



**Amaya & another v Republic (Criminal Appeal 122 of 2019)
[2025] KECA 1445 (KLR) (31 July 2025) (Judgment)**

Neutral citation: [2025] KECA 1445 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CRIMINAL APPEAL 122 OF 2019
MSA MAKHANDIA, HA OMONDI & LA ACHODE, JJA
JULY 31, 2025**

BETWEEN

THOMAS ONGAGA AMAYA 1ST APPELLANT

ALEX ONTARIGE ONYANCHA 2ND APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an Appeal from the Judgment of the High Court at Kisii
(R.E Ougo J) dated 11th day of April 2019 in HCCR No. 7 of 2018)*

JUDGMENT

1. Thomas Ongaga Amaya and Alex Ontarige Onyancha the appellants, were charged with the offence of murder contrary to Section 203, as read with Section 204 of the Penal code at Kisii High Court. The particulars of the information were that, on 16th January 2008, at Mang'ere Sub-location in Gucha Sub-County within Kisii County, jointly with others not before court they murdered Amaya Onyancha Amaya (the deceased).
2. The appellants pleaded not guilty to the information and the matter went to full trial in which the prosecution called six witnesses in support of their case. A summary of the case before the trial court will put this appeal into context.
3. Bwari Amaya PW1, recalled that on the material day at about 10:00 a.m. her husband the deceased returned from the farm with his hand on his mouth. He was bleeding and he told her that the 1st appellant's wife had hit him on the mouth with a stone. Shortly thereafter, she saw the 1st and 2nd appellants approaching. The 1st appellant is her step son and he was armed with a club and a machete. The 2nd appellant whom she knew as "Moi" was also armed with a machete and a stick. The two appellants were both shouting, "today we will finish you".



4. PW1 ran into the house with her daughter PW2 and a grandchild, as the deceased ran into the kitchen and locked himself inside. The appellants broke into the kitchen, burnt it down and brought the deceased outside, beat and cut him till he died. They then came to the main house and begun hitting it with the machetes as PW1 and PW 2 screamed. When PW1 later emerged from the house, she saw the deceased's body covered in blood. During cross examination, she testified that there were other people at the scene including one Nyangito Amaya and Omwana, but the ones she saw armed with machetes were the appellants.
5. Regina Nyanchoka Amaya, PW2 was a daughter to the deceased and a step sister to the two appellants. On the material day, she too saw the deceased come from the farm bleeding on the mouth and he told them that the 1st appellant's wife had hit him. As they prepared to take him to hospital, she heard screams coming their way. She saw four people including the two appellants and one Omwana Nyabuto. They were shouting that they would kill someone. The two appellants were armed with a club and machetes.
6. The deceased ran into the kitchen as she and PW1 entered the main house. While in the house, she heard the deceased screaming and then he said; "they have killed me." Thereafter he went silent. She and PW1 were also screaming as the appellants started destroying the main house using machetes. They came out of the house when they heard PW3 calling them from outside and found the deceased lying on the ground covered in blood. She confirmed that her mother, PW1 who had gone blind at the time of the trial had her sight before that.
7. Zephaniah Ogendi Onyancha, PW3 an elder brother to the deceased confirmed that the appellants were sons of the deceased, and that they hacked the deceased to death on 16th January, 2008, over a land dispute. He stated that he was outside his house when the deceased was killed and that he saw 3 people on that day. At first, PW3 denied having been called to resolve a dispute between the deceased and his sons, but when his statement was read to him, he admitted that indeed, the deceased had called him to help settle the dispute and during those deliberations, the deceased's sons cut him.
8. Amos Onsere Ogendi, PW4 the Assistant Chief of Mangare Sub- location and nephew to the deceased, was in his office when he received the report that the deceased had been killed by his sons. He reported the matter to Ogembo Police Station and visited the scene in the company of police officers. He found the kitchen burnt to the ground and the deceased's body lying on the ground with a cut wound on the head and blood oozing from the abdomen and the hand. The body was removed to Hema Mortuary, where he later identified it for postmortem purposes.
9. PW4 also confirmed that the deceased had a long-standing land dispute with his sons. That he had once summoned the entire family to his office as the Assistant Chief to discuss the dispute. He read to them the decision of the court concerning the dispute and warned them to cease from quarreling over the matter. Thereafter, the appellants moved out of the land with their entire families and livestock.
10. Dr. Gilbert Simba PW5, produced the post-mortem report prepared by Doctor Ombae whom he had worked with before he relocated. The post-mortem was conducted on 5th March 2008 at Hema Hospital Mortuary, after the body of the deceased was identified by PW4 and one Evans Ontita.
11. An external examination of the body showed that the deceased had mucus membrane and blood stains on his head, chest and abdomen: cut wounds on the anterior chest wall on the right side about 5cm long and on the left lateral chest wall about 3cm long; a penetrating chest injury on the right chest wall about 4cm on the 4th intercostal space; a deep cut wound on the left leg with a compound fracture of the tibia and a laceration of the scalp. An internal examination of the body revealed a laceration of the



- right lung with massive haemothorax; a compound fracture of the skull in the parietal region of the nervous system and oozing of brain matter through the fractured skull.
12. The doctor concluded that the cause of death was severe brain injury, secondary to trauma and severe hemorrhagic shock due to penetrating chest injury with a sharp object.
 13. Chief Inspector Benson Naibei, PW6 worked at the Ogembo CID Office at the material time and the lot fell upon him to trace the appellants who had gone missing after the murder in 2008. He caught up with them and arrested them ten years later, on 16th February, 2018. He told the court that when he came upon them, the 1st appellant was armed with a machete, a club and a torch. He arrested them and had them charged for the murder.
 14. In their defence, each appellant gave sworn testimony. The 1st appellant testified that on 16th January, 2018, he left home for work at 6:00 a.m. and was still there at 12:30 p.m. when he received a report that his father, the deceased had tried to rape his wife. A fight had ensued in which his wife overpowered the deceased and hit him with a stone, whereupon the deceased torched their house. The deceased then threatened the appellant's elder brother Christopher Nyabuto with a spear, and in the ensuing struggle over the spear, it pierced the deceased killing him instantly. His brother, Christopher Nyabuto, was charged in Criminal Case No. 50 of 2012, but died before the case could proceed. He pointed out that he was not charged in Criminal Case No. 50 of 2012 and his wife, who had also been arrested for the murder, was later released. He denied any involvement in the death of the deceased.
 15. The 2nd appellant testified that he was grazing his cattle in Trans- Mara at the time of the murder. He was informed that the deceased and his elder brother had been involved in a fight when the deceased went to beat up the 1st appellant's wife. He too testified that the deceased was speared to death by his own spear as he struggled with their brother. The 2nd appellant only returned home to arrange for the deceased's burial. His brother was arrested and charged in Criminal Case No. 50 of 2012. He urged the court to peruse the file to verify his claims.
 16. At the end of the trial, Ougo J convicted the appellants and sentenced each of them to 20 years imprisonment.
 17. Unhappy with the decision, the appellants filed a Memorandum of Appeal dated 4th November 2019 against both conviction and sentence and alleged that the learned Judge erred in law and fact:
 - i. By convicting the appellants on circumstantial evidence,
 - ii. By making an erroneous finding that the prosecution had discharged its burden of proof against the accused persons beyond reasonable doubt,
 - iii. By failing to resolve the contradictions and inconsistencies in the testimonies of the prosecution witness in favor of the appellants.
 - iv. By filling in the gaps left by the Prosecution case with the defence raised by the accused persons, regarding Criminal case no. 50 Of 2012, in which the accused persons were not suspects, thereby making an erroneous finding.
 18. In submissions filed on 3rd April 2023 by Nyandoro & Company Advocates on their behalf, the appellants urged that from the evidence adduced, no witness saw or testified that the wounds on the deceased were caused by the appellants. No witness saw the actual killing and that the convictions were based on circumstantial evidence that had many co-existing circumstances that destroyed its inference of guilt.



19. The 2nd Appellant argued that it does not make sense for them to be charged with a felony after 10 years had lapsed, based on statements made by people who claim to have clearly recognized and identified him at the scene. He opined that this was an afterthought to frame him and the embellishment cannot pass the test of evidence.
20. It was submitted that the prosecution case was marred with contradictions, discrepancies and inconsistencies on identification that were inconsistent with conviction. Further, that PW1 and PW2 did not state how far they were when they saw the assailants approaching their home, before they entered and locked themselves in the house. That PW1 and PW3 had poor eyesight while in court and were unable to make positive dock identification in broad daylight, or to identify the assailants by voice.
21. The appellants argued that the prosecution case fell short of proof beyond reasonable doubt and therefore, the learned trial Judge erred when she made a finding that the prosecution had discharged its burden of proof beyond reasonable doubt. They assailed the learned Judge for failing to resolve the contradictions and inconsistencies in the testimonies of the prosecution witness in their favor.
22. The appellants contended that the trial court failed to note the existence of bad blood between the witnesses and the appellant over the scrambling for land as the deceased was polygamous. Further, that no evidence linked them to the place where the deceased was found. That no blood stains were found on the appellants and neither was any forensic test conducted, or fingerprints lifted if indeed, they were at the scene.
23. It was urged that the manner in which investigations were conducted, coupled with the failure by the trial court to properly address itself to the alibi defence raised by the appellants, leads to the inescapable conclusion that the appellants' conviction was unsafe. It was stated that the alibi defence ought to have been sufficient, considering that the offence was allegedly committed on 16th January 2008 and it was not until 2018 that the 2nd appellant was arrested.
24. Finally, the appellants urged the court to find that the prosecution did not prove its case beyond reasonable doubt to sustain the convictions against them. That the 1st appellant should be compensated for the 2 years wasted behind bars, and the 2nd appellant be prevented from serving 20 years in prison for a crime he did not commit.
25. Ms. V. Kitoto, learned principle prosecution counsel filed written submissions dated 15th April 2024, on behalf of the respondent and relied on the Court of Appeal decision in Antony Ndegwa Nyari v Republic [2014] eKLR, where the elements of the offence of murder were summed up as follows:
 - a. The death of the deceased occurred;
 - b. That the accused committed the unlawful act which caused the death of the deceased; and
 - c. That the accused had malice aforethought.
26. The respondent submitted that on the first element of death and cause of death, PW5 produced a postmortem report showing that in his opinion, the cause of death was severe brain injury secondary to trauma and severe haemorrhagic shock due to penetrating chest injury with a sharp object. The body of the deceased was identified by PW4 who was a nephew to the deceased.
27. The respondent reiterated the evidence of PW1 and PW2, concerning the events that occurred on 16th January 2008 at around noon, when the deceased arrived home bleeding from the mouth, until they got out of the house and found him lying dead on the ground with injuries all over his body.



28. The respondent argued that the prosecution evidence on this element was circumstantial in nature, citing the case of *Sawe Vs. Republic* [2003] KLR 364, where the Court of Appeal amplified the circumstantial evidence test. That it was in the evidence of PW1 and PW2 that the appellants, in the company of two others went to their home, armed with machetes and a club, threatening that someone was going to die that day. Therefore, they were both placed at the crime scene.
29. On the element of malice aforethought, the respondent relied on the case of *Rex v Tubere S/O Ochen* [1945] 12 EACA 63 where the Court of Appeal set out the considerations that must be established to lay a basis that malice aforethought has been proved. The respondent submitted that the deceased suffered numerous lethal injuries all over his body and the weapons that the appellants were seen carrying were weapons intended to cause grievous harm or death.
30. The respondent contended that the appellants were arrested 10 years after the offence was committed and as such, getting material evidence such as their blood-stained clothes would be next to impossible.
31. The respondent asserted that the prosecution discharged its burden of proving its case beyond reasonable doubt and the court rightfully convicted and sentenced the appellants. The respondent urged us to dismiss the appeal in its entirety.
32. The matter came before us for hearing in plenary on 19th May 2025. Mr. Nyandoro learned counsel appeared for both appellants and elected to rely on the filed submissions entirely. Mr. Kimanthi learned State Counsel, appeared for the respondent and also relied on his filed submission entirely.
33. This being the first appeal, our mandate is set out in Rule 29(1) of the Court of Appeal Rules, and it requires us to re-appraise the evidence and draw inferences of fact on the guilt or otherwise of the appellant. We have a duty to reconsider the evidence in totality as laid before the trial Judge.
34. This mandate was well captured in *Kiilu & Another vs. Republic* [2005] 1KLR 174 as follows:

“

- “ 1. An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination 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.
2. 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. 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 also *Okeno vs. Republic* [1972] EA 32.

35. The appellants herein were charged with the offence of murder contrary to Section 203 as read with Section 204 of the [Penal Code](#) which provide as follows:

“ 203: Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.

204: Any person convicted of murder shall be sentenced to death.”



36. The fundamental elements that the prosecution must prove beyond reasonable doubt to secure a conviction are: that a death occurred, that the death was due to an unlawful act or omission, that the unlawful act or omission was on the part of the suspect and that the unlawful act that resulted in the death was actuated by malice aforethought.
37. On the first element that a death occurred and that the death was due to an unlawful act or omission is the easy part of this judgment. There was no dispute that Amaya Onyancha Amaya died on the ill-fated day of 16th January 2008, or that his death was untimely and due to an unlawful act. A post mortem report compiled by Doctor Ombae on 5th March 2008 at Hema Hospital Mortuary, was produced in evidence by his colleague PW5. PW4, a nephew to the deceased was one of those who identified the body of the deceased for postmortem purposes. According to the Pathologist, the cause of death was attributed to severe brain injury, secondary to trauma and severe hemorrhagic shock, due to penetrating chest injury with a sharp object.
38. The main dispute in this appeal revolves around the identity of the perpetrator of the ignoble deed that resulted in the death of the deceased. From the prosecution evidence, it is clear that none of the witnesses saw the appellants beat or hack the deceased leading to his death. The court therefore relied on circumstantial evidence extracted from PW1, and PW2 for the finding on identification, upon which the conviction of the appellants was based.
39. It is a truism that the guilt of an accused person can be proved by either direct or circumstantial evidence. Circumstantial evidence is evidence which enables a court to deduce a particular fact from circumstances or facts that have been proved. Such evidence can form a strong basis for proving the guilt of an accused person just as direct evidence. (See *Ahamad Abolfathi Mohammed and Another v Republic* [2018] eKLR).
40. Way back in 1928, Lord Heward, CJ stated as follows on circumstantial evidence in *R v Taylor, Weaver and Donovan* [1928] Cr. App. R 21:
- “It has been said that the evidence against the Applicant is circumstantial. So it is, but circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which, by intensified examination is capable of proving a proposition with the accuracy of mathematics. It is no derogation from evidence to say that it is circumstantial.”
41. The conditions to be considered in the application of circumstantial evidence in order to sustain a conviction in a criminal trial have been laid down in several authorities of this Court. In *Abanga alias Onyango v. Republic*, CR. App NO. 32 of 1990 (UR) this Court held as follows:
- “It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy
- three tests:
- (i) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established,
 - (ii) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;



- (iii) the circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else.”

42. This Court expounded on the foregoing exposition in *Sawe Vs. Republic* [2003] KLR 364, as follows:

“In order to justify on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt. There must be no other co-existing circumstances weakening the chain of circumstances relied upon. The burden of proving facts that justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence remain with the prosecution. It is a burden which never shift to the party accused.”

43. The chain of events is that PW1 and PW2 saw the appellants arrive in their home armed with machetes, a club and a stick on the material day. The appellants were in the company of two others and they announced that their agenda for the visit was to kill someone. The two witnesses ran into the house, as the deceased ran into the kitchen and locked himself inside. They heard the appellants break into the kitchen, set it on fire and drag out the deceased as he cried for help and the witnesses screamed. Minutes later PW2 heard the deceased cry out; “they have killed me!” before he fell silent. True to his word, minutes later the witnesses found the deceased lying dead on the ground with multiple injuries when they eventually emerged from the house.

44. The chain of events as seen from the evidence of PW1 and PW2 places the appellants at the scene of the crime and links them and 2 others to the murder, to the exclusion of any other person. It matters not who struck the fatal blows, and there were numerous of these. The inculpatory facts in the chain of events are incompatible with the innocence of the appellants, and are incapable of explanation upon any other reasonable hypothesis than that of their guilt.

45. We find that the foregoing circumstances taken cumulatively, form a chain so complete that there is no escape from the conclusion that, within all human probability the crime was committed by the appellants and their two cohorts. The learned trial Judge was therefore, not in error in convicting the appellants based on this circumstantial evidence.

46. The next element that must be determined is whether the appellants had malice aforethought when they assaulted the deceased. Section 206 of the [Penal Code](#) defines Malice aforethought as follows;

- “206. 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 or to do grievous harm to any person, whether that person is the person actually killed or
 - 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...”



47. The East African Court of Appeal pronounced itself on proof of malice aforethought in *Rex v Tubere s/o Ochen* [1945] 12 EACA 63, to which the respondent referred us as follows:

“To determine whether malice aforethought has been established a person should consider the weapon used, the manner in which it is used, the part of the body targeted, the nature of injuries inflicted, the conduct of the accused before, during and after the incident”.

48. Also, in the case of *Hyam v DPP* [1974] A.C. the Court held *inter alia*, that:

“Malice aforethought in the crime of murder is established by proof beyond reasonable doubt when during the act which led to the death of another the accused knew that it was highly probable that, that act would result in death or serious bodily harm.”

49. The weapons seen in the hands of the two appellants and which were employed during the attack were described by PW1 and PW2 as two machetes, a club and a stick. When the two witnesses saw the body of the deceased after the appellants were done with him, they described it as being covered all over with bleeding injuries. This portion of their testimony was corroborated by the postmortem report. The Pathologist concluded that the cause of death was severe brain injury, secondary to trauma and severe hemorrhagic shock due to penetrating chest injury with a sharp object. However, the cover of injuries was extensive as seen by the two witnesses and analyzed by the Pathologist.

50. The description of the injuries in the postmortem report was that externally, the body of the deceased had mucus membrane and blood stains on the head, chest and abdomen: cut wounds on the anterior chest wall on the right side about 5cm long and on the left lateral chest wall about 3cm long; a penetrating chest injury on the right chest wall about 4cm on the 4th intercostal space; a deep cut wound on the left leg with a compound fracture of the tibia; a laceration of the scalp. Internally, the deceased had a laceration of the right lung with massive haemothorax; a compound fracture of the skull in the parietal region of the nervous system and oozing of brain matter through the fractured skull.

51. The combination of the weapons the appellants carried, their pronouncement that they had come to kill someone and the extent of the injuries inflicted upon the deceased, is an indication that their actions were not only premeditated, but were intended to cause death or, at the very least, do grievous harm to the deceased. We are therefore, satisfied that malice aforethought was proved.

52. The appellants also assailed the learned Judge for failing to resolve the contradictions and inconsistencies in the prosecution evidence in their favour. Further, that she filled the gaps in the prosecution case with what they said in their defence, regarding HCCR Case No. 50 of 2012, in which they were not suspects, thereby making an erroneous finding. However, the appellants did not flag out any such contradictions specifically, neither did they point to any evidence imported from HCCR Case No. 50 of 2012 into this case to their detriment. We therefore do not need to belabor these grounds.

53. Lastly, we noted that although the appellants indicated that their appeal was on both conviction and sentence, they did not raise any ground on sentence nor did they submit on it. We therefore find no basis to interfere with the exercise of discretion by the learned Judge in imposing the sentence of 20 years imprisonment upon them considering the beastly manner in which they slew the deceased.

54. Consequently, we find that this appeal lacks merit and is hereby dismissed in its entirety.

It is so ordered.

DATED AND DELIVERED AT KISUMU THIS 31ST DAY OF JULY 2025.

ASIKE-MAKHANDIA



.....
JUDGE OF APPEAL

H. A. OMONDI

.....
JUDGE OF APPEAL

L. ACHODE

.....
JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR

