



REPUBLIC OF KENYA



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**Ojwang & 9 others v Republic (Criminal Appeal 107 of 2017)
[2023] KECA 365 (KLR) (31 March 2023) (Judgment)**

Neutral citation: [2023] KECA 365 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CRIMINAL APPEAL 107 OF 2017
HM OKWENGU, M NGUGI & F TUIYOT, JJA
MARCH 31, 2023**

BETWEEN

DAVID OCHIENG OJWANG ALIAS DAUDI 1ST APPELLANT
NICHOLAS OTUNGA OTIENO ALIAS ONEKO 2ND APPELLANT
DANIEL OWINO OGANYO 3RD APPELLANT
JULIUS MAKAMBO OBADE 4TH APPELLANT
KENNEDY KISA OMWERI 5TH APPELLANT
JULIUS OTIENO DEYA ALIAS OGENDO 6TH APPELLANT
JANES OGALO OKETCH OLENDU 7TH APPELLANT
JOSEPH ODHIAMBO MAJIWA ALIAS JOSY 8TH APPELLANT
JOSEPH KEYA OMWERI 9TH APPELLANT
PAUL KOI ODEKO 10TH APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal from the judgment of the High Court of Kenya at Migori
(Majanja, J) dated 31st March, 2017 delivered at Migori on 5th April,
2017 in HC. Criminal Case No. 46 of 2014 Formerly Kisii HCCRC No. 96 of 2013)*

JUDGMENT

1. CPL Benson Ingosi (PW22) of Scene of Crime Support Service, Migori County visited a scene at Nyarongi area within the County on August 12, 2013 and observed it to be deserted. There was a burnt double cabin motor vehicle in the middle of the road. Beside the vehicle were three bodies,



two of which had been burnt beyond recognition. In criminal proceedings before the High Court in Migori, being High Court Criminal Case No. 46 of 2014, the prosecution case was that the bodies were of Elikana Syongoh, Moses Magiri and Simon Gombe. In a judgment delivered on March 31, 2017, Hon. Majanja, J found David Ochieng Ojwang alias Daudi (the 1st appellant), Nicholas Otunga Otieno alias Oneko (the 2nd appellant), Daniel Owino Ogango (the 3rd appellant), Julius Makambo Obade (the 4th appellant), Kennedy Kisa Omweri (the 5th appellant), Julius Otieno Deya alias Ogendo (the 6th appellant), Janes Ogalo Oketch Olendo (the 7th appellant), Joseph Odhiambo Majiwa (the 8th appellant), Joseph Keya Omweri (the 9th appellant) , and Paul Koi Odeko (the 10th appellant) guilty of the murder of the three and convicted each of them accordingly. Each was sentenced to death.

2. In the course of trial, Erick Otieno alias Ford and Bernard Samuel Mboya alias Benard Hussein absconded and the prosecution withdrew the charges against them under section 87A of the [Criminal Procedure Code](#). Julius Otieno died after filing his appeal but before it was heard and his appeal has, on account of his death, abated.
3. In a joint appeal against both conviction and sentence, the appellants raised four grounds which were addressed by their counsel Mr. Odumbe under the following headings:
 - a. The evidence of identification of the appellants fell below the standards required by law.
 - b. The trial court failed or neglected to examine the alibi defence raised by each of the appellants.
 - c. The death sentence meted against the appellants was excessive in the circumstances given that the mandatory death sentence is outlawed.
4. Before we go any further, we observe that during the hearing of the appeal, it turned out that following the directions on resentencing in Supreme Court decision in [Francis Karioko Muruatetu & another vs. Republic](#) (2017) eKLR, the appellants petitioned the High Court at Migori for resentencing vide Constitution Petitions No.3 and 5 of 2018. The petitions were allowed and sentences set aside. The trial court conducted fresh sentencing proceedings in which the appellants tendered their mitigation and pleaded for non-custodian sentence. Having heard both sides on sentencing, the trial court observed and held:

“In balancing the interest of each side and the scale of justice this Court is of the considered view that none of the accused persons is deserving of any leniency. The murders were so heinously executed and that must be considered in sentencing. Having taken all relevant factors into account this Court hereby sentences each of the accused person who were duly convicted to suffer death.”
5. The petitions for resentencing came before the hearing of this appeal and having taken their chance at resentencing, the appellants’ challenge against sentence in this appeal was spent. There cannot be proper grievances against sentences because those sentences were set aside in the petitions and sentencing conducted afresh. If the appellants were aggrieved by the outcome of resentencing, then they needed to appeal against that outcome. Their appeals against the sentences imposed by the trial court were extinguished by their petitions for resentencing and are spent, and we shall not consider them at all.
6. Learned counsel, Mr. Odumbe, submitted that the backbone of the prosecution case was on the recognition evidence of PW1, PW3 and PW4. The learned trial Judge is said to have made hasty findings without inquiry of fundamental facts against the caution and approach enunciated in cited decisions of [Charles O. Maitanyi Vs- Republic](#) Criminal Appeal No. 6 [1986], [Kariuki Njiru & 7 others](#)



Vs Republic (2001) eKLR and *Donald Atemia Sipendi Vs Republic* [2019] eKLR. Counsel argued that the trial court ought to have considered the following;

- i. What were the lighting conditions under which the witness made the observation?
 - ii. What was the distance between the witness and the perpetrators?
 - iii. Did the witness have an obstructed view of the perpetrator?
 - iv. Did the witness have the opportunity to see and remember the facial features, body size, hair, skin color and clothing of the perpetrator?
 - v. For what period of time, in what direction were the witness and perpetrator facing, and where was the witness's attention directed to?
 - vi. What was the mental, physical and emotional state of the witness before, during, and after the observation?
 - vii. To what extent, if any did that condition affect the witness's ability to observe and accurately remember the perpetrator?
7. The appellants contend that the murder took place in a dark night as conceded by PW2, PW5, PW6 and PW7, and PW2's evidence was that the vehicle which was at the scene had its lights off. Further, that PW2 denied seeing anyone but Ford (one of the escapees) who assaulted him at the scene. Counsel for the appellants also submitted that PW2's other evidence was that the presence of moonlight enabled him to see the deceased persons, somewhat contradicting the evidence of other witnesses and indeed his own that it was a dark night.
8. Regarding PW1, the appellants submit that while he described the night to be of a full moon, he somehow found it necessary to carry a torch, the size of a finger. Counsel for the appellants argues that a full moon as a source of light only casts an image and that positive identification of a person would require very close proximity to the point of contact or that the suspect be well known to the witness. In an argument that was not easy to follow, counsel argues that as this was a case of a mob "soaked in an orgy of violence, the slight chance to identify a person is by the voice, a rare possibility in the many voices which we must as well refer to notice". It is further contended that the state of commotion combined with inadequate lighting made it impossible for the witnesses to identify the actual people who assaulted the deceased persons.
9. As to PW3, the appellants submit that he feared for his life and stood at a distance. PW3 admitted the night to be dark and there were many people at the scene. PW3 alleged to have recognized the attackers of one of the deceased persons (Simon Gombe) which was contrary to what he stated in his statement to the police, that he did not see any of the attackers.
10. All the appellants gave alibi evidence. The trial court is criticized for not considering the alibis nor dislodging them. Citing the decisions in *Republic V Kevin Barasa* [2020] eKLR and *Kiare v Republic* [1984] eKLR, learned counsel for the appellants reminds us that even when an accused person has pleaded an alibi, he does not assume the burden of proving it. It is argued that had the trial court weighed the weaknesses of the prosecution's case vis-à-vis the alibi defences of the appellants, then it would have resolved the matter in favour of the appellants.
11. Responding to the grievances raised by the appellants, Mr. Okango, Senior Prosecution counsel, appearing for the respondent relied on written submissions dated July 22, 2022. The respondent's



- submissions is fourfold that is; whether the appellants were properly identified, participation of each of the accused persons, the appellants' alibi evidence, and whether the sentence imposed was appropriate.
12. On the first issue, the respondent submits that the prosecution gave clear and convincing evidence on the events of 12th August, 2013. Firstly, that the prosecution witnesses saw the appellants assaulting the deceased before they set them on fire. Secondly, that they were in close proximity to the appellants and interacted with them during the ordeal. Although the incident took place at night, there was sufficient light which enabled the witnesses to properly recognize and identify the appellants as assailants. In addition, the appellants are people well known to them as they all hail from the same village. The respondent relies on the decision in *Reuben Taabu Anjononi & 2 Others vs. Republic* (1980) eKLR.
 13. On the apparent inconsistency as to whether the source of lighting came from the moon, torch or car headlights, the respondent submits that the same is immaterial. The bottom line remains that there was light, whatever the source, enough to help the witnesses see the appellants attack the deceased, and the small inconsistencies can be ignored by the court as stated in the Ugandan case of *Twehangane Alfred vs. Uganda* Criminal Appeal No. 139 of 2001, (2003) UGCA 6.
 14. On the second issue, that of participation of each of the appellants, the respondent relies on the doctrine of common intention and section 21 of the *Penal Code* which provides for features of criminal responsibility. It also relies on the case of *R. vs. Tabulayenka s/o Kirya* (1943) EACA 51. In conclusion, the respondent maintains that the appellants participated in the assault and final death of the deceased.
 15. Lastly on the appellants' alibi evidence, the respondent submits that there are two ways in which the same may be rebutted. The prosecution can either call evidence in rebuttal, or the court weighs it against the totality of the prosecution case. The respondent submits that in the instant case, the trial court reviewed and considered the respective defences of the appellants and reached the conclusion that the testimonies of the appellants did not in any way cast doubt on the weighty evidence adduced by the prosecution.
 16. Reading the judgment of the trial court, it is plain that the conviction of the appellants was hinged on the evidence of PW1, PW2, PW3 and PW4. Indeed, this appeal is substantially around discrediting the evidence of PW1, PW3 and PW4. In addition, the appellants have lauded the strength of the alibi defences they raised at trial. As the death of the deceased persons and the cause of their death is not disputed, it is proposed that we set out, briefly, the impugned evidence of PW1, PW2, PW3, and PW4, and the appellants' alibis.
 17. John Ojoko Deyangwa (PW1) is a farmer at Migingo in Migori County.

On the evening of 12th August, 2013, at about 9.00pm, he heard screams. He thought them to be from his brother so he left his house and went towards his brother's home which is at the Centre. While there, he saw a motor vehicle approach the Centre with head lights on. He went towards the car and as he did so, he met Ameko, son of Ameko Majiwa. He also saw Josy Majiwa (8th appellant), Awino, Augo Omollo and Omondi. These are people he knew as they are from the same area he lived in. They blocked the road using stones and logs. They explained their behaviour to PW1 on the basis that the Assistant Chief had instructed them to kill any thieves they would find. The people, who included Daudi Ojwang (1st appellant), insisted that the people in the vehicle were thieves who had come from Migori. When PW1 asked for proof that they were thieves, they threatened to kill him.
 18. Inside the vehicle were three people. It was the evidence of PW1 that in a bid to evade the stones and logs placed by the menacing crowd, the driver of the vehicle diverted to a neighbouring homestead belonging to PW1's Aunt, Phenina. As he tried to do that, Daudi Ojwang (1st appellant) cut the left hand of the driver using a panga. Undeterred, the driver continued driving towards a junction but the



vehicle moved slowly as it was up a hill, eventually stalling at the junction. Josy (8th appellant) removed the passengers from the vehicle as Ameko and Ougo Omollo who were also present, asked them to get out of the vehicle. All three alighted and were made to sit down in a line, leaning on the car.

19. The three were, in the words of PW1, beaten indiscriminately by all the people present. Bernard (the other escapee) had a stone, Daudi (1st appellant), and Ford (another escapee) each had pangas. Bernard and Kennedy (5th appellant) were also present and had runkus and pangas. At some point one Makambo Obade came by. He was with a Ward Representative called Jack Gucha and one Ogendo. The beatings continued notwithstanding the presence of the Ward Rep. At some point and as the beatings continued, PW1 left the scene to the home of one Lubanga (PW 2).

20. Later, PW1 returned to the scene with Peter, son of Makambo. On his way back to the scene, PW1 met with one Kichana and other people. Kichana asked PW1 whether he had met Lubanga. Kichana and his group sought out Lubanga and pulled him back to the scene where he was beaten and made to sit with the other three persons who had been assaulted.

Lubanga was viciously assaulted by the mob. PW1 saw Ford use a bolt studded rungu to hit him on the neck while Oreko (2nd appellant) used a log stick as his weapon of assault. Lubanga was, however, lucky as he escaped after being pushed by Obote Obiayo into a trench.

21. Not so for the other three. The driver made a dash of about 5 meters but Ford caught up with him and cut him at the waist using a panga. He was then carried back to the car by Josy (8th appellant), Kennedy (5th appellant), Owino (3rd appellant) and Oneko (2nd appellant). The attempts of the other two to get away were just as ill-fated. The second was cut on the back by Daudi (1st appellant), while the others descended on him with runkus. The third person Karakacha, ran into the home of William Ogaji which was 150 meters from the scene. Ogaji tried to restrain the crowd from pursuing Karakacha but he too was assaulted by Martin using a panga. Martin with Boi and Adegu tied Karakacha with a rope and Adegu dragged him back to the scene.

22. All three succumbed to the deadly blows inflicted on them. Their work done, Martin opened the bonnet to the Car while Ouma entered it and removed some things which included a battery, radio, jacket and open shoes. Martin lit a match and set the car ablaze. So as to increase the intensity of the fire, the members of the mob added sticks, twigs and grass to it and then dragged the bodies into what was now a bonfire.

23. The unfortunate trio had, before being fatally assaulted, visited the home of Nerbert Lubanga Anyira (PW2) in search of quail birds. PW2 sold 8 birds to them and walked them to their car. As he did so, a person by the name Ngesa informed him (PW2) that some people were saying that his three visitors were thieves out to steal cattle. One of the deceased (Gombe) laughed off the information, unaware of the horror that would soon befall them.

24. PW2 remained home and was there when PW1 and Makambo came to his house with information that his visitors had been removed from the car. PW2 left with the two towards the place where the three were under siege. On their way, they met one Kichana who held PW2 by the scruff of his neck, accusing him of being one of the cattle thieves. Other people joined Kichana, felling PW2 to the ground. One Ford hit him. He took on Ford and the two got into a scuffle. Even then he saw the three people who had visited his home to buy the birds. They were seated down. He could see them because of sufficiency of moonlight. Suddenly, someone pushed him, he rolled and fell into some bushes by the road side and managed to escape.

25. One of the deceased, Simon Gombe, was the brother of Peter Kaugwe Kalakacha (PW3). Sometime in the night of 12th August, 2013, after his deceased brother had called on him looking for quails to buy,



- he heard screams from Migingo direction near the home of PW2. Simon telephoned him and told him they were being accused of being thieves. PW3 decided to go to the rescue of his brother and he took with him another brother, Stephen Kalakachia Ademba (PW4). The two found the three supposed suspects seated next to a motor vehicle, all three injured. His brother had been hit on the head, the driver and the other had cut wounds on their heads.
26. On PW3 inquiring from his brother what had happened, Nicholas Otunga (2nd appellant) and Owino Ogango (3rd appellant) told him that the three were thieves and they threatened to assault PW3, and someone shoved PW3 aside. Present there was the Councilor armed with a spear who on attempting to attack Simon, was stopped by Kichana. PW3 and Kichana temporarily left the scene to look for PW2 at his home but they did not reach there because on the way, they found PW2 in the company of Peter Makambo and Jack Diangwa coming to the scene. They turned back and joined the three to the scene. There, PW2 was attacked, he was pushed back and forth while Ford hit him with a rungu.
27. Also while at the scene, PW3 saw the three persons who had been forced to sit attempt to escape, in vain. The witness told court that although it was dark, light was provided by the many torches carried by people. Simon's attempted escape took him to the homestead of Ogayi. He was pursued there by Paul Odeko (10th appellant), John Mbecha and Josiah Ombwa who assaulted him. What had happened caused PW3 to fear and he returned to his home. He was later to learn that his brother and the other two had been killed.
28. The evidence of PW3 was not without difficulty. Under cross-examination, he conceded that there were differences between his statement to the police and his testimony in court. One significant difference is that in his written account, he had stated that he did not recognize the attackers. Explaining that difference, PW3 told Court that although his memory was fresh at the time he recorded the statement, a day after the incident, he was in great fear hence the variance between what he recorded then and what he told court.
29. When PW4 reached the scene alongside PW3, he saw three people seated next to a car. One was his elder brother, Simon. He also knew a second person, Syongo who was Simon's driver. Four people were surrounding the seated persons. These were Josy (the 8th appellant), Nicholas Otunga (2nd appellant) Julius Makambo (the 4th appellant), Kichana and Ogendo (6th appellant). The 2nd appellant threatened to attack PW4 who moved to the back of the crowd. Later he saw Julius (6th appellant) cut Syongo with a panga, who at one point tried to escape but was brought back to the scene by the mob. Ford, Jay Gucha and the 6th appellant all assaulted the deceased.
- At this point he was so afraid that he decided to go home. Just like with PW3, there were differences between what PW4 recorded in his statement to the police and his testimony in court.
30. We now to turn to the defence evidence. As stated earlier, all the appellants pleaded alibi.
31. The 1st appellant is a farmer from Nyarongi. He denied participating in the killing of the deceased persons. He stated he was never at the scene. The 2nd appellant's evidence was that on 12th August, 2013, he left his home at Nyarongi for Macalder, Nyatike, to sell maize where he stayed overnight. Nyarongi to Macalder is about 30 km. He returned home on 13th August, 2013. He thought PW1 had implicated him because he had a dispute with him over a road access. As for PW3, the 2nd appellant stated that he (PW3) had stolen from him, implying a grudge.



32. The 3rd appellant is a pastor with the Holy Ghost Coptic Church and a resident of Mwache. His testimony was that;

“I did not see or heard (sic) anything on the night of 12th August, 2013.”

33. The 4th appellant is a member of PEFA church, a preacher and a farmer. He hails from Nyarongi, about 3½ km from Migingo. On the night of August 12, 2013, he heard screams but he neither responded to them nor did he leave his home.

34. The 5th appellant is a contractor and farmer and hails from Nyarongi. His evidence was that he was away from home from 12th August, 2013 to 18th August, 2013 as he was at a place called Osiri where he was building a house. The 6th appellant too resides at Nyarongi and is a farmer. His home is about 3½ km to Migingo. On the fateful night, he heard screams from Mwache area but he did not leave his house as he was too sick, being down with malaria.

35. The 7th Appellant, Janes Ogalo Olendo, is a farmer who resides at Mwache. On August 12, 2013, he attended a funeral at Mapera, a place far from Migingo, and only returned home on 17th August, 2013.

36. The 8th appellant is also a farmer who resides at Nyarongi. He knows nothing about the incident of August 12, 2013. His evidence was that on 8th August, 2013, he went to see his brother at Kisumu and returned on 16th August, 2016.

37. Joseph Keya Omweri (the 9th appellant) is a resident of Nyarongi and his home is about 1 to 1½ km to Migingo Centre. He did not hear any screams on the night of August 12, 2013 and knows nothing of the incident marking the death of the 3 deceased persons.

38. The 10th appellant is also a farmer and resident at Mwachi. His home is about 2 to 2½ Km to Migingo. He was at his home on the night of 12th August 2013 but did not remember hearing any screams.

39. The three deceased persons were killed in the night of August 12, 2013 at about 9.00pm. As correctly submitted by counsel for the appellants, at least three prosecution witnesses- PW5, PW6 and PW7- stated that it was a dark night. The evidence of one of them, Peter Onyango Makambo (PW5) was that it was a very dark night. There was also vivid evidence that the three were not just killed by a mob of people but that it was in the midst of many bystanders. So while the evidence of the identifying witnesses is of recognition, the substantial question raised in this appeal is whether the witnesses who implicated the appellants had seen them commit the crime in what would seem, at first blush, to be less than ideal circumstances for positive identification.

40. These are circumstances where great care is called upon in testing eye witness accounts, an approach consistently advocated by this Court. See for instance in *Clephas Otieno Wamunga vs. Republic* (1989) eKLR in which the conviction of the appellant on the 5 counts was based entirely on evidence of identification by two witnesses which the appellant challenged on his appeal. This Court voiced the following caution:

“it is trite law that where the only evidence against a

defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of a conviction.”



The Court continued:

“Evidence of visual identification in criminal cases can bring about miscarriages of justice and it is of vital importance that such evidence is examined carefully to minimize this danger. Whenever the case against a defendant depends wholly or to a great extent on the correctness of one or more identifications of the accused which he alleges to be mistaken, the Court must warn itself of the special need for caution before convicting the defendant in reliance on the correctness of the identification. The way to approach evidence of visual identification was succinctly stated by Lord Widgery C.J, in the well known case of *R. v Turnbull* (1976) 3 All E.R. 549 at page 552 where he said:

“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.”

We first examine the source and quality of light in what was an otherwise dark night. Emerging from the evidence is that even in the darkness alluded to by the three witnesses, there was light produced by other sources. PW5 said:

“The back lights of the car were on. One would only see something that was close.”

The evidence of PW7 was that:

“It was very dark but there were people with phone torches.”

41. This evidence gives credence to the evidence of the eye witnesses regarding the source of light. PW1 testified:

“I have a small torch which I used to see the incident.

It has one ordinary battery it costs me Kshs. 20 to buy. It is a small torch the size of the finger. The first time, the vehicle had all lights on hence I could see clearly.”

42. On his part, PW3 stated:

“It was dark but many people had torches.”

43. The conclusion we draw is that there were at least two sources of light in this otherwise dark night. The headlights of the vehicle in which the three deceased persons travelled before they were forcefully ejected and the torchlights from the many torches carried by many in the mob. It is from the two sources of light that the three key identifying witnesses, PW1, PW3 and PW4 saw the appellants assault the deceased persons.

44. What are the other aspects of the identification evidence? It turns out that all the assailants were well known to the three witnesses. These were people from the same village and had grown up together. In addition, the length of time of the assault gave the witnesses ample time to see who fatally assaulted the deceased persons. The incident, from the time the car was stopped to the time the bodies of the deceased were set on fire, was from about 9.00pm to 10.00pm, one hour. In this time period, the witnesses interacted and conversed with the assailants, people they knew. Something else contributed to the positive identification of the appellants: the witnesses were in close proximity to the assailants and the victims as the witnesses were in a mob that had turned out on that night.



45. In addition, the evidence of PW2 supports the evidence of PW1, PW3 and PW4 as to some of the people who were at the scene during the fatal attack on the deceased. While at home on that night, PW2 received news from PW1 and Makambo about the attack on the deceased persons who had earlier in the day visited and bought quail birds from him. Together with PW1 and Makambo, they made their way to the scene of attack. On their way, he met hostility. Kichana confronted him and held PW2 by the scruff of his neck, and he was hit on the head by Ford. PW8, who was all this time at home, was later to receive her wounded husband who told her that Ford had assaulted him. Ford was the 2nd accused in the High Court but absconded in the course of trial. Although PW2 did not directly implicate any of the appellants, his evidence lends credence to the evidence of PW1, PW3 and PW4 that Ford and Kichana were active members of the violent mob on that night.

46. From our own evaluation of the evidence, we endorse the following holding of the trial Judge:

“I also found the testimony of PW 1 credible. He was

- (a) fairly old man and there was no reason for him to lie in order to implicate the accused. Besides, no grudge, ill-will or malice against the accused was suggested to him in cross-examination. In relation to PW 3 and PW 4, who were brothers of Gombe, I am satisfied that their testimony was not coloured by the death of their brother and the need to implicate the accused. I do not find any hint [of] animus against the accused from the evidence of PW 3 and PW 4. On the other hand, a climate of fear had pervaded the village where people known to each other murdered three defenseless people. It is understandable that witnesses would not come forward due to threats and indeed PW 1, PW 2, PW 3 and PW 4 all mentioned receiving threats. PW 20 testified that after the incident there was a lot of tension in the area and witnesses did not turn up when called for interview while other suspects implicated in the matter fled from the area.”

47. The trial Judge was fully alive to the inconsistencies between the statements made by PW1, PW2, PW3 and PW4 to the police and their testimony in court and observed as follows:

“Counsel for the accused took issue with the written statements recorded by the witnesses at the police station which omitted to state that they identified the accused at the scene. The witness statements of PW 1, PW 2, PW 3 and PW 4 were marked for identification by the defence but were never produced by the accused. PW 3 admitted to some differences in his statement and testimony he gave in court stating, “There are differences between what I wrote in my statement and what I have testified in court. I have not lied. I was afraid when I wrote the initial statement that is why I did not include everything.” As the statements were not produced in evidence, I did not have the advantage of reading them. What is clear to me is that the circumstances under which the crime was committed were such that there was grave tension in the village creating a climate of fear particularly for those who would come forward to record statements. Some of the witnesses clearly stated that they had been threatened hence it is possible that the initial statements may not have been comprehensive. Omission in the original statement of some information including identity of the accused, cannot by itself, be sufficient to reject the evidence given in court particularly given in the situation I have described. Having heard all their testimony and observed their demeanor, I am satisfied that PW 1, PW 2, PW 3 and PW 4 were telling the truth despite the threats to their lives. In any case, I find that the evidence, as a whole, weaves a seamless and logical account of what actually transpired on the fateful day of 12th August 2013.”



48. We agree with the observations of the trial Judge. The inconsistencies do not speak to the credibility or lack of it of the witnesses but their state of mind at the time of recording the statements given the fear that had gripped the village following the brutal murder of the deceased persons.

49. Regarding the alibi defence raised by the appellants, it is clear that these were raised for the first time during the defence hearing and the opportunity for testing them at the investigation stage had passed. Those defences could only be tested by putting them on a scale against the evidence of the prosecution witnesses. This is the approach approved by this Court in Athuman Salim Athuman vs. Republic (2016) eKLR where the Court held that:

“Although the appellant in this case put forth his alibi defence rather late in the trial, we cannot agree with counsel for the prosecution that the alibi defence must be ignored. That defence must still be considered against the evidence adduced by the prosecution. Indeed, in GANZI & 2 OTHERS V. REPUBLIC (2005)¹

KLR 52, this Court stated that where the defence of alibi is raised for the first time in the appellant’s defence and not when he pleaded to the charge, the correct approach is for the trial court to weigh the defence of alibi against the prosecution evidence...”

51. When we do so, we reach the same conclusion as the trial court that the uncorroborated alibi accounts are overawed by the strong evidence of PW1, PW2, PW3 and PW4 which support each other materially and firmly implicate the appellants as the assailants who barbarically assaulted the deceased persons before setting their bodies ablaze.

51. In the end we are unable to fault the decision reached by the trial court and having made our earlier observations on the sentence, we now dismiss the appeal against both conviction and sentence.

DATED AND DELIVERED AT KISUMU THIS 31ST DAY OF MARCH, 2023.

HANNAH OKWENGU

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JUDGE OF APPEAL

MUMBI NGUGI

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JUDGE OF APPEAL

F. TUIYOTT

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR.

