



**Said v Republic (Criminal Appeal 33 of 2021)
[2022] KECA 27 (KLR) (21 January 2022) (Judgment)**

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**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CRIMINAL APPEAL 33 OF 2021
SG KAIRU, A MBOGHOLI-MSAGHA & P NYAMWEYA, JJA
JANUARY 21, 2022**

BETWEEN

MOHAMED SUDI SAID APPELLANT

AND

REPUBLIC RESPONDENT

(An appeal from the Judgment of the High Court of Kenya at Mombasa (M. Muya, J.) dated 15th April 2016 in Mombasa High Court Criminal Case No. 24 of 2014)

JUDGMENT

1. The appellant, Mohamed Sudi Said, was arraigned before the High Court at Mombasa on a charge of murder contrary to Section 203 as read with 204 of the [Penal Code](#). The particulars set out in the information were that on 10th June, 2014 at Manyatta area, Likoni, within Mombasa County, the appellant murdered Sheikh Mohamed Idris Mwamlatso. The appellant pleaded not guilty to the charge and a trial followed. At the conclusion of the trial, the learned judge found the appellant guilty, convicted him for murder and thereafter sentenced him to suffer death.
2. Aggrieved by the conviction and sentence, the appellant lodged the instant appeal through a memorandum of appeal dated 26th April 2021. The grounds of this appeal are that the learned judge erred in fact and in law in:
 - a. Convicting the appellant while relying on weak, tenuous, unbelievable and discredited informer evidence allegedly connecting the appellant to the possession of the alleged murder weapon.
 - b. Convicting the appellant while relying on weak, tenuous, disjointed and discredited evidence of alleged discovery of the alleged murder weapon from the appellant.



- c. Convicting the appellant while relying on weak tenuous, and untenable prosecution evidence allegedly linking the alleged murder weapon to the killing of the deceased.
 - d. Convicting the appellant when the evidence adduced did not disclose the ingredients of the offence charged.
 - e. Convicting the appellant against the weight of the evidence.
 - f. Convicting the appellant when the prosecution had not proved its case against the appellant to the required standard of proof beyond any reasonable doubt.
 - g. Convicting the appellant when material evidence tending to exonerate the appellant was deliberately withheld from Court, and/or suppressed by the prosecution.
 - h. Rejecting the appellant's alibi defence when the same had not been challenged nor dislodged by prosecution evidence.
 - i. Failing to consider the appellant's mitigation while meting out the sentence and deferring mitigation to the Board of the Prerogative of Mercy.
 - j. Holding that only one mandatory sentence was available and failed to consider other alternative sentences and meted out severe and excessive sentence of death.
3. The prosecution lined up 17 witnesses whose evidence can be summarised as follows: The first three witnesses gave a background to the deceased's activities and other events leading up to the murder of the deceased. PW1 Mohamed Ramadhan Nurdin was a former Chairman of the Muslim Association Mombasa; PW3 Shahil Parvez Sheikh was the son to PW1 and also a former Chairman of The Muslim Association; and PW2 Niser Ahmed Malik was a member of the Muslim Association.
 4. According to these witnesses, the deceased was the imam at the Sakina Mosque since 1979 where he had been conducting the daily prayers. The Muslim Association was responsible for paying the mosque's bills and paying Sheikh Mohamed Idris the deceased (the Sheikh). That in 2013, the Sheikh had been forcefully removed by radical youths who installed another imam. PW3 stated that around this time the Sheikh had informed him that he had received threats to his life but they only went as far as meeting with the County Commander on 25th December 2013 to discuss the situation at the mosque. PW3 stated that on 26th December 2013 after prayers, they made an announcement to the effect that the mosque should only be used as a place of worship and supplication to God; that no speeches were to be made in the mosque; and the Sheikh was to be re-installed. That as PW3 was leaving after the announcement was made, he was attacked by youths and cut with a panga but managed to escape.
 5. These witnesses' evidence was to the effect that in 2014, the deceased had reached the age of retirement and the Muslim Association had come to the decision that the Sheikh should retire. However, there was an agreement as to what was owed to the Sheikh but the disagreement was solved verbally and the dues calculated at Kshs. 130,000/=. PW3 prepared a letter to that effect dated 9th June 2014, a payment voucher and a cheque.
 6. The Sheikh was to sign the letter and receive the cheque the next day on 10th June 2014 but was shot and murdered that very day. PW2 got wind of the murder of the Sheikh when watching the 9 PM news on television that evening. Shocked, PW2 called PW1 to inform him of the murder. PW3 contended



that the dispute regarding the retirement package was not the cause of the Sheikh's murder but that the Sheikh was killed because he was a moderate.

7. PW5, Hamisi Juma Ali, a mason, went to Manyatta mosque to pray at 5:15 am on the material day. PW6, Hamisi Mohamed an assistant imam at Manyatta mosque, was also heading towards the mosque at the same time. They heard gunshots which caused a commotion. PW6 specifically heard two gunshots. A worshiper came and reported that Sheikh Idris had been shot. They went outside and found the Sheikh lying on the ground, having been shot and unable to speak. PW6 could see blood on the Sheikh's chest and laps. They called for a tuk tuk and rushed the Sheikh to a couple of hospitals but were told no doctor was available and that the hospital could not admit the patient respectively. They eventually took a ferry where they met a brother of the deceased Ali Idrissa Latso (PW7). PW7 had gotten information at about 5:30 am that his brother had been shot and proceeded towards the scene at Likoni Manyatta. PW7 had then been informed that the Sheikh had been taken to the hospital. PW7 proceeded to the ferry and found Pw5, PW6 and the Sheikh in the tuk tuk. They eventually took the Sheikh to Aga Khan, which had no room, and then to Pandya Hospital where he was admitted. After a duration of about one hour, they were informed that the Sheikh had passed on. They later went to the police.
8. According to PW6, the Sheikh had stated during his sermons that he was threatened with death on allegations that he had betrayed Sheikhs like Aboud Rogo. According to PW7 the Sheikh had wanted to retire from Sakina mosque and was demanding to be paid his pension from the Muslim Association who had offered Kshs. 90,000 that he rejected; and that the Sheikh had said his life was in danger and had reported the matter to the police.
9. PW8 Abdulrahman Mwakimako, an associate professor at Pwani University whose wife Aisha Mohamed was a daughter to the deceased Sheikh, stated that at 5:45 am on the material day his wife was called by one of her brothers and informed her that her father had been shot and had been taken to Pandya Hospital. PW8 stated that they drove to the hospital and found other relatives. The deceased was lying on a stretcher and the body covered. That there was nothing to suggest the cause of death and after consulting the administration they took the body to the mortuary.
10. As they waited for the post mortem, senior police officers came including County Commissioner Mr Marwa and Commander Mr Kitur. That Abdulaziz, a son of the deceased, came and showed PW8 two spent cartridges which he said were given to him by an unknown person who had collected them at the scene. That the police took the spent cartridges for further investigations and a post mortem examination conducted by Dr Mandalya. PW8 and another relative identified the body, and a scan was made to locate the bullets.
11. PW8 stated that he saw two bullet wounds one on the thigh and another on the abdomen; that the bullet at the thigh had exited while the other one was lodged in the abdomen and was not retrieved. PW8 did not know who caused the death of the deceased but that there were posters circulating in town with a list of people to be eliminated and the deceased appeared on that list. That he was informed by the investigating officer Mr Osuri that a person had been arrested in connection with the death of the deceased.
12. PW16 Abdulaziz Mohamed Idris, a son of the deceased Sheikh, stated that on 10th June 2014 at 5:00 am he was informed by his mother that his father had been shot. He proceeded to his father's house and on the way he met a vehicle taking his father to hospital. They proceeded to the emergency room where the Sheikh was declared dead.
13. While he was there, PW16 was handed something in a black polythene paper. He did not recollect the person who gave him the polythene paper. He went aside to check it and found that it contained a



- bullet head and spent cartridge. PW16 decided to show it to his elder brother who told him to hand it over to the police.
14. PW16 thereafter proceeded home and two hours later his brother called and told him that the spent cartridge was required by the police. He proceeded to Pandya Hospital and handed it over to officer Otieno. His brother-in-law saw him handing it over.
 15. PW10 Dr K. N. Mandalya pathologist gave evidence with regard to the post mortem he was asked to do on the deceased's body on 10th June 2014. The pathologist observed that the deceased was dressed in a blood stained T-shirt and kikoi. They took X-rays before the post mortem. The body had a bullet entry wound on the mid-abdomen 16 cm anterior and a bullet entry wound on the left mid-thigh on the same side measuring 5 cm in diameter. That the bullet head was lodged in the pelvic area and it was not possible to remove it. The findings were that the deceased had massive intra-abdominal haemorrhage due to the gunshot wounds.
 16. PW9, PC Stephen Sachita attached at Likoni Police Station CID, on the material day at the station got information from members of the public that the Sheikh had been shot while preparing to go to the mosque while in the company of Mohamed Said. In the company of the DCIO, OCPD and OCS, they proceeded to the scene at about 8:00 am where they got information that the victim had been taken for treatment.
 17. They found a bullet head and a spent cartridge which had been recovered by Abdulaziz a son of the deceased. The cartridge was handed over to PC Osuri the investigating officer. They later recovered two spent cartridges at the scene which were also handed over to PC Osuri. PC Osuri and PC Ouma took photographs of the scene. PW8 stated that the photographs were taken after Abdulaziz had already recovered the bullet head and cartridge and that he did not know at what stage Osuri was given the cartridges. PW8 admitted that he did not have a chain of custody log and that he did not know who saw Abdulaziz recover the spent cartridges.
 18. PW13 Sergeant Michael Oduor Gazi attached to CID Mombasa scenes of crime, was on 10th June 2014 called by his duty officer to proceed to Pandya Hospital mortuary and Likoni. PW13 took photos of the deceased at various angles and of the wounds on the deceased then proceeded to Likoni. There, PW13 took photos of the residence of the deceased, the pathway the deceased used when going to the mosque, various views of the mosque, and the position where the suspect stood while shooting the deceased. At the station, PW13 took photos of the bullet head and cartridge recovered at the scene. PW13 then prepared a certificate to the effect that the photos were made by his hand. PW13 stated that it was PC Sachita who gave him the bullet head and the cartridge. That the distance from the mosque to the house of the deceased was 150 metres.
 19. PW12 Corporal Joseph Mucheru who was a constable at the Flying Squad unit Headquarters at the material time, was on 11th June 2014 instructed by the Head of Flying Squad to join Sergeant Oluse, PC Chris, PC Sarah, and PC Salim at Mombasa to proceed with investigations on the murder of the Sheikh. They came to Mombasa on 12th June 2014 and were met by CI Giteri, CI Sachita and PC Ojura as well as PC Mwangi Munoko and PC Ouma. They proceeded with investigations and got information that the main suspect was at Likoni area and that he had the suspected murder weapon. They were to ambush the suspect who was a short brown bearded man.
 20. On 14th June 2014, on information that the suspect had been taken to Likoni ferry, they laid an ambush on both sides of the road to Ukunda from Likoni ferry. The appellant emerged while riding a black mountain bike and he fit the description of the suspect. PC Osuri and Munoko stopped the appellant and identified themselves. PW12 stated that he was seven metres away when PC Munoko opened a polythene bag that was on the frame of the bicycle. That they then jumped across the road and



- PW12 saw a Ceska pistol that did not bear a serial number; and the pistol had a magazine containing 4 rounds of 9 mm ammunition. That PC Mwangi and Osuri also recovered 50 CDs and DVDs with various headings, a bunch of keys, and two mobile phones. PC Osuri prepared an inventory which they signed and the appellant also signed but said he had reservation and denying possession of the pistol saying it was not his.
21. The appellant then took them to his house and opened the house with the recovered keys. PW12, Osuri, CI Gitari and PC Mwangi entered the house and carried out a search. In the main room, PW12 discovered a black paper under a mattress and upon opening it, he recovered one hand grenade, 4 detonators, a red wire and a ¼ kilo powder crystalline substance. In a shelf, PW12 recovered 59 CDs with different headings.
 22. They also recovered a document manifesto for the Mombasa Republican Council, a notebook with a list of members, the appellant's ID card, a file containing house rent payment receipts in the names of Mohamed Hussein, and other items that were listed in an inventory prepared by Osuri and signed by the officers. PC Ouma took photos of the recovered items. The appellant signed the inventory but denied possession of the hand grenade, detonators, red wire and the powder. The appellant was thereafter taken to the police station and was later charged.
 23. PW12 denied knowledge of CCTV camera footage indicating that the appellant was arrested on 13th June 2016 near Likoni Nakumatt and insisted that the appellant was arrested on 14th June 2016. PW12 stated that they were acting on information received to the effect that the suspect, a short brown and bearded man was returning the firearm to his accomplice; that it is CI Gitari who knows the informer.
 24. That there was no occupant in the appellant's house; there was an occupant in house no. 4 but PW12 did not see her being slapped. That no independent witness signed the inventory. That fingerprints were not taken at the time and he did not see DNA tests being taken. That no photograph of the pistol was taken. That a scene of crime officer was called after the recoveries were done.
 25. PW14 Edwin Saidi Munoko, an officer with the Flying Squad CID, gave an account similar to PW12. On 14th June 2014, PW14 and a team of other police officers received information through CI Gitari that there was a suspect by the name Osama said to be in possession of murder weapon which he was returning to an accomplice after shooting dead the Sheikh. PW14 stated that the suspect had been previously charged with terrorist related cases. That morning, they laid an ambush along Likoni – Ukunda Road and, at around 11:00 am, PW14 and PC Osuri spotted the appellant on a black and orange mountain bicycle emerging from the left side facing the ferry. The two approached the appellant and identified themselves. They searched the polythene that was on the frame of the bicycle and recovered a Ceska pistol without a serial number, 4 rounds of ammunition, 50 CDs, two mobile phones and a bunch of keys. The appellant took them straight to his house nearby. PW14 remained outside as his colleagues entered the house, conducted a search and recovered other items. The investigating officer prepared the inventory for the recovered items.
 26. The testimony of PW15, PC Geoffrey Ouma attached at CID Headquarters Mombasa scenes of crime section, was that on 11th June 2014 he received a call from DCIO Likoni requesting scene attendance. They proceeded to the office and PW15 was briefed by the DCIO about the shooting of the Sheikh and assigned PC Sachita who led him to the scene being a mosque along Ukunda – Likoni Ferry highway. PW15 took a number of photographs of the scene and of two spent cartridges.
 27. On 14th June 2016, PW15 received a call from PC Osuri requesting him to join them at Shell petrol station area of Likoni. On arrival there, he was led to a house adjacent to the petrol station where one accused had been arrested and his role would be to document the search exercise. PW15 took several photos of the scene generally, the interior of the house and the items recovered in the search.



- PW15 stated that he used a digital camera and the certificate he prepared showing that the photos were produced under his supervision can suit either a digital camera or an analogue one. That it was the accused who opened the door to the house and there is a photo depicting the same.
28. PW17 PC Osuri Otieno, at the time based at Likoni, was the officer appointed to investigate this case. On 10th June 2014, PC Osuri received a call from the regional CID Coordinator Andrew Ondieki who informed him about the shooting of the Sheikh and directed Osuri to join him at Pandya Hospital. PW17 found his bosses at the hospital as well as relatives of the Sheikh and the personal doctor of the deceased Dr Majani. They contacted Dr Mandalya a pathologist and Sergeant Oduor from scenes of crime.
 29. While at Pandya hospital, Abdulaziz, one of the sons of the deceased handed over to him one spent cartridge described as a 9x19mm calibre and a bullet head. PC Osuri was told that Abdulaziz was handed the items by someone he could not recall because there was a lot of commotion at the time. Later in the day Dr Mandalya came and X-rays taken showing that the body had two bullet entries at the mid-thigh left leg and the abdomen. The body was identified and Dr Mandalya undertook to do a limited autopsy the following day. The doctor was unable to retrieve the bullet head inside the body and after consultations the body was released for burial purposes.
 30. PC Osuri proceeded to the station where some witnesses were interviewed and statements taken. The following day, PC Sachita proceeded with a team to get more information. At 11:00 am PC Sachita returned to the station together with PC Geoffrey Auma in possession of two spent cartridges. PC Osuri prepared an exhibit memo and did a request that the expert ascertain the type of ammunition and possible type of firearms.
 31. On 14th June 2014, PC Osuri was contacted by the officer in charge who was in the company of NSIS, Nairobi, to the effect that they had an informer who had given them information that there was a suspect by the name Aboud Sama who was suspected to have been involved in the killing of the Sheikh. The suspect was described as a short man with long beards dressed in a kanzu and riding a mountain bike within Likoni channel. The information was to the effect that the suspect was to deliver a pistol to another at Likoni area.
 32. They laid an ambush along Likoni Ukunda highway in groups of two. At around 11:00 am, they saw a man fitting the description and they called other police to join them. A search of the man (the appellant) was conducted and two mobile phones recovered from his trouser pockets; and a pistol without a serial number, 4 rounds of ammunition and a number of CDs was recovered from a polythene bag. They demanded the appellant take them to his residence and the appellant was hesitant. They told the appellant that he was under arrest. The officers signed the inventory but the accused refused to append his signature.
 33. The appellant took the officers to his house near Shell petrol station at a place called “corner police” at a house door No. 6 which had some Arabic writings. They called for PC Ouma from scenes of crime to assist in taking photographs. PC Ouma came after the officers had entered the house of the appellant.
 34. A search was conducted of the compound and PC Osuri saw two women washing clothes. PC Osuri denied finding the appellant’s wife in the house, but a lady came to the scene from the gate claiming to be the appellant’s wife. Various items were recovered from the appellant’s house and were enumerated in an inventory prepared by PC Osuri. The accused appended his signature to this second inventory but denied possession of the recovered hand grenade, 4 detonators, red wire and ¼ kg powdery substance. PC Osuri prepared an exhibit memo for the pistol requesting experts to confirm the type of pistol, origin and type of ammunition, and whether the exhibit had been used to commit other crimes. PC Osuri also did a rough and fair sketch plan of the scene of crime indicating where PC Sachita had



- recovered the spent cartridges. He later received a ballistics report indicating that the recovered pistol and 4 ammunitions were serviceable and that the bullets recovered at the scene were fired by the pistol.
35. PC Osuri stated that information he received from the Chairman of the Muslim Association was that the deceased was against the radicalization of youths within the coastal region and was a moderate preacher; and that this was not perceived well by radicals. PC Osuri stated that the accused committed the offence while out on bond on a terror related case. Regarding the bullets received from PW16 at Pandya Hospital, PC Osuri stated that he did not prepare a handing over note but booked the exhibits after leaving the hospital. PC Osuri recorded his statement on 15th June 2014 and decided to charge the appellant with murder.
 36. PW11 Philip Kivyusi a real estate agent at Lloyd Masika gave evidence to do with the appellant's house. He stated that Lloyd Masika had been given authority to manage the houses next to Shell that were owned by BP Shell. They then started interacting with tenants so as to know them and some forms were filled. The appellant tenant identified himself as Hussein Mohamed and that was the same name provided by the previous agent. The appellant and his brother had previously been collecting rent for them. The appellant lived in house No. 6 and had a wife and children. He owned a bicycle, a black and orange mountain bike, and had once complained that one of the tenants was bringing women to the compound at night. PW11 produced payment receipts for rent paid by the appellant.
 37. On 16th June 2014 PW4 SP Lawrence Nthiwa, a firearm examiner attached at the firearms laboratory, CID Headquarters Nairobi, received an exhibit memo from PC Charles Koech for exhibits being, a fired bullet marked A1, and three expended cartridges marked B1 – B3 submitted by CID Likoni. On 19th June 2014, PW4 received from PC Stephen Sachita a pistol marked as A1 and 4 cartridges marked B1-B4. With respect to the first set of exhibits, PW4 found exhibit A1 to be a fired bullet and formerly a component of a round of ammunition calibre 9 x 19 mm. The bullet was slightly deformed due to impact on a hard surface and only three of the six possible engraved areas were visible. PW4 found that the engraved areas were consistent with discharge from polygonal rifling, but were not suitable for comparative analysis. Regarding the cartridges B1-B3, they were found to be expended cartridges in calibre 9 x 19 mm. PW4 carried out microscopic examination and found that cartridges B1 and B2 had markings similar to those produced by the Ceska pistol A1 submitted by PC Sachita. PW4 also found that B3 had been fired in the same firearm that had been used in eight other shooting incidents; the firearm being a Glock pistol chambered for calibre 9 x 19mm ammunition.
 38. PW4 examined the Ceska pistol A1 which was chambered for calibre 9 x 19mm ammunition but its serial number had been erased and attempts to restore the serial number were futile. The pistol was in good general condition. As for B1 – B4, the four rounds of ammunition, PW4 found that they were suitable for use in firearms such as A1. He picked two of the bullets and successfully fired them with A1.
 39. PW4 found that A1 and B1-B4 were a firearm and ammunition in terms of the *Firearms Act* and were capable of being fired. PW4 carried out further comparative examination of the cartridges and bullets fired by A1 in conjunction with others of equivalent calibre. PW4 saw sufficient firing pin and breech face marks to form the opinion that the pistol A1 had been used to fire the cartridges B1 and B2 submitted by CID Likoni. PW4 stated that he did not do fingerprint examination and DNA on the exhibits. He also did not ascertain the country of origin. Regarding reception of the exhibits, PW4 stated that they have a receipt manager at the laboratory and the exhibits are registered at time of receiving and departure.
 40. The appellant testified in his defence as DW1 stating that his name was Mohamed Sudi and also Mohamed Hussein. He denied killing the deceased and stated that he had never owned a gun. He denied being arrested on 14th June 2014 and instead stated that he was arrested on 13th June 2014 at



about 7:00 pm near Nakumatt supermarket. His account of the arrest was that he was riding a bicycle to the ferry and before reaching Boss Freighters, he saw a Nissan van. He was ordered to stop and two men got out of the vehicle and approached him. He asked them who they were and shouted thief but they did not respond. The men said they were police officers and pulled out their guns. They pushed the appellant into the van and threatened to kill him. The appellant produced an affidavit sworn by him during his application for bond stating that he was arrested on 13th June 2014. In the van, the appellant found seven police officers. They took his bicycle, fruits and umbrella. They crossed the Likoni channel and headed to Likoni police station.

41. The appellant was later told to enter a double cabin pick-up and he managed to identify one officer from the CID. The other officers left for what they said was Mtongwe. They returned two hours later. By this time they had already taken the appellant's two mobile phones. At about 11:00 pm, they left for the mainland and after a delay at the ferry, they proceeded to the Provincial police headquarters at around 1:00am. The appellant was not informed of the reasons for his arrest. One officer guarding the appellant asked his name and the appellant gave him his identity card.
42. The following day, at about 7:30 am, the officers who arrested the appellant arrived with others in a Subaru car and the appellant was ordered to enter the Subaru. The appellant's face was covered but he reckoned that they took the Mombasa Nairobi Road; he could hear the sound of planes taking off and landing. They drove through a gate into what the appellant came to know was a police station. The appellant asked the officers to remove the cloth from his face. The officers were waiting for their superior and when he arrived it was said that the appellant was able to lessen the pressure from Nairobi.
43. After another officer joined them, the appellant was ordered to enter the Nissan vehicle and they proceeded to Likoni ferry. They went to Likoni police station where the appellant was interrogated. The appellant stated that on 14th June 2014, he was to sleep at his second wife's house. The appellant was told they will proceed to his house which they did after PC Osuri and PC Maina joined them. They took the appellant to his house at Corner Police. The appellant showed them his house and upon entering, they found his wife and children who started crying. There were ladies washing clothes outside. The officers entered the appellant's room and commenced a search. Upon lifting the mattress they saw a knife. They got out and suddenly said that they go back. They checked the mattress again and alleged that there was a bag under the mattress. The appellant asked them where the bag came from and they responded that they could not have planted the items on him. The exhibits were arranged outside and photographed while the search continued. The appellant's wife started screaming for help. She was slapped and fell unconscious. The wife was told that the items had been recovered in the house.
44. Afterwards, the appellant was taken to a mosque and a house where he was asked to show them the house where he had killed Sheikh Idris and photographs were taken when he was near the house of the deceased. The appellant saw them place spent cartridges at the scene and take exhibits. The appellant was then taken to the office of the OCS where he was interrogated. An officer took out a spent cartridge and placed it in a bottle and PC Osuri flushed out a pistol from a drawer and said it belonged to the appellant. The appellant was shown an inventory and asked to sign but he denied knowledge of items 9 -12 in the inventory. He also denied possession of the pistol.
45. The appellant asserted that he bore no grudge against the deceased and that they had no differences in their religion. He denied participating in the death of the Sheikh. The appellant stated that on 10th June 2014 he was at Shelly beach Magongwana, which is some distance from the scene of murder. On 15th June he was in the house of his youngest wife. He got news of the death of the Sheikh at about 8:00 am and his sister had also called him to know whether he was safe as a preacher had been killed at Likoni. He called Muhuri Sheikh Khalif and also his wife who had gone to school with one of the Sheikh's children to send her condolence.



46. Asma Mohamed Ali Asku testified as DW2. She stated that, at the time, she was married to the appellant and staying at Majengo Mapya Likoni. Her account was that on 9th June 2014, the appellant came home at 6:00 pm and spent the night. They went for 5:00 am prayers the next morning and then the appellant went back to bed. The appellant woke up between 8:00 and 9:00 am. He later told her that he had received information that Sheikh Idris had been murdered. DW2 was surprised because the Sheikh was a family friend and she had schooled with the Sheikh's daughter at Kenyatta University.
47. On 13th June 2014, DW2 spoke to the appellant on phone. The appellant had spent the night at her co-wife Aisha's house. She told the appellant that she had a sick child and he allowed her to take the child to hospital. She told the appellant to bring her an umbrella and fruits for the child. The appellant said he would come home at around 6:00 pm. When he had not come by that time, DW2 decided to call the appellant at around 7:15 pm. The appellant sounded angry and told her that she should not wait for him. DW2 felt that there was something wrong and later tried calling the appellant again but there was no reception. DW2 tried contacting the appellant again the following morning in vain. DW2 went back to hospital that morning.
48. Upon returning home, DW2 found some messages that the appellant had been arrested by the police. DW2 went to the co-wife Aisha's house and was told what had taken place. That the accused had been taken to the house by police and they carried some items out of the house. Aisha told her that the appellant did not spend the night of 13th June 2014 with her.
49. Aisha Khahja Warjanya, the appellant's other wife, testified as DW3. Her account was that on 9th June 2014, the appellant left for her co-wife's house and returned on 10th June 2014. On 13th June 2014, the appellant left her house after spending the night and was supposed to stay at the co-wife's house. The appellant was to call DW3 but failed to do so. The following day 14th June 2014, DW3 prepared breakfast for the children and started cleaning the house. She did not see any grenades or any other type of arms.
50. At around midday, the appellant came in through the gate in the company of strangers, about six men, who were carrying bags. Her husband told her they were police officers and DW3 went unconscious for about 30 minutes in shock. One of her daughters started crying and the child was taken by the neighbours. There were three neighbours who ran and hid in their houses. One of the men slapped DW3; and she asked the men why they had chained the appellant. After some time, there was a knock at the gate and a man entered carrying a bag and photographs were taken of some items. The appellant told her that she should follow them to Likoni police station. At the police station, DW3 found the accused in one of the rooms; they wanted him to sign some documents. When she went back home she found the house in a disarray. DW3 asserted that on 14th June 2014, the appellant did not sleep in her house.
51. Mr Mbugua Mureithi, counsel for the appellant, submitted the evidence adduced did not disclose the ingredients of murder as defined in Section 203 of the Penal Code, and particularly the ingredient of malice aforethought as defined under Section 206 of the Penal Code. The prosecution case was wholly grounded on circumstantial evidence as there was no eye witness to the shooting of the deceased or the presence of the appellant at the scene. He contended that there was no evidence led to implicate the appellant on any of the statutory components of the requisite subjective intention or mens rea to kill the deceased. Counsel cited *Joseph Kimani Njau v Republic [2014] eKLR* for the proposition that the burden of proof on both *actus reus* and *mens rea* is always with the prosecution.
52. Counsel submitted that despite the prosecution theorising the motive of the deceased's killing being that he was a moderate Sheikh, no evidence of the appellant's Islamic persuasion, let alone his radicalization, was led by the prosecution. The learned judge erroneously concluded that proof of



actus reus, that is the shooting of the deceased, was ipso facto proof of malice aforethought. Counsel noted that although it is not mandatory for the prosecution to prove motive for murder, the failure to prove the motive advanced by the prosecution weakened its case, as per *Nzuki v Republic [1993] eKLR*. Counsel also cited *Dishon Litwaka Limbambula v Republic [2003] eKLR* for the proposition that motive becomes an important element in the chain of presumptive proof where the case rests on purely circumstantial evidence.

53. On the issue of the weight of the prosecution evidence, Mr Mureithi submitted that the prosecution relied on weak, tenuous, incoherent, unreliable and distorted evidence. Counsel submitted that there were inconsistencies in the police witnesses' evidence on who was the initial recipient of the informer information, and neither the informer nor the initial recipient of the information were called as witnesses. Counsel contended that the evidence of information from the alleged informer was therefore hearsay on top of hearsay.
54. He submitted that the issue of whether the Ceska pistol was the murder weapon could only be established by drawing a credible and coherent nexus between the recovered pistol, the recovered bullet cartridges and the killing of the deceased. Counsel pointed out that PW16 was handed a bullet head by a total stranger at Pandya hospital and curiously PW16 did not have a conversation with the stranger nor could he remember the face of the stranger. The stranger was not called as a witness. It was submitted that PW9 was also unclear about the day of the recovery of the spent cartridges at the scene, yet the evidence of the scenes of crime officers indicated that photos of the bullet head and cartridge were taken at the station; and PW17 PC Osuri indicated that he visited the scene twice on 10th June 2014 but did not make any recoveries. PW15 testified that on 11th June 2014, he photographed 3 spent cartridges at the scene but did not indicate who had recovered the same and at what point of the scene. According to counsel, it was therefore obvious that the recovery of the spent cartridges was doubtful and suspect.
55. Turning to the evidence of the ballistics expert PW4, counsel submitted that the exhibit memo indicated that PC Koech delivered one bullet head and three spent cartridges and no evidence was led as to the whereabouts of the fourth cartridge. He also noted that PW4 concluded that the bullet head A1 and cartridge B3 were discharged from a Glock pistol while cartridges B1 and B2 were discharged from the recovered Ceska pistol. That PW17 also confirmed that there were two firearms at the scene. Counsel submitted that despite the findings of the ballistic expert, P.W. 4, the record does not show that any other witness availed or produced the remnants of the test fired bullets that were allegedly used to match the recovered cartridges and the Ceska pistol. The remaining two live ammunitions that were test fired were also not produced in evidence. The learned judge failed to make a finding that there were two guns at the scene of shooting of the deceased and thereby tacitly eliminated the Glock pistol from the scene of the shooting.
56. The question of which of the two guns fell the deceased was further compounded by evidence of PW10 the pathologist who testified that the bullet head lodged in the pelvic area of the deceased was not removed but was buried with the body. Counsel saw no plausible reason why the body was buried with such critical evidence. He also pointed out that the X-rays of the bullet lodged in the body was not subjected to analysis by a ballistics expert such as PW4. Counsel contended that the presence of two guns at the scene also impacts the credibility of the alleged informer information that the appellant was in possession of a single firearm used in the murder. That no evidence was led to prove beyond reasonable doubt that the fatal shot was fired from the Ceska and not the Glock or a possible third firearm.
57. Counsel cited the case of *Republic v Danson Mgunya [2016] eKLR* where this Court upheld an acquittal by the High Court of the offence of murder where multiple firearms were fired at the scene and no evidence led to link the deceased's injuries to the appellant's pistol. It was curious that after



- arresting the appellant, the police made no further investigations into the alleged accomplice, even after getting information about a second firearm. Counsel submitted that the evidence of the presence of at least more than one gun at the scene weakened the chain of circumstances relied upon by the prosecution.
58. The learned trial judge convicted the appellant when material evidence tending to exonerate the appellant was deliberately withheld or suppressed by the prosecution. Counsel found it curious that the scenes of crime officers who were part of the investigation team from the start were absent at the climax of the investigation on 14th June 2014 when the appellant was allegedly arrested with the murder weapon in a pre-planned ambush. According to Counsel, this absence only pointed to a cover-up of the truth as narrated by the appellant. Counsel submitted that the procedure for recording the arrest of a suspect is statutory, and prescribed under Sections 50 and 59 of the [National Police Service Act](#) as well as Rule 8 of the Arrest and Detention Rules in the Fifth Schedule of the Act.
 59. The date of the appellant's arrest could only be satisfactorily proved by availing the record of the arresting station in the form of a register of detainees or occurrence book. That no occurrence book was provided yet the learned judge placed the onus of proof of the date of the arrest on the appellant who was not the custodian of the occurrence book. That by not furnishing the appellant with the occurrence book, the prosecution suppressed evidence favourable to the appellant and thereby denied him the right to a fair trial under Article 50 (2) (c) of the [Constitution](#).
 60. Regarding the appellant's alibi evidence, Counsel submitted that the learned judge failed to analyse the alibi evidence on its own merits. That the judge simply rejected the appellant's alibi evidence without any analysis. Counsel cited *Benson Mugo Mwangi v Republic* [2010] where the Court similarly found that the superior court did not direct its mind to the appellant's evidence when purporting to weigh the appellant's alibi defence.
 61. As for mitigation, Counsel submitted that the judge did not factor the appellant's mitigation in sentencing and that this ought to be done in line with the Supreme Court's decision in [Francis Karioko Muruatetu & another v Republic](#) [2017] eKLR.
 62. Mr Alex Gituma, counsel for the respondent, submitted that the learned judge properly considered the evidence presented and rightly found that the ingredients requisite to prove the offence of murder were met by the prosecution. Counsel cited the case of [John Mutuma Gatobu v Republic](#) [2015] eKLR for the proposition that malice aforethought as defined under Section 206 of the Penal Code does not denote the popular meaning of malice as ill will or wishing another harm; and that our law does not require proof of motive, plan or desire to kill in order for the offence of murder to stand proved although the existence of these may go to the proof of malice aforethought.
 63. The learned judge aptly dealt with the contention of the appellant that the prosecution evidence was weak, incoherent and discredited, and referred to the learned judge's conclusion that there were no major contradictions in the prosecution case that can be said to go to the substratum of the case. On the contention that the informer information was hearsay, counsel submitted that it is not the informer information that led to the conviction of the appellant but proper evidence placed before the court linking him to the offence. Regarding the alibi defence, Counsel submitted that the prosecution ably rebutted the alibi evidence presented by the appellant.
 64. On the issue of withheld or suppressed evidence, counsel submitted that the appellant was simply crying wolf. That the order for the occurrence book was directed to the provincial police headquarters and not the prosecution but the appellant instead served the order upon the DPP who was not the party meant to comply. That the appellant had time to follow up on the orders but failed to do so. That the appellant proceeded with and concluded his defence without moving the court that what he



intended to rely upon had not been provided. Counsel contended that if the appellant was sure that the occurrence book or CCTV footage would have exonerated him, the appellant would have moved mountains to have the evidence before the court.

65. Counsel submitted that for a sentence to be set aside, it has to be demonstrated that the court considered irrelevant factors or applied the wrong principles such that the sentence itself is excessive. Counsel submitted that the sentence meted was neither harsh nor excessive and urged this court to uphold the same.
66. The duty of this Court in a first appeal was well elucidated in *Erick Otieno Arum v Republic [2006] eKLR* where this Court held that:

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

67. The elements to be proved by the prosecution beyond reasonable doubt by the prosecution are set out under Section 203 of the Penal Code as (a) the death of the cause of that death; (b) that the appellants committed the unlawful act which caused the death of the deceased; (c) and that the appellant had harboured malice aforethought. See *Milton Kabulit & 4 others v Republic [2015] eKLR*. The trial judge rightly noted that Section 206 of the Penal Code set out the circumstances in which the element of malice aforethought is established as follows:

“Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances—

- a. an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;
 - b. knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;
 - c. an intent to commit a felony;
 - d. an 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.”
68. In this case, the undisputed evidence of PW10 and the post-mortem form produced revealed that the cause of Sheikh’s death was due to massive intra-abdominal haemorrhage due to gunshot wounds. As the trial judge correctly pointed out, no eyewitness to the killing of the deceased was presented. The prosecution case was entirely hinged on circumstantial evidence. The principles applicable in cases



turning solely or substantially on circumstantial evidence have been set out in a number of cases. In [Joan Chebichii Sawe v Republic \[2003\] eKLR](#), this Court held:

“In order to justify, on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt. There must be no other co-existing circumstances weakening the chain of circumstances relied on. The burden of proving facts that justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution, and always remains with the prosecution. It is a burden, which never shifts to the party accused.”

69. In *Abanga alias Onyango v Republic Cr. App No. 32 of 1990 (UR)* this Court emphasized that in such cases,

“the circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else.” The process entails subjecting each link in the chain to close and separate examination before the whole chain is put together and a conclusion drawn that the chain of evidence as proved is incapable of explanation on any other reasonable hypothesis except the hypothesis that the accused is guilty of the charge. See *Mwangi & another vs. Republic [2004] 2 KLR 32*.

70. The first set of circumstances the appellant has taken issue with are those surrounding his arrest in possession of the alleged murder weapon, a Ceska pistol loaded with 4 rounds of ammunition. The appellant took issue with evidence of the information from the alleged informer that informed the ambush laid for the appellant by the police, calling the evidence hearsay. The circumstances of this case did not require the informer to testify as the informer’s evidence was not necessary to determine the innocence or otherwise of the appellant, as the prosecution had led other evidence to serve this purpose (See [Joseph Otieno Juma v Republic \[2011\] eKLR](#)). The evidence regarding a tip-off to the police by an informer only served to recount the course of investigation taken by the police.

71. It is clear from the record that the trial judge did not take into account the evidence about information from an informer in his evaluation of whether the elements of the offence of murder were proved. This can be contrasted with the case of [Maina & 3 others v Republic \[1986\] eKLR](#) where the prosecution solely relied on the hearsay evidence of police officers that an informer had tipped them off about five people planning to commit a robbery as the mens rea of the offence of preparation to commit an offence contrary to Section 308 (1) of the Penal Code.

72. The appellant also contended that the respondent had deliberately withheld or suppressed material evidence tending to exonerate him. The appellant particularly pointed to the failure of the prosecution to produce the occurrence book entry of 13th June 2014, Safaricom call records for the appellant’s phone between 10th and 14th June 2014 and CCTV footage from Base Freight Terminal and Kencont CFS on 13th June 2014.

73. The appellant perhaps required these records to corroborate his assertion that he was arrested on the 13th June 2014 and not 14th June 2014. The record reveals that counsel for the appellant asked for these documents and footage to be availed and an order was made to that effect on 7th February 2015. It was later revealed through the affidavit of the general manager of Boss Freight Terminals dated 14th January 2016 that the CCTV footage was overwritten and could not be recovered. The other documents had apparently still not been availed by the time the last defence witness was called on 29th



January 2016. Thereafter, the defence case was inexplicably closed without revisiting the issue of the occurrence book entry or Safaricom call records.

74. The trial judge later found that the appellant's allegation that he was arrested on 13th June 2014 was not corroborated by evidence. It would appear that the omission may have occasioned a failure of justice but these concerns were neutralised by the appellant's own failure to revisit the issue at the best opportune time before the close of his defence. This situation is contemplated by the proviso to Section 382 of the *Criminal Procedure Code* as follows:

“Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings.”

75. Without the occurrence book extract and phone call records, the appellant's defence relied on alibi evidence of the appellant's two wives to the effect that he was not at the scene on the day the deceased was killed and that he had not spent the night of 13th June 2014 at either of their houses. It is the contention of the appellant that the learned judge rejected the evidence without analysis. According to the learned judge, the alibi evidence created no doubts in the minds of the court. The record however shows that the prosecution did not attempt to displace the evidence of DW2 and DW3 or show why their credibility ought to be questioned.
76. The most important link in the chain of circumstantial evidence forming the basis of the prosecution case was that the Ceska pistol recovered from the appellant was the weapon used to fire the fatal shots that caused the deceased's death. The evidence as presented however seems to raise some difficult questions that the prosecution case does not adequately address. Without establishing the identity of the person who handed PW16 the bullet head and spent cartridge at Pandya Hospital, there remains inescapable doubts as to where these items were recovered and when they were actually fired.
77. Two additional spent cartridges were found by the police at the scene. The bullet head (A1) and the three spent cartridges recovered from Pandya Hospital and the scene (B1 – B3) were examined by PW4, who also examined the Ceska pistol and four rounds of ammunition recovered from the appellant. PW4 concluded in his report that engraved areas on the bullet head A1 were consistent with a polygonal barrel discharge such as a Glock. PW4 also found that the cartridges B1 and B2 were fired in the Ceska pistol while cartridge B3 was fired in a Glock pistol that had been used in 8 other shooting incidents.
78. The first complication arising from these findings is that the spent cartridge received at Pandya hospital, whose origin is unknown, was not identified and distinguished from the other two cartridges prior to the examination. The second complication was that the evidence of PW4 could only lead to the conclusion that at least one other weapon, a Glock pistol, was used at the scene apart from the Ceska pistol. This important finding escaped the learned trial judge who instead erroneously stated that cartridge B3 was used in the same Ceska pistol yet the report is clear that B3 was used in a Glock pistol. The key to unlocking the mystery of which of the two weapons fired the fatal shot was in the examination of the bullet lodged in the pelvic area of the deceased. Unfortunately, the bullet was not removed and examined. The pathologist, PW10, gave no explanation as to why it was impossible to remove the bullet lodged in the deceased's body.
79. The upshot is that, the unchallenged alibi evidence of the DW2 and DW2, as well as the unanswered question as to which of the weapons fired the fatal shots that killed the deceased, raised reasonable doubts as to the culpability of the appellant with respect to the offence with which he was charged.



80. Upon reviewing the evidence presented before the trial court we have therefore come to the conclusion that the appellant's conviction was unsafe. As a result, this appeal is allowed, conviction quashed and sentence set aside. The appellant shall be set free forthwith unless otherwise lawfully held.

DATED AND DELIVERED AT MOMBASA THIS 21ST DAY OF JANUARY 2022.

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

A. MBOGHOLI MSAGHA

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JUDGE OF APPEAL

P. NYAMWEYA

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

