Chwanya v Republic (Criminal Appeal 70 of 2021)
[2024] KECA 391 (KLR) (12 April 2024) (Judgment)

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REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MOMBASA

CRIMINAL APPEAL 70 OF 2021

KI LAIBUTA, A ALI-ARONI & GV ODUNGA, JJA

APRIL 12, 2024

BETWEEN

JOSEPH ODHIAMBO CHWANYA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal from the Judgment of the High Court of Kenya at Mombasa (A. Ongeri, J.) delivered on 26th October 2018inCriminal Case No. 2 of 2013)

JUDGMENT

1. This is a first appeal from the judgment of the High Court of Kenya at Mombasa (A. Ongeri, J.) dated 26th October 2018 in High Court Criminal Case No. 2 of 2013 in which the appellant was charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. The particulars of the offence were that, on 28th December 2012 at Mwaroni village, Ukunda location in Kwale County within Coast region, the appellant murdered Jack Omondi (the deceased).

2. At the trial, the prosecution called 7 witnesses, parts of whose testimonies are inexplicably excluded from the record as put to us. In the circumstances, we purpose to make do with the impugned judgment and the accompanying evidential material on the record as put to us.

3. PW1, a carpenter residing at Diani in Ukunda, testified that, on 7th October 2012, he had a misunderstanding with his wife, who had deserted him; that he decided to go and fetch her and discussed the matter with his brother-in-law, the deceased, and his mother-in-law; that, on 18th October 2012, he called his wife and asked her to return, but she refused; and that when he met her the next day, she was still adamant.

4. PW1 also told the trial court that he took his wife's phone and flashed the appellant's number; that he had heard rumours of the appellant's friendship with his wife; that, a week later, his wife had not

returned; and that he (PW1) called the appellant.... (The rest of PW1's and PW2's evidence is excluded from the record of appeal).

5. PW3, who was PW1's wife, stated that the appellant was her lover; that she had left her husband to live with the appellant; and that she later learnt that the appellant had killed her brother. (The rest of her testimony and part of the ensuing proceedings are also excluded from the record).

6. PW4, a mechanic at Ukunda, stated that, on the material day, he left for home at 6:00 pm in the company of another man; that, when they got near a cemetery, they came across the appellant and the deceased; that he heard the deceased ask the appellant where his sister was; that the two had an altercation after which they (the appellant and the deceased) engaged in a fist fight; that, although PW4 tried to intervene, the appellant got hold of the deceased and pushed him against a tomb; that the deceased told PW4 that he had been stabbed; that the appellant brandished a blood-stained knife at PW4 and threatened to stab him; that PW4 examined the deceased and saw that he had been stabbed, and was bleeding profusely; and that the two (PW4 and his companion) took the deceased to his mother's house where he later died. The incident was reported to the police.

7. On cross-examination, PW4 stated that the time was about 6:00 pm, and that he was able to see the appellant clearly; that the appellant and the deceased fought for about 20 minutes; and that there were many passers-by at the scene where the incident took place.

8. PW5, a trader at Ukunda, testified that, on the material day, she had visitors when she heard a commotion outside; that her child told her that there were people fighting; that, when she went outside, she found the deceased crying, saying that he had been stabbed with a knife; that she saw a stab wound on his stomach; and that they took him to his mother's house nearby, after which he was taken to hospital. According to PW5, she did not see the attacker. The next day, she learnt that the victim had died.

9. PW6, Dr Ngali Mbuniko, carried out a post-mortem on the deceased at Msambweni Hospital mortuary and found that he had lost a lot of blood; that he had an injury to his stomach, resulting in spillage of its intestines; that there was a horizontal stab wound of about 3 centimetres long; that there was 2 litres of blood in his abdomen; that the stab wound pierced through the spleen to the stomach, and that this was the cause of the bleeding. According to PW6, the cause of death was bleeding due to the stab wound and injuries to the stomach (hemorrhage shock due to stab wounds). He produced the post-mortem report in evidence.

10. PW7, Sergeant Andrew Nderitu, was on duty at Diani Police Station on the material day. He testified that two people came to the station and reported that someone had been stabbed at Muvidui. He went to the deceased's house in the company of PC Osman Gakuru and found that the deceased had been taken to hospital. On further inquiry, they were told that the deceased was dead.

11. When PW7 commenced investigations, he learnt that the appellant had come to Diani police station claiming that 4 people had allegedly attacked and robbed him; but that he later changed his narrative, stating that he had fallen from a motorcycle. On 29th December 2012, he (PW7) went to the appellant's workplace, but did not find him; that, when the appellant returned and found them, he ran away; and that they later arrested him on 21st January 2013 at his workplace and preferred charges against him.

12. When put to his defense, the appellant testified on oath stating that, on the material day, he left his house on his motorcycle at about 6:30 – 7:00 pm and fell of the motorcycle about 100 metres from his house; that he was injured on the hand and bruised on the face; that he proceeded to Kwale where he went to hospital; that he was given bed rest for one week after treatment; that he went to work on 4th January 2013 after which he was given two more weeks bedrest; and that he returned to work on

21st January 2013 when he was detained by police officers and taken to Diani Police Station where he was interrogated. The appellant stated further that he and the deceased's sister were lovers, and that they (the appellant and the deceased) had never disagreed. He denied having met and fought with the deceased on 28th December 2012.

13. In its judgment, the court found that PW4 witnessed the incident at about 6:00 pm on 28th December 2013; that he saw the appellant stab the deceased; that the appellant had a knife with which he also threatened him (PW4); and that PW4 had no cause to lie about the incident. PW4's testimony was corroborated by that of PW5, who assisted PW4 to take the deceased to his mother's house. Indeed, there was evidence that the deceased had asked the appellant about the whereabouts of his sister, who the appellant admitted was his lover. The evidence of Dr Ngali corroborated that of PW4 and PW5 on the cause of the deceased's death. In its considered judgment, the trial court found that the appellant's defence was a mere denial, and that his alibi did not hold. Accordingly, his defence did not dislodge the prosecution's case. Consequently, the appellant was convicted and sentenced to 20 years imprisonment.

14. Aggrieved by the conviction and sentence, the appellant moved to this Court on appeal, faulting the learned Judge for allegedly: failing to appreciate that the prosecution did not establish malice aforethought; not finding that the appellant's identification was marred with contradictions, and that it could not sustain a conviction; convicting the appellant on Prosecution evidence that was "... shoddy and sham to prove the culpability to the offence;" and for failing to find that the ingredients of the offence of murder were not established and, therefore, "... vitiated the requirements of Section 111 and 147 of the *Evidence Act*".

15. When the appeal came up for hearing on 13th February 2023, learned Counsel for the appellant brought to the Court's attention that the record of appeal was incomplete, specifically that parts of the evidence adduced by certain prosecution witnesses were missing from the record. Consequently, the appeal was adjourned with directions that the Deputy Registrar do ensure that a complete record was availed before the next hearing.

16. The appeal came up for hearing once again on 15th May 2023 when the Deputy Registrar explained that the original record had been availed, but that part of the trial court's hand- written notes of the proceedings relating to the testimonies of PW1 and PW2 were missing as noted in the typed proceedings. On that basis, Counsel for the appellant urged that the appeal be allowed and the appellants set at liberty. Once again, the Court adjourned the appeal and directed Counsel for the appellant to file and serve submissions on the effect of the missing record of proceedings on the appeal; and that, upon service on them, Counsel for the respondent do file their submissions in reply.

17. Having carefully considered the rival positions of learned counsel on this preliminary point of law and fact, we hereby pronounce ourselves on the effect of missing record of proceedings and, thereafter, on the merits of the appeal.

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

19. This being a first appeal, it is by way of a retrial. As the first appellate court, the Court has a duty to re-evaluate, re- analyze and re-consider the evidence afresh and draw its own conclusions on it. However, the Court should bear in mind that it did not see the witnesses as they testified and give due allowance for that. See Selle vs. Associated Motor Boat CoLtd & Others [1968] EA 123.

20. With regard to the cardinal duty to re-evaluate, re-analyze and re-consider the evidence on record, this Court in Makube vs. Nyamiro [1983] eKLR set down the ground rule, stating thus:

> "A court on appeal will not normally interfere with the finding of fact by a trial court unless it is based on no evidence, or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching his conclusion."

21. In the same vein, the predecessor of this Court, the Court of Appeal for Eastern Africa pronounced itself on the cautious approach to be employed in discharge of its mandate on a first appeal and stated thus in Peters vs. Sunday Post Limited [1958] EA 424:

> " Whilst an appellate court has jurisdiction to review the evidence to determine whether the conclusions of the trial judge should stand, this jurisdiction is exercised with caution; if there is no evidence to support a particular conclusion, or if it is shown that the trial judge has failed to appreciate the weight or bearing of circumstances admitted or proved, or has plainly gone wrong, the appellate court will not hesitate so to decide."

22. 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 vs. 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."

23. This cautious approach has deep roots in comparative common law jurisdictions as demonstrated in the decision of the Supreme Court of India in Ganpat vs. 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.
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> 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."

24. Having carefully considered the record of appeal, the grounds on which it is anchored, the respective written and oral submissions and the law, we form the view that the appellant's appeal stands or falls on our finding on the following four main issues, namely: whether exclusion from the record of appeal of certain portions of the trial court proceedings is in itself sufficient to render the appeal successful; whether the appellant's defence of alibi was sufficiently proved so as to warrant his acquittal; whether the appellant was positively identified as the perpetrator of the offence with which he was charged; and whether the prosecution evidence was sufficient to prove the charge against the appellant beyond reasonable doubt.

25. On the 1st issue, counsel for the appellant submitted that, in view of the fact that part of the trial court's hand-written notes of the proceedings relating to the testimonies of PW1 and PW2 were missing from the record as put to us, the appeal should be allowed and the appellant set at liberty.

26. On his part, the State counsel made no submissions in reply to the appellant's preliminary application and left the matter for determination by the Court.

27. The pertinent question is whether the glaringly missing portions of the testimonies of two key witnesses was sufficient to render the appellant's trial and conviction unsafe. Closely related to this question is whether there is sufficient material before the Court on the basis of which the appeal may be determined one way or the other; and whether the missing parts of the trial court's proceedings would by any means prejudice the appellant's defence. That, in our view, is the guiding twin principle on which our finding on this pivotal issue depends.

28. Faced with a similar issue, this Court at Mombasa had this to say on the matter in Pius Mukabe Mulewa & another vs. Republic [2002] eKLR:

> "... the appellants' contention before us that we ought to acquit them without hearing their appeal must fail. There is more than sufficient material before the court upon which their appeals can be determined one way or the other and that being our view of the matter, we over- rule their preliminary arguments and demand for acquittal at this stage and order that their appeals must be heard and determined on merit."

29. In the same vein, this Court in John Karanja Wainana vs. Republic [2004] eKLR stated thus:

> "An acquittal should not follow as a matter of course where a file has disappeared. After all a person, like the appellant, has lost the benefit of the presumption of innocence given to him by Section 77(2) (a) of *the Constitution* he having been convicted by a competent court and on appeal the burden is on him to show that the court which convicted him did so in error. Thus, the loss of the files and proceedings may deprive him of ability to discharge that burden, but, it by no means follows that he must of necessity be treated as innocent and automatically acquitted. The interest of justice as a whole must be considered."

30. Having considered the circumstances of the appeal before us in light of the foregoing decisions of this Court, the appellant's application for acquittal fails. To our mind, acquittal cannot be a matter of course merely on account of missing record of proceedings in the trial court. We reach this conclusion mindful of the fact that, where there is no authentic record upon which an appeal to this Court can properly be grounded, the Court has three options, namely: to order a retrial; acquit the appellant; or

proceed with the appeal, the defects in the record notwithstanding (see Francis Ndungu Wanjau vs. Republic [2011] eKLR).

31. We need not over emphasise the fact that this Court has previously dealt with similar matters where those options were considered and applied and, therefore, it is not a matter without precedent. That said, we hasten to observe that, on all the available authorities, the Court has consistently held that there would be no automatic acquittal merely because all, or part of, the records for the case have disappeared.

32. As the High Court of Kenya at Malindi in Yeri vs. Republic [2021] KEHC 182 (KLR) correctly observed:

> "
>
> "14. Disappearance of court records constitutes a serious assault on the justice delivery system. It erodes public confidence in the administration of justice. It is not an injury to the appellant alone. It hurts the prosecution, the public who have an interest in ensuring that offenders are lawfully punished and the guilty are not acquitted...
>
> 16. It follows that the mere fact that the record is unavailable is ipso facto not a ground to invalidate a conviction. The court should be careful not to set a dangerous trend of creating an avenue for allowing appeals in a manner not contemplated by the law. It can also amount to condoning theft or disappearance of court files....
>
> To the extent that such an acquittal amounts to allowing an appeal without hearing it on merits as the law permits, it is a jurisdiction which is not expressly permitted by the law and must be exercised in the rarest circumstances with great care and circumspection."

33. Having carefully considered the nature and extent of the defects of the record as put to us, we are not persuaded that the exclusion of some portions of the testimonies given by some prosecution witnesses stand to prejudice the appellant's case in this appeal. Neither does it invalidate his conviction or, otherwise, compromise the integrity of the proceedings in the appeal before us. Accordingly, we elect to hear and determine the appeal on merit, which settles the 1st issue before us.

34. Turning to the 2nd issue as to his defence of alibi, it is noteworthy that the appellant initially informed the police that he had been attacked by four men while riding his motorcycle. In an apparent change of tact, he stated in his defence at the trial that he had fallen off his motorcycle and sustained the injuries for which he sought medical attention, and on account of which he was off duty and allegedly on bedrest during the period preceding his eventual apprehension and arrest.

> 35. With reference to alibi evidence, this Court in Erick Otieno Meda vs. Republic [2019] eKLR had this to say:
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> "In considering an alibi, we observe that:
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> a. An alibi needs to be corroborated by the other witnesses, and not just a mere regurgitation of the events from the accused's point of view.
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> b. An alibi defence needs to be introduced at an early stage so as to allow it to be tested, especially during cross-examination of the trial.
>
> c. The alibi defence or evidence may often rest on the credibility of the accused and the reliability of the evidence that he or she has presented in court.

d. The accused does not need to prove the alibi, but the prosecution must have presented its case that the accused is guilty beyond a reasonable doubt so as to allow the alibi to fail. (See Mhlungu - v - S (AR 300/13) [2014] ZAKZPHC 27 (16 May 2014)."

36. Viewed in light of the appellant's double talk as to what befell him, and the eyewitness account of PW4, we reach the irresistible conclusion that the appellant's credibility and the reliability of the evidence of his alleged alibi are highly questionable. Put differently, the appellant is not credible on this account, and his evidence of alibi is not reliable. Neither does it cast any doubt on the prosecution evidence of identification or recognition by PW4.

37. In addition to his alleged alibi, the appellant challenged the prosecution evidence placing him at the scene of crime, contending that no independent scientific evidence was led by the prosecution, such as a call data report; and that such evidence was crucial to place him at the scene of crime. He submitted that, in the absence of such electronic evidence, he was wrongly convicted.

38. In reply, the State counsel submitted that the alibi was unsupported by any evidence, and that no witnesses were called in support thereof.

39. Having considered the rival submissions on this issue, we hasten to observe that identification or recognition of an accused person is not the preserve of scientific technology. His argument founded on the absence of call data records is easily discredited by our finding on the closely-linked 3rd issue as to whether the appellant was placed at the scene of crime, and positively identified as the perpetrator of the offence with which he was charged and convicted. We are equally cognisant of the fact that the appellant's defence of alibi remained a bare denial that failed to discredit the eyewitness testimony of identification by PW4.

40. The appellant's further lamentation that no identification parade was conducted, and that the trial court relied on dock identification is, in our considered view, inconsequential in view of the fact that PW4's evidence was backed by circumstances that made it possible to identify the appellant without any margin of error, taking account of the time of the day (6:00 pm) and the time (about 20 minutes) taken in the fight between the appellant and the deceased in PW4's presence, and in his full view. In effect, the circumstances of identification were favourable, watertight and free from any possibility of error.

41. The Court of Appeal of Tanzania in Waziri Amani vs. Republic [1980] TZCA 23 listed some of the factors to be considered in determining whether identification is water tight. These factors include the following:

> "the time the witness had the accused under observation; the distance at which he observed him; the conditions in which the observation occurred if it was day or night time; whether there was good or poor lighting at the scene; whether the witness knew or had seen the accused before or not"

42. In the same vein, this Court observed thus in Wamunga vs. Republic [1989] KLR 424:

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

43. PW4 saw it all. He was at the scene where the appellant and the deceased had an altercation, engaged in a fist fight for approximately 20 minutes before the appellant drew a knife and stabbed the deceased on the stomach. Yet, the appellant did not stop there. He proceeded to threaten PW4 before leaving the scene. Thereafter, PW4, with the help of PW5 and others, helped to take the deceased to his mother's house and later to hospital.

44. The time was about 6:00 pm. PW4 was able to see the appellant clearly. The fact that he was the only eyewitness who testified at the trial does not by any means render his evidence of identification unreliable. In principle, the fact that the evidence of identification was of a single identifying witness does not of itself diminish its quality or credibility. Neither does it undermine its truthfulness or accuracy, particularly when the appellant was in close proximity and in full view of PW4. Moreover, the incident took place in daylight, and in favourable circumstances that left little or no room for mistaken identity.

45. In conclusion, the appellant's alibi is not credible, and was not sufficiently proved so as to warrant his acquittal. We are satisfied that the appellant was positively identified as the perpetrator of the offence with which he was charged. What remains for our determination is the issue as to whether the charge against him was proved beyond reasonable doubt.

46. As we so conclude, it would be remiss of us not to point out the fact that the law on the veracity of a single identifying witness as it stands today is well articulated, inter alia, in the case of Abdalla Bin Wendo & Another (1953) 20 EACA 166 thus:

> "Subject to certain well-known exceptions, it is trite Law that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with greatest care the evidence of a single identifying witness respecting identification when it is known that the conditions favoring correct identification were difficult. In such circumstances what is needed is other evidence whether it be evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from possibility of error."

47. Likewise, the High Court at Voi in Kimea vs. Republic [2022] KEHC 104 (KLR) correctly observed:

> "... a court must consider identification testimony with great care, especially when the only evidence identifying the accused as the perpetrator comes from one witness. However, the law is not so much concerned with the number of witnesses called as with the quality of the testimony given. A guilty verdict is permitted, only if the evidence is of sufficient quality to convince the court beyond a reasonable doubt that all the elements of the crime have been proven and that the identification of the accused is both truthful and accurate."
>
> Turning to the 4th main issue as to whether the prosecution proved its case against the appellant beyond reasonable doubt, the appellant's contention is: that the prosecution failed to establish malice aforethought; that the prosecution evidence was shoddy; that the Eye witnesses and those who reported the occurrence to the police were not called to testify; that the ingredients of the offence were not established; that the learned Judge failed to evaluate and analyse the evidence; that the impugned decision is not a Judgment within the provisions of section 169(1) and (2) of the Criminal Procedure Code; and that the apparent alterations or cancellations on it are not dated or countersigned by the trial court.

48. The appellant contends that the prosecution failed to establish the ingredients of the offence of murder as stipulated in section 203 of the Penal Code, namely (a) proof of an unlawful act or omission that

causes death; and (b) with malice aforethought, and with the intention of causing someone grievous bodily harm or death. The act or omission must be deliberate and without any lawful excuse.

49. In their submissions, the State counsel took the position that "... when the appellant stabbed the deceased in the stomach with a knife, he must have surely known that he would cause grievous harm which could led to death. He was therefore possessed of the requisite malice aforethought when he committed the offence. The prosecution proved this element of murder to the required standards."

50. This Court enunciated what constitutes murder in Joseph Kimani Njau vs. R (2014) eKLR thus:

> " Before an act can be murder, it must be aimed at someone and in addition, it must be an act committed with one of the following intentions, the test of which is always subjective to the actual subject;
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> i. The intention to cause death;
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> ii. The intention to cause grievous bodily harm;
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> iii. Where the accused knows that there is a serious risk that death or grievous bodily harm will ensue from his acts, and commits those acts deliberately and without lawful excuse with the intention to expose a potential victim to that risk as the result of those acts.
>
> It does not matter in such circumstances whether the accused desires those consequences to ensue or not..."

51. Malice aforethought is defined in section 206 of the Penal Code in the following terms:

> a. An intention to cause death or to do grievous harm to any person whether such person is the person actually killed or not.
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> b. Knowledge that the act or omission causing death will cause the death of or grievous harm to some person, whether such person is the person 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 be caused.
>
> c. An intent to commit a felony.
>
> d. An intention to facilitate the escape from custody of a person who has committed a felony.

52. With regard to the offence of murder and proof of malice aforethought, the Eastern Court of Appeal observed as follows in Rex vs. Tubere s/o Ochen (1945) 1Z EACA 63:

> " In determining existence or nonexistence of malice one has to look at the facts proving the weapon used, the manner in which it is used and part of the body injured."

53. In the same vein, the court in Hyam vs. DPP (1975) AC 55 held inter alia that the intent to do grievous bodily harm was sufficient to convict for murder. In the court's view:

> " 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."

54. According to PW4, the appellant used a knife to stab the deceased in the stomach with the intention of inflicting grievous harm on him. He did so well aware that his act was not only unlawful, but was also likely to cause grievous harm or death. And it did. Indeed, the appellant's vicious attack on the deceased followed a fist fight calculated to injure and subdue him.

55. As was also observed in the case of Hyam vs. DPP (ibid) the mens rea (criminal intent) needed to prove that a defendant acted with "intent" to produce death or grievous bodily injury to another should be restricted to cases where the consequences of a defendant's actions were clearly to cause a victim's death or that it was certainly foreseeable, as was the case here. Accordingly, the appellant's defence on the ground that the prosecution failed to prove the ingredients of murder, and to establish malice aforethought does not hold. On that score, his appeal fails.

56. The appellant advanced yet another ground of appeal, contending that not all eyewitnesses and those who reported the occurrence to the police were called to testify. However, he did not tell us who among those witnesses ought to have been called to testify, and how their testimonies would have aided in his defence, in which case he was at liberty to call them.

57. Be that as it may, the principles to consider in determining the issue of failure to call crucial witnesses was dealt with in the leading case of Bukenya and Others vs. Uganda 1972 EA 549 where the court held:

> " The prosecution must make available all witnesses necessary to establish the truth even if their evidence may be inconsistent. Where the evidence called is barely adequate, the Court may infer that the evidence of uncalled witnesses would have tended to be adverse to the prosecution.

The prosecution's burden in regard to witnesses is to call witnesses who are sufficient to establish a fact. It is not necessary to call all the people who know something about the case. The issue is whether those called are sufficient to aid the court establish the truth, whether the evidence is favourable to the prosecution or not."

58. That said, we hasten to observe that the law does not prescribe the nature or number of witnesses the prosecution is expected to call in proof of its case. On the other hand, an accused is at all times at liberty to call whoever, and whatever number of witnesses, he considered critical to discredit the prosecution case or bolster his defence. In this regard, this Court in Sahali Omar vs. Republic (2017) eKLR stated thus:

> " Section 143 of the *Evidence Act* provides that:
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> 'No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact.'"

59. Next comes his contention that the prosecution evidence was shoddy. To our mind, that is the same as saying that the prosecution did not prove its case beyond reasonable doubt. In the High Court of South Africa in S vs. Sithole and Others 1999 (1) SACR 585 (W) at 590 stated:

> " There is only one test in a criminal case, and that is whether the evidence establishes the guilt of the accused beyond reasonable doubt. The corollary is that an accused is entitled to be acquitted if there is a reasonable possibility that an innocent explanation which he has proffered might be true. These are not two independent tests, but rather the statement of one test, viewed from two perspectives. In order to convict, there must be no reasonable doubt that the evidence implicating the accused is true, which can only be so if there is at the

same time no reasonable possibility that the evidence exculpating him is not true. The two conclusions go hand in hand, each one being the corollary of the other. Thus in order for there to be a reasonable possibility that an innocent explanation which has been proffered by the accused might be true, there must at the same time be a reasonable possibility that the evidence which implicates him might be false or mistaken."

60. Addressing himself to the standard of proof in criminal cases, Lord Denning in Miller vs. Ministry of Pensions, [1947]

2 ALL ER 372 had this to say:

> "That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence of course it is possible, but not in the least probable, the case is proved beyond reasonable doubt, but nothing short of that will suffice."

61. We pause here to reflect on the cumulative chain of evidence leading to the appellant's conviction, beginning with PW4's testimony in which he narrated what he witnessed in the company of another, namely: the appellant's fight with the deceased; the vicious knife attack; and the severe injuries that led to the deceased's demise, which were corroborated by the testimonies of PW5 and PW6. The appellant's alibi having collapsed, we reach the conclusion that the prosecution proved the charge against the appellant beyond reasonable doubt and find nothing to fault the learned Judge for her decision to convict him.

62. In this regard, the appellant's further contention that the learned Judge failed to evaluate and analyse the evidence is unsubstantiated and goes against the grain of the learned Judge's reasoning and ultimate findings leading to the impugned decision. Likewise, the appellant's appeal on this ground also fails.

63. In addition to the foregoing, the appellant challenges the formal validity of the impugned judgment. According to him, the decision is not a Judgment within the meaning of section 169(1) and (2) of the Criminal Procedure Code, and is fatally defective in that "the Judgment does not comply with the provisions of Section 169(1) of the Criminal procedure Code requiring a Judgment to contain the point or points for determination, the decision thereon and the reasons for the decision; the Judgment failed to comply with Section 169(2) of the Criminal Procedure Code requiring the Judgment to specify, in the case of the conviction, the offence of which, and the section of the Penal Code under which the Appellant was convicted and the punishment to which he was sentence; and that the Judgment contains or is endorsed with handwritten notes or texts that are neither dated nor countersigned and which amend, replace, alter or substitute the typed text of the Judgment." That section reads:

> 169. Contents of judgment
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> 1. Every such judgment shall, except as otherwise expressly provided by this Code, be written by or under the direction of the presiding officer of the court in the language of the court, and shall contain the point or points for determination, the decision thereon and the reasons for the decision, and shall be dated and signed by the presiding officer in open court at the time of pronouncing it.

> 2. In the case of a conviction, the judgment shall specify the offence of which, and the section of the Penal Code or other law under which, the accused person is convicted, and the punishment to which he is sentenced ....

64. In reply, the State counsel submitted that it matters not that the Judge did not comply with section 169, and that the prosecution established a case against the appellant, and that he was properly convicted.

65. The instructive provisions of section 382 of the Penal Code settles the matter and provides:

> 382. Finding or sentence when reversible by reason of error or omission in charge or other proceedings Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice:
>
> Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings.

66. Addressing itself to a similar grievance in the case of James Nyanamba vs. Republic [1982 – 88] 1 KAR 1165; [1983]eKLR, this Court had this to say:

> " Again the magistrate transgressed subsection
>
> (2) (2) of section 169 of the Criminal Procedure Code which requires that in the case of a conviction, the judgment must specify the offence of which and the section of the Penal Code or other law under which the accused person is convicted. Since in his opening statement of the judgment, the magistrate did not state which accused was charged alone in which count of the counts 3 and 4 it cannot be said that the omission to comply with section 169(2) (ibid) did not occasion the appellant injustice. In the circumstances of this case that omission is not cured by section 382 of the Criminal Procedure Code."

67. The same fate befalls the appellant's complaint that certain alterations or cancellations on the impugned judgment relating to substitution of the prosecution witnesses' numbers and clerical errors that are not dated or countersigned by the trial court.

68. In our considered view, such errors, omissions or irregularities comprised of corrections relating to the numbering of prosecution witnesses and clerical errors are by no means fatal. Such corrections, though unsigned, find cure in the afore-cited section 382 of the Penal Code, which bars reversal or alteration of any finding, sentence or order passed by a court of competent jurisdiction on appeal or revision on account of an error, omission or irregularity in the ... order, judgment or other proceedings before or during the trial, unless the error, omission or irregularity in issue has occasioned a failure of justice. We find nothing to suggest that the error, omission or irregularity on which the appeal is founded occasioned a failure of justice. Likewise, the appeal fails on this score.

69. Having considered the record of appeal, the impugned judgment, the rival submissions, the cited authorities and the law, we reach the inescapable conclusion that the appeal has no merit and the same is hereby dismissed in its entirety. Consequently, the judgment of the High Court of Kenya at Mombasa (A. Ongeri, J.) delivered on 26th October 2018 in Criminal Case No. 2 of 2013 is hereby upheld on both conviction and sentence. Those are our orders.

DATED AND DELIVERED AT MOMBASA THIS 12TH DAY OF APRIL, 2024

DR. K. I. LAIBUTA

.....

JUDGE OF APPEAL

ALI-ARONI

.....

JUDGE OF APPEAL

G.V. ODUNGA

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR