



REPUBLIC OF KENYA



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**Walta & another v Republic (Criminal Appeal 67 of 2021)
[2023] KECA 763 (KLR) (22 June 2023) (Judgment)**

Neutral citation: [2023] KECA 763 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CRIMINAL APPEAL 67 OF 2021
AK MURGOR, S OLE KANTAI & PM GACHOKA, JJA
JUNE 22, 2023**

BETWEEN

CHRISTOPHER WALTA 1ST APPELLANT

LEONARD LANGAT 2ND APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal against the Judgment of the High Court at Kitui
(L.N. Mutende, J.) delivered on 31st July 2018 in HCCC No. 62 of 2015)*

JUDGMENT

- 1 In the information that was before the High Court at Kitui, the appellants, Christopher Walta and Leonard Langat were charged with the offence of murder contrary to section 203 as read together with section 204 of the [Penal Code](#).
- 2 The particulars of the offence were that on May 1, 2014 at about a.m. at Nzangathi AP Camp, Kyalele Location in Kitui County, the appellants murdered Mwangangi Mwanzui (deceased).
- 3 They pleaded not guilty to the charge, and the matter proceeded to trial, where the prosecution called 10 witnesses. The appellants were placed on their defence, and upon considering the evidence, the trial judge convicted them for the offence of manslaughter contrary to section 202 as read with section 205 of the [Penal Code](#) and sentenced them to serve 7 years' imprisonment.
- 4 The appellants were aggrieved by the decision, and filed this appeal, on grounds set out in a Memorandum of appeal; that they were not accorded a fair trial in accordance with section 50 (2) of [the Constitution](#); that the learned judge wrongly convicted them on hearsay contradictory evidence that was never proved beyond reasonable doubt, and failed to critically evaluate and analyze the evidence that was tendered by family members and which evidence was tainted by glaring contradictions, and



in failing to find that the prosecution did not prove its case to the required standards to support a conviction, and by failing to find that the doctrine of common intention was never established as envisaged under section 21 of the *Penal Code*.

5 The appellants filed written submissions, and when the appeal came up for hearing on a virtual platform, learned counsel Mr. E. Asitiba appeared for the appellants and briefly highlighted the submissions. Counsel submitted that, on the description of the weapon that was allegedly used to assault the deceased, Raphael Mburu PW5 the Chief testified that, there were two whips; a plastic whip and a rubber whip; that one of the whips was broken and short and the other whip was broken. Nzule Mutua PW 6 of ‘Nyumba Kumi’ on the other hand testified that the deceased was beaten with a stick like one cut from a tree; that these were a grave contradiction by prosecution witnesses on the description of the alleged weapon that caused his death.

6 It is further submitted that if there was a murder, the cause or circumstances leading to the offence required to have been established beyond any reasonable doubt so as to support or sustain a conviction and that the prosecution failed to establish the case; that the chain of events exposed fatal gaps in the prosecution’s case since there was no sufficient evidence that showed that the appellants were responsible for the death of the deceased; that no common intention was established.

7 Furthermore, the appellants tried to give the deceased glucose therefore they cannot be said to have had the intention to either kill or cause grievous harm to the deceased, a fact that the learned judge acknowledged.

8 In rebuttal, Ms. Matiru , learned prosecution counsel for the State, submitted that although all the witnesses were relatives, and the evidence they adduced was cogent and consistent; that the appellants ought to have restrained themselves from whipping the deceased to death; that the post- mortem report showed that the injuries were linked to his death. It was submitted that the trial was fair and that common intention was proved in the nature of the beating. Counsel concluded by asserting that the court was fair in reducing the charge to manslaughter.

9 This is a first appeal. The duty of a 1st appellate court was well articulated by this court in the case o *Erick Otieno Arum vs Republic* [2006] eKLR that;

It is now well settled, that a trial court has the duty to carefully examine and analyse the evidence adduced in a case before it and come to a conclusion only based on the evidence adduced and as analyzed. This is a duty no court should run away from or play down. In the same way, a court hearing a first appeal (i.e.) a first appellate court) also has a duty imposed on it by law to carefully examine and analyze afresh the evidence on record and come to its own conclusion on the same but always observing that the trial court had the advantage of seeing the witnesses and observing their demeanour”.

With reference to the foregoing, we consider that the issues for our determination are;

- i. Whether the Prosecution proved its case to the required standards;
- ii. Whether common intent was established beyond reasonable doubt to warrant a conviction of murder
- iii. whether there were contradictions and discrepancies in the prosecution witnesses’ evidence and
- iv. whether the evidence adduced against the appellants was sufficient to sustain their conviction.

10 So as to enable us reanalyse and reevaluate the evidence as is our duty, it is of necessity that we set out the evidence that was before the trial court. Ruth Mwanzia, (PW1) , the mother of the deceased had



- disagreed with him because he was stealing her crop harvests. She decided to take him to Nzangathi AP Camp so that he could be counselled on good behaviour.
- 11 Upon arrival at the AP Camp, the police took the deceased into custody. He was handcuffed and beaten with whips. Ruth stated that the appellants beat the deceased with whips from 9.00 am to 12.00 pm and when she told them to stop beating him, they ignored her and continued. She said they also stepped on him until he lost consciousness, succumbed to his injuries, and died.
 - 12 Ruth further stated that when the appellants noticed that the deceased had lost consciousness, they asked her to get a motor vehicle and take him to hospital, but the deceased was unable to stand up. She identified the appellants as the police officers who had beaten her son.
 - 14 On cross-examination, she stated that the deceased had been stealing her crops for over 5 years. She had previously reported the theft to the village elders, chairman of their clan, and area Chief. A Community Policing agent known as Mutema Matheka and his brother were involved in arresting the deceased who was known to be violent and had to be restrained with ropes. She denied that the deceased was taken to the Administration Police Camp after being assaulted, or that the appellants declined to take the deceased into their custody as he was already injured. She concluded that the deceased passed on while outside the AP Offices after the appellants gave him glucose to lick but he could not swallow it.
 - 15 On April 30, 2014 at about 4.00 pm, Josiah Muema Muthuka, (PW2), a cousin of the deceased received a complaint from Ruth that the deceased had stolen food crops from her and had gone to sell them. The following day, together with Ruth and the deceased's elder brother, one Mutua they restrained the deceased, who had a history of violence, with ropes and took him to the Administration Police Camp. They found the appellants at the camp and handed over the deceased to them. The deceased was handcuffed and taken inside the office. Through the window, he saw the deceased being beaten by the two (2) appellants for about two (2) hours. On realizing that the deceased was in a bad state, the 1st appellant carried him outside the office. They were told to buy the deceased glucose, but by the time it was brought, it was too late as he was unconscious and later passed on. He stated that the appellants ran away upon realising that the deceased had died. The body was taken away from the scene and the appellants were later arrested.
 - 16 In cross examination, he confirmed that the family had not beaten the deceased before taking him to the AP Camp; that they had tied him up because they were afraid that he would run away. He stated that he saw the appellants beating the deceased with a whip; that he was not involved in the death of the deceased.
 - 17 Dr. Patrick Mutuku, (PW3), conducted the autopsy on the body of the deceased. He stated that the deceased's body was identified by his sister and Munyao Mbungu, (PW4); that after examining the body, he observed that the deceased's external body was bruised on the left region of the face, the left upper limb was swollen on the shoulder with a large bruise on the forearm.
 - 18 Further, there were internal bruises in the scrotum and that he formed the opinion that the cause of death was due to cardiopulmonary arrest due to possible shock due to severe pain.
 - 19 In cross examination, he confirmed that he saw fresh bruises on the body and that a blunt object could have caused those injuries. He stated that he did not notice any black marks on the body, nor did he see bruises on the ribs, back or buttocks.
 - 20 In re-examination, he confirmed that the injuries were on the face, arms and scrotal area and that he opined that a blunt light object could have caused those injuries.



- 21 Raphael Mbuvi, (PW5) , or Chief of Kyalele, stated that on 1st May 2014 at about 11.00 am, he had sent for the deceased who had allegedly stolen food crops from his mother Ruth; that he initiated the arrest of the deceased, and was at the AP Camp where the deceased was taken. As he presided over another case, the deceased was taken into the office of the District Officer where he was beaten by both appellants. At 2.30 p.m. he learnt of the deceased's demise. He reported the matter to the OCPD who had the deceased's body collected from the scene and, the witnesses also recorded statements.
- 22 Nzule Mutua, (PW6), of 'Nyumba Kumi' initiative participated in the arrest of the deceased, and that the appellants received the deceased, and took him into a room where they beat him with what looked like a stick cut from a tree. She stated that she saw all this through the window; that the deceased started screaming and Ruth and the Chief told them to stop, but they kept on beating him upto 1.00 pm before carrying him away; that the 1st appellant walked out of the room holding the deceased; that she heard the deceased asking for water and they were told to get him glucose. After the deceased took the glucose and water, he complained of a stomach ache and soon thereafter passed on.
- 23 Mutua Mwanziu, (PW7), a brother of the deceased took the deceased to the D.O's office with his hands tied up; that from 30 metres away, he saw the appellants beating the deceased with whips; that the deceased started screaming and that Ruth and the Chief requested the appellants to stop but they continued beating him; that he went into the room where the appellants were beating the deceased and, that was when they left him and led him out; that the deceased could not swallow the glucose that was offered to him and the appellants asked them to take the deceased home; that as they walked home a few meters away from the camp, the deceased passed away.
- 24 Monica Salim, (PW8), stated that she followed her family members to the AP camp, upon hearing that the deceased had been apprehended. She witnessed the appellants assaulting the deceased with rubber whips; that the appellants took turns beating the deceased despite being told to stop by Ruth and the Chief. When they took him outside, he was unstable and could not walk properly. He was thirsty, and asked for water which he was given. She prayed for him and he died.
- 25 Corporal Livingstone Katui, (PW9), of Scenes of Crime Support Section visited the scene on 1st May 2014 and took photographs which he adduced in evidence. He stated that the body of the deceased lay outside the building but within the camp and was covered with a 'leso.'
- 26 IP Peter Munene, (PW10), investigated the case and charged the appellants. He testified that he viewed the deceased's body and noticed that it had no injuries. He stated that he took the witness statements, and took the body to the mortuary, and then arrested the Appellants.
- 27 In his defence, the 1st appellant denied having committed the offence. He stated that on the material date, he was on duty at the Nzanghati Division, where he worked until 10.00 a.m, when he left to go to the shopping center. While there, he got a telephone call from, the Chief, informing him that he was required at the camp, as a suspect had been taken there following allegations of stealing. He returned to the station and found the person whose hands had been tied with sisal ropes. The complainant was stated to be the suspect's mother. The suspect who sat under a tree outside the office said he was in pain and asked for water to drink. He advised the people to take him to the hospital. He saw people giving him milk at the gate and at the bus stage, then the people turned back and brought him to the precincts of their offices saying that the person seemed to have passed on. They put him on the ground. He rang the Chief Inspector of AP, Nzambani Sub-County (The District Administration AP Commander) and reported the incident. The OCPD, Nzambani, came to the scene at 4.00 p.m. and recorded statements from them. He ordered the appellants to leave the station and continue discharging their duties from the Sub-County Headquarters. Three (3) months later, they were arrested and subsequently charged them.



- 28 The 2nd appellant in his defence similarly denied having committed the offence. He stated that while on duty as a Sentry Officer, he saw a group of people. One of them was restrained with sisal ropes. The person was alleged to have assaulted his mother and was also a thief. The only person he knew in the crowd was the Chief, Raphael Mbuvi. He interrogated the suspect who said he was in pain. He held his abdomen as he asked for water. He stated that the 1st appellant had gone to the market, and the Chief rang him to come and attend to the complaint; that the suspect was frail. He was thereafter handed over to the 1st appellant. The people were advised to take him to hospital, due to his condition; that the person was not taken into custody but on walking a distance of 50 metres, he fell down. He was carried back to the camp, where he died. The people alleged that they caused the death of the deceased. They were re-deployed and charged after three (3) months.
- 29 It suffices to restate the various elements of the charge that the prosecution ought to prove beyond reasonable doubt so as to render a conviction for the offence of murder. Section 203 of the Penal Code provides for the ingredients of the charge of murder which are; i) the fact and cause of death of the deceased person; ii) that the death of the deceased was as a result of an unlawful act or omission on the part of the accused person; and iii. that such unlawful act or omission was committed with malice aforethought. These ingredients were aptly stated by this court in *Roba Galma Wario vs Republic* [2015] eKLR thus; 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.”
- 30 In this case, there is no doubt that the deceased died. This was proved by Dr. Patrick Mutuku, PW3, the pathologist who conducted post-mortem on the body of the deceased and produced a post-mortem report establishing the cause of death as cardiopulmonary arrest due to possible shock due to severe pain. Having established the fact and cause of death of deceased, the next issue is whether the appellants caused the death of the deceased.

The trial judge held;

The only reasonable conclusion I can therefore draw is that the injuries were sustained following the thorough beating. Evidence on record points to the Accused persons as the ones who acted unlawfully by assaulting the Deceased. The shock that he suffered was a result of the severe pain occasioned by the Accused persons.”

- 31 The evidence adduced by the prosecution witnesses was that they saw the appellants beating the deceased, and that he passed on shortly after he was assisted out of the room where they were beating him. Ruth, PW2, PW 4, and PW 5 were all eye-witnesses who testified. They emphatically stated that they saw the appellants continuously beating the deceased with whips. They clearly indicated that there were no intervening factors that might have caused his death; that it was the continuous and sustained assault that led to his death.
- 32 The appellants’ defence was that the deceased was beaten up by neighbours before he was taken to the AP camp. They denied beating him and stated that they strongly advised the family to take him to the hospital. But the evidence demonstrated otherwise. The deceased walked into the camp with his hands tied. The appellants affirmed that the Chief was present when Ruth accompanied by PW2 and PW6 went to the camp with him. If he was unwell, the Chief would have noticed. Instead, he testified that he saw the appellants beating the deceased, and despite having severally ordered them to stop, they refused.
- 33 With respect to whether the case fell within the scope of the doctrine of common intention formed by the two appellants, section 21 of the Penal Code provides the relevant guidance thus;



When two or more persons from 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.”

34 Pursuant to this provision, the cases of *Njoroge vs Republic* (1983) KLR 197 and *Solomon Munga vs Republic* (1965) EA 363 where the elements of common intention were set out thus;

If several persons combine for an unlawful purpose and one of them kills a man, it is murder in all who are present whether they actually aided or abated or not, provided that the death was caused by act of someone of the party in the course of the endeavours to effect the common object of the assembly.”

35 These elements for the application of the doctrine of common intention were adopted by this court in the case of *Stephen Ariga & another vs Republic* [2018] eKLR, as established in *Eunice Musenya Ndui vs Republic* [2011] eKLR thus:

- 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;
4. An offence must be committed in the process;
5. The offence must be of such a nature that its commission was a probable consequence of the prosecution of the unlawful purpose”.

36 In the instant case, the doctrine of common intention was applicable because with respect to the first ingredient, there were two appellants. On the second, they were both seen beating the deceased, third, a common intention was formed in the course of beating the deceased, and on the last two ingredients, the unlawful act resulted to his death. As found by the learned judge and we agree, a common intention between the appellants was properly established.

37 When the above findings are considered together, it is our view that the deceased died from a thorough beating by the appellants, who formed a common intention to beat him so as to teach him a lesson or two. The beating resulted in the deceased sustaining serious injuries which were confirmed by the medical report. The injuries lead to the deceased death. In the result, we adopt the trial judge’s conclusion that the prosecution evidence sufficiently proved that the appellants caused the death of the deceased.

38 Having so found, the central question in this appeal is whether by severely beating the deceased, the appellants intended to kill him or cause him grievous harm. In other words, whether the appellants had the requisite malice aforethought.

The trial judge took the view that;

The circumstances of this case are that, the Deceased was a suspect who was handed over to the accused persons. The individual was a habitual thief, who was chaotic at home, ever offending his mother, PW. 1. The accused persons decided to correct his behaviour by beating him. And on realising that he was becoming weak, they panicked, and even caused him to be given glucose to ensure he had the necessary energy. These were not people who could be stated to have had the intention to either kill or cause grievous harm to the Deceased, malice aforethought was absent.



39 I therefore find them guilty of manslaughter contrary to section 202 as read with section 205 of the Penal Code and accordingly convict them”.

40 Section 206 of the Penal Code provides the circumstances from which malice aforethought can be inferred in the following terms;

- (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.”

41 As to whether malice aforethought to kill the deceased was established when the appellants’ beat him with a whip, this Court considered similar circumstances in the case of Bonaya Tutu Ipu & another vs Republic [2015] eKLR and observed:

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 Chesakiv 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. Earlier in REX v Tubere s/ oOchen (1945) 12 EACA 63, the former Court of Appeal for Eastern Africa stated thus on the issue:

“It (the court) has a duty to perform in considering the weapon used and the part of the body injured, in arriving at a conclusion as to whether malice aforethought has been established, and it will be obvious that ordinarily an inference of malice will flow more readily from the case, say, of a spear or knife than from the use of a stick...”

42 PW1 testified that she took the deceased to the police for discipline and counselling because he was incessantly stealing her food crops. With this background, the appellants intended to discipline him through a thorough beating so that he would reform from this unsocial conduct. They requested for glucose and gave him water when they realised that they had gone too far. The circumstances of this case do not point to the appellants’ intention to kill the deceased. As was the learned judge, we too are not persuaded that malice aforethought was established. The deceased’s death was unintended, and we are therefore satisfied that the learned judge was right in finding that the appellants were guilty of manslaughter. As such, we uphold the conviction on manslaughter.

43 On the inconsistencies and contradictions alleged to have made up the prosecution’s case, this court stated in the case of Philip Nzaka Watu vs Republic [2016] eKLR that:

However, it must be remembered that when it comes to human recollection, no two witnesses recall exactly the same thing to the minutest detail. Some discrepancies must be expected because human recollection is not infallible and no two people perceive the



same phenomena exactly the same way. Indeed, as has been recognised in many decisions of this court, some inconsistency in evidence may signify veracity and honesty, just as unusual uniformity may signal fabrication and coaching of witnesses. Ultimately, whether discrepancies in evidence render it believable or otherwise must turn on the circumstances of each case and the nature and extent of the discrepancies and inconsistencies in question”.

44 A reassessment of the evidence shows that there are no contradictions or discrepancies that go to the root of the prosecution’s case against the appellants. In as much as there were discrepancies, for instance, the differences in time and description of the murder weapon as perceived by the witnesses, they are minor and incapable of vitiating the prosecution’s evidence. We are satisfied that they did not, and in the circumstances, this ground fails.

45 In sum, the appeal is unmerited and is dismissed in its entirety.

46 It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 22ND DAY OF JUNE, 2023.

A.K. MURGOR

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JUDGE OF APPEAL

S. OLE KANTAI

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JUDGE OF APPEAL

M. GACHOKA, CIArb, FCIArb

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Singed

DEPUTY REGISTRAR

