Odoyo & 2 others v Republic (Criminal Appeal 119 of 2019)
[2024] KECA 1657 (KLR) (15 November 2024) (Judgment)

Neutral citation: [2024] KECA 1657 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 119 OF 2019

HM OKWENGU, HA OMONDI & JM NGUGI, JJA

NOVEMBER 15, 2024

BETWEEN

PETER OCHIENG ODOYO ..... 1ST APPELLANT

POLYCARP ODHIAMBO OBIERO ..... 2ND APPELLANT

DAVID OCHIENG ADERO ..... 3RD APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the judgment of the High Court of Kenya at Kisumu (Cherere, J) dated 28th March, 2019 in HCCR A No. 6 of 2015)

JUDGMENT

1. Peter Ochieng Odoyo (1st appellant), Polycarp Odhiambo Obiero (2nd appellant), and David Ochieng Adero (3rd appellant), were tried by the High Court of Kenya, for the offence of murder contrary to Section 203 as read with 204 of the Penal Code. They were alleged to have murdered Nelson Aoko Ochola (Deceased), on 30th January, 2015, at Rabuor Market in Kisumu East District, within Kisumu County. Following the trial, the appellants were each found guilty, convicted and sentenced to 30 years' imprisonment.

2. The appellants, being dissatisfied with the judgment, have preferred an appeal, each filing separate grounds of appeal. The 1st appellant faults the learned judge for relying on circumstantial evidence; failing to note that crucial witnesses were never called and that the prosecution did not prove their case; and failing to consider the mitigation before sentencing him.

3. The 2nd appellant faults the learned judge for convicting him on circumstantial evidence; dismissing his defence; failing to find that crucial witnesses were not called; lowering the standard of proof; and failing to consider his mitigation before sentencing him. The 3rd appellant also faults the learned

judge for convicting him on circumstantial and contradictory evidence; failing to find that competent witnesses were never called and that the offence was not proved; and failing to consider his mitigation.

4. During the trial, four witnesses testified for the prosecution, while each appellant gave a sworn statement in defence. Briefly, the prosecution evidence was that on the material night, Tom Onyango Nyaori (Tom) the owner of Favourite Bar (the bar) at Rabuor market, shared a table with the 2nd appellant as they were drinking outside the bar at around 9pm. They chatted for about 10 minutes, then the 2nd appellant went inside the bar. Thereafter, he saw the Deceased and Sylvester Odida Ouma (Sylvester), go inside the bar. Tom remained outside for a while, then left the bar and went to his house which was near the bar.

5. Sylvester testified that when they went inside the bar with the deceased, they sat next to 1st and 3rd appellants, and ordered drinks, as they were drinking, the 3rd appellant stepped on his toes. He asked him why he had stepped on his toes but 3rd appellant did not answer. Consequently, Sylvester moved to another table, leaving the deceased and the two appellants on the first table. It was then that 2nd appellant entered the bar and joined the other appellants and the Deceased. Sylvester then heard the accused persons, quarrelling with the deceased, and he alerted Tom, who ordered the appellants to leave the bar, and the appellants left. The Deceased and Sylvester continued drinking until 10.00pm when they also left. As Sylvester and the deceased were walking home, from the bar, the appellants ambushed them, and confronted them. The 2nd appellant hit the deceased, and the 3rd appellant gave the 1st appellant a knife with which he threatened the two. Sylvester ran back to the bar leaving the deceased fighting off the appellants. Shortly thereafter, the deceased went back to the bar, bleeding profusely and groaning in pain. Tom, who was called from his house, directed one Abdalla and Sylvester to take the Deceased to the hospital. Unfortunately, the Deceased succumbed to his injuries, while he was being taken to the hospital.

6. Upon receiving the report of the murder, Sergeant Godfrey Shikuku Wabomba (Sgt. Wabomba), proceeded to the scene of the crime, and was given the names of the appellants. He went to the house of the 1st appellant, and upon searching the house, recovered a pair of blood-stained brown trousers, and a T-shirt. He arrested the 1st appellant who led him to the house of the 3rd appellant, whom he also arrested. The 3rd appellant also led Sgt Wabomba to the house of 2nd appellant whom he arrested and from whom he recovered a blood-stained navy blue trouser, and overalls. On further interrogation the 3rd appellant produced a knife from his house which the witness took possession of.

7. PC Peter Ooyi (PC Peter), later took over the investigations of the case. During the trial, he produced all the exhibits which were recovered, as well as a postmortem report showing that the postmortem examination was done by Dr. Rukia, and that the deceased died of internal bleeding due to a raptured spleen, caused by a penetrating abdominal injury.

8. In his defence, the 1st appellant stated that on the material day he went to Favorite Bar at Rabuor, he stayed in the bar until 8pm, he then went bought himself some super at the market, went home and slept. At about 3am he was woken up by people knocking his door, a group of people entered his house, tied his hands with a curtain rope, and escorted him to Kondele Police Station, where he was charged with the murder that he had not committed.

9. Similarly, the 2nd appellant also testified on oath that on the material night, he went to Favorite Bar, where he was served by Tom and he left the bar at about 10pm. On the way he met Sylvester who is his neighbor, and another person whom he did not know. When he approached them, they attacked him by hitting him on the face with an iron bar. He fell down but managed to run away, and went home. He was wearing a white sweater which he used to wipe blood from his face. At about 5pm, some people knocked his door, and upon entering identified themselves as police officers. They asked him to

dress in the same clothes he was wearing the previous night, which he did. He was arrested and taken to Kondele Police Station, where he was charged with a murder that he had not committed.

10. The 3rd appellant in his sworn defence also stated that he went to Favorite bar at about 4pm, returned home at about 5pm, and continued with his chores until 10pm when he slept. He woke up at 4.45am and left on a motorcycle to go to his tomato farm. On arriving on the road, he saw a police Landcruiser, and a policeman in the Landcruiser asked him where he was going. He responded that he was going to his shamba. The officers searched him, took him back to his house but recovered nothing of interest. He was handcuffed and taken to Kondele Police Station. The following day, he was asked about an incident that occurred at Rabuor during the previous night, but he explained that he knew nothing about the incident. The 3rd appellant stated that the 1st and 2nd appellants who were his co- accused, were not known to him and that when he went to Favorite Bar, he did not meet any of his friends but bought his beer and returned home to drink it.

11. In her judgment, the learned Judge found that the death of the deceased was confirmed through the postmortem report which was produced, and the cause of death established to be internal bleeding due to a raptured spleen caused by a penetrating abdominal injury. The learned Judge found from the evidence of Tom and Sylvester, that all the appellants were at Favorite Bar on the material night and that they were all well known to Tom and Sylvester. The learned Judge was satisfied that the two witnesses, Tom and Sylvester had adequate time to see the appellants, and the possibility of mistaken identity did not arise. Sylvester explained how the appellants waylaid them and attacked them, and the learned Judge was satisfied that although Sylvester did not witness the actual stabbing of the deceased, he saw 1st appellant with a knife which 1st appellant handed over to 3rd appellant, and Sylvester thereafter ran away leaving the appellants fighting the deceased.

12. The learned Judge found that the knife recovered was the probable weapon that caused the injury on the deceased. The Judge, therefore, rejected the appellants defence, and found that the assault on the deceased for whatever reason was an unlawful act, and that although the stab wound may have been caused by one of the three appellants, it was in the course of the execution of a combined unlawful purpose. She, therefore, found that the three appellants jointly caused the death of the deceased. The learned Judge further found that the penetrating stab wound on the deceased's abdomen left no doubt that the appellants intended to cause the deceased grievous harm or death. She, therefore, found malice aforethought established under Section 206 of the Penal Code.

13. The appellants each stated their mitigation and the learned Judge called for a pre-sentence report, as well as a victim impact assessment report. Upon the reports being availed, she noted that the home reports were favourable, and that the appellants were all first offenders. But she also noted that the offence was serious and the victims were still bitter. Consequently, she sentenced each of the appellants to serve thirty years' imprisonment.

14. In support of the appeal, each of the appellants filed written submissions, through their advocates Ochieng Erika Bilha. For the 1st appellant, it was submitted that the evidence tendered by the prosecution was insufficient to sustain the conviction for the offence of murder; that the evidence relied on, was the uncorroborated testimony of Sylvester; and that the evidence was purely circumstantial. The 1st appellant relied on PON -vs- Republic [2019] eKLR, for the proposition that circumstantial evidence had to be watertight, and "if there is any reasonable possibility consistent with innocence, it is the duty of the court to find the suspect not guilty." The 1st appellant faulted the learned Judge for finding that he was placed at the scene by Tom and Sylvester, when it is only Sylvester who purported to have seen him. He noted that Tom only recalled seeing the 2nd appellant, but did not mention any scuffle between the 1st appellant and the deceased.

15. The 1st appellant pointed out that he had given evidence in his defence stating his whereabouts on the material night and that his defence was consistent with his innocence. He also pointed out that none of the prosecution witnesses saw the deceased being stabbed. In particular, Sylvester admitted that he did not see the 1st appellant stab the deceased. 1st appellant argued that there was a miscarriage of justice as the court failed to invoke Section 150 of the Criminal Procedure Code to summon the government analysist to produce his report regarding the knife and the blood-stained clothes that were allegedly recovered from the 1st appellant; that the blood stained clothes and the knife were not tested; that the learned Judge erred in finding that the failure to produce the government analysist's report was not fatal to the prosecution case. The 1st appellant relied on Bukenya & Others -vs- Uganda [1972] EA 549, where it was held that the court has a right and a duty to call witnesses whose evidence appear essential to the just determination of the case.

16. Further, the 1st appellant submitted that the prosecution failed to prove beyond reasonable doubt that the death of the deceased was caused by the appellants; that the learned Judge did not warn herself on the danger of convicting on the evidence of a single identifying witness; that there was no evidence as to who owned the knife that was alleged to have been used in causing the injury to the deceased; and that there was no evidence regarding who recovered the knife and where it was recovered from. On malice aforethought, the 1st appellant submitted that since his presence at the scene of the murder was in doubt, malice aforethought cannot be inferred against him.

17. Finally, on the sentence, the 1st appellant relied on Francis Karioko Muruatetu & Another -vs- Republic, Petition No. 15 of 2015. He pointed out that he had already served four years in prison, including the year he was in remand; had also undergone rehabilitation, and had no disciplinary issue in the prison; and that being a first offender, and the home report having been favourable, the Court should reduce his sentence. He added that he was remorseful and was the sole breadwinner of his family, which included his four-year-old daughter.

18. The 2nd appellant in his submissions argued that the evidence brought by the prosecution was contradictory and insufficient to sustain a conviction for the offence of murder; that there were glaring contradictions on the events of the night on which the deceased was murdered; that Tom testified that the bar was peaceful; and that Sylvester did not mention any scuffle between him and the appellants, having occurred inside the bar. He pointed out that the prosecution evidence was circumstantial and there was no corroborative evidence; that the 2nd appellant in his sworn statement gave a credible defence which the learned Judge misdirected herself in dismissing. The 2nd appellant also relied on PON -vs- Republic [2019] eKLR, submitting that the prosecution evidence was insufficient; as the burden of proof was not discharged; that the exhibits were not analyzed by a government analyst; and that there was no sufficient evidence upon which malice aforethought on his part, could be inferred.

19. On sentence, the 2nd appellant similarly relied on the case of Francis Karioko Muruatetu & Another -vs- Republic, Petition No. 15 of 2015. He pointed out that he had already served two years since his conviction, and that being a first offender and the home report having been favourable, his sentence should be reduced. He also pleaded that he had a wife and three children who all depend on him.

20. Finally, the 3rd appellant also filed written submissions which were basically along the same lines as those of the 1st and 2nd appellants addressing the issue of the paucity of circumstantial evidence, contradictions in the evidence, and lack of corroboration. He urged that there was reasonable doubt which should be resolved in his favour. He also submitted that malice aforethought had not been proved. Likewise, on the issue of sentence, he also relied on Francis Karioko Muruatetu & Another -vs- Republic, Petition No. 15 of 2015, and urged the Court to reduce his sentence as he had already served six years in prison, including the time he was in remand during trial.

21. The respondent also filed written submissions through Mr. Patrick Okango, a Senior Principal Prosecuting Council in the Office of the Director of Public Prosecutions (ODPP). In the submissions, the respondent observed that each appellant filed a separate memorandum of appeal, but the grounds set out were generally similar. The respondent summarized the grounds as, the appellants having been convicted in error solely on circumstantial and contradictory evidence; crucial witnesses not having been called; the murder not having been proved beyond reasonable doubt; the standard of proof having been lowered; and the appellants' mitigation not having been considered. The 2nd appellant added another ground which was that his right to fair trial was violated.

22. In response to the 1st appellant's submissions that he was convicted purely on circumstantial evidence which was not corroborated, the respondent argued that the use of circumstantial evidence to convict is acceptable and courts have held that there are instances where it may be the best evidence available; the learned trial judge cannot therefore be faulted for relying on circumstantial evidence.

23. The respondent pointed out that Tom could not have seen the 1st appellant, while he was inside the bar, as Tom, from his testimony, never went inside the bar. Tom could not, therefore, be expected to corroborate the facts as stated by Sylvester on events inside the bar. Moreover, the testimony of Sylvester which placed the 1st appellant, at the scene was found to be cogent and credible as the witness had sufficient time to see the 1st appellant at the bar, and there was no possibility of mistaken identity.

24. In addition, the respondent submitted that while no one saw the deceased being stabbed, Sylvester was emphatic in his testimony that the 3rd appellant gave the 1st appellant a knife; thereafter, the 1st appellant confronted Sylvester, and Sylvester ran back to the bar, leaving the 1st appellant with the knife; that having left the deceased being confronted by the three appellants with the 1stappellant having a knife, and shortly thereafter, the deceased coming back to the bar bleeding, the circumstances taken together, led to the conclusion that the deceased must have been stabbed by the appellants; and that regardless of who stabbed the deceased, the doctrine of common intent is applicable to find each of the appellant culpable for the murder of the deceased.

25. On the failure to produce the government analyst report, the respondent submitted that no miscarriage of justice was occasioned; that while the same would have gone to further strengthen the prosecution case, the trial court rightly observed that the absence of the evidence was not fatal to the prosecution case; and that it was not alleged nor demonstrated, that the report would have exonerated the 1st appellant. The respondent reiterated that the circumstantial evidence on record, taken in its totality leads to the conclusion that the 1st appellant was indeed part of the enterprise that fatally wounded the deceased.

26. As regards malice aforethought, the respondent agreed with the holding by the trial Judge that the extent of the penetrating stab injury on the deceased's abdomen, which is a delicate part of the body, left no doubt that the appellants must, or ought to have known that the injury would cause the deceased grievous harm, or even death; that the post mortem report showed that the injuries targeted vital areas, and was not a one off act of stabbing; and that in the circumstances, malice aforethought was proved within the provisions of section 206 of the Penal Code.

27. As regards the 2nd appellant, the respondent dismissed his submissions that there was contradiction in the testimony of Sylvester and Tom, contending that from the testimony of Tom, he never went inside the bar where Sylvester and the appellants were, but he sat with the 2nd appellant outside the bar, before the 2nd appellant went inside the bar; and that Tom was therefore not privy to what happened inside the bar regarding the scuffle. On the 2nd appellant's defence that he was attacked by Sylvester and other people, the respondent submitted that the trial court rightly rejected this defence, as it was not credible,

and was an afterthought. The respondent argued that the 2nd appellant contradicted himself swearing that he was attacked by Sylvester and another man whom he did not know, and in his submissions suggesting that he was attacked by the appellants. It was submitted that the 2nd appellant having been with the 1st and 3rd appellants, they formed one enterprise and had a common intention, and therefore malice aforethought was proved in accordance with section 206 of the Penal Code.

28. In regard to the 3rd appellant, the respondent reiterated that while it is only Sylvester's evidence that placed him at the scene, Sylvester's evidence was credible and water-tight. He first sat with the 3rd appellant inside the bar. In-fact, the 3rd appellant stepped on him, and Sylvester talked to him asking him why he did that, but 3rd appellant did not answer. Sylvester then moved to another table and he was able to witness the 1st and 3rd appellant quarrel the deceased. Hence when he met the 3rd appellant on the road shortly thereafter, he was someone he had interacted with for some time. The respondent reiterated its submissions on the strength of circumstantial evidence, and the application of the doctrine of common intent.

29. In regard to sentence, the respondent submitted that the court called for pre-sentence reports and victim impact statements, and each appellant offered their mitigation, and the court considered all these factors before imposing the thirty years' imprisonment. The respondent, therefore, urged the court to dismiss the appeal against conviction and sentence, as it was devoid of merit.

30. This being a first appeal from the High Court exercising its original jurisdiction, as has been stated in many decisions of this Court, our obligation is to reconsider and subject the evidence that was adduced before the High Court, to a fresh analysis in order to arrive at our own conclusion. (Okeno -vs- Republic [1972] EA 32); Kiilu & Another -vs- Republic [2005] 1KLR 174; and David Njuguna Wairimu -vs- Republic [2010] eKLR).

31. In accordance with that duty, having perused the record of appeal and the submissions that were before us, we find the evidence clear that the deceased died as a result of a penetrating abdominal injury which raptured his spleen. This is revealed in the postmortem report which was produced in evidence, which report also showed that the body had stab wounds on the left loin region and the right gluteal region.

32. Under section 203 of the Penal Code, the offence of murder is committed where any person with "malice aforethought causes the death of another person by an unlawful act or omission." The main issue in this appeal is whether the evidence which was before the trial Judge, established that the deceased died as a result of an unlawful act or omission, on the part of the appellants, and if so, whether in committing the act or omission, the appellant had malice aforethought. The deceased's death arising from a stab wound was well established. However, it is not disputed that no one saw any of the appellants inflict injury on the deceased. The evidence against the appellants is therefore purely circumstantial.

33. In PON -vs- Republic [2019] eKLR, which was cited by the appellants, this Court had this to say on circumstantial evidence:

> " The direct evidence sought in the matter the subject of this appeal is - who saw how the deceased met her death. There is no such evidence hence the recourse to circumstantial evidence. Though not direct, circumstantial evidence, as this Court stated in *Musili Tulo V. Republic Criminal Appeal No. 30 of 2013*, ' is as good as any evidence if it is properly evaluated and, as is usually put, it can prove a case with the accuracy of mathematics.'
>
> To base a conviction entirely or substantially upon circumstantial evidence, it is necessary that guilt of the suspect should not only be rational inference but also it should be the only

rational inference that could be drawn from the circumstances. If there is any reasonable possibility consistent with innocence, it is the duty of the court to find the suspect not guilty. This principle has been applied for years in this jurisdiction and the two leading judicial authorities that have stood the test of time are Rex V Kipkerring Arap Koske & 2 Others [1949] EACA 135 and Simoni Musoke V R [1958] EA 71. In Rex V Kipkerring (supra) the court explained that;

'In order to justify a conviction on circumstantial evidence the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt and the burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any reasonable hypothesis of innocence is always on the prosecution and never shifts to the accused.'

Simoni Musoke V R (supra) introduced an additional factor to the foregoing, to the effect that before drawing the inference of the accused's guilt from circumstantial evidence the court must be sure that there are no co-existing circumstances or factors which would weaken or destroy that inference. Over the years these strictures have been developed further by way of explanation. For example, in the case of Omar Mzungu Chimera V. R Criminal Appeal No. 56 of 1998, the Court stated that;

'It is settled law that when a case rests on entirely circumstantial evidence, such evidence must satisfy three tests:

i. the circumstances from which an inference of guilty is to be drawn, must be cogently and firmly established;

ii. those circumstances should be of a definite tendency unerringly pointing towards 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"Musili *Tulo -vs- Republic, Criminal Appeal No. 30 of 2013*.'"

34. The law on circumstantial evidence as above stated, has been affirmed by the Supreme Court in Republic vs Mohammed & Another, [2019] KESC 48 (KLR) as follows:

"(55) The law on the definition, application and reliability of circumstantial evidence, has, for decades been well settled in common law as well as other jurisdictions. Circumstantial evidence is "indirect (or) oblique evidence ... that is not given by eye witness testimony" It is "(a)n indirect form of proof permitting inferences from the circumstances surrounding disputed questions of fact." It is also said to be "(e)vidence of some collateral facts from which the existence or nonexistence of some facts in question may be inferred as a probable consequence ...."

(56) On its application, circumstantial evidence is like any other evidence. Though, it finds it probative value in reasonable, and not speculative, inferences should be drawn from the facts of a case, and, in contrast to direct testimonial evidence, it is conceptualized in circumstances surrounding

disputed questions of fact, circumstantial evidence should never be given a derogatory tag ....

(57) ...

58. However, conclusive as it may be, as it has long been established, caution is always advised in basing a conviction solely upon circumstantial evidence. The court "should proceed with circumspection when drawing firm inferences from circumstantial evidence." The court should also consider circumstantial evidence in its totality and not in piece-meal. As the Privy Council stated in Teper v. R [1952] AC at p. 489 "Circumstantial evidence must always be narrowly examined, if only because evidence of this kind may be fabricated to cast suspicion on another."

59. To be the sole basis of a conviction in a criminal charge, circumstantial evidence should also not only be relevant, reasonable and not speculative, but also, in the words of the Indian Supreme Court, "the circumstances from which the conclusion of guilt is to be drawn should in the first instance be fully established...." As was stated in the case of Kipkering Arap Koskei & Another v. R (1949) 16 EACA 135, a locus classicus case on reliance of circumstantial evidence in our jurisdiction, for guilt to be inferred from circumstantial evidence, "...the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt, ..."

58. As was further stated in the case of *Musili v. Republic CRA No.30 of 2013* (UR) "to convict on the basis of circumstantial evidence, the chain of events must be so complete that it establishes the culpability of the appellant, and no one else without any reasonable doubt." The chain must never be broken at any stage.16 In other words, there "must be no other co-existing circumstances weakening the chain of circumstances relied on" and the circumstances from which the guilt inference is drawn must be of definite tendency and unerringly pointing towards the guilt of the accused. "Suspicion however strong, cannot provide a basis for inferring guilt."

35. In accordance with the law as above stated, the fact that the evidence that was adduced against the appellants was only circumstantial evidence, does not make that evidence inferior. However, such circumstantial evidence must be established and must point unerringly to the guilt of the appellant, and there must be no coexisting circumstances that weaken that inference.

36. The evidence implicating the appellants was basically that of Sylvester. According to Sylvester, he was with the deceased when the three appellants attacked them. Sylvester also states that the altercation started inside the bar where the 1st and 3rd appellants were quarrelling the deceased. The 1st and 2nd appellants both admitted in their defence that they were in the bar, although they denied having been involved in the altercation with the deceased or having attacked him outside the bar. The 3rd appellant also admitted having gone to the bar but claims that he bought his beer and carried it home at about 5pm. In other words, he was not at the bar when the deceased and Sylvester were there. In fact, he claimed that the 1st and 2nd appellants were not persons known to him.

37. The issue here is the credibility of Sylvester whose evidence implicates the appellants. The learned Judge who saw the witness testify, believed and accepted the evidence of Sylvester. The learned Judge

had the advantage of seeing and accessing the demeanor of the witnesses, which advantage we do not have. Be that as it may, we are struck by the consistency of Sylvester's evidence. He explained how the 3rd appellant provocatively stepped on his toes causing him to move from the table where he was sitting with 3rd appellant, 1st appellant and the deceased. From the table where he had moved to, Sylvester observed the deceased and the appellants quarrelling, although he could not tell what they were quarrelling about, because of the loud music. According to Sylvester, he alerted Tom who came and ordered the three appellants to leave the bar. In his evidence, Tom explained that he sat outside the bar with the 2nd appellant for about ten minutes before 2nd appellant went inside the bar, and thereafter the deceased and Sylvester also came and went inside the bar.

38. Tom did not mention about Sylvester reporting to him regarding the quarrel between the appellants and the deceased and Tom's alleged intervention, leading to the appellants leaving the bar. This does not, however, provide a contradiction between Tom's evidence and the evidence of Sylvester. Contrary to the respondent's submissions that Tom could not be expected to corroborate Sylvester's evidence in this regard because he never went inside the bar, Tom never actually denied going inside the bar or ordering the appellants to leave. It may be a detail that just simply slipped off his memory. As stated in Sigei -vs- Republic [2023] KECA 154 (KLR):

> " In assessing the impact of contradictory statements or discrepancies on the prosecution's case, our understanding is that firstly, for contradictions to be fatal, it must relate to material facts. Secondly, such contradictions must concern substantial matters in the case. Thirdly, such contradictions must deal with the real substance of the case."

39. Tom was not cross examined on the issue. In our view, there was no contradiction on the issue, nor did the issue concern a substantial matter, nor do we find the issue to have any impact on Sylvester's evidence.

40. Sylvester stated that after he and the deceased, finished taking their drinks, they also left the bar only to be attacked just about twenty meters from the bar. Sylvester swore that it was the three appellants who attacked them. Sylvester also swore that he saw 3rd appellant give 1st appellant a knife with which the 1st appellant threatened him, causing him to ran back to the bar leaving the deceased behind. Shortly thereafter, the deceased came back, groaning in pain, and having a stab wound on the left shoulder, and the side of his abdomen.

41. In his defence, the 2nd appellant claimed that when he left the bar he was attacked by Sylvester and another person, whom he did not know. This was evidently not true as it is apparent that it is Sylvester and the deceased who were attacked. Contrary to the 3rd appellant's assertion in his defence that he did not know the 1st and 2nd appellants who were his co-accused, it is apparent that they knew each other and were in the bar drinking together. Sylvester initially sat next to 1st and 3rd appellants. The 2nd appellant joined the 1st appellant, 3rd appellant and the deceased, after Sylvester had moved to another table.

42. Going by the evidence of Sylvester, the three appellants having attacked them, and him having ran away leaving 1st appellant holding a knife, and the deceased having come back shortly thereafter with a stab wound, the implication is that, the deceased was stabbed with a knife by one of the appellants. This evidence is consistent with the evidence of Sgt Wabomba who arrested the three appellants on the same night, and who recovered blood-stained clothing from the 1st appellant's house and the 2nd appellant's house, and also recovered a knife from the 3rd appellant's house. Although the report of the government analyst to whom these exhibits were forwarded for examination was not produced in evidence, the mere recovery of the exhibits provided consistency and corroboration to Sylvester's evidence. In the

circumstances, the learned Judge was right in rejecting the appellants' defences, and believing and accepting the evidence of Sylvester, with regard to the circumstances in which the deceased died.

43. We find that the evidence that was established before the learned Judge, pointed irresistibly to the deceased having been stabbed with a knife during the fracas with the three appellants. It is evident that the stabbing of the deceased on his vital organ was not an accident, but a deliberate action on the part of the appellants.

44. Section 21 of the Penal Code states:

> " 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."

45. In ambushing Sylvester and the deceased, the three appellants had a common intention of attacking the deceased and Sylvester. The fact that the 1st appellant had a knife which he passed on to the 3rd appellant during the fracas, confirmed that the appellants had an intention of either causing grievous harm or death to the deceased, or Sylvester. It is, therefore, immaterial as to who administered the fatal blow, as the action of one is considered to be the action of all. For these reasons we find that the charge against the appellants was established as the circumstantial evidence which was adduced was sufficient to prove that the appellants inflicted the injury that led to the death of the deceased, and that they had malice aforethought.

46. As regards the appeal against sentence, we note that the maximum sentence for the offence of murder under section 203 as read with section 204 of the Penal Code, is death, but the learned Judge having considered presentence reports, victim impact assessment reports and also heard the mitigation of each appellant, imposed thirty years imprisonment on each appellant, also taking note that they were first offenders. In Bernard Kimani Gacheru vs. Republic [2002] eKLR, this Court stated as follows:

> " It is now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account some wrong material, or acted on a wrong principle. Even if, the Appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exist."

47. In our view the learned Judge properly exercised her discretion in sentencing, taking into account all relevant factors, and we have no reason to interfere. For the above reasons, we find no merit in the appeal against conviction and sentence. We uphold the judgment of the trial court and dismiss the appeal in its entirety.

DATED AND DELIVERED AT KISUMU THIS 15TH DAY OF NOVEMBER, 2024.

HANNAH OKWENGU

JUDGE OF APPEAL

H. A. OMONDI

JUDGE OF APPEAL

JOEL NGUGI

JUDGE OF APPEAL

I certify that this is a true copy of the original

Deputy Registrar