



**Ntoitha & 2 others v Republic (Criminal Appeal 29, 30 & 72 of 2019  
(Consolidated)) [2024] KECA 774 (KLR) (5 July 2024) (Judgment)**

Neutral citation: [2024] KECA 774 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NYERI  
CRIMINAL APPEAL 29, 30 & 72 OF 2019 (CONSOLIDATED)  
J MOHAMMED, LK KIMARU & AO MUCHELULE, JJA  
JULY 5, 2024**

**BETWEEN**

**BONIFACE KIMATHI NTOITHA ..... 1<sup>ST</sup> APPELLANT**

**DICKENS MURANGIRI KUBAI ..... 2<sup>ND</sup> APPELLANT**

**PATRICK KAREITHI MUTHURI ..... 3<sup>RD</sup> APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(An appeal from the judgment of the High Court of Kenya at Meru  
(A. Ong'injo, J.) dated 18th October 2018) in HCR No. 64 OF 2013)*

**JUDGMENT**

1. When the post mortem was conducted on the body of the deceased, Julius Mungathia on November 9, 2012 at Maua Methodist Hospital by Dr. Salesians Mwirigi Ithai (PW 4), it was found that the head had a deep penetrating cut that had caused intracranial hemorrhage and brain tissue damage and this is what had caused his death. The deceased had been attacked on the evening of October 29, 2012 at Maibuki Village in Kabachi Location of Igembe North District in Meru County, and pronounced dead on arrival in the hospital.
2. The appellants, Boniface Kimathi Ntoitha, Dickens Murangiri Kubai and Patrick Kareithi Muthuri were arrested and charged under sections 203 and 204 of the [Penal Code](#) with the murder of the deceased. Their trial was conducted by the learned A. Ong'injo, J. who on October 28, 2018 found them jointly guilty as charged. Each was sentenced to serve 20 years in jail. They were aggrieved by the conviction and sentence and filed their respective appeals to this Court.
3. Each appellant filed his grounds of appeal, but, in summary, their complaint was that they had been convicted on contradictory and inconsistent evidence which had not established their guilt beyond all



reasonable doubt; that the incident was at night and there were insufficient evidence to show that there was such light that could enable proper identification; that the only injury found on the deceased was the cut wound and yet the prosecution witnesses had testified that, beyond the cut, the appellants had beaten the deceased on the legs and hands using sticks and jembes; that material witnesses had not been called by the prosecution; and that the defence evidence had not been considered.

4. Our duty as explained in the various decisions of this Court, including *Okeno -vs- Republic* [1972]EA 32, is to subject the evidence before the High Court to a fresh and exhaustive examination and to form our own conclusion thereon, while taking into account that we did not have the advantage of seeing and hearing the witnesses as they testified.
5. According to the prosecution case, two witnesses were present when the deceased was attacked and killed by the appellants whom they said they knew and came from the same neighborhood. The witnesses were Grace Mathanya Petro (PW 1) and Catherine Kaminwa John (PW 2). The two were at about 9.00pm at a local kiosk where PW 1 had come to buy sugar.
6. PW 1 stated that the kiosk was well lit with solar light inside and security light outside. She saw the appellants and others moving away from the kiosk. They had *pangas*. The deceased, also from the same area, came from a different kiosk. The appellants chased him as he screamed. He was chased into a trench about 70-80 metres away where the 1<sup>st</sup> appellant cut him on the head and killed him. When PW1 was cross-examined, she stated that the deceased was cut in a banana *shamba* which was about 400 metres from the kiosk. She had stated in examination in chief that the banana plantation where the deceased was cut was well-lit by moonlight. She could not recall how the appellants were dressed that night. She stated that as the appellants were chasing the deceased, she followed them from behind while screaming.
7. PW 2's evidence was that she was with PW 1 when the owner of the kiosk, one Cecilia, pushed out the appellants following an argument. The 1<sup>st</sup> appellant was armed with a panga while the other appellants had sticks and jembes. She witnessed the 2<sup>nd</sup> appellant beating the deceased on his legs and hands while the 3<sup>rd</sup> appellant beat him on the back. The 1<sup>st</sup> appellant cut the deceased on the head and he fell into a ditch. The deceased was her brother-in-law. She called her husband, John M'Ngothia Kamathi (PW 3) who came to the scene. PW 3 stated that he found the deceased dead and took the body to the hospital. He did not witness the attack. PW 2 stated that at that kiosk there was light but that she was able to see what was happening at the scene of the attack because of light from the full moon.
8. The Investigating Officer, Corporal Henry Naibel (PW 5) of Mutuati Police Station testified that when he was taken to the scene following the incident, the place was dark. It was in a banana *shamba*.
9. Each appellant gave sworn testimony and denied that he was at the scene, or that he had attacked the deceased. They did not call any witnesses.
10. The learned Judge considered the evidence and came to the conclusion that the prosecution witnesses had told the truth but that the appellants had not. On the evidence of PW 1 and PW 2, the learned Judge found that the appellants were the ones who had attacked and murdered the deceased, and were jointly guilty of the charge.
11. We have looked afresh at the recorded evidence, and with respect do not agree with the findings by the learned Judge. One, whereas PW 1 stated that each appellant was armed with a panga, PW 2 stated that only the 1<sup>st</sup> appellant had a panga and the rest had stick and jembes. PW 1 at first stated that the attack was in a trench about 70-80 metres from the kiosk, and that the place was lit by light from the kiosk. When she was cross-examined, she changed the story to state that the incident happened about 400 metres away and that what enabled her to see the appellants was moonlight. When PW 5 came to



the scene, the place was dark. According to PW 1's evidence in chief, only the 1<sup>st</sup> appellant attacked the deceased by cutting him on the head with a panga. However, when cross examined, she stated: -

“ All had *pangas*. Others cut him with *pangas*. They used blunt side ”

12. PW 2 stated that the 1<sup>st</sup> appellant cut the deceased on the head, and that the 2<sup>nd</sup> appellant beat him on the legs and hands while the 3<sup>rd</sup> appellant beat him on the back. The appellants were concerned, and correctly in our view, by the fact that the only injury that the postmortem report revealed was the cut on the head. The body of the deceased had no other injuries.
13. We consider that if PW 1 and PW 2 were together and witnessed what happened on the material evening, their versions of what happened could not have been so materially at variance. The trial court did not consider these varying versions to be able to find whether or not they did not go to the root of the prosecution case. To us, the two witnesses were not wholly believable.
14. The incident was at night. Either it was 70-80 metres away from the kiosk but that the solar light could still enable PW 1 to see the attackers, or it was about 400 meters away in a banana plantation where the only source of light was moonlight. Grave contradictions in the prosecution case have to be explained otherwise they will compromise the prosecution case that is usually required to be proved beyond any reasonable doubt (*W.W.N. -v- Republic* [2020]eKLR).
15. PW 1 and PW 2 stated that they knew the appellants well before the attack. Even then the learned Judge was required to consider whether, under the circumstances, the appellants had been properly recognized to have attacked and murdered the deceased. The learned Judge was required to warn herself of the special need for caution before convicting on the evidence of visual identification and or recognition. (See *Cleophas Otieno Wamunga*, Kisumu Criminal Appeal No. 20 of 1989). We do not think there was any careful examination of the evidence of PW 1 and PW 2 in regard to identification by recognition.
16. We find that the appellants were convicted on evidence that was not safe. Consequently, we allow the appeal, quash the conviction and set aside the sentence. The appellants shall be henceforth set at liberty unless they are otherwise being lawfully held.

**DATED AND DELIVERED AT NYERI THIS 5<sup>TH</sup> DAY OF JULY 2024**

**JAMILA MOHAMMED**

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**JUDGE OF APPEAL**

**L. KIMARU**

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**JUDGE OF APPEAL**

**A.O. MUCHELULE**

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**JUDGE OF APPEAL**

I certify that this is a true copy of the original

**DEPUTY REGISTRAR**

