



REPUBLIC OF KENYA



**KENYA LAW**  
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**Mboya v Republic (Criminal Appeal 74 of 2019)  
[2024] KECA 1658 (KLR) (15 November 2024) (Judgment)**

Neutral citation: [2024] KECA 1658 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT KISUMU  
CRIMINAL APPEAL 74 OF 2019  
HM OKWENGU, JM MATIVO & JM NGUGI, JJA  
NOVEMBER 15, 2024**

**BETWEEN**

**POLYCAP MBOYA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal from the judgment of the High Court of Kenya at Homa Bay (Karanja, J) delivered on 23rd January 2019 in HCCRC No. 49 of 2014)*

**JUDGMENT**

1. Polycap Mboya, the appellant herein, was charged with the offence of murder contrary to section 203 as read together with section 204 of the *Penal Code*. The particulars of the offence as contained in the information, were that on 9<sup>th</sup> July 2014 at Kokweno Oriang location Rachuonyo North District Homa Bay County, jointly with others not before court, he murdered Geoffrey Ouko Gaya (deceased).
2. The appellant pleaded not guilty to the charge, and the matter proceeded to trial, the prosecution calling six witnesses, and the appellant giving sworn evidence in his defence, and calling two defence witnesses. Upon considering the evidence, the trial judge found the appellant guilty, convicted him and sentenced him to serve fifteen years imprisonment.
3. The prosecution witnesses were: the deceased's mother, Emily Akinyi Gaya (Emily); the deceased's sister-in-law, Florence Akelo Mimba (Florence); a cousin to the deceased Teddy Akoko (Teddy); a brother to the deceased, Collins Omondi Ayiimba (Collins); PC Nancy Koskei (PC Koskei), who was the investigating officer and Dr. Peter Ogola (Dr. Ogola), who produced the postmortem report on behalf of Dr. Ephram Ochola (Dr. Ochola).
4. Briefly, the evidence for the prosecution was as follows. On 9<sup>th</sup> July, 2014, at about 7:00am, Emily was in her home with her daughter in law, Florence. The appellant, then, arrived at the home accompanied by five boys. They were looking for the deceased (who was commonly known as Dokta). They explained



that some things had gone missing and they suspected the deceased had stolen them. Emily informed them that the deceased had left the home at 6am to collect water for someone. Later, the appellant came back at about 10am. This time he was accompanied by a larger group of people. They were with the deceased together with the deceased's cousin, Teddy. The deceased appeared to have been beaten, and was bleeding from the mouth, nose and ears. The appellant and his group demanded that the things that the deceased had allegedly stolen be produced, and Emily told them they could search the house. As Emily watched, the appellant and the group of people beat up the deceased, using various weapons. Teddy was also beaten up. The deceased's brother, Collins, ran and called the police, but by the time the police arrived from Kendubay police station, the attackers had fled. Teddy and the deceased were taken to hospital, but the deceased was pronounced dead on arrival at the hospital.

5. PC Nancy recorded statements of witnesses and visited the home of the deceased. She later arrested the appellant at Homabay town. A postmortem examination was done at Gendia Mission Hospital, by Dr. Ochola, whose report was produced in evidence by Dr. Ogola, as Dr. Ochola was not available as he was at Moi University where he was pursuing a Master's Degree. According to the postmortem examination, the deceased died as a result of severe head injury resulting from a blunt trauma.
6. In his defence, the appellant explained that on the material morning he learnt that his TV and a generator had been stolen from the center where he was operating a video show business. He later went to the scene and found that one of his workers had been held by boda-boda riders, and was forced to reveal the names of those who stole the TV and the generator. The worker mentioned Ted who was traced, and he also mentioned another suspect known as Ogopa. The two suspects were beaten by a mob and he tried in vain to rescue them. He, therefore, fled from the scene and called the area Chief who called the police. He later learnt that one of the two suspects had died from the beatings by the mob.
7. The appellant's wife, Maureen Akinyi Tindi (Maureen), testified that her husband was telephoned by one Museveni who informed him that his property had been stolen. He proceeded to the center and later informed Maureen that the TV and generator had been stolen. Maureen also went to the scene and found many people gathered at the scene. He stated that he did not witness the lynching of the suspect. Wilton Odhiambo Otieno (Wilton), who also testified on behalf of the appellant, testified that he went to watch a world cup football match between Germany and Brazil, and that after the match ended he went home. In the morning, he learnt that the video room had been broken into. He later went to the trading center and found two suspects being beaten by a mob. The two included the deceased. They were rescued by the police but the deceased later died. The witness confirmed that the appellant was at the scene while the two suspects were being beaten, but he was merely standing on the side.
8. In his judgment, the learned Judge found that, the deceased died as a result of grievous injuries inflicted on him by a group or mob of people who suspected him of having stolen property belonging to the appellant; that from the injuries it was clear that the mob intended to cause the deceased's death; that each and every member of the group or mob who participated in assaulting the deceased or abetted the act in any way, committed the murder of the deceased, and must be held fully responsible for the consequences of the unlawful act.
9. The learned Judge found that from the evidence of Emily and Florence, the appellant was the person who led the group of people in search of the deceased for allegedly stealing his property; that they found the deceased, and brought him back home at about 10am; that by this time the deceased was bleeding and appeared to have been beaten up; and that the appellant played an active role along with boda-boda riders in the fatal assault on the deceased. The Judge therefore found the appellant guilty, convicted him of the charge, and after hearing his mitigation, sentenced him to serve fifteen years imprisonment.



10. The appellant, who is aggrieved by the decision of the trial Judge filed this appeal, relying on a memorandum of appeal in which his advocate Oduk & Co. Advocates set out four grounds of appeal. In brief, the grounds were that the learned Judge erred in fact and in law by relying on the postmortem report that was produced in court; failing to appreciate the inconsistency in the date the postmortem was alleged to have been conducted, and the date of burial of the deceased; in finding that that deceased person was murdered by the appellant when there was insufficient proof of death and or cause of death; in relying on the testimonies of the investigating officer and pathologist both of whom were not present when the postmortem examination was done; in relying on the prosecution's evidence and testimony of witnesses that were inconstant and contradictory.
11. In his written submissions that were prepared by his advocate Oduk & Co. Advocate, the appellant submitted that the prosecution did not prove that the deceased died, or that he died out of injuries that were inflicted by the appellant. He submitted that a postmortem report was produced in court, but the date the postmortem was done, was inconsistent with the date of burial of the deceased, as the deceased was buried on 10<sup>th</sup> July, 2014, while the postmortem was said to have been conducted on 15<sup>th</sup> July, 2014, and there is no way the postmortem could have been done after the burial.
12. The appellant submitted that the prosecution did not give any explanation on the contradiction regarding the postmortem; that Dr. Ogola who testified and produced the postmortem report did not perform the autopsy, nor did he produce the burial permit; that none of the police officers who rescued the deceased and Teddy were called to testify regarding the injuries that they saw on the deceased and Teddy; and that the pathologist who conducted the postmortem examination was also not called to testify.
13. The appellant argued that the absence of these witnesses left gaps and irreconcilable inconsistencies in the prosecution evidence. The appellant relied on *Benson Ngunyi Ndungu v Republic* [1985] eKLR, for the proposition that the normal and straightforward way of proving death and cause of death is by producing a postmortem examination report; that there were no independent witnesses apart from the deceased's relatives; that the contradictions in the postmortem report and witness testimonies were not explained and cannot therefore be dismissed as human error, but are fundamental questions that go to the root of the prosecution case.
14. The appellant relied on *Bukenya & others v Uganda*, for the proposition that the prosecution must make available all witnesses necessary to establish the truth; that the burden of proof, including the legal burden of proof, was on the prosecution; and that the prosecution witnesses identified the person who allegedly hit the deceased on the head with a hammer as one Seth and not the appellant. In addition, the evidence of Emily, who was the main prosecution witness, was inconsistent with the postmortem report, nor did the postmortem report support the evidence of Teddy, that he was cut on the head, or that one Nick cut the deceased on the head using a panga. The Court was therefore urged to allow the appeal.
15. In rebuttal, the respondent also filed written submissions which were duly highlighted by learned counsel Mr. Okango a Senior Principal Prosecuting Counsel. The respondent maintained that the prosecution proved the case against the appellant to the required standard. Regarding the death of the deceased, which the appellant suggested could only be proved by the production of a postmortem report, the respondent countered that death can be proved without production of medical evidence. The respondent gave examples of proof by way of circumstantial evidence, or oral evidence, or admission by the assailant. In this regard the respondent cited *Robert Wanjala Shiundu v Republic* [2018] eKLR.



16. The respondent further argued that in the instant case, the death of the deceased was not in dispute, as it was proved by the oral testimony of Emily, Florence, Teddy and Collins; that Emily and Florence identified the body for purposes of the autopsy. As regards the cause of death, the respondent submitted that the postmortem report that was produced in evidence, corroborated not just the fact that the deceased died, but also confirmed the cause of death as “severe head injury resulting from blunt trauma.” The respondent noted that the postmortem report was produced in evidence in accordance with sections 33 and 77 of the *Evidence Act*, by Dr. Ogola on behalf of Dr. Ochola who had done the autopsy; that there was no objection raised by the appellant to the production of the postmortem report, and it is therefore properly on record; that the report bore the names of the people who identified the body to the pathologist for the autopsy; and that the names of all the people who were present at the autopsy, did not need to be indicated on the post mortem report.
17. Regarding the failure to call the police officers who took the deceased to the hospital and the pathologist who performed the autopsy, the respondent relied on the case of *Keter v Republic* [2007] 1 EA 135 in which the court held that “the prosecution is not obliged to call a superfluity of witnesses but only such witnesses who are sufficient to establish the charge beyond any reasonable doubt”.
- The respondent argued that the police officers who rescued the deceased were not crucial witnesses and their failure to testify did not prejudice the appellant.
18. In addition, the respondent submitted that the appellant was positively identified as part of the mob that assaulted the deceased and although in his defence he placed himself at the scene claiming that he was only a bystander, the prosecution evidence showed that he was actively involved in the assault of the deceased. Relying on the case of *Ali Salim Babati & another v Republic* [2019] eKLR, the respondent submitted that under the doctrine of common intention, the appellant caused the unlawful death of the deceased as part of the mob that assaulted the deceased. He was therefore culpable for the murder of the deceased though he may not have delivered the fatal blow.
19. As a first appellate court, this Court has the obligation to reconsider, reevaluate the evidence afresh, and to draw its own conclusion having regard to the fact that, unlike the trial court, it did not see or hear the witnesses testify. This duty has been stated in numerous times by this Court. For instance, in *Alexander Ogasia & 8 others v Republic* (1993) eKLR, the Court stated:
- It is now trite law that “it is the duty of a first appellate court to reconsider the evidence, evaluate it itself and draw its own conclusions in deciding whether the judgment of the trial court should be upheld” - see for example *Okeno v Republic* [1972] EA 32
20. And in *Mark Oiruri Mose v Rep* [2013] eKLR, the Court reiterated:
- “It has been said over and over again that the first appellate court has the duty to revisit the evidence tendered before the trial court, afresh analyse it, evaluate it and come to its own independent conclusion on the matter but always bearing in mind that the trial court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and to give allowance for that.”
21. Having carefully considered the record of appeal in its entirety, the written and oral submissions of the respective parties, and the authorities cited and relevant law, we find it common ground that the deceased and Teddy were accosted by a group of people for allegedly stealing the appellant’s property, and that they were taken to the appellant’s home, where they were subjected to “mob justice”. The issues that we discern for our determination are, whether the Prosecution proved that the deceased died as a result of the assault arising from the mob justice; if so, whether common intention was



- established between the appellant and the mob, to warrant the appellant being convicted for the offence of murder; whether there were fundamental contradictions and discrepancies in the prosecution witnesses' evidence; and whether the appellant's conviction was safe.
22. To prove the offence of murder, there are various elements of the charge that the prosecution must establish. Section 203 of the *Penal Code* states:
- Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.
23. This means that the essential elements of the offence of murder that have to be proved are, first the death of the deceased; secondly, the fact that the death of the deceased was caused by an unlawful act or omission on the part of the accused person; and thirdly, that such unlawful act or omission was committed by the appellant with malice aforethought.
24. In their submissions the appellant disputed the fact of death of the deceased. However, it was clear from the evidence of the prosecution witnesses and the defence witnesses including the evidence of the appellant, that the deceased died. Emily and Florence identified the body of the deceased to Dr. Ochola, who performed the autopsy and prepared a report. This report was properly produced in evidence by Dr. Peter Ogola, under section 77 of the *Evidence Act*, as Dr. Ochola was not available, and Dr. Ogola was familiar with his handwriting having worked with him. We therefore find no substance on the issue regarding the death of the deceased.
25. The appellant's advocate capitalized on an alleged discrepancy regarding the date the autopsy is alleged to have been done, that is 15<sup>th</sup> July, 2014, and the date the deceased is alleged to have been buried, which according to Collins was 10<sup>th</sup> July, 2014. While counsel is correct in that observation, nothing turns on it because in our view, the evidence is clear that the deceased died and that a postmortem examination was carried out on the 15<sup>th</sup> July, 2014. The burial date was not of any material significance. It was only Collins who testified on that date and it appears to us that either he may have been mistaken on that date, or the trial Judge in recording the proceedings may have committed an error in recording the wrong date. Indeed, it was practically impossible for the deceased who is said to have died on 9<sup>th</sup> July, 2014, to have been buried the next day, the matter being a case under police investigations.
26. The main contention was the cause of death of the deceased, and whether it was the result of an act or omission on the part of the appellant. Dr. Ochola, who did the autopsy, observed that the body of the deceased had bruises on the chest and lower limbs; fractures from the fourth to sixth ribs on the right; and fracture on the occipital bone. He formed the opinion that the cause of death was severe head injury due to blunt trauma to the head.
27. The evidence of Emily, Florence, Teddy and Collins, was that when the deceased appeared at the home, with the appellant and the crowd in tow, he appeared to have been already subjected to some beatings, as he was bleeding from the mouth and ears. The deceased was again subjected to severe beatings by the mob in the presence of the witnesses. This was not denied by the appellant who claimed that it was the mob who beat up the deceased, and that he was just a mere bystander. However, the eye witnesses Emily, Florence, Teddy and Collins, all testified that the appellant not only played a lead role in directing the mob, but also actively participated in the assault against the deceased. We therefore reject his defence that he was only a bystander, and find that he actively participated with the mob in assaulting the deceased, as a result of which the deceased sustained several injuries.



28. It may not be possible to identify the blow that actually resulted in the fatal injury. However, Section 21 of the Penal Code which deals with joint offenders in prosecution of a common purpose provides as follows:

“When 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 a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence.”

29. In the circumstances before us, the doctrine of common intention was applicable as the appellant was not only in the company of the group of people who attacked the deceased, but was at the forefront because it was his goods that were allegedly stolen, and participated with the mob in beating up the deceased. The appellant and the mob had a common venture of taking the law into their hands, to recover what had allegedly been stolen, and this was an unlawful purpose. Malice aforethought was established under section 206(a)(b) and (c) as the appellant and the mob intended to cause the death of, or do grievous harm to the deceased. The serious injuries that were inflicted on the deceased resulting in the death of the deceased, was a probably consequence of that unlawful purpose. Under section 21 of the Penal Code, the appellant and the mob are deemed to have committed the offence of murder.

30. Although the appellant appealed against both conviction and sentence, there was no specific ground in regard to the sentence. Moreover, the learned Judge properly exercised his discretion in imposing the sentence of fifteen years on the appellant.

31. The upshot of the above is that the appellant’s conviction was safe and the appeal against conviction and sentence has no merit. The appeal is accordingly dismissed in its entirety.

**DATED AND DELIVERED AT KISUMU THIS 15<sup>TH</sup> DAY OF NOVEMBER, 2024**

**HANNAH OKWENGU**

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**JUDGE OF APPEAL**

**J. MATIVO**

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**JUDGE OF APPEAL**

**JOEL NGUGI**

.....

**JUDGE OF APPEAL**

I certify that this is a true copy of the original

**DEPUTY REGISTRAR**

