Namayengo alias Nakhafanyaje & 4 others v Republic (Criminal Appeal 215 of 2019) [2024] KECA 1203 (KLR) (20 September 2024) (Judgment)

Neutral citation: [2024] KECA 1203 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 215 OF 2019

HM OKWENGU, JM MATIVO & JM NGUGI, JJA

SEPTEMBER 20, 2024

BETWEEN

DAVID WAFULA NAMAYENGO ALIAS NAKHAFANYAJE ..... 1ST APPELLANT

RASTO KIBUK NAMAYENGO ..... 2ND APPELLANT

MORRIS WAMALWA ..... 3RD APPELLANT

MOSES NAMAYENGO ..... 4TH APPELLANT

LEONARD LIRU NAMAYENGO ..... 5TH APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Bungoma (Ali-Aroni, J.) dated 10th June, 2019 in HCCRC No. 31 of 2015)

JUDGMENT

1. The five appellants herein, David Wafula Namayengo alias Nakafanyaje, Rasto Kibuk Namayengo, Morris Wamalwa, Moses Namayengo, Leonard Liru Namayengo, were the 1st, 2nd, 4th, 6th and 7th accused persons respectively in the trial before the High Court in Bungoma, Criminal Case No. 31 of 2015. Jamine Sindani and Fred Machenje alias Obunga, were the 3rd and 5th accused persons respectively in the same trial. They were all charged with four (4) counts of murder contrary to section 203 as read with section 204 of the Penal Code. The particulars of the offences were that on the 22nd day of October, 2015, at Kapsika village, Cheptais Sub-County within Bungoma County, the appellants herein together with the other two accused persons murdered Stephen Wanjala and his three children namely Brian Wafula, Shaline Nasimiyu and Briton Wanjala.

2. The appellants together with the two other accused persons who were acquitted at trial pleaded not guilty and a fully-fledged hearing ensued. At the conclusion of the trial, the five appellants herein were convicted and sentenced to life imprisonment. Whereas the trial court found no evidence linking the two other accused persons to the said murders; and thus, acquitted them.

3. The appellants were aggrieved by that decision and have lodged the present appeal. Consequently, the appellants prayed that the appeal be allowed and the convictions and sentence imposed upon them be quashed.

4. This is a first appeal. Accordingly, the role of this Court is to re- evaluate evidence, assess it, weigh it as a whole and reach our own independent conclusions. In doing so, we are required to remember that we neither saw nor heard the witnesses, for which we must make allowance. See Okeno vs. Republic [1972] EA 32 where the predecessor of this Court held thus:

> " 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 v. R., [1957] E. A. 336) 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. (Shantilal M. Ruwala v. R., [1957] E.A. 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 findings and conclusions; 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 v. Sunday Post, [1958] E. A. 424."

5. This is the standard of review and analysis we shall adopt in this judgment. The evidence that emerged during the trial was as follows.

6. The prosecution called a total of nine (9) witnesses. The chronology of events that took place on the material day of the incident and led to the deaths of the deceased persons (Stephen Wanjala and his three children) were, at the trial, unraveled by Veronica Nanjala, the deceased daughter (PW1); Joyce Nanjala, the deceased's 2nd wife (PW2); Alice Nangekhe Opicho, the deceased's 1st wife (PW4); Mark Wamalwa, the deceased's neighbour (PW8); Geoffery Mabinda, the deceased's neighbour (PW9); and Christine Wamalwa, the 2nd appellant's lover (PW3).

7. Veronica Nanjala (PW1), who gave an unsworn statement during trial as she was thirteen (13) years at the time, testified that on the material night, at around 8.00pm, she was at home with her father (deceased), mother (PW2) and her siblings: Brian, Robin, John, Vivian, Shaline and Bahati. The deceased left the house to go and relieve himself in the toilet outside. Immediately thereafter, PW1 heard what seemed to be a gunshot outside and the deceased returned to the house and told PW2 "Mama Robin I am dying". He had been shot in the abdomen and was bleeding. PW1 and PW2 assisted the deceased to push the door in order to close it. However, two people hit it open with a stone and entered the house. PW1 identified the 1st and 2nd appellants as the assailants, using a tin lamp that illuminated the house (sitting- room) at the time, as they were their neighbours and uncles (i.e. step-brothers of the deceased). According to PW1, the 1st appellant had a gun but she was not certain if the 2nd appellant was also armed. PW1 then rushed to hide in the bedroom with Robin, Bahati and John. Meanwhile, she heard the assailants tell the deceased to kneel down as they beat him. During this time, the deceased and PW1's other siblings, Brian, Shaline and Valencia were shot and killed in the process.

8. The narration of Joyce Nanjala (PW2) was similar to that of PW1, save for the fact that she recalled that when the assailants forcefully entered the house, the deceased told her to go to the bedroom but she declined and hid behind the door. As she hid there, she testified that she witnessed the shooting of all the deceased persons by the 1st appellant. However, one of the children who was shot did not die but was injured. She further told the court that the 1st appellant shot at her but missed and she hid behind the main door at the entrance. She also said that the gun used by the 1st appellant was long and that he shot randomly.

9. After the shooting, the assailants lingered in the house for about five minutes before they left. After confirming that the assailants had left, PW2 went to the house of Joseph Sindano, a friend to the deceased, and told him what had happened. Sindano called the chief and police, who later came and accompanied them to the scene of crime. In addition to the two assailants who entered the house, PW2 testified that there were other people outside the house, some of who were knocking the windows. However, she was not able to identify them.

10. According to PW2, the 1st appellant had a land dispute boundary with the deceased and had insulted and threatened the deceased. The deceased had reported to both the chief and police. Lastly, she told the court that she only saw and recognized the 1st appellant during the incident. However, during trial, she said that she knew all the accused persons as follows: the 1st accused was the deceased's step brother; 2nd accused was the deceased's cousin; 3rd accused was a neighbour; the 4th and 5th accused were the deceased's step brothers; the 6th accused was the deceased's cousin; and the 7th accused was the deceased's uncle.

11. During cross-examination, she pointed out that there had been allegations during the funeral of one Bramwell, who was the father to the 7th accused (5th appellant), that the deceased had bewitched him and caused his death. Bramwell had been buried two days before the incident and a family meeting had been called to resolve the issue.

12. On her part, Alice Nangekhe Opicho (PW4), testified that on the material night, she was in her house with her children Linda, Mitchell, Nelima, Abina and Sarah. At that time, which was between 7.00pm and 8.00pm, the deceased was in the second house with her co-wife (PW2). Thereafter, the deceased came to her house and asked if anyone wanted to go and relieve themselves, but they all said no. He then went to relieve himself and shortly afterwards, she heard a gunshot. She saw the deceased run towards her co-wife's house saying "Mama Robin ninakufa". She quietly got out of her house and hid near a makeshift kitchen which was covered with banana leaves. From there, she saw four people, David Namayengo, Rasto Kibuki, Wangulupi and Wangila; that is, the 1st, 2nd and 4th appellant respectively, and one Brian Wafula who was not before court. These were people who were well known to her as they were relatives and neighbours. They were leaving and passed by her door. However, she did not see them carrying anything. It was her testimony that there was moonlight on that night and she used it to identify the said people.

13. After they left, she went to her co-wife's house and saw that they had killed the deceased and some of the children. She screamed and headed to a neighbour, Robert Nyongesa, who accompanied her back to her co-wife's house. Later, the police came and told her to take the injured child to hospital where they were admitted for five (5) days. She further testified that there was a land boundary dispute between the deceased and the 4th appellant and that they used to fight all the time for quite a while. She also testified that there were allegations that the deceased killed one Bramwell as he died under strange circumstances.

14. Mark Wamalwa (PW8) testified that he heard several gunshots coming from the deceased's home on the material night at about 8.00pm. He was scared and remained indoors. Moments later, he heard the voice of PW2 from outside and that is when he opened the door to his house. He called the assistant chief and joined other neighbours who were headed to the deceased's house; whereupon they found the deceased and his three children dead and one of the children critically wounded. After sometime, the police arrived and carried the bodies of the deceased persons to the mortuary.

15. According to PW8, the deceased had a long-standing land dispute with his brother, the 3rd appellant herein. However, according to him, the matter was resolved by the chief in July 2015. Even then, he testified that when Bramwell died mysteriously, the deceased did not participate in his burial and the 5th appellant herein got annoyed and said that he would avenge his death concluding that the deceased had something to do with Bramwell's death.

16. Geoffrey Mabinda Sindani (PW9), a member of nyumba kumi, testified that on the material day at around 6.00pm, he overheard the 2nd and 5th appellant, together with one Mzee and Bravo Wangila, say that they had put an informer to check on the deceased's movements. Later that evening, one of the deceased's wives went by his house and informed him that the deceased and three (3) of his children were no more. She had blood all over her. He asked her to get inside his house and he locked the door. Shortly afterwards, the police arrived and they all went to the scene of crime where they found the deceased and three of his children dead. Similarly, just like PW2, PW4 and PW8, PW9 testified that the deceased and the 3rd appellant herein had a land dispute, and upon Bramwell's death, it was alleged that it was the deceased who had killed him.

17. PW3, Christine Wamalwa – who was a girlfriend to the 2nd appellant, testified that prior to the day of the incident, she visited the 2nd appellant and stayed with him for three days. During that time, Jamine and Wafula went by the house and had discussions with the 2nd appellant. On the material night at about 8.00pm, the 2nd appellant left his house with Jamine and Wafula and returned at 10.00pm. Upon his return, he washed his clothes which were stained with blood and also took a bath. Later on, the 2nd appellant received a call in which he answered that he had arrived home safely. Afterwards, when they were about to sleep, the police came and arrested both of them. But she was later released from custody.

18. Dr. Haron Ombongi was PW5. He conducted the postmortem on all the four victims. His results were that Briton Wanjala had a penetrating gunshot wound on the left side of the face causing a fractured scalp and another one on the anterior abdomen. The latter affected the spleen and perforated the gut and abdomen. The cause of death was severe head injury and multiple organ damage.

19. For Shaline Wanjala, the doctor observed two bullet wounds on the right arm and lower limb. He also saw haematoma of both lungs; a fracture of the spinal column; and a spinal cord injury. He concluded that the cause of death was cardio-pulmonary arrest due to the gunshot wounds.

20. Respecing Brian Wanjala, Dr. Ombongi observed three bullet wounds; a fractured scalp with exposed brain matter; facial fractures; and fractures of the left humerus and scapula. He concluded that the cause of death was severe head injury due to gunshot wounds.

21. Finally, regarding the body of Stephen Wanjala, Dr. Ombongi saw four bullet wounds on the anterior chest wall, lumbar region, and on the left and right thighs. He also observed haematoma and cardiac injuries as well as penetrating abdominal injuries which led to the perforation of the spleen and gut. His conclusion was that the cause of death was multiple injuries to the deceased's organs due to gunshot wounds.

22. Bramwel Kise Kiboi, the area chief, was PW6. He confirmed the existence of a land boundary dispute between the deceased and the 3rd appellant, which he said was resolved. However, a few months later, the deceased lodged a complaint regarding the same land and alleged that the boundary had been moved. He also told PW6 that his life had been threatened by the 2nd appellant and one Bravin Wangila; and he advised him to report the matter to the police. Thereafter, he did not hear from him and believed that he had reported the matter as advised.

23. On the material night at about 10.00pm, Bramwel got a call from the Deputy County Commissioner who inquired about the incident at the deceased's home. He told him that he had no information but that he had heard gunshots and would do a follow up. He then called a retired OCS who informed him that he heard shouts coming from the deceased's home, and that the deceased and his children had been shot. The following morning, he went to the scene of crime and confirmed the information he had been given, from the police who were present.

24. PW7, was Constable Denis Ouma, the investigating officer who gave formal evidence about how the investigations unfolded. He told the court that on the material night, he received a call from DCIO, Chief Inspector Makena, to investigate homicides at the home of the deceased. He went to the scene of crime with some of his colleagues whereby they found four bodies in pools of blood. They also found PW2 who was in a corner with three children. They interrogated her and she informed them that the deceased had been attacked by the 2nd appellant and other people whom she did not recognize. They also interrogated PW4 who told them that she saw three people, that is, the 1st and 3rd appellant; and one Fred Machange, who was the 5th accused at the trial court. Later that night, they conducted a random search in the village and arrested some of the accused persons and many others, who included the 1st, 2nd, 3rd appellants and the said Fred. During the arrests, police recovered a long rain coat and muddy gumboots from the 2nd appellant's house. Afterwards, they released some of the people who they had arrested. In addition, PW7 testified that on the material night, there was moonlight and since PW2 and PW4 houses were 10 meters apart, one could see what was happening in the other house.

25. When they were placed on their defence, the appellants gave sworn testimonies and called no witnesses.

26. The 1st appellant confirmed that the deceased was his step- brother but denied killing him or knowing the circumstances of his death. He claimed that on the material night, he was at home with his family. He further claimed that the prosecution witnesses knew him very well and had been coached by the State to implicate him in the murder incident.

27. The 2nd appellant also confirmed that the deceased was his cousin. He too claimed that on the material night, he was at home with his "wife" i.e. the woman he had just agreed to marry. Later that night, the police went to his house and arrested him. They also searched his house and took two phones, a pair of gumboots and kshs. 27,000.00/= that he had put under the mattress. He further testified that PW3 lied to the court when she said that he returned home with blood stained clothes. According to him, PW3 only said that because she was threatened that she would be charged if she did not say as the prosecution coached her to.

28. The 3rd appellant testified that the deceased was his step brother and that on the material night, he was at home with his wife. However, at around 8.30pm, it was drizzling and they had an unusual sound from outside. Later on, the police went to his house and arrested him. He confirmed that he had a land boundary dispute with the deceased but that it was resolved. In addition, he claimed that he did not know whether the deceased killed his uncle by the name Lumbuko (Bramwell); and neither did he hear of any revenge mission mentioned during his funeral.

29. The 4th appellant testified that the deceased was his cousin but denied killing him and his three children. He claimed that on the material night, he was at home with his wife and heard a gunshot at around 8.00pm. He told his wife that it looked like SLDF were back; and they went to sleep. The following morning, they saw people at the deceased's home and when he went to check, he did not find the deceased's body and that of his three children; but there was a lot of blood at the scene. Later on, the clan met to give a way forward on the matter and the deceased persons were buried thereafter. On 11th September, 2015, he was arrested by the police who inquired about the quarrel between the deceased and the 3rd appellant. He told them that there was a land boundary dispute between them but the same had been resolved. It was his testimony that he had a good relationship with the deceased and that he was arrested because he refused to write a statement that implicated him to the murder incident.

30. Similarly, the 5th appellant denied killing the deceased and his three children. He confirmed that the deceased was his nephew. He testified that on the material night at about 8.30pm, he heard several gunshots and thought that it was the police fighting thugs. Shortly afterwards, Richard Wangatia, the village elder, called and informed him about the incident at the deceased's home which had been reported by his wife. Later, the police arrested the 1st – 5th accused persons. Whereas he was arrested on 12th December, 2015. He further testified that he did not have a dispute with the deceased and that when Lumbuko died, it was his (Lumbuko's) wife who said that it was the deceased in this case who had killed him.

31. The testimonies of the other two accused persons is not necessary with regard to this appeal as they were acquitted. Be that as it may, they too denied killing the deceased and his three children.

32. The appeal was argued by way of written submissions by both parties. During the virtual hearing, learned counsel, Mr. Okoth, appeared for the appellants and learned Senior Prosecuting Counsel, Mr. Oyiembo appeared for the respondent.

33. In their Supplementary Memorandum of Appeal filed by their lawyer, the appellants raised four (4) grounds of appeal, which are that:

    1) The learned judge erred in fact and in law in finding that the circumstances under which the appellants were identified were safe for positive recognition.

    2) The learned judge erred in fact and in law in finding that the appellants were positively identified/recognized by the witnesses.

    3) The learned judge erred in fact and in law in finding that the appellants were placed at the scene of the crime.

    4) The learned judge erred in fact and in law in finding that the mens rea was proved beyond reasonable doubt.

34. As is readily obvious, the grounds of appeal, as argued by the appellants, are collapsible into two:

    a. Whether the identification evidence relied on by the Court was error-free and safe for conviction; and

    b. Whether mens rea was proved beyond reasonable doubt.

35. Regarding the identification evidence, the appellants argue that the incident happened at night at around 8 pm on a dark day when it had rained as per the testimonies of the witnesses. They argue that only three identifying witnesses were presented: PW1; PW2 and PW3. PW1 and PW2, they argue, only identified a tin lamp as the source of light – and, even then gave contradictory evidence with PW1

saying she saw the 1st and 2nd appellants while PW2 said she only saw the 1st appellant. PW4, on the other hand, the appellants argue, claimed to have have recognized 4 attackers; the 1st, 2nd appellants, Wangila and Wangupi. They point out that although she claimed that she was aided by moonlight, she misled the court because evidence showed that it had rained heavily that night; and that it was, therefore, unlikely that there was moonlight. In any event, the appellants argue that PW4 claimed to have been hiding in a makeshift kitchen behind banana leaves and that, therefore, it was unlikely that she saw anything.

36. Based on these arguments, the appellants rely on the famous decision in R v Turnbull (1971) OR 227 to make the argument that the circumstances were simply not ideal for error-free identification. In any event, the appellants argue that there was absolutely no mention of the 3rd, 4th and 5th appellants as having been seen by any of the witnesses at the scene.

37. On the issue of mens rea, the appellants argue that having ruled out that the boundary dispute was the cause of bad blood between the deceased and the appellants since the issue had been resolved, the learned Judge should have found no mens rea was established beyond reasonable doubt. This is because, the appellants argue, it was not established to the required degree of proof that the second motive relied on by the court – that some of the appellants had threatened to kill the deceased out of suspicion that he had something to do with the death of their brother, Bramwel – was not proved.

38. The appellants argue that the alleged threats as the motive for the killings was not proved because the threats as reported by PW2 and PW6 allegedly issued by the 1st and 2nd appellants were so issued, regarding the boundary issue which the trial court found to have been resolved; while the ones issued by the 5th respondent cannot apply because none of the witnesses stated that the 5th appellant was present at the scene. In any event, that threat cannot be taken as proven because PW8 did not testify that the 5th appellant was one of the people he allegedly saw plotting the death of the deceased earlier in the evening the incident happened.

39. On its part, the respondent argues that all the elements of murder were firmly established at trial. Regarding identification, the respondent says that evidence was clear that circumstances were ideal for error-free identification; and that it was identification by recognition; and by multiple witnesses. On the issue of mens rea, the respondent argues that the manner of killing (shooting) and the kinds of weapon used (gun) was sufficient proof that the appellants intended the deaths of the victims. Further, since they were acting in concert, the mens rea applies to all of them.

40. We have carefully assessed the entire record of the trial court, as rehashed above and we have keenly considered the rival arguments of the appellants and the respondent.

41. The ingredients of the offence of murder were identified by this Court in Roba Galma Wario v Republic [2015] eKLR as follows:

> "For the conviction of murder to be sustained, it is imperative to prove that the death of the deceased was caused by the appellant; and that he had the required malice aforethought. Without malice aforethought, the appellant would be guilty of manslaughter, as it would mean the death of the deceased during the brawl was not intentional."

42. In the present case, the fact of the death of the deceased and his four children is not in dispute. It was clearly established by the evidence of the post-mortem examination as well as by PW1 and PW2 who witnessed them being shot. It was also confirmed by the evidence of PW4, PW7 and PW8 all of who arrived at the scene shortly thereafter and found the lifeless bodies.

43. Hence, arising from the remaining two ingredients of murder, the four issues that fall for determination are whether:

    a. The identification evidence in the case was safe to form the basis of conviction of the five appellants;

    b. There was any other basis for conviction beyond the identification evidence;

    c. Whether the prosecution proved mens rea; and

    d. Whether the sentence imposed on the appellants is lawful.

44. We will deal with the first two issues together. The appellants are correct that given that the incident took place at night, care ought to be taken to ensure that the appellants were positively identified as the perpetrators of the offence in accordance with the guidelines set in various cases, among them Republic vs. Turnbull [1976] 3 ALL ER 549 and Kiarie vs. Republic [1984] KLR 739. Ordinarily, the accuracy of an identifying witness testimony depends on the opportunity the witness had to observe and remember that person, and whether the witness knew the accused before. This Court, in Paul Etole & another vs. Republic [2001] eKLR, underscored the need for caution while receiving all forms of identification evidence. In so doing, it stated:-

> "Identification evidence can bring about miscarriages of justice. But such miscarriages of justice occurring can be much reduced if whenever the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused, the Court should warn itself of the special need for caution before convicting the accused. Secondly, it ought to examine closely the circumstances in which the identification by each witness came to be made. Finally, it should remind itself of any specific weaknesses which had appeared in the identification evidence. It is true that recognition may be more reliable than identification of a stranger; but, even when the witness is purporting to recognise someone whom he knows, the Court should remind itself that mistakes in recognition of close relatives and friends are sometimes made." [Emphasis supplied].

45. We will now look at the identification evidence that was before the trial court. Only three witnesses testified that they had witnessed the incident and identified perpetrators. These were PW1; PW2 and PW4. None of the other witnesses were present when the attack happened.

46. PW1 testified that he only identified two people whom she recognized as relatives: the 1st and 2nd appellants. She was categorical that she did not see anyone else. She was also categorical that she recognized the two using the koroboi (tin lamp) which illuminated the room they were in. She was also in close proximity with the attackers since she was hiding in the next room and the attack unfolded for more than five minutes.

47. PW2, on the other hand, was quite categorical that she recognized only one assailant – the 1st appellant. She also testified about all the favourable identifying factors that PW1 testified about. In her case, she was even closer in proximity than PW1 since the assailant (1st appellant) saw her and shot at her but missed.

48. PW4, on the other hand, was in the next house. She heard the gunshots and commotion and came out. She testified that she hid in the makeshift kitchen outside camouflaged by banana leaves. As the

assailants left her co-wife's house, they passed close to where she was and, with the aid of moonlight, she was able to recognize four of them. This is exactly what PW4 said:

> " There was moonlight and I hid near a makeshift kitchen covered with banana leaves. I saw people. David Namanyengo; Rasto Kibuki Wangila; and Wangupi leaving and they passed by my door."

49. Later in her testimony, PW4 said:

> "I saw the 1st Accused [1st appellant]; 2nd Accused [2nd appellant]; Brian Wafula not in court and the 6th Accused [4th appellant]. David is a relative. All are relatives. So is the 6th Accused."

50. The learned Judge analyzed the identification evidence thus:

> "Having considered the evidence on record, I am convinced that the 1st, 2nd, 6th and 7th accused were seen together at about 6:00pm on the fateful night by PW8 and PW9.
>
> Further, I am convinced that PW1, PW2 and PW4 were able to identify accused 1, 2, 4, 6 and 7 though separately on the fateful night. Further, I am convinced by the evidence of PW8 and 9 that accused 7 had threatened to avenge for the death of his father. As stated by several prosecution witnesses, the suspect was the deceased. A plot to avenge the death of Bramwell was hatched and concluded at the stone where chang'aa and bang were consumed the evening of the fateful night and at 8:00pm, the plot was executed, where the deceased and his four innocent children were shot at."

51. On our part, scrutinizing this analysis against the actual testimonies given, we are constrained to point out that theidentifying witnesses – PW1, PW2 and PW4 – only identified three of the appellants: the 1st appellant (identified by PW1, PW2 and PW4); the 2nd appellant (identified by PW1 and PW4); and the 4th appellant (identified by PW4).

52. None of the witnesses testified to seeing either the 3rd appellant or the 5th appellant on the night of the incident. There are only two pieces of evidence tying the 3rd and 5th appellant to the crime. One is the testimony of PW8 who testified that he saw the 1st, 2nd, 3rd and 5th appellants shortly before the attack; and they were consuming chang'aa and bangi in a possible preparatory meeting. Two, PW9 testified that the 5th appellant had issued threats that he would kill the deceased to avenge for the death of Bramwell.

53. We must point out that neither pieces of evidence, without more, would be enough to tie the 3rd and 5th appellants to the murders. Evidence of motive alone is never enough to convict for a criminal offence: so the available evidence that the 5th appellant issued threats against the deceased, though credible, cannot sustain a conviction against him without more. Similarly, evidence of a supposed planning meeting alone, without more, would not be sufficient to incriminate the 3rd and 5th appellants with murder. After scouring through the record, we were unable to find any other evidence linking the two to the murders.

54. Turning back to the identification evidence in regard to the 1st, 2nd and 4th appellants, it behooves us to analyze and re-evaluate it, in order to come to an independent conclusion as to whether it was error-free. Our starting point in that analysis is to note that the identification evidence against the 1st, 2nd and

4th appellants was that of recognition. Lord Widgery, C. J. in R vs. Turnbull (1956) 3 All ER 549 at 552 stated the following about recognition evidence:

> "Recognition may be more reliable than identification of a stranger, but even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made."

55. Closer home, concerning the probative value of recognition evidence, Madan J.A in Anjononi and Others vs. The Republic [1980] KLR stated as follows:-

> "...This, however, was a case of recognition, not identification, of the assailants; recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other."

56. In the present case, each of the three witnesses was categorical that they recognized either one or the other, of 1st, 2nd and 4th appellants at the scene. They knew them as both relatives and neighbours. PW1 and PW2 testified that they saw the 1st and 2nd appellants using the koroboi which illuminated the room when the assailants broke in. By all accounts, it was a small room in a rural area. The witnesses were, thus, quite close to the assailants in terms of space. Finally, testimony showed that the assailants remained in the room for more than five minutes hence giving the witnesses ample time to take in their features.

57. As for PW4, she testified that she recognized the 1st, 2nd and 4th appellants with the aid of moonlight. She testified that they passed very close to where she was hiding as they left the scene of the murder. All the three are also neighbours and relatives.

58. Taking into consideration the surrounding circumstances, the internal consistency of the testimonies of the witnesses which pointed to their credibility, and, in the surrounding circumstantial evidence, we are persuaded that the identification evidence with regard to the 1st, 2nd and 4th was error-free and iron-clad.

59. The surrounding circumstantial evidence is four-fold. First, there is the testimony of PW3, a girlfriend to the 2nd appellant. She testified that she was visiting the 2nd appellant and staying in his house for three days. On the material day, the 2nd appellant left home just before 8:00pm and came back later with a bloodied pair of shorts. He proceeded to wash it. Thereafter, he received a mysterious phone call to which he answered that he had arrived safely. Second, there is the testimony of PW8 which, while not adequate to convict on its own, shows that the 1st, 2nd and 4th appellants were among a group of people who met shortly before the incident. At the very least, this demonstrates that the three of them were together on that night – and displaces their respective alibi defences.

60. Third, the testimony of the investigating officer corroborated the identification evidence with respect to the 2nd appellant: PW4 described the 2nd appellant as having been dressed in a long rain jacket and gumboots. When the investigating officer went to the 2nd appellant's home immediately after, upon search, he recovered a pair of gumboots and a long rain jacket. Both were wet. The 2nd appellant offered no explanation to vitiate the conclusion that he was the person PW4 had earlier seen. Fourth, all the three identifying witnesses – PW1; PW2 and PW4 – gave names of the assailants at the very first report. Indeed, the investigating officer testified that at the very first interview at the scene, all the three witnesses named the attackers by name. This evidence of first report offers additional layer of safety from possibility of error. See Terekali & Another v Republic [1952] EA 259.

61. In the end, therefore, we have no doubt that the identification evidence against the 1st, 2nd and 4th appellant is error-free and places them on the scene as the perpetrators of the heinous murders.

62. This takes us to the question posed by the appellants whether mens rea was established. It is true that the establishment of mens rea is a requisite to obtaining a guilty verdict in a murder trial. However, the appellants mistake the meaning of mens rea in our law. Mens rea is not a synonym for motive. Mens rea is the desire to produce a particular consequence. Motive, on the other hand, is the reason or driving force behind doing the act. Mens rea is the deliberate cause and wilful effort to produce a particular consequence (in the case of murder, the death of the deceased) while motive is the implicit cause or driving force that instigates a person to do any act aimed at producing the consequence.

63. The appellants blotted much ink, in a bid to falsify the learned Judge's posed motivational theory for the murders: that the appellants aimed to avenge for the death of Bramwel. The appellants' aim was to show that the motive could not, by the evidence tendered, be ascribed to any of the appellants other than the 5th appellant – who allegedly uttered the threat. In truth, however, the motive for the murders, even if factually wrong, is insignificant. What matters in criminal law is whether the mens rea has been established for a charged offence. Sometimes an established motive aids in deducing mens rea – but there is no requirement that motive be established.

64. The mens rea for murder is malice aforethought. Under Section 206 of the Penal Code, malice aforethought is defined as follows:

> " Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances-
>
> a. An intention to cause the death of or to do grievous harm to any person, whether that 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 that person is the person actually 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 not be caused;
>
> c. An intent to commit a felony;
>
> d. An intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony."

65. In the present case, evidence established that the 1st, 2nd and 4th appellants, acting in concert, budged into the home of the deceased and the 1st appellant, with the use of a firearm, shot the four victims. There is no question that one aims to either kill, maim or cause grievous harm to a person when they shoot at them. So, there can be no question that the actions by the 1st appellant satisfy the definition of malice aforethought in section 206 of the Penal Code. Further, as the respondent correctly argues, under section 21 of the Penal Code, the malice aforethought is ascribed to all the appellants since they were acting in concert.

66. We will now turn to the sentence imposed against the appellants. After conducting the sentence hearing, the learned Judge pronounced herself thus:

> "I have considered the mitigation of the accused persons. I have weigh[ed] the plea against the offence committed. They were [convicted] of killing 1 man and 3 innocent children.

Their action was heinous, barbaric, inhuman and must be condemned in the most severe terms. In my view, the accused do not deserve any mercy and I condemn them to life imprisonment."

67. The appellants did not explicitly appeal against sentence. No ground of appeal attacked the sentence imposed. Even then, we must point out that the learned Judge was obligated to pronounce a sentence for each of the four counts over which she convicted the appellants. Given the circumstances herein, we can only state that the life imprisonment sentence imposed was commensurate with the crime, and was imposed after the trial court exercised its sentencing discretion. We only clarify that the appellants against whom conviction is affirmed are sentenced to concurrent life imprisonment sentences for each of the four counts of murder against which they were convicted.

68. The upshot is that our independent re-evaluation of the evidence tendered yields the conclusion that the charges of murder against the 1st appellant; the 2nd appellant and the 4th appellant were proved beyond reasonable doubt with respect to all the four counts of murder. In similar vein, our analysis has shown that the charges against the 3rd appellant and 5th appellant were not so proved. Consequently, we affirm the convictions of the 1st; the 2nd; and the 4th appellants against all the four counts. We clarify that they shall be imprisoned for life for each of the four counts; and the sentences shall run concurrently.

69. We also hereby quash the conviction and set aside the sentence imposed against the 3rd and 5th appellants. The 3rd and 5th appellants shall be set free forthwith unless detained for other lawful reasons.

70. Orders accordingly.

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

HANNAH OKWENGU

.....

JUDGE OF APPEAL

J. MATIVO

.....

JUDGE OF APPEAL

JOEL NGUGI

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR