Kombe & another v Republic (Criminal Appeal 12 & 15 of 2022 (Consolidated)) [2024] KECA 1477 (KLR) (25 October 2024) (Judgment)

Neutral citation: [2024] KECA 1477 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MALINDI

CRIMINAL APPEAL 12 & 15 OF 2022 (CONSOLIDATED)

AK MURGOR, KI LAIBUTA & GV ODUNGA, JJA

OCTOBER 25, 2024

BETWEEN

FARAJ KINGI BAHATI ..... 1ST APPELLANT

ROBERT KINGI KOMBE ..... 2ND APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal from the judgement of the High Court of Kenya at Malindi (R. Nyakundi, J.) delivered on 22nd December 2021 in High Court Criminal Case No 11 of 2017)

JUDGMENT

1. Faraj Kingi Bahati and Robert Kingi Kombe, hereinafter referred to as the 1st and 2nd appellants respectively, were charged with the offence of murder contrary to section 203 and 204 of the Penal Code. The particulars were that, on 24th June 2017 at Kavinautu village, Kaembeni Sub-Location in Ganze, they jointly with others not before the Court murdered Nelson Kiti Mwakuni Dava. To that charge, the appellants pleaded not guilty and, in support of its case, the prosecution called five witnesses.

2. The proceedings reveal a rather disjointed account of the evidence of PW2 (wrongly indicated as PW1) that on 24th June 2017 at around 6.30am, he was awoken by the appellants in the company of other youths who reported to him that they had arrested a maize thief; that, when he went to check, he found that the person referred to was from his village and was being beaten; that a tyre was placed on his shoulders and the 2nd appellant poured petrol on him while the 1st appellant continued beating the deceased; that the 2nd appellant then lit a match and the deceased was burnt to death; that all this happened despite the attempts to restrain the appellants; and that it was the appellants who killed the deceased.

3. According to Jacob Iha Thoya, PW3, a village elder, on 24th June, 2017 at about 5.00 am, the 1st appellant went to his house and informed him that, earlier on, they had arrested a thief whom he cut twice; that the 1st appellant requested him to go and visit the deceased who was inside his house; that he saw the villagers take the deceased from his house and take him to the farm; that the 2nd appellant then came with a jerrican of petrol and a matchbox with which he used to set the deceased on fire; that the deceased was tired to escape and fell down and succumbed; that the appellants were the ones who burnt the deceased.

4. The Assistant Chief for Wahera Sub location, Ronald Kitsao, who testified as PW4, recalled that, on 24th June 2017 he received a telephone call from PW3 about the death of the deceased; that PW3 informed him that the appellants had reported to him the arrest of a thief whom they had assaulted; that they agreed to visit the scene of theft which they left for at 6.00 am; that, on arrival at the scene, they found that the deceased had already been picked up and taken to the scene where it was alleged by the appellants that he had been stealing maize; that, although the deceased was conscious, he had injuries on his hand and around his ribs; that the 1st appellant had a panga in his hand while the 2nd appellant had a bottle with some petrol inside; that he reported the matter to the police but that, by the time the police arrived, the deceased had already succumbed; and that the 1st appellant had reported an incident of theft in his farm.

5. It was PW4's evidence that he observed that the deceased had sustained injuries, although he never witnessed the assault on the deceased; that there were many people at the scene; and that he cautioned the appellants against taking the law into their hands.

6. PW1, Dr. Kairuri Ndolo, who produced the post-mortem examination report on behalf of Dr. Juma, who was on study leave in Cuba, stated that, according to the report, the examination was carried out on the body of the deceased on 28th June 2017; that the deceased was found to have suffered burns on the head and chest with a deep cut on the lower lobe of the body; and that Dr Juma formed the opinion that the cause of death was penetrating injury to the right lung.

7. PW5, Chief Inspector Raymond Mateli testified that on 24th June 2017 at about 9.00pm, he was in the office when the chief of Kaiben relayed to him the information that the deceased was found stealing maize in the appellants' farm; that the appellants had surrendered to an Administration Police Camp; that, when he went to the AP Camp, he did not see the appellants, but that he received a call from the Assistant Chief, who informed him that the deceased had not died; that he rushed to the scene but that, on arrival, they found that the deceased had already died; that the deceased had burnt injuries on his face and hands, and cut injuries on the left buttocks and the right ribs; that he recorded statements from the witnesses and moved the body to Kilifi Hospital mortuary; that, while taking statements from the witnesses at the scene, he saw the 2nd appellant standing near their home and was arrested by one of the people who was at the scene before PW5 rearrested him; and that, after completing his investigations, he charged the appellants with the offence.

8. When placed on their defence, both appellants gave sworn evidence. The 1st appellant told the Court that on the night of 23rd June 2017 at 9.00pm, he received information that his maize had been stolen from his farm; that he went to the farm, but returned to his house three hours later after he saw nothing unusual,; that, at about midnight, he went back to the farm where he heard some movements and, on flashing his torch, he saw someone about 200 metres away, but was barely able to identify him; that when he approached the person who had a sack with some maize, he disappeared into a forest as the 1st appellant continued raising an alarm; that he then saw the 2nd appellant behind him who inquired about the whereabouts of the thief; and that they decided to report the incident to the village elder after which he went home; that during the night he did not come into contact with the deceased.

9. The 1st appellant further testified that the following day at around 7.15am, the 2nd appellant came to his house and they proceeded to the farm and, while there, he heard screams from the people; that he saw the village elder with the deceased heading to the farm while the villagers were interrogating the deceased about the theft at his (the 1st appellant's) farm; that an altercation started between the deceased and those who were accompanying him; that, since he was waiting for the location chief to summon them to a meeting following his earlier report, he requested the 2nd appellant to hire a motor cycle so that they could go and report the incident but that, on their way to the police station, they had a tyre burst and decided to repair it; that, while in the process, they received information from one Safari about the assault on the deceased at about 9.00 am and decided to return to the scene where they confirmed that the deceased had been fatally injured; that they found many people there, including police officers, and was arrested; that he did not cut the deceased because he had only a club , yet the deceased had burnt injuries to the chest; and that he was not involved in the arson against the deceased.

10. The 2nd appellant's case was that, on 23rd June 2017, they entered the farm to guard the maize from being stolen because there were allegations of maize stealing; that, although they returned home with the 1st appellant, the 1st appellant went back to the farm; that, at about 2.00am, he heard screams and was informed by the 1st appellant that he saw the thief; that they decided to report the incident to PW3 to whom the 1st appellant narrated the incident and described the thief and how he disappeared; that PW3 appeared to know the deceased from the description and disclosed that he had deported the deceased from the village; that PW3 informed them that he would visit the farm the following day and, on that day, PW3 came to their farm together with other people, and the deceased's return to the village was discussed; that the appellants took a motor cycle to go and report the matter to the police and, on their way, they had a tyre burst and stopped to repair it; that, while there, one Faraj called them and informed them that the deceased had been killed and, upon their return to the scene, they were arrested by the police; that he neither knew the deceased nor burnt him; and that he did not see the deceased body which was covered by a sheet, and he did not avail the petrol and was not at the scene when the deceased suffered the injuries.

11. In his judgement, the learned Judge was satisfied that, from the evidence adduced by PW1, PW2, PW3 and PW4, it was proved that the deceased died on 24th June 2017; that, from the evidence of PW2, PW3 and PW4, the appellants who were on the 24th June 2017 armed with a panga, a bottle of petrol and a match box, inflicted deep cut wounds on the upper limbs of the deceased body and thereafter set his body on fire; that, in the testimony of PW1, who produced the post-mortem report, the multiple wounds to the buttocks, shoulder, right lower lobe of the lungs contributed to the cause of death of the deceased; that the learned Judge was satisfied that PW2 and PW3 saw the deceased being assaulted under mistaken belief that he was a thief of maize produce from the 1st appellant's farm; that the appellants' action of assaulting the deceased with a panga and thereafter setting his body on fire by use of petrol was wrong and without any justification; that, based on the evidence of PW2, PW3 and PW4, the appellants, in killing the deceased, were motivated with malice aforethought; that, although the appellants attempted to discredit the prosecution case by raising an alibi defence, the case against them remained watertight; and that the conspiracy, and a common intention to commit the murder in furtherance of the unlawful acts, brought the case within the statutory framework of section 206 of the Penal Code on malice aforethought.

12. The learned Judge found the appellants guilty and convicted him of the offence of murder contrary to section 203 of the Penal Code. After considering the mitigating factors, the learned Judge sentenced the appellants to serve 28 years imprisonment.

13. Dissatisfied with the decision, the 1st appellant, Faraj Kingi Bahati, filed Criminal Appeal No 15 of 2022 while the 2nd appellant, Robert Kingi Kombe, filed Criminal Appeal No. 12 of 2022. We have consolidated both appeals since they arise from the same judgement.

14. In their similar grounds of appeal enumerated in their respective memoranda of appeal, the appellants complain that the learned Judge erred in law: by not considering that there was no malice aforethought in the death of the deceased and that, therefore, the offence of murder was not proved beyond reasonable doubt; by not considering that there was no proper identification at the scene of crime; and by not considering the appellants' defence. In what was christened "Supplementary Memorandum of Appeal" dated 13th December 2023, the appellants disclosed that the they would rely on article 165(3) a and (b), 159(2) (a) and (b) and 22(4) of the *Constitution* and the Supreme Court decision in *Iqiro v R* [2023] KECA 926; and that "further grounds will be adduced at the hearing."

15. At the virtual hearing on 21st May 2024, both appellants appeared from Malindi Prison represented by learned counsel, Mr. Mirembe, while learned Senior Principal Prosecution Counsel, Mr. Mwangi Kamanu, represented the respondent. Mr. Mirembe relied entirely on the submissions dated 13th December 2023 while Mr. Kamanu relied on the submissions filed in Criminal Appeal No. 12 of 2022 by Kennedy Kirui Kariuki, Prosecution Counsel, and on his brief oral submissions.

16. In their submissions, the appellants cited the cases of: *JOO v R* (2015) eKLR, stressing on the standard of proof in criminal cases being beyond reasonable doubt; *Joseph Kimani Njau v R* [2014] eKLR, highlighting the position that in all criminal }trials, both mens rea and actus reus must be proved beyond reasonable doubt before a conviction can be sustained; *Miller v Minister of Pensions* ([1947] All ER 372 at 373, submitting on what constitutes proof beyond reasonable doubt; and *Kiilu and Another v R* [2005] 1 KLR 174, highlighting the duty of the first appellate court. As two other judicial authorities, *Iqiro v R* [2023] KECA 926; and *Francis Karioko Muruatetu & Anor v R* [2017] eKLR appeared in the appellants' list of authorities, but without being referred to in the submissions.

17. On the other hand, the respondent cited *Mabel Kavati & Anor v R* [2014] eKLR; and *Okeno v R* (1972) EA 32, highlighting the duty of this Court, as the first appellate court, to re-evaluate the evidence; *Republic v Anthony Wambua Willy* [2021) eKLR rehashing the ingredients of the offence of murder; *Republic v Ismail Hussein Ibrahim* [2018] eKLR, submitting on what constitutes proof beyond reasonable doubt; and *Sango Mohamed Sango & Another v R* [2019] eKLR, distinguishing between identification and recognition.

18. In their submission, the appellants combined grounds 1, 2 and 3 and submitted that, from the evidence of PW2 and PW4, the appellants were not placed at the scene where there were many people beating the deceased; that, whereas PW3 stated that he saw the appellants assaulting the deceased with a stick, he did not say that the appellants had a panga; that none of the witnesses who alleged to have been at the scene testified that the appellants had a jerrican apart from PW3; that the learned Judge never considered the appellants' defence that they did not cut the deceased; that the sharp objected which, according to the evidence of the doctor led to the death of the deceased, was never produced; that the prosecution failed to prove the element of mens rea in the commission of the offence; and that, in the premises, the evidence presented could not sustain a conviction as it was inconsistent and contradictory, and did not meet the standard of proof beyond reasonable doubt.

19. In the respondent's written submissions, it was contended that the prosecution proved all the ingredients of murder to the required standards; that the death of the deceased was proved by the evidence of PW1, PW2, PW3 and PW4; that, in their evidence, the same witnesses testified that the deceased's cause of death was assault and his subsequent lynching; that PW2, PW3 and PW4 testified

that the deceased was killed because he was suspected to have been a thief; that the appellants who were well known to PW2, PW3 and PW4 were also identified by the same witnesses; that the offence occurred between 2.00am and 6.30pm in broad daylight when the deceased was set on fire; that the appellants were found at the scene holding a jerrican full of petrol; and that the appellants had an intention to cause the death of the deceased.

20. From the prosecution's evidence, we gather that there were allegations of ongoing theft of maize within the village. On 24th June 2017, the appellants informed PW2 and PW3 that they had apprehended the thief while stealing in their farm. The fact of the deceased being found in the farm was confirmed by the 1st appellant, who had gone to the farm at midnight to keep vigil. That the 1st appellant was in the farm that night was corroborated by the 2nd appellant. Although the 1st appellant denied it, PW2's evidence was that the 1st appellant informed him that "they found a thief whom he cut twice". By the time PW2 arrived at the scene, he found the deceased being beaten with a stick by the 1st appellant and a vehicle tyre placed around his neck. The 2nd appellant, who was in possession of a match box and petrol, then doused the deceased with the petrol and lit the matchstick, setting him on fire. PW3, who had similarly been informed by the appellants that they had managed to catch the thief, was present from the time the deceased was removed from his house by the villagers, taken to the farm and burnt. According to him, in the course of the interrogation, the 2nd appellant came with a jerrican of petrol and a matchbox which they lit, setting the deceased on fire. In his evidence, the appellants were the ones to burnt the deceased.

21. The appellants have taken issue with alleged contradictions, inconsistencies and discrepancies in the evidence of PW2, PW3 and PW4. It is important, where counsel submits that there were contradictions in the evidence of witnesses, that the alleged contradictions be pointed out and clearly explained. As enunciated by the Court of Appeal of Nigeria in the case of *David Ojeabuo v Federal Republic of Nigeria* {2014} LPELR-22555 (CA):

> " Evidence contradicts another piece of evidence when it says the opposite of what the other piece of evidence has stated and not where there are mere discrepancies in details between them. Two pieces of evidence contradict one another when they are inconsistent on material facts while a discrepancy occurs where a piece of evidence stops short of, or contains a little more than what the other piece of evidence says or contains.".

22. It was the appellants' submission that it was only PW3 who mentioned that the petrol was in a jerrican. While that may be so, PW2 did not mention the container that had the petrol. In those circumstances, it cannot be argued that the evidence of PW2 and PW3 was contradictory as regards the container in which the petrol was carried. While PW2 was clear in his evidence that the 1st appellant was beating the deceased, PW3's evidence was that the deceased was being beaten, and that it was the appellants who burnt the deceased. This was not a question of two witnesses giving inconsistent and contradictory testimonies, or whose evidence had discrepancies, but merely one where one witness may not have seen exactly what the other one saw since they arrived at the scene at different times. We associate ourselves with the views expressed by this Court in *Philip Nzaka Watu v Republic* [2016] eKLR that:

> "Evidence that is obviously self- contradictory in material particulars or which is a mere amalgam of inconsistent versions of the same event, differing fundamentally from one purported eyewitness to another, cannot give the assurance that a court needs to be satisfied beyond reasonable doubt. However, it must be remembered that when it comes to human recollection, no two witnesses recall exactly the same thing to the minutest detail. Some discrepancies must be expected because human recollection is not infallible and no two people perceive the same phenomena exactly the same way. Indeed as has been recognised

in many decisions of this Court, some inconsistency in evidence may signify veracity and honesty, just as unusual uniformity may signal fabrication and coaching of witnesses. Ultimately, whether discrepancies in evidence render it believable or otherwise must turn on the circumstances of each case and the nature and extent of the discrepancies and inconsistencies in question."

23. While dealing with circumstances when a court would be entitled to disturb the findings of the trial court based on contradictions, inconsistencies and discrepancies in evidence, this Court stated in *John Nyaga Njuki & Others v Republic* [2002] eKLR that:

> " In certain criminal cases, particularly those which involve many witnesses, discrepancies are in many instancesinevitable. 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."

24. As for the evidence of PW4, apart from the report he received from PW2, by the time he arrived at the scene, the deceased had been assaulted. However, he found the 1st appellant still holding a panga in his hands while the 2nd appellant had a bottle with some petrol inside. He did not state the size of the bottle. We cannot say that in the circumstances, his evidence that the petrol was in a bottle and PW3's evidence that the petrol was in a jerrican, amounted to material discrepancies. As held by the Court of Appeal of Tanzania in *Dickson Elia Nsamba Shapwata & Another v Republic*, Cr. App. No. 92 of 2007:

> " In evaluating discrepancies, contradictions and omissions, it is undesirable for a court to pick out sentences and consider them in isolation from the rest of the statements. The Court has to decide whether inconsistencies and contradictions are minor, or whether they go to the root of the matter."

25. In this case, the appellants had reported the theft of their maize. When they laid ambush, they caught the thief, who turned out to have been the deceased. During the first confrontation with the 1st appellant, the deceased slipped away. However, he was fished from his house and taken to the farm where he was assaulted and subsequently burnt. In our view, the evidence of PW2, PW3 and PW4 were consistent in material aspects regarding the presence of the appellants at the scene, the person who was in possession of the petrol and the fact of the assault on the deceased. The appellants admitted that they were present at the scene after the deceased was apprehended. Although they said that they left before the assault on the deceased, we find no reason for PW2 PW3 and PW4 to have erroneously placed them at the scene during the assault. While there may have been many people at the scene, we have no evidence that any one of those present assaulted the deceased other than the appellants. In the premises, we find that, the appellants confronted the deceased earlier in the night, searched for him in the morning, took him to the farm where they assaulted him, and set him on fire.

26. It is true that there were many people at the scene. It may even be true that some other members of the public may well have assaulted the deceased. It may even be true that the 1st appellant was armed with a stick and not a panga. However, the role played by the appellants of removing the deceased from the house, taking him to the farm and eventually participating in assaulting and setting him on fire

clearly brought them within the ambit of those who had common intention with others to either kill the deceased or cause him grievous bodily harm. Section 21 of the *Penal Code* provides that:

> Where two or more persons form 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 nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence.

27. For common intention to be invoked by the Court, it is not necessary that those involved expressly agree to take a particular course of action. As held by the predecessor to this

Court in *Rex v Tabula Yenka S/o Kirya and 3 others* [1943] 10 EACA 51:

> "To constitute a common intention to prosecute an unlawful purpose ... it is not necessary that there should have been any concerted agreement between the accused prior to the attack on the so called thief. Their common intention may be inferred from their presence, their action and the omission of any of them to disassociate himself from the assault."

28. Similarly, it is not necessary that those involved act in concert. As held by this Court in *Dickson Mwangi Munene & Another v R*, [2014] eKLR, common intention can develop in the course of the commission of an offence and, as was observed in *Njoroge v Republic* [1983] KLR 197:

> " If several persons combine for an unlawful purpose and one of them in the prosecution of it kills a man, it is murder against all who are present whether they actually aided or abetted or not provided that the death was caused by the act of someone of the party in the course of his endevours to effect the common assault of the assembly...Their common intention may be inferred from their presence, their actions and the omission of either of them to dissociate himself from the assault."

29. From the evidence adduced by PW2 and PW3, the appellants actively participated in the assault on the deceased that eventually led to his death.

30. The appellants contended that the learned Judge never considered their defence that they did not cut the deceased. The learned Judge having discounted the defence of self – defence, expressed himself as follows:

> "In all the circumstances of this case, this is an open and shut case of murder committed with malice aforethought in the deceased house and during the fatal assault at the farm of the accused persons. There is the prosecution evidence for drawing that inference that the accused persons committed the offence of which they were arraigned. It appears to the Court that on examination of the evidence with the greatest care on recognition in so far as the evidence of (PW2), (PW3) and (PW4) on the incident in the home and the farm, is concerned as they positively recognized the accused persons on identification of the accused persons, I draw inspiration from the principles in the case of *Waithaka Chege v R* {1979} EA 271, *Simiyu v R* {2005} 1 KLR 192 that crucial evidence on to recognition of the accused persons in connection with the commission of the offence in this trial is that of (PW2), (PW3) and (PW4). Its categorical and their testimonies demolishes the alibi defence put forth by the accused persons that they were not at the scene."

31. It is a duty bestowed in every court to weigh one set of evidence (prosecution) against another (defence) before arriving at a conclusion. This is the basic calling of every court without exception. See *John*

Matiko & Another v Republic, Criminal Appeal No. 218 of 2012. This Court in *Nguku v Republic* [1985] eKLR observed that:

> "it is incumbent on the trial magistrate or judge to consider the evidence in its respective stages and then arrive at a general conclusion on the totality of the evidence after doing so."

32. In this case, while the learned Judge may have only briefly referred to the alibi defence evidence of the appellants, we associate ourselves with the decision of the Supreme Court of Uganda (per Odoki, JSC as he then was) in *Odongo and Another v Bonge* Supreme Court Uganda Civil Appeal 10 of 1987 (UR), said:

> "While the length of the analysis may be indicative of a comprehensive evaluation of evidence, nevertheless the test of adequacy remains a question of substance."

33. In any event, this Court as a first appellate court has a duty to analyze and evaluate afresh the entire evidence adduced before the trial court and draw its own conclusion to ensure that the appellant is not prejudiced. In any case, a consideration of the evidence by PW2, PW3 and PW4, which placed the appellants at the scene, we find that the appellants' evidence that they were not present thereat could not stand, and that the learned Judge was correct in rejecting their alibi defence. Accordingly, we find that nothing turns on the submission that the learned Judge did not consider the appellants' evidence.

34. As regards the prosecution's failure to produce the weapon(s) used in the assault of the deceased, this Court in *Ekai v Republic* (1981) KLR 569 held that failure to produce the murder weapon was not of itself fatal to a conviction and that, as long as the post mortem report had established beyond reasonable doubt the injury from which the deceased died, a conviction could still stand. Similarly, in *Karani v Republic* (2010) 1 KLR 73, the court stated that:

> "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."

35. The mere fact that the weapon was not produced is not necessarily fatal to an otherwise proper conviction.

36. Regarding the submission that the prosecution failed to prove the element of mens rea in the commission of the offence, we understand the appellants to be submitting that there was no proof of malice aforethought. In this case, there was evidence of prior confrontation between the 1st appellant and the deceased over the allegations of theft of maize from the appellants' farm. In setting the deceased on fire by use of petrol, the appellants clearly intended that the deceased be killed or, at the very least, that grievous harm be occasioned to him. As this Court held in *Robert Onchiri Ogeto v Republic* (2004) KLR 19:

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

death or grievous harm to the deceased. That being the case, we are satisfied that the appellant was properly convicted for the offence of murder."

37. Malice aforethought may be discerned from the circumstances in which the death occurred. The prosecution does not have to necessarily prove the motive behind the killing. Malice aforethought does not necessarily depend on what the assailant intended to achieve but whether he ought to have foreseen the consequences of his action. This is our understanding of the persuasive authority of *S v Sigwahla* 1967 4 SA 566 in which the court stated that:

> " The expression intention to kill does not in Law, necessarily require that the accused should have applied his will to compassing the death of the deceased. It is sufficient if the accused subjectively foresaw the possibility of his act causing death and was reckless of such result. This form of intention is known as a dolus eventualis as distinct from dolus directus."

38. Section 203 of the *Penal Code* sets out the three elements which the prosecution must prove beyond reasonable doubt to sustain a conviction, namely: (i) The death of the deceased, and the cause of his/her death; (ii) that the accused person(s) committed the unlawful act which caused the deceased's death; and (iii) that the accused had malice aforethought. See *Nyambura & others v Republic* [2001] KLR 355; *Roba Galma Wario v Republic* [2015] eKLR; and *Anthony Ndegwa Ngari v Republic* [2014] eKLR.

39. In this case, the death of the deceased was proved by the evidence of PW1, PW2, PW3 and PW4. The appellants did not dispute the fact of the death of the deceased. The circumstances of the death of the deceased was proved by the evidence of PW2 and PW3 and, from their evidence, the culprits were the appellants. The assault took place in broad daylight and the appellants were well known to PW2, PW3 and PW4. There was no possibility of a mistaken identity due to the fact that the case rested on recognition as opposed to identification. 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."

40. In view of the foregoing, we find that the deceased's death was caused by malice aforethought on the part of the appellants. In those circumstances, we find that all the elements of murder were proved by the prosecution beyond reasonable doubt.

41. Having re-evaluated the evidence on record as presented before the learned Judge, as we are enjoined to do, we find no merit in this appeal which we hereby dismiss in its entirety.

42. 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 C.Arb, FCIArb.

.....

JUDGE OF APPEAL

G. V. ODUNGA

.....

JUDGE OF APPEAL

I certify that this is the true copy of the original

Signed

DEPUTY REGISTRAR