



REPUBLIC OF KENYA



**KENYA LAW**  
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**Kingumbe v Republic (Criminal Appeal 23 of 2020)  
[2022] KECA 1293 (KLR) (18 November 2022) (Judgment)**

Neutral citation: [2022] KECA 1293 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT MALINDI  
CRIMINAL APPEAL 23 OF 2020  
SG KAIRU, P NYAMWEYA & JW LESSIT, JJA  
NOVEMBER 18, 2022**

**BETWEEN**

**KALUME CHENGO KINGUMBE ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(An appeal from the judgment of the High Court of Kenya at Malindi (Nyakundi, J.) delivered on 27th February 2020 in High Court Criminal Case No. 21 of 2018)*

**JUDGMENT**

1. The appellant, Kalume Chengo Kingumbe, was tried and convicted for the offence of murder and sentenced to serve thirty-five (35) years imprisonment in a judgment delivered by the High Court at Malindi (R Nyakundi, J) on February 27, 2020. He has challenged his conviction and sentence on grounds that there was no proper identification and that the threshold for conviction on basis of circumstantial evidence was not met.
2. The Information on the basis of which the appellant was charged before the High Court was that on November 10, 2018 at Mkangagani village, Gede location, Malindi sub county within Kilifi county, he murdered John Mboro Saidi, deceased.
3. The evidence led by the prosecution was that on November 10, 2018 at about 9.00 pm, the deceased and the appellant were patrons at Mama Kapilingo's club, a Mnazi house, run by Neema Tinga Kalu (PW1) when a quarrel erupted between the deceased and the appellant. Apparently, the altercation between them began when a passing millipede travelled in the direction of the appellant whereupon the deceased is said to have accused the appellant of being a witch. According to Dhabu Mwangoro (PW2) a waitress at the club, she and PW1 intervened to stop the argument and thereafter, the appellant left the club.



4. Shortly after the appellant had left the club, the deceased stated that he had been hit with a stone on the right side of his head. Baraka Kasiwa Kahindi (PW4) who was at the club stated that after “about 4 minutes” of the appellant leaving the club, he “heard a sound made by a catapult from the direction we were facing” and that the deceased started bleeding from the head on the right side. The testimony of Samuel Biryra Karisa (PW3), who was also at the club, was to the same effect. He stated that after “about five minutes” of the appellant leaving the club, he “heard a noise made by a catapult” and heard the deceased say that he had been hit. Karisa and Kahindi then went outside to find out what had happened. In Karisa’s words:

“I heard John saying he had been hit. On looking up we saw somebody running. We gave chase with Baraka. The man had overalls with reflective material. He disappeared into the bush and we stopped chasing him.”

5. On cross examination, Karisa stated that it was “dark as it was night. It was the usual darkness. You could not identify him.” Similarly, Baraka stated under cross examination that on hearing the sound of a catapult being pulled and released, he alongside others, went outside the club and saw somebody running, they gave chase and the person entered the bush, and that it was dark outside and he could not identify the person.
6. Having given up the chase, PW3 and PW4 returned to the club and found the deceased bleeding and took him to Matsangoni Dispensary where he was treated and discharged and thereafter taken home.
7. William Saidi Konde (PW5), testified that when his son, the deceased, got home early morning of November 10, 2018, he was bleeding from the right side of the head and was later taken to Kilifi Hospital as his condition deteriorated where he was referred to Coast General Hospital, Mombasa where he died.
8. Moses Parker (PW6) who was attached to Kenya Forest Service at Gede assisted in the apprehension of the appellant and called the Police. The appellant was taken to Watamu Police Station, where the investigating officer, Police Constable Gideon Mutua (PW7) was based. PW7 undertook investigations, attended the post mortem of the deceased where it was confirmed that the deceased died of trauma to the head. He produced the post mortem report in that regard prepared by Dr Nafisa Seif who gave the opinion that the cause of death of the deceased was “blunt trauma on the head with massive right subdural hematoma.”
9. In his defence, the appellant denied the charge. He stated that on the date in question, he went to the club and ordered local brew; that in the course of the evening he saw two men conversing; that his neighbour, one Milton, a teacher then arrived. In his words: “we left the club [with] Milton who is a teacher. We left the two disputing at the club with the owners of the club. I do not know what happened. I continued with my normal duties”; that the following day he saw some people who “inquired of a watchman guarding the premises” and they started beating him and that he was then arrested and taken to Watamu Police Station where he was later charged.
10. The appellant maintained in his defence that he, “left the two men who were fighting at the club. The owner of the club Mama Kaviringo was also at the club. I did not kill anybody.”
11. In convicting the appellant, the learned trial Judge was satisfied that the prosecution had established its case to the required standard. In doing so, the Judge stated:

“In my considered view, it is sufficient to conclude that at the time accused step out to go home, there is a high probability and beyond peradventure that he went out to arm himself



with a stone which he used on target to assault the deceased. In other words, the accused conduct's after a heated quarrel with the deceased over a milliped and witchcraft 'naming' draws a logical inference that he was the one who hit the deceased is not in conflict with the prosecution case (sic).”

12. The Judge went on to state that he took “it that what happened was that when the accused picked a stone and targeted the head of the deceased, he intended to cause grievous harm or death” and that he drew the inference from the circumstantial evidence “which has not been controverted by the accused defence” that the encounter between the appellant and the deceased “did not end at the time he stepped out of the premises but on violently hitting back with a stone”.
13. Before us, learned counsel for the appellant Mr Gicharu Kimani submitted that none of the prosecution witnesses identified the appellant as the assailant; that the event having taken place at night, it was impossible for the witnesses to clearly identify the appellant as the perpetrator of the offence; that it was incumbent on the trial court to carefully scrutinize the evidence relating to identification to be satisfied that the same was free from the possibility of error. Reference was made to the case of [\*Kariuki Njiru vs Republic\*](#) and the case of [\*Gabriel Kamau Njoroge vs Republic\*](#) [1982-88] 1 KAR 1134.
14. Counsel submitted further that there was no evidence, circumstantial evidence, on which the conviction and the sentence could be sustained; that the evidence was neither cogent, and did not unerringly point to the guilt of the appellant and to no one else; and nor did the evidence form a complete chain establishing that it was the appellant, and no one else who committed the offence. The High Court case of [\*Musa Adika Mudavila vs Republic\*](#) [2015] eKLR was cited. It was submitted that the appellant's conviction was based on suspicion, which, however strong can never be the basis of conviction. [\*Joan Chebichii Sawe vs Republic\*](#) [2003] eKLR was cited.
15. Opposing the appeal, learned counsel Mr Nyoro, in citing the case of [\*Anthony Ndegwa Ngari vs Republic\*](#) [2014] eKLR submitted that all the ingredients of the offence of murder were proved; that in any event, based on the testimony of the father, PW5, the deceased mentioned the name of the appellant before he died.
16. As regards identification, the law is established that in criminal cases evidence relating to identification must be scrutinized carefully, and should only be accepted and acted upon if the court is satisfied that the identification is positive and free from the possibility of error. As this court explained in [\*Cleophas Otieno Wamunga vs Republic\*](#) [1989] eKLR:

“Evidence of visual identification in criminal cases can bring about miscarriages of justice and it is of vital importance that such evidence is examined carefully to minimize this danger. Whenever the case against a defendant depends wholly or to a great extent on the correctness of one or more identifications of the accused which he alleges to be mistaken, the court must warn itself of the special need for caution before convicting the defendant in reliance on the correctness of the identification. The way to approach evidence of visual identification was succinctly stated by Lord Widgery CJ, in the well known case of [\*R v Turnbull\*](#) [1976] 3 All ER 549 at page 552 where he said:

“Recognition may be more reliable than identification of a stranger; but, even when the witness is purporting to recognise someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.””



17. In the present case, none of the prosecution witnesses identified the perpetrator. As already indicated, PW3 and PW4, who pursued the perpetrator after they heard what they said was the sound of a catapult releasing a projectile, stated that after the deceased was hit, they went outside in the dark and pursued the assailant. They said they could not identify the person they were pursuing.
18. PW2, the waitress, was also not helpful in identifying the perpetrator. She stated, based on information she received from PW3 and PW4, that the perpetrator was wearing attire that is ordinarily worn by bajaj riders. She narrated that based on what PW3 and 4 informed her, the assailant wore clothes that Kalume (appellant) was wearing; that the clothes were shining like those worn by Kalume; that Kalume had overalls with stripes like those worn by bajaj riders. Under cross examination, she stated that she saw somebody running away; “I did not see the face of the person. The person was short. The person had overalls and a jacket for boda boda riders. Most bajaj riders wear those jackets.”
19. The Judge also relied on a statement made by the father of the deceased, PW5, that the deceased mentioned to him that the appellant is the one who hit him with a stone. There is, however, no evidence that the deceased, unlike all the other persons at the club, was in a position to see who hit him or who threw the stone that is said to have hit him.
20. PW1, PW2, PW3 and PW4 who were all at the club at the time stated that after the appellant had left the club, the deceased “said he had been hit with a stone on the side of the head” without, at that point, suggesting that it was the appellant who did it. Clearly, therefore, the person who allegedly threw the stone that is said to have inflicted the fatal wound was was not identified by any of the prosecution witnesses.
21. As for the circumstantial evidence, all that emerged from the evidence of PW1, 2, 3, and 4 is that there was a quarrel between the appellant and the deceased at the club; that the appellant left and shortly thereafter the deceased complained that he had been hit on the head. As already noted, none of the witnesses saw who threw the stone. PW3 and 4 said they heard the sound of a catapult four to five minutes after the appellant had left the club. Nonetheless, the learned Judge stated that:

“It is sufficient to conclude that at the time accused stepped out to go home, there is a high probability and beyond peradventure that he went out to arm himself with a stone which he used on target to assault the deceased.”
22. With respect, that conclusion is not supported by the evidence. The appellant in his defence readily accepted that he was at the club. He however denied that he was involved in an altercation with the deceased stating that there was a quarrel between two men; that he left the club in the company of a neighbour, one Milton, a teacher and left the two disputing men with the owners of the club and that there was an inquiry about a watchman who was guarding the premises.
23. Based on our evaluation of the evidence, we are not satisfied that it met the test as set out in the two well known and often cited cases of *Rex vs Kipkering Arap Koske and another* [1949] EACA 135, and *Simon Musoke vs R* [1958] EA 715 in which the law on circumstantial evidence in criminal cases was set out that, in order to justify a conviction based wholly on circumstantial evidence, the inculpatory facts must not only be incompatible with the innocence of the accused, and be incapable of explanation upon any other reasonable hypothesis than that of his guilt, but also that the said facts must exclude co-existing circumstances which may tend to weaken or destroy the inference of guilt.
24. In our judgment, the evidence in this case did not, as the learned Judge concluded, point unerringly, to the appellant, to the exclusion of all others, as the person, who as the Judge put it, “used a stone to



hit the head of the deceased”. We think that the defence put forward by the appellant raised reasonable doubts as to the guilt of the appellant.

25. All in all, it seems to us the conviction was based on no more than the suspicion that the appellant, after leaving the club, went to arm himself with a catapult, which no one saw, and pelted the deceased.

26. We allow the appeal. The appellant shall forthwith be set at liberty unless otherwise lawfully held.

**DATED AND DELIVERED AT MOMBASA THIS 18<sup>TH</sup> DAY OF NOVEMBER 2022.**

**S. GATEMBU KAIRU, FCIArb**

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**JUDGE OF APPEAL**

**P. NYAMWEYA**

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**JUDGE OF APPEAL**

**J. LESIIT**

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**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**

