Adogo & 3 others v Republic (Criminal Appeal E240 of 2022)
[2024] KECA 1587 (KLR) (8 November 2024) (Judgment)

Neutral citation: [2024] KECA 1587 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL E240 OF 2022

PO KIAGE, F TUIYOTT & JM NGUGI, JJA

NOVEMBER 8, 2024

BETWEEN

JOSEPH ONDICHO ADOGO ..... 1ST APPELLANT

EVANS NYOKA ONGERI ..... 2ND APPELLANT

RONALD OGWANGI ONDIEKI ..... 3RD APPELLANT

LAMECK RIOBA SAKAWA ..... 4TH APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an Appeal from the Judgement of the High Court of Kenya at Kisii (Ougo, J.) dated 31st March, 2022 in HCCRC No. 27 of 2018)

JUDGMENT

1. The appellants, Joseph Ondicho Adogo; Evans Nyoka Ongeri, Ronald Ogwangi Ondieki and Lameck Rioba Sakawa (the appellants), were the accused persons in the trial before the High Court in Kisii in High Court, Criminal Case No. 27 of 2018. They were charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. It was alleged that on 2nd June, 2017, at Jogoo Estate in Kisii Township within Kisii County, the appellants, jointly with others not before court, they murdered Catherine Sarange Ongeri (deceased).

2. The appellants pleaded not guilty and a fully-fledged hearing ensued. At the conclusion of the trial, the learned Judge (Ougo, J.) held that the prosecution had failed to prove the offence of murder against the accused persons. Instead, the learned Judge concluded that the prosecution evidence revealed that the accused persons had helped cover up the offence that was committed by another person. As a result, she invoked the provisions of Section 179(2) of the Criminal Procedure Code (CPC) and convicted

the accused persons to the offence of being accessories after the fact of murder. She, then, sentenced each one of them to serve fifteen (15) years imprisonment.

3. The appellants were aggrieved by that decision and have lodged the present appeal. In his Memorandum of Appeal, the 1st appellant raised ten (10) grounds of appeal, which are that:

    1. The learned trial judge erred in law by finding the appellant was an accessory to the death of the deceased person herein notwithstanding the fact that there was no evidence whatsoever that was presented to prove such allegation.

    2. The learned trial judge erred in law and fact in finding and holding that the prosecution had proved its case beyond the requisite standards whilst the evidence tendered and/or rendered by the prosecution was riddled with material contradictions.

    3. In finding and holding that the evidence of the minor(s) was fundamental, the learned trial judge erred in fact and law by failing to make a determination that their evidence was replete with substantial contradiction whatsoever.

    4. Having failed to find the appellant guilty of murder, the learned trial judge erred in law and in fact to draw an inference against the prosecution, which inference would have been to the advantage of the appellant herein. Consequently, the learned trial judge misconceived and/or misapprehended the legal duty placed upon the prosecution as pertains to the calling of witnesses and tendering evidence.

    5. The learned trial judge erred in convicting and sentencing the appellant on a charge that was not in the charge sheet whatsoever.

    6. The learned trial judge erred in fact and in law in failing to properly evaluate, appraise and/or analyze the evidence on record and thereby failed to appreciate contradictions which were apparent on the prosecution witnesses.

    7. The learned trial judge erred in law in requiring the appellant to prove his innocence contrary to and in contravention of the established criminal principle that the burden of proof rests upon the prosecution and the same does not shift whatsoever. The judgement is associated with error and misdirection.

    8. The learned trial judge erred in law and in fact in failing to appreciate the fact that all prosecution witnesses confirmed that the deceased was killed by one Kariuki and not the appellant herein.

    9. The learned trial judge erred in law and in fact by introducing the issue concerning land as the source of death of the deceased person herein when in reality no evidence was ever provided by the prosecution.

    10. The sentence meted out by the learned trial judge was manifestly excessive, harsh and/or punitive taking into account that the appellant was not culpable of the charge herein.

4. On the other hand, the 2nd, 3rd and 4th appellants jointly raised seven (7) grounds of appeal in their Memorandum of Appeal which are that:

    1. The trial court erred in law and in fact in relying on inconclusive evidence of identification that it was at night and the intensity and brightness of the alleged moonlight was not tested with great care.

2. The trial court erred in law and in fact in relying on the evidence of first report by PW2 and PW3 to the authority, who in their early opportunities never mentioned the 2nd, 3rd and 4th appellants to have been involved in the matter. They only came to record after one year, hence an afterthought and therefore such evidence was entered after consultation/couching.

3. The trial court erred in law and in fact in relying on the evidence of children of tender years that was not corroborated, a child cannot corroborate the evidence of another child, they needed independent corroboration.

4. The trial court erred in law and in fact when relying on evidence obtained after a span of time.

5. The trial court erred in law and in fact in convicting the accused persons of an offence they were not charged of.

6. The trial court erred in law and in fact on its analysis of the evidence tendered in court which was not beyond reasonable doubt and went ahead to convict the accused/appellants.

7. The trial court erred in law and in fact on analyzing the evidence on identification and recognition of the appellants by the witnesses.

5. This is a first appeal. Accordingly, the role of this Court is to re- evaluate evidence, assess it, weigh it as a whole and reach our own independent conclusions. In doing so, we are required to bear in mind that we neither saw nor heard the witnesses, for which we must make allowance. See Okeno vs. Republic [1972] EA 32.

6. At the High Court, the prosecution called a total of twelve (12) witnesses. The evidence that emerged from the trial was as follows.

7. PW2, MMO (name withheld), was a minor, 14 years old, and a daughter to the deceased. She testified that on the material day at 7.00am, she left her mother at home with her sisters, P (4 years old) and V (6 years old), as she went to school with her brothers, J and R. Just as they left, one Kariuki, arrived at their home and they left him with their mother and sisters. Kariuki was a handyman who used to come periodically to make repairs at their home. PW2 returned home at 4.00pm and found her two sisters and Kariuki sitting under a tree eating oranges.

8. PW2 went to the "big house" where her mother used to sleep and saw that the curtain was torn; there was spilled tea on the table, and there was some blood on the table mixed with the tea. There was also some blood on the floor and on a chair. She got out to inquire what had happened but found that Kariuki had already left. However, her sister, P, the 4-year old, told her that Kariuki had beaten the deceased with a hammer and she fell down. P reported that afterwards, Kariuki sent her and V for mandazis and so they did not know where he took the deceased.

9. PW2 testified that she assumed that the deceased was injured and had gone to hospital. Kariuki told her that the deceased had given instructions that they should not open the side-house where they (the older children) used to sleep. That side-house was a few metres from the main house. It was locked with two padlocks, and she was even unable to change clothes since her clothes were inside that side-house. Kariuki also told PW2 that they should put off all the lights and sleep in the main ("big") house.

10. PW2 inquired from Kariuki how they were supposed to turn on the security light and change from their uniforms but Kariuki told her that the deceased would return and put on the lights. Meanwhile, they should still remain in their uniforms. She went to the "big house" with her sisters and had dinner, during which time Kariuki returned to the house and she gave him food. He helped them lock up.

11. Afterwards, Kariuki told them to put off all the lights and sleep in the "big house", while they wait for the deceased. She was afraid since both her parents were not home. Later, at past 7.00pm, she heard people talking outside. She woke up and quietly went by the window and peered outside where she saw six people, who were Robert, Kariuki and the four appellants. She testified that she saw the 4th appellant taking out soil from the house which was locked, whilst the 1st appellant beckoned them to hurry up. She saw them enter the house with an empty sack and a blanket but when they left, the sack was full and was carried by Robert and the 4th appellant. Upon leaving, they locked the house again with the two padlocks and put the sack inside a car, a Probox, which had been parked about 7 to 10 meters away from the "big house", and drove off. She added that the distance between the big house and the locked house was only about 3 meters.

12. PW2 testified that she was able to see the appellants using moonlight which shone brightly that night. In addition, the appellants also flashed torches as they entered the house which had been locked. She also told the court that she recognized all the four appellants as she had known them for a long time: the 1st appellant was her uncle; the 2nd appellant was a neighbor; the 3rd appellant was a member of Sungusungu – a vigilante group in the village; and the 4th appellant used to dig a well for them. She further testified that she woke up PW3, to see Robert and the 4th appellant carrying the sack.

13. The next day, PW2 went to her aunt, Lilian Kemunto, and told her what she saw. She testified that her aunt warned her not to tell anyone what she saw and to inform her if she saw those people again. Her aunt, together with another one of their aunts, and uncle, went to their home. While there, her brother (PW3) broke a window of the locked house and they all peeped inside and saw blood which dotted all the way from the door to the beds which they used to sleep on. PW2 further testified that her mother's body was later found at Kisii School.

14. On cross examination, PW2 stated that on the material day, her father (PW4) had run away from home. She also stated that she clearly saw the 1st appellant with a walking stick; the 1st and 3rd appellants were dressed in black clothing; the 4th appellant opened the two padlocks; while the 2nd appellant stood outside. She further stated that when the deceased went missing, the 3rd appellant was among the people who purportedly arrested Kariuki and brought him to their home to explain what had happened to her.

15. PW3, JO, was a minor aged 11 years old, and a son to the deceased. He testified that on the material day, he left her mother at home with her sisters P and V, as he went to school with his sister PW2 and brother Regan. At 12.00pm, PW3 and Regan went back home for lunch. They found Kariuki and his sisters at the avocado tree. He then proceeded to the house where they used to sleep to change his clothes but found it locked with two padlocks. He asked Kariuki why the door was locked and he told her that the deceased had locked it and had gone to buy nails. He went to the house where their parents used to sleep, he reported seeing what PW2 had seen: the torn curtain and the spilled blood. He asked Kariuki about the blood and he told him that the deceased had got hurt and gone to the hospital. When PW2 returned at 4.00pm, he told her what he had seen at the house. They went to ask Kariuki but found that he had left and had told their two sisters that he would return.

16. He recalled that PW2 woke him up later that night when she heard people talking outside. He went to the window and saw the 1st appellant at the car, the 3rd appellant was outside the house, while the 2nd and 4th appellant entered the house which had been locked. He testified that the distance between the house where they were sleeping and the locked house was very close, about 2 meters apart, while the car was about 3 meters away. He told the court that he saw the appellants carrying something in a white sack and put it in the car before they locked the house again and left. Just like his sister PW2, PW3 told the court that he recognized all the four appellants as he had known them for a long time and described them in the same way that PW2 described them.

17. The following morning, PW3 placed a chair by the window of the house which had been locked, to look inside. He broke the window and together with PW2, saw blood in between the two beds in the house. They both went to call their aunt who came and also had a look inside the house, and said that it was blood. He further testified that since that day, he has never seen his mother again but her body was later found in a sewage at Kisii School.

18. On cross examination, he told the court that P and V told him that Kariuki had hit their mother with a hammer behind her head. He further stated that he saw the 1st appellant standing by the car and telling the others "fanya haraka, fanya haraka". He added that Robert carried a blanket, the 2nd appellant carried a white sack, while the 3rd appellant stood outside the house that was locked.

19. PW7, Robert Mososi Omwenga, was the deceased's brother-in- law. He testified that on 4th June, 2017, all the deceased's children went to his house at 10.00am and informed him that the deceased had disappeared the previous day. The children went to his house on three different occasions and reported that their mother had not returned home. The first time they went to his house, they told him that they were looking for one Makori, who used to work at their home, to ask him the whereabouts of their mother. Thereafter, PW7 found Makori at his house and asked him the whereabouts of the deceased. Makori told him that she had left for town but did not know where she went. The third time they went to his house, the children told him that there was blood in the house. He accompanied them to their home and found a house that had been locked with two padlocks. On Saturday, he returned with the children again and on checking through the window of the locked house, he saw blood at the door which appeared to be covered by soil. Later that night at 8.00pm the police visited the home and collected some blood.

20. PW4, Francis Ongeri Omwenga, was the deceased's husband. He testified that the 1st and the 2nd appellants were his cousins; and he also knew the 3rd and 4th appellants. He stated that sometime in 2013, the 1st appellant sued him over their ancestral land, which he had subdivided so that their step sister could also have a part of it. However, four years after the subdivision, the 1st appellant told PW4 that he had obtained a court order to sell the land which had been subdivided to their step sister. The deceased questioned the sale and destroyed the fence which had been put up by the 1st appellant. As a consequence, the 1st appellant caused the deceased to be arrested but she was later released.

21. However, sometime in 2017, the 1st appellant together with some people from the community policing unit, chased PW4 from his home and he went to Nakuru where he put up in a rented house. He later went back and told the deceased that he would run away as they were looking for him and he was afraid they would harm him. He testified that he last spoke to the deceased on 2nd June, 2017, and upon returning home the following day, he did not find her. He only found his children who told him that they did not know where their mother went to. He reported the matter to the police who went to his home and broke the two padlocks which had been used to lock the door of one of the houses, but they did not find the deceased. However, they found blood inside the house which was collected for investigation. He further testified that the deceased remained missing until October 2017 when parts of her body were found in a sewer tank in Kari in Kisii.

22. On cross examination, PW4 told the court that he reported the land matter to the chief. He also stated that his child told him that Kariuki had hit the deceased on the head with a hammer. He added that he heard that Kariuki was taken to the police station but was later released for reasons he did not know.

23. PW6, Justus Obira Omwenga, was a brother-in-law to the deceased and brother to PW4. He testified that when the subdivision of the land was proposed, the deceased opposed it. Later, the land was subdivided by the 1st appellant but the deceased destroyed part of the fence which had been put up by

the 1st appellant. She was arrested and later released; where after she further damaged a small portion of the said fence to allow their cows to pass through. The deceased then filed a case in court and again, there was an altercation between her and the 1st appellant and the police were called. When the police left, one Kariuki, who was a worker at the home of the deceased, went to stay there. By this time, PW4 and PW6 had been chased away by the 1st appellant and they went to PW6's house to sleep.

24. PW1, Everlyn Kemunto Ontiri, testified that the deceased was her friend and that she bought a parcel of land from her. However, before buying the parcel from her, she asked the deceased if she had obtained consent from her husband to sell the land, and she said that she had. Later, she met with the 1st appellant who warned her that she should not have taken possession of the parcel as it belonged to him. At the time, there was some exchange between the deceased and the 1st appellant, whereby the deceased asked the 1st appellant why he had left his home on the upper side and instead came down to her land. The 1st appellant then came back with one, Charles Onsongo (Onsongo), and told the deceased to rescind the agreement she had with PW1 and instead sell the land to Onsongo who was ready to pay more for the parcel.

25. However, the deceased and her husband declined the offer. PW1 further testified that the deceased had earlier on demolished a fence that had been put up by the 1st appellant. As a result, the deceased was arrested but was later released.

26. Afterwards PW1 started building on the land but had to give the 1st appellant kshs. 40,000.00 as a bribe so that she could occupy the land peacefully. Later on, the 1st appellant wrote a letter to PW1 through M/S Ochoki Advocates informing her to move out of the parcel as it belonged to Onsongo. From then on, the land matter escalated between the deceased and the 1st appellant, which prompted the deceased to file a suit against him. But as fate would have it, the deceased disappeared before the case was heard and determined. She further testified that following the disappearance of the deceased, the 1st appellant threatened her that she could disappear just like the deceased did, which matter she reported to the police under OB/No. 91/30/9/2017. On cross examination, she told the court that the 1st appellant had threatened the deceased in her presence. In addition, PW4 had told her that he went into hiding because of threats from the 1st appellant.

27. PW5, Bernard Nyamanya, was a civilian clerical officer, who was well known to the deceased, the 1st, 2nd, and 4th appellants; as they were his aunt, uncle and cousin respectively. He testified that sometime in May 2017, the deceased told him that she had removed the fence that had been put up by the 1st appellant and sold the land to someone else. The next day, as he was going to work, he overheard people saying that the deceased had been arrested over the removal of the fence and was warned not to repeat what she had done. The following day, he saw boys from the community policing fencing her land using posts but the same were removed immediately after. Days later, he met the deceased and asked her about the removal of the posts and told her that it would cause her trouble. The deceased told him that she had been threatened together with her husband that if they destroyed the fence, their lives will be in danger. He advised her to file the land matter in court following the threats she received from the community policing group, in which the 2nd, 3rd and 4th appellants were members. By then, PW4 had already run away. The deceased filed the land matter in court and on the material day, PW5 passed by her home and advised her to visit her advocate to prepare for the hearing which was scheduled for 5th June, 2017. Later that evening, he did not find the deceased in her home and neither could he get her on the phone. He found the deceased's children and the older girl told him that they found the man who lived with their mother. The man, one Nibai, told them that their mother had gone on a safari. PW5 then left and told the girl to inform her mother not to forget about the court case which was scheduled on 5th June, 2017.

28. The next day, people became suspicious and began looking for the deceased and PW5 thought that maybe she had gone to visit her relatives and forgotten about the court case. He again passed by the deceased's home and the older girl told him that she had not returned but that they were surprised by what they saw in their store. The children told him what they had seen; and what had transpired on the material night. On cross examination, PW5 told the court that Nibai was arrested on two occasions but was released by the OCS. He also stated that he had not heard the name "Kariuki" and that Nibai was a suspect in the murder of the deceased.

29. PW9, Teresia Kemunto Samwel, was the deceased's mother. She testified that she went to the deceased's home and found a man who worked for her. While there, her grandchild told her that there was a man burning the deceased clothes. She confronted the man and asked him why he was at the deceased's home, whilst she was not there; and he told her that he was waiting for the deceased to pay him. PW9 testified that the deceased was found two months later and that her body was rotten and it had no head. She only saw her legs and clothes. As a consequence, samples of her saliva and nails were taken for purposes of confirming whether the body found was that of her daughter, the deceased. On cross examination, PW9 told the court that she heard the children call the man who was burning the deceased's clothes, Kariuki, but said he was not among the four appellants who were arraigned in court.

30. PW10 was Dr. Benjamin Ndilibe, the pathologist who conducted the postmortem. He testified that the decomposing body parts of a female adult were discovered in a sewerage manhole wrapped in a blanket. General observation of the body revealed that she was a female African aged 32 years. The deceased's body was fully decomposed and the skull and torso were separate. Consequently, he could not establish any soft tissue injuries on the body or bones. He concluded that the cause of death could not be ascertained. Additionally, he took samples of her hair, teeth, femur and one rib for DNA examination.

31. PW8, Richard Kimutai Langati, was the government chemist who received blood samples, in form of blood-stained cotton wool, from the crime scene, which was suspected to be that of the deceased. He testified that he took a buccal swab from PW9 to examine her genetic relationship to the deceased. Preliminary examination determined that the blood sample was human blood. He subjected the blood sample and buccal swab of PW9 to a DNA analysis. The findings showed that the blood sample from the crime scene belonged to a female who shared half of her DNA with PW9. He testified that there was 99.99+% chance that PW9 is the biological mother of the deceased, whose blood stains were collected from the crime scene.

32. PW12, John Kimani Mungai, was the government chemist who received samples of the deceased's femur bone, teeth and a buccal swab from PW9. Upon examination of the samples, he found that the was 99.99+% chance that the remains (femur bone and teeth) were from a daughter of PW9.

33. PW11, Corporal Cosmas Kaloki, was the investigation officer in this case. He testified that the incident was reported at Kisii Police station on 7th August, 2017. The relatives of the deceased complained that she had been murdered and her body locked up in one of the houses in her home. They went to the deceased home and found a house which had been locked with two padlocks. The said house was used as the children's bedroom and their parents used to sleep in the next house which was close to the children's bedroom. They broke into the house but did not find the deceased. However, they found blood stains under one of the beds. Additionally, PW11 observed that there were prints of footsteps in the house, which indicated that some people must have entered the house and probably removed the body. With the help of the crime scene officer, they collected the blood stains and preserved it for further investigations.

34. He testified that when they visited the crime scene, PW4 was not present and rumour had it that he had gone into hiding. They only found the children of the deceased. However, at the time, they were scared to talk until their father (PW4) resurfaced after hearing that the police were following up the matter. PW11 testified that during investigations, he learnt about the dispute between the deceased and the 1st appellant. He recorded witness statements and concluded that the appellants were involved in the murder, together with Robert and Kariuki who were still at large. After completing his investigation, he forwarded the file to the Director of Public Prosecutions (DPP) who recommended that the four appellants be charged in court.

35. When they were placed on their defence, the appellants gave sworn testimony and called no witnesses. They all denied committing the offence they were charged with.

36. The 1st appellant testified that the deceased was the wife to his cousin (PW4) and he was not involved in her killing and neither did he meet with the co-accused persons to plan her murder on the material day. He further testified that PW2 and PW3 did not connect him to the murder of the deceased but said that it was Kariuki who was involved. During cross examination, he told the court that he was at the Mosque on the material day. He admitted that the deceased sold her parcel of land to PW1 but denied that that was a motive to kill her.

37. The 2nd appellant testified that none of the witnesses stated that he was seen killing the deceased. He pointed out that PW1 testified that Kariuki killed the deceased but the said Kariuki was not in court.

38. The 3rd appellant also denied killing the deceased and testified that he was among the people who arrested Kariuki, who was almost lynched after the deceased's death. He admitted that he was a member of the community policing group. He further testified that he knew Kariuki as a former school mate and had seen him at the deceased's home doing general duties. He also said that he was not among the people who PW3 saw talking, as he mentioned Micah and yet he was Ronald.

39. The 4th appellant similarly denied killing the deceased and testified that no one said he was involved in her murder.

40. The appeal was argued by way of written submissions by all appellants. During the virtual hearing, learned counsel, Mr. Ochwangi appeared for the 1st appellant, learned counsel, Mr. Mokaya appeared for the 2nd, 3rd and 4th appellants, whereas Mr. Okango, Senior Principal Prosecution Counsel, appeared for the respondent. The appellants relied on their submissions and orally highlighted them. However, Mr. Okango told the Court that he was unable to file his written submissions given the volume of the record and a heavy work schedule but prayed for the Court to allow him to make oral submissions. The Court allowed him to make oral submissions.

41. The main points of the 1st appellant's appeal from both his written and oral submissions through counsel were as follows:

    a. The evidence presented by PW1, PW2, and PW3 did not indicate that the 1st appellant was the one who killed the deceased. PW1 specifically stated that she did not witness the 1st appellant killing the deceased, did not report her disappearance, and was not present when the 1st appellant allegedly threatened the deceased. The trial court, therefore, relied on hearsay evidence that was not conclusive in finding the 1st appellant guilty. Additionally, PW2 and PW3 testified that their sisters informed them that the deceased was killed by someone named Kariuki, not the 1st appellant. It was also argued that the testimony of these witnesses who claimed to have seen the appellants at night could not be considered reliable as they were

minors. The trial court's use of their evidence to establish the "last seen" theory was deemed inappropriate for the 1st appellant.

b. Despite PW4 testifying that the 1st appellant had a dispute with him over a parcel of land that he sold, upon being shown his statement during the trial, PW4 denied that it was his statement or contained his signature. Furthermore, he claimed to have no knowledge of who killed his wife. The trial court, in this case, relied on his testimony without valid explanation as to who was responsible for the deceased's death.

c. Testimonies from PW5, PW6, PW7, and PW9 did not implicate the 1st appellant in the murder of the deceased. None of these witnesses claimed to have seen the 1st appellant threaten or kill the deceased.

d. PW10 stated that he could not determine the cause of death of the deceased.

e. PW11's evidence was limited to investigations only. The trial judge convicted and sentenced the 1st appellant without any clear identification by a witness implicating him in the murder. It was also argued that the judge made a decision based on a charge sheet that did not exist, as there was no evidence to suggest that the 1st appellant was involved as an accessory to murder.

42. On the other hand, Mr. Mokaya, representing the 2nd, 3rd, and 4th appellants, argued that none of the prosecution witnesses proved that the appellants murdered the deceased. It was indicated by PW2 and PW3 that a person named Kariuki was responsible for the murder, leading to the belief that the prosecution's evidence was solely circumstantial. The trial court convicted and sentenced the appellants for a lesser offense of being an accessory after the fact to murder, based mainly on the testimonies of PW2 and PW3.

43. Using the laid -out facts as a foundation, counsel for the 2nd to 4th appellants made several arguments. First, he contended that the evidence provided by PW2 and PW3 was not aligned with the charge of murder as specified. The charge sheet, according to him, should have clearly indicated the roles of the appellants in the crime, but this information was not adequately proven during the trial. Furthermore, he highlighted that the appellants deserved to be charged with an offense recognized by law and be given all the necessary details to prepare an adequate defense.

44. The legal counsel for the appellants further argued that the prosecution failed to provide sufficient details of the offense they were charged with, which infringed upon their right to a fair trial. All the appellants contested that it was open to the court to convict on the offence of being accessories after the fact on a charge of murder. They argued that section 179 of the Criminal Procedure Code did not envisage this type of usage; as it it opened up the appellants to unfairness since they were eventually convicted of an offence they were not charged with and did not have an opportunity to defend.

45. Additionally, the appellants called into question the witness testimonies, particularly from PW2 and PW3, both for not meeting the threshold for identification evidence; for lacking credibility; and for lacking corroboration which they argued was required by law.

46. Mr. Okango, opposing the appeal, dismissed the appellants' submissions as lacking merit and supported the judgment of the trial court.

47. Firstly, he argued that the prosecution aimed to prove a case of murder against the appellants from the beginning, with specific details to support the charge of murder. Mr. Okango stated that while the prosecution believed it had enough evidence to prove murder, the trial court disagreed and instead found evidence of accessory after the fact of murder. He challenged the assertion by Mr. Ochwangi

that the trial judge came up with the theory of "accessory after the fact," stating that it is defined under Section 396 of the Penal Code and not a foreign legal concept.

48. Secondly, Mr. Okango explained that the appellants were actually convicted under Section 179(2) of the Criminal Procedure Code as the circumstances of the case did not align with Section 179(1). He pointed out that this section allows for convictions of offenses other than those charged. Mr. Okango highlighted that the prosecution's evidence supported the conviction of the appellants under Section 179(2) based on the specific facts presented.

49. To support his argument, Mr. Okango mentioned the blood sample evidence taken from the crime scene matching the body samples found near Kisii School, confirmed through DNA analysis as belonging to the deceased. He stated that this evidence justified the trial court's decision to convict the appellants under Section 179(2) and Section 396(1) of the Penal Code.

50. Thirdly, Mr. Okango addressed the issue of minors PW2 and PW3 giving evidence, arguing that their age did not discount the credibility of their testimony. He emphasized that both minors were found capable of giving sworn testimony and were not challenged during cross-examination regarding their truthfulness. He refuted claims by Mr. Mokaya that the minors may have been coached, stating that their evidence remained consistent and placed the appellants at the crime scene.

51. Lastly, Mr. Okango discussed the issue of identification, stating that key witnesses PW2 and PW3 were able to recognize and name the appellants, pinpointing their locations and actions accurately. He mentioned that the moonlight and torches used by the appellants aided in their identification. Mr. Okango argued that the trial court's decision in sentencing the appellants should not be interfered with, as it was made with careful consideration.

52. We have carefully evaluated the evidence before the trial court. We have also considered the appeal before us, the rival submissions of the parties and the authorities cited in support of the opposing positions.

53. This appeal, as framed and argued, raises four questions for determination:

    a. First, whether the evidence of PW2 and PW3 on identification was sufficiently error-free to sustain a conviction;

    b. Second, whether the court was in error to rely on the testimonies of PW2 and PW3, who were minors, in view of the legal requirement for corroboration.

    c. Third, whether, in a criminal case in which an accused person has been charged with murder, it is open for the trial court to convict the accused person of the offence of accessory after the fact to murder as a lesser but cognate offence through the modality of section 179(2) of the Criminal Procedure Code.

    d. Fourth, whether the totality of evidence presented by the prosecution yielded the conclusion that the appellants were guilty of the offence of being an accessory after the fact.

54. In the present case, it is true, as the all the four appellants argue, that the incident took place at night. The two identifying witnesses place the time of the incident – the carrying of what the two witnesses thought was the body of the deceased from a room within her homestead – at around 7:30 – 8:00pm. Given that the incident took place at night, care ought to be taken to ensure that the appellants were positively identified in accordance with the guidelines set in various cases, among them Republic vs. Turnbull [1976] 3 ALL ER 549 and Kiarie vs. Republic [1984] KLR 739. Ordinarily, the accuracy of an identifying witness testimony depends on the opportunity the witness had to observe and remember that person, and whether the witness knew the accused before. This Court, in Paul Etole & another vs.

Republic [2001] eKLR, underscored the need for caution while receiving all forms of identification evidence. In so doing, it stated:-

> "Identification evidence can bring about miscarriages of justice. But such miscarriages of justice occurring can be much reduced if whenever the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused, the Court should warn itself of the special need for caution before convicting the accused. Secondly, it ought to examine closely the circumstances in which the identification by each witness came to be made. Finally, it should remind itself of any specific weaknesses which had appeared in the identification evidence. It is true that recognition may be more reliable than identification of a stranger; but, even when the witness is purporting to recognise someone whom he knows, the Court should remind itself that mistakes in recognition of close relatives and friends are sometimes made."

55. We will now look at the identification evidence that was before the trial court. It behooves us as a first appellate court to analyze and re-evaluate this identifying evidence, in order to come to an independent conclusion as to whether it was error-free. Our starting point in that analysis is to note that the identification evidence against all the appellants was that of recognition. Lord Widgery, C. J. in R vs. Turnbull (1956) 3 All ER 549 at 552 stated the following about recognition evidence:

> " Recognition may be more reliable than identification of a stranger, but even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made."

56. Closer home, concerning the probative value of recognition evidence, Madan J.A in Anjononi and Others vs. The Republic [1980] KLR stated as follows:-

> " ...This, however, was a case of recognition, not identification, of the assailants; 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."

57. In the present case, each of the two witnesses was categorical that they recognized each of the four appellants (and two others) on the night of 3rd June, 2017. They both said they had known the appellants for a long time prior to the incident: the 1st appellant is their uncle; the 2nd appellant was a neighbor for a long time; the 3rd appellant was a member of Sungusungu – a vigilante group in the village whom they knew well; and the 4th appellant used to dig a well for them

58. Both witnesses – PW2 and PW3 – gave remarkably similar accounts of what they saw. Both stated that they watched the events from a window which was less than ten metres away from where the incident was taking place. Both stated that there was bright moonlight; and that the appellants had torches which illuminated their faces. Both stated that the incident happened for a sufficiently reasonable length of time for them to make out who the people were. Indeed, PW2 stated that she observed the six people for some time before waking up his brother with whom they watched the final part of the incident as two of the people dumped what they assumed to be their mother's body into a vehicle of the make, Probox.

59. Finally, the witnesses reported the following day to their aunt (Lillian Kemunto); uncle (PW7) and the deceased's acquiantance (PW5) what they had seen. They also recorded the same version in their first statements to the Police. This, in our view, adds probative value to the identification of the appellant.

The significance of early reporting was pronounced in Terekali & Another Vs. Republic [1952] EA 259 as follows: -

> " Evidence of first report by the Complainant to a person in authority is important as it often provides a good test by which the truth and accuracy of subsequent statement may be gauged and provides a safeguard against later embellishment or made up case. Truth will always come out in a first statement taken from a witness at a time when recollection is very fresh and there has been no time for consultation with others..."

60. Taking into consideration the totality of the circumstances surrounding this identification evidence including the internal consistency of the testimonies of the witnesses which pointed to their credibility, we are persuaded that the identification evidence with regard to the appellants was error-free and iron-clad.

61. The second issue raised by the appellants is whether the testimonies of PW2 and PW3 should be considered, and what probative value to assign them given the legal requirements of corroboration respecting the testimonies of minors.

62. Section 124 of the *Evidence Act* provides as follows:

> " Notwithstanding the provisions of section 19 of the *Oaths and Statutory Declarations Act* (Cap. 15), where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him."

63. On the other hand, section 19(1) of the *Oaths and statutory Declarations Act*, cap 15 Laws of Kenya provides as follows:

> " where, in any proceeding before any Court...any child of tender years called as a witness does not, in the opinion of the Court ...understand the nature of an oath, his evidence may be received, though not given on oath if, in the opinion of the Court...he is possessed of sufficient intelligenceto justify the reception of the evidence, and understands the duty of speaking the truth..."

64. The *Oaths and Statutory Declarations Act* does not define who a child of tender years is. The predecessor of the Court in Kibageny v. Republic [1959] EA 92, defined a child of tender years to mean in the absence of special circumstances, any child of any age or apparent age, of under fourteen years. This Court reiterated that view in *Patrick Kathurima v R Court of Appeal at Nyeri Criminal Appeal No. 131 of 2014*).and Maripett Loonkomok v Republic [2016] eKLR.

65. In the present case, PW2 was fourteen years old at the time she testified while PW3 was eleven years old. The learned Judge conducted voir dire for both and concluded both were intelligent enough to testify under oath. Going by our decisional law, however, PW2 is not a child of tender years, and it was unnecessary to conduct a voir dire with respect to her. The learned Judge was probably acting out of an abundance of caution.

66. In any event, since PW2 was fourteen years old at the time she testified, her testimony did not require corroboration under section 124 of the *Evidence Act*. On the other hand, the testimony of PW3, who was eleven years old at the time he testified, required corroboration. That corroboration was, in turn, provided by the evidence of PW2, whose evidence, as pointed out above, did not need corroboration.

Consequently, we see no legal infirmity in the fact that the learned Judge accepted and believed the testimonies of PW2 and PW3. On our part, we must add that after carefully perusing the record, we note that the two witnesses gave straight-forward accounts of what they saw and heard, and their cogent narratives remained unshaken under thorough cross-examination by counsel.

67. We now turn to the critically consequential question: In a criminal case in which an accused person has been charged with murder, it is open for the trial court to convict the accused person of the offence of accessory after the fact to murder as a lesser but cognate offence through the modality of section 179(2) of the Criminal Procedure Code?

68. Section 179 of the Criminal Procedure Code provides as follows:

"179.

(1) When a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence, and the combination is proved but the remaining particulars are not proved, he may be convicted of the minor offence although he was not charged with it.

(2) When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence although he was not charged with it.

69. This section has been given judicial interpretation by this Court in Robert Mutungi Muumbi vs. Republic [2015] eKLR where it was stated:

> "As is apparently clear, section 179 of the Criminal Procedure Code empowers a court, in some particular special circumstances, to convict an accused person of an offence, even though he was not charged with that offence. The court contemplated by section 179 can be either the trial court or the appellate court..... The question is whether the special circumstances contemplated by section 179 were in existence to enable the court convict the appellant of an offence with which he was not charged. An accused person charged with a major offence may be convicted of a minor offence if the main offence and the minor offence are cognate; that is to say, both are offences that are related or alike; of the same genus or species. To sustain such a conviction, the court must be satisfied on two things. First, that the circumstances embodied in the major charge necessarily and according to the definition of the offence imputed by the charge, constitute the minor offence. Secondly, that the major charge has given the accused person notice of all the circumstances constituting the minor offence of which he is to be convicted. (See ROBERT NDECHO & ANOTHER V. REX (1950 - 51) EA 171 and WACHIRA S/O NJENGA V. REGINA (1954) EA 398)."

70. In the present case, the appellants were charged with the offence of murder under section 202 as read with section 204 of the Penal Code. The learned Judge found that the charge of murder was not proved. Having believed the testimonies of PW2 and PW3 that the appellants participated in disposing of the body of the deceased, the learned Judge convicted the appellants of the offence of being an accessory after the fact of murder contrary to section 222 of the Penal Code. In doing so, the learned Judge invoked section 179(2) of the Penal Code.

71. The critical question is whether one can be convicted of the offence of being an accessory after the fact of murder contrary to section 222 of the Penal Code when they were charged with the offence of murder contrary to section 202 as read with section 204 of the Penal Code. Differently put, is the offence of being an accessory after the fact of murder a minor and cognate offence to that of murder?

72. We have given anxious thought to this question. Unfortunately, our analysis has yielded a response in the negative. This is because one cannot be convicted under section 179(2) of the Criminal Procedure Code unless the offence of which he is convicted is not only lesser (arrived at through substraction) but is also cognate of the principal offence with which he was charged. "Cognate" in this sense has been defined to mean that the two offences must be of the same "genus" or "type".

73. It is important to realize that this is not merely a technical requirement: it serves the critical function of ensuring that the accused person has sufficient notice of the case he is facing. The predecessor to this Court, the Court of Appeal for Eastern Africa explained the rationale beautifully in In Ndecho and Luora v R (1951) 18 EACA 171. In that case, the Court held, in relation to section 179(2) of the Kenya Penal Code, that on a charge of murder there could not be a conviction of wilfully obstructing the police in the due execution of their duty. The Court said:

> "The point which we stress and which may be in danger of being overlooked is, that in both [Rex v Muhoja and Rex v Home], this Court implied that the minor offence must be of a cognate character. Admittedly neither judgment stated this in explicit terms, yet we are convinced that that is the effect of both judgments....It will be observed that in both these cases the minor offence substituted was cognate to the offences charged in that they were both offences which involved hurt to the human body. This Court has never said, and in our opinion could not without error say, that section 179(2) permits a Court, on an information for murder, to find the person so charged, to quote one example, guilty of riding a bicycle without a light. In our view to read the sub-section as giving the Court such a power would not only be repugnant to natural justice but would introduce into the wording of the subsection something that is not there. The governing word in this subsection is the word 'reduce', and the sub-section cannot be read as if the words ran 'and facts are proved which reveal another offence'. The facts proved must reduce the major offence to a minor offence. The words used being 'facts are proved which reduce it to a minor offence'. In our opinion we have no doubt that the Legislature both intended and have so expressed the intention that the minor offence must be cognate to the major offence charged."

74. In the same case, the Court explained further that:

> "In order to make the position abundantly clear we restate again that the judgments of this Court given in Rex v Muhoja and Rex v Home mean nothing more than this: where an accused person is charged with an offence he may be convicted of a minor offence although not charged with it, if that offence is of a cognate character, that is to say of the same genus or species. Furthermore, we point out that the wording of section 179(2) is permissive only and that in our opinion, when the major offence charged is murder, a Court should exercise its discretion most warily before convicting a person charged, with any alternative offence, although cognate, other than manslaughter. The test the Court should apply when exercising its discretion is whether the accused person can reasonably be said to have had a fair opportunity of making his defence to the alternative."

75. Similarly, and analogously to the present case, in Kashizha s/o Madagede v R (1954), 21 EACA 389 the same Court held, in relation to section 182(2) of the Uganda Criminal Procedure Code (the Ugandan version of Kenya's section 179(2) of the Criminal Procedure Code), that, on a charge of murder, a conviction could not be entered of accessory after the fact to murder. The Court, having referred to

Ndecho's case (supra) and others, held that the rule was that the minor offence must be cognate to the major offence. The Court said:

> " It is clear that the offence of being accessory after the fact is not cognate with murder, though in some cases evidence admissible to prove murder may establish that the accused, while not a murderer, was accessory after the fact of murder. The accessory takes no part in the actual commission of murder, need not be present at it, and in fact may know nothing about it until after its committal."

76. We need not belabour the point. It is fairly obvious that it was an error for the learned Judge to convict the appellants of the offence of being accessories after the fact of murder in this case where they had been principally charged with the offence of murder.

77. Having reached this consequential conclusion, it is unnecessary for us to reach the fourth issue which inquired whether sufficient evidence was presented to support the conviction for the offence of being accessories after the fact of murder. It would not even be prudential to offer a hypothetical view of this question given the fact that one of the legal objections to the conviction by dint of section 179(2) of the Criminal Procedure Code is the fact that the offence of which the appellants were ultimately convicted was of a different genus than that of which they were charged meant that the appellants were not, by definition, accorded a fair opportunity to offer their defences to that charge.

78. The upshot is that the appeal herein succeeds. The conviction of the appellants of the offence of being accessories after the fact of murder (contrary to section 222 of the Penal Code) in a trial in which they had been charged with murder (contrary to section 202 as read with section 204 of the Penal Code) by dint of section 179(2) of the Criminal Procedure Code is a reversible error. We allow the appeal and quash the conviction. The appellants shall be set at liberty forthwith unless otherwise lawfully held in custody.

79. Orders accordingly.

DATED AND DELIVERED AT KISUMU THIS 8TH DAY OF NOVEMBER, 2024.

P. O. KIAGE

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JUDGE OF APPEAL

F. TUIYOTT

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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