Kea & 2 others v Republic (Criminal Appeal 35,36 & 37 of 2020) [2023] KECA 817 (KLR) (7 July 2023) (Judgment)

Neutral citation: [2023] KECA 817 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MALINDI

CRIMINAL APPEAL 35,36 & 37 OF 2020

SG KAIRU, P NYAMWEYA & GV ODUNGA, JJA

JULY 7, 2023

BETWEEN

MWALIMU KEA ..... 1ST APPELLANT

ZIRO WANJE ALIAS SHIDA MKUTANO ..... 2ND APPELLANT

GARAMA KEA ..... 3RD APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the judgment of the High Court of Kenya at Malindi (Chitembwe, J.) dated and signed on 17th April 2018 and delivered by Korir, J. on 19th July 2018 in High Court Criminal Case No. 21 of 2015)

JUDGMENT

1. The appellants, Mwalimu Kea, Ziro Wanje alias Shida Mkutano and Garama Kea, alongside Nyundo Mwamure Thoya (who was acquitted by the High Court) were charged with the offence of murder contrary to Section 203 as read with Section 204 of the *Penal Code*. The particulars of the offence being that on the night of 22nd October 2015 in Malindi Sub-County within Kilifi County, jointly with others not before the court murdered ZM.

2. The prosecution case was that during the evening of 22nd October 2015, ZM, deceased, was at his home with his family. There was a knock at the door. The deceased opened the door and there stood a person by the name Bahati, accompanied by another by the name Safari Iha as well as the appellants, among other persons. Bahati accused the deceased of bewitching a person by the name B. Claiming that they were taking the deceased to a local doctor to check if he (the deceased) was a witch, they escorted him away to the home of the 2nd appellant, ZW alias SM, where the said B who was allegedly bewitched by the deceased was to be found. There, the said B, who was apparently sick, was brought outside the

house, and the deceased was challenged to cleanse and heal him. The deceased denied the allegation that he had bewitched B. An assault on the deceased commenced. He attempted to ran away and was pursued and apprehended. He was set on fire and burnt to death.

3. It was the prosecution case that the appellants were amongst those who assaulted and murdered the deceased. The main prosecution witnesses of fact to the incident were the deceased's own family members. The wife of the deceased, NM (PW1) and his children MZM (PW2), BZM (PW3), and PY (PW4). The testimony of the four of them was that on 22nd October 2015, at about 7.00 p.m. they were at home having taken dinner when some people, amongst them the appellants, visited. PW2 put it as follows:

> " ...some people came to our home. They were Bahati Mwamure Thoya, Safari Iha, Shida Mkutano, Mwalimu Kea and Garama Kea. I knew these ones."

4. PW2 went on to state that Bahati knocked on their door and the deceased went outside and they also followed him outside whereupon Safari Iha started interrogating the deceased accusing him of having bewitched one B who was said to be on his death bed; that Safari Iha held the deceased and took him to Shida Mkutano's home where the said B, the son of Bahati, was; that the sick B was brought outside the house and made to sit on a chair; that a water jag/jerican was filled with water and handed over to the deceased who was then ordered to "treat the water and give it to B"; that the deceased stated that he had nothing to say maintaining that he had not made any allegations that B would die; that Bahati then slapped the deceased and ran away; that one boy threw a stone aimed at the deceased, missed the deceased and caught PW2 who was holding the deceased and injured her on the head and she had to be taken to hospital; that the deceased started running but was apprehended, assaulted and later burnt. PW2 stated further that:

> " The four accused were also assaulting my father. They had sticks. 1st accused hit my father on the back. 2nd accused had a stick. All of them had sticks and they were hitting my father. This was before I was taken to hospital."

5. She later attended two identification parades where she identified the four accused persons as the persons who had visited the home of the deceased on the night of 22nd October 2015 and who had assaulted the deceased.

6. NM (PW1), the wife of the deceased testified that on 22nd October 2015 at about 7.30 p.m., she was at home with her husband, the deceased, when there was a knock at the door. She followed her husband as he went to open the door and there was one Bahati who asserted that the deceased "was the one bewitching B". The deceased denied stating that he was ready to go to the village elder or sub-chief to disprove the allegation, whereupon, in her words:

> " Bahati held the deceased's hands. Safari Iha came and asked my husband if he knew him. There was Garama, Shida and Nyundo plus Safari Iha. They took my husband saying they were taking him to a local doctor to check if my husband is a witch. I went with them."

7. She stated further that on reaching B's home, which she said was about 300 to 400 meters away, she and the deceased were accused of practicing witchcraft and were pushed inside the house; that:

> " They started slapping my husband. Shida, Nyundo, Bahati and Safari Iha were the ones slapping my husband. Shida is in court, Mwalimu Kea is also in court, Garama and Nyundo are also in court...I know all the accused. They are my neighbours. There was moonlight.

They also had sticks and were using them to hit the deceased. I was held and taken out of the house. There were many people at the scene. I went to my brother in law-Charo".

8. She went on to say that Safari Iha, Shida, Mwalimu Kea and Garama Kea then took the deceased saying they were taking him to his house and on the way assaulted him. That she could see them assaulting the deceased from her brother in law's place. That, "they killed my husband and burnt his body. They cut his body into pieces and burnt it". That her children, MZM, A, BZM and PY were at the scene.

9. She maintained, under cross examination, that although it was at night, she could see and identify the appellants whose names she reiterated including their respective occupations. She clarified that it was to Shida's house, and not Bahati's where they had been taken and that all the appellants assaulted her husband.

10. The testimony of the other children of the deceased, BZM (PW3), a form four student, and PY(PW4), a form two student, to a large extent echoed the evidence of PW2. They were at home on 22nd October 2015 at about 7.30 p.m., after dinner when there was a knock at the door. Amongst those they identified at the door were the appellants. PW3 and PW4 accompanied the deceased, and the appellants to Ziro Wanje's home where the deceased was supposed to cleanse or heal the sick person he had allegedly claimed would die. There, they stated, the deceased was given a jag of water by Ziro "so that he could traditionally heal the sick" after which the deceased was to be escorted home. PW3 narrated that:

> "While walking on a murram road, they started hitting him with sticks and stones. Ziro Wanje, Bahati Mwamure, Nyundo Thoya, Garama and Mwalimu were assaulting my father. Ziro Wanje had a fimbo/stick and hit my father on the head. I was just next to my father. Ziro Wanje also hit my father with stone. Garama hit my father with stones on the back. Mwalimu Keya had stones. Nyundo Thoya had a fimbo and hit my father."

11. She stated that her father ran for about twenty meters and fell; that he was following them running and tried to intercede but was ignored; that the deceased was dying and a person known as Lemi Makanga who had a motorcycle removed petrol from the motorcycle and burnt the deceased while:

> "...all the accused were there and were celebrating saying my father was a witch. They took firewood and piled it on my father. The accused participated in the burning."

12. She stated further that she was there and started crying while her father was burning. She asserted that she knew the appellants and attended an identification parade at which she identified the 1st and 3rd appellants. She maintained, under cross examination, that she was present and witnessed what happened and that she was there when the deceased was killed and burnt.

13. Philip Yaa (PW4) who stated that he was a form two student added that he was about two meters away when his father, the deceased, was being assaulted by the appellants with "stones and sticks" and that he tried to stop them and that the appellants participated in burning the deceased.

14. Inspector of Police Kipkemboi Rop (PW5) the Deputy DCIO Malindi received a call from Inspector Getenda (PW9) of Crime Branch on 27th October 2015 at about 3.00 p.m., with a request to conduct an identification parade for three murder suspects, namely, Ziro Wanje, Garama Kea and Mwalimu Kea. He looked for and got 8 people for each parade from which BZM (PW3) identified the 1st, 2nd and 3rd appellants; MZM (PW2) identified the 2nd appellant and the 4th accused, Nyundo, who was acquitted. He stated that the 4th accused, though not a suspect, had been arrested for a different offence but was touched by the witness. He completed the parade process. He produced three parade forms as exhibits 1(a) to (c).

15. Karisa Baya Maitha (PW6), an Assistant Chief, Kijiwe Tanga received a call from a village elder on 22nd October 2015 at about 8.45 p.m., who informed him that the deceased was being killed by a mob. He proceeded to the scene and "found the deceased had been killed and they were burning him".

    PW3 narrated to him what had happened.

16. Moses Karisa Katana (PW7) also got to the scene having received a call from PW4 and "found that the deceased had already been killed and burnt". He reported the matter to the police and witnessed the postmortem being performed at Malindi Sub-County Hospital Mortuary. The postmortem was performed by Dr. Kombe whose report, which was produced by Dr. Eddy Nzomo (PW8), indicated that the body was burnt and had fracture and dislocation on the leg and that the cause of death was given as suffocation secondary to burns.

17. Inspector Charles Getende (PW9) was in 2015 in charge of investigations at Malindi Police Station. At about 9.00 p.m., on 22nd October 2015 he got information to rush to Mkunguni village to rescue a person who was about to be killed. However, on reaching there accompanied by other police officers, they found the deceased's body had already been burnt. PW2 narrated to him what had happened. The names of the appellants and that of Thoya, the 4th accused were mentioned as having been involved. PW9 and his colleagues took the body of the deceased to Malindi Hospital Mortuary where post mortem was done. On 24th October 2015, PW9 and his colleagues went to Mkunguni and were shown the houses of the appellants. They went there and arrested them. The 4th accused was already in the cells having been arrested in connection with an offence of house breaking. On 27th October 2015, he requested Inspector of Police Kipkemboi Rop (PW5) to conduct identification parades. With that, the prosecution closed its case.

18. In defence, the appellants gave sworn testimony and each one of them called a witness to support their defences. The 1st appellant, Mwalimu Kea, the younger brother to the 3rd appellant, Garama Kea, stated in his defence that he is a boda rider at Mkunguni and that the deceased was his neighbour. He stated that he was working on 22nd October 2015 and carried his boss, Alfred Jeffa at 4.00 p.m. to a bar where his boss drank until 6.00 p.m.; that thereafter he was paid Kshs.100.00 to buy vegetables and was hit by a vehicle at about 8.00 p.m. and sustained injuries but was not badly hurt; that he was taken to Mbaraka Chembe Clinic; that in the morning he went to hospital; that while at home he heard noise from the deceased's compound; that he heard that the deceased was a witch.

19. Alfred Jeffa Kalu (DW7) testified on behalf of the 1st appellant, Mwalimu Kea. He stated that he is in boda boda business. That on 22nd October 2015 from about 4.00 p.m. he was in the company of the 1st appellant at a bar called Tracks where they drank until 6.00 p.m.; that he sent the 1st appellant to Malindi to buy vegetables and on the way, he was knocked down by a vehicle near Ngala Estate and returned to the bar without the without the vegetables but with an injury on the hand, shoulder and leg; that he then gave him Kshs. 100.00 and told him to go home; and that the 1st appellant went to hospital in the morning.

20. In his defence, the 2nd appellant Ziro Wanje alia Shida Mkutano denied involvement in the death of the deceased. He stated that on 22nd October 2015, he left home for roof thatching work at Gede at 10.00 a.m., where he remained until 6.00 p.m.; that he then collected his bicycle from a repairer at Gede where he had left it and on reaching Msabaha he met boda cyclists at around 7.45 p.m., who told him that a suspected witch, who was just a neighbour, was being burnt at Mkunguni. Under cross examination, he stated that the sick child B was not in his house but in his brother's house and that he reached home at 8.00 p.m., and only met B at home.

21. Gabriel Mashanga Karisa (DW5) testified on behalf of the 2nd appellant Ziro Wanje alia Shida Mkutano. He testified that on the material day, on 22nd October 2015, the 2nd appellant was engaged in repairing his makuti and started work from 10.30 a.m., until 6.00 p.m. when he completed the work; that he paid him for his service about 7.30 p.m. and they parted ways; that he was surprised to learn a week later that the 2nd appellant had been arrested in connection with this case. Under cross examination, he stated that the 2nd appellant left between 7.30 p.m. and 8.00 p.m.

22. The 3rd appellant, Garama Kea, an older brother to Mwalimu Kea, the 1st appellant, stated in his defence that he was at home on 22nd October 2015 at 3.00 p.m. and went to Mkao Moto Primary School to repair a borehole where he remained until 6.30 p.m. Thereafter he went to a bar at Msabaha. At 8.30 p.m. he got a call from one John Maitha, a village elder, who informed him that a "neighbour had been taken by some people and was being assaulted."; that he walked to Mkunguni and got there about 10.00 a.m. (should be p.m.) and heard that the deceased had been killed and the body taken to the mortuary. He stated that earlier in 2010, he had a court case with the deceased over encroachment of land which was settled.

23. John Maitha Sirya (DW6) testified on behalf of the 3rd appellant, Garama Kea. He stated that he is village elder and a herder; that the 3rd appellant is a Nyumba Kumi elder and lives near where the incident occurred; that on 22nd October 2015 at about 8.30 p.m. he received a call that someone was being assaulted whereupon he called the 3rd appellant and informed him of the incident; that the 3rd appellant told him that he was at Msabaha and not near the scene; that on his way to the scene he passed through the 3rd appellant's place but he was not there; that he then met a girl who told him that her father was being burnt and he then called the Chief. He then ran to the scene and saw a big crowd. He did not see the 3rd appellant there. He waited for the Chief, shortly the police arrived but the deceased had already been killed. Under cross examination, the witness stated that he was not with the 3rd appellant and that he could not tell where he (the 3rd appellant) was.

24. Nyundo Mwamure Thoya, the 4th accused who was acquitted by the trial court, testified that on the material day he was on duty as a night watchman between 5.45 p.m. on 22nd October 2015 until 5.45 a.m. the following morning, and produced work records of that date to demonstrate.

25. Upon reviewing the evidence, the trial court was satisfied that the prosecution had proved its case against the appellants to the required standard beyond reasonable doubt and convicted the appellants. Regarding sentence, the Judge considered the mitigation offered after which he expressed that there was no reason for imposing the death sentence but that a deterrent sentence was called for. The appellants were each sentenced to serve thirty (30) years imprisonment.

26. The appellants have challenged the conviction on four main grounds namely that their alibi defences were not appreciated by the trial court; that their identification was not positive and was marred with mistakes and irregularities; that the prosecution evidence was with inconsistent; and that voire dire examination was not conducted with respect to the minor prosecution witnesses.

27. Urging the appeal before us during a virtual session on 14th March 2023, learned counsel Mr. Boaz Adalla in orally highlighting his written submissions urged that the learned trial judge failed to appreciate and properly consider the defence of alibi raised by all the appellants. Citing the case of *Ssentale v Uganda* [1968] 1 EA 365 (HCU) counsel submitted that once the defence of alibi was raised, it was not enough for the Judge to find that it was not true but should have gone further to find whether the prosecution had discredited the alibi and placed the appellants at the scene.

28. It was submitted that the evidence of identification was marred by irregularities which led to a miscarriage of justice. Citing the English case of *R v Turnbull* [1976] 3 All ER 549 for the proposition that evidence of visual identification should be examined carefully to minimize the danger of miscarriage of justice, counsel faulted the way evidence of identification was produced before the trial court. It was submitted that police standing orders and guidelines on identification were not followed and that the forms were not produced in evidence.

29. Counsel submitted further that the evidence of PW1 to PW4 should have been treated with caution considering that the Judge found the identification of the 4th accused, who was acquitted, to have been faulty. Counsel urged that the 4th accused having been acquitted, the appellants should also have been acquitted.

30. It was submitted that the prosecution evidence was full of inconsistencies and the prosecution did not prove its case to the required standard. It was urged that there were inconsistencies in the evidence regarding the number of people who were present, that some witnesses approximated the number to be 30 people while others estimated the number to be 50 and that such inconsistencies led to an error. Counsel also faulted the trial Judge for mixing up matters relating to the 4th accused, who was acquitted, with those of the 2nd accused (3rd appellant); that whilst the sick boy Baraka was a relation of the 4th accused, the learned Judge proceeded on the basis that he was a relative of the 3rd appellant.

31. The next complaint was that the trial court erred in failing to conduct voire dire examination on witnesses who were minors. It was urged that PW2 is recorded to be a minor of 17 years, that PW3 is indicated to have been in form 4 and therefore a minor by inference; that it is trite that before taking the evidence of a minor, the court must conduct voire dire examination and the failure to do so rendered the testimony of the minor witnesses to be of less probative value unless corroborated by other cogent evidence.

32. Opposing the appeal, learned Senior Principal Prosecution Counsel Miss. Mutua holding brief for Mr. Birir, learned Senior Principal Prosecution Counsel submitted the prosecution evidence established that the appellants hatched a plan of killing the deceased alleging that he had bewitched one Baraka whereupon they went to the deceased's house and took him away under the pretext of being taken to a local doctor to check if he was indeed a witch and thereafter went ahead to assault him using sticks and stones and later burnt him. It was submitted that in accordance with Section 206 of the *Penal Code*, malice aforethought was established; that based on the post mortem report that was produced, the cause of death was established to be suffocation secondary to burns and in that regard it was urged that the evidence of PW8 was consistent with that of PW1 to PW4 that the deceased was assaulted severally and later burnt.

33. It was urged that the appellants were positively identified; that besides the fact that the appellants were known to PW2 and PW3, they were also positively identified in the Identification parade. Counsel urged that all the ingredients of the offence of murder were established. Regarding the alibi defences, counsel submitted that the same were duly considered; that the witnesses who testified on behalf of the appellants in that regard were not with the appellants throughout the material time and the trial court properly rejected the same.

34. We have considered the appeal and submissions. We begin with the complaint that the learned Judge failed to appreciate the appellants alibi defences. In *Erick Otieno Meda v Republic* [2019] eKLR this Court expressed the following principles regarding alibi defence:

> " 18. In an *alibi* defence based on witness testimony, the credibility of the witness can strengthen or weaken the defence dramatically. A successful alibi defence entirely rules out the accused as the perpetrator of the offence. There is no burden of proof on the accused to prove an alibi. If there is a reasonable possibility that the accused's alibi could be true, then the prosecution has failed to discharge its burden of proof and the accused must be given the benefit of the doubt. In the case of *Kiarie v Republic* [1984] KLR, this Court stated:
>
> > " An alibi raises a specific defence and an accused person who puts forward an alibi as an answer to a charge does not in law thereby assume any burden of proving that answer and it is sufficient if an alibi introduces into the mind of a court a doubt that is not unreasonable "
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> 19. In the recent case of *Victor Mwendwa Mulinge v R*, [2014] eKLR this Court rendered itself thus on the issue of alibi:
>
> > " It is trite law that the burden of proving the falsity, if at all, of an accused's defence of alibi lies on the prosecution "

35. The Court endorsed the view expressed by Greenberg JA in the South African case of *R v Biya* 1952 (4)SA 514 that if there is evidence of an accused person's presence at a place and at a time which makes it impossible for him to have committed the crime charged, then if on all the evidence there is a reasonable possibility that the *alibi* evidence is true it means that there is the same possibility that he has not committed the crime. The Court the expressed itself as follows:

> " In considering an alibi, we observe that:
>
> a. An *alibi* needs to be corroborated by the other witnesses, and not just a mere regurgitation of the events from the accused's point of view.
>
> b. An *alibi* defence needs to be introduced at an early stage so as to allow it to be tested, especially during cross-examination of the trial.
>
> c. The *alibi* defence or evidence may often rest on the credibility of the accused and the reliability of the evidence that he or she has presented in court.
>
> d. The accused does not need to prove the alibi, but the prosecution must have presented its case that the accused is guilty beyond a reasonable doubt so as to allow the alibi to fail. (See Mhlungu v S (AR 300/13) [2014] ZAKZPHC 27 (16 May 2014)"

36. With those principles in mind, the learned trial Judge did, in his judgment, note that all the appellants did inform the court in advance that they would raise *alibi* defence but that "the burden of proving the prosecution case always lies with the prosecution". In that regard the Judge considered the claim by the 1st appellant that at the material time he had been sent by his boss to go fetch vegetables; the claim by the 2nd appellant as supported by his witness DW 5 that he had spent the day repairing DW5's

roof; and the claim by the 3rd appellant that he was in a bar in Msabaha at the material time when he was called at 8.30 p.m. by DW6 before concluding that the exact timings of the appellants "trips and alibis" were not proved and that the evidence of PW1 to PW4 placed the appellants at the scene; and that the *alibi* defences were not "plausible in the circumstances of this case" as the "the prosecution evidence totally displaces the alibi proffered" by the appellants.

37. As stated, the *alibi* by the 1st appellant (Mwalimu Kea) was that he is a boda rider at Mkunguni and on the material day at 4.00 p.m. he carried his boss, DW7 to a bar where they drank until 6.00 p.m. when he was sent on an errand, was injured in the process, and went for treatment the following morning. DW 7 corroborated that evidence stating that he was with the 1st appellant at Tracks bar where they drank until 6.00 p.m. and sent him off to buy vegetables (chicken as he stated in cross examination). Neither the 1st appellant nor DW7 could properly account for the whereabouts of the 1st appellant after allegedly leaving the bar at 6.00 p.m.

38. The *alibi* by second appellant (Ziro Wanje) was that he was engaged in a roof thatching job in Gede on the material day between 10.00 and 6.00 p.m. after which he collected his bicycle from a repairer and headed for Msabaha and at around 7.45 p.m. he heard from boda cyclists talking about a suspected witch, who he said was his neighbour, was being burnt. DW5 Gabriel Mashanga Karisa testified that the 1st appellant was indeed engaged in repairing his leaking kiosk at Gede Trading Center and worked until 6.00 p.m. and parted with him at about 7.30 p.m. Whereas the appellant stated that he parted company with DW 5 to go collect his bicycle at 6.00 p.m., DW5 stated that they parted company at 7.30 p.m.

39. The *alibi* by the 3rd appellant, Garama Kea, was that he went to repair a borehole at 3.00pm and worked until 6.30 p.m. after which he went to a bar in Msabaha from where he was called by DW6 at about 8.30 p.m. and informed that a neighbour was being assaulted at Mkunguni and he walked there and got there at about 10.00 by which time the deceased had been killed and taken to mortuary.

40. The evidence of PW1-PW4, was that the deceased was collected from his home at about 7.00 p.m. -7.30 p.m. According to Inspector Getende (PW9) he got information at about 9.00 p.m. to rush to Mkunguni village to rescue someone who as about to be killed. In effect the offence was committed sometime between 7.00 p.m. and sometime after 9.00 p.m. None of the appellants properly and convincingly demonstrated that they were away from the scene of crime at the material time when the offence was committed. We therefore respectfully agree with the learned trial judge that "the prosecution evidence totally displaces the alibi proffered" by the appellants. We are not persuaded that the learned Judge erred in his approach and conclusions regarding the alibi defences raised.

41. As regards identification, there is no doubt that the appellants were persons well known to PW1 to PW4. This was a case of recognition and as the learned Judge noted the identification parade was unnecessary. The main thrust of the appellants' complaint in this regard is that the 4th accused, who was identified through the same process, was acquitted and that the conviction of the appellants is therefore unsafe, based as it is, on the same identification evidence.

42. The prosecution has not challenged the decision by the trial court to acquit the 4th accused and it would therefore be inappropriate for the Court to delve into the matter. That said, it is apparent the Judge granted the 4th accused the benefit of doubt since the 4th accused was able to demonstrate, based on his employer's records, that he reported to work as a watchman on the evening in question and logged out the following morning. That is of course not to say that he would not have had an opportunity to leave his place of employment in the night and return later. But that, as we have stated, is not a matter before us. Suffice to state that his acquittal does not in itself discredit the testimony of PW1-PW4 on identification.

43. The Judge found that PW1, PW2, PW3 and PW4 identified the appellants as among the persons who attacked the deceased and that PW3 and PW4 saw the appellants directly participating in the killing of the deceased. Having cautioned himself that evidence of visual identification should be approached with great care and caution and that even greater care should be exercised where the conditions for favourable identification are poor, the learned Judge expressed:

> " The evidence of PW1, PW2, PW3 and PW4 passes this test. PW3 and PW4 were at the scene where the mob lynched the deceased and the two saw the accused participating directly in burning the deceased. There was moonlight which enabled them to see someone who was nearby and having known the accused before the crime they could identify them. PW1, PW2, PW3 and PW4 all saw the accused coming to their home to pick the deceased and they saw them assault him with sticks and stones as they took him to the 1st accused house. They also saw the accused assaulting the deceased when they alleged that they were taking him home. The witnesses were present when their father was being burnt."

44. The Judge went on to state that apart from moonlight, the appellants were neighbours to the deceased and were properly identified right from the time they went to collect the deceased from his house and that identification was full proof. Based on our own evaluation of the evidence, we respectfully agree with the findings and conclusions of the learned Judge regarding the identification of the appellants. The appellants were well known to the family of the deceased and were amongst those identified by PW1-PW4 as having gone to the deceased house on the fateful evening and got the deceased to accompany them ostensibly on a mission to vindicate himself that he had not bewitched the ailing B.

45. PW1 to PW4 accompanied them to the house where the said Baraka was recuperating where they witnessed the deceased being asked to administer an oath. They were also present when the deceased was escorted from that house and assaulted. PW2 explained in some detail that:

> " There was Safari Thoya. He is not in court. Ziro Wanje, 1st accused was there. There was also 3rd accused, Mwalimu Kea. There was also Mwalimu (Garama?) Kea, second accused as well as Nyundo Thoya, 4th accused. The four accused were also assaulting my father. They had sticks. 1st accused hit my father on the back. 2nd accused had a stick. All of them had sticks and they were hitting my father. This was before I was taken to hospital."

46. She maintained under cross examination that all four accused persons were at their house and that there was moonlight which could enable her to see someone who was nearby. She went on to describe the occupations of each of the appellants. Her evidence was corroborated by that of her mother PW1 and her siblings PW 3 and PW4. We are therefore unable to fault the conclusions reached by the judge regarding identification of the appellants and there is no merit in that complaint.

47. The complaint that the prosecution case was riddled with inconsistencies is based on the fact that one witness estimated the number in the mob as 30 while another witness estimated the number to be 50. Nothing turns on this. What matters is that the appellants were positively identified as having been part of the mob. It does not diminish the cogent evidence of identification of the appellants as among those who assaulted the deceased and participated in burning him. Perceptions of the actual number of people in a mob can understandably differ.

48. The last issue relates to the complaint that Judge erred in failing to conduct voire dire examination in respect of the minors PW2, 3 and 4. As this Court recently stated in *Odhiambo v Republic* (Criminal Appeal 85 of 2016) [2022] KECA 1082 (KLR)

> " ...voir dire is required only when the proposed witness is a child of tender years so as to establish the competence of the witness' to testify intelligibly and to establish whether she understands the nature of an oath and the obligation to tell the truth. A child of tender years is, in the absence of special circumstances, one of an age or apparent age of 14 years and below. See Section 19 of the *Oaths and Statutory Declarations Act*, Cap 15, Laws of Kenya as interpreted in, among others *Kibageny Arap Kolil v Republic* 1959 EA 92 and *Baya v Republic*[2000] KLR 376."

49. Earlier in *Maripett Loonkomok v Republic* [2016] eKLR the Court stated:

> " However way back in 1959 in the celebrated case of *Kibageny Arap Kolil v R* (1959) EA 82 the Court of Appeal for Eastern Africa held that the phrase "a child of tender years" meant a child under the age of 14 years. The only statutory definition of a "child of tender years" is in section 2 of the *Children Act* where it is defined to mean a child under the age of 10 years. This Court has recently in *Patrick Kathurima v R*, Criminal Appeal No. 137 of 2014 and in *Samuel Warui Karimi v R* Criminal Appeal No.16 of 2014 stated categorically that the definition in the *Children Act* is not of general application; that it was only intended for the protection of children from criminal responsibility and not as a test of competency to testify. It follows therefore that the time-honoured 14 years remains the correct threshold for voir dire examination."

50. With that in mind, PW2, MZM state, "I am 17 years old." PW3 BZM stated, "I am a student at [Particulars Withhheld] Secondary School in form four." PW4, PY did not state his age either but stated in cross examination that, "I am a form two student". PW2 was clearly above the age of 14. PW3 being a form four student would be unlikely to be below the age of 14 years. The age for PW4 is unclear but his testimony and the way he handled cross examination would suggest a mature person. Moreover, as held in *Maripett Loonkomok v Republic*, even assuming PW4 was below the age of 14, the failure to conduct voire dire would not automatically vitiate the conviction. The Court expressed in that case that:

> " It is firmly settled that not in all cases that voir dire is not administered or is not administered properly the entire trial would be vitiated. This Court sitting at Nyeri has recently reiterate what has been said many times before that that question will depend on the peculiar circumstances and particular facts of each case. See //James Mwangi Muriithi v R, Criminal Appeal No.10 of 2014."

51. Even without the evidence of PW4, there was, in our view sufficient evidence in our view to support the charge and the convictions.

52. All in all, there is no merit in these appeals. The same are hereby dismissed. We uphold the conviction and the sentences.

DATED AND DELIVERED AT MOMBASA THIS 7TH DAY OF JULY 2023.

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

P. NYAMWEYA

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JUDGE OF APPEAL

G.V. ODUNGA

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR