Kungu v Republic (Criminal Appeal 103 of 2018)
[2023] KECA 1452 (KLR) (24 November 2023) (Judgment)

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REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 103 OF 2018

M NGUGI, F TUIYOTT & JM NGUGI, JJA

NOVEMBER 24, 2023

BETWEEN

MMICHEAL JUMA KUNGU ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at HomaBay (Omondi, J.) dated 16th October, 2017 in H.C.CR.C. No. 42 of 2014)

JUDGMENT

1. The appellant, Michael Juma Kungu, was the 2nd accused person in the trial before the High Court in Homa Bay High Court, Criminal Case No 42 of 2014 as consolidated with Homa Bay High Court, Criminal Case No 29 of 2015. He was charged with the offence of murder contrary to section 203 as read with 204 of the *Penal Code*. The particulars of the offence were that on October 3, 2014, at Kawadhgone Sub-location, Kawadhgone Location in Rachuonyo North District within Homa Bay County, Kennedy Omondi Kungu and Michael Juma Kungu (the appellant), jointly with others not before court murdered Joseph Omollo Opapa.

2. Kennedy Omondi Kungu (Kennedy) and the appellant pleaded not guilty and a fully-fledged hearing ensued. At the conclusion of the trial, the learned judge acquitted Kennedy, holding that the adduced evidence was insufficient to sustain the charge against him. However, the appellant was convicted and sentenced to death.

3. The appellant was aggrieved by that decision and has lodged the present appeal. In his Memorandum of Appeal, the appellant raised three (3) grounds of appeal, which are that:

    1. The Learned Trial Judge erred in fact and in law in convicting and sentencing the appellant when the prosecution evidence did not support the offence as charged.

2. The Learned Trial Judge erred in fact and in law in finding the appellant guilty and convicting him even though the prosecution evidence was marred with immense inconsistencies, did not meet the standard proof of beyond reasonable doubt and vitiated the appellant's right to a fair trial.

3. The Learned Trial Judge erred in condemning the appellant to a sentence which under the circumstances was excessive, harsh, unconstitutional and unlawful.

4. This is a first appeal. Accordingly, the role of this Court is to re- evaluate evidence, assess it, weigh it as a whole and reach our own independent conclusions. In doing so, we are required to remember that we neither saw nor heard the witnesses, for which we must make allowance. See *Okeno v Republic* [1972] EA 32.

5. At the trial court, the prosecution called a total of seven (7) witnesses. The evidence that emerged from the trial was as follows.

6. On October 3, 2014, at around 7.30pm, Mary-Gorretti Omollo (Mary-Gorretti), Joseph Omollo Opapa (deceased), Gorretti Auma Omollo (Gorretti) and Mary Akoth Omollo (Mary) – in that order - were walking in a single file from Kandiege market, heading for their home in Kawadhgone, using a narrow foot path. On their way, they met Maurice Ochieng Kungu alias Ngut (Maurice) and Michael Juma Kungu alias Toti (the appellant), near a posho mill owned by Mildred Sure.

7. Even though it was night time, Goretti (who testified as PW1), Mary-Goretti (who testified as PW3) and Mary (who testified as PW4) testified that there was bright moonlight. The two groups passed each other in silence; each going in the opposite direction. After walking a distance of about 8 meters from each other, PW1 noticed the two brothers turn back and advance towards them. She alerted the deceased and told him "Joseph, Ngut is killing you", but the deceased replied and said that Ngut would not kill him. PW1 testified that she made that statement because earlier that day, Kennedy, the elder brother to the appellant and Maurice, made a report to the assistant chief to the effect that "they had to kill Omollo (deceased)" on that day. In essence, Kennedy had uttered a threat to kill the deceased on that day.

   The assistant chief relayed this message to the deceased and gave him a letter in that regard to take to the police. Kennedy was summoned to the assistant chief's office by the police and was arrested. At the time of his arrest, Kennedy was accompanied by the appellant. The arrest was made at 11.00am.

8. According to PW1, they thought they would be at peace and they returned to the market. However, that hope turned illusory as the two groups now met in the stillness of the night. PW1 testified that Maurice struck the right side of the deceased's head with the panga he was carrying, upon which the deceased began to run. Maurice, then, slashed the deceased's head twice and the deceased fell to the ground. Immediately after, the appellant picked a huge stone measuring 6 by 9 inches and smashed the back of the deceased's head with it. PW1 and her co-wife, Mary- Gorretti (PW3) started screaming, attracting many people to the scene. Unfortunately, by then, the deceased was no more and the appellant and his brother Maurice had fled the scene. The police and the assistant chief were called to the scene. Thereafter, the body of the deceased was taken to the mortuary.

9. PW1 confirmed that Kennedy was not at the scene as he was in police custody, having been arrested earlier that day. Maurice, on the other hand, disappeared after the murder and has never been seen again.

10. The testimony of Mary-Gorretti (PW3) was similar to that of PW1, save that she testified that Maurice was armed with a panga and arrow, whereas the appellant was not armed. She further testified that the two brothers ran away with the weapons they had.

11. Similarly, the testimony of Mary (PW4), the daughter-in-law to PW1 and PW3, was the same as that of PW1 and PW3; save that she testified that Maurice was armed with a panga, whereas the appellant had an arrow. Additionally, during cross-examination, PW4 stated that bad blood between the two families had been precipitated by the deceased's family's goats straying onto a field belonging to Maurice and feeding on his potatoes. Angered, Maurice went to the deceased's home and uttered insults then left.

12. PW2, Ernest Ataro, the area assistant chief testified that on 24th September, 2014, at around 9.00am, Kennedy went to his home and made a report that he would like to kill the deceased as they had been having some conflicts and the deceased had a habit of "engaging" him using the police. Kennedy told PW2 that he would kill the deceased and then surrender himself to the police in Homa Bay. PW2 advised him to go to the police station and make a similar report but he declined. Later that day, PW2 learnt that Kennedy was searching for the deceased with a panga.

13. On that same day at about 4.00pm, the deceased called PW2 and informed him that he heard that Kennedy was searching for him with a panga. PW2 then told the deceased about the report Kennedy made to him that morning and the deceased asked him why he did not inform him. He told the deceased that it was because he considered it as "just a joke." The next day, the deceased went to PW2 who wrote him a letter, with regard to the report Kennedy made, which he (deceased) took to Kendu Bay police station. On taking the letter to Kendu Bay police station, the deceased informed PW2 that the police were to arrest Kennedy but he was on the run.

14. PW2 told the court that sometime thereafter, Kennedy went to him and requested that he calls for a reconciliation meeting between his (Kennedy's) family and the deceased family. According to PW2, Kennedy wanted them to talk so that they could live in peace. The dispute was that at one time, the deceased's wife alleged that Kennedy had thrown a stone which hit a window in their house, with the intention of injuring her. Kennedy denied the allegation and claimed it was intended to provoke him. After the meeting which was held on September 24, 2014, Kennedy asked the deceased to forgive him and even knelt down as he sought for forgiveness, but the deceased declined to forgive him; and the matter was referred to Kendu Bay police station.

15. Thereafter, on October 3, 2014, at about 8.30pm, PW2 received a call from one Mildred Sure who informed him that the deceased had been killed by some people near her posho mill. A short while later, PW2 also received a call from PW1 who told him that her husband had been killed by the appellant and Maurice. He went to the scene and found the deceased lying on the ground in a pool of blood. He also found a crowd of people gathered at the scene. During examination-in-chief and cross examination, he told the court that even though there was moonlight, he also used a torch to see the scene and the body of the deceased clearly. Additionally, during cross examination, he told the court that the deceased was killed on a different day after the reported threats.

16. PW5, Collins Oduor Omollo, a son of the deceased and PW1, identified the body of the deceased before the postmortem examination was done. He told the court that on 24th September, 2014, the deceased told him that he received information from PW2 about the threat upon his life by Kennedy. He also told the court that the deceased had a problem with Maurice, who is Kennedy's brother.

17. PW6, PC Richard Chemjor, was the investigating officer who gave formal evidence about how the investigations unfolded. He told the court that upon arrival at the scene, they found the deceased lying dead with deep panga cuts at the back of his head; and PW1, PW3 and PW4 stated that the appellant

and Maurice were the assailants. Both Maurice and the appellant fled the area immediately after the incident. The appellant was traced a year later through an informer. However, Maurice has never been traced and is still at large.

18. PW6 testified that the events preceding the brutal murder of the deceased were that sometime on 19th September, 2014, PW1 made a report against Kennedy for the offence of malicious damage at Kendu Bay police station, vide OB No9/19/9/14. Later, on 24th September, 2014, the deceased made another report against Kennedy about a threat on his life, vide OB No9/24/9/14. On the day of the incident, PW6 established that the appellant and Maurice attacked the deceased as an act of revenge, over the arrest of their brother, Kennedy, earlier that day. He confirmed that indeed, Kennedy had been placed in police custody earlier that day at 6.30pm and the deceased was killed about an hour and half later. In the premise, it was PW6's view that Kennedy participated in planning the deceased's death and was an accomplice in his murder.

19. PW6 testified that during investigations, he was informed that Maurice was the person who cut the deceased's head, while the appellant picked a stone and crushed the deceased's head with it. He also told the court that the scene of crime had a lot of stones and he could not tell which stone was used to crush the deceased's head; and added that he did not recover the murder weapons, and neither did he take photographs of the scene. PW6 informed the court that the reason he did not take photographs of the scene was because it was night time and there were very many people gathered at the time. After investigations, it was decided that Kennedy would be charged with murder as he had an intention common with his two brothers to kill the deceased.

20. The final witness was PW7, Dr. Andrew Kipyegon Cheruiyot, who conducted the postmortem on the deceased. He observed that the deceased had multiple cuts on the head measuring approximately 18cm, a deformed skull which had a depression and bone fracture, a scalp with deep cuts and blood stains on the face and hands. He concluded that the cause of the deceased's death was haemorrhagic shock due to severe head injury.

21. When they were placed on their defence, both the appellant and Kennedy gave sworn testimonies but called no witnesses. Kennedy testified that he knew the deceased and his wives, but denied ever having a disagreement with any of them. He told the court that on the material day, he was arrested at 10.00am and was in police custody at the time the deceased was murdered. He also told the court that he did not know why he was arrested and upon inquiry, he was told that he would know when they got to the police station.

22. The appellant told the court that he was a miner at the quarry within Kawadhgone; and on the material day, he was there in the company of Zablon Amolo. He too testified that he knew the deceased and his two wives, but denied ever having a disagreement with any of them. He also informed the court that he did not know why he was arrested but that he later heard that the deceased had been killed.

23. The appeal was argued by way of written submissions by both parties. During the virtual hearing, learned counsel Ms. Olonyi appeared for the appellant whereas learned counsel, Mr. Okango, appeared for the respondent. Both parties relied on their submissions.

24. On the first ground, counsel impugned the prosecution evidence and argued that it did not support the offence charged as only one of the three main elements of murder were proved by the prosecution. Counsel contended that while the death of the deceased was not in dispute, the cause of death, malice aforethought and the identity of the persons who killed the deceased, were not proved beyond reasonable doubt.

25. As regards the cause of death and malice aforethought, counsel relied on the decision in *Republic v Silas Magongo Onzere alias Fredrick Namema* [2017] eKLR, for the proposition that it must be proved beyond reasonable doubt that an accused person's act or omission was the sole cause of the deceased's death.

26. Counsel argued that none of the prosecution evidence alluded to any dispute whatsoever between the appellant specifically and any of the deceased's family members; which evidence was also reiterated by the appellant in his defence, but the same was ignored by the trial court. In any event, the prosecution evidence pointed to the deceased having disputes with the appellant's two brothers, Kennedy and Maurice; and not the appellant. To this end, counsel argued that the trial court erred in stretching the alleged motive for murder to envelop the appellant as part of the dispute between Kennedy, Maurice and the family of the deceased. Counsel insisted that there was no evidence of such motive on the part of the appellant; and that the trial court drew an impermissible and prejudicial inference in that regard.

27. Counsel for the appellant further argued that the inquiry was to establish whether the perpetrator(s) of the offence had the sole aim of killing or causing grievous bodily harm to the deceased. In this regard, counsel relied on the decision in *Republic v Ismail Hussein Ibrahim* [2018] eKLR, for the proposition that to determine malice aforethought, the court has to consider the weapon used, the manner in which it was used, the part of the body targeted, the nature of injuries inflicted, and the conduct of the accused before, during and after the incident.

28. Counsel further contended that the supposed motive that the appellant had could not have been to murder the deceased since the alleged family feud remained unproved. She submitted that the only thing that tied the appellant to the offence charged in this case was circumstantial evidence and relied on this court's decision in Anne Waithera Macharia & 5 Others v Republic [2019] eKLR, to argue that it would be in the best interest of justice if this court declared that the trial court erred and convicted the appellant on circumstantial evidence.

29. Additionally, counsel contended that the prosecution did not tender any evidence to rebut the appellant's defence of alibi, and neither did it put the appellant at the scene of crime, to show that he committed the offence to the exclusion of all others.

30. As regards the identity of the persons who killed the deceased, counsel argued that while PW1, PW3 and PW4 testified that they identified the assailants of the deceased using moonlight that shone on that material night, PW2 confirmed that there was some darkness, so much that he had to use light from a torch to identify the deceased, whom he knew very well. Thus, by logic, there was a possibility that the deceased together with PW1, PW3 and PW4, wrongfully identified the person who accosted the deceased and confused him with the appellant. Counsel also submitted that PW1, PW3 and PW4 testified that the assailants never uttered a word to them. Thus, voice recognition which would have helped in further identification was lacking.

31. Counsel further argued that the testimonies of PW1, PW3 and PW4 were all inconsistent with regard to whom, between Maurice and the appellant, was armed with weapons (panga and arrow). To this end, counsel contended that the post mortem report showed that the deceased suffered multiple cuts on the head and the cause of death was said to be haemorrhagic shock due to depressed skull fracture with severe head injury. Thus, according to counsel, the narrative driven by PW7 was that the deceased succumbed from injuries inflicted upon him by Maurice, and there was nothing that showed that the cause of death was attributable to the appellant's acts, whom it was alleged hit the deceased's head with a stone.

32. Additionally, counsel argued that even though it is trite law that failure to produce a murder weapon is not fatal to the prosecution case, as long as the court believed that the evidence before it showed that no such weapon existed at the time of the offence, the accused person is entitled to an acquittal. Counsel relied on *Karani v Republic* [2010] 1KLR 73 and argued that there was no evidence that the appellant had a weapon (a 6 by 9 inches building stone) at the time of the offence; and further, there was no indication that the injuries described in the post mortem report were inflicted by a building stone. According to counsel, the deceased's skull was fractured because he was hit five times with a panga. Therefore, the evidence by PW1, PW3 and PW4 that the appellant hit the deceased's head with a building stone, was not supported by evidence. Thus, the appellant's conviction without evidence of a murder weapon was prejudicial.

33. On the second ground, counsel contended that the prosecution evidence was marred with immense inconsistencies and did not meet the standard of proof beyond reasonable doubt, thus vitiated the appellant's right to a fair trial. In this regard, counsel pointed out that the trial court erroneously assumed that the death threat referred to by PW1 was issued on the material day of the murder, however, PW2 clarified that the said threat was made on September 24, 2014 and not on October 3, 2014. Counsel also submitted that Kennedy sought the deceased forgiveness, hence the supposed motive was superimposed.

34. Counsel also contended that the judgment of the trial court flouted the requirement of section 169(1) of the *Criminal Procedure Code* which stipulates that every judgement must contain point(s) for determination, the decision thereon and the reasons for the decision. In this regard, counsel submitted that the trial court made serious and prejudicial assumptions when it held that the appellant murdered the deceased as he may have felt harassed and fed up as his brother, thus decided to carry out the revenge for his brother's sufferings; which assumption was not backed by evidence nor decision, to the detriment of the appellant. Counsel also submitted that in its judgment, the trial court stated that it was PW1's evidence that the attack lasted about four minutes. However, a reading of the court proceedings as recorded by the court itself did not mention whatsoever any time period if at all, or the four minutes, stated by PW1. Counsel argued that the assumption made by the trial court failed to meet the mandatory threshold required and relied on this court's decision in *James Nyanamba v Republic* [1983] eKLR. Counsel also argued that the trial court completely ignored the appellant's defence without any justification, and relied on the decision in *Okale Okethi & Others v Republic* (1965) EA 555.

35. On the third ground, counsel argued that the death sentence meted was not proper as the case against the appellant was never proved and his defence was overlooked. Further, counsel submitted that the mandatory death sentence is not only inimical to international law and customs, but also unconstitutional as it violates the appellant's right to be free from cruel, inhuman and degrading treatment as provided for under articles 25(a and c), 29(f) and 28 of the *Constitution*. Lastly, counsel submitted that the sentence meted was illegal, excessive and unconstitutional, and relied on the decision in *Francis Karioko Muruatetu & Another v Republic* [2017] eKLR and *Juma Anthony Kakai v Republic*, Criminal Appeal No 48 of 2015, for the proposition that mandatory death penalty is unconstitutional.

36. Opposing the appeal, as regards the first ground, Mr. Okango cited this court's decision in *Anthony Ndegwa Ngari v Republic* [2014] eKLR, wherein it was held that for an accused person to be convicted for the offence of murder, the prosecution must prove three elements beyond a reasonable doubt. 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 malice aforethought.

The first element of death of the deceased was not in dispute. Thus, with regard to the second element, counsel submitted that the following prosecution evidence pointed to the appellant as the one who assaulted the deceased leading to his death. The evidence of PW1 that she saw the appellant pick a huge stone (6 by 9 inches) used for building and smashed it onto the deceased's head the evidence of PW3 that the appellant picked a stone and hit the deceased with it; the evidence of PW4 that she saw the appellant take a stone (6 by 9 inches) and hit the deceased at the back just at the portion of lumbar stem supporting the neck; the evidence of PW7 that the skull and scalp were deformed with deep cuts and there was a depressed skull fracture with obvious bone fractures. Counsel argued that the depression on the skull was clearly caused as a result of the smashed stone on the head.

37. As regards the third element (malice aforethought), counsel argued that in the instant case, the appellant picked a huge stone used for building and smashed it on the head of the deceased after his brother had inflicted cut wounds on the deceased's head. Therefore, it was clear from the actions of the appellant that he had the intention of making sure the deceased was dead and would not even survive the cut wounds that had already been inflicted on his head. Counsel also argued that the fact that the deceased had caused the appellant's brother to be arrested for the offences of malicious destruction of property and threatening to kill led to bad blood between the appellant and the deceased; therefore, the reason to cause the death of the deceased.

38. The respondent's counsel also argued that it was proper for the trial court to reject the appellant's alibi defence and relied on this court's decision in *Victor Mwendwa Mulinge v Republic* [2014] eKLR, wherein it was held that in testing a defence of alibi, a trial court may weigh it against all other evidence to see if the accused's guilt is established beyond reasonable doubt, taking into account the fact that he did not put forward his defence of alibi at an early stage so that it can be tested by those responsible for investigating and thereby prevent any suggestion that it was an afterthought. In this regard, counsel submitted that the defence of alibi was raised by the appellant at the tail end during their defence hearing, hence there was no opportunity for the defence to be tested. Additionally, he submitted that the defence was clearly an afterthought and unreliable.

39. Further, counsel rejected the appellant's submission that the only thing that tied him to the offence charged was circumstantial evidence. In this regard, he relied on this court's decision in *Anne Waithera Macharia & 5 Others v Republic* [2019] eKLR, wherein the nature of circumstantial evidence was described. He argued that in the instant case, there were three(3) credible witnesses, PW1, PW3 and PW4, who testified that they saw the appellant pick a stone and hit the deceased on the head after he had been cut several times by Maurice. Counsel submitted that this was direct evidence as to the motive of the appellant in killing the deceased.

40. On the second ground, counsel rejected the appellant's assertion that the prosecution evidence was inconsistent. He contended that the same was consistent and argued that while Maurice, who is at large, was the one who actually cut the deceased's head, he was in the company of the appellant who took a stone and dropped it on the deceased's head while he lay on the ground. He further argued that the evidence of PW7 showed that the cause of death was haemorrhage due to a deformed skull, which could not have been caused by cuts. Counsel argued that in any event, both the appellant and Maurice directed their attack on the head of the deceased, and the two acts of cutting and dropping a stone on the deceased's head, caused deformation of the skull and led to haemorrhage. Additionally, counsel argued that even if the act of dropping the stone on the appellant's head was to be dismissed, the fact

that the appellant was in the company of Maurice at the time of the incident means that the doctrine of common intent applies to implicate the appellant for having been part of the common enterprise.

41. On the third ground, counsel conceded the appellant's reliance on the Supreme Court decision in *Francis Karioko Muruatetu & Another v Republic* [2017] eKLR (*supra*), in which the mandatory death sentence was declared unconstitutional. Counsel argued that while it was true that the appellant was not afforded the opportunity to mitigate, this Court should consider the fact that the appellant had no mercy on the deceased who lay helpless on the ground after being cut several times on the head. Instead, the appellant crushed a stone on the deceased's head and killed an innocent soul without any provocation.

42. We have carefully evaluated the evidence before the trial court. We have also considered the appeal before us, the rival submissions of the parties and the authorities cited in support of the opposing positions.

43. This appeal, as framed and argued, raises four questions for determination:

    a. First, whether the main elements of murder were proved beyond reasonable doubt.

    b. Second, whether the prosecution evidence was marred with inconsistencies.

    c. Third, whether the learned trial judge ignored the appellant's defence.

    d. Fourth, whether the sentence meted out was excessive, harsh, unconstitutional and unlawful, in the circumstances.

44. The first three issues are related as they go to the question whether there was sufficient evidence to prove all the ingredients of murder beyond reasonable doubt. As such, we will deal with them together. We have set out above the evidence as it emerged at the trial. As rightfully submitted by the respondent herein above, this court in *Anthony Ndegwa Ngari v Republic* [2014] eKLR (*supra*) set out the elements for the offence of murder as

    (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.

45. In the present case, the death of the deceased is not in dispute.

46. With regard to the cause of death and the identity of the persons who caused the deceased's death, looking at the evidence at the trial court, it is clear from the testimonies of PW1, PW3 and PW4 that they saw the appellant hitting the deceased's head with a huge stone, immediately after his brother, Maurice cut the deceased's head with a panga about two or three times. Given that the incident took place at night, care ought to be taken to ensure that the appellant was positively identified as the perpetrator of the offence in accordance with the guidelines set in various cases, among them *Republic v Turnbull* [1976] 3 All ER 549 and *Kiarie v Republic* [1984] KLR 739. In this regard, the record shows that PW1, PW3 and PW4 testified that they identified the appellant, as they passed each other on the narrow path, using moonlight which shone on the material night at 7.30pm. This was direct evidence and not circumstantial evidence as submitted by the appellant. The three prosecution witnesses also said that the two perpetrators were people who were well known to them, being that they come from the same clan and were also neighbours. As a result, the trial court found that evidence as credible and satisfactory in the circumstances.

47. Having thoroughly re-evaluated the evidence, it is our view that the learned judge was right to believe the evidence of PW1, PW3 and PW4. These three witnesses, contrary to the submissions by the appellant, gave direct, eye-witness accounts of the murder of the deceased.. To a large extent the main account was the same: the deceased and his family met with the appellant and his brother; and the latter two attacked the deceased – one armed with a panga. The appellant, then, took a stone and sadistically brought it down on the head of their fallen victim, killing him instantly. The testimonies given by PW1, PW3 and PW4 did not amount to circumstantial evidence; they were direct, eye witness accounts.

48. The essential evidence, in our view, remained unshaken during cross examination. It is true that there were some discrepancies in the three accounts of the three eyewitnesses – but it would be unrealistic to expect completely uniform accounts of a traumatic incident like that. In our considered view, these discrepancies in their accounts were not material at all – whether Maurice – the appellant's accomplice who is still a fugitive of justice – was armed with an arrow or a panga; whether only the appellant cut the deceased with a panga; how many times the deceased was cut; and the slightly differing accounts of PW2 and PW4 on whether the murder took place on the same day that Kennedy had made threats to the deceased or a few days apart. The essential narrative is that the appellant and Maurice clearly acted in concert in attacking; chasing the deceased as he fled; and finally dropping a big stone on his head. None of these alleged inconsistencies is material enough to introduce reasonable doubt to the prosecution case. The test that the court utilizes on the effects of contradictions or inconsistencies on the prosecution case is a substantive one: it inquires whether the contradictions or inconsistencies in the prosecution evidence are to such an extent that a reasonable person would be left in doubt as to whether the charges were proved, or whether the contradictions (if any), are so material that the trial court ought to have rejected the evidence. Differently put, not every inconsistency, however small, introduces reasonable doubt to the prosecution case. See *Erick Onyango Ondeng' v Republic* [2014] eKLR Criminal Appeal No 5 of 2013. Here, the alleged inconsistencies do not affect the substance of the Prosecution case.

49. The next issue raised by the appellant respecting the sufficiency of the prosecution evidence is the critical issue of identification. The appellant says that the conditions were not ideal for safe identification since it was night. He buttresses his argument by positing that the fact that PW2 (the area chief) testified that he used his torch to identify the deceased when he found him lying lifelessly on the path is a pointer to the less-than-ideal conditions for identification.

50. It is true that the identification in this case was at night. It is also true that the Court is enjoined to consider identification evidence with circumspection. We, therefore, reiterate what this Court stated in *Wamunga v Republic*:

> "It is trite law that where the only evidence against a defendant is evidence on identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of a conviction."

51. In the present case we note, first, that the identification evidence is not from just one witness – but three witnesses. We also note that all the three witnesses were categorical that there was moonlight and that it was bright enough for them to see the appellant and his brother. Finally, we note that the identification evidence was one of recognition by all the three witnesses. Indeed, the identifying witnesses not only belonged to the same clan but lived (and, in this case, constantly feuded) as neighbours. The possibility of error, we conclude, is simply illusory. The safety of the identification evidence, in our view, is strengthened by the evidence of motive which was available in this case. Contrary to the appellant's assertions, motive is not one of the requirements for a murder conviction. However, evidence of motive

(or lack of it) can be used to strengthen (or weaken) certain aspects of the prosecution case. In the present case, it strengthens the identification evidence. In making this observation, we also explicitly affirm the learned judge's finding of fact that there was an ongoing family conflict between the family of the appellant and that of the deceased. Indeed, so intense was the conflict that the appellant's brother, Kennedy, was languishing in a police cell at the time of the attack following a report made by the deceased about Kennedy's threats to him. We do not think it is unreasonable to impute the motive to the family as evidence showed the bad blood was between members of the two families, not just some individuals.

52. As for PW2's use of a torch at the murder scene, that can be explained by many factors including the fact that the witness wanted to be doubly sure about the identity of the deceased, the nature of the injuries, and whether he was still alive. The dark might also have grown darker considering that the attack was at around 7:30pm and PW2 did not get to the scene until after about an hour.

53. Returning to the theme of motive, it would seem that the appellant mistook motive for malice aforethought as an ingredient for the offence of murder. Malice aforethought is, simply, the mental element (or *mens rea*). In Kenya, malice aforethought is defined by section 206 of the *Penal Code*: malice aforethought is established, when there is evidence of:

    i. Intention to cause death of or grievous harm to any person whether that person is the one who actually died on not;

    ii. 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;

    iii. Intent to commit a felony; or

    iv. 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.

54. In his submissions, the appellant made reference to the decision in *Republic v Ismail Hussein Ibrahim* [2018] eKLR. In that case, the court held that to determine malice aforethought, it considers the weapon used, the manner in which it was used, the part of the body targeted, the nature of injuries inflicted, and the conduct of the accused before, during and after the incident, and so forth. From the evidence on record, Maurice cut the deceased with a panga a few times on the head; and then used a big stone to hit his head. The nature of the attack; the intensity of it; the parts of the body targeted; and the weapons used are sufficient to establish malice aforethought in this case.

55. Turning to the alibi defence, we note that, first, it was only raised for the first time by the appellant as he gave his unsworn statement. The legal position with regard to an alibi is that there is no onus on an accused person to establish it, and the accused person is entitled to an acquittal if the alibi might reasonably be true. However, in applying this test, the alibi is not considered in isolation. The correct approach is to consider the alibi in light of the totality of the evidence, and the court's impression of the witnesses. A further governing principle on an alibi defence is that a failure to disclose it at a sufficiently early time to permit it to be investigated by the police is a factor which may be considered in determining the weight given to it. See, for example, *Kossam Ukiru v. R*. (2014) eKLR where this Court (Azangala, Gatembu and Kantai, JJA.) held that the defence of alibi may be rejected as an afterthought when it is not raised at the earliest opportunity and when, weighed against all the other evidence, it is established that the appellant's guilt has been established. The Court said -

> "We are fully alive to the principle that an accused person who sets up an alibi does not assume any burden to prove the same (see *Karanja vs Republic* [1983] KLR 501). In this

case, however, the two courts below rejected the appellant's alibi defence on the basis first, that it had not been raised at the earliest opportunity in the proceedings and second, that weighing the defence with all the

56. In the present case, we observe that the learned judge properly considered the alibi defence – indeed, the learned judge accepted the alibi of the appellant's brother, who was in a police cell at the time of the incident, and acquitted him. The alibi defence of the appellant, on the other hand, was properly rejected, when weighed against the totality of evidence. First, it was belatedly raised. Second, the defence was not put to the witnesses in cross-examination, and was raised for the first time when the appellant was put on his defence. Third, when weighed against the strong prosecution evidence by three eye-witnesses whose testimonies remained unshaken through cross-examination.

57. The appellant also raised a final curious ground against his conviction: it is that the judgment did not comply with section 169(1) of the *Criminal Procedure Code* which stipulates that every judgement must contain point(s) for determination, the decision thereon and the reasons for the decision. In our view this ground requires no more than short shrift: the judgment of the learned judge evidently meets the technical qualifications of a judgment under section 169 of the *Criminal Procedure Code*. What that section stipulates is not a mechanical and mathematical formulae for writing a judgment. It is, rather, a substantive requirement that is aimed at ensuring that a court has analyzed and weighed the prosecution and defence evidence in its totality rather than each separately and in isolation. Looking at the judgment, we have no doubt that it easily complies with the requirements of section 169 of the *Criminal Procedure Code*: the judgment contains the name of the accused person; the charge he was facing, a summary of the prosecution and defence evidence; the ingredients of the offence of murder and the decision made on each; the reasons for the decisions; and the case for conviction.

58. In the end, therefore, we are satisfied that the conviction of the appellant was safe and hereby affirm it.

59. As regards the fourth question – of appeal against sentence -- we take cognizance of the Supreme Court decision in *Francis Karioko Muruatetu & Another v Republic* [2017] eKLR (*supra*), in which the mandatory death sentence under section 204 of the *Penal Code* was declared unconstitutional. Although the respondent's counsel has urged us to take the circumstances into consideration and impose the death sentence in the exercise of this Court's discretion, we note that the appellant was not given an adequate opportunity to mitigate in the High Court. We are therefore of the view that the proper course in this case is to set aside the mandatory death sentence imposed and remit the case back to the High Court for a rehearing on sentence.

60. The upshot is that the appeal against conviction fails and is hereby dismissed. The appeal against sentence succeeds. Consequently, we set aside the death sentence meted out upon the appellant. Instead, we remand the case back to the High Court for resentence hearing. The Honourable Deputy Registrar of this Court to arrange for the case to be mentioned before the Presiding Judge, Kisumu High Court, for directions within fourteen (14) days of today.

61. Orders accordingly.

DATED AND DELIVERED AT KISUMU THIS 24TH DAY OF NOVEMBER, 2023.

MUMBI NGUGI

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JUDGE OF APPEAL

F. TUIYOTT

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JUDGE OF APPEAL

JOEL NGUGI

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR