



**Watulo & another v Republic (Criminal Appeal 218 of 2020)  
[2023] KECA 1541 (KLR) (15 December 2023) (Judgment)**

Neutral citation: [2023] KECA 1541 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAKURU  
CRIMINAL APPEAL 218 OF 2020  
FA OCHIENG, LA ACHODE & WK KORIR, JJA  
DECEMBER 15, 2023**

**BETWEEN**

**RODGERS WASIWA WATULO ..... 1<sup>ST</sup> APPELLANT**

**ANTHONY MUKOKHA ..... 2<sup>ND</sup> APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(An Appeal from the Judgment of the High Court of Kenya at Eldoret (Hon. S.M. Githinji, J.) delivered and dated 19th November 2020 in HCCRC No. 87 of 2012)*

**JUDGMENT**

1. Rodgers Wasiwa Watulo and Anthony Mukokha, the respective 1<sup>st</sup> and 2<sup>nd</sup> appellants, were at the trial before the High Court charged with the offence of murder contrary to section 203 as read with section 204 of the *Penal Code*. The information stated that on the night of 20<sup>th</sup> June 2011 at Kapyego Shopping Centre, Kapyego Location within Elgeyo Marakwet County they jointly murdered Julius Yator Biwott alias Abdul. They entered a plea of not guilty and at the conclusion of the trial each one of them was found guilty and sentenced to 10 years' imprisonment.
2. The appellants being dissatisfied with the judgment of the trial court have through the Memorandum of Appeal dated 26<sup>th</sup> January 2021 appealed to this Court on the grounds that malice aforethought was not established; that the learned trial Judge erred in finding that the appellants had common intention; that the learned trial Judge erred in dismissing the appellants' defence on the ground that it was an afterthought; that the prosecution evidence was marred with contradictions and inconsistencies which ought to have been resolved in their favour; that there was failure to call a crucial witness; and, that the evidence on record failed to prove whether it was the appellants who delivered the fatal blow to the deceased. The appellants therefore pray that the appeal be allowed, their convictions quashed and the sentences set aside.



3. A perusal of the record of appeal shows that the prosecution relied on the evidence of 9 witnesses to make up a case against the appellants. Paul Kimutai Biwott took the stand as PW1 and testified that on 23<sup>rd</sup> June 2011, he identified the body of his deceased brother, Julius Yator Biwott, at Moi Teaching and Referral Hospital, Eldoret for purposes of post-mortem.
4. Joshua Toroitich Chebet testified as PW2 stating that the deceased was to be his guest on 20<sup>th</sup> June 2011. He met the deceased at about 6.30pm and agreed to link up with him at 7.00pm at Richard's Hotel. When he arrived at the venue at 7.30pm he was informed that the deceased had been there but had left. He proceeded home but did not find the deceased. The next day at about 7.45am he received a call informing him that the deceased had been locked up at the chief's camp with injuries. He proceeded with the caller to the chief's camp and along the way they met the 2<sup>nd</sup> appellant who informed them that the deceased had bitten his thumb the previous night. The 2<sup>nd</sup> appellant then referred them to the 1<sup>st</sup> appellant. At the chief's camp they found the deceased unconscious with injuries on his head and neck. The 1<sup>st</sup> appellant informed them that the deceased had tried to snatch a gun from them and a fight ensued. PW2 then took the deceased to Kapsowar Hospital for treatment where he was pronounced dead upon arrival.
5. Joel Suter testified as PW3 and recalled that on 23<sup>rd</sup> June 2011 at about 4.00pm he witnessed post-mortem on the body of the deceased at Moi Teaching and Referral Hospital. The deceased was his cousin.
6. Dr. Macharia Benson testifying as PW4 stated that he conducted a post-mortem on the deceased's body on 23<sup>rd</sup> June 2011 at Moi Teaching and Referral Hospital. He noted that the deceased's nails had turned blue due to lack of oxygen. The deceased also had bruises on both knees and blood was oozing from the nostrils. He further noted two lacerations on the left side of the skull near the centre. PW4 observed that the deceased had no defensive wounds. According to the witness, the deceased had a bruising of the scalp extending from the vertex to the backside. There was also bleeding within the cranium with the brain flattened from the surface. PW4 formed the opinion that the deceased died as a result of raised intracranial pressure due to intracranial bleeding as a result of blunt force trauma.
7. On his part Willy Kangogo Kandie (PW5) testified that on 21<sup>st</sup> June 2011 at about 12.30am he was woken up to attend to a patient at Kapyego Dispensary where he worked as a nurse. While heading to the dispensary, he met the 2<sup>nd</sup> appellant who had a human bite on the right thumb. They proceeded to the dispensary where he attended to him. PW5 further testified that on his way back home he was beckoned by the 1<sup>st</sup> appellant who asked him to attend to the deceased who was sitting by the roadside. They took the deceased to the chief's camp and upon assessing the deceased's situation, he advised the 1<sup>st</sup> appellant to take the patient, who was in a coma, to Kapsowar Hospital as he could not manage him. PW5 observed that the patient had multiple injuries. In the morning, together with his colleagues, they went to the chief's camp and found the deceased still there.
8. Robert Kiplagat Biwott (PW6) recalled that on 20<sup>th</sup> June 2011 at about 9.50pm he was with the deceased in a bar at Kapyego Trading Centre when the appellants walked in and ordered drinks. The appellants later talked with the deceased after which the deceased told him that the appellants were pestering him for drinks. PW6 went away at about 10.00pm leaving behind the deceased and the appellants.
9. PW7 Gladys Jepkemboi Bomett, a bartender at the Emirates Bar at Kapyego Center testified that on the material day the deceased went to her bar. Shortly thereafter the appellants also arrived and asked the deceased to buy them beer but he declined. When the deceased left the bar, the appellants followed him. She closed the bar at about 11.00pm and on stepping out, the appellants directed torch light at her



and ordered her to stop. She also saw the deceased. It was at that juncture that the 2<sup>nd</sup> appellant slapped the deceased on the face and held him by the collar of his jacket. The two appellants then wrestled the deceased to the ground whereupon the 2<sup>nd</sup> appellant sat on him as the 1<sup>st</sup> appellant used the butt of his rifle to hit him on the head. The deceased screamed until he became unconscious and that is when PW7 ran to her house. Her evidence was that she relied on the light from the appellants' torches and the security lights of the bar to ascertain the identities of the deceased's assailants.

10. Felix Rono (PW8) and Timothy Toroitich (PW9) recounted that on the material day they were headed home from work when they heard screams which later stopped. On reaching their gate, the appellants called them and asked them to help carry the deceased to the Administration Police Camp. They identified the appellants using the light from the torches the appellants had. The 2<sup>nd</sup> appellant left to seek medical attention while they headed to the camp with the 1<sup>st</sup> appellant. At the time, the deceased who was bleeding from the nostrils could not talk.
11. When placed on their defence, the 1<sup>st</sup> appellant who testified as DW1 stated that on the material day in the company of the 2<sup>nd</sup> appellant they went to Emirates Bar to catch up with the 9.00pm news. At about 9.15pm, they left to prepare for night patrol within Kapyego Trading Centre. They commenced the patrol at midnight and that is when they met three people dressed in black jumpers. Two of the three fled when they directed their spotlights at them. The one who remained behind was the deceased and upon being questioned, he pounced on the 2<sup>nd</sup> appellant overpowering him. The 1<sup>st</sup> appellant testified that the deceased snatched the 2<sup>nd</sup> appellant's rifle but the 2<sup>nd</sup> appellant was able to snatch it back from him. The deceased then bit the 2<sup>nd</sup> appellant's hand and took off from the scene. The deceased was later chased, arrested and beaten up by the villagers who were angry at him for assaulting a police officer.  
  
The 1<sup>st</sup> appellant stated that the deceased was escorted to the chief's camp where their attempts to get a police vehicle to escort him to the hospital did not bear fruits. In the morning, with the aid of the deceased's relatives they escorted the deceased for treatment at Kapsowar. They later went to Kapsowar Police Station where they reported the incident and handed over two bullets recovered from the deceased during his arrest.
12. The 2<sup>nd</sup> appellant testified as DW2 and adopted the evidence of the 1<sup>st</sup> appellant in his defence. He added that on the material day he was injured by the deceased and later treated by PW5. He stated that on his way home to rest, he heard the 1<sup>st</sup> appellant ask PW5 to attend to the deceased. The 2<sup>nd</sup> appellant denied participating in the killing of the deceased.
13. In a judgment delivered on 19<sup>th</sup> November 2020, S. M. Githinji, J found that the appellants acted in concert with the intention of causing grievous harm to the deceased. The learned Judge also found that the evidence of PW7 was consistent with and corroborated that of the other prosecution witnesses and that the defence case was unbelievable. The Judge held that the injuries sustained by the deceased could not have been inflicted by a mob as alleged by the appellants as they were consistent with the evidence of the prosecution witnesses. The trial court also determined that the appellants were known to the witnesses who had the opportunity to ascertain their identity at the scene of crime. He therefore found them guilty as charged and convicted them.
14. At the hearing before us, Mr. Murunga appeared for the appellants and Ms. Konga represented the respondent. In the submissions dated 30<sup>th</sup> August 2021, Mr. Murunga relied on the cases of *Nzuki vs. Republic* [1993] KLR 191 and *Republic vs. Tubere s/o Ochen* [1945] 12 EACA 63 to highlight the necessity of establishing the ingredient of malice aforethought in a murder case. Counsel proceeded to submit that malice aforethought and common intention were not proved to the required standards and therefore the charge of murder against his clients could not stand. Counsel added that the appellants were police officers on official patrol duties and did not harbor any ill motive against the deceased.



15. Mr. Murunga also submitted that the trial court erred in dismissing the appellants' defence by terming it an afterthought because it was not introduced during cross-examination of the prosecution witnesses. According to counsel, as held in *Thomas Patrick Gilbert Cholomondely vs. Republic* [2008] eKLR the burden of proof in a criminal trial always lies with the prosecution and not the accused person. He submitted that in order to earn an acquittal, the appellants were only required to establish during cross-examination of the prosecution witnesses that they were not responsible for the deceased's death. Counsel submitted that the trial Judge adopted an erroneous view of the appellants' defence, failed to give due consideration to the contradictions in the prosecution case and shifted the burden of proof to the appellants thus perpetuating a miscarriage of justice.
16. Mr. Murunga further submitted that the evidence of PW7, who was the only eyewitness, was not credible as it was marred with inconsistencies and thus misleading.
17. Counsel for the appellants additionally submitted that the failure by the prosecution to call the investigating officer as a witness left gaps in the prosecution case as to how the appellants were arrested and the outcome of the investigations. Counsel relied on the case of *Bukenya & others vs. Uganda* [1972] EA 49 to urge that the failure to call a material witness was fatal to the prosecution case.
18. Finally, counsel contended that the evidence on record did not point to the appellants as the persons who occasioned the blows that led to the deceased's demise. Counsel consequently urged us to find that the judgment was against the weight of the evidence on record, allow the appeal, quash the conviction and set aside the sentence.
19. In response, Ms. Konga relied on her submissions dated 14<sup>th</sup> July 2023. She commenced by referring to the decision of the High Court in *Republic vs. Juma Kituku Mwambegu*, CR Case No. 12 of 2018 as outlining the elements of the offence of murder. Counsel then urged us to uphold the findings of the trial court stating that the evidence on record sufficiently proved all the elements of murder. Counsel submitted that the findings of the trial court on malice aforethought were in tandem with the holding in *Republic vs. Tubere s/o Ochen* [1945] 12 EACA 63 on what amounts to malice aforethought. According to counsel the nature and extent of the injuries sustained by the deceased were considered by the trial court in concluding that malice aforethought was established.
20. Counsel for the respondent further submitted that the failure to call the investigating officer to testify was not prejudicial to the prosecution case or that of the appellants. She argued that all the material elements of the offence charged attained the required threshold of proof. She therefore urged us to uphold the judgment of the trial court by dismissing this appeal for want of merit.
21. This being a first appeal, our jurisdiction cuts across both matters of fact and of law. The manner in which we will exercise our mandate is as was stated in *Dickson Mwangi Munene & another vs. Republic* [2014] eKLR as follows:

“This being a first appeal, this Court is obliged to re- evaluate the evidence on record to determine if the trial court's decision was based on evidence and is legally sound. On matters of fact, as appellate court we have to bear in mind the caution that having heard and seen the witnesses testify, the trial court was better placed to assess their demeanor. We should therefore be slow to reverse the trial judge's finding of fact unless it is supported by the evidence on record.”
22. We have reviewed the record of appeal and the submissions by the advocates for the parties as well as the cited authorities. The issue arising for our determination is whether the charge of murder was proved against the appellants.



23. Section 203 of the Penal Code which legislates the offence of murder outlines the ingredients of the offence as: the fact and cause of death of the deceased person; that the death of the deceased was as a result of an unlawful act or omission on the part of the accused person; and, that such unlawful act or omission was committed with malice aforethought. Thus, in *Roba Galma Wario vs. Republic* [2015] eKLR, the importance of proving malice aforethought in a charge of murder was outlined as follows:
- “For the conviction of murder to be sustained, it is imperative to prove that the death of the deceased was caused by the appellant; and that he had the required malice aforethought. Without malice aforethought, the appellant would be guilty of manslaughter, as it would mean the death of the deceased during the brawl was not intentional.”
24. A perusal of the record shows that there was no dispute as to the fact of the deceased’s death. According to the evidence of PW4, the deceased died as a result of raised intracranial pressure due to intracranial bleeding arising from blunt force trauma. That the body upon which post-mortem was performed did indeed belong to the deceased was confirmed by PW1 and PW3.
25. The next question is whether the injuries sustained by the deceased were caused by the appellants. According to PW6, he was in the company of the deceased at a bar on the material night when the appellants walked in. The appellants had small talk with the deceased while they drank their beer. The deceased later informed him that the appellants were pestering him to buy them beer. His evidence was corroborated by PW7 who was the bartender at Emirates Bar that evening. She confirmed hearing the appellants demanding beer from the deceased and the deceased’s negative response. She added that as she was leaving the bar after closing business the appellants directed torch light at her and ordered her to stop. Using light from the appellants’ torches and the security lights of the bar, she saw the 2<sup>nd</sup> appellant slap the deceased who at the time was standing in the middle of the road. The deceased fell on the ground and the 1<sup>st</sup> appellant joined in the assault. Her evidence was that while the 2<sup>nd</sup> appellant sat on the deceased, the
- 1<sup>st</sup> appellant used the butt of his gun to assault him on the head several times. The deceased screamed until he went quiet. PW8 and PW9 on their part were ordered by the appellants to help carry the deceased from the scene of assault to the chief’s camp. As for PW5, he was called by the 1<sup>st</sup> appellant to attend to the deceased at the chief’s camp. He found the deceased with multiple injuries and in a coma.
26. The evidence is logical and corroborative. It places the appellants at the scene of crime and also explains what transpired. In the circumstances, the appellants’ claim that they were accosted by the deceased and two others who attempted to snatch a rifle from the 2<sup>nd</sup> appellant does not add up. We also find unbelievable the evidence that the deceased was arrested by the members of the public while running away. PW7 who was an eyewitness to the incident did not talk about any members of the public being present. Neither did PW8 or PW9 who helped carry the deceased to the chief’s camp ever talk of any members of the public. PW5 was also at the scene and he never mentioned a multitude. Indeed, PW5 corroborated the evidence of PW8 and PW9 as he testified that he found the 1<sup>st</sup> appellant, the deceased and two young men. The deceased was being supported by one of the young men.
27. We also find it hard to believe that the deceased who was alone could overpower two trained police officers. We therefore agree with the learned trial Judge that the defence case was an afterthought. On the other hand, the evidence tendered by the prosecution clearly portrayed the appellants’ role in inflicting the fatal injuries on the deceased. The parts of the body that were hit by the gun butt as witnessed by PW7 are the sites of the injuries that were observed by PW4 during post-mortem. This evidence also finds support in the testimony of PW5 who stated that the deceased’s head was swollen. It is therefore our finding that the fatal injuries inflicted on the deceased emanated from the appellants.



Our analysis above takes care of and leads to the rejection of the appellants' assertion that the evidence of the prosecution witnesses was contradictory and marred with inconsistencies.

28. The question that follows is whether the appellants had malice aforethought. As per Section 206 of the Penal Code, some of the factors that will demonstrate that there was malice aforethought are the intention to cause death or grievous harm, or, the knowledge that an act or omission might cause death or grievous harm. As held in *Republic vs. Tubere s/o Ochen* [1945] 12 EACA 63 malice aforethought can be discerned from the nature of the weapon used; the manner in which it was used; the part of the body targeted; the nature of the injuries inflicted; and, the conduct of the accused before, during and after the incident.
29. In this case, the evidence of PW7 was that the 1<sup>st</sup> appellant hit the deceased severally on the head using the butt of his gun. The two appellants combined efforts and even after subduing the deceased, continued to assault him until he could neither utter a word nor move. Even if the deceased had injured the 2<sup>nd</sup> appellant, the force deployed by the appellants was excessive in the circumstances. As already stated, the evidence of PW7 was consistent with and corroborative of the evidence of the pathologist. If the intention was to subdue and arrest the appellant, putting him on the ground was enough to subdue a tipsy man. However, beating him to the extent that he lost his consciousness can only amount to malice aforethought. The appellants being police officers trained in handling guns are expected to know that death is likely to occur where the butt of a gun is used to hit a human head. It is also not lost upon us that the appellants had, a few hours prior to the assault, been denied drinks by the deceased. Consequently, we find that the appellants were aware that their actions would result in grievous harm and therefore acted with malice aforethought.
30. The appellants took issue with the application of the doctrine of common intention to their case. The doctrine is housed in Section 21 of the Penal Code which states:

“When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence.”
31. The cited provision was interpreted in *Dickson Mwangi Munene & Another vs. Republic* [2014] eKLR as follows:

“This provision has been interpreted and the doctrine of common intention dealt with by our courts in several cases. In *Solomon Mungai v. Republic* [1965] E.A. 363, the predecessor of this Court held that in order for this section to apply, it must be shown that the accused had shared with the other perpetrators of the crime a common intention to pursue a specific unlawful purpose which led to the commission of the offence charged.”
32. We agree with the interpretation of the doctrine in the cited decision. We also agree with the holding in *Stephen Ariga & Another vs. Republic* [2018] eKLR that the forming of the common intention must not necessarily be before the execution of the act complained. Adopting the foregoing principles, we are left in no doubt that the appellants had a common intention of committing the murder. As the 1<sup>st</sup> appellant was assaulting the deceased on the head, the 2<sup>nd</sup> appellant pinned him down by sitting on him. Even after the deceased was taken to the chief's camp, the appellants failed to take measures to ensure he was accorded the necessary urgent medical attention. Instead, they waited until the next day when the deceased's relatives sought a motor vehicle to take him for treatment.



33. Before we conclude on the appeal against conviction, we need to point out that failure to call the investigating officer in a criminal trial is not fatal to the prosecution case so long as the witnesses called to testify have established the ingredients of the offence with which the accused person has been charged- see *Haward Shikanga Alias Kadogo & Another vs. Republic* [2008] eKLR; *Jeremiah Gatuiku Kiriungi vs. Republic* [2009] eKLR; and *Reuben Gitonga Nderitu vs. Republic* [2009] eKLR.
34. For instance, this Court (differently constituted) held in *Haward Shikanga Alias Kadogo & Another vs. Republic* [2008] eKLR that:
- “So in the circumstances of these appeals, the failure to call the investigating officer did not occasion to the appellants any failure of justice and we reject Mr. Onalo’s contention to the effect that we allow the appeals because the investigation officer was not called. We think that in all cases it would be good practice which prosecuting authorities ought to comply with, but the mere failure to comply with it, i.e. calling an investigating officer, cannot automatically result in an acquittal. Each case would have to be considered on its own circumstances in order to determine the effect of such a failure on the entire case for the prosecution.”
35. In the appeal before us the prosecution ably discharged the burden placed upon it to prove, beyond reasonable doubt, the charge of murder against the appellants. We therefore find no merit in the appellants’ claim that the failure to call the investigating officer ought to have led to their acquittal. We therefore find that the prosecution proved the charge of murder against the appellants. The appeal against conviction is therefore without merit and is dismissed.
36. The appellants did not take aim against the sentence of ten years imprisonment imposed by the trial court and they were wise in that decision. There was also no cross-appeal in respect to that sentence. We will therefore hold our peace and let the sentence be. The upshot of the foregoing is that the appeal herein is without merit and is dismissed in its entirety.

**DATED AND DELIVERED AT NAKURU THIS 15<sup>TH</sup> DAY OF DECEMBER, 2023**

**F. OCHIENG**

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**JUDGE OF APPEAL**

**L. ACHODE**

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**JUDGE OF APPEAL**

**W. KORIR**

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**JUDGE OF APPEAL**

I certify that this is a true copy of the original

Signed

**DEPUTY REGISTRAR**

