



REPUBLIC OF KENYA



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**Chengo & 4 others v Republic (Criminal Appeal 80, 81, 82, 83 & 84 of 2022
(Consolidated)) [2023] KECA 1069 (KLR) (22 September 2023) (Judgment)**

Neutral citation: [2023] KECA 1069 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MALINDI
CRIMINAL APPEAL 80, 81, 82, 83 & 84 OF 2022 (CONSOLIDATED)
SG KAIRU, P NYAMWEYA & GV ODUNGA, JJA
SEPTEMBER 22, 2023**

BETWEEN

**BARAKA KENGA CHENGO 1ST APPELLANT
SAIDI MASOUDI SHANGA ALIAS SAIDI BUYOYA 2ND APPELLANT
WILBERT RASHID RASI ALIAS HAMISI RASHID 3RD APPELLANT
SAMUEL TANDALE MWALEMBO ALIAS WILLIAM 4TH APPELLANT
WILSON KARISA 5TH APPELLANT**

AND

REPUBLIC RESPONDENT

*(Appeal from the judgment of the High Court of Kenya at Malindi (R. Nyakundi J.)
dated and delivered on 31st March, 2022 in High Court Criminal Case No.19 of 2018)*

JUDGMENT

1. The Appellants herein were jointly charged before the Malindi High Court in Criminal Case No. 19 of 2018 with the offence of Murder contrary to Section 203 as read with Section 204 of the [Penal Code](#). The particulars in the Information were that the Appellants on 14th October, 2018 at Mutoroni Village in Magarini Sub-County within Kilifi County, jointly with others not before court unlawfully murdered Farah Omar Dahir.
2. At the trial, the prosecution called 4 witnesses. According to PW1, Mohammed Galgalo, a brother to the deceased, on 14th October, 2018, along Malindi-Garsen Road, he came across a group of people proceeding towards a place where a person was being attacked. On approaching that place, he saw the deceased on whom had been inflicted serious injuries and whose body was on fire. At the scene, where there were many people, he found Baraka, the 1st Appellant herein and Said, the 2nd Appellant amongst



- other people. It was his evidence that the 1st Appellant was holding the deceased's leg while the 2nd Appellant was holding the deceased's hand and they were dragging the deceased's body towards the grass. According to him, the deceased was also being assaulted by other people. While at the scene, the 1st Appellant pushed him away in the process dropping a knife. Shortly thereafter, the police arrived at the scene and those attacking the deceased ran away. The deceased was then taken to the Hospital and passed away while undergoing treatment. Amongst those present, PW1 could only identify the 5 Appellants.
3. According to PW2, Hassan Dahir, also a brother to the deceased, he left his house on 14th October, 2018 at 8.00am for work and at a place called Mwenda Pole, he saw people running while some people were being beaten. At the scene, he witnessed the deceased being assaulted by the 1st Appellant and a group while the 3rd Appellant hit the deceased in the mouth, both the Appellants using clubs. He also saw the 4th and 5th Appellants lighting fire on the deceased. When PW2 tried to intervene, the 1st and 5th Appellant threatened him that he would suffer the same fate. Upon the arrival of the police, they took the deceased to the Hospital. PW2 confirmed that PW1 was at the scene and that together, they assisted in taking the deceased to the Hospital.
 4. PW3, No. 49218 Corporal Victor Ngoa, was one of the police officers who went to the scene where they found a group of people surrounding the deceased who had been injured in the head and was burnt on his lower limbs. After dispersing the crowd, they placed the deceased in an ambulance but was later informed that the deceased passed away. It was his evidence that he attended a post mortem examination where the doctor's opinion was that the deceased's death was caused by injuries to the head and lower limbs. Though not the investigating officer, PW3 gathered that the deceased was suspected of having stolen a motor cycle which was later recovered. He however did not know the Appellants and was not aware of the circumstances under which they were arrested.
 5. The last witness for the prosecution was PC Abdalla Mawazo, PW4, who was the investigation Officer. According to him, based on the statements of the witnesses, the Appellants were arrested upon being identified as the culprits by one Hassan. It was his evidence that the deceased was suspected of having been a motor cycle thief. According to him, identification parade was not necessary. Though the 1st and 2nd Appellants were mentioned, the witness was not aware if the 3rd, 4th and 5th Appellants were also mentioned. It was his evidence that it was PW2 who was the first to arrive at the scene.
 6. At the close of the prosecution's case, the Appellants were placed on their defence. The 1st appellant testifying as DW1 gave sworn testimony that on 24th October, 2018 he was not at the scene but at Jackson's garage to change the tyre of his motor cycle registration No. KMEH 411Y and only reached at the scene at around 10.30am after being told by Francis Kinganga about a motor cycle thief who had been killed. By then the deceased's body had been removed. According to the 1st Appellant, there was a grudge between him and PW2 resulting from the 1st Appellant's refusal to sell a house to PW2. DW2, Francis Baya Funganga, corroborated the 1st Appellant's evidence that on 14th October, 2018 he found and left the 1st Appellant at Jackson's garage.
 7. The 2nd Appellant, in his sworn evidence, similarly denied having been at the scene at the scene of crime. According to him, at 8.00 am on 14th October, 2018, he was at home preparing to go for work when he got information that the deceased had been killed. He however did not go to the scene. The 3rd Appellant, Wilbert Rashid Rasi, testifying as DW4, stated that though he was not at scene, he heard about the incident and saw people running around. He, however, did not reach the scene since his children had made a distress call to him and he went to his neighbour's house, instead. According to the 5th Appellant, Wilson Karisa, who testified as DW5, he had taken his father to the farm which was about 8 kilometres and on returning home, he met a police officer who asked to be dropped at the



scene and on arrival at the scene they found two other police officers. According to the 5th Appellant, he did not see the deceased and denied involvement in the assault on the deceased. DW6, Gilbert Yunga Ndurumo, testified that on the material day he was with the 1st Appellant when they saw a group of people. After leaving the 1st Appellant he called the 3rd Appellant and informed him about the assault on the deceased. DW6, Mary Kahindi Mwanje, the 3rd Appellant's wife testified that on the material day, she saw many motor cycles being ridden along the road while the 3rd Appellant was still asleep. She then woke up the 3rd Appellant who followed the people who had gone to the scene. DW7, Samuel Tandale Mwalemba, the 4th Appellant stated that on the material day, he was in his farm at 7.00 am where he had gone to check the charcoal about 4 kilometres away from his home. Upon arrival at the stage at 12.00pm he heard about the deceased from PW1. He proceeded to the scene where he found police officers before proceeding to his home.

8. At the end of the hearing, the Learned Trial Judge (Nyakundi, J), held that the death of the deceased had been proved by the post-mortem report dated 14th October, 2018 prepared by Dr. Kombe of Malindi Sub County Hospital. According to the learned Judge, the evidence of PW1 and PW2 sufficiently identified the Appellants at the scene of crime in that PW1 saw the 1st and 2nd Appellants assaulting the deceased while PW2 saw the 1st Appellant, in execution of the murder, hit the deceased on the mouth with a club and setting the deceased's body on fire. The learned Judge observed that since the post-mortem report did show that the deceased suffered grievous harm and 50% 2nd degree burns and according to the learned Judge, the termination of the deceased life was not only unlawful but motivated with malice aforethought. He convicted the Appellants and sentenced each one of them to a term of imprisonment of 35 years from the date of their arraignment in court on 5th November, 2018.
9. Aggrieved by the High Court judgment, the Appellants have proffered this appeal premised on 3 grounds of appeal challenging the conviction and sentence. These grounds were that the prosecution case did not establish or prove the circumstances prior to the alleged offence; that the prosecution failed to adduce evidence that could prove beyond reasonable doubt that the offence was committed; and that the court failed to analyse and evaluate the evidence exhaustively.
10. During the virtual hearing of the appeal before us on 13th March, 2023, the Appellants appeared virtually from Malindi Prison and were represented by learned counsel, Mr Gicharu Kimani while Mr Mwangi Kamanu, Learned Senior Prosecution Counsel, appeared from the Respondent. Both counsel filed their respective written submissions which they relied on entirely.
11. The Appellants submitted that PW1 and PW2 stated in their witness statements that the deceased had been beaten by many people hence the prosecution failed to prove its case against the Appellants when it relied on the statements which according to the Appellants are inadmissible. According to the Appellants, the burden of proof was not discharged by the prosecution since it is evident that the Appellants were not at the scene. The Appellants submitted that the prosecution's case failed the test of proof beyond reasonable doubt since the witnesses' testimonies created so many doubts. Reliance has been placed on the cases of *Josephat Manoti Omwancha v R* (2021) eKLR and *Festus Mukati Murawa v R* [2013] eKLR and Article 50(1)(a) of the *Constitution*. According to the Appellants their defences were not considered by the Learned Judge while making a determination on burden of proof. The Appellant contended that malice aforethought was not established since the prosecution failed to present in court the alleged murder weapon used to inflict harm and reliance has been placed on the cases of *R v Tubere s/o Ochen* [1945] 12 EACA 63 where the Court of Appeal held that in determining whether malice aforethought has been established the nature of the weapon used; manner in which it was used, part of the body targeted; nature of the injuries inflicted either a single stab/wound or multiple injuries; and conduct of the accused before, during and after the incident are elements to be considered by court. The Appellants further submitted that the evidence presented by the prosecution



was circumstantial and did not point to the Appellants as the only people who could have caused the death of the deceased.

12. In opposition to the Appeal, it has been submitted that the death of deceased was proved by the post-mortem report produced by the investigation officer which established the cause of death as ‘severe head injury due to blunt trauma coupled with inhalational burns’. According to the Respondent, the post-mortem report was corroborated by PW1, PW2 and PW3 testimonies. As to whether the Appellants caused the deceased’s death, the Respondent relied on the evidence of PW1 and PW2 who identified the Appellants at the scene beating the deceased with clubs. According to prosecution PW1 and PW2’s evidence corroborated the head and burn injuries indicated in the post-mortem. The prosecution submits that by beating the deceased with clubs and burning him, the Appellants must have known that their actions were likely to cause death if not grievous harm. Reliance has been placed on the cases of *Roba Galma Wario v R* [2015] eKLR, *Nzuki v R* [1993] KLR 171 and *Daniel Muthee v R* Criminal Appeal No. 218 of 2005 (UR) cited in *R v Lawrence Mukaria & another* [2014] eKLR.
13. The Respondent’s submissions were that there was joint venture since each Appellant played a crucial role in the death of the deceased and reliance for this submission placed on Section 21 of the *Penal Code* and the cases of *Njoroge v R* [1983] KLR 197, *Dickson Mwangi Munene & another v R* [2014] eKLR. According to the prosecution the Appellants’ defence of alibi did not dislodge the evidence presented by the prosecution witnesses.
14. On sentencing, it was submitted that the Learned Judge took into account the aggravating factors leading to the death of the deceased which outweighed the mitigating factors presented by the Appellants. According to the Respondent, the court was more than lenient to the Appellants hence the sentence should not be interfered with.

Analysis And Determination

15. We have considered the appeal and the submissions. This being a first appeal, it is our duty to analyse and re-assess the evidence on record and reach our own conclusions. In *Okeno v Republic* [1972] EA 32 this Court set out the duties of a first appellate court as follows:

“An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (*Pandya v Republic* (1957) EA.(336)and the appellate court’s own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (*Shantilal M. Ruwala V R.* (1957) EA. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court’s finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate’s findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see *Peters v Sunday Post* [1958] E.A 424.”

16. The issue for determination is whether the prosecution proved all the ingredients of the offence of murder to the required standard. The ingredients were well set out in the case of *Anthony Ndegwa Ngari v Republic* [2014] eKLR, where it was held that;

“For the offence of murder, there are three elements which the prosecution must prove beyond reasonable doubt in order to secure a conviction. They are: (a) the death of the



deceased and the cause of that death; (b) that the accused committed the unlawful act which caused the death of the deceased and (c) that the Accused had the malice aforethought.”

17. That the deceased died is not in doubt since his death was proved by the post-mortem exhibit 1 produced by the investigation officer which established the cause of death as ‘severe head injury due to blunt trauma coupled with inhalational burns’. The deceased’s death was also confirmed by all the prosecution witnesses.

18. As to whether the prosecution established that the appellants committed the unlawful act which caused the death of the deceased, the Learned Judge heavily relied on the evidence of PW1 and PW2 who were the only eye witnesses. According to the learned Judge, the court:

“...was presented with the testimony of PW1 who saw the 1st and 2nd accused persons assaulting the deceased. In addition, they also set his body on fire.”

19. As regards the evidence of PW2, the learned Judge stated that:

“he saw the 1st accused at the scene in company of the 2nd and 3rd accused attacking the deceased. In (PW2’s) observation, the 1st accused in executing the murder, hit the deceased on the mouth with a club, this was followed with setting his body on fire.”

20. Throughout the judgement, there is no mention at all of the roles played by the 4th and 5th Appellants, if any. In fact, going by the judgement, one fails to understand the basis upon which the said two appellants were convicted. From the evidence of PW1, there were many people at the scene including the 4th and 5th Appellants. That was the furthest he went in linking the 4th and 5th Appellants to the death of the deceased. While PW2 mentioned that the 4th and 5th Appellants were at the scene, the failure by the learned trial judge to make a finding on that evidence, having had the benefit of seeing and hearing PW1 testify leaves us with some doubt as to whether the 4th and 5th Appellants took part in the death of the deceased, more so, in light of the fact that PW1 who was present did not mention any roles played by the 4th and 5th Appellants. This was no doubt, what is commonly referred to as “mob justice” which properly should be referred to as “mob injustice”. In those kind of cases, the prosecution ought to strive to adduce evidence showing the role played by an accused person in inflicting injuries that led to the death of the deceased. It is not enough to simply present evidence that the accused was present at the scene since being at the scene, however accidental, does not necessarily mean that a person participated in the death of the deceased. In this case we find the single identifying evidence of PW2 linking the 4th and 5th Appellants to the deceased’s death insufficient to meet the threshold for criminal culpability. While the failure to corroborate the evidence of a single identifying witness is not necessarily fatal, where two witnesses are present in the same place, particularly in a mob attack and one of them does not mention the role played by some of the accused persons, caution ought to be exercised to ensure that the evidence of that one witness is not free from error. In circumstances such as that where the atmosphere is charged, it is not impossible for one to be genuinely mistaken as regards the respective roles played by the people at the scene.

21. Accordingly, we find the conviction of the 4th and 5th Appellants unsafe. As regards, the 1st, 2nd and 3rd Appellants, the learned Judge found that:

“there is sufficient evidence on recognition to constitute reliability in placing the accused persons at the scene of the murder.”



22. According to PW2:

“At the scene I saw Baraka Kenga and group assaulting my brother. Baraka Kenga hit the deceased on the mouth using a club. Said hit the deceased on the head with a club. Hamisi hit the deceased on the neck with a club. Bomu Mwalumbo lit the fire upon the deceased.”

23. In this case, the evidence presented was that of recognition.

We therefore agree with the Respondent’s submissions that in those circumstances, the identification parade was unnecessary. The offence occurred in the early morning at about 8.00 am hence dispelling any doubt as to the possibility of mistaken identity. From the evidence of PW2, he was at the vicinity and was able to see the 1st, 2nd and 3rd Appellants very well and was even threatened by them. We have considered the alibi defences raised by the Appellants and we agree with the learned Judge that the prosecution’s case was overwhelming in light of the fact that the Appellants were people well known to PW1 and PW2 and PW2 even exchanged words with the 1st Appellant.

24. In those circumstances, we agree with the trial Judge’s findings and we have no reason to disturb his finding as regards the conviction of the 1st, 2nd and 3rd Appellants. However, as there was no finding made in respect of the 4th and 5th Appellants by the learned Judge, we find no basis for sustaining their conviction. In the premises we allow the appeal by the 4th and 5th Appellant, set aside their conviction and quash the sentence. We direct that they be set at liberty forthwith unless otherwise lawfully held. We however dismiss the appeals by the 1st, 2nd and 3rd Appellants on conviction.

25. As regards the sentence, we find the sentence of 35 years imprisonment from the date of their arraignment in court on 5th November, 2018, in the circumstances of this case where death resulted from a mob action in which the 1st, 2nd and 3rd Appellants were involved, manifestly excessive. We set aside the sentence of 35 years and substitute there for a period of 20 years imprisonment. We do not disturb the period of the commencement of the conviction which the learned judge found to run from the date of their arraignment in court on 5th November, 2018.

26. Judgement accordingly.

DATED AND DELIVERED AT MOMBASA THIS 22ND DAY OF SEPTEMBER 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

