



**Chiphoro v Republic (Criminal Appeal E010 of 2023)
[2024] KECA 227 (KLR) (8 March 2024) (Judgment)**

Neutral citation: [2024] KECA 227 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CRIMINAL APPEAL E010 OF 2023
S OLE KANTAI, KI LAIBUTA & GV ODUNGA, JJA
MARCH 8, 2024**

BETWEEN

ALI SULEIMAN CHIPHORO APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal from the Judgment of the High Court of Kenya at Mombasa
(A. Ong'injo, J.) delivered on 8th July 2022 in Criminal Case No. 1 of 2019)*

JUDGMENT

1. This is a first appeal arising from the judgment of the High Court of Kenya at Mombasa (Ong'injo, J.) dated 9th June 2022 and delivered on 8th July 2022 in HC Criminal Case No. 1 of 2019 in which the appellant, Ali Suleiman Chiphoro, and one Suleiman Chiphoro alias Dimau (Suleiman) were jointly charged with murder contrary to section 203 as read with section 204 of the Penal Code.
2. The particulars of the charge were that, on 10th January 2019 at Kikonde Village in Kwale County within the coastal region, the appellant and Suleiman Chiphoro jointly with another not before court murdered Josephat Karuga Wainaina. The two denied the charge and stood trial, culminating in the impugned judgment.
3. At the trial, the prosecution called ten (10) witnesses. PW1 - Erick Dzombo Mate, an employee of the deceased, testified that, on 10th January 2019, cattle belonging to Suleiman were spotted grazing on the deceased's farm; that the deceased called on Suleiman and raised a complaint over the matter; that the deceased informed PW1 that a quarrel ensued between him (the deceased) and Suleiman, but that he had left him (Suleiman) driving away the cattle from the farm; that, later, Suleiman returned with two of his sons; that the appellant and one of his brothers (not before court), and who were known to PW1, proceeded to physically attack the deceased using Rungus; that they also threatened to kill him (PW1) as well; that they assaulted the deceased, who fell and lay on his back, unable to talk; that PW1



- ran for help from the village chairman but that , by the time they returned, the three had fled, leaving the deceased lying on the ground unresponsive, and with blood oozing from his mouth and ears; that PW1 reported the incident to the police on 11th January 2019; and that the police told him to wait for the deceased to recover before having the P3 form filled.
4. According to PW1, the Occurrence Book entry dated 11th January 2019 indicated that the deceased was attacked by three boys, who were Suleiman's sons, but that that was untrue as he was attacked by the two accused persons (Suleiman and the appellant) and another of Suleiman's sons who fled from the scene. Notably, none of Suleiman's sons were identified by name.
 5. PW2 – Bernard Ndeto, the village Chairman and neighbour to the deceased, the appellant and Suleiman, testified that, on 10th January 2019, PW1 went to his home and reported that the deceased had been assaulted by Suleiman Chiphoro and two of his sons. On reaching the compound, they found Suleiman trying to lift the deceased, who was bleeding from the nose and had a swelling on the left side of his head. He inquired as to what had happened. Suleiman told him that a scuffle had ensued on account of his animals grazing on the deceased farm; and that his sons had physically assaulted the deceased. PW2 requested Suleiman to look for means of transporting the deceased to hospital, and to call one Balози Mutinda, the Deputy Chairman of the village and a neighbor to the deceased and to the appellant and Suleiman, to accompany them.
 6. PW3 – Mutinda Musyoka testified that, when called, he went to the deceased's compound and found him lying on the ground unresponsive, bleeding from his nose and ears; that upon inquiry, he was informed that the deceased had been assaulted by two of Suleiman's sons; and that Suleiman arranged for transport, and that he (PW3), PW1 and Suleiman accompanied the deceased to hospital where he later died.
 7. PW4 – Jacinta Njoki Karuga, the deceased's widow, testified that her late husband and Suleiman had a strained relationship on account of Suleiman's cattle straying into their farm; that, on 10th January 2019, PW3 called and informed her that the deceased had been assaulted by Suleiman's sons, and that he was in a poor condition; that she facilitated transfer of the deceased to Pandya hospital where he underwent surgery for head injuries and admitted to the intensive care unit where he died on 13th January 2019; and that a post mortem conducted on 16th January 2019 by Dr. Ngali (PW5), showed that the cause of death was increased intercranial pressure with brain contusion due to traumatic brain injury and severe brain trauma.
 8. The deceased's daughter, Leah Eunice Wainaina Karuga (PW6), confirmed her mother's testimony, adding that they visited the scene of crime on 12th January 2019 in the company of PW1, the appellant and Suleiman, who had been arrested, to collect the weapons used to attack her deceased father.
 9. PW7 – Ouma Kevin (No. 113766), a police officer based at Mamba police station at Lunga Lunga, testified that, on 10th January 2019 at about 11.00 am, he was manning the report office when Suleiman and his son Kassim came to report that, at about 9.00 am, Kassim had heard Suleiman quarreling with the deceased; that, when they approached him, the deceased hit him (Kassim) with a metal rod on his hand; that PW7 did not observe any injuries on Kassim; that he booked the report under OB 07/10/11/2019 on 11th January 2019; that he was informed by AP Adanyi that a report had been made by PW4 and PW6 to the effect that the deceased had been assaulted by Suleiman's three sons; and that Suleiman and the appellant were later arrested, but that Kassim was not at home at the time of the arrest. After conducting investigation, the officers linked the deceased's murder to the appellant, Suleiman and Kassim, who has since been at large.



10. According to the investigating officer (PW9), Jena Ndinda (No. 50865), then attached to DCI Lunga Lunga police post testified that, on the material day at around 9.00 am, the deceased had been physically attacked by Suleiman Chipphoro and his three sons following a quarrel relating to Suleiman's cattle straying into and grazing on the deceased's farm. He preferred charges against the two accused because the eyewitness placed them at the scene.
11. In his defence, Suleiman Chipphoro testified that he had no grudge with the deceased. According to him, his five cattle strayed into his deceased neighbour's farm on 10th January 2019; that, when he went to remove the animals from the farm, the deceased made rude remarks, which he ignored; that he handed over the animals to his son Kassim; that, at the time, the appellant was asleep; that he returned to his farm to do some work; that, soon after, he heard a commotion and rushed back to the deceased farm and found the deceased lying on his back; that he sent PW1 to call PW2; that PW1 informed him that the deceased had been assaulted by his sons, but that the appellant was not among them; that he made arrangements for the deceased to be taken to hospital at his cost; that, on his return home, he found his son Kassim, who informed him that he had fought with the deceased and got injured on his left shoulder; and that he accompanied Kassim to the police station where PW7 recorded their statements and, thereafter, Kassim went to seek medical treatment.
12. On his part, the appellant testified that, on 10th January 2019 at 9 .00 am, he was resting in his house when he heard a commotion, which prompted him to go outside; that he found the deceased lying on the ground with a swelling on the head and bleeding from the nose; that he overheard PW1 telling PW4 that the deceased had gotten into a fight with Kassim, and that his other brother Mazera had witnessed the fight; that, after the deceased was taken to hospital, they went back home with Suleiman; that Suleiman and Kassim went to report the incident; that he was arrested along with Suleiman on 11th January 2019; that he had no grudge with the deceased; and that he and PW1 were friends.
13. In his judgment dated 9th July 2022, A. Ong'injo, J. acquitted Suleiman Chipphoro, but found the appellant guilty as charged, convicted him of murder and sentenced him to imprisonment for a term of twenty (20) years. According to the learned Judge, the appellant murdered the deceased together with his two brothers, who were at large.
14. Aggrieved by the trial court's decision, the appellant moved to this Court on appeal on the grounds set out in his memorandum of appeal dated 22nd November 2022, faulting the trial court for: finding that there was evidence to show that the appellant together with his two brothers attacked and killed the deceased; finding that the appellant was placed at the scene of crime and was indeed culpable; ignoring factual evidence admitted by the prosecution witness and adduced by the defence; rejecting the appellant's defence and his version of the events without reason and justification; ignoring the charges made in the prosecution case, particularly the departure from what was recorded earlier in a clear bid to implicate the appellant and his father to justify the prosecution; finding that the facts disclosed the offence of murder; not finding that the conviction was against the weight of evidence, and that the sentence was manifestly excessive in the circumstances.
15. In support of the appeal, learned counsel for the appellant, M/s. J. O. Magolo & Company, filed written submissions dated 11th October 2023 drawing the Court's attention to evidential facts, but citing no judicial authorities.



16. In her response, learned State Counsel, Ms. Angela Fuchaka, filed her written submissions dated 19th October 2023 citing the cases of *Antony Ndegwa Ngari v. Republic* [2014] eKLR and *Nzuki v. Republic* (1993) KLR 171, highlighting the essential elements that require proof in a charge for murder;

Bernard Kimani Gacheru v. Republic [2002] eKLR and *Ogolla S/O Owuor v. Republic* (1954) EACA 270, highlighting the trial court's discretion in sentencing.

17. We have considered the record of appeal, the rival submissions and the applicable law. Our mandate on a first appeal as set out in rule 31(1) (a) of the *Rules of this Court* is to reappraise the evidence and to draw our own conclusions. In principle, a first appeal takes the form of a rehearing (see *Ogaro v. Republic* [1981] eKLR).

18. This being a first appeal, it is by way of a retrial and this Court, as the first appellate court, has a duty to re-evaluate, re-analyze and re-consider the evidence afresh and draw its own conclusions on it. The Court should however bear in mind that it did not see the witnesses as they testified and give due allowance for that.

19. It must be borne in mind, though, that scrutiny without more is not sufficient. The Court is mandated to undertake a fresh and exhaustive examination and reach its own decision on the evidence on record. In this regard, the Court in *Okeno v. Republic* [1972] EA 32 set out the duty of a first appellate court in the following words:

“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 the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. 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 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.”

20. This cautious approach has deep roots in comparative common law jurisdictions as demonstrated in the decision of the Supreme Court of India in *Ganpat v. State of Haryana* (2010) 12 SCC 59. 4. where the court set out the principles to be borne in mind by a first appellate court while dealing with appeals and stated thus:

- a. There is no limitation on the part of the appellate Court to review the evidence upon which the order appealed against is founded and to come to its own conclusion.
- b. The first appellate Court can also review the trial court's conclusion with respect to both facts and law.
- c. It is the duty of a first appellate Court to marshal the entire evidence on record and by giving cogent and adequate reasons may set aside the decision appealed against or the entire proceedings if they are flawed.
- d. When the trial Court has breached provisions of the *constitution* or ignored statutory provisions, or misconstrued the law, or breached rules of procedure, or ignored crucial evidence or misread the material evidence or has ignored material documents, or in any manner compromised the accused rights to a fair trial or prejudiced the accused etc. the appellate court is competent to reverse the decision of the trial court depending on the materials in question.”



21. Having carefully considered the record of appeal, the grounds on which it is anchored, submissions and the law, we form the view that the appeal raises four main issues, namely: whether the appellant was recognised or positively identified as one of Suleiman's sons who assaulted the deceased; whether the appellant was placed at the scene of the crime with which he was charged; whether there was sufficient evidence to convict the appellant; and, if the answer is in the affirmative, whether the sentence meted on the appellant was excessive in the circumstances; and what orders ought we to make in final determination of the appeal.
22. While we take to mind the numerous grounds of appeal from the impugned judgment as advanced by the appellant, we nonetheless form the view that the 1st and 2nd issues, which are closely linked, stand out and commend themselves to us for determination, namely whether the appellant was recognised or positively identified as one of Suleiman's sons who assaulted the deceased thereby inflicting fatal head injuries; and whether the appellant was placed at the scene of crime. Our finding on these decisive issues will determine whether or not to proceed and pronounce ourselves on the others.
23. We hasten to observe that a common thread runs through different testimonies of the prosecution witnesses with regard to the identity of the persons who attacked and fatally injured the deceased. Indeed, the prosecution witnesses are on the same page on the fact that the deceased was attacked by Suleiman's sons. Apart from Kassim with whom Suleiman went to report the incident saying that he (Kassim) had been attacked by the deceased and sustained injuries on his shoulder, none of the other sons was mentioned by name. Instead, the common narrative shifted from two to three sons having been involved.
24. PW1, who witnessed the incident firsthand, told the trial court that the Occurrence Book entry dated 11th January 2019 erroneously indicated that the deceased was attacked by three boys, who were Suleiman's sons. In his testimony, PW1 stated that the deceased was attacked by the two accused persons (Suleiman and the appellant) and another of Suleiman's sons who fled from the scene. PW1 also reported to PW2 that the deceased had been assaulted by Suleiman Chipphoro and two of his sons.
25. It is noteworthy that, with regard to the two reports, PW1 did not identify any of those sons by name, even though they were apparently known to him. As for PW3, PW4 and PW6, their testimonies to the effect that the deceased had been attacked by Suleiman's sons were founded on what they had been told by PW1, PW2, the officers to whom PW1 had reported the incident, and by others who visited the scene soon after the incident. The same applies to PW9, the investigating officer who recorded statements from various witnesses.
26. We take to mind the fact that PW1 was perhaps the only eyewitness to the incident leading to the deceased's demise. He was the only one in a position to provide visual identification of those who attacked the deceased. As the only eyewitness, only he could tell whether it was Suleiman and two or three of his sons. He was best placed to tell who those sons were. Instead, he testified that the deceased was attacked by Suleiman and two of his sons, one of whom fled the scene.
27. In their defence, Suleiman and the appellant stated that they were not in the vicinity during the incident in question. Suleiman's testimony was that he rushed to the scene in response to a commotion in the deceased's neighbouring farm. Likewise, the appellant stated that he had been resting in his house and asleep when he heard the commotion and rushed to the scene, only to find the deceased lying on the ground bleeding and unresponsive. According to the appellant, PW1 told him that the deceased sustained injuries from a fight with Kassim, one of Suleiman's sons. The evidence on record shows that Suleiman made arrangements to have the deceased taken to hospital and that, later, he and Kassim reported the matter to the police.



28. The testimonies given by the prosecution witnesses reveal two contradicting versions: on the one hand, that the deceased was assaulted by three of Suleiman’s sons; and, on the other hand, that it was Suleiman and two of his sons who attacked the deceased. Apart from Suleiman who names his son Kassim, none of the others is identified by name. PW1, the only eyewitness, did not explain who, among Suleiman’s sons, assaulted the deceased. Yet the incident took place in broad daylight, and at a time when visual identification or recognition should have left no doubt as to who was responsible. To our mind, the correctness of PW1’s recognition or visual identification of the appellant leaves many questions unanswered. Indeed, such evidence should be taken with caution.
29. The critical need for caution when considering evidence of visual identification was underscored by this Court sitting at Kisumu in the case of *Cleophas Otieno Wamunga v. Republic* [1989] eKLR where the Court observed that:
- “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....”
30. The cautious way to approach evidence of visual identification was succinctly stated by Lord Widgery, CJ in the celebrated case of *R v. Turnbull* [1976] 3 All E.R. p.549 at p.552 where he had this to say:
- “Recognition may be more reliable than identification of a stranger; but, even when the witness is purporting to recognise someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.”
31. It is evident that PW1 was acquainted with Suleiman and his sons. However, it is not clear to us what made it difficult for him to recognise who, among the three sons, assaulted the deceased. Failure to name them raises the possibility of error as was observed in *Joseph Ngumbao Nzaro v. Republic* [1991] 2 KAR 212 (Hancox CJ, Gachuhi and Cockar JJA). In that case, this Court held:
1. Before accepting visual identification as a basis for conviction the court had a duty to warn itself of the inherent dangers of such evidence.
 2. A careful direction regarding the conditions prevailing at the time of the identification and the length of time for which the witness had the accused person under observation, together with the need to exclude the possibility of error, was essential.”
32. The danger of visual identification by a single witness was also underscored in *Roria v. Republic* (1967) EA 583 where the Predecessor of this Court (the Court of Appeal for East Africa) stated:
- “A conviction resting entirely on identity invariably causes a degree of uneasiness. That danger is of course, greater when the only evidence against an accused person is identification by one witness and although no one would suggest that a conviction based on such identification should never be upheld it is the duty of this court to satisfy itself that in all circumstances it is safer to act on such identification.”



33. In its judgment, the Court cited Lord Gardner, LC. who had this to say in the House of Lords in the course of a debate on S. 4 of the Criminal Appeal Act 1966 of the United Kingdom, which is designed to widen the power of the court to interfere with verdicts:

“There may be a case in which identify is in question, and if any innocent people are convicted today I should think that in nine cases out of ten – if they are as many as ten – it is in a question of identify.”

34. It is noteworthy that Suleiman and his sons were the deceased’s neighbours, who were known to PW1. To our mind, the rapid escalation of the quarrel and the ensuing physical confrontation might explain PW1’s failure to recall by name who, among Suleiman’s sons, had assaulted the deceased. As explained by PW1, “after about 5 minutes Dimau and his 2 sons came armed with rungus and they started beating the deceased. They warned me saying they would also kill me. ...when I saw the deceased had fallen and could not talk I ran ...”

35. The short period during which the altercation and the assault took place before PW1 took to flight might explain his inability to recall by name who, among Suleiman’s sons, assaulted the deceased. In our considered view, it is not unusual for mistakes to be made even in such circumstances as where the accused is known to the witness. This Court in *Maitanyi v. Republic* (1986) KLR 198 observed:

“We do agree that as is stated in the case of *R. v. Turnbull & others* (1976) 3 All ER 549 mistakes can be made even in cases of recognition as an honest witness may nevertheless be mistaken even in case of recognition but in the case where the appellant not only neighbours the were of the complainant, but also engaged in conversation...”

