



**Manini & 4 others v Republic (Criminal Appeal 26 of 2019)  
[2024] KECA 47 (KLR) (25 January 2024) (Judgment)**

Neutral citation: [2024] KECA 47 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT KISUMU  
CRIMINAL APPEAL 26 OF 2019  
HM OKWENGU, HA OMONDI & JM NGUGI, JJA  
JANUARY 25, 2024**

**BETWEEN**

**CHARLES SURVEY MANINI ..... 1<sup>ST</sup> APPELLANT  
RICHARD OMBUI MANINI ..... 2<sup>ND</sup> APPELLANT  
GILBERT MAKORI MINYONGA ..... 3<sup>RD</sup> APPELLANT  
JOSEPH MANDELA MANINI ..... 4<sup>TH</sup> APPELLANT  
SAMUEL KAMWANA MOREMA ..... 5<sup>TH</sup> APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(An appeal from the Judgment of the High Court of Kenya at Kisii  
(Majanja, J.) dated 5th December 2018 in HCCR No. 96 of 2014)*

**JUDGMENT**

1. The appellants were convicted of the offence of murder contrary to section 203 read with section 204 of the *Penal Code* and sentenced to 25 years imprisonment on December 5, 2018 in Kisii HCCR No. 96 of 2014 (Majanja, J.). The particulars of the offence were that on the 17<sup>th</sup> day of April 2014 at Bogita sub-location in Kisii South District within Kisii County, they jointly with another not before court, murdered Dennis Obwoga Kerema (deceased). They denied the offence, and the prosecution called a total of 4 witnesses to prove its case.
2. Upon close of the prosecution case, the trial court found that a prima facie case had been established against the appellants and placed each one of them on their defence. In defense, they all gave unsworn testimonies and called no witnesses.



3. The trial court upon evaluating the evidence on record, found that the prosecution had proved its case and convicted all the appellants as charged. Each appellant was sentenced to serve 25 years in prison. Being aggrieved by the outcome, the appellants filed this appeal.

4. This being a 1<sup>st</sup> appeal the duties of this Court are set out in the case of *Okeno v Republic* [1972] EA 32 as follows:

“an appellant is entitled to expect the evidence as a whole to be submitted to a fresh exhaustive examination *Pandya v Republic* (195) EA (336) and the appellate court’s own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. *Shantilal M. Ruwala v R* (1957) EA 570). It is not the function of the first appellate court to merely scrutinize the evidence to see if there was some evidence to support the lower court’s finding and conclusion; 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.”

5. With this approach in mind, we revisit the background to the matter as reflected in the evidence of the witnesses before the trial court Lynette Nyaboke, PW1 testified that on the night in question at about 9.00pm, the appellants entered the house where she lived with her late husband Dennis Obwoga Kerema. Also present were one Gladys and Moseti. With the aid of light burning from a tin lamp, she saw the 2<sup>nd</sup> to 5<sup>th</sup> appellants whom she mentioned by their respective names. The 4<sup>th</sup> appellant, Joseph Mandela Manini who is also known as Tom, begun hitting the deceased’s neck using a panga and was joined by the other appellants. They warned PW1 of dire consequences if she raised an alarm. The deceased ran towards the river with the appellants in zealous pursuit; and when she tried to follow, she was warned to go back home. The next day, PW1 learnt that the deceased died on arrival at Riana Dispensary. PW1 knew the accused persons before the night of the attack. This is what she informed the trial court:

“I knew Tom Manini as a neighbour and an uncle, to the deceased. Samuel was the deceased’s friend. They used to visit each other. Moseveni was also his friend. Ombui and Charles were also the uncles of the deceased. The 1<sup>st</sup> accused (Charles) had the deceased’s debt and so the deceased went to repossess Charles goat. The case became a police case. When Charles came for his goat, the deceased hit him with a slasher and the deceased was arrested but later released on bond. The rest of the accused persons did not have any bad relationship with the deceased. Charles is the one who hired the rest to come and attack the deceased.”

6. Patrick Mayienga Kirera, PW2, a cousin to the deceased described how he was ordered by a group of people who were outside his house, to open his door on the night in question; he obliged and saw 6 people who were armed with pangas and sticks; and whom he recognized as the 1<sup>st</sup>, 2<sup>nd</sup>, 4<sup>th</sup> and 5<sup>th</sup> appellants as well as one Tom Ruori. They started assaulting him while saying: “today we have caught your friend (Dennis)”. They led him to the place where Dennis was, and he noticed that the latter had been tied with ropes; and he had injuries on the head and hands. His clothes were soaked in blood. The 1<sup>st</sup> appellant assaulted PW2 on the head using a panga, then ordered him to carry Dennis so that they could go to Riana police station; and to say that it was the deceased who assaulted him. The deceased was taken to hospital where he was pronounced dead on arrival. PW2 was able to identify the 1<sup>st</sup> - 3<sup>rd</sup> appellants, as they are his uncles and they had torches. He also claimed to have witnessed all the five appellants assaulting the deceased, and destroying the deceased’s house; but on cross examination by the defense counsel contradicted himself stating that: “I did not see anyone beat Dennis...I did not see



- them destroy house but I heard noises from outside”. On re-examination, he confirmed that there had been some bad blood between himself, the deceased, and the 1<sup>st</sup> appellant, which had then ended up in some violent confrontation.
7. Post mortem was done, which revealed that the deceased sustained a cut wound on the right supra orbital region, bruises on lower limbs and gluteal region and cut wound on the left wrist. An internal examination showed a cut wound on the right side of the head and cerebral edema. Dr. Morebu Peter Momanyi (PW3) who carried out the post mortem examination concluded that the deceased had died as a result of the head injury.
  8. Corporal Hussein Mohammed, PW4 confirmed receiving a report from PW1 on how her husband was dragged away from their home by a gang of people, and his eventual death; on visiting the deceased’s home, he was informed by witnesses that the deceased was removed from his house, beaten up and taken to Bogita Administration police post (AP). PW4 went to the AP post, and confirmed that the deceased was taken their unconscious by a group of people, he eventually arrested the 1<sup>st</sup> and 2<sup>nd</sup> appellant, and that the murder weapon was not recovered.
  9. In his defence, the 1<sup>st</sup> appellant stated that on the date in question he was very ill, nursing head injuries and was in hospital. He produced a document in support of his alibi. The 2<sup>nd</sup> and 3<sup>rd</sup> appellants stated that on the date in question, they were both taking care of the 1<sup>st</sup> appellant who was nursing injuries earlier inflicted by the deceased.
  10. The 4<sup>th</sup> appellant told the trial court in his defence that he had attended the funeral of a chief and when he got back home he was informed that the deceased, who was a known criminal had been caught defiling a young child. The 5<sup>th</sup> appellant claimed that on the night in question, he was away operating his boda boda business; and he had no clue why he was arrested.
  11. Edward Mamwacha Moenda, DW1, the chief of Riana location, testified that he was on his way to work when he got information that the deceased who was a known criminal had been beaten up and taken to a health facility. He described the deceased as one who would spread terror in the village by night, stealing people’s property; and maintained that the injuries he sustained were as a consequence of mob justice. William Moronga Ongaro, DW2 a clan elder in Bogita village told the trial court that the deceased had stolen a goat from the 1<sup>st</sup> appellant and when confronted, he cut the 1<sup>st</sup> appellant using a panga; and the 1<sup>st</sup> appellant was taken to hospital. He absolved the 1<sup>st</sup> appellant from the incident, saying the deceased was attacked by an angry mob while the 1<sup>st</sup> appellant was in hospital.
  12. The trial court found that the fact and cause of death were undisputed as there was evidence of the deceased being assaulted; that he sustained multiple injuries consistent with assault; and the cause of death was a head injury following assault; With regard to identification, the learned trial Judge noted that although the assault happened at night, this was a case of identification by recognition by persons who knew the appellants as relatives and neighbours; that PW1 saw the accused persons with the aid of light from a tin lamp, and saw the accused persons as they assaulted the deceased, threatened her, and frog marched him out of his house. The trial court was persuaded there was sufficient proximity to exclude mistaken identity of the accused persons. The learned Judge concluded thus:

“In my view, the light in the confined state of the room, the fact of assault of the deceased and in addition to the fact that she followed them before she was threatened was sufficient interaction to exclude the possibility of mistaken identity.”

The trial court was persuaded there was sufficient proximity to exclude mistaken identity of the accused.



13. The learned Judge also pointed out that PW2 also recognized 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> appellants from their voices and the torches that they carried; the appellants were known to PW2 and the time spent was considerable, favoring positive identification. The court was of the view that PW1 & PW2's evidence confirmed that the appellants planned to take the deceased from his house and assault him; and that they acted together to prosecute an unlawful act, as such common intention was fully established.
14. The learned Judge also considered the alibi defence raised by the appellants, and stated as follows:

“...The medical documents he produced show that he was injured on October 30, 2013 and admitted to hospital the following day. He was discharged on November 7, 2013, more than 5 months before the deceased died. The defence of 2<sup>nd</sup> appellant and 3<sup>rd</sup> appellant was hinged on that of 1<sup>st</sup> appellant, they heard that 1<sup>st</sup> appellant had been injured by the deceased and went to take him to hospital. The alibi defences of 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> appellants refer to a time much earlier than the period in question. By the time the deceased was assaulted, 1<sup>st</sup> appellant had long since been discharged from hospital. It follows that I must therefore reject the defences of 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> appellant particularly when weighed against their positive recognition by PW1 and PW2.”
15. The totality of the evidence led the trial court to the conclusion that motive was duly established as it was common ground that the deceased had taken 1<sup>st</sup> appellant's goat; the appellants, who were thirsty for revenge, armed themselves and proceeded to the deceased's house with the sole aim of revenging the attack; and that taking into account factors such as the vulnerability of the part of the body targeted, the type of weapon, the manner in which it was used and the conduct of the appellants before, during and after the attack, the prosecution clearly established the existence of malice aforethought as the appellants intended to cause grievous harm. The learned Judge found all the elements of murder proved beyond reasonable doubt and went on to convict the appellants accordingly.
16. The appellants challenge the judgment of the High Court on 5 grounds. These are, that the trial court erred; in convicting the appellants on insufficient evidence by failing to find that crucial witnesses never testified; in convicting the accused without the prosecution having proved all the ingredients of the offence; by failing to find that the prosecution did not prove its case beyond reasonable doubt; by failing to consider the appellants' defences thereby arriving at a wrong conclusion; and failing to give reasons for disbelieving the defences contrary to section 16(1) of the *Criminal Procedure Code* cap, 75, yet the defence were plausible and impeached the prosecution case. Our view is that the grounds can be condensed to two broad issue, namely: whether or not the prosecution proved its case beyond reasonable doubt; and whether the 25-year imprisonment sentence imposed was warranted. They thus pray that the conviction and sentence be set aside and that they be set free.
17. Were the appellants convicted on insufficient evidence/were crucial witnesses never called to testify? The appellants contend that the murder could have been committed by persons other than the themselves. They state that there was inconsistency in the number of the alleged assailants, and the time of the assault. The appellants further contend that the prosecution failed to call crucial witnesses, such as the police officers at Riana police station and the two people who were present at PW1's house at the time of the assault. It is clear from the judgment that PW1 & 2 properly recognized the appellant beyond reasonable doubt. We are of the considered view that the witnesses called by the prosecution were sufficient to identify the appellants. In particular PW1 & 2's identification of the appellants was credible and not shaken. It is up to the prosecution to call whichever witnesses they consider necessary as long as the prosecution witnesses' evidence can prove their case beyond reasonable doubt.



Indeed, the learned Judge recognized the situation in the following manner:

“... I would like to point out that the prosecution called only two direct witnesses who were relatives of the deceased. There is no rule of law or evidence that their evidence must be rejected solely for that reason. What emerged from the evidence including the testimony of the area Chief and elder was that the deceased was a bad person and a known criminal. However, he did not deserve to die the way he did. It is therefore not surprising that only his relatives came forward to give evidence for the prosecution. I am however satisfied that the prosecution proved all the elements of the offence of murder.”

We recognize the jurisprudence in *Bukenya & others v Uganda* (1972) EA 549 on the need for the prosecution to call all crucial witnesses even where their testimonies would be prejudicial to the prosecution case. However, as pointed out by the respondent, the discretion of deciding which witnesses to call rests with the prosecution and there is no law on the number of witnesses that must be called to prove a case; the rider only being that crucial witnesses should be called. The case of *Keter v Republic* [2007] 1 EA 135 held inter alia that:

“The prosecution is not obliged to call a superfluity of witnesses but only such witnesses as are sufficient to establish the charge beyond any reasonable doubt.”

In any event, there was no demonstration to the effect that were the purported crucial witnesses to testify, their evidence would have been prejudicial to the prosecution case. As the respondent has submitted; Gladys and Moseti, were not crucial witnesses so that failure to call them would be said to have prejudiced the appellants’ case. While PW1 stated in chief examination that she was with Gladys and Moseti, she clarified during cross examination that Gladys and Moseti came to their rescue when she screamed. It thus emerges that at the point when the appellants stormed the house and attacked the deceased, Gladys and Moseti were not present.

18. We thus find that the learned Judge took into account all the relevant factors concerning the opportunity for identification, and why the PW 1& 2’s evidence on identification was credible.

19. Did the prosecution prove the ingredients of murder?

The fact that a death occurred is not disputed; and according to the clinical officer’s report there was indeed proof of a cut on the deceased’s head. The appellants submit that the alluded panga used to assault the deceased was never found. We take note of the lapse of time between the actual assault and the trek to the police station accompanied by the very protagonists; and we cannot ignore the opportunity created in disposing of the assault weapon. This court in the case of *Karani v Republic* (2010) 1 KLR 73 stated:

“the offence as charged could have been proved even if the dangerous weapon was not produced as an exhibit as indeed happens in several cases where the weapon is not recovered. So long as the court believed, on the evidence before it, that such weapon existed at the time of the offence, the court may still enter and has been entering convictions without the weapon being produced as exhibit.”

See also *Ramadhan Kombe v Republic* Mombasa CA No 168 of 2002.

20. The upshot of this is that PW1 & 2’s evidence remained unshaken.

The postmortem report confirmed that cause of death was cardio- respiratory arrest secondary to severe head injury secondary to assault - the injury being the cut wound on the right supra orbital region.



There is no requirement in law for a murder weapon to be produced in criminal cases. Many times, the weapon is not recovered, and in this case it is safe to assume that the appellants got rid of the murder weapon on their way to Riana Police Station from PW2's house. This court in the case of *Godfrey Wafula Simiyu v Republic* [2021] eKLR stated that:

“whereas it might have been important to produce the murder weapon, it is our considered view that failure to produce the same was not fatal to the prosecution's case.”

21. The appellants also submit that the prosecution failed to prove mens rea and/or establish motive, arguing that the fact that one of them owed the deceased a debt which led to differences, could not be believed. The 1<sup>st</sup> appellant testified that the deceased had taken his goat and when he went to get it, he was assaulted by the deceased. This court agrees with the finding of the trial judge that this grudge made it very rational and compelling to conclude that the 1<sup>st</sup> appellant committed the offence in revenge. We note the nature of the multiple injuries inflicted on the deceased, leading to his death; and we cannot fault the trial judge's conclusion that the appellants intended to kill the deceased. The deceased's death was not an accident.
22. The appellants also argue that the alibi defence was not considered.  
The 1<sup>st</sup> appellant contends that on the night in question he was in hospital badly injured. The incident happened on 17<sup>th</sup> April 2014 but the medical documents produced show that the 1<sup>st</sup> appellant was admitted on 30<sup>th</sup> October 2013 and discharged on 7<sup>th</sup> November 2013. Besides even if we were to accept that the 2<sup>nd</sup> appellant was taking care of the 1<sup>st</sup> appellant at Kenyatta Hospital, there was no proof of the other appellants' involvement.
23. From the treatment documents produced as defence exhibits, the date of admission and discharge of the 1<sup>st</sup> appellant was months before the incident; although the 2<sup>nd</sup> appellant claimed that on the material day he was taking care of the 1<sup>st</sup> appellant at Kenyatta National Hospital, it is not lost to us that the hospital documents produced by 1<sup>st</sup> appellant are not from Kenyatta hospital, and as such both alibi defences could not hold, and were properly rejected by the trial court.
24. Certainly, the prosecution in an information of murder has the singular task of proving the following 3 ingredients to secure a conviction; that the death of the deceased has occurred; that the death was caused by an unlawful act of commission or omission by the accused and that the accused had malice aforethought as he committed the said act. See *Chiragu & Another v Republic* (Criminal Appeal 104 of 2018) [2021] KECA 342 (KLR) (17 December 2021) (Judgment).
25. As to the death of the deceased this court agrees with the trial court's finding that the deceased was murdered. There is sufficient evidence to that effect which was corroborated by the production of the postmortem report and testimony of PW3, the medical examiner. The appellants themselves confirm the death of the deceased.
26. The big question however is whether the appellants were responsible for the deceased's death. From the evidence tendered before the trial court it is clear that PW1 & 2 duly identified the appellants as the assailants with the aid of a tin lamp and the fact that the assailants were known to them, as well as the close proximity during the incident.
27. Lastly on the issue of sentence the appellants urge the court to review the sentence as the sentence meted out by the superior court was harsh and capricious. The appellants were sentenced to 25 years' imprisonment for the offence of murder. Although section 204 of the *Penal Code* provides for the mandatory death sentence, for anyone charged and convicted with the offence of murder, in *Francis Kariakor Muruatetu & Another v Republic* SC Pet. No. 15 & 16 of 2015, the Supreme Court held



that the mandatory nature of the death sentence prescribed for the offence of murder by section 204 of the *Penal Code* was unconstitutional as it deprived the courts of their legitimate jurisdiction not to impose the death sentence in an appropriate case. It is this court's view that the sentence of 25 years' imprisonment imposed on the appellants was therefore in accordance with the decision of the Muruatetu case.

28. From the circumstances of the case, the deceased died as a result of a cut wound on the head, inflicted by the appellants. A life was lost, and the learned Judge properly exercised his discretion in sentencing. There would be no reason to disturb the sentence of 25 years. The same is hereby affirmed and upheld.
29. The upshot of the foregoing is that the appellants appeal on both conviction and sentence is without merit and is dismissed in its entirety.

**DATED AND DELIVERED AT KISUMU THIS 25<sup>TH</sup> DAY OF JANUARY, 2024.**

**HANNAH OKWENGU**

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**JUDGE OF APPEAL**

**H.A. OMONDI**

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**JUDGE OF APPEAL**

**JOEL NGUGI**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**

