Osewe & 3 others v Republic (Criminal Appeal 21 of 2019)
[2024] KECA 1414 (KLR) (11 October 2024) (Judgment)

Neutral citation: [2024] KECA 1414 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 21 OF 2019

HM OKWENGU, JM MATIVO & JM NGUGI, JJA

OCTOBER 11, 2024

BETWEEN

EMMANUEL ODHIAMBO OSEWE ..... 1ST APPELLANT

PETER OCHIENG OLOO ..... 2ND APPELLANT

PRESTON AYAYO MIREJE ..... 3RD APPELLANT

YUSTO ODHIAMBO OJUAKA ..... 4TH APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal from the Judgement and sentence of the High Court of Kenya at Homabay (J. R. Karanjah, J.) dated 6th December, 2018 in Criminal Case No. 7 of 2015)

JUDGMENT

1. The appellants Emmanuel Odhiambo Osewe, Yusto Odhiambo Ojuaka, Preston Ayayo Mireje and Peter Ochieng Oloo were arraigned before the High Court at Homabay with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. It was alleged that on 23rd January, 2015 at Kakuma village, Ratanga Sub-location, Central Kwabwai Location, in Ndhiwa District, Homabay County within the Republic of Kenya, jointly with others not before the court, they attacked Charles Juma Odongo and set his house ablaze. Even though Charles Juma Odongo managed to escape from his burning grass-thatched house, he succumbed to the injuries sustained while receiving treatment at Homabay Hospital.

2. The prosecution case rested on the evidence of 6 witnesses, namely: PW1, Margaret Anyango Odongo, (the deceased's mother), PW2, Joseph Odongo Omolo, (the deceased's father), PW3, Kennedy Odoyo Obwanga and PW4, Philip Odiambo Obewanga, (neighbors), PW5, Dr. Osuri Kevin and PW6, PC Shadrack Male. The totality of their evidence was that on 23rd January, 2015, the deceased was attacked

by a mob alleging that he was a cow thief. He sustained serious injuries during the attack from which he died while undergoing treatment at Homabay Hospital. Amongst those who were in the mob attackers, PW1 and PW2 testified that they positively identified five assailants who they claimed were known to them. Four of whom were charged with the offence and are the appellants herein. A fifth person disappeared and still at large.

3. The appellants pleaded not guilty to the charge. Their trial commenced before Majanja, J. on 14th December, 2015 who heard one witness and adjourned the hearing to allow for the arrest of the other accused persons. Subsequently, he was transferred to another station. When the matter resumed for hearing before Omondi, J. (as she then was) on 27th July, 2016, the appellants requested for de novo hearing. The learned judge heard the evidence of the 6 prosecution witnesses before she was also transferred out of the station. The case proceeded for defence hearing before Karanja, J. on 27th November, 2018.

   Each of the appellants denied being among those who assaulted and fatally injured the deceased. They also called DW1, Bildian Adhiambo Odira, the area assistant chief and DW2, Patrick Lumumba Awino, a senior chief as their witnesses. Their evidence was that when they interviewed the deceased's father, he informed them that he was unable to identify the attackers.

4. After considering the evidence, the learned judge concluded that the appellants were all placed at the scene at the material time by the prosecution witnesses, among them PW1 and PW2, the deceased's parents. PW1 identified all the four accused persons by recognition. She knew them very well as her village mates and said that the offence occurred in the night but there existed favourable conditions for identification in the form of solar generated light which is normally as bright as electric light. PW2 also testified that there was bright light in his house which enabled him to identify by recognition the first accused and another person called Pius Anyuong said to be at large.

5. The learned judge also found that the appellants were identified by PW3 and PW4, through the dying declarations made to each of them by the deceased whom they found at the scene lying on the ground while crying immediately after he had been assaulted. The deceased told PW3 that the first, second and third appellants attacked him. The deceased also told PW4 that all the four accused persons attacked him. The deceased also mentioned other persons who were not arrested.

6. In the impugned judgment delivered on 6th December, 2018 Karanja, J. found the appellants guilty as charged and convicted them. After mitigation, the appellants were each sentenced to serve 25 years imprisonment. Aggrieved by the judgment, the appellants appealed to this Court against both conviction and sentence citing 6 grounds in their memorandum of appeal dated 6th March, 2019 which can be reduced to 5. The grounds are: (a) The learned Judge erred in law and fact in holding that the appellants were positively identified among a multitude of people. (b) The learned judge erred in law and in fact in relying on contradictory prosecution evidence. (d) The learned trial judge erred in holding that the witnesses were credible when they were not. (e) The learned trial judge failed to consider the appellant's alibi and defence; and (f) The judgement was against the weight of evidence on record.

7. During the virtual hearing on 11th March, 2024, the appellants were represented by learned counsel Mr. Athuga while the respondent was represented by learned counsel Mr. Okango. The appellants' counsel highlighted his written submissions dated 19th January, 2021 while the respondent's counsel highlighted his written submissions dated 10th February, 2024.

8. On behalf of the appellants, it was submitted that the appellants were not positively identified because the incident occurred at night and the circumstances were not conducive for proper identification. It was contended that that PW1 and PW2 were 80 meters away from the deceased's house and it was

PW2's evidence that he only saw two people among many attackers through the lighting from a solar lamp in the house. They contended that there was no way PW1 could see a person outside their house through the gap of the sitting room door when the main door was closed from outside, and in any event, afraid as they were, they could not have identified them. Counsel cited Wamunga vs. R [1998] KLR 424 where this Court held that evidence of visual identification in criminal cases could occasion injustice; therefore, such evidence must be carefully examined to avoid injustice.

9. Regarding the dying declaration, the appellants' counsel maintained that at the scene there were only four people that is PW1, PW2, the deceased and an undisclosed neighbour who cannot be PW3 or PW4 because he was not mentioned by PW1 and PW2 in their testimony nor were PW3 and PW4 part of the entourage that took the deceased to hospital.

10. The appellants' counsel described the prosecution evidence as contradictory and, as an example, cited PW1's evidence that there was light which remained on from 6pm to 6am because children use it to study. Counsel argued that because no child was said to have been in PW1's house or anywhere within the compound at the material time, and none was called to testify, that piece of evidence was contradictory. Another example provided is that PW1 and PW2 said the solar light was bright, yet PW2 was unable to see the person who cut him when he went out of the house. It was also argued that even though PW1 said she raised an alarm, PW2 did not corroborate her evidence on the said issue. Regarding the testimony of PW3 and PW4, counsel contended that it materially differs on what exactly the deceased said in his dying declaration. Another contradiction cited is that PW6 did not mention whether the deceased named his attackers to PW3 and PW4. In addition, counsel argued that whereas PW1 said that PW2 was cut when he went outside the house, PW2 said he was hit with a rungu. The appellants' counsel questioned why it took PW1 and PW2 one week to report the attackers to the police yet they claimed that they had identified them. Counsel argued that the said contradictions and inconsistencies dent the credibility of the prosecution witnesses.

11. The appellants' counsel also contended that the learned judge did not consider the appellants' alibi. The 1st appellant's defence was that he was working in Wachara and that he proceeded to the scene the following day. The 2nd appellant stated that he carried the deceased's wife on his motorbike to Ndhiwa where he learnt of the deceased's demise, therefore, he wondered how the deceased's wife accepted the ride if at all he was the offender. The 3rd appellant stated that he was at home on the material day, while the 4th appellant said that he had been hired to proceed to Sori to purchase fish and, on his return, he proceeded to the scene. The appellants' counsel maintained that the prosecution had a duty to rebut their alibi.

12. Counsel contended that the trial court's finding that the appellants disappeared briefly after the incident amounted to circumstantial evidence which was wrong since there is no law that requires one to always remain at his residence nor can being away from home mean that one was involved in a crime. It was also submitted that PW1 and PW2 did not describe the attackers, their dressing, physique, or whether there was security lighting. In addition, counsel argued that PW6 did not testify that the deceased mentioned the attackers to PW3 and PW4, therefore, PW3 and PW4's evidence was contradictory, untrue, incredible, and unsafe to form a basis for conviction.

13. The appellants' counsel also submitted that DW1 and DW2 were not called as prosecution witnesses yet they were independent witnesses who were conversant with the events in their locality, therefore, the failure by the prosecution to call them suggests that their evidence was adverse to the prosecution case. Lastly, the appellants' counsel faulted the trial judge for failing to comply with the provisions of section 200 (3) of the Criminal Procedure Code (CPC) and issue directions whether the trial would start de novo or proceed from where it had reached after the learned judge who was handling it ceased to have jurisdiction over the matter.

14. Counsel for the respondent, Mr. Okango, submitted that the prosecution case stood on identification by recognition as opposed to identification of total strangers because PW1 and PW2 knew the appellants. Counsel recalled that PW1 testified that he knew the appellants because they came from the same clan and PW1's uncontroverted evidence was that there was illumination provided by a combination of a bulb and light from the torches which the appellants had. Counsel argued that PW1's evidence was corroborated by PW2 who maintained that after the appellant set ablaze the deceased's house, the moonlight and the light from the burning house enabled them to see and recognize the assailants. Furthermore, DW1 and DW2's evidence did not controvert PW1 and PW2's evidence.

15. Responding to DW1 and DW2's evidence, the respondent's counsel submitted that it was PW2's testimony that he only spoke to DW1 and DW2 when they came to condole with them and they never spoke about the incident. However, PW2 later mentioned to DW2 who the assailants were, therefore PW2's account was credible as was correctly stated by the trial court.

16. Regarding the alleged contradictions, Mr. Okango argued that minor contradictions that do not go to the core of the evidence cannot render a conviction fatal. He submitted that PW3 was clear that they carried the deceased on a motorcycle to the hospital. Consequently, the submission that PW2 and PW3 were not present at the scene should be ignored.

17. Responding to the submission that the prosecution failed to call DW1 and DW2 as its witnesses, he submitted that DW1 and DW2's evidence was contradictory and not credible and, therefore, their testimony did not rebut the prosecution evidence.

18. Regarding the argument that the trial court failed to consider the appellants' defence, Mr. Okango maintained that the appellants' alibi was raised after the prosecution had closed its case by way of an unsworn testimony. Therefore, they could not be cross-examined. Thus, it was upon the court to weigh their alibi against the prosecution evidence, which it did, and found their alibi wanting.

19. Lastly, regarding the trial court's failure to comply with the provisions of Section 200 (3) of the CPC, Mr. Okango maintained that throughout the trial, the appellants were represented by counsel. Bearing in mind that the trial commenced in 2015, and it was part heard by two judges, and on 27th July, 2018 it came before Karanja J., the interests of justice tilted in favour of not ordering for a retrial. Mr. Okango cited the High Court decision in Office of Director of Public Prosecutions vs. Peter Onyango Odongo & 2 Others [2015] eKLR in support of the holding that Section 200 (3) of the CPC should be sparingly applied. Further, where the accused had the opportunity to cross-examine witnesses and where the matter had been pending for a long, a retrial may be contrary to Articles 47, 50 (2)(e) and 159 (2) (d) of *the Constitution* which requires expeditious determination of cases.

20. We have carefully evaluated the entire record, the parties' submissions and the authorities cited. This being a first appeal, the appellants are entitled to raise both questions of law and of fact. We are obligated to rehear the case, to consider the material before the trial judge and arrive at our own conclusions. If after full consideration we conclude that the judgment is wrong, we are obliged to overturn it. However, where the question is which witness is to be believed, and the issue turns on the witnesses' demeanor, we will defer the impression made by the trial judge who saw and heard the witnesses. (See Pandya v. Regina [1957] EA 337.

21. Section 203 of the Penal Code defines murder as follows:-

> " 203. Murder

> Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder."

22. A reading of the above section shows that to succeed in a murder case, the prosecution is obliged to prove the following prerequisites: (a) The death of the deceased. (b) That the death was caused by an unlawful act or omission on the part of the accused. (c) That in causing the death of the deceased, the accused had malice aforethought. (d) That it was the accused who killed the deceased. (See this Court's decision in Titus Ngamau Musila Katitu vs. Republic [2020] eKLR and Antony Ndegwa Ngari vs. Republic [2014] eKLR).

23. It is not disputed that the deceased died. Therefore, the first ingredient is not an issue for determination. We will however examine the evidence to satisfy ourselves whether the other ingredients were proved, bearing in mind that a guilty verdict is only permitted if the evidence is of sufficient quality to convince the court beyond reasonable doubt that all the elements of the crime have been proven. The burden of proving the ingredients of an offence in criminal cases always lies with the prosecution. Viscount Sankey L.C. in the celebrated case of Woolmington vs. DPP [1935] A.C 462 at page 481 in masterly fashion stated the law on legal burden of proof in criminal matters as follows:-

> " Through the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt subject to what I have already said as to the defence of insanity and subject also to any statutory exception...No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained."

24. We will now examine the issue whether the appellants unlawfully caused the deceased's death. As to whether the appellants' culpability was proved to the required standard, the prosecution case rested on the question whether the appellants' identification as the offenders was free from error. Where the case rests on identification evidence, the identification must be both truthful and accurate. Our system of justice is deeply concerned that no person who is innocent of a crime should be convicted of it.

25. To determine whether the prosecution evidence on the issue of the appellant's identification was truthful, that is, not deliberately false, this court must evaluate the believability of the witness who claimed to have identified the appellants. In doing so, the court will consider the various factors for evaluating the believability of identification evidence. This is because the accuracy of a witness's testimony identifying a person depends on the opportunity the witness had to observe and remember that person, and whether the witness knew the accused before. The Court of Appeal of England in R. vs. Turnbull [1977] QB 224 laid down the following considerations for evaluating the accuracy of identification testimony, the court should consider such factors as: -

    a. What were the lighting conditions under which the witness made his/her observation?

    b. What was the distance between the witness and the perpetrator?

    c. Did the witness have an unobstructed view of the perpetrator?

    d. Did the witness have an opportunity to see and remember the facial features, body size, hair, skin, color, and clothing of the perpetrator?

    e. For what period of time did the witness actually observe the perpetrator?

f. During that time, in what direction were the witness and the perpetrator facing, and where was the witness's attention directed?

g. Did the witness have a particular reason to look at and remember the perpetrator?

h. Did the perpetrator have distinctive features that a witness would be likely to notice and remember?

i. Did the witness have an opportunity to give a description of the perpetrator? If so, to what extent did it match or not match the accused, as the court finds the accused's appearance to have been on the day in question?

j. What was the mental, physical, and emotional state of the witness before, during, and after the observation?

k. To what extent, if any, did that condition affect the witness's ability to observe and accurately remember the perpetrator?

26. Decided cases agree that evidence of identification in criminal cases is always a pivotal question and whenever it arises, the trial court has to satisfy itself that the suspect was positively identified. The central element of this cautionary approach is that identification evidence by any eyewitness should not be accepted unless it has been rigorously tested. PW1's evidence was that she knew the 1st, 2nd and 3rd appellants since they came from her clan and they hailed from the same locality. She witnessed the appellants unleashing violence on the deceased using crude weapons. She maintained that after the assailants broke down their door, she hid in the shadow of her bedroom door and the appellants were unable to see her when they entered into her house, which was lit by a bulb. It was her evidence that she could clearly see all the assailants. Subsequently, when the assailants went outside the house, she came back to the sitting room and she could see all the assailants through the broken door. It was also her evidence that the assailants had torches, which illuminated them.

27. PW2 testified that there was light in the house from a bulb, which remained on the whole night, and from the light, he was able to identify the appellants. He stated that the 1st appellant asked him where his wife was. He also recognized Pius Anyuog who was at large. PW3 and PW4 were neighbours who responded to PW1's screams. Their evidence was that they found the deceased injured but still alive, and while taking to hospital, he mentioned all the appellants as the assailants who attacked him.

28. The 1st appellant's defence was that the day after the incident, he learnt that a person had been beaten and died in hospital and proceeded to the scene where he found many people. It was his evidence that PW2 said he did not know what happened to the deceased. The 2nd appellant denied the offence claiming that he had travelled on the material day. The 3rd and 4th appellants also denied being involved in the commission of the offence. In support of the appellants' case, DW1 and DW2's evidence was that the deceased was suspected of being a cow thief and as a result he was attacked by villagers. Further, PW1 and PW2 informed them that they were not in a position to identify any of the assailants.

29. PW1 and PW2's testimony was evidence of recognition, which is ordinarily more reliable. As was stated by Madan, JA. in Anjononi and Others vs. The Republic [1980] KLR

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

30. The critical question is whether PW1 and PW2 knew the appellants prior to the incident and whether they identified them as the offenders. There is undisputed evidence by PW1 that the attackers were her clansmen and hailed from the same locality and she knew them. PW2 stated that he knew all the appellants. He was also attacked and injured when he ventured out after hearing the deceased's screams, beatings and commotion. Also, on record is PW1's uncontroverted evidence that the 1st appellant gained access to their house and even asked for a match stick. There is evidence that the room had a bulb, so the witness was able to see the 1st appellant. PW1 and PW2's account they knew the appellants prior to the incident places the appellants at the scene of the crime.

31. Evidence from eye witnesses plays an important role in all contested cases. In assessing the value of the evidence of eyewitnesses, two principal considerations apply. First, is whether the witnesses persuade the court that they were present at the scene. Second, is whether there is anything inherently improbable or unreliable in their evidence. In respect of both these considerations, we find no circumstances either elicited from the witnesses themselves or established by other evidence tending to question their presence at the scene or to discredit the veracity of their statements. There is nothing palpable or glaring in their evidence on the basis upon which we can take the view that they are not true or reliable eye- witnesses. Importantly, the appellants in their defence never disputed that they hail from the same neighborhood with PW1 and PW2. They never denied they are clansmen as was stated by PW1. They never disputed that PW1 and PW2 knew them. Confronted with such evidence, one wonders why the appellants never in their testimony controverted it. Their alibi was essentially they were not the offenders. We find that the appellants were positively identified by PW1 and PW2.

32. Importantly, PW1 and PW2's evidence is not the only evidence implicating the appellants. On record is the evidence tendered by PW3 and PW4 who found the deceased injured but still alive.

    According to PW3, the deceased informed her that the first, second and third appellants attacked him. PW4's evidence was that the deceased told him all the four accused persons attacked him. Other persons who were not arrested were also mentioned. The statement attributed to the deceased by these two witnesses implicating the appellants constitutes what is called a "dying declaration."

33. A dying declaration is admitted as an exception to the hearsay rule if a declarant who is dead at the time of trial and who, at the time of making the declaration, believed that his death was near and certain. It must also appear that the declarant, if living, would have been competent to testify. (See, The admissibility of dying declarations, Fordham Law Review, 1970, Vol. 38, page 509). It has long been believed that a man who is about to die and meet his maker would be unwilling to die with a lie on his lips which is best expressed in the latin maxim "Nemo Moriturus Praesumitur Mentire" meaning "A man will not meet his maker with a lie in his mouth." As Wigmore stated:-

    > " ...all Courts have agreed, with more or less difference of language, that the approach of death produces a state of mind in which the utterances of the dying person are to be taken as free from all ordinary motives to mis- state."(Quick, Some Reflections on Dying Declarations, 6 How. L.J. 109 (1960)).

34. Dying declaration is hearsay evidence. The admission of such evidence is provided for by section 33(a) of the *Evidence Act* which states:-

    > 33. Statements, written or oral, of admissible facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence or whose attendance cannot be procured, or whose attendance cannot be procured without an amount of delay or expense which in the circumstances of the case appears to the court unreasonable, are themselves admissible in the following cases–

(a) when the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question and such statements are admissible whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question;

35. In considering a dying declaration, the court should have regard to the factors set out in the above section before admitting such evidence. The court must bear in mind that it is dealing with a criminal trial where a finding needs to be made beyond reasonable doubt, and where such evidence may play a pivotal part in the conviction of an accused person. The deceased in this case made the dying declaration to two independent witnesses that is PW3 and PW4. The declaration implicating the appellants as among the persons who attacked the deceased is direct evidence of the deceased who was a witness to his own killing. The most important consideration of a dying declaration is its probative value. This implies that the evidence must be considered with caution as the probative value depends on the credibility of the person who made the declaration, and the person(s) to whom the declaration was made. The dying declaration must be honest and reliable. Whereas the appellants only attacked the evidence of PW1, PW2, PW3 and PW4, they did not attempt to provide cogent reasons why the deceased would specifically implicate them as his assailant nor did they suggest that PW3 and PW4 were untruthful.

36. The probative value of such evidence depends not only on the credibility and reliability of the statement made by the deceased but also on the credibility and reliability of the witnesses to whom the declaration was made. PW3 and PW4, who were neighbors to the deceased, responded to screams from PW1 and, on arrival, each one of them was told by the deceased that it is the appellants who attacked him. The primary function of the court is to find out whether the dying declaration is true. PW3 and PW4's evidence was not controverted. DW1 and DW2's evidence did not dislodge the deceased's dying declaration. There is evidence that the deceased though injured was communicating and mentioned his attackers. In the circumstances of this case, the dying declaration is an objective fact that strengthens the identification evidence and dispels any risk of mistake. It is our view that the weight and probative value of the dying declaration is overwhelming.

37. Flowing from our determination of the issues discussed above, it is our finding that the appellants were correctly determined to the offenders and that they unlawfully inflicted injuries to the deceased and set his house on fire. The deceased succumbed to the injuries while undergoing treatment in hospital.

38. The other issue is whether malice aforesaid was proved. Malice aforethought refers to an intentionally harmful act that typically leads to someone's death. It is a critical element of the crime that distinguishes the offence of murder from other types of homicide cases, such as manslaughter. Malice aforethought shows the following: (a) The killer's state of mind at the time of the murder, (b) The killer thought about the murder before committing it, and, (c) The killer took specific steps to facilitate the murder.

39. Malice may be express or implied. Express malice is when a deliberate intention is manifested to take away the life of a person unlawfully. Malice is implied when no considerable provocation appears or when the circumstances attending the killing show a reckless and wicked heart. To be convicted of murder, malice aforethought must be proved. Malice cannot not be imputed to an accused person based solely on their participation in a crime. If it is shown that the killing resulted from an intentional act with express or implied malice, no other mental state need be shown to establish malice aforethought.

40. The threshold for determining malice aforethought is provided in section 206 of the Penal Code, which provides:-

> " 206. Malice aforethought Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances—
>
> a. an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;
>
> b. knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;
>
> c. an intent to commit a felony;
>
> d. an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony."

41. We will now examine the facts of this case to satisfy ourselves that malice aforethought was proved. The appellants were among a crowd that went to the deceased's home at night armed with crude weapons. Undoubtedly, they had gone there with a clear premeditated mission. PW1 and PW2 heard screams and sound of something being beaten, and they even thought it was a cow being beaten. PW2 went out to find out what was happening only to be attacked. He saw the appellants and others assaulting the deceased using crude weapons. The cries and pleas by the deceased's and PW1 and PW2's did not stop them. The attack continued for some time inflicting more injuries and pain to the deceased who was helpless. They even set the deceased's house on fire but the deceased, though critically injured, was able to emerge from the house. The vicious, sustained and repeated attacks on an armed person including setting his house on fire demonstrates their clear intention was to kill or critically injure him which they did leaving him for dead. Accordingly, we find that malice aforethought was could be inferred from their conduct and therefore it was proved.

42. The other ground urged by the appellants is that their alibi was not considered. By requiring, the trial court to consider and weigh all the evidence does not mean that the judgment must also include a complete embodiment of all evidence led, as if it comprises a transcript of the proceedings. All it means is that the summary of the evidence led must indeed entail a complete embodiment of all the material evidence led. In order to determine whether there is any merit in the appellants' complaint, this court must consider the evidence led in the trial court, juxtapose it against the judgment by the trial court, and finally determine whether there is any basis for interfering with the said judgment. Our reading of the judgment leaves us with no doubt that the learned judge considered both the appellants' defence and weighed it against the prosecution case.

43. The appellants also argued that their alibi was not rebutted by the prosecution evidence. All the appellants raised their alibi for the first time in their unsworn statements of defence. In Ganzi & 2 Others vs. Republic [2005] 1 KLR 52, this Court stated that where the defence of alibi is raised for the first time in the appellant's defence and not when the accused persons pleaded to the charge, the correct approach is for the trial court to weigh the defence of alibi against the prosecution evidence.

We are satisfied that the learned judge weighed the appellants' alibi against the prosecution evidence of identification and the dying declaration. We are persuaded that the prosecution evidence properly placed the appellants at the scene of the crime and reliably identified them as the assailants.

44. It was also the appellants' case that the prosecution evidence was marred by contradictions. The court's duty is to determine whether there were contradictions in the evidence tendered, and if so, whether the contradictions are so material that the trial judge ought to have rejected the evidence. In Twehangane Alfred vs. Uganda [2003] UGCA, 6 the Ugandan Court of Appeal held, not every contradiction that warrants rejection of evidence. It stated:-

> "...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."

45. Admittedly, inconsistencies and contradictions in evidence unless satisfactorily explained would usually but not necessarily result in the evidence of a witness being rejected. The question is whether the contradictions alleged by the appellants existed, and if they did, whether they point to deliberate untruthfulness or affect the substance of the prosecution case. The Nigerian Court of Appeal in David Ojeabuo vs. Federal Republic of Nigeri [2014] LPELR-22555 (CA), defined contradictions as:-

> "... 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."

46. The appellants' claim that the prosecution evidence was contradictory was premised on their assertion that PW1 stated that there was light which remained on from 6pm to 6am as children use the same for studying. They argued that no child was said to be in PW1's house or anywhere within the compound at the material time and none was called to testify. They also contended that that PW1 and PW2 said the solar light was bright, yet PW2 was unable to see the person who cut him when he went out of his house. The appellants also claimed that PW3 and PW4 differ in what they allege the deceased said which the superior court took as a dying declaration. They maintained that PW6 never testified that the deceased mentioned names of his attackers to PW3 and PW4. They also argued that PW1 said that PW2 was cut when he went outside but PW2 says he was hit with a rungu.

47. Contradictions in evidence of a witness that would be fatal must relate to material facts and must be substantial. It must deal with the real substance of the case. Minor or trivial contradictions do not affect the credibility of a witness and cannot vitiate a trial because not every trifling inconsistency in the evidence of the prosecution witness that is fatal to its case. It is only when such inconsistencies or contradictions are substantial and fundamental to the main issues in question before the court and therefore necessarily create some doubt in the mind of the trial court that an accused is entitled to benefit there from. The appellant's attempt to discredit the prosecution evidence citing inconsistencies does not pass the threshold laid down in the earlier cited cases.

48. The appellants also urged that the prosecution failed to call DW1 and DW2 as their witnesses. The law in this area was summed up by the East Africa Court of Appeal in Bukenya & Others vs. Uganda [1972] E.A.549 as follows:-

i. The prosecution must make available all witnesses necessary to establish the truth, even though their evidence may be inconsistent.

ii. The court has the right, and the duty to call any person whose evidence appears essential to the just decision of the case.

iii. Where the evidence called barely is adequate the court may infer that the evidence of uncalled witness would have tended to be adverse to the prosecution.

49. However, even as the court in the above case stated the above principles, it was categorical that the prosecution is not expected to call a superfluity of witnesses. Adverse inference can only be made if the evidence by the prosecution is not or is barely adequate. No inference can be drawn unless evidence is given of facts requiring an answer. In order for an adverse inference to be made, the evidence of the missing witness must be such as would have elucidated a matter. The appropriate inference to draw is a question of fact to be answered by reference to all the circumstances of the case. We are not persuaded that the failure to call DW1 and DW2 as prosecution witnesses left gaps to the prosecution evidence. In any event, their evidence as defence witnesses lacked credibility and was of little help to the appellants and the Court.

50. It was also argued that Karanja, J. failed to comply with the provisions of section 200 (3). We note that the record does not show whether the appellants were informed of their right under Section 200 (3) which provides:-

"(3) Where a succeeding magistrate commences the hearing of proceedings and part of the evidence has been recorded by his predecessor, the accused person may demand that any witness be re-summoned and reheard and the succeeding magistrate shall inform the accused person of that right."

51. This Court in Johanes Amadi vs. Republic [2018] eKLR stated:-

> " ... Before a Judge proceeds with a trial in which another Judge has partly heard and recorded evidence, the accused person must be informed of his right to have the hearing proceed de novo or proceed from where the previous Judge had reached. Should the accused person choose to proceed with the trial from where it has reached, the court must inform him of his right to have any of the witness who have already testified re- summoned and re-heard."

52. However, it is not a requirement of the law that a case should start afresh. What the court is obligated to do is to explain the legal position under the above section. The said provision is to be invoked where justice of the case so demands, taking into account the interests of the complainant and accused. In Ndegwa vs. R [1985] KLR 535 (Madan, Kneller and Nyarangi, JJ.A.) underscored that in applying the provisions of section 200, the court must ensure the accused person is not prejudiced. They said:

> "...No rule of natural justice, no rule of statutory protection, no rule of evidence and no rule of common sense is to be sacrificed, violated or abandoned when it comes to protecting the liberty of the subject. He is the most sacrosanct individual in the system of our legal administration...."

53. The duty to inform an accused his rights under Section 200 (3) lies with the succeeding magistrate/ Judge who takes up a matter partly. (See Samuel Kabiru vs. Republic [2004] eKLR). The right to recall

a witness who has testified is essential to the conduct of a fair trial in that context. However, section 200 (3) is not to be read in isolation. Section 200 (4) provides that:-

> " Where an accused person is convicted upon evidence that was not wholly recorded by the convicting magistrate, the High Court may, if it is of the opinion that the accused person was materially prejudiced thereby, set aside the conviction and may order a new trial."

54. A reading of the above provision shows that the court must be satisfied that the accused person was materially prejudiced before setting the conviction aside and ordering a retrial. The question is whether the appellant has demonstrated that he was materially prejudiced as a result of the trial court's omission to comply with section 200 (3). We find nothing to suggest that the appellant was materially prejudiced by the omission. In any event, a retrial is not to be ordered as a matter of course, but the court must be satisfied that that it is in the interests of justice to order a retrial in the circumstances of the particular case. As was held by this Court in Fatehali Manji vs. Republic 1966 EA 343:-

> "In general, a retrial will be ordered only when the original trial was illegal or defective; it will not be ordered where the conviction is set aside because of insufficiency of evidence or for the purpose of enabling the prosecution to fill up gaps in its evidence at the first trial; even where a conviction is vitiated by a mistake of the trial court for which the prosecutor is not to blame, it does not necessarily follow that a retrial should be ordered; each case must depend on its particular facts and circumstances and an order for retrial should only be made where the interests of justice require it and should not be ordered where it is likely to cause injustice to the accused." (See also Muiruri vs. Republic [2003] KLR 552).

55. This Court in Joseph Kamau Gichuki vs. Republic [2013] eKLR stated:-

> " This Court has previously held that section 200 of the Criminal Procedure Code should be invoked sparingly and only in cases where the ends of justice will be defeated if a succeeding magistrate does not continue a trial commenced by his predecessor. Some of the considerations to be borne in mind before invoking section 200 include whether it is convenient to commence the trial de novo, how far the trial had proceeded, availability of witnesses who had already testified, possible loss of memory by the witnesses, the time that had lapsed since the commencement of the trial and the prejudice likely to be suffered by either the prosecution or the accused."

56. Similarly, in Nyabuto & Another vs. Republic [2009] KLR 409, this Court stated:-

> " ...section 200 aforesaid is a provision of the law which is to be used very sparingly and only in cases where the exigencies of the circumstances, not only are likely but will defeat the ends of justice if a succeeding Judge does not, or is not allowed to adopt and continue a criminal trial started by a predecessor owing to the latter becoming unavailable to complete the trial....
>
> Musinga, J. in our view acted in an attempt to dispatch justice speedily and cannot be faulted because the law permitted him to do so. It cannot be lost in mind that public policy demands that justice be swiftly concluded..."

57. In order to order a retrial, the court must be satisfied that the accused person would be prejudiced and that the interests of justice so require. As mentioned earlier, the trial began in 2015. In 2018, Karanja, J. was the third judge to handle the case and the appellants' counsel never raised any objection to the case proceeding from where it had reached nor did he apply for hearing to commence de novo. Further, the appellants tendered their defence and called two witnesses in support of their case.

58. It is settled law that the provisions of Section 200 of the CPC ought to be used sparingly; and only in cases where the exigencies of the circumstances are not only likely but will defeat the ends of justice if a succeeding magistrate is not allowed to adopt or continue a criminal trial started by a predecessor. Even though the learned trial judge failed to comply with section 200 (3), in our view, the circumstances of this case are such that it cannot be said that the appellants were materially prejudiced.

59. Lastly, regarding sentence, we have considered the severity of offence and the sentence of 25 years imposed by the trial court upon the appellants. We find no reason to interfere with the said sentence.

60. The upshot of our conclusions on the issues determined above is that this appeal by the 1st, 2nd, 3rd and 4th appellants lacks merits and it is hereby dismissed. Accordingly, we uphold both the conviction and sentence imposed by the High Court on at Homabay (Karanjah, J.) delivered on 6th December, 2018 in High Court Criminal Case No. 7 of 2015.

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

HANNAH OKWENGU

.....

JUDGE OF APPEAL

J. MATIVO

.....

JUDGE OF APPEAL

JOEL NGUGI

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR