Ndatho & 2 others v Republic (Criminal Appeal 24 & 70 of 2019 (Consolidated)) [2024] KECA 1862 (KLR) (20 December 2024) (Judgment)

Neutral citation: [2024] KECA 1862 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NYERI

CRIMINAL APPEAL 24 & 70 OF 2019 (CONSOLIDATED)

W KARANJA, J MOHAMMED & LK KIMARU, JJA

DECEMBER 20, 2024

BETWEEN

GERALD MWITI NDATHO ..... 1ST APPELLANT

JOEL MURIMI NDATHO ..... 2ND APPELLANT

EDWARD MWINDI NDERI ..... 3RD APPELLANT

AND

REPUBLIC ..... RESPONDENT

(eing an Appeal from the Judgement the High Court of Kenya at Chuka (R.K. Limo) dated 31st October 2018 in HCRA No. 15 of 2015)

JUDGMENT

1. Gerald Mwiti Ndatho (Gerald), Joel Murimi Ndatho (Joel) and Edward Mwindi Nderi (Edward), the appellants before us were tried and convicted by the High Court (R.K. Limo, J.) at Chuka, for the offence of murder contrary to section 203 as read with section 204 of the Penal Code. Gerald and Joel were each sentenced to serve 25 years imprisonment while Edward was sentenced to serve life imprisonment.

2. The particulars of the information upon which the appellants were tried, were that, on 11th March 2013 at Kanjoro Location in Tharaka North District within Tharaka Nithi County they murdered Peter Kangori Gaichu (deceased).

3. At the trial, 8 witnesses testified for the prosecution. These were PW1 - Julius Kirema Kang'ori (Julius) - son to deceased, PW2 - Fridah Kagendo (Fridah) - the niece to the deceased, PW3 - Mugambi Gaicho (Mugambi) - brother to deceased, PW4 - Tarasiria Ciari Kang'ori (Tarasiria) - wife to deceased, PW5 -Joseph Murithi - (Joseph) uncle to deceased, PW6 - Janet Kairu (Janet)- daughter-in-law to the deceased, PW7 - No.233028 CIP Robinson the investigating officer and who also arrested the

appellants and PW8 - Dr. Brian Kiprop Bett - Medical Doctor at Meru Level 5 Hospital who produced the post mortem report on behalf of Dr. Njuguna who carried out the post mortem examination.

4. Briefly, the prosecution case was that, on the material day at around 8.30am Julius (PW1), had accompanied the deceased to a farm which was about 500 meters away from their home. He testified that on reaching the farm, they were confronted by three men who were armed with bows and arrows. He was able to identify them as they were all their neighbours. He stated that Edward, (3rd appellant) was the first to shoot an arrow aiming at the deceased and that it struck him on the right side of the chest. Gerald, the 1st appellant, also shot and hit the deceased on the right arm above the wrist and finally that Joel, the 2nd appellant also shot the deceased but the arrow missed. He stated that the deceased ran back towards home screaming for help but he fell down on the road where he lay until he was later taken to Marimanti District Hospital where he was pronounced dead on arrival.

5. Julius further testified that there was a dispute over the land they had gone to that fateful morning as the grandfather of Edward claimed ownership of the said land and that there was an incident where Edward's grandmother went and cut their cotton plants growing on the disputed land and that on another occasion Joel had pursued the deceased with arrows wanting to shoot him over the same dispute. Julius also stated that he recalled a previous altercation between the deceased and Edward where Edward threatened to kill the deceased.

6. Fridah (PW2), testified that she was at home on the material date when at around 8.40am she heard screams a short distance away and upon checking she saw the deceased lying down with an arrow lodged on his chest. She ran back and informed her father- in-law and the deceased's wife what she had seen.

7. Mugambi (PW3), stated that he was called by his daughter-in-law (PW2) who informed him that his brother - the deceased, had fallen down near the fence with an arrow lodged in his chest. He stated that he went to check and he found the deceased had been shot with an arrow which was still lodged in his chest and that he noticed that his right hand had also been injured. He stated that when he asked the deceased who had shot him, the deceased informed him that he had been shot with an arrow on the chest by Edward and that Gerald had shot him on the right arm and Joel's arrow had missed him.

8. Tarasiria (PW4), the deceased's wife testified that on the material date, her husband left for the farm at around 7.00am after taking tea. She stated that her son Julius followed him and that not long after they left, Fridah called her informing her that her husband had been shot. She told the court that she rushed to the scene where she found the deceased lying down with an arrow lodged in his chest.

9. She further testified that she went to the farm where the deceased had been shot and that she found the three appellants perched on some rocks on the farm and they ran away when they saw her. She stated that she came back to arrange for transport to take the deceased to hospital which she did and that the deceased was ferried to hospital where he subsequently died.

10. Janet (PW6), testified that she was a daughter-in-law to the deceased and that on the material date she received a call at around 8.40am at her place of work and was informed that her father-in-law (deceased) had been shot with an arrow that was lodged on his chest. She stated that she arranged for transport and rushed to the scene and she found the deceased with an arrow lodged in his chest. She testified that she inquired from the deceased who had shot him and he reportedly told her that Edward had shot him on the chest while Gerald had shot him with an arrow on his right hand, and further that Joel had shot at him but that the arrow had missed. She stated that she accompanied the deceased to Marimanti Hospital where he was pronounced dead on arrival.

11. The Investigating Officer (PW7), IP Robinson, testified that he was stationed at Gatungu Police Station at the material time when he received a call from the OCS CIP Erastus Olando at around

12.00pm informing him that someone had been shot with an arrow at Kanjoro area. He stated that he together with another police officer proceeded to the scene where they found one arrow and a blood-stained arrow stick. They then proceeded to Marimanti Hospital and found that the deceased had already died. He said that they looked at the body and noticed two wounds on the right hand and on the right side of the chest. He also stated that the wound on the chest still had an arrow sticking out. He stated that they took the body to Meru Hospital Mortuary for post- mortem examination.

12. Dr. Brian (PW8) testified that the post-mortem was performed by Dr. Njuguna whom he had known for nine months as he had worked with him as an intern and he was familiar with his handwriting and signature. He stated that according to the general external observation of the deceased's body by Dr. Njuguna there was an arrow lodged between the 8th and 9th ribs on the right side of the chest and some cut on the right forearm. Internally, there was massive blood on the right side of the internal cavity of the chest with punctured right lung and diaphragm. Blood vessels to the liver were punctured as well as the liver on the right side. The Doctor concluded that the cause of death was massive haemorrhage due to penetrating chest and abdominal injury from an arrow.

13. In their defence, the appellants gave sworn statements and called three witnesses. Gerald testified that the deceased was his uncle. He raised an alibi and stated that on the material date he was at his farm picking millet with one Peter Mugao and Njeru Murithi and that while working he was called by one Atanasio Gitonga who informed him that the deceased had been killed. He spoke of an incident in 2012 where he had gone to testify in court against the deceased and his son who had been accused of malicious damage to property belonging to Edward in Marimanti Law Court. He stated that there was a land feud between the deceased and Edward.

14. Joel testified that the deceased was his cousin, Gerald was his brother and that he had no relation with Edward but that they were neighbours. He stated that on 11th March, 2013 there was a funeral of one Martha Kaongo,4 Kms away which he attended as he was in charge of grave digging. He stated that he attended with Edward Nyaga and Francis Mithamo at 6.00am. He testified that they arrived at the burial at around 7.00 - 8.00am and that they dug the grave till 11.00am and that at noon they heard that his uncle, the deceased, had been shot with an arrow and had been taken to Marimanti.

15. He further testified that they stayed at the funeral till 5.00pm and went back home at 6.00pm. He stated that the following day he met Mugambi who told him not to attend the funeral of the deceased because the sons were hostile to him.

16. He testified that on 30th March 2013 he was at the market and he was arrested and told that he was one of the people who killed the deceased and that he was later charged with the offence.

17. On his part, Edward stated that on the material date and time, the deceased who was in the company of one Muriithi Kithambi went to a farm belonging to his grandmother armed with an arrow and that he shot at him but Edward ducked behind a tree. He stated that he got hold of the same arrow and shot back at the deceased and that he took the opportunity to run away and report the matter to the police. In cross-examination he stated that he reported the matter to the police on 11th March 2013 and admitted that there was a land dispute between him and the deceased. He told the court that he had no intention to kill the deceased.

18. After considering the evidence adduced before the court, the learned Judge held that there was nothing on record to show that the deceased had been seen harvesting millet on the 10th of March 2013 on the disputed farm and that Edward had intentionally planned to cause grievous harm to the deceased.

19. The learned Judge found that actus reus had been established against the appellants. The medical evidence indicated that the deceased suffered an injury to the right forearm and the chest an indication that he had been shot at more than once.

20. In the end the learned Judge held that Edward the 1st accused chose to settle his difference over a parcel of land with the deceased in a most brutal and unlawful way and he was assisted by both the 2nd and 3rd appellants who apparently shared his concern and hence a common purpose to unlawfully bring the dispute to an end. The prosecution was found to have proved its case beyond reasonable doubt and so the appellants were found guilty of the murder, convicted and sentenced as indicated earlier. In passing the sentences, the learned Judge noted that Edward (3rd appellant) had a previous conviction for a similar offence and was serving 20 years imprisonment. That explains his sentence of life imprisonment as the other appellants were sentenced to 25 years imprisonment.

21. Aggrieved by both conviction and sentence, the appellants filed separate notices of appeal and memoranda of appeal. The 3rd appellant filed his notice of appeal in person much later but with the leave of the Court. He also filed some homemade grounds of appeal. Gerald and Joel (1st and 2nd appellants), were represented by J.K. Ntaragwi Advocate. In sum, the appellants' faulted the learned Judge for, inter alia, not properly testing and analyzing the evidence of PW1, PW2, PW3, and PW4; overlooking contradictions which led to an incorrect conclusion that the appellants committed murder; failing to consider the benefit of doubt in the prosecution's evidence regarding the appellants' involvement in the murder; finding that the prosecution had established a murder case against the appellant before considering the defense evidence, causing prejudice to the appellants. The appellants also cudgeled the learned Judge for rejecting their defence.

22. The learned Judge was also faulted for relying on the 3rd appellant's confession and PW1's evidence to support the deceased's dying declaration, leading to an erroneous finding of guilt and that the Judge relied on facts not presented in evidence; that the Judge erred in finding that the prosecution had established the ingredients of murder and that the learned Judge erred in concluding that there was common intention between the 1st appellant and others in committing the murder.

23. On the sentence, the appellants contended that the sentence imposed was harsh and excessive given the circumstances of the case.

24. During the plenary hearing of the appeal, the 1st and 2nd appellants were represented by Ms. Ntaragwi while the 3rd appellant was represented by Tyson Mwendwa. The respondent was represented by Miss B. Nandwa of the ODPP. All counsel relied on their written submissions, with brief oral highlights.

25. Counsel expounded on their grounds of appeal. Counsel for the 1st and 2nd appellants on grounds 1, 2 and 6 submitted that the evidence tendered by the prosecution through the evidence of PW1 was that of recognition of the appellants as persons who committed the offence jointly with Edward and that the same should have been tested against that of the other prosecution witnesses.

26. Counsel highlighted what she said were contradictions in the prosecution witnesses' evidence. It was submitted that the court while dealing with that evidence held that there existed no contradictions with the evidence of PW1, PW2, PW3 and PW4. Counsel submitted that the contradictions in question cast doubt to the prosecution case and such doubt should have been resolved in favour of the appellants.

27. It was submitted that the trial court arrived at a finding of fact not borne in the evidence to the effect that the appellants met and planned to lay ambush to the deceased because they were not happy that he had harvested millet from the farm of Edward. It was stated that this finding was prejudicial to

the appellants as the court relied on the same to make a finding that the appellants had the common intention and motive to commit the offence.

28. With regards to ground 3, 4 and 7, it was submitted that the court made the finding of guilt before analysing the whole evidence by making a finding that the evidence which had been tendered by the prosecution was sufficient to prove that the appellants had committed the offence.

29. With regards to ground 5, it was submitted that for the court to rely on the evidence of a co-accused which the court obtained from the cautionary statement that the same required corroboration and the court erred in relying on the said evidence to corroborate the dying declaration as to who shot the deceased as was given in court by PW1 and PW3.

30. Finally, it was submitted that taking into account the circumstances of the case the sentence of 25 years was excessive and we are urged to allow the appeal and to quash the sentence and set the 1st and 2nd appellants at liberty.

31. On the part of the 3rd appellant, it was submitted that it is not in doubt that the deceased was murdered on 11th March 2013. It was stated that the trial court relied on the only direct evidence of PW1 who is alleged to have been at the scene of the crime. Further that the evidence of PW1 and PW4 should be taken with a pinch of salt because whereas PW3 confirms that there was no one present at the scene of crime, PW1 testified otherwise and that PW4 stated that when she arrived at the scene, the three appellants were sitting on some rocks and they ran away on seeing her. It was submitted that there were glaring inconsistencies in the prosecution witnesses' testimony. Reliance was placed in the High Court case in AHM -vs- Republic [2022] eKLR.

32. Counsel submitted that the trial court heavily relied on the dying declaration of the deceased as testified by PW3 and PW6. It was stated that the 1st to 6th witnesses were related to the deceased and that no independent evidence was called beyond the family members which raises more questions on the credibility of the prosecution witnesses. Reliance was placed on David Agwata Achira -vs- Republic [2003] eKLR.

33. We are urged to find that the evidence of the prosecution witnesses was uncorroborated and full of inconsistencies.

34. On the aspect that the learned Judge erred in law and in fact in failing to appreciate that the appellant acted in self-defence, it was submitted that Edward pleaded that he acted in self-defence, and that this was discredited by the trial court as being incredible. Reliance was placed in Beckford -vs- R, as cited by this Court in Ahmed Mohammed Omar & 5 others -vs- Republic [2014] eKLR.

35. It was submitted that no material evidence was placed before the trial court to impeach the fact that there was bad blood between Edward and the deceased and that no evidence was led to discredit the fact that the appellant was acting in self-defence.

36. Finally, we are urged to re-evaluate the evidence and to allow the appeal and quash the conviction and set aside the sentence.

37. In response, Ms Nandwa, learned prosecution counsel submitted with regards to the death of the deceased that it was not in dispute that Peter Kangori Gaichu died which fact was proven by the Post-Mortem Form which was produced by PW8 who found that the cause of death was as a result of massive haemorrhage due to a penetrating chest/abdominal injury inflicted by an arrow. Further that this piece of evidence was corroborated by the evidence of PW1, PW2, PW3, PW4, PW5, PW6, PW7 and DW1.

38. She submitted that the appellants committed the unlawful act which caused the death of the deceased and that the prosecution proved that the appellants murdered the deceased. Counsel added that the appellants sought to use violent means to deal with a land dispute instead of filing the land dispute before a court of law. It was further submitted that the evidence on record through the confession of the 3rd appellant clearly shows that the attack of the deceased by the appellants was premediated as this was after the 3rd appellant had shared his concerns with both the 1st and 2nd appellants who helped him attack the deceased with the use of the arrows. Counsel submitted that section 21 of the Penal Code is instructive in the circumstances as it provides for the doctrine of common intention. Counsel emphasised that the choice of weapon in itself clearly demonstrated that the appellants' intention was indeed to murder the deceased. Reliance was placed on Dickson Mwangi Munene & Anor -vs- Republic [2014] eKLR, and Stephen Ariga & Another -vs- Republic [2018] eKLR.

39. According to Ms. Nandwa, the appellants jointly set out to assault the deceased hence occasioning him injuries that resulted in his death and that the confession does clearly prove to court that the appellants did plan to attack the deceased, a fact further proved by the evidence of PW1 who testified that the arrow which the 3rd appellant fired hit the deceased on the chest, while that of the 1st appellant struck the deceased on the right arm whereas that struck by the 2nd appellant missed the deceased and as such that these actions by the appellants clearly show that they had the intention of murdering the deceased.

40. It was further submitted that the evidence of PW1 was corroborated by the deceased's dying declaration to PW3 and PW6 that all the appellants had shot him with arrows. Reliance was made to Section 33(a) of the *Evidence Act* and the case of Philip Nzaka Watu -vs- Republic [2016]eKLR that a statement made by a deceased person relating to his cause of death is admissible in evidence.

41. With regards to identification by recognition, it was submitted that the incident occurred at about 8.30am. PW1 testified that at the time, he was together with his father and had gone to the farm and saw three men that he knew by name, and he mentioned the names of the 1st and 2nd appellants because they came from the same village. He testified that the 3rd appellant shot the deceased first with an arrow which hit the right side of his chest and that this information was confirmed by the 3rd appellant in his confession and defence when he stated that he shot the deceased with an arrow, albeit in self-defence.

42. With regard to malice aforethought, it was submitted that it is not in issue that there was a land dispute between the deceased and the 3rd appellant and that it is apparent from the 3rd appellant's confession that he, together with the 1st and 2nd appellants, planned to murder the deceased after he felt that the deceased was utilizing land, he believed belonged to him. Further that the appellants went to where the deceased was while armed with very dangerous and offensive weapons being bows and arrows and caused grievous harm to the deceased.

43. On the confession, it was submitted that the same was made properly and recorded before a chief inspector of police on 15th March 2013 and that there was no objection to the production of the confession and that the court found the confession admissible. Reliance was made to Musili Tulo -vs- Republic [2014]eKLR.

44. With regards to contradicting evidence, counsel submitted that there was no contradiction as the testimonies of the prosecution witnesses were clear, concise and well corroborated. Reliance was placed in Richard Munene -vs- Republic [2018]eKLR and Stephen Mwiti -vs- Republic [2021]eKLR.

45. On alibi defence, it was submitted that the defence of the 1st and 2nd appellants was an afterthought since the same was never raised during the trial when the prosecution witnesses testified. Reliance was placed in Wangombe -vs- Republic [1980] KLR.

Further it was submitted that the 1st appellant in his defence stated that he was at his farm, however, that the persons he mentioned and those mentioned by DW6 are different yet they both stated that they were together at the farm at the same time. It was stated that there was inconsistency with regards to the testimony of the 2nd appellant and his whereabouts on the date of the incident as he had stated that he went for a funeral and was grave digging.

46. With regards to self-defence, it was submitted that the 3rd appellant pleaded self-defence but that the evidence of PW1 and PW4 clearly states that the deceased was going to his farm to harvest millet and that there was no evidence to suggest that the deceased was prepared for a confrontation with the 3rd appellant.

47. With regards to sentence, it was submitted that the sentence meted on the 1st and 2nd appellants, being 25 years imprisonment and life imprisonment for the 3rd appellant, is lawful and not at all excessive considering that they had the intention to murder the deceased by the fact that they shot him with arrows.

48. We are urged to dismiss the appeals and to uphold both the conviction and sentences.

49. We have carefully considered the record of appeal in its entirety, the submissions made before us and the law. This being a first appeal, it is our duty to exhaustively reconsider and re-evaluate the evidence that was adduced in the trial court in light of the law, and draw our own conclusions in determining whether the judgment of the trial court should be upheld. In doing so, we bear in mind what this Court stated in Kiilu & Another -vs- Republic [2005]1 KLR 174:

> " 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 to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. 2.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 findings and 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."

50. The appellants were charged with the offence of murder and it was incumbent upon the prosecution to prove the ingredients of the offence of murder. This required proof that the death of the deceased occurred; that the death was caused by an act or omission on the part of the appellants; and that in committing the act or omission, the appellants had malice aforethought. These are the issues that we shall inquire into in addressing the evidence that was before the trial court.

51. The fact and cause of the deceased's death is not in dispute. It was clearly established by the evidence of the post-mortem examination that the deceased died due to massive hemorrhage from the penetrating chest/abdominal injury inflicted by an arrow.

52. The other issue falling for our determination is whether the actus reus, or act of death was occasioned by the appellants, and whether they had the requisite malice aforethought. We will deal with the first two issues together. In our view, the evidence implicating the appellants can be classified into two; first the evidence of the eye witness and secondly, the dying declaration by the deceased.

53. 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." [Emphasis supplied].

54. We will now look at the identification evidence that was adduced before the trial court. Only PW1 testified that he had witnessed the incident and identified the perpetrators. None of the other witnesses were present when the attack happened. According to PW1 on reaching the farm they were confronted by three men who were armed with bows and arrows. He was able to identify them as they were their neighbours. He stated that Edward, the 3rd appellant was the first to shoot an arrow aiming at the deceased and that it struck him on the right side of the chest, also that Gerald, the 1st appellant also shot and hit the deceased in the right arm above the wrist and finally that, Joel, the 2nd appellant also shot the deceased but the arrow missed. He was also in close proximity to the attackers and he saw them clearly and knew the three appellants very well before that date.

55. The learned Judge analysed the identification evidence thus:

> " PWl got the message from his father loud and clear when the deceased was confronted by three people armed to the teeth with bows and arrows, The cautionary message was running away and he took to the bush and retreated back home. That is what any reasonable person can do when faced with such danger. This court finds that PW1 going by his evidence and that of his mother (PW 4) had the chance to witness what befell his father(deceased). It was around between 8.30am and 9.00 a m in the morning and given that the assailants are people he knew well because they were from the neighbourhood, he had no problem identifying them. Furthermore, the fact that the 2nd and 3rd accused persons are relatives with the deceased makes it even better to conclude that identification was positive. All the accused persons were positively identified by PWl and there was nothing to show that perhaps he may have been mistaken in his identification."

56. On the identification evidence in regard to the three appellants, we note that the identification evidence against the three 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."

57. Closer home, concerning the probative value of recognition evidence, Madan J.A in Anjononi and Others -vs- 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."

58. PW1 and later PW4 were categorical that they recognized the appellants at the scene. They were not just neighbours, but they were also close relatives. PW1 testified that he clearly saw the three appellants at the scene shoot arrows at his late father who screamed and told him to ran away. PW4 stated that when she went to the scene, she saw the three appellants perched on some rocks and when they saw her, they ran away. It was during the day; the appellants were not masked and PW1's eyesight was unfettered as such the recognition could not have been an error.

59. The identification of the three appellants by PW1 was further corroborated by the dying declaration of the deceased. A dying declaration can loosely be defined as a statement made by a person concerning what he believes to be the cause or circumstances of his death, when knowing that death is imminent. The statement so made earns its credibility and evidentiary value from the general belief that most people, upon realizing that they are about to die 'will not lie'.

60. Two witnesses, PW3 and PW6 testified that the deceased, told them, separately, that he had recognized the appellants as the persons who assaulted him. Section 33(a) of the Evidence Act permits admission, as evidence, the statements made by a person who is dead where:

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

61. The learned Judge conducted a substantive analysis of the ingredients necessary for statements to be regarded as dying declarations as prescribed under section 33(a) of the *Evidence Act*. The ultimate test arrived at by the Judge is that for dying declarations to have full probative value, it must be supported by corroboration. We agree with the learned Judge on the applicable principles surrounding the admissibility of dying declarations.

62. The only issue, therefore, is whether the dying declaration was corroborated as it ought to have been. Guidance can be obtained from Philip Nzaka Watu -vs- Republic [2016]eKLR. In this case, the evidence of PW3 and PW6, all who spoke to the deceased on the day he was shot, was that the deceased told them that he had been shot with arrows by the appellants. The fact that the deceased died the same day in hospital while seeking treatment for the assault qualifies these statements as dying declarations. Further, the evidence of PW1 corroborates the statements contained in the dying declarations. PW1 saw the appellants shoot the deceased. PW3 and PW6 on their part, found the appellant shot with an arrow still stuck on his chest, and upon inquiry from the deceased, the deceased told them separately that the appellants had shot him with arrows.

63. Considering this line of evidence, we do not find fault on the part of the learned Judge in holding that this evidence amounted to a dying declaration. The deceased made a dying declaration, not to one person but to two, and the same is corroborated by the evidence of PW1, the eye witness who was at the

scene of the incident. We are persuaded that the identification evidence with regard to the appellants was error-free and iron-clad.

64. This brings us to the second element of murder, malice aforethought. Under section 206 of the Penal Code, malice aforethought is defined in the relevant part as follows:

> " 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; ..."

65. Having found that the deceased's death was caused by the arrow wounds inflicted by the appellants as we have analyzed before, the concomitant point we need to address is whether malice aforethought as defined above was demonstrated. There is no question that one aims to either kill, maim or cause grievous harm to a person when they shoot at them. So, there can be no question that the actions by the appellants satisfy the definition of malice aforethought in section 206 of the Penal Code. Further, as the respondent correctly argues, under section 21 of the Penal Code, the malice aforethought is ascribed to all the appellants since they were acting in concert.

66. Turning to the defence of alibi, it is noteworthy that the appellants were all identified by PW1 when they shot at the deceased at the scene on the material day. With reference to alibi evidence, this Court in Erick Otieno Meda -vs- Republic [2019]eKLR had this to say:

> " In considering an alibi, we observe that:a.An alibi needs to be corroborated by the other witnesses, and not just a mere regurgitation of the events from the accused's point of view.b.An alibi defence needs to be introduced at an early stage so as to allow it to be tested, especially during cross-examination of the trial.c.The alibi defence or evidence may often rest on the credibility of the accused and the reliability of the evidence that he or she has presented in court.d.The accused does not need to prove the alibi, but the prosecution must have presented its case that the accused is guilty beyond a reasonable doubt so as to allow the alibi to fail."

67. Viewed in light of the eyewitness and account of PW1 and PW4 we reach the irresistible conclusion that the appellants' credibility and the reliability of the evidence of their alleged alibi are highly questionable. Weighing the said defence against the prosecution evidence, especially, the fact that PW1 and PW4 testified to the fact that they knew the appellants and recognized them and further the dying declaration made to PW3 and PW6, it is our view that the said defence indeed raised no doubts as to the presence of the appellants at the scene of crime and their participation in the commission of the crime. The appellants were squarely placed at the scene and the alibi was properly displaced by the

prosecution.

68. On the defence of self-defence raised by the 3rd appellant, he claimed that he was attacked by the deceased first and he threw back the arrow after it missed him. In his view, his decision to react in that

manner was justified. The defence of self-defence is provided for in section 17 of the Penal Code which provides, inter alia:

> " Subject to any express provisions in this Code or any other law in operation in Kenya, criminal responsibility for the use of force in the defence of person or property shall be determined according to the principles of English Common Law."

69. The said common law principles were spelt out in the case of Palmer -vs- Republic [1971] AC 814 where it was held:

> " It is both good law and good sense that a man who is attacked may defend himself. It is both good law and common sense that he may do, but only do, what is reasonably necessary. But everything will depend upon particular facts and circumstances. Some attacks may be serious and dangerous, others may not be. If then is some relatively minor attack, it would not be common sense to permit some act of retaliation which was wholly out of proportion to the necessities of the situation. If an attack is serious so that it puts someone in immediate peril, then in a mediate defensive action may be necessary. If the moment is out of crisis for someone in immediate danger, he may have to avert the danger by some instant reaction. If the attack is over and no sort of peril remains, then the employment of force may be way of revenge or punishment or by way of paying off an old score or may be pure aggression. That may be no longer any link with a necessity of disproved, in which case as a defence it is rejected. In a homicide case these circumstances may be such that it will become an issue as to whether there was provocation so that the verdict might be out of manslaughter. Any other possible issues will remain. If in any case the view is possible that the intent necessary to constitute the crime of murder was lacking then the matter would be left to the jury."

70. This Court in the case of Mokwa -vs- Republic [1976–80] 1 KLR 1337, held that:

> " Self-defence is an absolute defence even on a charge of murder unless in the circumstances of the case the accused applied excessive force."

In the case of Mungai -vs- Republic [1984] KLR 85, the same Court held:

> " 1. It is a doctrine recognized in East Africa that the excessive use of force in the defence of the person or property, whether or not there is an element of provocation present, may be sufficient for the court to regard the offence not as murder but as manslaughter – R -vs- Ngolaile s/o Lenjaro (1951) 18 EACA 164; R - vs- Shaushi (1951) 18 EACA 198.
>
> 2. While there is no rule that excessive force in defence of the person will in all cases lead to a verdict of manslaughter, there are nevertheless instances where that result is a proper one in the circumstances and on the facts of the case being considered – Palmer -vs- Reginam [1971] 1 ALL ER 1077."

71. The death of the deceased was not in any way connected to any attack that had been initiated by the deceased. Further, there was no evidence of imminent danger posed by the deceased as alleged by the 3rd appellant who claimed that the deceased had attacked him first at the farm. We are satisfied, like the trial court, that this defence was not available to the 3rd appellant at all. In addition, }even if it were, the response and force employed was excessive as the 3rd appellant could have retained the arrow and not shot back at the deceased. The defence of 'self -defence' was not available to the 3rd appellant.

72. Accordingly, based on the foregoing, we find the appeal on conviction totally devoid of merit and it is hereby dismissed.

73. On the sentence, under section 204 of the Penal Code a person convicted of murder under section 203 is liable to be sentenced to death. In Bernard Kimani Gacheru -vs- Republic [2002]eKLR, this Court stated:

> " 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 states is shown to exist."

74. On sentence, the appellants submitted that the sentences imposed were harsh and excessive in the circumstances. We note that the appellants' mitigating factors were taken into consideration. The learned Judge exercised his discretion and imposed the prison term of twenty-five years for the 1st and 2nd appellants respectively. The sentence is lawful; and cannot be said to be manifestly harsh or lenient by any rational standards. In our view, the learned Judge properly exercised his discretion as the trial court, and we have no reason to interfere.

75. In the circumstances of 3rd appellant, after conducting the sentence hearing, the learned Judge pronounced himself thus:

> " It is true that he cooperated well with the police during the initial investigations. This court however notes that the 1st accused convict decided to take the life of an innocent man due to a dispute over land which dispute should have been referred to a legal avenue which is the Environment and Land Court for a solution. The 1st convict is also not a first offender as he is currently serving another sentence (20 years) vide Marimanti Principal Magistrate Court Criminal Case No. 7 of 2016 for an offence of manslaughter. This is another murder committed almost within a year. This shows that the 1st convict is becoming a danger to society and deserves a deterrent sentence. The penalty provided under Section 204 for the offence of murder is death but following the decision of the Supreme Court in the decision of Muruatetu, this court is inclined to sentence the 1st accused person to life imprisonment."

76. Given the circumstances herein, and the 3rd appellant's previous antecedents, we can only state that the life imprisonment sentence imposed on him was commensurate to the crime, andwas imposed after the trial court had considered his mitigation.We are satisfied that the trial court exercised its discretion properly when sentencing the appellants.

77. The upshot of the above is that we uphold the appellants' conviction and sentences, and dismiss the appeal in its entirety.

DELIVERED AND DATED AT NYERI THIS 20TH DAY OF DECEMBER 2024.

W. KARANJA

.....

JUDGE OF APPEAL

JAMILA MOHAMMED

.....

JUDGE OF APPEAL

L. KIMARU

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR