Katana v Republic (Criminal Appeal 48 of 2021)
[2024] KECA 463 (KLR) (12 April 2024) (Judgment)

Neutral citation: [2024] KECA 463 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MALINDI

CRIMINAL APPEAL 48 OF 2021

S OLE KANTAI, KI LAIBUTA & GV ODUNGA, JJA

APRIL 12, 2024

BETWEEN

DANIEL CHARO KATANA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

((An appeal from the judgement of the High Court of Kenya at Malindi (R. Nyakundi, J.) dated 30th September 2021 in High Court Criminal Case No 17 of 2016)

JUDGMENT

1. The Appellant, Daniel Charo Katana, was charged in Malindi High Court Criminal Case No. 17 of 2016 with the offence of murder contrary to section 203 as read with section 204 of the Penal Code, the particulars of the offence being that on the 24th September 2016 at Ngerenya Village, within Kilifi County, the appellant murdered Hamisi Charo Katana.

2. In support of its case, the prosecution called 5 witnesses.

   PW1, Peter Katana Kathambi, testified that, on the day when the deceased was killed, his sister's fiancée was visiting the family for introductions. He therefore invited

   family members including his cousin, the deceased. After

   the ceremony, at about 8pm, PW1 escorted the deceased, PW4 and one Kazungu but, about 500 metres along the way from the deceased's home, he parted way with the deceased and PW4 as he continued escorting Kazungu, after which he returned home. About 30 minutes later, when he heard screams coming from the direction of the deceased's home, he called the deceased's phone number but it went unanswered. 15 minutes later, he tried again to get in touch with the deceased when he heard voices from the villagers but, once again, there was no response. He then called the deceased's brother, DW2, who informed him that the deceased had been killed.

3. In the company of the Assistant Chief who lived nearby, PW1 proceeded to the scene at around 9 pm where they found the deceased lying on the ground at the entrance to his home about 250 to 300 metres from the appellant's home with a cut wound on the right side of his head. They then reported the matter to the police. According to PW1, the appellant, a brother to the deceased, had earlier on accused the deceased of bewitching his children.

4. PW1's evidence was materially corroborated by the evidence of PW4, Said Mkubwa Kirao, who testified that the deceased had differences with his brothers, the appellant and one Katana, who accused the appellant of practising witchcraft. According to him, he was called by PW1 after parting ways with PW1 and informed that the deceased had been slashed to death. Being late, he did not go to the scene until the following morning. However, he confirmed finding the appellant's brothers, the deceased and DW2 at the mortuary. He stated that DW2 was also arrested.

5. While preparing food on 24th September 2016 at about 8pm, Furaha Katana (PW2), the deceased's widow, heard voices of people quarrelling behind their house. When she went out, she heard the deceased pleading with the appellant not to kill him. However, the appellant responded that he would kill the deceased for refusing to vacate the land. According to PW2, she knew the voices of both the appellant and the deceased since they had lived in the same homestead.

6. PW2 then took her children to a neighbour's home, one Kahunda, after which the two proceeded towards the direction from which she had heard the voices. On the way, they met DW2 running. DW2 asked her whether she heard the quarrel and broke the news to her that the deceased had been killed. Together they proceeded to the scene where they found the deceased's body. They raised alarm for the villagers to come and then DW2 reported the matter to the Chief. It was the evidence of PW2 that there was a land dispute within the family members of the deceased, and that the appellant had demanded that the deceased leave the place, a matter which had been reported to the area chief. According to PW2, the relationship between the deceased and the appellant had deteriorated to the extent that they were not on talking terms. In her evidence, the place where she heard the deceased and the appellant exchange words was not very far and she was able to hear what they were saying. According to her, when the chief arrived and asked for the appellant's whereabouts, he was not around.

7. PW3, Augustine Kithi, the area assistant chief, testified that the deceased and the appellant were his subjects. According to him, a report had been made at his office by the deceased that the appellant was threatening his life on allegations of witchcraft, and he advised the deceased to report the incident to the police. In September 2016, PW1 reported the deceased's death and, on, reaching the scene, he found the deceased who had been cut into pieces already dead. It was his evidence that the appellant was also present at the scene and he advised them to report the matter to the police. In his evidence, one night, two months prior to the incident, voices, which were identified as belonging to one Kazungu and the deceased, were heard where threats to the life of the deceased were made on the allegations that the deceased was involved in witchcraft.

8. The investigating officer, Kevin Wafula, who testified as PW5, took over the investigations from his retired colleague. In his evidence, the body was recovered from the scene. However, he was not involved in the initial investigations and did not know much about the murder. He produced the post mortem report.

9. In his defence, the appellant, while admitting that the deceased was his elder brother, denied any involvement in the deceased's death. In his evidence, he was asleep in his house by 9pm and was only woken up by his younger brother who informed him that the deceased had been killed. According to him, he was not at the scene. He stated that the prosecution's evidence was fabricated as there was no

land dispute between him and the deceased, and that he had never threatened the deceased. He stated that he was the one who reported the deceased's death to the police.

10. The appellant called his brother, Peter Charo (DW2) as his defence witness, who confirmed that he was the one who relayed the information concerning the deceased's death to the appellant. According to him, the body of the deceased was 1 metre away, though he did not mention from where. After relaying the information to the appellant, they both proceeded to the scene at about 8.30am. However, he, , did not record any statement with the police.

11. In his judgement, the learned Judge found that, based on the evidence of PW1, PW2 and the post-mortem examination report, there was no doubt that the deceased was dead; that the deceased had passed on as a result of the serious injury inflicted by the assailant, and hence his death was caused by an unlawful act; that the strands of circumstantial evidence to strengthen the prosecution case on malice aforethought came from PW1, PW2, PW3, PW4 and the medical evidence on the post-mortem examination report produced in evidence by PW5; that the yelling of the deceased and the appellant, which were well known to PW2 prior to the incident of murder was unimpeachable; and that the circumstantial evidence linking the appellant to the death of the deceased were prior threats arising from the appellant's in the belief that the deceased was bewitching his children and the existence of a land dispute between the appellant and the deceased.

12. On identification, the learned Judge relied on the case of Anjononi & others v R [1976-1980] 1KLR 1566 on voice identification and found that, in this case, as PW2 was well versed with the voices of both the appellant and the deceased having interacted with them for a long period of time, one as the spouse and the appellant as a direct family relative. He therefore found that PW2's identification of the appellant as the assailant was good enough to pass muster, and that identification was never corrupted merely due to the omission to conduct an identification parade.

13. The learned Judge therefore convicted the appellant and sentenced him to 30 years imprisonment.

14. Dissatisfied with the said decision, the appellant appealed to this Court. The appeal was based on the grounds as summarised in the submissions filed by his learned counsel, Ms. Lilian Oluoch, dated 23rd October 2023 contending that the learned Judge erred in law by failing to consider: that there was no malice aforethought; that there was no proper identification at the scene of the crime; and that the appellant was underage. However, the last ground was, and rightly so in our respectful view, abandoned.

15. We heard this appeal on the Court's GoTo Meeting virtual platform on 25th October 2023 during which the appellant, who appeared from Malindi Prison, was represented by learned counsel, Ms. Lilian Oluoch Wambi while learned counsel, Ms. Nyawinda appeared for the respondent. Both learned counsel relied entirely on their written submissions.

16. It was submitted on behalf of the appellant that failure by the prosecution to ascertain and provide conclusive evidence of the deceased's cause of death was fatal to the prosecution's case. Reliance was placed on the case of Ndungú v R [1985] KLR 487 where it was held that, even

    in cases where there is testimony to the effect that the deceased suffered serious and grave injuries, the prosecution is still under an obligation to call evidence to prove the effect of such injuries on the mortality of the deceased. Based on the decision in Chengo Nickson Kalama v R [2015] eKLR, it was the appellant's view that it would have been prudent to call the pathologist who conducted the post-mortem examination. In the appellant's submissions, the prosecution did not adduce any evidence regarding the cause of death of the deceased. While appreciating that there is no legal requirement that a murder weapon be produced in criminal cases, it was submitted that failure to do so in this case was

fatal to the prosecution's case in light of the pathologist's indication of the need to ascertain the cause of death and, particularly, as there was evidence that PW1 and PW4 had been drinking palm wine. In this regard, it was submitted, based on the case of Patrick Mose v R [2007] eKLR that it would not be safe to rely on the evidence of witnesses who were generally drunk.

17. It was contended that from the statutory declaration of the previous investigations officer, IP Isika, which was admitted as an exhibit in the case, the investigations officer had already made up his mind to charge the appellant contrary to the presumption of innocence under Articles 25 and 50 of *the Constitution*. It was further noted that, since the author of the said declaration was not called as a witness, the defence was not accorded an opportunity to cross-examine the author thereof. Further, it was contended that, although the declaration identified a certain D1 as the father of the deceased, he was not called as a witness despite his allegations being pivotal to the investigations. The appellant relied on the case of David Agwata Achira v R [2003] eKLR to advance the position that it is, generally speaking, unsafe to base a conviction solely on the dying declaration of a deceased person made in the absence of the accused and not subject to cross- examination, unless there is satisfactory corroboration. In addition, it was submitted on the authority of R v EKK [2018] eKLR that the prosecution failed to explore and establish the "last seen with" principle in light of the evidence that, in July 2016, two months prior to the death of the deceased, villagers had identified DW2 and Kazungu as having issued threats to the deceased, and that Kazungu, PW1 and PW4 were the last persons seen with the deceased. On the other hand, it was Peter Charo, DW2, who reported the death of the deceased to the deceased's wife (PW2) and the appellant. It was therefore submitted, based on the case of Mary Wanjiku Gichira v R Criminal Appeal No. 17 of 1998, that suspicion, however strong, cannot provide a basis for inferring guilt. According to the appellant, the learned Judge erred in failing to consider the evidence adduced and analyse it, and we were therefore urged to allow the appeal and quash the conviction.

18. On the other hand, the respondent, relied on the submissions dated 19th October 2023 drawn by Ms Vallerie Ongeti, in which it was submitted that the deceased's death was proved by PW1, PW2 and PW3 who saw the deceased lying down on the ground with cuts on the head as well as the post mortem report which revealed the cause of death as severe head injury due to assault. According to the respondent, on the authority of the decision in R v Boniface Isawa Makodi [2016] KLR which cited Guzambizi v R (1948) 15 EACA 65, every homicide

    is presumed to be unlawful, except where circumstances make it excusable, or where it has been authorised by law. In this case, the deceased was found to have died from severe head injury due to assault and, from the evidence adduced, it was submitted that it can safely be said that the death was unlawful. Regarding malice aforethought, it was submitted on the authority of Daniel Muthee v R Criminal Appeal No. 218 of 2005 (UR) that there is no requirement in the Penal Code that one must have a motive for murder and that, in this case, malice aforethought may be inferred from the nature of the injuries inflicted on the deceased coupled with the evidence of PW2, who heard the appellant threatening to kill the deceased over a land dispute.

19. As to whether it was the appellant who caused the death of the deceased, the respondent cited Choge v R [1985] KLR 1, also cited with approval in George Mwaura Kinyita v R [2020] eKLR to the effect that evidence of voice identification is receivable and admissible and it can, depending on the circumstances, carry as much weight as visual identification; that, however, care and caution must be exercised to ensure that the witness was familiar with the appellant's voice and recognised it; and that the conditions obtaining at the time the recognition was made were such that there was no mistake in testifying to that which was said and who had said it. It was the respondent's case that the conduct of the appellant after the commission of the offence, of escaping, was that of a person who was guilty of committing an offence

20. We were urged not to interfere with the conviction and the sentence meted on the appellant.

21. We have considered the foregoing submissions.

22. A first appeal, such as the present one, is by way of a retrial and this Court, sitting as the first appellate Court, has a duty to re-evaluate, re-analyse and re-consider the evidence afresh and draw its own conclusions on it. Allowance should however be made to the fact that the Court did not see the witnesses as they testified. See Okeno v Republic [1972] EA 32 where this Court set out the duties of a first appellate court as follows:

> " An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya vs. Republic (1957) 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 Vs. R. (1957) EA. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's 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, see Peters vs. Sunday Post [1958] E.A 424."

23. The predecessor to this Court in Pandya v Republic

[1957] EA 336 pronounced itself as follows:

> "On a first appeal from a conviction by a Judge or magistrate sitting without a jury the appellant is entitled to have the appellate court's own consideration and views of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the witnesses before the Judge or magistrate with such other material as it may have decided to admit. The appellate court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises which witness is to be believed rather than another and that question turns on manner and demeanor, the appellate court must be guided by the impression made on the Judge or magistrate who saw the witness but there may be other circumstances, quite apart from manner and demeanor which may show whether a statement is credible or not which may warrant a court differing from the Judge or magistrate even on a question of fact turning on the credibility of witnesses whom the appellate court has not seen."

24. Likewise, in Kiilu & Another v Republic [2005]1 KLR

174, this Court held that:

> "1. An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusions.
>
> 2. It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's findings and conclusions; 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."

25. From the submissions made by the appellant, the issues that broadly call for our determination are whether the appellant was properly identified; whether malice aforethought was proved; and whether the appellant was afforded a fair hearing.

26. It is not in doubt that the evidence, as regards the identification of the appellant was based on the voice recognition by PW2, the deceased's wife. In Libambula v R [2003] KLR 683, the issue of voice identification was dwelt on by the Court of Appeal in which it stated as follows:

> "Normally, evidence of voice identification is receivable and admissible in evidence and it can, depending on the circumstances, carry as much weight as visual identification. In receiving such evidence, care would be necessary to ensure that it was the accused person's voice, the witness was familiar with it and recognized it and that the conditions obtaining at the time it was made were such that there was no mistake in testifying to that which was said and who had said it. See Choge v Republic [1985] KLR 1."

27. In this case, there is no doubt that PW2 was a close relative of the appellant, being a sister in law to the appellant. In her own words, she stated that:

> " I heard people quarrelling and ongoing out, I heard the quarrels continue. The noise was behind our house. I heard my husband's voice. He said 'Daniel please don't kill me". I heard Daniel tell him 'I will kill you because you refused to leave the land'. I knew the voice of my husband. I lived with Daniel in the same homestead and I knew his voice."

28. In cross-examination, PW2 insisted that:

> " They were quarrelling not far from home. I could have heard if somebody had called me from there."

29. What comes from the foregoing is that PW2 knew the appellant very well having stayed with him in the same homestead. On the material date, upon hearing the quarrelsome voices, she went outside and confirmed that the voices belonged to the appellant and the deceased. She heard the exact wordings of the deceased and the appellant before taking the children to the neighbor's place. In those circumstances, it cannot be said that the voices of the appellant and the deceased were muffled by the wall in between. The appellant's submission that the evidence was merely a dying declaration is not entirely true. Had the evidence been that PW2 only heard the deceased mention the appellant without the appellant responding, we would have agreed that it was only a dying declaration. However, in this case, PW2 heard the the appellant's voice. Hence, it was evidence of voice identification. We are satisfied that, based on long familiarity with the appellant and the fact that PW2 heard the said voices when outside the house, the conditions were conducive for voice identification, and that PW2 properly identified the appellant.

30. As regards the submission that some of the people mentioned were not called as witnesses, we have not been addressed on what the said people could have possibly said had they been called, or whether their testimony would have taken the case a notch higher. Section 143 of the *Evidence Act* provides that:

> 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.

31. We reiterate this Court's position in Benjamin Mbugua Gitau v R [2011] eKLR that:

> " This Court has stated severally that there is no particular number of witnesses who are required for proof of any fact unless the law so requires – see section 143 *Evidence Act*."

32. We are guided by the case of Mwangi v R [1984] KLR 595

where this Court stated:

> " Whether a witness should be called by the prosecution is a matter within the discretion of the prosecution and the court will not interfere with that discretion unless it may be shown that the prosecution was influenced by some oblique motive."

33. The prosecution is therefore not duty bound to call all persons involved in the transaction, and its failure to call them is not necessarily fatal, unless the evidence adduced is barely sufficient to sustain the charge. In Keter v R [2007] 1 EA 135, the court was categorical that:

> "The prosecution is not obligated to call a superfluity of witnesses, but only such witnesses as are sufficient to establish the charge beyond any reasonable doubt."

34. It is not enough to simply contend that certain people who were involved in the transaction were not called by the prosecution, but the defence ought to go further and state why, in its view, it was necessary to call the said persons without whose evidence, an inference that the said witnesses, had they been called, would have given evidence adverse to the prosecution's case. In this case, PW2 simply said that one Kahunda accompanied her to where the body of the deceased was. It was not contended that the said Kahunda heard or saw anything that would have assisted in advancing the prosecution or the defence case. We find that nothing turns on this submission. Similarly, the fact that the statutory declaration made by the previous investigating officer alluded to bad blood between the appellant and their father did not necessary make the father a necessary witness to the events leading to the deceased's death.

35. It was also submitted that the investigating officer was not called, and that PW5 who was called to produce the post mortem report was not cross-examined. It is clear that the appellant was represented at the hearing by counsel who extensively cross-examined PW5. There was no objection raised regarding the production of the said exhibit by that witness. In our understanding of the law, failure to call the investigating officer is not necessarily fatal to the prosecution's case. In Harward Shikanga Alias Kadogo & Another v R [2008] eKLR, this Court was of the view that calling the investigating officer in all cases is:

> " ...good practice which prosecuting authorities ought to comply with, but the mere failure to comply with it, i.e. calling an investigating officer, cannot automatically result in an acquittal. Each case would have to be considered on its own circumstances in order to determine the effect of such a failure on the entire case for the prosecution."

36. The same position was taken by this Court in Simion Waiganjo Mwangi v R Mombasa Court of Appeal Criminal

Appeal No. 90 of 1997 (UR) where it was opined that:

> "...As to the investigation officer not testifying it was not necessary for him to be called unless his omission would have prejudiced the appellant which it did not do."

37. As stated above, the appellant did not contend that he was prejudiced by failure to call the investigating officer. On our part, we are satisfied that, even without the evidence of the previous investigating officer, the witnesses who testified before the trial court placed the appellant at the scene where he was heard quarrelling with the deceased and, thereafter, the deceased's body was found with fatal injuries. We have considered the impugned judgement and are unable to find that the learned Judge's decision turned on the statutory declaration by the previous investigating officer in order to justify interference with his decision.

38. As regards the principle of "last seen with", section 111(1) of the *Evidence Act* provides that:

When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, or qualification to, the operation of the law creating the offence with which he is charged and the burden of proving any fact especially within the knowledge of such person is upon him:

Provided that such burden shall be deemed to be discharged if the court is satisfied by evidence given by the prosecution, whether in cross- examination or otherwise, that such circumstances or facts exist:

Provided further that the person accused shall be entitled to be acquitted of the offence with which he is charged if the court is satisfied that the evidence given by either the prosecution or the defence creates a reasonable doubt as to the guilt of the accused person in respect of that offence.

39. While dealing with the said section, this Court in Dida Ali Mohammed v R Nakuru Court of Appeal Criminal Appeal

No. 178 of 2000 (UR) held that:

> " Then there is the circumstantial evidence which shows that it was the appellant who was the last person seen with the deceased before her death...As to when the deceased left the appellant's home and upto where the latter escorted her are maters which were peculiarly within the appellant's knowledge which we think, under section 111(1) of the *Evidence Act*, he was the only person who could but did not explain. And the evidence of recovery of the deceased's body consequent upon information the appellant gave are all circumstances which when taken cumulatively lead to irresistible conclusion that the appellant and no other person killed the deceased, and which exclude any other reasonable hypothesis than that the appellant killed the deceased."

40. In this case, the evidence by PW2 was clear that the last person who was heard communicating with the deceased and threatening the deceased was the appellant before his body was shortly thereafter found. That evidence, in our view, breaks the link between the time the deceased was in the company of PW1, PW4 and the said Kazungu and when the deceased's body was found.

41. The appellant submitted that there was no evidence of malice aforethought. It is now trite that malice aforethought does not necessarily connote motive, and that the former may be inferred from the circumstances of the case. Section 206 of the Penal Code sets out the circumstances which constitute malice aforethought in the following terms:

> " Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances:

a. An intention to caused death or to do grievous harm to any person whether such person is the person actually killed or not.

b. Knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether such person is the person actually killed or not, although such knowledge is accomplished by indifference whether death or grievous harm is caused or not, or by a wish that it may be caused or not, or by a wish that it may not be caused.

c. An intention to commit a felony.

d. An intention by an act or omission to facilitate the flight or escape from custody of any person who attempt to commit a felony.

42. The predecessor to this Court in R v Tuper S/O Ocher

[1945] 12 EACA 63, held that:

> " It (the court) has a duty to perform in considering the weapon used and the part of the body injured, in arriving at a conclusion as to whether malice aforethought has been established, and it will be obvious that ordinarily an inference of malice will flow more readily from the case, say of a spear or knife than from the use of a stick..."

43. According to this Court in Robert Onchiri Ogeto v R [2004] KLR 19:

> " The prosecution does not have to prove the motive for commission of any crime, neither is evidence of motive sufficient by itself to prove the commission of a crime by the person who possess the motive – see Karukenya & 4 Others vs. Republic [1987] KLR
>
> 458. By section 206(a) of the Penal Code, malice aforethought is deemed to be established by evidence showing an intention to cause death or to do grievous harm. It can be reasonably inferred that when the appellant stabbed deceased with a knife on the chest he intended to cause death or grievous harm to the deceased. That being the case, we are satisfied that the appellant was properly convicted for the offence of murder."

44. In our opinion, malice aforethought may well be inferred from the force applied and the weapon used by the assailant. In this case, the post mortem report revealed that the death of the deceased was due to severe head injury resulting from assault. In fact, the injury exposed the crushed brain matter of the deceased, a clear indication of the extent of the force or the nature of the weapon used. The only inference that can be made in those circumstances is that the assailant intended to cause death or at least grievous harm to the deceased and, either way, that proves the existence of malice aforethought. We are also satisfied that the documentary evidence in the form of the post mortem report, which was produced without objection clearly revealed the cause of death, and the submission that the cause of death was not established does not hold.

45. In light of the same documentary evidence, nothing turns on failure by the prosecution to produce the weapon. In Ekai v R [1981] KLR 569, this Court held that failure to produce the murder weapon was not of itself fatal to a conviction and that, as long as the post mortem report had established beyond reasonable doubt the injury from which the deceased died, a conviction could still stand. If there is sufficient evidence on record that prove that the homicide was committed, the court may well convict the accused person.

46. This Court appreciated this position in the case of Karani v R [2010] 1 KLR 73 in which this Court pronounced itself

as follows:

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

47. In this case, there was evidence of bad blood between the appellant and the deceased arising partly from the suspicion by the appellant that the deceased was bewitching his children, and partly from the land dispute between the two. Taken together with the testimony of PW2 that she heard the deceased pleading with the appellant not to kill him, and the appellant insisting that he would kill him for refusing to vacate the very same land that was in dispute, we have no doubt in our mind that the death of the deceased, which is not disputed even by the defence witnesses, arose from an unlawful action of the appellant, based on proved malice aforethought.

48. We have considered this appeal and find no reason to warrant interference with the decision arrived at by the learned Judge of the High Court. We accordingly dismiss the appeal.

Dated and delivered at Mombasa this 12th Day of April, 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

DEPUTY REGISTRAR