21 of the *Penal Code*:

> " when two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence."

43. The evidence implicating the four appellants show that they were all acting in concert in attacking the deceased. They were no doubt pursuing an unlawful purpose of assaulting the deceased of which death was a probable consequence. In the circumstances, the appellants must all be deemed to have had the common intention of committing the offence of murder which arose from their common purpose of attacking the deceased. From the foregoing, all the ingredients of the offence of murder were proved against each of the appellants to the required standard. Their conviction was, therefore, safe.

44. Finally, the appellants complain that the sentence of twenty years imprisonment that was imposed upon each of them is harsh and excessive. In sentencing the learned Judge stated as follows:

> " The accused were part of marauding gang that was bent on exacting revenge for a land dispute. On that day, they assaulted several persons including one who was amputated and ultimately murdered the deceased who had merely come to find out what was happening.
>
> I have heard their mitigation and given the circumstances under which the offence was committed, a non-custodial sentence is out of the question. I sentence each accused .... to twenty years imprisonment each."

45. It is trite law that sentencing is a matter that falls within the discretion of the trial court and an appellate court can only intervene in circumscribed circumstances. This was clearly stated by this Court (Chunga, CJ, AB Shah & Bosire, JJA) in Bernard Kimani Gacheru v Republic [2002] KECA 94 (KLR), as follows:

> " It is now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account, some wrong material, or acted on a wrong principle. Even if, the Appellate Court feels that the sentence is heavy and that the Appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exist."

46. The maximum sentence for the offence of murder is death. The learned judge pointed out the aggravating factors in the case, and having considered the mitigation of the appellants exercised his discretion in sentencing the appellants to a term of twenty years imprisonment. In our view, given the circumstances, that sentence was well deserved and was neither harsh nor excessive. In our view, there is no justification for this Court to interfere with the sentence.

47. The upshot of the above is that, there is no merit in this appeal.

Consequently, we uphold the judgment of the trial court, affirm the conviction and sentence and dismiss the appeal.

It is so ordered.

DATED AND DELIVERED AT KISUMU THIS 13TH DAY OF MARCH, 2025.

HANNAH OKWENGU

JUDGE OF APPEAL

.....

H.A. OMONDI

JUDGE OF APPEAL

.....

JOEL NGUGI

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR