



**John v Republic (Criminal Appeal E058 of 2023)
[2024] KECA 1406 (KLR) (11 October 2024) (Judgment)**

Neutral citation: [2024] KECA 1406 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CRIMINAL APPEAL E058 OF 2023
PO KIAGE, A ALI-ARONI & LA ACHODE, JJA
OCTOBER 11, 2024**

BETWEEN

ALEX MWENDO JOHN APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal from the Judgment of the High Court of Kenya at Makueni
(Dulu, J.) delivered on 21st September 2022 in HCCR. No. 158 of 2017)*

JUDGMENT

1. Alex Mwendo John, the appellant herein was charged before High Court at Makueni, with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars of the offence were that, on the night of 3rd and 4th February 2017 at Kyandune Village, Kitiango Location in Mukaa Sub-County within Makueni County he murdered Hannah Wanza John.
2. The appellant pleaded not guilty to the charge and the case proceeded to trial with the prosecution calling 9 witnesses.

Dennis John Mbai (PW1) testified that on 3rd February 2017, he was sleeping at home in the same house as his uncle Silas Wambua (PW2) when at about 11:00 pm they were woken up by the appellant, who is also an uncle. They both came out of the house and found the appellant with two other people, Kioko Kaunda (PW3) and Mwongela Kilowa (PW5). The three men they found outside were seated on a bench. The appellant asked him and Silas to join them, which they did at which point the appellant asked PW5 if he had a sexual relationship with the deceased Annah Wanza John, who was the appellant's mother. PW5 denied, and the appellant turned to PW4 and posed the same question. PW4, too, denied the allegation. PW5 then ran away followed by PW4. The appellant followed PW4 but could not catch up with him. The appellant then warned PW4 never to go back. PW2 also ran away. The appellant turned to him and ordered him (PW1) to cook for him. PW1 had a flashlight and



- could see around. Later PW2 returned and helped with the cooking. They then took the food to the appellant and went to sleep. It was his further testimony that the deceased was also present at the time, but he never saw her thereafter.
3. He testified further, that even though he and PW2 told the appellant about the deceased disappearance and what had happened the night before, the appellant, who had been drunk, simply told them to check on her at her family home. Despite their efforts, they could not find the deceased. On 8th February 2017, while at school, PW1 heard people saying that the deceased had been found. When he got home, he learned that the deceased body had been discovered about 100 meters from her home. At the scene, PW1 saw Dominic (PW4) and the appellant, who had been arrested and beaten. The police arrived and took the decomposing body of the deceased, and the appellant in a police vehicle.
 4. PW2, Silas Wambua John, a student at Kigeti Secondary School testified that on 3rd February 2017 at 11:00 pm, while at home with his brother Dennis (PW1) and their mother Annah Mwanza at home, and asleep, the appellant who had just arrived, woke them up and asked them to join him outside. The appellant was in the company of PW5 and, the deceased. The appellant wanted PW1 and PW2 to explain what had been happening since PW5 had abused him and had claimed that he used to have sex with the deceased. They told him that nothing had happened. He gave them food to cook for him and PW3 and PW5 ran away.
 5. PW2 further testified that he heard the deceased crying behind the kitchen as they took food to the appellant. They did not see the deceased after that and their search for her was all in vain. She was found dead after a week.
 6. PW3, Kioko Kaunda testified that on the night of 3rd February 2017 at 11:00 pm, he was at Kyandue market with the appellant and PW5 and, after having some drinks, they headed home and, while at the river, the appellant took out a panga, which he sharpened. When they reached the junction where they were to part ways, the appellant mentioned that there was something he wanted to investigate. He urged PW3 to accompany him and threatened to harm him if he refused. Both PW3 and PW5 accompanied the appellant to his home and once there, they all sat on a bench outside the house. PW1 and PW2 were present. The appellant went to call his mother at which point PW5 fled. The appellant forced open his mother's door and threatened her. He struck her on the head three times with a panga, causing her to kneel. Despite her refusal to sit, he kicked her until her legs stretched out. The appellant demanded an explanation from his mother about her interaction with PW3 and PW5. The mother denied any wrongdoing, which led the appellant to threaten to kill her. The deceased eventually admitted that she had asked for tobacco and started crying. The appellant then strangled the deceased until she urinated. PW3 attempted to stop the appellant from harming the deceased, but the appellant threatened him with the panga, telling him to leave as it was not his home. Meanwhile, PW1 and PW2 were still outside. Later that night, PW3 went back to his home. The next day, at 8:00 am, he went to the appellant's home and asked about the deceased whereabouts, when PW1 and PW2 informed him that they had not seen her. He encountered the appellant on 5th February 2017 but did not see the deceased. On 8th February 2017, he received news that the deceased had been found dead. He never went to the river where the body was found.
 7. PW4, Dominic Nzesi Mbova of Kyandue, a 'Nyumba Kumi' elder testified that on 8th February, 2017 at 11:00 am, as he was proceeding to his farm with two dogs, the dogs ran towards the river and he heard them bark while fighting with other dogs. He also sensed a foul smell and when he checked around, he noticed a piece of red cloth. On approaching, he saw a rotting human body with both hands eaten, stomach swollen, and lower body parts covered in sand. He called his wife Philomena Mwende on the phone and asked her to call the neighbours. She came with three people and on arrival they screamed and the appellant appeared with a machete. When he was informed about the body, he checked and said



- it was the body of his mother. Together with others, they beat up the appellant as they had previously heard the appellant's mother cry at night but when they inquired about her whereabouts, the appellant told them that she had gone to her sister's home. He also testified that the appellant had told him that a man of God had told him that his mother had been mysteriously taken to go and cook for his father.
8. PW5, Mwangela Kilowa testified that on a day he could not recall, he left the club/bar around 11:00 pm, in the company of PW3 and the appellant and when they reached Kyandui river, the appellant took out a panga from his trousers and sharpened it. They then proceeded to the appellant's home where he woke up the deceased but she refused to come out. Other boys who were sleeping in a separate house were also woken up and asked to come out. Subsequently, the appellant forcefully entered his mother's house by kicking the door open. PW5 then ran away leaving behind PW3 and the two boys. After approximately 10 minutes, he heard the appellant shouting on the phone that he had killed his mother as he talked to his father.
 9. It was his testimony further that upon the appellant entering the deceased house, PW5 heard a loud noise inside and the deceased scream. Further, the appellant used to beat the deceased like a small child, and the villagers were accustomed to the cries and were tired of them. He learnt that the appellant informed people the following day that his mother was missing. The deceased body was later found. He never went to view the body.
 10. PW6, John Mulwa the father of the appellant and the husband of the deceased testified that on 3rd February 2017 at 1:00 am, he was phoned by the appellant who threatened to kill the deceased alleging that PW5 usually slept with her. He asked the appellant if his mother was alive, to which the appellant answered in the affirmative. Using PW2's phone, he warned the appellant not to cause trouble at home and to be careful about his mother (deceased).
 11. PW6, further testified that he contacted his daughter Dorcas Shushu, who had already been informed about the dispute between the appellant and the deceased and Dorcas informed him that she too had warned him against his actions. On 8th February 2017, the appellant called to inform him that the deceased's body had been found buried in a hole. He went home, when he found the appellant already arrested and his whole body swollen as he had been beaten by the neighbours. He then went to view the deceased's body and arranged for her burial.
 12. PW7, Stephen W. Muindi testified that on 6th February 2017, he encountered the appellant while conducting community policing, who informed him that his mother had been missing for 3 days. He advised the appellant to report the matter to the police before 4:00 pm. The following day, while he was at home, he heard screams coming from near the deceased's residence. He proceeded to the location of the commotion and learned that the deceased had been discovered dead, at which point members of the public apprehended the appellant, and he tied his hands with a rope. The irate public wanted to set the appellant on fire. Subsequently, the police arrived and re-arrested him. He also testified that the appellant and his mother were in the habit of consuming alcohol and engaging in quarrels. During cross-examination, he stated that it was PW4 who initially came across the deceased's body. That PW4's home was near the deceased's home. PW4 was their cousin.
 13. PW8, Dr. Makau Alex testified that the postmortem of the deceased was done at Kilungu Hospital Mortuary on 11th February 2017 by his colleague Dr. Emmanuel Loiposha, who had left the hospital for further studies two years prior. Upon examination his colleague recorded his findings which included; 80% superficial skin loss, first-degree burns due to decomposition, missing hands from the upper shoulder, and visible strangulation marks around the neck; the examination was after 6 days of death, putrefaction had started; and the body had a foul smell. The body was embalmed. His opinion was that the cause of death was strangulation causing asphyxia and severe multiple body injuries.



14. PW9, No. 236312 IP. Rama Mwachuno testified that on the morning of 8th February 2017, he got a call from PW4 at about 9:00 am, who informed him that while walking on the road with two dogs, the dogs ran into a bush. He followed the dogs and discovered them near a bridge where a decomposed female body lay, with the legs covered in soil. After PW9 documented the report in the Occurrence Book, he and PC Moses Karani proceeded to the scene. Upon arrival, they encountered the appellant sitting on the road with ropes tied around him. They were shown the decomposed body, and due to the gathering of the public, they swiftly removed the body to avoid harm to the appellant. The body was then taken to the mortuary, and the appellant was placed in custody. Subsequently, they obtained statements from witnesses.
15. It was his further testimony that while recording the statements of the witnesses PW3 and PW5 informed him that on 3rd February 2017, they were with the appellant in Kilome Trading Center and left for home at around 11:00 pm. While on the way, the appellant took out a machete and sharpened it on the roadside. He then accused them of being in a relationship with his mother and forced them to accompany him to their home to confirm the allegation. Upon reaching, the appellant loudly woke up his mother and asked her to come out, but she did not respond. He kicked open her door, entered, and pulled her out, at which point PW5 escaped. He then questioned the deceased about her relationship with the two. The appellant also woke up his nephew (PW1) and his brother (PW2) and proceeded to kick and strangle the deceased as she lay down. Further, during the incident, PW2 and PW3 also managed to escape. The appellant then took eggs and flour and compelled PW1, his nephew, to cook. While PW1 was cooking, the appellant called his father, who was in Nairobi, and informed him that he felt like killing the deceased because she was involved in romantic relationships with young men. Subsequently, the appellant left the house with his mother around 1:00 am – 2:00 am, and after about an hour the appellant returned home alone.
16. It was also his testimony that on 6th February 2017, a village elder, one Waema encountered the appellant on the road and inquired about the whereabouts of the deceased to which he replied that she had fled on 3rd February 2017, and had not returned. When asked if he had informed the police, he responded in the negative and was then advised to make a report, which he did on the same day, 6th February 2017, at Kilome Police Station.
17. Further the witness testified that he completed taking witness statements on 11th February 2017, a postmortem examination was carried out, where the doctor concluded that the cause of death was strangulation, which according to him indicated an intent to kill, which led him to charge the appellant who was implicated with the offence of murder. He also learnt from the neighbours that the appellant had a lot of disagreements with his mother.
18. The trial court considering the prosecution's evidence, found the appellant had a case to answer and placed him on his defence. The appellant gave a sworn statement and denied the charge. It was his testimony that on 2nd February 2017, he and his deceased mother attended the trial at Kilungu Court involving Bernard M. Nzomo and Salim Mwau, who were facing the charge of robbery. The court proceedings were adjourned, and on his way back home, he passed by Kiunde market at around 4:30 pm, when he encountered Dominic (PW4) and one Peter Marueti Katoo. PW4 inquired why he intended to testify against Bernard and Salim, and offered him Kshs. 50,000 from Bernard to persuade him and the deceased not to testify in the case, an offer he rejected. The following day, the 3rd February 2017, at 8:00 pm, as he was returning from the market carrying food, PW3 and PW5 asked him to take items to his mother. That, together, they walked home, and once inside, he handed the bag of food to PW1 and PW2 and asked them to cook. PW3 and PW5 gave alcohol to the deceased, and he quarreled with the deceased for accepting the items.



19. He testified further, that earlier in the day PW5 had told him that they had brought his mother some alcohol and went on to insult his mother, and when asked why, PW5 ran away. Later, he called his father and informed him that PW5 had insulted his mother. However, his father instructed him to pass the phone to the deceased. He had his meal, went to bed, and just before falling asleep, he overheard PW5 calling the deceased, alleging that he had heard people shouting and had called the police.
20. The following day, he visited the deceased house wanting to know about the previous night's conversation between the deceased and PW5 but he did not find her. He asked PW1 about the deceased whereabouts, and PW1 mentioned that he heard her leave with PW5. Thereafter, he contacted his sister and brother, who confirmed that they had not seen her. His search for the deceased on 4th and 5th was in vain and on the 6th, he reported the matter to the police in Kilome. On the 7th, he encountered PW4, who inquired about his mother. On 8th at about 11:00 am, he received a phone call from Paulina Muli, a cousin, informing him that PW5 had witnessed something and advised him to return home. On returning home, he encountered PW4, one Bernard Nzomo, and Dorcas Nzomo on their farm, when they directed his attention to his mother's coat. He immediately called his father and on mentioning his name to his father, PW4 struck him with a stick, causing him to fall. Stephen Waema Muindi appeared with a rope and the two tied him up, beat him, and broke his shoulder bone. PW5 stepped on his head with his shoes until his eardrum broke. Thereafter, the police arrived, took the body of the deceased, arrested him, and later charged him with the offence. According to him, the deceased was killed due to the robbery case, since he had refused to be bribed. He denied having killed the deceased.
21. In its determination the trial court (Dulu, J.) having considered the evidence of both the prosecution and the defense was persuaded that the appellant committed the offence. It convicted him and sentenced him to 18 years' imprisonment.
22. Aggrieved by the conviction and sentence, the appellant lodged this appeal and relied on grounds in a supplementary memorandum of appeal dated 20th February 2024 stating that the trial judge erred: by failing to consider that the prosecution did not prove the ingredients of the offence of murder; by failing to analyze and evaluate the appreciating that the prosecution's evidence was tainted with contradictions and inconsistencies; failing to properly consider the principle applicable to circumstantial evidence; and that the sentence meted out is inappropriate.
23. The hearing before us proceeded by way of written submissions with brief highlights of the same on the GoTo virtual meeting platform.

The appellant's learned counsel filed submissions dated 20th February 2024. He reminded us of our role as the first appellate court by citing the case of Joseph Ndung'u Kagiri v Republic [2016] eKLR.
24. Learned counsel collapsed the grounds of appeal into 2 issues namely; whether the offence of murder was proved beyond a reasonable doubt; and whether malice aforethought was established under Section 206 of the Penal Code. On the first issue learned counsel relied on the case of Nyambura & Others v Republic [2001] KLR 355 where the High Court outlined the ingredients of the offence of murder.
25. Learned counsel further submitted that there were numerous inconsistencies in the prosecution's case. For instance, he pointed out, that during the examination-in-chief, PW1 stated that he possessed a chargeable torch that emitted sufficient light. However, during his cross-examination, PW3 claimed that he did not see PW1 with a torch. Additionally, during the examination-in-chief, PW5 mentioned that the area was well-lit due to the light from the stars. The appellant's learned counsel also raised the question of whom was to be trusted between PW1 and PW3. In that during examination-in-chief, PW3 told the trial court that while at the river the appellant removed a panga and started sharpening



- it; and that the appellant used the same panga to hit the deceased on the head thrice yet during cross-examination PW5 told the trial court that the appellant had no panga at the bar. PW3 and PW5 were together at the bar until they reached the appellant's home, yet it was not clear where the panga could have come from. He also questioned why PW1 and PW2 did not see the panga when they were with the appellant, as the issue of the panga appeared not to have featured in their statements, and was, therefore, an afterthought.
26. Learned counsel further contended that the trial court arrived at its determination based on circumstantial evidence, as there was no direct proof linking the appellant to the death of the victim. The court linked the allegation that the appellant was heard telling his father on the phone that he had killed his mother; with the allegation, that he had entered the deceased's house forcefully; and that she was heard screaming, and that other than what PW5 shared with the trial court, there was no additional evidence indicating how the victim died at the hands of the appellant. Counsel relied on the case of Ahamad Abolfathi Mohammed & Another v Republic [2018] eKLR, where the court held that circumstantial evidence enables a court, to deduce a particular fact from circumstances or facts that have been proved and that such evidence can form a strong basis for proving the guilt of an accused person as would direct evidence. Learned counsel also relied on Sawe v Republic [2003] KLR 364, where the court held that for circumstantial.
 27. On the doctrine of 'last seen' learned counsel submitted that the doctrine should not apply to the appellant, since PW5's testimony that he was last seen with the deceased, was not corroborated. In support of this contention learned counsel relied on the Nigerian case of Moses Jua v the State [2007] LPELR-CA/IL/42/2006 and Stephen Haruna v The Attorney General of the Federation [2010] 1 Ilaw/CA/A/86/C/2009, where the courts were of the view that the doctrine of 'last seen' means that the law presumes that the person last seen with a deceased has to bear full responsibility for his death. Locally, he relied on the case of Republic vs. EEK [2018] eKLR.
 28. As to whether the court was entitled to rely on the doctor's report to inform the cause of death, learned counsel cites the case of Parvin Singh Dhalay v Republic [1997] eKLR which was quoted in the case of Yahya v Republic [2022] KECA 389 (KLR), where the court held that while it is trite law that courts must give proper respect to opinions of experts, even though such opinions are not, as it were, binding on the courts and that such evidence must be considered along with all other available evidence.
 29. The respondent's learned counsel filed submissions dated 13th March 2024. The State submitted that through the 9 witnesses, all the ingredients of the offence of murder were proved; that PW3 who was a key witness testified, and PW9 who was the one who moved the body to the mortuary and further who witnessed the postmortem being conducted, corroborated the testimonies of the eyewitnesses. The State further submitted, that the appellant was seen by more than 3 witnesses, to wit, PW1, PW2, and PW3 hitting the deceased with a panga before strangling her, and some witnesses saw him moving to bury the body next to the river where it was discovered by PW4. He was further heard by PW3 informing PW6 that he had killed the deceased, a fact that was not controverted during cross-examination.
 30. The State further submitted that the trial court did a thorough and proper analysis of the totality of the evidence before arriving at its verdict where the court found that all the ingredients of the offence had been proved.
 31. This being a first appeal, our mandate involves revisiting the evidence presented to the trial judge, conducting an independent analysis thereof, and subsequently drawing our conclusions. It is, however, essential to acknowledge that we did not have the opportunity to witness, or hear the witnesses



firsthand and make allowance therefor. This was aptly stated in the case of *Okeno v Republic* [1972] EA 32, as follows:

“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.”

32. We have, therefore, subjected the record to scrutiny, considered the rival submissions, case law cited and the law and we are of the view that the issues for our consideration are:
- i. whether the ingredients of the offence of murder were proved to the required standard;
 - ii. whether the trial court properly invoked the doctrine of circumstantial evidence;
 - iii. whether the prosecution’s evidence was fraught with contradictions and inconsistencies; and
 - iv. whether the sentence was lawful.
33. The postmortem report produced in evidence by PW8 was in support of the fact of death of the deceased. Both the prosecution’s witnesses and the appellant alluded to the death. The real issue then is who the perpetrator of the heinous act was. From the evidence on record, although, the altercation between the appellant and the deceased was witnessed by several witnesses, none of them directly pointed a finger at the perpetrator of the heinous crime. PW1, PW2, PW3 and PW5 testified that on the fateful night, the appellant who was drunk violently opened the deceased’s door at about 11 pm having indicated to PW3 and PW5 that the deceased had to answer to some allegations. PW5 escaped before the mayhem heightened. PW1, PW2, and PW3 saw what took place after the appellant dragged his mother out of the house. Before then, the appellant who was in the company of PW3 and PW5 was seen by the two sharpening a panga as they walked home. He insisted on PW3 accompanying him to his home when he accused his friends of having a sexual relationship with the deceased which they both denied, which led him to fetch the deceased from her house in the thick of the night.
34. PW3 who is the key witness testified that he saw the appellant drag the deceased from her house, beat her three times with the panga, and strangle her until she urinated. PW2 testified that he heard the deceased cry behind the kitchen as they took food to the appellant, and, in his evidence, PW6 who is the father to the appellant and the deceased’s husband testified that he received a call from the appellant the night before the deceased disappeared when the appellant complained of the deceased’s behavior and the insult from PW5, who had alleged that he used to sleep with the deceased and had threatened to kill the deceased.
35. The trial judge acknowledged that there was no direct evidence to pin down the appellant and pierced together the strands of evidence before it to conclude that the appellant was the person who gave the final blow to his mother’s life. The trial judge had this to say:

“48. Did the accused cause the death of the deceased? The evidence on record is circumstantial in nature as nobody saw the accused kill or fatally injure



the deceased. For circumstantial evidence to sustain a case against an accused person, the unculpatory facts should irresistibly lead to the conclusion that the accused is guilty and should not lead to any other reasonable hypothesis that that the accused is guilty.

49. In the present case, the deceased was the mother of the accused. There is evidence that their relationship was not cordial due to the deceased drinking habits, and suspicion by the accused that the deceased was having love affairs with other men in the absence of his father. on the night the deceased disappeared there is evidence including that of the accused that there was a heated quarrel between the two for the deceased receiving alcohol at night from two young men.

The accused admitted that he phoned his father that night regarding the incident.

...

52. In my view from the evidence on record, the circumstantial evidence herein leads to no other reasonable conclusion that it is the accused and nobody else that killed the deceased...”

36. Circumstantial evidence should be considered cautiously as was stated in the English case of *Teper v R* [1952] AC by the court where it stated that:

“Circumstantial evidence must always be narrowly examined, if only because evidence of this kind may be fabricated to cast suspicion on another. It is also necessary before drawing the inference of accused’s guilt from circumstantial evidence, to be sure that there are no coexisting circumstances which could weaken or destroy the inference.”

37. Further this Court has stated that circumstantial evidence must satisfy several conditions as set in the case of *Ahamad Abolfathi Mohammed & Another* [2018] eKLR:

“Before circumstantial evidence can form the basis of a conviction however, it must satisfy several conditions, which are designed to ensure that it unerringly points to the Accused person, and to no other person, as the perpetrator of the offence. In *Abang’a alias Onyango v. R* CR. App. No 32 of 1990, this court set out:-“It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests: (i) the circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established; (ii) those circumstances should be of a definite tendency unerringly pointing towards the guilt of the Accused; (iii) the circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the Accused and none else.” (emphasis added)

38. Further in the case of *Neema Mwandoro Ndunya v Republic* CRA 466 of 2007, the court cited with approval the case of *R vs. Taylor Weaver and Donovan* [1928] 21 CRC 20 stating that:

“Circumstantial evidence is often said to be the best evidence. It is the evidence of surrounding circumstances which by intensified examination is capable of proving a proposition with the accuracy of mathematics”.



39. We associate ourselves with the holdings of this court above and find concurrence with the findings of the trial court as the pieces of evidence from the persons who were with the appellant on that fateful night leave no doubt in our minds that he having been angered by the drinking habits of his mother and with the information he had received from PW5 picked a quarrel with his mother whom he mercilessly assaulted fatally injuring her, thereafter disposing her body in what seemed as a shallow grave, after which he went about his business for 6 days without a care in the world until a neighbor with the assistance of dogs discovered the mutilated body of the deceased. We further agree that the pieces of evidence chained together leave no doubt that the appellant and none else caused the death of the deceased.

40. On whether the actions of the accused were laced with malice aforethought, the evidence before the court was that the appellant spoke to his father and his sister who warned him against the threat of killing the deceased. PW3 also attempted to stop the appellant's merciless beating of the deceased. The brutal and senseless beating and strangling that the deceased suffered was so massive that it cannot be attributed to a "spur-of-the-moment anger" as it were, but an act that had been premeditated over time, hence the panga that the appellant had and the sharpening of the same just before the appellant got home. One cannot help but infer malice aforethought from the appellant's actions. In the case of Ernest Asami Bwire Abanga alias Onyango v R (CACRA No. 32 of 1990), the court held:

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

41. Minor discrepancies or variations in testimonies are not uncommon and do not necessarily undermine the credibility of witnesses, or the overall strength of the prosecution's case. Courts have consistently recognized that witnesses may recall events differently due to factors such as the passage of time, individual perspective, and the traumatic nature of the events in question.

The Court of Appeal of Nigeria in the case of David Ojeabuo v Federal Republic of Nigeria [2014] LPELR-22555(CA), stated as follows:

"Now, contradiction means lack of agreement between two related facts. 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."

42. In John Cancio De SA vs. V. N Amin Civil Appeal No. 27 of 1933 [1934] 1 EACA 13, the court held that:

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



more reasonable to argue that the journey never took place than that one or both suffered from a defective memory.”

43. Similarly, in Erick Onyango Ondeng’ v Republic [2014] eKLR, this Court cited the Ugandan case of Twehangane Alfred v Uganda, (Crim. App. No 139 of 2001, [2003] UGCA, 6, in which the Court of Appeal of Uganda stated:

“With regard to contradictions in the prosecution’s case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution’s case.”

44. In our view, the contradictions of the witnesses herein were so minor compared to the concurrence and similarity of facts seen from their testimonies. We therefore are not persuaded to reject or disbelieve the evidence which is cogent that the said evidence was not displaced by the defence.

45. We are also in total agreement with the trial court that the prosecution proved its case beyond reasonable doubt with the result that we dismiss the appeal on conviction.

46. Regarding sentence, we think with respect that the appellant got off lightly with 18 years given the gravity of the offence against his mother we would not interfere with it.

47. As a result, this appeal fails in its entirety and is accordingly dismissed.

DATED AND DELIVERED AT NAIROBI THIS 11TH DAY OF OCTOBER, 2024.

P.O. KIAGE

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JUDGE OF APPEAL

ALI-ARONI

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JUDGE OF APPEAL

L. ACHODE

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR

