Katana & another v Republic (Criminal Appeal 14 & 53 of 2021 (Consolidated)) [2024] KECA 1163 (KLR) (20 September 2024) (Judgment)

Neutral citation: [2024] KECA 1163 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MALINDI

CRIMINAL APPEAL 14 & 53 OF 2021 (CONSOLIDATED)

AK MURGOR, KI LAIBUTA & GV ODUNGA, JJA

SEPTEMBER 20, 2024

BETWEEN

KATSUNGA KAZUNGU KATANA ..... 1ST APPELLANT

KATANA KAZUNGU KATANA ..... 2ND APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal from the judgement of the High Court of Kenya at Malindi (R. Nyakundi, J) delivered on 13th October 2020 in High Court Criminal Case No 17 of 2010)

JUDGMENT

1. The appellants, Katsunga Kazungu Katana and Katana Kazungu Katana, were charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code, the particulars being that, on 17th August 2015 at Mwangatini village, Pumwani Sub-Location in Magarini Sub County within Kilifi County, jointly with others not before Court, they murdered Dama Tsui Kapombe.

2. In support of its case, the prosecution called 8 witnesses.

   PW1, Tsofa Furaha Charo, and PW2, Ali Anderson Charo, residents of Kibaoni in Magarini, were both minors aged 12 and 13 years respectively. After voir dire examination, they gave sworn testimony in which they stated that, on 17th August 2015 at about 2 pm, they were at home clearing maize with their grandmother, the deceased, together with other children, Enock and Esther, when Katana Mtawali (Mtawali) entered their compound holding a hammer and requested for water to drink which was readily served by PW2. When asked why he was carrying the hammer, Mtawali did not respond and instead threw the hammer to PW2, who took it into the house. Shortly thereafter, the two appellants arrived and, together with Mtawali, they led the deceased out of the compound. Mtawali had by then picked a bicycle iron bar from the house. Once outside the compound, the 1st appellant started

assaulting the deceased with the iron bar causing injury to the head and breaking her arm. Upon noticing the presence of PW1 and PW2, the assailants ran away. Thinking that the assailants were coming after them, PW1 and PW2 also ran away. While PW2 hid in the bush, PW1 went to report the incident to her auntie, PW3, Mary Wanjiku but, finding that she had gone to a funeral, reported the incident to one Safari Kapishi.

3. According to PW3, on that day, she left the deceased, her mother in law, with the children including PW1 and PW2 to go to a burial. On her way, she met a boda boda rider who asked her whether she was aware of the death of her relative one Riziki Jabu (Riziki), who had been hospitalised at Malindi Hospital. PW3 decided to go to Riziki's home and, on noticing that the deceased was absent, which was unusual, she decided to check on her at home. On her way, she saw blood on the road and, on following the blood trail, she came upon the deceased's tobacco tin before she noticed the deceased lying in the bush. Shocked, PW3 screamed and ran to call the neighbours. Her screams attracted those who were at the burial and, when they proceeded to the scene, they found the deceased bleeding with injuries on her head with a broken hand but still alive, but was not talking. It was then that PW2 came from his hiding place and narrated to PW3 what had taken place. At the scene, PW3 saw the bicycle iron bar that PW2 had mentioned to her. The deceased, accompanied by PW3 and other people, was then taken away by an ambulance to Malindi Hospital. According to PW3, by the time they arrived at the Hospital, the body of Riziki had been removed. However, the deceased died that night while undergoing treatment.

4. According to PW3, prior to the incident, there were allegations by the 1st appellant's father that the deceased was a witch and he proposed to PW3's husband that the deceased be subjected to oath taking, a proposal that the deceased had readily agreed to as she protested her innocence.

5. The same day, PW4, Charo Kaingu Tinga, was on his way to Malindi Hospital to check on Riziki who had been admitted when he received the news of her death. Since the father had no money to preserve the body at the mortuary, they started contributing. It was while they were doing so that he received information from her wife, PW3, that her mother, the deceased, had been assaulted at her home. He informed PW3 to organise to have the deceased brought to the Hospital. It was his evidence that, by the time the deceased was brought to Hospital, Riziki's body had been taken away. He then left the deceased with PW3 and returned home where PW1 and PW2 informed him of what took place.

6. PW4 denied that the deceased was a witch even though he was aware of allegations to that effect. He confirmed that he was with Jabu Karisa, Riziki's father, at the Hospital where they were later joined by the appellants at about 3.30 to 4.00 pm.

7. PW6, Jacob Chikola, a resident of Bate Village in Marafa Division in Magarini and a member of the community policing, testified that, following the death of the deceased, on 23rd August 2015 at about 7.15 am, the area Assistant Chief, one Renson Chengo, went to his home and informed him that the latter had received a report from an old man, Kazungu Katana Katsunga, seeking assistance; that the Assistant Chief informed him that some suspects had left Mwangatini Village, Pumwani Sub-location and had come to Bura Sub-location; that the Assistant Chief requested PW6 to accompany him and proceeded to the home of a pastor, Festus Mtawali Katana, where the old man was hiding in the church; that the old man informed them that a woman had been killed in his area and his children were the suspects, and that the community was threatening his life if he did not take them to the village; that the old man suspected that the suspects were in the home of Zawadi Katsunga (Zawadi); that they proceeded to the house where the suspects were sleeping and, on opening the door, they found two people sleeping on the floor; that they apprehended the suspects whom he identified as the appellants, whom they later handed over to the police.

8. PW5, Dr. Angore Gilbert, testified on behalf of Dr. Aziz, who carried out the post-mortem examination on the deceased's body on 26th August 2015. Dr. Aziz was reported to have been out of the country. According to the report, the body of the deceased had two cut wounds on the frontal aspect of the scalp with stitches, a fracture displacement of scalp on the site, haematoma 5x8 cm on the temporal aspect of the left scalp and swelling on the left eye. The death was stated as having been caused by cerebral haemorrhage secondary to severe head injury. The same evidence was given by PW8, Dr. Swaleh, who was erroneously recorded as PW7 and who produced the post-mortem report as exhibit 2.

9. PW9, Henry Sang (erroneously recorded as PW8), the government analyst, testified that Sgt Awayi (PW7), forwarded an exhibit memo accompanying blood samples of the deceased and the two appellants as well as a metal bar; that the profile generated from the blood stains on the metal bar matched those generated from the blood sample from the deceased.

10. From the evidence of PW7, Inspector Awayi (formerly a Sergeant attached to DCIO office Malindi in 2015), on completion of the investigations into the death of the deceased, he formed the opinion that the appellants had played a role in the death of the deceased; and that there was evidence that the deceased was initially beaten with an iron bar by the appellants before succumbing to death.

11. At the close of the prosecution case, each of the appellant was placed on his defence. The first appellant stated in his sworn evidence that, on 23rd August 2015, he was at home when he received information that his step sister, Riziki, who was in Malindi Hospital had passed away; that they started making funeral arrangements and travelled to Malindi mortuary from Kibaoni in Pumwani, a distance of more than one hour, where he was joined by his brother, the 2nd appellant, at the mortuary; that PW4, who had the money, had delayed; that, while they were waiting for him to arrive, they got the news of the deceased's death; that he was with Karisa Kahindi, his grandfather-Elias, his step uncle-Charo Katana and Riziki's mother; that, instead of transporting Riziki's body, it was decided that the vehicle should go for the deceased instead; that he remained at the mortuary from where he heard allegations that he was connected to the death of the deceased; that it was decided that Riziki be buried the following day; that, although the deceased passed away on the night of 18th August 2015, he never saw her body since the chief had them arrested by the police at night; and that, although he was aware that the deceased used to be suspected of being a witch, he had nothing to do with her death.

12. In his evidence, the 2nd appellant testified that the 1st appellant was his brother; that, on 17th August 2015 he left home at 6 am and went to his wine tapping work which they used to do in shifts; that while at work some distance from his village, he received a telephone call from his wife, Fatuma Charo, at 10 am informing him that Riziki, who had been admitted at Malindi Hospital, had died; that he proceeded to Malindi mortuary where he met the 1st appellant; that they viewed the body before taking a boda boda for a meeting to discuss Riziki's burial arrangements; that it was during the funeral arrangements that his uncle Charo received a telephone call informing him that the deceased, their grandmother, had passed away; that together with Francis Charo and Karisa Kaingu, they organised for the transportation of Riziki's body home and, while on their way, they received information on the allegation that they were connected with the death of the deceased; that a meeting was called to discuss the allegations; that they were arrested by police officers from the chief's office in connection with the murder; and that, although the deceased was a suspected witch, he was not involved in her death.

13. DW3, Cleophas Katana Charo, an uncle to Riziki, testified that, on 17th August 2015, he was a student at Kupatana Teachers College from where he left for the mortuary; that, on arrival at the mortuary, he met other family members, including the 1st appellant at about 11 am; that, while they were making arrangements for the preservation of the body, information was received regarding the assault on the deceased; that they transported Riziki's body home for burial; that, on arrival at home, they heard

allegations that the appellants were linked to the death of the deceased; that fearing for the safety of the appellants, the family sought refuge for the appellants; that from their home to the Hospital, it takes about 2 hours; and that the deceased was a suspected witch.

14. DW4, Kazungu Katana, the appellants' father, testified that, on 17th August 2015, he was with Charo Kaingu, who informed him that Riziki' illness was caused by the deceased; that PW3 was the one who informed them of the assault on the deceased, which he confirmed upon going home; that he was not told who assaulted the deceased; that they took the deceased to the hospital while making arrangements to bring Riziki's body home; that aboard the vehicle that they used to take Riziki home were the appellants; that due to the rumours that the appellants were involved in the death of the deceased, they looked for a safe haven for the appellants, and that he contacted Zawadi about the incident; that they agreed to report the matter to the police, and that the Assistant Chief instructed the police officers to go for the appellants; that the fact that the deceased was suspected of being a witch was normal; and that the appellants were well known to PW1 and PW2.

15. While returning the verdict of guilty on both the appellants the learned Judge found that the appellants entered the homestead of the deceased and thereafter dragged her out to the scene of the murder; that the unlawful acts were done with malice aforethought to cause death or to do grievous harm to the deceased; that the metal bar used to inflict harm was picked from the deceased's house, and was recovered at the scene; that the killing of the deceased took place during daylight; that there was no possibility of a mistaken identity as the appellants were not strangers to PW1 and PW2; that the alibi defence put forward by the appellants was displaced by the evidence of PW1 and PW2, whose evidence of identification was stronger than that of the appellants; that the alibi defence was of poor account and susceptible to fabrication as it did not account for the accused persons whereabouts at the time PW1 and PW2 stated that they had seen them at the scene of the crime; that the prosecution established beyond reasonable doubt that the appellants were at the scene of the crime, and that the numerous statements in their defence and their witnesses' testimonies was a conspiracy to support a non-existent alibi; and that the appellants were guilty of the charge of murder contrary to section 203 of the Penal Code.

16. On sentence, the learned Judge held that the murder of the deceased was so gruesome and, combined with other aggravating factors, far outweighed the mitigating factors put forth by the appellants. While discounting the 5 years spent in custody pursuant to section 333(2) of the Criminal Procedure Code, he sentenced each of the appellants to thirty-five (35) years imprisonment.

17. Dissatisfied with the decision, the 1st appellant, Katsunga Kazungu Katana, filed Criminal Appeal No 53 of 2021 while the 2nd appellant, Kazungu Katana Kazungu, filed Criminal Appeal No. 14 of 2021. We have consolidated both appeals since they arise from the same judgement.

18. In his grounds of appeal, the 1st appellants complained that the learned Judge erred in law: by convicting and sentencing him without considering that the sentence imposed was harsh and excessive as there was no direct evidence linking him to the murder as the evidence was circumstantial; by not considering that there was no malice aforethought; and by not considering his defence evidence.

19. The 2nd appellant based his appeal on the grounds that the learned Judge erred in law and fact: in failing to appreciate that no malice aforethought was proved; in failing to find that the investigation was shoddily conducted; in failing to evaluate and observe that some witnesses who were not cross-examined were not recalled; in failing to appreciate that the circumstantial evidence relied on could not sustain a conviction; in failing to appreciate that crucial witnesses were never availed by the prosecution; and in failing to appreciate that the appellants' defence was cogent and believable, and in dismissing the same.

20. At the virtual hearing on 22nd April 2024, the appellants, who appeared from Manyani Maximum Prison, were represented by learned counsel, Mr Joseph Mathenge Kihara while learned prosecution counsel, Ms Kanyuira, represented the respondent. Both counsel relied on their submissions, which they briefly highlighted.

21. In their submissions, the appellants cited: Bukenya v Uganda & Others [1972] EA 542 on the proposition that the prosecution must make available all witnesses necessary to establish the truth even if their evidence may be inconsistent; Johnson Muiruri v R [1983] KLR 445, highlighting the need for corroboration where a child of tender years makes unsworn statement; Kibangeny Arap Kolil v R, (1959) EA 92, stressing that even where the evidence of a child of tender years is sworn (or affirmed), while there is no necessity for its corroboration as a matter of law, a court ought not to convict upon it if uncorroborated without warning itself of the danger of so doing; *Said v R (Criminal Appeal 33 of 2021)* [2022] KECA 27 (KLR) (21 January 2022) (Judgment), was cited with reference to the need to explain the chain of custody of the alleged murder weapon and the necessity of displacing alibi defence; and MW v R [2019] eKLR on the proposition that where grave contradictions exist in the evidence of the prosecution's case, the same must be reconciled.

22. On the other hand, the respondent cited S v Malgas (117/2000) (2001) ZASCA 30; [2001] 3 All SA 220 (A) (19 March 2001) and Mokela v The State (135/11) 120111 ZASCA 166, highlighting the court's discretion in sentencing and the reluctance by an appellate court to interfere therewith; Bernard Kimani Gacheru v R (2002) eKLR, highlighting the circumstances under which an appellate court interferes with the discretion on sentencing; Nzuki v R (1993) eKLR on the proposition that malice aforethought may be inferred from the circumstances; and Peter Kiambi Muriuki v R [2013] eKLR, underscoring the part played by recognition where the defence of alibi is raised.

23. According to the appellants, whereas the evidence of PW1 and PW2 placed the appellants at the scene of the crime and disclosed that one Katana Mtawali was also on the scene, the two witnesses differed on the role played by the said person; and that the option by the prosecution not to prefer charges against Mtawali ought to draw an inference that, had he been called, his evidence would have been adverse to the prosecution's case. The respondent did not respond to this submission.

24. It is true that the general position is that the prosecution in a criminal trial should call witnesses to prove its case and should not withhold readily available witnesses even if their evidence would be adverse to the prosecution case. That position was set out by this Court in Thomas Patrick Gilbert Cholmondeley v R [2008] eKLR in which it was held that:

> "...the duty of a prosecutor, acting on behalf of the Republic is not to secure a conviction at all costs but to be a minister of justice, i.e. to help the court arrive at a just and fair decision in the circumstances of each case. Any public prosecutor who sees his or her duty as being to secure convictions misses the point. As ministers of justice, public prosecutors must place before the court all evidence, whether it supports his or her case or whether it weakens it and supports the case for the accused."

25. However, in the case of Suleiman Otieno Aziz v R [2017] eKLR, this Court expressed itself as hereunder:

> "Secondly, as propounded in Bukenya v. Uganda [1972] EA 549, the proposition that the court may draw an adverse inference from the prosecution's failure to call important and readily available witnesses arises in cases where the evidence called by the prosecution is

barely adequate. In *Donald Majiwa Achilwa & 2 Others v. Republic, Cr. App. No 34 of 2006*, this Court explained the position thus:

> 'The law as it presently stands, is that the prosecution is obliged to call all witnesses who are necessary to establish the truth in a case even though some of those witnesses' evidence may be adverse to the prosecution case. However, the prosecution is not bound to call a plurality of witnesses to establish a fact. Where, however, the evidence adduced barely establishes the prosecution case, and the prosecution withholds a witness, the court, in an appropriate case, is entitled to infer that had that witness been called his evidence would have tended to be adverse to the prosecution case.'"

26. Therefore, where there is some evidence gathered by the prosecution, but which the prosecution fails to place before the court without any reasonable justification, and the evidence adduced barely establishes the prosecution's case, the court would be entitled to draw an inference that the omitted evidence, had it been availed to the court, would have been adverse to the prosecution's case. In this case, it is true that the evidence of PW1 and PW2 disclosed the presence of Katana Mtawali at the scene. It is also true that the failure to charge him was not explained, although in PW3's evidence, he stated:

> " I asked Ali Anderson what had happened. He told me that three people had come, Katsunga, Mtawali and Kazungu. Ali Anderson narrated how the three assaulted the deceased. Katana Mtawali ran away."

27. From PW3's evidence, it would appear that Katana Mtawali was not to be found, although the position could have been made clearer. Nevertheless, the charge as presented indicated that the offence was committed by the appellants jointly with others not before the court. In this case, we do not know whether any statement was taken from the said Mtawali and, therefore, we cannot state with certainty that Mtawali's evidence was concealed from the court or the defence. In the absence of evidence that his statement was recorded, we are unable to ascertain how his presence at the hearing would have aided the appellants' case. On the other hand, if Mtawali was readily available and had recorded his statement, nothing prevented the appellants from calling him as their witness, or from insisting that the prosecution hands him over to the defence as their witness. We are guided by the case of Mwangi v R [1984] KLR 595 where this Court stated that:

> " 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."

28. That ground must fail.

29. Related to this ground, although not expounded in the submissions, was that the witnesses who were not cross- examined were not recalled by the Court. We have not seen from the record any application by the appellants during the proceedings seeking the recall of any witness.

30. It was submitted that the two key witnesses in this case, PW1 and PW2, being minors, their evidence ought to have been corroborated. In this case, both PW1 and PW2 gave sworn evidence. Section 124 of the *Evidence Act* provides that:

> Notwithstanding the provisions of section 19 of the *Oaths and Statutory Declarations Act*, where the evidence of alleged victim admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be

liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him.

31. Section 19 of the *Oaths and Statutory Declarations Act* deals with unsworn statements of children of tender years. In the case before us, PW1 and PW2 testified under oath. Their evidence did not, as a matter of law, require corroboration. This Court dealt with the evidence of children in similar circumstances in the case of Isaack Kijiba v R Nairobi Court of Appeal Criminal Appeal No. 80 of 1980 (UR) and held that:

> " Children can make good witnesses, and they often do make good witnesses. Two of the children gave sworn evidence which did not require corroboration. The unsworn evidence of the third child Adan Ngunyo was corroborated by the other two children who also corroborated each other, and the appellant himself corroborated the evidence of the three children by the remarks he made at the identification parades that they knew him previously. The learned judge was fully justified in accepting their evidence."

32. It was submitted that, whereas PW1's evidence was that she singlehandedly witnessed the incident, PW2's evidence was that they were together; and that it was unfathomable that PW1 would forget such crucial evidence on the sequence of the events that took place that fateful day. However, our perusal of the evidence does not fully support the appellants' submissions. PW1's evidence was to the effect that:

> " While beating her, I was alone seeing them.
>
> Enock, Esther and Alii were behind."

33. PW1's evidence was confirmed by PW2, who stated that:

> " PW1 was ahead of me. PW1 saw very well the incident. I did not see clearly what happened. I then ran away to hide...There were three people who attacked the deceased. They all went with the deceased. We could see them assaulting the deceased."

34. According to PW3, the first person she saw as between PW1 and PW2 was PW2, who narrated to her what took place. The totality of the evidence of PW1, PW2 and PW3 clearly reveals that, although PW2 was behind PW1 and hence PW1's impression that she alone witnessed the attack on the deceased, PW2 did witness the incident and was able to relay the information to PW3 after PW1 ran away to report the incident.

35. It was further submitted that there were discrepancies in the evidence of the two eye witnesses, PW1 and PW2 regarding the weapon used in attacking the deceased; and that it was not clear whether the weapon of attack was a panga, metal bar or a stick. PW1 was categorical in her evidence that the weapon in question was an iron bar while PW2's testimony was that:

> "I saw Katana Mtawali picking something like a stick. I didn't know what it was...We realised Katunga Mtawali was holding something which looked like a panga. We were scared. They picked the iron bar which we thought was a panga from out homestead. It was an iron bar from a bicycle."

36. From the evidence of PW1 and PW2, it was clear that the weapon used was an iron bar. The impression of discrepancy seems to stem from the evidence of PW2 regarding the other items that were at the scene

which PW2 was not very clear about. As was held by the predecessor to this Court in John Cancio De SA v V N Amin [1934] 1 EACA 13:

> " Probably every judge has had occasion at some time or other to regard discrepancies as showing veracity, and to regard uniformity as showing fabrication, but it depends upon the nature of the discrepancies and the uniformity. If two people allege that they made a journey together from Kampala to Nairobi and they differ on such details as the time the train stopped at Eldoret, what they had for lunch and dinner, and whether it rained on the journey and where, it would be more reasonable to argue a difference in memory than that the journey was never undertaken. But if one says they made the whole of the journey by rail, and the other says they went to Entebbe by car and thence by air to Nairobi, it would be more reasonable to argue that the journey never took place than that one or both suffered from a defective memory."

37. This Court in John Nyaga Njuki & Others v R [2002] eKLR observed that:

> " In certain criminal cases, particularly those which involve many witnesses, discrepancies are in many instances inevitable. But what is important is whether the discrepancies are of such a nature as would create a doubt as to the guilt of the accused. If so, then the prosecution would not have discharged the burden squarely on it to prove the case beyond any reasonable doubt. However, where discrepancies in the evidence do not affect an otherwise proved case against the accused, a court is entitled to overlook those discrepancies and proceed to convict the accused. The discrepancies in the evidence in the matter before us are in our view, of a minor nature considering the facts and circumstances of the case."

38. In the final analysis where it is alleged that there were contradictions in the evidence by the prosecution witnesses, the court should be guided by the position adopted by this Court in *Joseph Maina Mwangi v R CA No. 73 of 1992* (Nairobi) (UR) that:

> " In any trial there are bound to be discrepancies. An appellate court in considering those discrepancies must be guided by the working of Section 382 of the Criminal Procedure Code, viz whether such discrepancies are so fundamental as to cause prejudice to the Appellant or they are inconsequential to the conviction and sentence."

39. We have considered the evidence on record, but do not agree that there were material discrepancies in the evidence of PW1 and PW2 to vitiate the appellants' conviction.

40. The appellants also took issue with the fact that, although PW3 arrived at the scene and found the deceased alive and nursing her injuries, she did not bother to enquire from the deceased the identity of the perpetrators, "an obvious human reaction". According to PW3's evidence:

> "I saw blood on the road. I followed the blood. I then saw the deceased's tobacco tin. I realised it belonged to the deceased. I saw a body in the bush. I got shocked and ran to call the neighbours. I called my brother in law. I screamed and those who were at the burial came. I took my lesso and tied her. I could not see the children. I screamed. Ali Anderson came from hiding. The neighbours called for an ambulance. It came and took the deceased. I asked Ali Anderson what had happened."

41. In cross-examination, PW3 explained that:

> " She was not talking."

42. In our view, considering the prevailing circumstances, it was not out of the ordinary for PW3 to have sought help before seeking to know from the deceased what had taken placed who, in any case, was not talking, and having been informed of the incident by PW2.

43. The appellants took issue with the fact that Cpl Aduda who recovered the murder weapon from the scene was not called as a witness. While it may well have been prudent for Cpl

Aduda to have been called as a witness, having been the initial investigation officer, the failure to call him is in our respectful view not necessarily fatal to the prosecution case, his role having been taken over by PW6. As appreciated by this Court in Kiriungi v R (2009) KLR 638:

> "...the effect of failure to call police officers involved in a criminal trial, including the investigating officer, is not fatal to the prosecution unless the circumstances of each particular case so demonstrate. We have examined the circumstances of this case and we are satisfied that the evidence of the investigating officer and the arresting officer would not have been prejudicial to the prosecution case as it was established beyond doubt that the appellant was involved in the crime with which he was charged."

44. The appellants also took issue with the fact that the chain of custody of the murder weapon was not procedural. The appellants seem to be of the view that the weapon referred to in the proceedings may not have been the one that was used in attacking the deceased since there was a break in the chain of its custody. However, the evidence of PW8 was clear that the DNA profile generated from the metal bar matched the profile generated from the deceased's blood samples. To our mind, nothing turns on the submissions made by the appellants since there was no allegation that the appellants' DNA profiles were traced to that weapon. In any case, the mere fact that a murder weapon is not traced is not necessarily fatal to the prosecution case as long as there is credible evidence that the offence was committed. As observed by the Court in the case of Karani v Republic [2010] 1 KLR 73:

> " 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."

45. This case must be distinguished from the case of Said v R (supra) whose outcome was based on circumstantial evidence. In the present case, there was direct evidence linking the appellants to the offence. This also disposes of the complaint that the evidence was purely based on circumstantial evidence.

46. According to the appellants, it was an unjust for the trial court to have ignored the alibi defence evidence tendered by their four defence witnesses, yet the prosecution did not disprove their credibility. The respondent's position was that the learned Judge considered the alibi defence and weighed it against the prosecution case and rightly preferred the evidence of PW1 and PW2.

47. In his judgement, the learned Judge expressed himself as follows:

> "I have given careful consideration to the whole evidence adduced before me by the prosecution and the defence. I am not inclined to believe the alibi defence of the accused person and their witnesses that they were not at the scene of the incident where the deceased was beaten to death. I prefer the evidence of (PW1) and (PW2) whose identification evidence was strong than that of the accused and their witnesses the demeanour. This was a choreographed defence aimed at controverting the prosecution case. In my view, the alibi defence was of poor account and susceptible to fabrication as it did not account for the accused persons' whereabouts at the time (PW1) and (PW2) stated they saw them at the scene of the crime. The cogent and credible evidence by the prosecution fully discharged the burden of proof of beyond reasonable doubt. I think the whole evidence on this matter by the accused was aimed to provide a narrative so as to create a doubt in the mind of the Court that the deceased was killed by some other persons who are yet to be apprehended by the police. Contrary to the assertion evidence given by eye-witness (PW1) and (PW2) on identification displaced any such doubts that the accused were never at the scene of the crime."

48. In light of the foregoing, it is unfounded to accuse the learned Judge of not having considered the appellants' alibi defence, which was considered and rejected.

49. However, the appellants took issue with the comments made by the learned Judge to the effect that:

> "In particular, there is a danger in this part of the country where witnesses sometimes will too readily come to the aid of their kinsman when it comes to the stage of exonerating him from culpability on matters of witchcraft behind the murder of the suspected witch or wizard."

50. We agree with the appellants that the foregoing remarks, coming from the learned Judge without any evidence in support thereof, were unjustifiable. Courts ought not to make generalised statements not backed by evidence on record except in cases where the facts justify the court in taking judicial notice of particular circumstances. The circumstances in this case did not justify such course. In our considered view, there is nothing inherently wrong with relatives testifying in an accused's defence as long as they are competent to give evidence in support of a party's case. This was the position in Keter v R [2007] 1EA135, where it was held, inter alia, that:

> "Whether or not a witness is to be believed is a matter for the discretion of the trial court. Judicial discretion is based on evidence and sound principles. The practice of criminal law courts is that the trial magistrate or judge has to observe the demeanor and other factors to decide whether any particular witness is a witness of truth or not. There is no principle of law which entitles a court to disbelieve a witness merely because the witness is related to either the complainant or the accused."

51. In this case, the appellants were well known to PW1 and PW2. The evidence adduced was that of recognition as opposed to identification and, as was held in Anjononi & others v R (1976-80) 1 KLR 1566 at page 1568:

> "Recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends on the personal knowledge of the assailant in some form or another."

52. In Isaack Kijiba v R (supra) this Court expressed itself as follows:

> " In our opinion also, the nature of the prosecution evidence was such as to satisfy us that the appellant's alibi could not be true. The appellant was seen catching hold of the deceased, doing violence to him by knocking him down on the stone, and forcibly abducting him away from his school companions which led to the irresistible inference that the child who was not seen alive again was killed by the deceased. The totality of the circumstantial evidence could only lead to the conclusion, as it did, that these proved inculpatory facts were incompatible with the appellant's innocence and incapable of explanation upon any other hypothesis than that of his guilt."

53. The same position was adopted by this Court in Peter Kiambi Muriuki v R [2013] eKLR where it held that:

> "The evidence on record is one of recognition and we are persuaded that the alibi raised by the appellant in his defence is not convincing. Both PW1 and PW2 were well known to the appellant who was their neighbour. We are satisfied as to the identity of the appellant as the perpetrator of the crime."

54. On the basis of the evidence presented, and as the appellants' evidence did not address the time the incident was said to have occurred, the learned Judge was entitled to arrive at the impugned decision on the alibi defence.

55. On the sentence, the appellants submitted that, since in their mitigation the appellants expressed remorse for the offence and also stated that they were the sole breadwinners of their polygamous families, their mitigation was compelling, and that they ought not to have been sentenced to 35 years imprisonment. The respondent took the view that, sentencing being in the discretion of the trial court, this Court ought not to interfere with such exercise of discretion unless it is shown that the discretion was not properly exercised. This Court addressed the issue in Bernard Kimani Gacheru v R [2002] eKLR and held that:

> "It is now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account, some wrong material, or acted on a wrong principle. Even if, the Appellate Court feels that the sentence is heavy and that the Appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exist."

56. We were not sufficiently addressed on why we should interfere with an otherwise lawful sentence and have no justification for doing so.

57. Although in their grounds of appeal the appellants alluded to the fact that malice aforethought was not proved, the submissions did not address the issue which the respondents addressed at length. In this case, from the nature of the injuries inflicted, malice aforethought was readily inferred. As was held by this Court in the case of Bonaya Tutut Ipu and Another v R [2015] eKLR in which the persuasive

authority of the Ugandan Court of Appeal case of Chesakit *v UG, Criminal Appeal 95 of 2004* was cited with approval:

> " In determining a charge of murder whether malice aforethought has been proved, the court must take into account factors such as the part of the body injured, the type of weapon used if any, the type of injuries inflicted upon the deceased and the subsequent conduct of the accused person."

58. In this case, the injuries were grave. As a result of the attack, the deceased sustained injuries on the head and had a fracture on her arm. Such injuries were either meant to cause her death or cause her grievous harm. Accordingly, malice aforethought may be inferred from the acts of the accused person as stated in Ernest Asami Bwire Abanga alias Onyango vs R (CACRA No. 32 of 1990), where the Court held:

> " the question of intention can be inferred from the true consequences of the unlawful acts or omission of the brutal killing, which was well planned and calculated to kill or to do grievous harm upon the deceased."

59. We have re-evaluated the evidence on record as presented before the learned Judge. We find no merit in this appeal which we hereby dismiss in its entirety.

60. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 20TH DAY OF SEPTEMBER, 2024.

A. K. MURGOR

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JUDGE OF APPEAL

DR. K. I. LAIBUTA

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JUDGE OF APPEAL

G. V. ODUNGA

.....

JUDGE OF APPEAL

I certify that this is the true copy of the original

signed

Deputy Registrar