**Bwanadi & another v Republic (Criminal Appeal 132 of 2022) [2024] KECA 1573 (KLR) (8 November 2024) (Judgment)**

Neutral citation: [2024] KECA 1573 (KLR)

**REPUBLIC OF KENYA**

**IN THE COURT OF APPEAL AT MALINDI**

**CRIMINAL APPEAL 132 OF 2022**

**KI LAIBUTA, GWN MACHARIA & GV ODUNGA, JJA**

**NOVEMBER 8, 2024**

**BETWEEN**

**BWANADI OMAR BWANADI ........................................................ 1ST APPELLANT**

**ABDI ALI MOHAMED ...................................................................... 2ND APPELLANT**

**AND**

**REPUBLIC ............................................................................................ RESPONDENT**

***(Being an appeal from the Judgment of the High Court of Kenya at Garsen (R. Lagat Korir, J.) delivered on 31st January 2022 in HCCR No. 12 of 2016)***

**JUDGMENT**

1. This is a first appeal arising from the judgment of the High Court of Kenya at Garsen (R. Lagat Korir, J.) dated 31st January 2022 in HC Criminal Case No. 12 of 2016 in which the appellants, Bwanadi Omar Bwanadi and Abdi Ali Mohamed, were charged with murder contrary to section 203 as read with section 204 of the Penal Code.

2. The particulars of the charge were that, on 10th June 2016 at Mbwajumali Village, Lamu East Sub-County in Lamu County within the coastal region, the appellants jointly murdered Mohamed Shee Mohamed Omar (the deceased). The appellants denied the charge and stood trial.

3. At the trial, the prosecution called eleven (11) witnesses. PW1 – MMH, a 15-year-old minor and a student at [Particulrs withheld] Primary School situated between the forest where the murder occurred and Mbwajumwali village, was sworn in after a voire dire examination was conducted. He testified that on the material day at 9:00 am while on his way to fetch water from the ocean to use in the school's toilet, he saw the appellants running from the forest heading towards the village; that thereafter, he heard that the deceased had been killed and witnessed people streaming to the forest to view the scene; that he and the appellants came from the same village; and that he had known them for a long time.

4. PW2 – Amina Mohamed Abushiri, the deceased's neighbour, testified that, on the night before the murder, her parents' cow had been cut; that, at 8:30 am the following morning of the material day, the deceased, who was the area chief, passed by PW2's home to view the cow; that the deceased called the police to inform them of the incident; that, before the deceased left, he requested PW2 and her parents to record a statement with the police; that, shortly thereafter, PW2 heard screams coming from the deceased's home; that she rushed there, and upon arrival, she was informed that the deceased had been killed; and that the appellants had been arrested, charged and fined for cutting PW2's parents' cow sometime in 2015.

5. PW3 – Malik Athman Shee, a nephew to the deceased, testified that, on the material morning, he received information that the deceased had been killed; that he rushed to the scene where many people had already gathered and noticed that the deceased had cuts on his head and back; that he saw the appellants at the scene; that the deceased was buried on the same day after a postmortem was conducted in his presence;

   and that PW1's mother, one Mohamed Maulana, revealed to him what PW1 had witnessed.

6. PW4 – Mohamed Shee Mohamed, the deceased's son, testified that, on the day his father met his death, he (the father) left home for work between 8.15 at 8.30am; that PW4 later received information that his father had been killed; that he visited the scene where a crowd had gathered and confirmed that his father had been killed in the forest along a shortcut path to his deceased father's workplace; that the short cut was a common route; that his deceased father routinely used the short cut to get to work; and that the police later came and moved the body from the scene.

7. PW5 – Mwana Halima Bwanadi, testified that, on the material morning while on her way to get milk for her children, she met the deceased "100 metres from the place he was killed."; that the deceased was alone; that she inquired from the deceased about her brother's birth certificate; that the deceased requested her to call on his house and pick the birth certificate; that she went to the deceased's home and found his wife; that a short while later, one Kenan Bwanali, came and informed them of the deceased's misfortune; that PW5 visited the scene and confirmed that the deceased had been killed; but that she did not see the chief being killed.

8. PW6 – Athman Shamina Barkale, a fisherman, testified that, on the material date at 9:00 am, he was on his way from Faza to Mbwajumwali when he saw the appellants, who were his fellow fishermen, and who he knew well, walking very fast in the bush; that fifteen minutes later, PW6 learnt that the deceased had been killed; and that he went to the scene, which was at a shortcut regularly used by the deceased, and saw that the deceased had been cut with a panga.

9. PW7 – Yusuf Mohamed Yusuf, the deceased's nephew, testified that, upon receiving news of the deceased's slaying from his wife, one Mirma Athman, at around 9:10 am, he went to the packed scene and found the deceased placed on a stretcher; that the deceased had cuts on his neck, back and right hand; and that they took the body to the hospital for post-mortem; and, thereafter, proceeded for burial. It was PW7's testimony that he was not bitter that the 2nd appellant had assaulted him many years ago; that he had married the 2nd appellant's sister; and that the 1st Appellant was his relative.

10. PW8, PC Robert Korir, a police officer based at Kizingitini Police Station, testified at the trial and stated that, on the material morning, his colleague, one Stephen Rono, received a call from the deceased regarding PW2's parents' cow; that Mr Rono requested the deceased to ask the owners of the cow to visit the police station and make a report about the incident; that, thirty minutes later, he received information from one Chief Inspector Oliech Were that someone had been killed at Mnyabori; that he visited the crowded scene, which was approximately 200 metres to the Chief's office; that it was evident

that the deceased had cuts on his left hand and shoulder; that, together with other officers, they moved the deceased's body to Mbwajumwali Dispensary for post-mortem; and that the deceased's body was later released to his family for burial.

11. PW9 – Dr. Mohamed Kombo, a medical officer at Lamu County Hospital, conducted the post-mortem at Mbwajumwali Dispensary and prepared the report. PW9 testified that, upon examining the deceased's body, he established that the body had: multiple cuts on the upper body, multiple cuts on the left side of the face, long cuts at the base of the neck extending down to the lower back of the neck, and cuts on the upper arm; that the deceased had experienced excessive loss of blood; and that his body was still soft and warm. PW9 concluded that the cause of death was severe haemorrhage; that the weapons used had a sharp cutting edge; that the cuts seemed to have been simultaneous; and that there must have been more than one attacker.

12. PW10 – George Ogunda, a Government Chemist based in Mombasa, stated that, on 27th June 2016, he received exhibits from PW11 – PC Noah Kiplagat – for analyses. He produced a report – exhibit MFI - 11 revealing that the blood-stained soil, pangas, t-shirts, multi coloured pair of shorts and piece of nylon bag had no DNA profiles, possibly due to exposure to a harsh environment; and that the blood stained muslim cap generated a male DNA profile, which did not match that of the blood samples provided by the appellants.

13. The last witness for the prosecution was the investigating officer, PW11, CPL. Kiplagat Noah of DCIO Kilimani in Nairobi, but previously based in Lamu East at Faza. He testified that, on the material day at around 10am, he received a report of the murder incident; that he travelled to the scene with his colleagues; that upon arrival, the body of the deceased had already been moved to Mbwajumali Dispensary; that he proceeded to the Dispensary and observed that the deceased's body had deep cuts on the neck and head as well as defensive wounds on his hands; that he later returned to the scene where they collected samples of blood from the soil and retrieved a blood-stained cap; that, on the same day, they arrested the 2nd appellant upon receiving information of his location; that, on 11th June 2016, their investigations led them to the 1st appellant's house where they recovered two blood-stained pangas concealed in a corner of the house – tied together with a black rubber string, a pair of shorts, a blue blood-stained T-shirt and a white blood-stained vest; that he took possession of those items; that the 1st appellant's wife, one Hadijah Omar Bwanadi, signed the inventory of the items; that he prepared the Exhibit Memo, which he produced as exhibit MFI 12; that, on interrogating the 1st appellant's wife, she stated that the recovered clothes had been worn by her husband the previous day; and that the 1st appellant was arrested and booked at the police station.

14. After further investigations, PW11 concluded that the appellants had a grudge with the deceased after their conviction in 2015 for cutting PW2's parents' cow because it was the deceased who had reported the matter to the police. PW11 subsequently submitted the recovered items to PW10 for analysis.

15. On 30th September 2019, the appellants were found to have a case to answer. They gave sworn statements in their defence, but did not call any witnesses.

16. The 1st appellant raised an alibi defence and stated that, on the material day, he was resting in his house when he was informed by his wife that there was noise coming from outside; that he went towards where the noise was coming from together with other villagers; that, when he got to the scene, he found the deceased's body, some police officers, and members of the deceased's family;

that he knew the deceased as the chief and his neighbour; and that he assisted in taking the body to the Dispensary.

17. The 1st appellant confirmed that the exhibits were recovered from his house, but denied that they belonged to him; and that there were many members of his family living together in the house. The 1st appellant argued that PW1 could not have seen him; that this case was only due to a grudge that PW2 had with him because of the 2015 criminal case; and that the DNA examination results were negative and did not link him to the offence.

18. In his defence, the 2nd appellant stated that, on the material day, he was asleep in his house at 9:00 am; that he was told by his sister's son, one Mohamed Yusuf, that the deceased had been killed; that he visited the scene; that he was arrested because of his differences with his brother in law (PW8); and that the exhibits were not linked to him.

19. In his judgment dated 30th November 2020, R. Lagat Korir, J. found the appellants guilty as charged, convicted them of murder and sentenced each of them to serve a term of twenty-eight (28) years in prison.

20. The learned Judge held that the evidence that the pangas and blood-stained clothes were recovered from the 1st appellant's house was unchallenged; that the 1st appellant had a duty to explain why the items were in his house and whose property it was; that the 1st appellant only stated that there were other people living with him ; that he did not name who those other people were, how many they were and why they had kept suspicious items in his house; that the explanation was not convincing; that the chain of circumstantial evidence pointed to the appellants as the persons who killed the deceased; that the appellants had a motive to kill the deceased; and that the direct evidence that the appellants were seen running away from the scene, and the evidence as to the circumstances of their arrest was uncontroverted.

21. Aggrieved by the trial court's decision, the appellants moved to this Court on appeal on the grounds set out in their undated memorandum of appeal, namely that the learned Judge erred in law by failing to: consider that their conviction as against the weight of the evidence adduced; consider that there was no direct evidence to warrant their conviction; and adequately consider their defence evidence.

22. In addition to the grounds aforesaid, the appellants filed an undated "Supplementary Grounds of Appeal" containing 4 grounds, faulting the trial court for: not considering that there was no direct evidence to warrant their charging with the offence; failing to adequately consider their defence; finding that the circumstantial evidence proved the prosecution's case beyond reasonable doubt; convicting them on the premise of suspicions; shifting the burden of proof to the appellants unjustifiably; and for imposing a harsh and excessive sentence in the circumstances.

23. In support of the appeal, learned counsel for the appellants, M/s. Kakai Mugalo & Company, filed written submissions dated 8th June 2024 citing the cases of R vs. Kipkering Arap Koske & Another EACA 135; and Sawe vs. Republic [2003] KLR 364, highlighting the three tests that must be satisfied before a court can accept circumstantial evidence; Kevin Kiswiki Kyongi vs. Republic [2018] eKLR, submitting that the appellants conviction was solely premised on suspicions which, however strong, cannot provide the basis of inferring guilt; and Ahamad Abolfathi Mohamed & Another vs. Republic [2018] eKLR praying that, in the unlikely event this Court upholds their conviction, it orders that their sentence run from the date of their arrest.

24. In her response, learned State Counsel, Ms. Wangari Mwaura, filed written submissions dated 10th June 2024 citing the cases of Antony Ndegwa Ngari vs. Republic [2014] eKLR; and Musili Tulo

vs. Republic [2014] eKLR, submitting that, although there was no eyewitness account, all the circumstantial evidence pointed to the appellants being the executors of the cruel murder;

> Erick Odhiambo Okumu vs. Republic [2015] eKLR , highlighting the three essential tests that must be satisfied before a court can accept circumstantial evidence; Woolmington vs. DPP (1935) AC 462; Miller vs. Minister of Pensions (1942) AC 244; and Bakare vs. State (1985) 2 NWLR 465, submitting that the prosecution discharged its duty of proving the case against the appellants despite the evidence being circumstantial.

25. We have considered the record of appeal, the rival submissions and the applicable law. Our mandate on a first appeal as set out in rule 31(1) (a) of the Rules of this Court is to reappraise the evidence and draw our own conclusions. In principle, a first appeal takes the form of a rehearing (see Ogaro vs. Republic [1981] eKLR).

26. This being a first appeal, it is by way of a retrial and this Court, as the first appellate court, has a duty to re-evaluate, re-analyze and re-consider the evidence afresh and draw its own conclusions thereon. The Court should however bear in mind that it did not see the witnesses as they testified and give due allowance for that.

27. It must be borne in mind, though, that scrutiny without more is not sufficient. The Court is mandated to undertake a fresh and exhaustive examination and reach its own decision on the evidence on record. In this regard, the Court in Okeno vs.Republic [1972] EA 32 set out the duty of a first appellate court in the following words:

> "An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses."

28. This cautious approach has deep roots in comparative common law jurisdictions as demonstrated in the decision of the Supreme Court of India in Ganpat vs. State of Haryana (2010) 12 SCC 59. 4. where the court set out the principles to be borne in mind by a first appellate court while dealing with appeals and stated thus:

> " a. There is no limitation on the part of the appellate Court to review the evidence upon which the order appealed against is founded and to come to its own conclusion.
>
> b. The first appellate Court can also review the trial court's conclusion with respect to both facts and law.
>
> c. It is the duty of a first appellate Court to marshal the entire evidence on record and by giving cogent and adequate reasons may set aside the decision appealed against or the entire proceedings if they are flawed.
>
> d. When the trial Court has breached provisions of *the constitution* or ignored statutory provisions, or misconstrued the law, or breached rules of procedure, or ignored crucial evidence or misread the material evidence or has ignored

material documents, or in any manner compromised the accused rights to a fair trial or prejudiced the accused etc. the appellate court is competent to reverse the decision of the trial court depending on the materials in question."

29. Having carefully considered the record of appeal, the grounds on which it is anchored, submissions and the law, we form the view that the appeal raises five main issues, namely: whether the prosecution proved the offence of murder beyond reasonable doubt; whether the appellants were placed at the scene of the crime with which they were charged; whether the appellants' defenses were adequately considered; whether the learned Judge shifted the burden of proof to the appellants; and whether the sentence meted on the appellants was harsh and excessive in the circumstances.

30. The 1st and 2nd issues as to whether the prosecution proved the offence of murder beyond reasonable doubt, and whether the appellants were placed at the scene of the crime with which they were charged, are interlinked and are best considered as one, namely whether the prosecution proved the three ingredients of murder against the appellants beyond reasonable doubt to sustain their conviction. Closely related to the two issues is the question as to whether there was any direct evidence in this regard, or whether the appellants were convicted on the basis of circumstantial evidence.

31. Learned counsel for the appellants submitted that the circumstantial evidence tendered by the prosecution in the absence of any direct or corroborative evidence did not prove the prosecution case beyond reasonable doubt.

32. On her part, learned Principal Prosecution Counsel submitted that the trial Judge did not rely on suspicion but on circumstantial evidence, which pointed to the appellants' guilt. According to counsel, the prosecution proved the charges against the appellants beyond reasonable doubt. She cited the case of Antony Ndegwa Ngari vs. Republic [2014] eKLR, highlighting the elements of murder.

33. Section 203 of the Penal Code sets out the three elements which the prosecution must prove beyond reasonable doubt to sustain a conviction, namely: (i) The death of the deceased, and the cause of his/her death; (ii) that the accused person(s) committed the unlawful act which caused the deceased's death; and (iii) that the accused had malice aforethought. See Nyambura & others vs. Republic [2001] KLR 355; Roba Galma Wario vs Republic [2015] eKLR; and Anthony Ndegwa Ngari vs Republic [2014] eKLR).

34. It is not in dispute that the deceased died as testified by PW3, PW4, PW5, PW6, PW7 and PW8, all of whom saw his body at the scene. The cause of his death was confirmed by Dr. Mohamed Kombo (PW9) to be severe haemorrhage resulting from multiple cuts on the upper body, the left side of the face, long cuts at the base of the neck extending down to the lower back of the neck, and cuts on the upper arm. Likewise, the post- mortem report prepared by PW9 and produced as evidence of the deceased's death and the cause thereof was not disputed. Accordingly, we need not say more save to conclude that the deceased's death and the fatal injuries were proved beyond reasonable doubt.

35. As to the identity of the person(s) responsible for the deceased's death, PW1 testified that, on the material day and time of the murder, he saw the appellants running from the forest heading towards the village. Soon thereafter, he heard that the deceased had been killed and witnessed people streaming to the forest to view the body.

36. Among the prosecution witnesses who visited the scene was PW6, who also testified that, on the material day at 9:00 am, he was on his way from Faza to Mbwajumwali when he saw the appellants walking away very fast in the bush close to where the deceased's had been killed; that the appellants were his fellow fishermen who were well known to him; and that he went to the scene and saw that the deceased had been cut with a panga.

37. PW11 (the investigating officer) testified that, on 11th June 2016, their investigations led them to the 1st appellant's house where they recovered two blood-stained pangas concealed in a corner of the house; that they were tied together with a black rubber string, a pair of shorts, a blue blood-stained T-shirt and a white blood-stained vest; that he took possession thereof; and that, on interrogation, the 1st appellant's wife, one Hadijah Omar Bwanadi, stated that her husband had worn the recovered clothes the previous day. To our mind, her confirmation dispels the 1st respondent's denial of ownership of the recovered bloodstained clothes, and the allegation that they could have belonged to a member of his household who he did not identify.

38. The direct evidence of PW1 and PW6 placed the appellants in close proximity to the scene where the deceased's lifeless body lay with fresh fatal injuries inflicted on him shortly before the appellants were seen by PW1 and PW2 fleeing from the scene. Rather than explain their presence in the vicinity of the murder scene, the appellants elected to raise an alibi, claiming that they were in their respective homes on the material day and time. However, the recovery of blood-stained clothes from the 1st appellant's house, his wife's confirmation that he wore them on the material day, coupled with their having been cited fleeing from the scene, left no doubt that the appellants were responsible for the deceased's death.

39. In addition to their alibi defence, which was not corroborated by anyone else's testimony, the 1st appellant denied ownership of the bloodstained clothes recovered in his house and confirmed by his wife to have been worn by him on the material day. According to the 1st appellant, the charge against them was fabricated. In addition, the appellants faulted the learned Judge for convicting them on circumstantial evidence. According to them, no-one saw them kill the deceased, and the DNA examination results did not link the 1st appellant or any of them with the offence charged. We take note of PW10's explanation that the samples tested had no DNA profiles, possibly due to exposure to a harsh environment. In any event, PW9's finding that the cuts inflicted on the deceased seemed to have been simultaneous; and that there must have been more than one attacker provided additional circumstantial evidence of the appellants' involvement in the murder.

40. Cognisant of the circumstantial evidence of the appellants' presence in the vicinity of the scene of murder; their having been sited fleeing therefrom; the nature of the fatal injuries inflicted on the deceased; and the recovery of bloodstained clothes worn by the 1st appellant on the material day, we find no fault in the learned Judge's finding that the appellants were responsible for the deceased's death. According to the learned Judge:

> " 58. In the premises, I find that the Prosecution has proved the case against the 1st and 2nd Accused to the required legal standard. The evidence points to the 1st and 2nd Accused as the persons who unlawfully killed the Chief."

41. Considering the need to be careful in convicting on circumstantial evidence, we call to mind this Court's decision in Sango Mohamed Sango & another vs. Republic [2015] eKLR where the Court expressed itself thus:

> "The court ought to be extremely careful before relying on circumstantial evidence as a basis for conviction. ... circumstantial evidence must be incompatible with the innocence of the accused person and incapable of explanation upon any other reasonable hypothesis than that of his guilt and further that for circumstantial evidence to form the basis of a conviction, there must be no other existing circumstances which would weaken the chain of circumstances." [Emphasis added]

42. On the question as to whether the circumstantial evidence adduced against the appellants was safe to sustain a conviction against them, we take to mind the grounds on which they come to this Court on appeal, namely that they were convicted on mere suspicion; that the case against them was founded on circumstantial evidence; that their defences were not adequately considered; that the case against them was fabricated; and that the charge against them was not proved beyond reasonable doubt.

43. Circumstantial evidence is so called where no eyewitnesses, if any, are called to testify in support of the prosecution or defence case but that, rather, surrounding circumstances point to proof beyond reasonable doubt that the accused is criminally liable for the offence charged. Addressing itself to the principles on which a trial court may convict an accused on circumstantial evidence, this Court in Ahamad Abolfathi Mohammed and Another vs. Republic [2018] eKLR had this to say:

> "… it is a truism that the guilt of an Accused person can be proved by either direct or circumstantial evidence. Circumstantial evidence is evidence which enables a court to deduce a particular fact from circumstances or facts that have been proved. Such evidence can form a strong basis for proving the guilt of an Accused person just as direct evidence. Way back in 1928 Lord Heward, CJ stated as follows on circumstantial evidence in R v Taylor, Weaver and Donovan [1928] Cr. App. R 21: -
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>> 'It has been said that the evidence against the Applicant is circumstantial. So it is, but circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which, by intensified examination is capable of proving a proposition with the accuracy of mathematics. It is no derogation from evidence to say that it is circumstantial.'

44. Further, the conditions for the application of circumstantial evidence in order to sustain a conviction in any criminal trial have been laid down in several authorities of this court. Suffice to mention the case of Abanga alias Onyango v. Republic CR. App NO. 32 of 1990(UR) in which this Ccourt held as follows:

> "It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests: (i) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established, (ii) those circumstances should be of a definite tendency unerringly pointing towards 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."

45. Having keenly analysed and re-assessed the evidence on record, we reach the inescapable conclusion that the circumstantial evidence on which the appellants were convicted satisfies the threefold test enunciated in the afore-cited case of Abanga alias Onyango v. Republic (ibid). To our mind, the circumstances from which the inference of the appellants' guilt was drawn was cogently and firmly established to the satisfaction of the trial court. We are equally satisfied that those circumstances point to their guilt.

46. Taking the circumstances of this case cumulatively, we are satisfied that the evidence forms a chain so complete that there is no escape from the conclusion that the appellants committed the crime as charged. Their contention that they were nowhere near the scene of the murder does not hold.

47. Section 206 of the Penal Code defines "malice aforethought" as follows:

206. Malice aforethought

Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances—

a. an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;

b. knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;

c. an intent to commit a felony;

d. an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.

48. This Court in John Mutuma Gatobu vs. Republic [2015] eKLR lent further clarity to the conception of malice aforethought thus:

> "There is nothing in that definition that denotes the popular meaning of malice as ill will or wishing another harm and all the related negative feelings. Nor, for that matter, is it to be confused with motive as such. Our law does not require proof of motive, plan or desire to kill in order for the offence of Murder to stand proved, though the existence of these may go to the proof of malice aforethought."

49. Turning to the 3rd issue as to whether the appellants' defenses were adequately considered, counsel for the appellants submitted that:

> " 15. .... It was the evidence of the Appellants that they did not harbour any grudge or hard feelings against the deceased at any time and that they had never collided anywhere and on any issue. It was never claimed at any time that the deceased had ever complained against any of the Appellants and to the contrary, it was the evidence of the Appellants that some, if not most of the witnesses did harbour grudges against them and the same was explained in details and that informed the reason as to why they picked on the Appellants herein."

50. In response, the Principle Prosecution Counsel submitted that, at paragraphs 46 and 47 of the impugned judgment, "the trial court did actually analyse the defence evidence and rightly held the same could not be true".

51. Indeed, paragraphs 46 and 47 of the impugned judgment speak for themselves. The learned Judge did consider the appellants' defences and pronounced herself thereon in the following words:

> " 46. Both Accused denied in their respective defences that they had gone into hiding immediately the Chief was killed. The 2nd Accused said that he responded like everyone else when he heard from his wife about the death of the Chief by going to the scene and that he even participated in the burial rites.
>
> 47. I have weighed the 1st and 2nd Accused's respective defences on the aspect of their arrest. They stated that the only reason they were arrested is because

of the outstanding respective cases where they were alleged to have cut the neighbours' cows."

52. The record is clear to our minds that the learned Judge duly considered the defences advanced by the appellants and, on the direct and circumstantial evidence before him, found that they did not dislodge the prosecution case against them.

53. On the 4th and closely related issue as to whether the learned Judge shifted the burden of proof to the appellants, counsel for the appellants submitted that:

"15.

(iii) ...The said exhibits remained controversial and disputed by the Appellants herein and they had no legal duty to explain anything, the Government Chemist (PW10) having failed to draw a nexus between the said exhibits and the Appellants. The learned Hon. Judge erred in both law and fact in shifting the burden of proof to the Appellants herein."

54. On their part, learned Principal Prosecution Counsel submitted that "... the burden of proof is well settled that it's the state that bears the responsibility at all times. The well- established jurisprudence on this is that the duty rests on the prosecution to prove the charge beyond reasonable doubt." See (Woolmington vs. DPP (1935) AC 462, Miller vs. Minister of Pensions (1942) AC 244 and Bakare vs. State (1985) 2 NWLR)

55. As the learned Judge correctly observed:

" 55. In this case, the 1st Accused had a rebuttable burden to discharge. He had a duty to explain why the items were in his house and whose property it was. He only stated that there were other people living with him. He didn't name who those other people were, how many were they and why they had kept suspicious items in his house. His feeble explanation is therefore not convincing. I am convinced that the exhibits belonged to him and directly linked him and his co-accused to the killing of the deceased."

56. We agree with the learned Judge that, in the absence of any explanation as to the presence and ownership of the bloodstained articles of clothing, said to have been worn by the 1st appellant on the material day, and of the items suspected of having been used in the murder, the only reasonable conclusion was that the appellants were responsible for the murder as charged.

57. Turning to the 5th and final issue as to the severity of the sentence, counsel for the appellants made no substantive submissions beyond urging the Court, "... in the unlikely event that [the] ... Court does find that the appeal against conviction lacks merit, ... to give a proper interpretation of section 333(2) of the CPC and ... order the sentence to run from the date that the appellants were arrested."

58. According to the learned Principal Prosecution Counsel, the sentence meted on the appellants was neither harsh nor excessive. According to counsel, the trial court considered the provisions of section 333(2) of the Criminal Procedure Code as evidenced in paragraph 18 of the "sentencing ruling," which reads:

" 18. Taking into consideration all the factors above, I sentence each accused to serve 28 years in prison. The sentence shall be deemed to run from 24th June,

2016 being the date they were first arraigned in court and placed in pre-trial custody."

59. It is instructive that section 204 of the Penal Code prescribes death sentence on anyone convicted of murder. The appellants were sentenced to twenty-eight (28) years imprisonment which, to our mind, is by no means harsh or excessive. Accordingly, this ground of appeal does not stand, and nothing turns on the appellants' request that we do order that the sentence commences from the date on which they were taken into custody.

60. Having carefully considered the record of appeal, the impugned judgment, the grounds on which the appeal is anchored, the rival submissions, the cited authorities and the law, we reach the inescapable conclusion that the appeal lacks merit and is hereby dismissed. It is so ordered.

**DATED AND DELIVERED AT MOMBASA THIS 8TH DAY OF NOVEMBER, 2024**

**DR. K. I. LAIBUTA Carb, FCIArb.**

**......................**

**JUDGE OF APPEAL**

**G. W. NGENYE - MACHARIA**

**......................**

**JUDGE OF APPEAL**

**G. V. ODUNGA**

**......................**

**JUDGE OF APPEAL**

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

Signed

**DEPUTY REGISTRAR**