Koi & 2 others v Republic (Criminal Appeal 3 & 17 of 2021 & E016 of 2023 (Consolidated)) [2024] KECA 1485 (KLR) (25 October 2024) (Judgment)

Neutral citation: [2024] KECA 1485 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MOMBASA

CRIMINAL APPEAL 3 & 17 OF 2021 & E016 OF 2023 (CONSOLIDATED)

AK MURGOR, KI LAIBUTA & GV ODUNGA, JJA

OCTOBER 25, 2024

BETWEEN

SAFARI KOMBE KOI .... 1ST APPELLANT

KAZUNGU KADENGE .... 2ND APPELLANT

KAHINDI SAFARI KOMBE .... 3RD APPELLANT

AND

REPUBLIC .... RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Malindi (R. Nyakundi, J.) delivered on 27th November, 2020 in HCCA No 21 of 2016)

JUDGMENT

1. Safari Kombe Koi is the appellant in Mombasa Criminal Appeal No. 3 of 2021 (the 1st appellant), Chengo Kazungu Kadenge the appellant in Mombasa Criminal Appeal No. 17 of 2021 (the 2nd appellant), and Kahindi Safari Kombe is the appellant in Mombasa Criminal Appeal No. E016 of 2023 (the 3rd appellant). The three were charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. The information was that, on 8th December 2016 at Matsongoni village in Karimani Sub-location, Bandari, Ganze, within Kilifi County, jointly with others not before Court, murdered Karisa Katoi Kani (the deceased). Each of the appellants pleaded not guilty and the matter proceeded to hearing.

2. Katana Katoi, PW1 testified that, on 8th December 2016 while they were with the deceased at the 1st appellant's home, some people began pointing fingers at the deceased inferring that he was suspected of inflicting an illness on the 1st appellant's wife through witchcraft. As he tried to leave with the deceased,

all the appellants' together with other people threatened the deceased with violence. The witness then stated:

> " I went and told Karisa we should go home. As we tried running away the people had gone ahead Kahindi Safari (the 1st appellant) emerged with a stick and threw it at us. The father of Kahindi... told me to leave Karisa alone. He grabbed me. Chengo emerged with a rungu (kongo) and hit Karisa on the head. I was very close. Jumaa (4th accused) had a stick and he beat Karisa. Chengo (the 2nd appellant) hit him on the head. He had a rungu. Jumaa hit him on the waist. All the accused persons then joined in beating him. People took off when they realized what was happening. The mob did not join in beating Karisa the sticks they used are here... There could have been nothing I could do to assist the deceased. I stayed there up to (sic) three of them left. Chengo remained behind. People kept saying Karisa will leave. Chengo continued hitting him."

3. In cross-examination, PW1 confirmed that the Assistant Chief had requested the deceased to visit the home of the 1st appellant so as to conduct a cleansing ritual to heal the 1st appellant's wife.

4. Katana Charo Kaingu, PW2, testified that the deceased had been suspected of bewitching the 1st appellant's wife. On the material day, the Assistant Chief requested him to escort the deceased to avoid threats to his life or injury by the family of the 1st appellant. The cleansing ceremony at the 1st appellant's home involved the deceased holding a cup of water in the direction of the 1st appellant's wife whilst uttering the words, "I have been told, I bewitched you, if that is true, may this water I have given you heal you." After completing the ritual, they were making arrangements to leave when all the appellants began hitting the deceased. Under cross examination, PW2 reiterated that the underlying reasons for inflicting fatal injuries was the suspicion of him being a witch, and the use of magic charms to cause the death of the 1st appellant's wife.

5. Dama Karisa Katoi, PW3, wife to the deceased, told the court that under instructions from the Chief of the area, they were requested to go to the home of the 1st appellant for the cleansing of his wife, who was unwell. As the ceremony got underway PW3 explained that she left the 1st appellant's home to get food for the deceased. Before going far, she heard screams, only to return and find that the deceased was being assaulted by the appellants. She stated:

> " My husband was being beaten with these sticks... and he appeared to have died. Chengo, Kazungu, Jumaa Kazungu, Safari Kombe and Kahindi Safari who are in court were the people beating my husband... I found them hitting him on the head with the sticks. After ensuring that he had died, they put the sticks on top of him. I sat by the body until police officers came and collected the body. I found them still hitting the deceased, Jumaa was hitting him on the head. Chengo also hit him on the head. Safari hit him on the back. Kahindi hit him on the head. I knew all the accused persons prior to the incident."

6. Stephen Juma Katana, PW4, a nephew to the deceased, was at the home of the 1st appellant. He stated that the 1st appellant's wife was seated under a tree and that, after about ten minutes of his arrival, she passed away. He heard people talking about witchcraft and the involvement of the deceased with the death of the 1st appellant's wife; that a joint violent attack by the appellants ensued upon the deceased. The appellants acting in turns assaulted the deceased inflicting fatal injuries on him. The witness positively identified some of the sticks used to beat the deceased.

7. Kahindi Karisa, PW5, the son to the deceased, confirmed that he received a letter from the Chief that required him to attend a meeting at the 1st appellant's home. Accompanied by the deceased, they went

to the home of the 1st appellant to attend a cleansing ceremony for the 1st appellant's wife who was unwell. PW5 stated that he left the home, but before long, he heard screams and shouts from the homestead. He returned to the home only to find that his father, the deceased, had been killed.

8. Ronald Safari, PW6, the Chief of Ndemi Sub-location, testified that, on 7th December 2016, he received a complaint from the 1st appellant regarding his wife's illness. The 1st appellant demanded a meeting with the deceased because he suspected him of being responsible for her sickness through witchcraft. Thereafter, on 8th December 2016, PW6 facilitated a meeting for the families to attend a cleansing ceremony at the 1st appellant's home. He later received information that the wife of the 1st appellant passed away, even though the cleansing ceremony had gone well and without a hitch. It was in the above context that PW6 told the court that the appellants sought to avenge the 1st appellant's wife's death by killing the deceased.

9. Cpl. Stanley Maritim, PW7, received the report of the occurrence of a murder and visited the scene. On arrival, he found that the deceased had suffered several multiple injuries to the back and the back of the head which appeared to have been shattered. He recovered the murder weapons identified as sticks by the witnesses and produced them in court. Photographs were taken and later processed and developed to be used as evidence during the trial. PW7 stated that the post-mortem examination was carried out at Kilifi Hospital Mortuary by Dr. Bachu and was produced by consent without calling the maker. According to the findings, the cause of death was severe head injury consistent with blunt object targeted to the head.

10. When placed on his defence, the 1st appellant in his unsworn statement denied the charge or committing any unlawful act or omission. He told the court that the deceased was suspected to have bewitched his wife, and that the deceased was called upon to carry out a cleansing ceremony "Uhasa" to remove the evil spell; that his wife passed on; and that this angered a crowd at the scene. He was thereafter beaten by a group of people on suspicion of being a witch.

11. The 2nd appellant, a brother to the 1st appellant, also gave an unsworn statement where he denied participating in the murder of the deceased. He stated that the death occurred while he was going about his normal duties at his farm, and denied being at the scene when the deceased died.

12. The 3rd appellant stated that he spent most of the day at Bandari Secondary School. On the same day, he received information about the death of his mother, Taabu, which prompted him to return home to establish the nature and cause of her death. When he arrived home, he found many people and saw the deceased lying next to his mother's body about three meters away. He denied being involved with the murder as he was at school when he learnt of the death of the deceased. He also stated that he was 17 years old.

13. During the proceedings, the trial court ordered that the 3rd appellant's age be assessed, and that according to the age assessment report, the 3rd appellant's age was assessed at 17 years of age as at 23rd May 2018. He was thereafter placed in a children's holding facility. The judgment was rendered 2 years later on 27th November 2020 which meant that, by the time he was convicted and sentenced, the 3rd appellant had reached the age of majority.

14. Upon considering the evidence, the learned Judge found that, based on the evidence of PW1 to PW6 and the post-mortem examination report, there was no doubt that the deceased died from serious injury inflicted by the three appellants; that his death was caused by their unlawful act; and that PW1, PW2 and PW3 narrated how the deceased was initially invited to the 1st appellant's home to cleanse his wife, Taabu, who was unwell. As the event involved the Chief of the area, PW6, and other clan elders, the deceased acceded to the invitation to attend the ceremony, and that malice aforethought was proved

on the appellants' part after they descended on him and beat him on the head with sticks and clubs. The Judge further held that the appellants' common intention to kill the deceased was established through the evidence of PW1, PW2, PW3 and PW6 where it was demonstrated that the appellants jointly designed and purposed to commit the unlawful act of assault against the deceased.

15. On identification, the learned Judge found that PW1, PW2, PW3, PW4 and PW5 were able to identify the appellants, who were armed with sticks and assaulted the deceased. Based on the overwhelming evidence, the learned Judge convicted the appellants and sentenced them each to 35 years' imprisonment.

16. Aggrieved by the conviction and sentence, the appellants filed separate appeals being Criminal Appeals Nos. 3 and 17 of 2021 and No. E016 of 2023. The appeals, though not consolidated, were heard together. Since the appeals arise from the same decision, we have decided to deliver one judgement in respect of all the appeals.

17. In his grounds of appeal, the 1st appellant's took issue with the trial Judge's failure to find that there were massive contradictions and variance in the evidence; in failing to appreciate that no psychiatric report was provided in court to ascertain the cause of the deceased death; and in failing to consider his defense.

18. The 2nd appellant's grounds of appeal were that: the actus reus and mens rea were not established against him; in failing to consider that Sections 74, 77, 107 and 111 of the *Evidence Act* were not complied with in the production of the exhibits; and that the trial Judge failed to consider his defence.

19. For his part, the 3rd appellant contended that the learned trial Judge was in error in failing to appreciate that he was not positively identified as a perpetrator of the offence; in failing to prove malice aforethought; and in failing to take into account his defence.

1. Learned Counsel for the appellants also filed a supplementary record of appeal where it was contended that the learned Judge also failed to take into account the appellants' defence of provocation notwithstanding that the defence was disclosed by the totality of the evidence adduced by all the prosecution witnesses.

20. When the appeal came up for hearing on the Court's virtual platform, learned counsel Mr. Ngumbao relied on the appellants' written submissions and his written submissions on the supplementary grounds filed on their behalf.

21. In his submissions, the 1st appellant submitted that the prosecution failed to prove the motive behind the deceased's death, and that the evidence of PW1 that the 1st appellant was at the scene of crime had no basis. It was also submitted that there was no evidence of common intention on the 1st appellant's part; that he was not aware of any planned attack on the deceased, and neither did he act in concert with anyone; that, for this reason, malice aforethought was not established. Furthermore, it was submitted that the learned Judge failed to warn himself of the danger of convicting the 1st appellant without crucial evidence, such as the psychiatric report which was in violation of Articles (1) and 50 (2)(j) and (k) of the Constitution and, hence, the conviction and sentence were null and void.

22. In respect of the 2nd appellant, it was submitted that there was nothing in the evidence that connected him to the deceased death; that there were many people at the 1st appellant's home and that, as a result of a commotion at the home, the deceased was killed by a mob; that he did not plan to kill the deceased together with any person, and that he did not have any grudge against him; and that besides PW1, no other witness testified as to his being responsible for attacking the deceased. Further, it was the 2nd appellant's complaint that the postmortem report was produced without the doctor testifying.

23. The 2nd respondent also submitted that his defence was not considered in that he had stated that it was the boda boda riders, and not the appellants, who instigated the commotion that led to the deceased's death; that the learned Judge disregarded this evidence in arriving at the conclusion that the 2nd appellant was responsible for the deceased's death.

24. For his part, the 3rd appellant submitted that he was at school and only came to learn of the deceased death after the ceremony. He also submitted that he was a child at the time the offence was committed and that, therefore, the sentence imposed was contrary to the provisions of Articles 53(1) (b), (c), (d) and (f) of *the Constitution* and section 7(1) and (2) of the *Children Act*, as well as Article 28 of the United Nations Convention on the Rights of the Child.

25. In respect of the defence of provocation, the appellants' counsel submitted that the learned trial Judge ought to have appreciated that the 1st, 2nd and 3rd appellants were provoked as they genuinely believed that the deceased used the power of black magic to cause the death of the 1st appellant's wife following a long illness; that, as a consequence, the three appellants ought to have been charged with the offence of manslaughter and not murder. Counsel argued that, although none of the appellants raised the defence of provocation because of their belief in witchcraft, that this alone did not negate the application of the defence of provocation to the circumstances of the case; that, from the witness evidence, it ought to have been apparent to the trial court that the appellants were provoked.

26. Finally, it was submitted that the sentences imposed on the appellants was excessive, and ought to be set aside.

27. Learned counsel for the State, Ms. Fuchaka, also filed written submissions where it was submitted that the evidence of PWI, PW2, PW3 and PW6 showed that the appellants jointly designed and purposed to commit the unlawful act of assault against the deceased person; and that they went to pick the deceased from the home of the 3rd appellant whilst armed with sticks and clubs with the clear intent to cause him grievous bodily harm. There was direct evidence from the witnesses that they acted in concert in attacking the deceased by inflicting harm across his head whereupon a common intent was established.

28. Counsel submitted that there was no contradiction in the prosecution's case, and that a psychiatric report on the appellants was not a mandatory requirement for a trial. It was further submitted that the defence of provocation was not substantiated, and that it was an afterthought and did not convince the trial court that the appellants were not responsible for committing the offence as charged.

29. This being a first appeal, this Court is expected to submit the evidence as a whole to a fresh and exhaustive examination so as to arrive at its own independent on the evidence. The Court must itself weigh conflicting evidence and draw its own conclusions. See Kiilu & Another vs Republic [2005] 1 KLR.

30. From the record of appeal and the submissions, the issues that arise from the three appeals for this Court's determination are: i) whether the prosecution proved the offence of murder to the required standards; ii) whether the appellants were identified as the perpetrators of the crime; iii) whether the post- mortem report was admissible; iv) whether the appellants were required to undergo a psychiatric examination; v) whether the trial court disregarded the appellants' defence; vi) whether the prosecution evidence comprised of inconsistencies and contradictions and vii) whether the defence of provocation was available to the appellants and viii) whether the sentences imposed on the appellants were unlawful, harsh and excessive.

31. Under Section 203 of the Penal Code, for the offence of murder to be established, the prosecution must prove three main elements: first, that the death of the deceased occurred; second, that the death was

caused by an unlawful act or omission on the part of the accused person; and, third, that the accused person had malice aforethought in causing the act or omission.

32. In the case of Chiragu & another vs. Republic [2021] KECA 342 (KLR), this Court restated that:

> " The prosecution in an information of murder has the singular task of proving the following three ingredients in order to secure a conviction; that the death of the deceased occurred; that the death was caused by an unlawful act of commission or omission by the appellant and that the appellant had malice aforethought as he committed the said act."

33. The death of the deceased is not in dispute. All of the prosecution witnesses confirmed that the deceased died after being assaulted by the appellants at the home of the 1st appellant. The post mortem conducted on the deceased indicated that the cause of death was due to severe head injury consistent with blunt object targeted to the head. Therefore, the fact of death of the deceased was clearly established.

34. However, the 1st appellant asserted that the manner of production of the postmortem report demonstrating that the deceased died was in contravention of the law as it was not produced by a doctor or an expert, and that it was therefore inadmissible. This issue was not raised during the trial. Needless to say, we have reviewed the proceedings where it was recorded on 10th June 2019, that the Postmortem report was adduced by Cpl. Stanley Maritim PW7 and marked as exhibit 5. Following its production, there was no objection by the appellants or their counsel. But, in discerning the admissibility or not of the postmortem report, we find that nothing turns on this issue since all the prosecution witnesses graphically described how the deceased died after being brutally beaten on the head when he attended the ceremony at the 1st appellant's home. For their part, the appellants acknowledge that his lifeless body lay at the scene after he had been beaten to death. Hence, there is no doubt that the evidence pointed to the deceased having died from the injuries sustained after he was severely beaten on the material day. This issue therefore lacks merit.

35. As concerns the element of whether the evidence demonstrated that the appellants' unlawful actions caused the deceased's death, according to the prosecution witnesses, the deceased died from severe injuries sustained after being continually hit on his head and back with clubs and sticks. In particular, PW1, PW3 and PW 4's evidence was that a meeting had been called at the 1st appellant's home where the deceased had been requested to attend a cleansing ceremony for the 1st appellant's wife who was unwell. After the ceremony was concluded, the witnesses recounted the events as they had unfolded. PW1 stated that the 1st appellant emerged with a stick and threw it at PW1 and the deceased. He held PW1 and told him to leave the deceased alone. Then the 2nd appellant emerged with a rungu (kongo) and hit the deceased on the head. The 2nd appellant again hit him on the head whereupon all the appellants joined in beating the deceased.

36. According to PW3, she found the 1st, 2nd and 3rd appellants beating the deceased on the head with sticks, and when they ascertained that he had died, they threw the sticks on him and walked away. PW4 said that she also saw the 1st, 2nd and 3rd appellants beating the deceased on his head as he lay on the ground.

37. The involvement of each of the appellants in attacking and beating the deceased remains uncontroverted. Each of them was armed with a stick or a rungu, and each of them played a role in inflicting fatal injuries on the deceased's head and back. The vicious attack by the three appellants, together with the injuries the deceased sustained, are what ultimately led to his death.

38. The above evidence notwithstanding, the appellants contend that they were not properly identified because they were not present at the scene. The 2nd appellant stated in his defence that he was going

about his business on his farm and only came to learn of the death after the ceremony. In his defence, the 3rd appellant stated that he had spent most of the day at his school, and only arrived at the 1st appellant's home to find that the deceased had already died. On the question of identification, the learned Judge stated that:

> " ... according to PW1, PW2, PW3, PW4 and PW5 evidence it came out clearly that they were able to identify the accused persons armed with sticks while assaulting the deceased. This was an incident that happened during the day and therefore sufficient light illuminated the scene so as to be favourable in identifying the accused person, there was no time gap here from the time the crime was committed and the rest of the accused person for the witnesses to lose sight of their physical figures apart from these considered considerations it's credible that PW1 to PW5 were conversant and familiar with the accused persons prior to the unfortunate incident of the attack and the deceased's death...I am satisfied on assessment of the evidence as I have indicated that the reception of evidence as to recognition is correct and safe to place the accused persons at the scene."

39. Our reanalysis of the evidence as set out above squarely places the 1st, 2nd and 3rd appellants at the scene. It is not in dispute that the incident occurred during the day and that, in their evidence, PW1, PW2, PW3, PW4 and PW5 were unequivocal that they saw all three appellants attack the deceased on the fateful afternoon. More particularly, there is direct evidence from PW1, PW3 and PW4 that they saw the 1st appellant throw a stick at the deceased and, thereafter, the 2nd appellant emerged with a rungu with which he hit the deceased over the head. When the deceased fell to the ground, the 1st 2nd and 3rd appellants descended on him with sticks and clubs and continued to beat him on his head and back, thereby fatally injuring him.

40. Furthermore, the three persons were well known to the witnesses and, therefore, they were identified by recognition, which is more satisfactory, reassuring and reliable because it is dependent upon personal knowledge. See Anjononi &Othersvs.Republic[1980] KLR 59. As a consequence, just as was the learned Judge, we are satisfied that the 1st, 2nd and 3rd appellants were not only placed at the scene, but were properly identified as the persons who physically assaulted and fatally injured the deceased.

41. As concerns the 1st and 2nd appellants' contention that it was other members of the public, in particular the boda boda drivers, and not the appellants who were responsible for beating the deceased to death, once again, our assessment of the evidence would lead us to conclude that this assertion is without basis since there was incontrovertible prosecution witness evidence that properly identified and placed the appellants at the scene. In effect, the evidence pointed to the three appellants, and no other, as the persons who beat the deceased to death. We are satisfied that it was they, and not the boda boda riders that were responsible for killing the deceased. The two grounds are lacking in merit and accordingly fail.

42. Having so found, the appellants have challenged the trial Judge's conclusion that they had a common intention to kill the deceased person.

43. In this regard, the trial Judge stated:

> " It is important to state that in the instant case each of the accused person was involved in one way or another to do the act and or omission which constitutes the effect offence in which they are charged. It brings into parties to a crime as provided in Section 20 of the Penal Code, that is when an offence is committed jointly and each of the accused person is deemed to have taken part in committing the offence and are held to be guilty of the offence...

There is sufficient evidence from PW2 and PW3 that such persons include the accused person who took wooden sticks and used them to assault the deceased which led to his death. Simply stated under Section 21 of the Penal Code the accused persons and lawful acts and omission have been positively identified as the cause which gave rise to the crime, the fatal harm suffered by the deceased."

44. The doctrine on common intention as defined under Section 21 of the Penal Code provides:

> When two or more persons from a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence.

45. The elements on the principle of common intention were defined in the cases of Njoroge vs Republic [1983] KLR 197 andSolomon Munga vs Republic [1965] EA 363 thus:

> " If several persons combine for an unlawful purpose and one of them kills a man, it is murder in all who are present whether they actually aided or abated or not, provided that the death was caused by act of someone of the party in the course of the endeavors to effect the common object of the assembly."

46. This Court also considered the doctrine of common intention in the case of Dickson Mwangi Munene &another vs Republic [2014] eKLR and stated that:

> " This provision has been interpreted and the doctrine of common intention dealt with by our courts in several cases. In Solomon Mungai v. Republic [1965] E.A. 363, the predecessor of this Court held that in order for this section to apply, it must be shown that the accused had shared with the other perpetrators of the crime a common intention to pursue a specific unlawful purpose which led to the commission of the offence charged."

47. In the same vein in the case of Stephen Ariga & another vs Republic [2018] eKLR, this Court held that, for common intention to occur, there requires to be:

    i. two or more persons;

    ii) the persons must form a common intention; the common intention must be towards prosecuting an unlawful purpose in conjunction with one another;

    iv) an offence must be committed in the process; and

    v) the offence must be of such a nature that its commission was a probable consequence of the prosecution of the unlawful purpose.

48. In applying the afore listed requirements to the facts of the instant case, in terms of the first requirement, the evidence shows that the three appellants were present at the scene. Secondly, the appellants were seen beating the deceased with sticks, thirdly, it is clear that a common intention was formed in the course of beating the deceased and, satisfying the 4th and 5th requirements, their illegal actions resulted in the death of the deceased. It therefore stands to reason that, all the requirements having been met, the common intention of the appellant's actions was proper and soundly established. See also Walta and another vs Republic (Criminal Appeal 67 of 2021) [2023] KECA 763 (KLR). In effect, our reanalysis of the evidence brings us to the conclusion reached by the learned Judge that the appellants had a common intention to murder the deceased.

49. The appellants also sought to raise the defence of provocation which they claim was caused by their belief that the deceased was a witch, and that he had bewitched the 1st appellant's wife. Our consideration of the judgment discloses that, contrary to the appellants' assertions, the trial Judge considered the issue of provocation and stated thus:

> " …that belief in sorcery is not a reasonable belief so there can be no defence or fact as the basis for provocation and suspicion of witchcraft to kill the deceased by the accused persons…"

50. In the case of Republic vs Chibatsi and Another [1989] KLR 333 Bosire, J (as he then was) stated:

> " Mere belief in witchcraft does not constitute a circumstance or excuse or mitigation for killing a person believed to be a witch or wizard.
>
> When there is no immediate provocation, witchcraft as a provocative act can only avail an Accused as a defence where the victim is shown to have done an act in the presence of the Accused which he believed was an act of witchcraft against him and he was thereby angered as to be deprived of his self-control."
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> See also Patrick Tuva Mwanengu vs. Republic [2007] eKLR.

51. Concerning allegations of witchcraft, the established legal principle is, and has remained for a long time, that the belief in witchcraft does not justify deviation from law by private infliction of punishment on a suspected witch, except in cases where the accused has been put in such fear of immediate danger to his own life, that the defence of grave and sudden provocation can be held to have been proved. See Thoya Kitsao vs Republic [2015] eKLR andKatana Kaka alias Benson & 2 others vs Republic [2017] eKLR.

52. In this case, save for rumors and allegations, there was no evidence produced showing that the deceased was indeed a witch or that he caused the death of the 1st appellant's wife. Neither was there anything in the deceased's statement during the ceremony that could have so pointedly provoked the appellants as to cause them to brutally attack him the way they did. Given that the defence of provocation for reasons of witchcraft is not a defence, and considering that nothing the deceased said or did could have provoked the appellants, we find that the defence of provocation was not established and, for this reason, this ground is also dismissed.

53. Having so found, we next consider whether, contrary to the appellants' assertions, malice aforethought was established. Section 206 of the Penal Code defines 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 -
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> 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;
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> 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.

54. In the case of Hyam vs DPP [1974] A.C. the Court held interalia that:

> " Malice aforethought in the crime of murder is established by proof beyond reasonable doubt when during the act which led to the death of another the accused knew that it was highly probable that, that act would result in death or serious bodily harm."

55. In the case of John Mutuma Gatobu vs Republic [2015] eKLR, this Court observed that:

> " Malice aforethought in our law is used in a technical sense properly defined under Section 206 of the Penal...
>
> There is nothing in that definition that denotes the popular meaning of malice as ill will or wishing another harm and all the related negative feelings. Nor, for that matter, its to be confused with motive as such. Our law does not require proof of motive, plan or desire to kill in order for the offence of murder to stand proved, though the existence of these may go to the proof of malice aforethought."

56. In the instant case, the prosecution witness evidence and the post mortem report are clear that the death of the deceased was due to severe head injury resulting from the continued and sustained assault. The evidence pointed to a clear use of force by the appellants in the assault on the deceased. The serious injuries inflicted on the deceased's head and back by the sticks and rungu with which the appellants were armed would lead to the inference that the appellants intended to cause death or grievous harm to the deceased and to the effect that malice aforethought was proved. See Katana vs Republic (Criminal Appeal 48 of 2021) [2024] KECA 463 (KLR).

57. Regarding the 1st appellant's complaint that a psychiatric report was not conducted on him, we agree with Ms. Fuchaka that a report of this nature is not a mandatory requirement for a trial, and particularly where neither the 1st appellant nor the proceedings disclosed that, on account of his mental disposition, such a report was necessary. We also find the allegation that there were contradictions and inconsistencies in the prosecution evidence to be baseless and without foundation and, accordingly, dismiss the two grounds.

58. All in all, when the evidence in its totality is considered, there can be no question that all the ingredients for the offence of murder were established by the prosecution to the required standard; that the deceased died, and that the death was caused by the unlawful acts with malice aforethought on the part of the appellants. As such, we are satisfied that the trial Judge rightly convicted the 1st, 2nd and 3rd appellants for the murder of the deceased.

59. Turning to the sentence, the trial court sentenced the appellants to serve 35 years' imprisonment each. In the 1st and 2nd appellants' case, save for contending that the sentence was harsh and excessive, they have not demonstrated how the Judge wrongly exercised his discretion in sentencing them. When the severity of the offence and the fact that the appellants jointly and brutally assaulted the deceased causing him the fatal injuries that resulted in his death is taken into account, we can find no justification to warrant our interference in the sentences imposed on the 1st and 2nd appellants by the trial court.

60. However, in the case of the 3rd appellant, it was submitted that the trial Judge failed to appreciate that though the 3rd appellant had attained the age of majority at the time of sentencing, he was a child when he was charged with the offence and therefore the sentence imposed was contrary to the provisions

of Articles 53(1) (b), (c), (d) and (f) of *the Constitution* and section 7(1) (2) of the *Children Act*, as well as Article 28 of the United Nations Convention on the Rights of the Child. Our consideration of the grounds of appeal does not disclose that the issue was raised and, additionally, there were no submissions from the respondent in respect of the issue.

61. But the question of the 3rd appellant's sentence having been raised, we consider that it would be remiss of us not to address it for the reason that the Constitution and the *Children Act* are unequivocal on how child offenders in the criminal justice system should be dealt with. As stated earlier, the age assessment report dated 23rd May 2018 indicated that the 3rd appellant was 17 years old by the time of commission of the offence. He was therefore below the age of 18 years at the time. And by the time of sentencing two years later, he had attained the age of majority.

62. Notwithstanding that Section 190 of the *Children Act* prohibits imprisonment of a child, which is not the situation here, Section 191 of the *Children Act* provides guidance on sentencing in circumstances such as the one before us. It specifies:

> " In spite of the provisions of any other written law and subject to this Act where a child is tried for an offence and the court is satisfied as to his guilt the court may deal with the case in one or more of the following ways:-
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> a. by discharging the offender under Section 35(1) of the Penal Code (Cap 63).
>
> b. by discharging an offender on entering a recognizance with the or without sureties.
>
> c. by making a probation order against the offender under the *probation of offenders Act* (Cap 64).
>
> d. by committing the offender to the case of a fit person whether a relative or not or a Charitable Children's Institution willing to take him under his case.
>
> e. if the offender is above ten years and under 15 years of age by ordering him to be sent to a rehabilitation school.
>
> f. by ordering the offender to pay a fine, compensation or costs or any of them.
>
> g. in the case of child who has attained the age of 16 years dealing with him in accordance with any Act which provides for the establishment and regulation of a borstal institution.
>
> h. by placing the offender under the case of a qualified counsellor.
>
> i. by ordering him to be placed in an educational institution or a vocational training programme.
>
> j. by ordering him to be placed in a probation hostel under *probation of offenders Act* (Cap 64)
>
> k. making a Community Service Order.
>
> l. in any other lawful manner."

Of significance is Section 191 (l) that empowers a court to sentence an offender "…in any other lawful manner".

63. In the case of JKK vs Republic [2013] eKLR, this Court stated:

> “ The purposes of the sentences provided for under the *children Act* are meant to correct and rehabilitate a young offender, i.e any person below the age of eighteen years while taking into account the overarching objective is the preservation of the life of the child, and his best interest. A death sentence or a life imprisonment are not provided for but when dealing with an offender who has attained the age of sixteen years the court can sentence him in any other lawful manner. The offence committed by the appellant is very serious, an innocent life was lost, the appellant, though probably a minor when he committed the offence must serve a custodial sentence so that he can be brought to bear the weight and responsibility of his emission or lack of judgment by serving a custodial sentence. We are of the view that the appellant who is now of the age of majority cannot be released to the society before he is helped to understand the consequences of his mistakes which can only happen after serving a custodial sentence.”

64. In the instant case, we find that the trial court failed to take into account the 3rd appellant’s age at the time of commission of the offence during sentencing, notwithstanding that at the time he was sentenced he had reached the age of majority.

65. In the case of Bernard Kimani Gacheru vs Republic [2002] eKLR, this Court stated:

> “ 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.”

66. In reassessing the 3rd appellant’s sentence, since the trial Judge did not take into account that the 3rd appellant was a child offender at the time of committing the offence, we find it necessary for us to interfere with the 3rd appellant’s sentence of 35 years and reduce the sentence to 12 years. Such custodial sentence is for the purposes of rehabilitation of the 3rd appellant and to enable him to take cognaisance of the seriousness of the offence that led to the death of an innocent person. Such period will also afford the 3rd appellant an opportunity to acquire knowledge and skills that can go towards his own self-development, which ultimately will be for the benefit of his community and the country as a whole in the future.

67. Accordingly, the 1st and 2nd appellants’ appeals against conviction and sentence are hereby dismissed. The 3rd appellant’s appeal against conviction is also dismissed, but the appeal against the sentence is allowed. The sentence imposed on the 3rd appellant of 35 years is hereby substituted for a sentence of 12 years. All the sentences to run from the date of their conviction by the trial court.

It is so ordered.

DATED AND DELIVERED AT MOMBASA THIS 25TH DAY OF OCTOBER, 2024.

A. K. MURGOR

....

JUDGE OF APPEAL

DR. K. I. LAIBUTA CArb, FCIArb.

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JUDGE OF APPEAL

G. V. ODUNGA

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JUDGE OF APPEAL

I certify that this is the true copy of the original

Signed

DEPUTY REGISTRAR