36. In the case before us, the rapid succession in which events leading to the physical confrontation with the deceased, and the resultant fatal injuries, raises red flags with regard to PW1’s evidence of recognition in which he fails to identify the assailants by name. On the testimony of a single witness, this Court in *Titus Ngamau Musila Katitu v. Republic* [2020] eKLR held:

“..., that evidence qualifies as testimony of a single witness respecting identification. As the Court warned in *Abdalabin Wendo & Another v. R.* (1953) 20 EACA 166, *Cleophas Otieno Wamunga V. R.* (1989) eKLR and *Paul Etole & Reuben Ombima V. R.* (2001) eKLR, and a host of others, the testimony of a single witness respecting visual identification or recognition must be received with the greatest care, especially when the conditions favouring a correct identification are difficult. In such circumstances the court ought to examine closely the circumstances in which the identification by the witness came to be made. In addition, and of significance, the court must look for some other corroborating evidence, pointing to the guilt of the accused person, so as to minimize the error in the identification by a single person. Those authorities also warn that, although recognition may be more reliable than the identification of a stranger, mistakes are sometimes made in recognition of even close relatives and friends. They emphasize that when the quality of the identification evidence is good the danger of mistaken identification is lessened.”

37. The shortcomings of PW1’s evidence of recognition or visual identification, as the case may be, is also compounded by the contradictions as to whether the deceased was assaulted by Suleiman and three of his sons (who were not identified by name) or whether the attack was by his three unnamed sons. It is also noteworthy that PW2, PW3, PW4, PW6, PW7, PW8 and PW9, all of whom recounted what they had heard from PW1 and other prosecution witnesses, gave contradictory accounts with regard to the identity of the persons responsible for the fatal injuries inflicted on the deceased.



38. This Court sitting in Kisumu in *Moses Odongo Odinga v. Republic* [2011] eKLR had this to say respecting the evidence of a single witness as reported to investigating officers:

“Again, whether the witness reported to another person or to the police that he could identify his assailants are matters of importance whether in case of a stranger or a person known to him before the offence.

... .. in inquiring on the evidence of a single witness on identification, it be ascertained whether the complainant informed the police or those who went to his/her aid of his or her ability to identify his/her attackers.”

39. PW1’s inability to name Suleiman’s sons who allegedly committed the offence with which the appellant was charged is also compounded by the contradicting reports as to how many of them were involved. With regard to contradiction or inconsistency in the evidence of the prosecution witness, this Court in *Richard Munene v. Republic* [2018] eKLR stated:

“Contradictions, discrepancies and inconsistencies in evidence of a witness go to discredit that witness as being unreliable. Where contradictions, discrepancies and inconsistencies are proved, they must be resolved in favour of the accused.

It is a settled principle of law however, that it is not every trifling contradiction or inconsistency in the evidence of the prosecution witness that will be fatal to its case. It is only when such inconsistencies or contradictions are substantial

and fundamental to the main issues in question and thus necessarily creates some doubt in the mind of the trial court that an accused person will be entitled to benefit from it.”

40. Addressing the issue of discrepancies in prosecution evidence of recognition/visual identification in *Dickson Elia Nsamba Shapwata & Another v. The Republic* [2008] TZCA 17, the Court of Appeal of Tanzania had this to say on the matter:

“In evaluating discrepancies, contradictions and omissions, it is undesirable for a court to pick out sentences and consider them in isolation from the rest of the statements. The Court has to decide whether inconsistencies and contradictions are minor, or whether they go to the root of the matter.”

41. In the same vein, in *Erick Onyango Ondeng’ v. Republic* [2014] eKLR, this Court cited *Twehangane Alfred v. Uganda*, [2003] UGCA 6, in which the Court of Appeal of Uganda stated:

“With regard to contradictions in the prosecution’s case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution’s case.”

42. We need not say more, save to point out that the contradictory accounts as to how many of, and who among, Suleiman’s sons were linked to the fatal injuries inflicted on the deceased cannot be wished away as trifling. Their positive identification by name goes to the root of recognition or visual identification. It is a matter of grave concern to the trial court and to this Court in equal measure. We need not overemphasise the fact that such inconsistencies or contradictions are substantial and fundamental to the main issues in question, which ought to have raised doubt in the mind of the trial



court. In conclusion, we find and hold that it was not safe for the trial court to convict the appellant in circumstances in which there was reasonable doubt in his recognition or visual identification by the only eyewitness. From the evidence on record, we find nothing to suggest that he was placed at the scene of the crime for which he was charged and convicted.

43. In view of the foregoing, the appeal succeeds.

Consequently, we hereby quash the conviction and set aside the sentence imposed by Ong'injo, J. in the judgement delivered on 8th July 2022. The appellant shall be set free forthwith unless otherwise lawfully held.

DATED AND DELIVERED AT MOMBASA THIS 8TH DAY OF MARCH, 2024

S. OLE KANTAI

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JUDGE OF APPEAL

DR. K. I. LAIBUTA

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JUDGE OF APPEAL

G. V. ODUNGA

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

