



**Alimaris v Republic (Criminal Appeal 134 of 2018)
[2023] KECA 134 (KLR) (10 February 2023) (Judgment)**

Neutral citation: [2023] KECA 134 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT ELDORET
CRIMINAL APPEAL 134 OF 2018
F SICHALE, FA OCHIENG & LA ACHODE, JJA
FEBRUARY 10, 2023**

BETWEEN

SAMUEL ALIMARIS APPELLANT

AND

REPUBLIC RESPONDENT

(An Appeal from the Judgment of the High Court of Kenya at Kapenguria (S.M. Gitinji, J.) delivered and dated 17th January, 2018 in HC Criminal Case No. 31 of 2016)

JUDGMENT

1. The appellant herein, Samuel Alimaris was charged with the offence of murder contrary to section 203 as read with section 204 of the *Penal Code*. The particulars of this offence were that on 24th November 2016, the appellant murdered one Geoffrey Thomas Loweti at Nakwomoru Village within West Pokot County.
2. The appellant being dissatisfied with the judgment and conviction of the learned Judge, has preferred this appeal before us. In his amended grounds of appeal dated 25th January, 2021, the appellant raises six grounds of appeal which we reproduce verbatim as follows:
 - i. That the appellant pleaded not guilty at trial;
 - ii. That the trial judge erred in law and fact by convicting the appellant without considering his plea of mistaken identity;
 - iii. That the prosecution's case was not proved beyond reasonable doubt;
 - iv. That the trial judge erred in law by convicting the appellant without considering that the evidence adduced by the prosecution witnesses was contradictory and insufficient to warrant a conviction;



- v That the trial judge erred in law and fact by convicting the appellant without considering the totality of evidence and finding malice aforethought without any evidence in support thereof;
 - vi. That the trial judge erred in law and fact by shifting the burden of proof to the appellant and convicting the appellant without considering his defence;
3. This is a first appeal on conviction and sentence by the High Court. The mandate of this court as the first appellate court is outlined in section 379(1) of the [Criminal Procedure Act](#) and Rule 31(1)(a) of the [Court of Appeal Rules, 2022](#). This court in *Dickson Mwangi Munene & Another v Republic* [2014] eKLR expressed itself concerning the manner in which this court must exercise its jurisdiction as a first appellate court as follows;

“This being a first appeal, this Court is obliged to re- evaluate the evidence on record to determine if the trial court’s decision was based on evidence and is legally sound. On matters of fact, as an appellate court we have to bear in mind the caution that having heard and seen the witnesses testify, the trial court was better placed to assess their demeanor. We should therefore be slow to reverse the trial judge’s finding of fact unless it is not supported by the evidence on record. See *Okeno v Republic* [1972] EA 32 and *Mwangi v Republic* [2002] 2 KLR 28.”

4. During trial, the prosecution called a total of six witnesses to make its case against the appellant. Benjamin Lingangole testified as PW1 stating that on 28th November, 2016 at about 2.00 pm while he was at Chepareria, he received a call from PW2. PW2 informed him that the deceased, her son, had been short with an arrow. PW1 testified that he was informed that the incident took place at Selewo. He then proceeded to Kapenguria Hospital where he found the deceased was still alive. He testified that the deceased informed him that he was shot by the appellant. PW1 also testified that he later identified the body during postmortem. On cross examination, he stated that was not present when the incident took place.
5. PW2, Monica Thomas, testified that she lived at Kapromu but had bought land at Selewo. She recalled the events of 23rd November, 2016, stating that while she was from the river, she witnessed Thomas armed with bow and arrows chasing after his father, prompting the deceased her son, Geoffrey Thomas, (the deceased) to also run away. She testified that she then saw the appellant shoot an arrow at Geoffrey Thomas. The deceased then fell down crying. The appellant then went after PW2 who also ran away. PW2 later went for the deceased and took him to Kapenguria Hospital and later to Eldoret Hospital where he was admitted. The deceased later died after two days, whilst undergoing treatment. PW2 also stated that the appellant had had a quarrel with the deceased over some posts, but the issue was resolved.
6. PW2 also testified that she saw the arrow which shot the deceased and took the arrow to the police. She identified the arrow which she stated that the deceased drew it out of his body and kept it down. It was also her evidence that the appellant also shot her on her finger after which he ran away. On cross examination, PW2 testified the police found them at Selewo Dispensary. And that the deceased was shot at while along the road and not home of Samuel and while near the house and not in a house. She stated that the appellant’s house was near their house.
7. Thomas Lowet father to the deceased took to the stand as PW3. His testimony was that on the material day he was building his house at Selewo at about 2 pm when the appellant attacked him with bow and arrows. The appellant then shot two arrows but he escaped and they did not get him. He stated that while he was escaping, crossing the road, he heard screams on the other side of the road and upon



