



**Nzioki & 5 others v Republic (Criminal Appeal 24 of 2021)
[2023] KECA 333 (KLR) (17 March 2023) (Judgment)**

Neutral citation: [2023] KECA 333 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CRIMINAL APPEAL 24 OF 2021
MSA MAKHANDIA, GWN MACHARIA & WK KORIR, JJA
MARCH 17, 2023**

BETWEEN

**MUMO NZIOKI 1ST APPELLANT
DAVID MBAI 2ND APPELLANT
MWANGANGI KAKUTI 3RD APPELLANT
MUTHUI KAKUTI 4TH APPELLANT
BREINSON MUEKE 5TH APPELLANT
JULIUS KYALO WAYUA 6TH APPELLANT**

AND

REPUBLIC RESPONDENT

*(Being an appeal from the Judgment of the High Court of Kenya at Kitui
(Mutende, J.) dated 19th November, 2019 in Kitui HCCRA No. 15 of 2016)*

JUDGMENT

1. This appeal emanates from the judgment of the High Court at Kitui delivered on November 19, 2019 by Mutende, J. in Criminal Case No 15 of 2016. The appellants were charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. The particulars being that on February 9, 2015 at Kaumba Village, Katulani Division in Katulani District in Kitui County jointly with others not before court murdered Jackson Kanyalu Kisilu, hereinafter “the deceased”.
2. The appellants denied the charges, were tried, convicted, and each sentenced to 20 years imprisonment. During the trial, the prosecution called nine witnesses. According to PW1, Kimanzi Malusi, on February 8, 2015 at about 1:00am, the deceased came to his house and told him that he would explain to him his reason for coming late to his house in the morning. At about 4:00am, they were woken up



by a crowd calling out the deceased. The 4th appellant asked him to open the door and together with 2nd and 6th appellants entered house flashing torches. The 1st appellant was armed with a panga and embarked on assaulting them. They were taken towards Kaumba where it was alleged that the deceased had fought with his elder brother and gone into hiding. He managed to escape and went back to the house. Later, the 2nd appellant came and asked for the deceased's items that had been left behind. He later learnt that the deceased had been beaten to death.

3. PW2, Joshua Mutua Kisilu, on the material day at about 8:00pm, was called by his wife and told that his brothers, the 5th appellant and the deceased had fought. He went home. Some people came over, among them the 1st, 3rd, 4th and 6th appellants and discussed how to discipline the deceased for committing such an abominable act and resolved to look for him. The 5th appellant was told to go sleep while the others looked for the deceased. The 6th appellant came back and woke up the 5th appellant telling him that they had found the deceased and beaten him. He followed them and heard screams. There was moonlight and he could see the appellants clearly. The deceased had been made to sit down and they were beating him with sticks. They then took the deceased to Kaunga area and the 5th appellant was told to be the first to beat the deceased. He kicked him and the other appellants joined the fray assaulting him all over the body. This was about 6:00am thus there was light. They continued assaulting him until the police vehicle arrived and they ran away. The deceased was taken to Kitui Hospital where he was pronounced dead upon arrival.
4. PW3, Allan Kasango Solomon on the material night was asleep and when he woke up to go for a short call, he heard the 4th appellant say "we have caught him". He went to PW4's house and they decided to go check on what was happening. They found a person whose hands had been tied and made to sit down. There was moonlight and people had torches, thus he saw and recognized the 1st, 2nd, 4th and 5th appellants among them. The 1st and 3rd appellants asked the 5th appellant to confirm that the deceased was the one who had injured him. Upon confirmation, he was then told by the 4th appellant to revenge and he kicked the deceased on the chest. He also picked a stick and hit the deceased on the head. The 2nd appellant hit the left leg repeatedly until it broke. The 4th appellant had a hoe and hit the deceased on the chest. When the police officers approached the crowd including the appellants, dispersed except the 5th appellant. The deceased was taken to hospital where he succumbed to his injuries.
5. PW4, Allan Mutinda, was at home when he heard noise emanating from the river at 3:30 am with some people saying "kill". PW3, his neighbour came to his house and they decided to go and see what was happening. The deceased had been made to sit down while his hands were tied from behind. The appellants were hitting him at random. He was able to see the appellants through the moonlight and torchlight in the possession of some of the appellants. When the police came, all except the 5th appellant ran away. Later, he heard the deceased had died. He knew the appellants well as they were his relatives. PW5, APC Jonathan Bonaya attached to Nzambani Sub-County Headquarters was instructed to go to Kaumba village on rescue duties. They found the deceased lying on the ground and mentioned the people who had assaulted him being the appellants and others.
6. PW6 Dr. Patrick Mutuku carried out the postmortem on the deceased and formed the opinion that the cause of death was pulmonary arrest due to bleeding due to blunt trauma. PW7, Simon Kalumu was asleep when the 1st appellant woke him up to go look for the deceased. Outside, he found the 2nd and 4th appellants. The 1st appellant ordered him to follow them and they went to PW1's house, found the deceased and started assaulting him. The 6th appellant was sent to call the 5th appellant who came and was told to take a stick and hit him which he did. The 2nd appellant took an iron bar and broke his leg, the 4th appellant took the iron bar and broke his hands. He left and went back to sleep, and later, learnt that the deceased had died.



7. PW8, IP Alex Mwangi got a call from IP Mbundi the OCS Nzambani Police Station that an injured person had died. He went to Kaumba village and interrogated the family members of the deceased. From the scene, he went to Kitui District Hospital Mortuary and found the body of the deceased. He recorded statements, took photographs of the scene and caused the arrest of the appellants. PW9, IP Nicholas Mulei, processed and prepared 10 photographic prints which he produced in evidence.
8. Placed on their defence, the appellants gave sworn testimonies and called two witnesses. The 1st appellant stated that on the material day he was called by the deceased's wife who told him that her husband had been stabbed by the deceased and he should help look for him. He went to the deceased's homestead and found many people and joined the group looking for the deceased. He denied assaulting the deceased. Instead, he was protecting him from the crowd who wanted to lynch him but he was overwhelmed. The crowd picked stones and stoned him to death.
9. The 2nd appellant testified that on the material night at 4.00am Kimanzi Maluki came calling and asked him to go and rescue the deceased who was being beaten. He went and found him lying down, seriously injured. He denied assaulting the deceased as he found him already assaulted. The 3rd appellant testified that he heard screams and went to the 5th appellant's house and found him injured. He and the 6th appellant took him to hospital. He was not present when the deceased was assaulted but was asleep.
10. The 4th appellant testified that he was at home when he heard noise. People were taking the deceased to the village elder. He denied assaulting the deceased. The 5th appellant testified that on the material night he got home drunk when his brother, the deceased all of a sudden hit him, saying he would kill them. He could not hit back due to his drunken stupor. He later found himself in hospital where he was treated and discharged. He thereafter returned home and slept until morning. He did not assault his brother as alleged. The 6th appellant on the other hand stated that he got a call from the wife of the 5th appellant telling him that the 5th appellant had been injured. He helped take him to hospital and went to sleep till midday the next day.
11. DW7, Celestina Wambua Mbotela testified that on the material night, she heard screams and went with other people and found the 5th appellant injured. He was taken to hospital and she went back home. Later, she heard screams again and went to see what was happening. She found many people with the deceased lying on the ground, but did not see any of the appellants thereat. DW8, William Willy Odida testified that at 4.00am, he heard noise and went outside and saw people assaulting the deceased with stones but he did not identify any of those people.
12. The trial court after considering the evidence as presented, found as already stated, the appellants culpable, convicted them and sentenced each one of them to 20 years imprisonment.
13. Dissatisfied with the judgment, the appellants preferred this appeal on six grounds, to wit: that the trial court erred in law by failing to find that the key ingredients of the offence were not proved; wrongly invoking the doctrine of common intention; failing to find that crucial witnesses were not procured to testify; wrongly admitting photographs of the alleged scene of crime; rejecting the appellants' plausible defence; and lastly, meting out harsh and excessive sentence.
14. In their written submissions, the appellants stated that their identification was not free from possibility of error. Reliance was placed on the case of *Paul Etole & Another v Republic* [2002] eKLR for the proposition that the court should warn itself of the special need for caution before convicting an accused on evidence of identification. That the intention to harm the deceased by the appellants was not demonstrated. If anything, the facts show that it was a case of mob justice. That the trial court erred in holding that the appellants acted with common intention to cause the death of the deceased, further, malice aforethought could not be inferred from this borderline circumstances. None of the



ingredients for the offence of murder were proved. That crucial witnesses were not called being one Maluki and the deceased's wife. The appellants relied on the case of *Bukenya and Others v Uganda*, [1972] EA 549 to buttress the fact that the prosecution must make available all witnesses necessary to establish the truth, even if their evidence may be inconsistent with the prosecution case, failing which, the court may draw adverse inference. It was submitted that the case arose from family feud and the appellants could have been fixed to settle family scores. The investigating officer was not a gazetted crime scene officer thus he was not qualified to take photographs of the scenes of crime. Lastly, that the imprisonment of 20 years was undeserving and manifestly excessive.

15. The respondent in opposing the appeal submitted that the evidence adduced by the prosecution in a nutshell was that the deceased was assaulted by a group of known people who included his family members. In the course of the investigations, the six appellants were positively identified as part of the members of the group who were instrumental in planning and actually executing the fatal attack on the deceased. The earlier meeting, they held to hatch a plan to punish the deceased and the actual lethal beating of the deceased for several hours makes all the appellants criminally culpable. Further, mens rea was proved beyond reasonable doubt as all the appellants had the common intention to cause death or at least grievous harm.
16. A postmortem on the body of the deceased was conducted by PW6 who formed the opinion that the cause of death was cardio pulmonary arrest due to a head injury and hemothorax due to blunt trauma. PW6's findings that the deceased sustained multiple bruises on both the lower limbs, fracture of the right upper 1/3 of the tibia/ fibula bone with an open wound multiple deep cuts on the skull were consistent with the manner in which the deceased was battered as per the testimony of eye witnesses. There was a common intention among the appellants that was proved beyond reasonable doubt in terms of section 21 of the Penal Code. The case of *Wanjiro d/o Wanerio v Republic* 22 EACA 52 was referred to, for the proposition that common intention generally implies a premeditated plan, but this does not rule out the possibility of common intention developing in the course of event.
17. Further, malice aforethought on the part of all the appellants was proved beyond any reasonable doubt. The evidence adduced by the prosecution witnesses sufficiently proved the ingredients set out section 206(a), (b) and (c) of the [Penal Code](#), as the appellants not only had an intention to cause the death of or to do grievous harm to the deceased but it was also clear that they hatched a plan to commit a felony.
18. This is a first appeal. As a first appellate court, we are entitled to have our own considerations and views of the evidence as a whole and arrive at our own conclusions, but always bearing in mind that we neither saw nor heard the evidence by the prosecution witnesses. In that regard, we have to give premium to the trial court's findings on facts. Further, we are also reminded that when it comes to a question arising as to which witness should be believed rather than another, and that question turns on the manner and demeanor of such a witness, we must be guided by the impressions made by the trial court which saw and heard the witnesses as they testified. See *Pandya v Republic* [1958] EA 336.
19. We have considered the record, in the light of the rival submissions, and principles of law and case law relied upon by the appellants and the respondent. In our view, the issues that fall for our consideration are whether: the ingredients of the offence were proved; the element of common intention met the requisite threshold; failure to call certain witnesses was detrimental to the appellants' case; the appellants' defence was considered, and lastly, whether the sentence imposed was harsh and excessive in the circumstances.
20. On the first issue, the trial court in its judgment stated that the prosecution was duty bound to prove beyond reasonable doubt: the fact of death; cause of death; the death having been perpetrated by the appellants; and, whether it was committed with malice aforethought. There is no doubt that the



death of the deceased and its cause was proved by PW1, PW2, PW3, PW4, and PW6, the doctor who performed postmortem on the body of the deceased and formed the opinion that the cause of death was cardio pulmonary arrest due to a head injury and hemothorax due to blunt trauma.

21. As regards proof that the appellants committed the unlawful act which caused the death of the deceased, eye witnesses who were at the scene including PW1, PW2, PW3, PW4 among others, confirmed that the deceased was assaulted by the appellants and sustained injuries that he subsequently succumbed to. From the record, PW1, was awoken up by 4th appellant and when he opened the door, he saw the 1st, 4th and 6th appellants amongst other people who forced the deceased out of his house. Later on, the same day and at 7.00 a.m, the 2nd appellant went to collect the deceased's items. The planning of the commission of the offence was revealed by PW2, a brother of both the deceased and the 5th appellant, who testified that he was at home when a meeting was held and a resolution made to discipline the deceased. He recognized the 1st, 3rd, 5th and 6th appellants amongst those in the meeting, and when they returned the second time at midnight the 4th appellant was with them. At the point of the deceased being assaulted in the wee hours of the morning, he identified all the appellants taking part in the unlawful act. These were people who were well known to the witnesses as they were relatives and lived in the same community. That notwithstanding, it was clear from the record that PW1 was aided by moonlight and light from torches to see the appellants.
22. The evidence of PW1 was corroborated by PW2 to the extent that in the wee hours of the morning as the deceased was being given a final blow, PW2 recognized the 1st, 2nd, 4th and 6th appellants among the perpetrators. Indeed, he had been with them all along when they went in search of the deceased. PW2 also confirmed that at the scene of crime, the 5th appellant granted permission to the other appellants to embark on assaulting the deceased.
23. The offence was committed over a long period of time, until the wee hours of the morning. During the night, there was moonlight as well as torches that assisted the witnesses recognize the appellants. In the morning, when the appellants were giving the deceased the final blows, there was sufficient sunlight that enabled the witnesses again to recognize the appellants in the act. The appellants were persons well known to the witnesses. There is therefore no possibility of mistaken identity contrary to the submissions of the appellants.
24. We turn to the last limb, whether there was proof that appellants had malice afterthought when they inflicted the injuries that resulted in the death of the deceased. Section 206 of the Penal Code defines malice aforethought as an intention to cause the death of or to do grievous harm to any person, knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, an intent to commit a felony and an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.
25. The importance of proving malice aforethought in a murder case was explained in the case of *Roba Galma Wario v Republic* [2015] eKLR where the court held that:

“For the conviction of murder to be sustained, it is imperative to prove that the death of the deceased was caused by the appellant; and that he had the required malice aforethought. 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.”
26. In this case, the appellants held a meeting to plan how to discipline the deceased. Thereafter, they mounted a search for him who had taken refuge in PW1's house. They forcefully removed him from the house, set upon him with all manner of crude weapons leading to fatal injuries



detailed in the post mortem report by PW6. It was premeditated. At some point they even threatened to set him ablaze before the police intervention. If this is not manifestation of the worst form of malice aforethought, then we do not fathom what else it is.

27. As regards whether failure to call certain witnesses was detrimental to the appellants' case, this Court dealt with the said issue in the case of *Sabali Omar v Republic* [2017] eKLR where it was stated thus:

“Section 143 of the *Evidence Act* provides that: -

“No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact.”

The principle used to determine the consequences of failure to call witnesses was succinctly stated in *Bukenya & Others v Uganda* (1972) E. A549, where the court held that: -

- i. “The prosecution must make available all witnesses necessary to establish the truth even if their evidence may be inconsistent.
- ii. That court has the right and duty to call witnesses whose evidence appears essential to the just decision of the case.
- iii. Where the evidence called is barely adequate, the court may infer that the evidence of uncalled witnesses would have tended to be adverse to the prosecution.”

28. The prosecution therefore have a right to decide which witness to call. However, should the prosecution fail, to call witnesses otherwise crucial to the case, then the court has the mandate to summon those witnesses. Should the said witnesses fail to testify and the hitherto adduced evidence turns out to be insufficient, only then shall the court draw an adverse inference against the prosecution. This is because the prosecution is not obliged to call a superfluity of witnesses, but only such witnesses as are sufficient to establish the charge beyond reasonable doubt. See *Keter v Republic* [2007] I E. A. 135.

29. In the instant case, the testimony and evidence adduced by the prosecution witnesses was sufficient. There was no need of calling other eye witnesses to the offence to come and repeat the same evidence. We doubt whether the deceased's wife or Mr. Maluki's evidence would have testified to anything different. The evidence was not bare or insufficient as to attract the adverse inference.

30. The doctrine of common intention is found in section 21 of the *Penal Code* which states thus:

“When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence.”

The doctrine was explained by this Court in the case of *Dickson Mwangi Munene & Another v Republic* [2014] eKLR thus:

“This provision has been interpreted and the doctrine of common intention dealt with by our courts in several cases. In *Solomon Mungai v Republic* [1965] E.A. 363, the predecessor of this Court held that in order for this section to apply, it must be shown that the accused had shared with the other perpetrators of the crime a common intention to pursue a



specific unlawful purpose which led to the commission of the offence charged.” [Emphasis supplied]

The ingredients of common intention were enunciated in *Eunice Musenya Ndui v Republic* [2011] eKLR as follows:

1. There must be two or more persons;
 2. The persons must form a common intention;
 3. The common intention must be towards prosecuting an unlawful purpose in conjunction with one another; and
 4. An offence must be committed in the process.
31. It is clear from the evidence that the appellants had a preparatory meeting in which they agreed to teach the deceased a lesson for having fought and injured his elder brother, the 5th appellant. Thereafter, they moved in a group as they looked for the deceased, and they would communicate to get each other from their respective homes. The intent of finding the deceased was common among all appellants, as they wanted to harm him, and which they did. They pulled the deceased out of PW1’s house where he had taken refuge, set upon and beat him to death. Each of the appellants in one way or another, assaulted the deceased. Indeed, it was the 1st appellant who set the ball rolling by kicking the deceased in the chest. He thereafter invited the other appellants to enter the fray leading to the death of the deceased. The ingredients of common intention as enunciated in the case of *Eunice Musenya Ndui* [supra] were met. The appellants’ defence that they were mere onlookers who found the deceased being beaten by a mob has no basis at all to stand on.
32. As regards whether their defence was considered, we have gone through the judgment of the trial court wherein it is stated:
- “Although the Accused persons denied having assaulted the deceased their explanation that they were present to either assist or as onlookers, evidence adduced by the Prosecution as to how they participated in committing the unlawful act was overwhelming.”
33. We cannot begrudge the trial court for reaching such conclusion, given the prosecution evidence which placed them at the scene and the roles played by each appellant in the saga. Their defences were therefore rightly rejected. The upshot of all the above is that, the appellants were properly convicted. There is no basis for us to interfere or disturb the conviction of each of the appellants.
34. As regards the sentence, we are not convinced that the sentence of twenty years imposed on each appellant was harsh and excessive considering the way they caused the death of the deceased.
35. We find no merit in this appeal, which is accordingly dismissed in its entirety.

Dated and delivered at Nairobi this 17th day of March, 2023.

ASIKE-MAKHANDIA

.....

JUDGE OF APPEAL

G. W. NGENYE -MACHARIA

.....

JUDGE OF APPEAL



W. KORIR

.....

JUDGE OF APPEAL

I certify that this is a True copy of the original

Signed

DEPUTY REGISTRAR