- approaching the scene, he found Geoffrey Thomas Losweti fallen on the road with blood oozing from the side of his ribs. A motorbike then came and they took the deceased to Selewo dispensary.
8. Later on, an ambulance came and they took the deceased to Kapenguria Hospital, after which he was referred to Eldoret where he died upon arrival and the body taken back to Kapenguria Mortuary. They then made a report to Kapenguria police station. PW3 also testified that the arrow was next to the deceased at the scene and he took it and surrendered it to the police. On cross examination, he denied chasing after the appellant with arrows and bow as claimed by PW2. He also stated that they had sold 4 cows and bought a motorbike but he refunded the amount and got the animals back and there was no quarrel over that.
 9. Dr. Thuo Samwel testified as PW4 stating that he conducted a postmortem on the body of Geoffrey Thomas Loweti on 28th November, 2016 at Kapenguria Referral Hospital Mortuary. He stated that the deceased was male African, aged 23 years, with good nutrition. He was well built and was 5. 4 inch in height. When he examined the deceased, he noted that 2 ribs were broken, namely, the 5th and 6th ribs on the left. The deceased had a petechial on left chest wall. Upon opening the body, the trachea was deviated to the right while the left lung was smaller than the right one with a pool of blood on the left chest of about 500ml. The covering of the heart also had blood. The heart was compressed; which to PW4, was a sign of cardiac limitation in pumping movement. He made a conclusion that the deceased's cause of death was cardiac arrest due to asphyxia and left haemothorax. He produced the post mortem report as Pexhb. 2.
 10. IP Nicodemus Nyakundi who was attached to the Kapenguria Police Station as OC Crime testified as PW5. His testimony was that on 23rd November, 2016 he was informed by the area chief via phone that someone called Geoffrey had been shot with an arrow and had died. Alongside PC Omondi, Muya and Koros, they set off for the area and upon reaching Serewo Dispensary, a relative of Geoffrey told them that the victim had been rushed there. They entered the hospital and found nurses working on the deceased who had an injury on his left side of the chest. PW5 stated that he spoke to the deceased who informed him in Kiswahili that he was shot at by his neighbour called Samwel Alimaris due to a boundary dispute.
 11. They took the deceased in their car but before they could leave, an ambulance came in and carried the deceased to Kapenguria Hospital. He also stated that they were informed by a villager that the appellant had escaped into the forest with bow and arrows. They asked the villagers to tell the appellant to go to the police. The appellant then went to the police station, where he was arrested.
 12. PC Cornelius Muya took the stand as PW6 and testified that he was the investigating officer in the case against the appellant. It was his evidence that on 23rd November, 2016 at about 3 pm, PW5 called him alongside PC Omondi informing them that someone had been shot with an arrow at Nakomoruru. He corroborated the evidence of PW5 on how they left for the scene and found the deceased in the hospital. Upon interrogation, the deceased informed him that he was building his mud house when at about 2 pm, the appellant invaded his compound and shot him using an arrow.
 13. PW6 also stated that the deceased also informed them that they had a land dispute with the appellant. On 25th November 2016, relatives to the deceased reported that the deceased had died while undergoing treatment at Moi Teaching and Referral Hospital (MTRH). He then accompanied the deceased's relatives to the scene where he found and interrogated PW1 who informed him that the deceased and the appellant had a long unresolved land dispute. On 28th November, 2016, he witnessed a postmortem conducted by PW5 at Kapeguria Hospital. The appellant later availed himself to the police station on 1st December, 2016 at about 5.30 pm when he was rearrested.



14. The appellant was placed on his defence and he gave unsworn evidence. It was his evidence that on 23rd November, 2016 he was at home undertaking his normal duties when he heard people quarrelling in his neighbour's home. He stated that the quarrel was about animals which had been sold by the deceased, without permission of his father. He then went to buy animals from the market where he bought 2 of his neighbour's animals.
15. On arriving home, he noticed that the same were sold illegally and he returned them to the neighbour who took them back. Later that day, he was told by someone that PW3 was aiming at him with an arrow. Upon seeing that it was true, he ran away past his house into the forest. He later went to report to the police who arrested him on allegations that he had shot the deceased with an arrow.
16. The trial court in its judgment found the appellant guilty of the offence and convicted him. The trial court noted the fact that the death of the deceased was not in dispute. The court also found that the evidence pointing to the appellant as the person who caused the deceased's death was strong and that the appellant had malice aforethought. The trial court dismissed the appellant's defence as an afterthought which was never raised during cross examination of prosecution witnesses. The appellant was sentenced to serve life imprisonment.
17. Messrs Mogire Wanyama & Co. Advocates filed submissions dated 26th January, 2021 on behalf of the appellant. It is the appellant's submissions that section 379(1) of the *Criminal Procedure Code* permitted him to file the appeal against his conviction and the sentence on both issues of facts and of the law. On the second ground of appeal, counsel for the appellant submitted that the appellant was placed at the scene of the murder by his presence at the time the deceased and his father were arguing. Counsel argued that the identity of the appellant as the perpetrator of the offence was one of a mistaken identity and that it was a mistake to allege that he committed the murder. He said that the offence was probably committed by the deceased's father, since the deceased and the appellant were not quarreling or fighting at the time of the murder; but the fight was between the deceased and his father.
18. Counsel reiterated that the appellant was a victim of mistaken identity and is therefore not guilty of the offence. Moving to the third ground of appeal, counsel submitted that the prosecution failed to discharge its duty to prove beyond reasonable doubt the culpability of the appellant. According to counsel, the evidence tendered by the prosecution witnesses is that there were three persons at the scene, which therefore implies that the death may have been caused by someone other than the appellant.
19. On the fourth ground of appeal, counsel submitted that the evidence of PW2, PW3, PW5 and PW6 were marred with contradictions which went to the root of the case.
20. The appellant also submitted that mens rea was not established. Finally, counsel submitted that the respondent did not prove their case against the appellant and therefore the trial court erred in shifting the burden of proof to the appellant, leading to the appellant's conviction, without sufficient evidence. Counsel urges this court to allow the appeal and set aside the conviction and sentence against the appellant.
21. The respondent, through prosecution counsel Mark Mugun, filed their written submissions dated 16th April, 2021 where counsel urged this court to dismiss the appeal. Counsel submitted that the prosecution sufficiently proved all the elements of the offence against the appellant. Counsel argued that the fact as to the death of the deceased was never in contention before the trial court.
22. Counsel also submitted that the appellant was recognized as the person who committed the offence and that the circumstances were favourable to the witnesses who recognized him. He sought reliance in the case of *Anjonomi & Others v Republic* [1976-1980] and *R v Turnbull* [1976] All ER 551. On



- the issue of mens rea counsel referred the court to the provisions of section 206 of the *Penal Code* and urged the court to find that the appellant had knowledge that his actions were bound to maim the deceased. Counsel urged this court not to disturb the findings of the trial court.
23. As we had already stated, our role as the first appellate court is outlined in section 379(1) of the *Criminal Procedure Act* and Rule 31(1)(a) of the *Court of Appeal Rules, 2022*. We are mandated to re-evaluate, and independently assess the evidence on record and come out with our own independent conclusion.
 24. Upon perusal of the record of appeal, and submissions by rival parties, it is our view that the issues for determination in this appeal are;
 - i. Whether the prosecution proved the offence of murder against the appellant;
 - ii. Whether contradictions in the prosecution case were of a fatal nature to the case against the appellant;
 - iii. Whether the sentence issued against the appellant is lawful.
 25. The appellant herein was charged with the offence of murder. Section 203 of the *Penal Code* provides for the ingredients of the charge of murder to include, the fact and cause of death of the deceased person; that the death of the deceased was as a result of an unlawful act or omission on the part of the accused person; and that such unlawful act or omission was committed with malice aforethought.
 26. The fact and cause of death of the deceased is not in dispute in this case.
 27. The next question is whether the prosecution proved that indeed it was the appellant who caused the death of the deceased. The evidence of PW2 was that while she was from the river, she saw the appellant chasing after his father whilst armed with a bow and arrows. She then saw the appellant shoot an arrow at the deceased after which the deceased fell down crying. The appellant then went after her but she ran away. Thereafter, she went and found that the appellant had been short on the left rib and he had removed the arrow and placed it by his side.
 28. PW3, on the other hand, testified that on the material day while he was building his house the appellant attacked him with a bow and arrows. The appellant shot two arrows at him but he escaped. It was while he was escaping that he heard screams on the other side of the road and upon approaching the scene, he found the deceased lying down with blood oozing from the side of his ribs. He also testified that the arrow was next to the deceased at the scene and he took it and surrendered it to the police. Both PW2 and PW3 stated that the appellant disappeared into the forest after committing the offence.
 29. The evidence of PW2 and PW3 is further corroborated by that of PW5 and PW6 who were police officers. In their testimonies, they stated that during their investigations and on interrogation of the deceased they established that it was the appellant who indeed shot the deceased with the arrow. The appellant in his defence alluded to having heard people quarrelling in his neighbour's home. He also testified as to how he bought the neighbour's animals but later returned them after learning that the animals had been sold illegally. He was later informed by someone that PW3 was aiming at him with an arrow. He then ran away from his house into the forest and later reported to the police where he was arrested for having killed the deceased.
 30. From this chain of evidence, both PW2 and PW3 and the appellant confirm that indeed the appellant was at the scene of crime. PW3 was also the scene of crime while PW2 was approaching the scene from the river. The scene of crime is also within the home of PW3, which was the same compound at which the deceased was staying. We also note that the incident took place at about 2 pm, when it was



broad daylight. Furthermore, PW2, the deceased, the appellant and PW3 were neighbours; thereby well known to one other.

31. We are inclined to believe the evidence pointing to the appellant as the person who had the bow and arrow which was shot towards the deceased. Furthermore, that evidence points towards the appellant as having shot at PW2 and PW3 as well. We find the appellant's evidence that it was PW2 who aimed at him as an afterthought and a story merely meant to hoodwink and misdirect the attention of the court to PW2.
32. This court in *Stephen Nguli Mulili v Republic* [2014] eKLR, addressed the issue of standard of proof in the following words:

“The standard of proof required is “proof beyond reasonable doubt”. In reference to this Lord Denning in *Miller v Ministry of Pensions*, [1947] 2 ALL ER 372 stated:

“That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence of course it is possible, but not in the least probable, the case is proved beyond reasonable doubt, but nothing short of that will suffice.”

33. We find that the evidence adduced by the prosecution leaves no doubt as to the fact that it is the appellant who fired the arrow at the deceased. We find no persuasive evidence on record to cast any doubt on the corroborative and cogent evidence which had been tendered by the prosecution.
34. The appellant submitted that there was mistaken identity. He said that the death was as a result of the fight between the deceased and his father. But we find no merit in the said submission, as the offence was committed in broad daylight, when the appellant was positively recognised.
35. The next question that we must answer is whether the appellant had malice aforethought when he shot the deceased. Section 206 of the *Penal Code* provides that:

“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. escape from custody of any person who has committed or attempted to commit a felony.”



36. The importance of malice aforethought in murder charges has been underscored by this court previously in the case of *Roba Galma Wario v Republic* [2015] eKLR at para 26 that:

“...Without malice aforethought, the appellant would be guilty of manslaughter, as it would mean the death of the deceased during the brawl was not intentional.”

37. In addressing the issue of malice aforethought this court is called upon to take into account all the surrounding circumstances of case. This position was reiterated by this court in *N M W v Republic* [2018] eKLR where the court cited with approval the case of *Bonaya Tutu Ipu & Another v Republic* [2015] eKLR that:

“It is in rare circumstances that the intention to cause death is proved by direct evidence. More frequently, that intention is established by or inferred from the surrounding circumstances. In the persuasive decision of *Chesakit v Uganda*, Cr. App. No. 95 of 2004, the Court of Appeal of Uganda stated that in determining, in a charge of murder, whether malice aforethought has been proved, the court must take into account factors such as the part of the body injured, the type of weapon used, if any, the type of injuries inflicted upon the deceased and the subsequent conduct of the accused person.”

38. From the evidence of PW2 and PW3, the appellant came with arrows and bows and fired the initial shots at PW2. He later fired arrows towards PW3 and the deceased. In the eyes of an ordinary man, it is without doubt that an arrow fired from a bow carries the possibility of causing death or grievous harm to its target. We find that the appellant knew that the arrow he fired would probably cause the death of the deceased, or it could have caused grievous harm to the said deceased.

39. Accordingly, the appellant was culpable for the consequences of his actions.

40. Based on the reasons above, we cannot therefore fault the learned Judge for finding that the offence of murder was committed by the appellant in this case. We find that the learned Judge correctly applied the evidence, law and principles when he found the appellant guilty of murder. The conviction against the appellant is therefore safe and is sustained.

41. The next issue for our consideration is whether contradictions in the prosecution case were of a fatal nature to the case against the appellant. On this issue, counsel for the appellant submitted that the evidence of PW2, PW3, PW5 and PW6 were marred with contradictions which went to the root of the case. The respondent did not address this issue.

42. In dealing with the issues of discrepancies, we are alive to the pronouncements of this court in *Joseph Maina Mwangi v Republic* [2000] eKLR, where it was stated:

“In any trial there are bound to be discrepancies. An appellate court in considering those discrepancies must be guided by the wording of section 382 CPC, viz whether such discrepancies are so fundamental as to cause prejudice to the appellant or they are inconsequential to the conviction and sentence.”

43. We are therefore alive to the principle that only inconsistencies or contradictions that are substantial and fundamental to the main issues in question before the court are capable of creating some doubt in the mind of the trial court. In *Erick Onyango Ondeng' v Republic* [2014] eKLR the court said that:

“The hearing before the trial court invariably entails consideration of often contradictory, inconsistent and hotly contested facts. The primary duty of the trial court is to carefully



analyse that contradictory evidence and determine which version of the evidence, on the basis of judicial reason, it prefers. It is the trial court, when it comes to questions of fact, which has the singular advantage of seeing and hearing the live witness testify and being subjected to cross-examination, that time-honoured device for testing the truth or correctness of evidence. Next is the first appellate court which by law, it is its bounden duty to re-consider, re-evaluate and analyse the evidence that was before the trial court, to determine whether, on the basis of those facts, the decision of the trial court is justified. (See *Okeno v Republic* [1972] EA 32).”

44. On the issue of discrepancies and contradictions, counsel for the appellant submitted that the evidence of PW1, PW2 and PW3 is contradictory as to what transpired. According to counsel, the evidence of PW2 reveals that it was PW3 who was in possession of the bow and arrows chasing after the deceased. Counsel also faults the evidence of PW3 on the grounds that the witness was involved in the crime and was bound to lie in his evidence. Counsel further takes issue with the evidence of PW5 and PW6 citing them for being contradictory with regards to the hospital that the deceased was transferred to from Kapenguria Hospital. It is our view that the discrepancy as to which hospital the deceased was referred is trivial in this matter and does not affect the substratum or the main issue before us.
45. With regards to the evidence of PW1, PW2 and PW3, we have independently perused and reviewed the evidence of these witnesses. The relevant sections of the testimonies of PW2 is at page 14 of the record of appeal where the witness stated:

“I was from the river. Thomas was armed with bow and arrows chasing after his father. Thomas chased the accused while armed with bow and arrows. My child called Geoffrey Thomas ran away when he saw them. Samuel Aimaris shot an arrow at Geoffrey Thomas on the left rib... My left hand pointing finger was also injured by the accused. The accused chased me with the arrow.”

In cross examination, PW2 states at page 17 and 18 thus:

“Thomas is called Thomas Ngunareng Lowot... The accused chased after Thomas with an arrow. Thomas did not witness as Geoffrey was shot.... Geoffrey sold his father’s cows and they quarreled over that. Later he bought him a motorbike. Thomas my husband does not keep bow and arrows. Geoffrey was also not keeping bow and arrow.”

46. In our understanding of the evidence, there were two different persons who were named Thomas. The first one was Thomas Ngunareng Lowet, whilst the second one was Geoffrey Thomas (the deceased). The deceased ran away when he saw Ngunareng chasing after the appellant. The deceased was shot with an arrow, as he was running away from both Ngunareng and the appellant: and the person who shot him is the appellant.
47. We find that the alleged discrepancies do not affect an otherwise cogent case against the appellant.
48. The upshot of the foregoing is that the appellant’s appeal against conviction is without merit and is hereby dismissed.
49. The final issue is whether the sentence passed against the appellant is lawful. The appellant was sentenced to life imprisonment by the trial court.
50. This court has stated many times that an appellant seeking this court’s intervention on sentence must first convince this court that the trial court either acted on wrong principles; ignored material factors;



took into account irrelevant considerations; or that the sentence is manifestly excessive. See *Abamad Abolfathi Mohammed & Another v Republic* [2018] eKLR.

51. The appellant did not canvass any issue pertaining to the sentence.

Therefore, there would be no legal basis for making any determination on a matter that was not in issue in the appeal.

52. The upshot of the foregoing and on the basis of the reasons we have elaborated above, this appeal is without merit and is hereby dismissed.

DATED AND DELIVERED AT NAKURU THIS 10TH DAY OF FEBRUARY, 2023.

F. SICHALE

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JUDGE OF APPEAL

F. OCHIENG

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JUDGE OF APPEAL

L. ACHODE

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

