



IN THE COURT OF APPEAL

AT NYERI

(CORAM: MUSINGA, J. MOHAMMED & KANTAL, JJ. A.)

CRIMINAL APPEAL NO. 121 OF 2017

BETWEEN

DANIEL NZIOKA MBUTHI.....1ST APPELLANT

SIMON MAINA.....2ND APPELLANT

AND

REPUBLIC ..... RESPONDENT

*(Being an appeal against the conviction and sentence of the High Court of Kenya at Embu (F. Muchemi, J.) dated the 2nd day of August, 2017*

*in*

*H.C. Cr. C. NO. 32 OF 2012)*

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JUDGMENT OF THE COURT

This is a first appeal from the judgment of the High Court of Kenya at Embu (**F. Muchemi, J**) delivered on 2nd August, 2017. In the information that had been presented to that Court, the two appellants, **Daniel Nzioka Mbuthi** and **Simon Maina** were charged with the offence of murder contrary to **section 203** as read with **Section 204** of the **Penal Code**, particulars being that on 27th December 2011 at Machang'a Shopping Centre in Mbeere South District of Embu County, they unlawfully and jointly murdered **Bernard Kimathi Kiara**. A trial took place before the said Judge where the prosecution called nine witnesses; the Judge found that a case had been established to put the appellants on defence; they gave sworn testimonies and called one witness. The Judge evaluated the case by both sides and found that the prosecution had proved the case as required by law. The appellants were convicted and sentenced to death. They were aggrieved by those findings and filed this appeal.

In the memorandum of appeal filed for the 1st appellant (**Daniel Nzioki Mbuthi**) by his lawyers, **M/s Muchoki Kang'ata Njenga & Co. advocates**, ten (10) grounds of appeal are taken which we summarize as: that the learned Judge erred in law and fact in finding that there was sufficient evidence to support the charge of murder; that the learned Judge should have found the evidence of PW1, 3 and 6 to be inconsistent on the encounter between the appellant and the deceased; that the evidence on weapons used was inconsistent; that there were no independent witnesses called by the prosecution; that no report of theft of a sheep had been made to police, when such a report had been made; that the evidence of the defence witness, a local chief, should have been given more weight; that the Judge should have found that no proper investigation had been conducted; that the Judge should have found that the prosecution had not established its case beyond reasonable doubt, and finally, that the Judge erred in law and fact in failing to consider testimonies of the appellant in arriving at the conclusion that the appellant was guilty.

For the 2nd appellant, the Memorandum of Appeal is drawn by his then lawyers M/S Irungu Kang'ata & Company Advocates where, again, ten grounds of appeal are set out. We shall not visit or resummurize those grounds here as they are, word for word, a rehash or reproduction of the grounds set out in the Memorandum of Appeal by the 1st appellant. It is not surprising that the grounds of appeal for both appellants are similar – those drawn for the 1st appellant by M/S Muchoki Kang'ata Njenga & Company Advocates are dated 22nd September, 2017 while those drawn for the 2nd appellant by M/S Irungu Kang'ata & Company Advocates are dated 12th September, 2018. M/S Irungu Kang'ata & Company Advocates had filed a Notice of Change of Advocates on 16th May, 2018 taking over from M/S Muchoki Kang'ata Njenga & Company Advocates on behalf of the 1st appellant, Mr. Irungu Kangata, Advocate, who eventually argued the appeal for both appellants, being the common factor in the two law firms.

Being a first appeal from a decision of the High Court in first instance, the appellants are allowed by **Section 379 Criminal Procedure Code** to take, on appeal, both issues of law or matters of fact, or of mixed law and fact. Of the jurisdiction of the court on first appeal, this is what appears in the case of *David Njuguna Wairimu v Republic [2010] eKLR*:

*“In Okeno v. R [1972] EA. 32 the Court of Appeal for East Africa, laid down what the duty of the first appellate court is. Its duty is to analyse and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decision. In Okeno v. R (Supra) the Court said:-*

*“It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court’s findings and conclusions; it must make its own findings and draw its own conclusions.”*

What was the evidence that the prosecution brought forth on which the trial court founded its conviction?

It was that on 27th December 2011 at 10 a.m. **John Kihara (Kihara – PW1)** was at home in Mbeere South with his daughter, **Risper Wairera Munya (Wairera – PW6)** and his mother, **Jane Mbandi Kiara (Mbandi – PW3)**. **Kihara** was sitting outside the house basking as he was unwell while **Wairera** and **Mbandi** were in the shamba (farm) ploughing, a few meters from him. Presently three men who were identified by these witnesses as the 1st and 2nd appellants and another called **Mureithi Mbogo Njika** arrived demanding to be shown where **Bernard Kimathi Kiara (“the deceased”)** was. They were informed by Mbandi that the deceased was in the miraa shamba about 30 metres away. The men who were armed with rungas and sticks proceeded to where the deceased was and unleashed terror on him using the said weapons. This was in full glare of these witnesses. Screams from the deceased did not help as they continued to beat him, saying that he had stolen the 1st appellant’s sheep. When the said witnesses tried to intervene, they were threatened with a beating. The three men tied the deceased with a rope which they used to drag him through a fence at which point Mbandi asked the men where they were taking the deceased. The 1st appellant informed her that they were going to kill him. Mbandi and Wairera followed the men up to Machang’a market where they abandoned the deceased. Mbandi and Wairera observed that the deceased was unconscious; he was bleeding from the head, mouth and nose. The deceased was dead the next morning. According to the three witnesses – Kihara, Mbandi and Wairera

– they knew the appellants very well as they were their neighbours and Mureithi the 3rd man, also their neighbour had disappeared after the incident. Kihara identified the body of the deceased on 18th January 2012 for purposes of post mortem which was conducted at Siakago District Hospital by **Dr. Ngari** of Embu Provincial General Hospital. **Dr. Godfrey Njuki Njuru** of that hospital produced the report prepared by his colleague who had gone for further studies. Findings were that there was a depressed skull fracture on the right side of head and cause of death was the said head injury.

**Dr. Joseph Thuo**, a Psychiatrist at Embu Provincial General Hospital on 30th August 2012 examined both appellants and found them fit to stand trial for the offence of murder.

Mbandi confirmed to court what had been said by her son, **Kihara (PW1)** adding:

*“I saw them beating my son very well (sic). They took about 1 hour in the shamba. They took him away towards the road saying they were going to kill him. My son was screaming as they held him by the hands...”*

**Cpl. Samuel Onyango (PW4)** of Gachoka police station was at the station on 28th December, 2011 when he and his colleagues received a report of a dead body at Machang’a Trading Centre. He accompanied his OCS to the scene, collected the body and took it to Siakago mortuary. He was assigned to investigate the case and recorded statements from witnesses, whereafter he forwarded the file to the DCIO, Mbeere, with a recommendation that an inquest be conducted. When he visited the scene and area later, he did not find the appellants but was told that the 1st appellant had reported a case of theft of his sheep but the 1st appellant did not record a statement to that effect. In cross-examination, he testified that after forwarding the investigations to the DCIO, he recommended that the appellants be charged with murder.

According to this witness no other person, apart from the deceased’s family, were willing to come forward as witnesses in the case.

**Cpl. Jonathan Kiringa (PW7)** who at the material time worked at the District Commissioner’s Office, Kiritiri, was, with his colleague, on 28th August 2012 instructed by the District Officer of that office to proceed to Machang’a shopping centre where they found the 1st appellant and arrested him. They handed him over to Kiritiri police station.

**Cpl. Magiri Mbaabu (PW8)** stationed at the DCIO’s office, Mbeere South Division Office, took over investigations of the case from Cpl. Onyango. He testified that the deceased had stolen a domestic animal from the 1st appellant which led to the beating of the deceased. The 2nd appellant was arrested at Muchonoke market but the 3rd suspect was at large at the time of the trial.

The last prosecution witness was **PC Evans Kimutai (PW9)** of the DCIO’s Office, Mbeere North District. He was instructed on 28th August, 2012 by his DCIO to effect an arrest and did arrest the 2nd appellant.

At the close of the prosecution case the trial court finding that there was a case to answer. The 1st appellant gave a sworn statement where he stated that he was previously working in Eldoret but had relocated to Nairobi. In denying the offence, he stated that he was at home at Mavuria location in the evening of 26th December 2011, when the cows came home from grazing. His watchful daughter noted that one sheep was missing. They looked for it in vain and the next day – 27th December 2011 he called his cousin Mureithi (the man at large) and in the 1st appellant’s own words:

**“... and informed him that we had a suspect in mind one Bernard Kimathi, the deceased. I requested him to investigate. He came a short while later and brought me a skin of a sheep which I identified as that of my lost goat (sic)”.**

Further, that he and Mureithi decided to go to the deceased’s home where they found the deceased’s mother (Mbandi) and the deceased’s brother who was not called as a witness. They carried with them the sheep skin (hide) and a rope. He denied that Kihara and Wairera were present. Upon being shown by Mbandi where the deceased was hiding they found him; he was armed with a panga. At this point, the 2nd appellant, who had been sent by Kihara to take the latter’s jacket home, arrived. The three of them got hold of the deceased, tied him up with the rope and enquired from him where the rest of the meat was because they wanted it to be an exhibit. This is when Mbandi screamed, telling them to hasten and take the deceased to the police as he had caused her all manner of problems. Mbandi demanded for the panga that the deceased had and the 1st appellant gave it to her. She however continued screaming, which attracted neighbours and at this time the 1st appellant with his colleagues decided to leave. At the gate, they encountered many people to whom they complained about what had happened and the people decided to deal with the deceased. The 1st appellant picked the hide and rope and reported at Kiritiri police station, but at that station, there was already a report about the death of the deceased. Details about stock theft were recorded and he was asked to go home as he would be summoned later. On learning that the deceased had died, he decided to go to his place of work in Eldoret. He was arrested on 28th August 2012. He denied having ran away from home. According to him the deceased was beaten by a mob.

In sworn evidence in defence, the 2nd appellant stated that he met his neighbour **Kihara (PW1)** on 27th December 2011, who requested him to take his (Kihara’s) jacket home. On arrival at Kihara’s home he met the 1st appellant and Mureithi who had apprehended the deceased. Upon surrendering the jacket to Mbandi he assisted them to tie up the deceased with a rope. According to him, Mbandi cried for help shouting that the deceased had troubled her for long time, which attracted neighbours who took the deceased away. As the crowd was hostile to them, he escaped to his home. He learnt, one month later, that the deceased had died. He denied running away from home for six months, stating that he had been at work from where he was arrested on 28th August 2012. He confirmed that the deceased was his neighbour.

**Michael Mutaru Njeri, Chief Mavuria** location, was called as a defence witness by the 1st appellant. He knew both appellants as residents of his location. He recalled that the deceased’s mother had reported to him that the deceased had been assaulted. He advised her to report the matter to the police. He did not record a statement and did not follow up the report made to him. That is how the defence closed its case.

We conducted a virtual hearing through “Go-to-Meeting” platform on 17th November 2020, due to the prevailing global Covid-19 pandemic.

Mr. Irungu Kang’ata, learned counsel for the appellants, had filed written submissions as had learned counsel for the Director of Public Prosecutions, Mr. Ondimu. The latter had also filed a list of authorities.

In an oral highlighting of the submissions, Mr. Kang’ata took as first issue, compliance with **sections 200(2) and 201** of the **Criminal Procedure Code**, submitting that the Judge did not accord the appellant adequate opportunity to make submissions or recall witnesses. According to counsel this was a violation of fair trial rights, a situation that the Constitution of Kenya, 2010 does not countenance.

The other point taken by learned counsel for the appellants regarded availing by the prosecution of all witnesses – he submitted that critical witnesses were not called but the prosecution only called close relatives of the deceased. The alleged murder having taken place in broad daylight, why, wondered counsel, were there no independent witnesses?

Counsel for the appellants submitted, on a different point, that the two investigating officers called – **Cpl. Mbaabu (PW8)** and **Cpl. Onyango (PW4)** contradicted each other in that Cpl. Onyango testified that the deceased was killed by an infuriated mob, while **Cpl. Mbaabu** who took over the investigations, testified that the deceased was killed by the appellants. This according to counsel, was testimony that there was no evidence on who effected the fatal blow that unnecessarily took away the life of the deceased, and in those circumstances, could malice aforethought be established?

On yet another aspect of the appeal, Mr. Kang’ata submitted that the 1st appellant’s sheep had been stolen; he had made a theft report to the police, who took no action and the deceased was killed by the mob as the suspect in the theft of livestock. In his final submissions, Mr. Kang’ata stated that there was a variance in evidence on which weapons were used to kill the deceased and for all that, we should allow the appeal.

Then it was Mr. Ondimu’s turn to reply. In opposing the appeal, it was counsel’s submissions that the issue of compliance with **section 200** of the Criminal Procedure Code was well answered by the case of **Joseph Nyanjui v Republic [2018] eKLR** which dealt with the issue of compliance with **section 200(3)** of the said Code where an accused person is represented by counsel. According to Mr. Ondimu, the appellants were represented by counsel at the trial and the lawyer made the election provided in the said section on behalf of the appellants.

On calling of witnesses by the prosecution, it was counsel’s submission that all necessary witnesses had been called and there was compliance with the provisions of **section 143** of the **Evidence Act**.

Counsel for the DPP submitted, on the facts of the case that there was a full narration of the facts through the witnesses called on how the deceased was picked by the appellants, dragged on the ground by using a rope, beaten and finally left for dead at the market centre. According to learned State Counsel, the appellants did not dispute in their defence that they had met the deceased. Counsel submitted that all elements of murder had been proved as there was malice aforethought. Counsel concluded his submissions by stating that there had been an attempted cover up and that is why it took long for the appellants to be arrested and be initially charged at a Magistrates’ Court.

In a brief rejoinder, **Mr. Kang’ata** in what appeared to be a plea in mitigation, submitted that the appellants had suffered for long; they were first offenders; they were married with children and should be allowed to rejoin their families.

We have considered the whole record, submissions made by both sides, and the law, and this is what we think of this appeal.

Learned counsel for the appellants complains that there were breaches of fair trial rights against the appellants when **section 200, Criminal Procedure Code** was not complied with. The record shows that the hearing of witnesses began on 20th November, 2013 before **H. I. Ong’udi, J.** who took the testimony of six prosecution witnesses between that date and 5th May, 2014 (with adjournments). The record also shows that when the matter came up for further hearing on 7th October, 2014 the presiding Judge was **F. Muchemi, J.** who recorded that the previous Judge had since proceeded on transfer. It was ordered that proceedings be typed. Next date was 17th November, 2014 before the said Judge and **Ms. Muriuki**, counsel for the appellants, (accused) is recorded to say:

*“The defence wishes to proceed from where the former trial Judge reached. We shall not recall any witness.”*

The Court then directed that the case proceed from where the previous Judge had reached.

Learned counsel now complains that the appellant’s fair trial rights were violated as the appellants were denied an opportunity to make submissions or to recall witnesses. That, with respect, is not what the record shows. The record shows that the incoming Judge confirmed that the previous Judge had since proceeded on transfer and counsel then on record for the appellants informed the incoming Judge that the appellants elected to have the case proceed from where it had reached and they did not wish to recall any witness.

**Part IX** – Procedure in trials before the High Court – **Criminal Procedure Code** regulates the procedure to be followed in trials before the High Court. That part has no direct reference to how an incoming Judge should deal with a trial partly heard by another Judge. **Section 200 (3)** of the said Code provides that:

*“200(3) Where a succeeding magistrate commences the hearing of proceedings and part of the evidence has been recorded by his predecessor, the accused person may demand that any witness be resummoned and reheard and the succeeding magistrate shall inform the accused person of that right.”*

This, therefore is the procedure to be followed in trials before the High Court, and the murder charge facing the appellants fell in that category. The appellants here were entitled, where **Muchemi, J.** was taking over the part-heard matter by **Ong’udi, J.**, to demand that any or all witnesses who had testified be recalled and re-heard and the succeeding Judge had a duty to inform the appellants of that right. One of the issues that arose in the case of **Joseph Mwathi Nyanjui vs. Republic [2018] eKLR** concerned compliance with **section 200, Criminal Procedure Code** where a magistrate who had taken evidence of some witnesses had been transferred to another station and a succeeding magistrate had taken over the case. The appellant in that case had been informed by the incoming magistrate that he had a right to recall witnesses but he had elected that the case proceed from where it had reached. This Court held that it was satisfied that the appellant was fully aware of this right to have all witnesses recalled where the trial was taken over by the incoming magistrate but had elected, through his lawyer, to proceed with the trial without recall of any witnesses. The Court cited the case of **Joseph Gichuki Njoroge vs. Republic Criminal Appeal No. 523 of 2010 (UR)** where it was held:-

*“This Court has previously held that section 200 of the Criminal Procedure Code should be invoked sparingly and only in cases where the ends of justice will be defeated if a succeeding magistrate does not continue a trial commenced by his predecessor. Some of the considerations to be borne in mind before invoking section 200 include whether it is convenient to commence the trial de novo, how far the trial had proceeded, availability of witnesses who had already testified, possible loss of memory by the witnesses, the time that had lapsed since the commencement of the trial and the prejudice likely to be suffered by either the prosecution or the accused.”*

In the instant appeal, the outgoing Judge had heard the testimony of six witnesses. The incoming Judge took the testimony of the remaining 3 witnesses. As we have shown, the incoming Judge informed the appellants of their right to recall witnesses. The appellants, through their lawyer, elected that the case proceeds from where it had reached and the lawyer informed the Court that the appellants did not wish to recall any witnesses. There was, in those circumstances, full compliance with the requirements of **section 200** of the **Criminal Procedure Code** and we cannot see any merit in the complaint by the appellants in that regard.

The appellants complain that the prosecution chose to call only close relatives of the deceased as witnesses but did not call any independent witnesses. **Mr. Ondimu**, learned counsel for the DPP, counters this first, by citing **section 143** of the **Evidence Act** and secondly, submitting that there was hostility by that locality; witnesses refused to come forward to record statements and there was, thirdly, attempted cover up by the police.

When **CPL Mbaabu** took over investigations from **CPL Onyango** upon being instructed to do so by his superiors, he recommended that the appellants be charged with murder. On why there were no independent witnesses in the case, he stated in cross examination:

*“...I visited the scene and talked to people living in the neighbourhood. They were not cooperative. This is the neighbourhood of the accused persons...”*

One of the answers to the question why there were no independent witnesses (save close relatives of the deceased) is provided by the said investigations officer who says that the neighbourhood from which the deceased and the appellants hailed was not cooperative and residents were hostile and unwilling to come forth to testify in the case. **Section 143, Evidence Act** provides that, absent any provision of law to the contrary, no particular number of witnesses shall be required for the proof of any fact. In the oft-cited case of **Bukenya & Others -vs- Uganda [1972] EA 549** it was held on the duty of the prosecution to avail witnesses at trial:

*“It is well established that the Director has discretion to decide who are the material witnesses and whom to call, but this needs to be qualified in three ways. First, there is a duty on the Director to call or make available all witnesses necessary to establish the truth even though their evidence may be inconsistent. Secondly, the Court itself has not merely the right, but the duty to call any person whose evidence appears essential to the just decision of the case. Thirdly, while the Director is not required to call a*

*superfluity of witnesses, if he calls evidence which is barely adequate and it appears that there were other witnesses available who were not called, the Court is entitled, under the general law of evidence, to draw an inference that the evidence of those witnesses, if called, would have been or would have tended to be adverse to the prosecution case.”*

In the case before the trial court, the prosecution called the deceased’s relatives who were present when the appellants were unwelcome visitors to their home. The witnesses included the mother of the deceased; brother of deceased and a niece. These were eye-witnesses to the events that happened on the fateful day and they gave straight forward evidence on facts leading to the charge of murder. There was an explanation why residents of the area who knew both the deceased and the appellants who were their neighbours were unwilling to testify for either side. Other witnesses including doctors and police officers testified in the case and there was no necessity to call any other witnesses to prove the facts.

**Mr. Kang’ata**, learned counsel for the appellants, also raised the issue of the weapons that were used. The evidence by Kahara, Mbandi and Wairera was that the appellants and Muriithi arrived at their home that morning armed with runqus and sticks. They also had a rope. They used runqus, sticks and fists to assault the deceased. The trial Judge found that these were the weapons used to assault the deceased. The record supports this finding and we agree with it.

The question of who killed the deceased will be part of the following analysis.

To found murder the prosecution must prove beyond reasonable doubt that the accused person did the unlawful act that caused the death of the deceased and that the accused person had malice aforethought. In the case of **Anthony Ndegwa Ngari vs. Republic [2014] eKLR** this Court held that for murder to be proved, the prosecution must prove i) the death of the deceased and the cause of death; ii) that the accused committed the unlawful act which caused the death of the deceased; and iii) that the accused had malice aforethought.

**i) Death of the deceased and cause of death** Kahara, Mbandi and Wairera all witnessed the assault of the deceased by the 2 appellants and Mureithi, when the three tied up the deceased with a rope and dragged him through a fence and thereafter on the ground, all the way to Machanga Shopping Centre. Mbandi and Wairera witnessed the assault and the deceased being abandoned by the appellants to die. They saw blood oozing from his ears, mouth and nose. Kahara later attended post-mortem and identified the body of the deceased for that purpose. The post-mortem examination was conducted by **Dr. Ngari** at Siakago Hospital and a report produced by **Dr. Njiru** which showed that the cause of death was head injuries. From the totality of the evidence, the deceased, who was alive on the morning of 27th December, 2011, was assaulted by the appellants and their accomplice using crude weapons and he died of the injuries inflicted during that assault.

**ii) That the accused committed the unlawful act which caused the death of the deceased.**

As we have seen **Kahara, Mbandi and Wairera** were at home and were witnesses to the events that occurred when the appellants and their accomplice visited terror on the deceased inflicting injuries that led to the death of the deceased the same day. **Mbandi and Wairera** saw the deceased, now unconscious, with blood oozing from his ears, mouth and nose. The appellants did not deny being at the scene of crime. The 1st appellant readily admitted that, accompanied by his relative **Muriithi**, they went to the home of the deceased following on a sheep that had been lost or stolen the day before. The 2nd appellant also admitted being at that home that morning. The appellants alleged that it was a mob that attacked the deceased but in the face of the eye witness account by **Kahara, Mbandi and Wairera** that was not the case and the trial Judge was right to dismiss that defence.

The appellants armed themselves with runqus and sticks and violently attacked the deceased when he was at his home/shamba minding his business. They tied him up with rope and proceeded not only to attack him using runqus, sticks and fists but, after tying him up with a rope they dragged him through a fence and hence dragged him on the ground all the way to a shopping centre where they abandoned him for dead and he was either already dead or died moments later.

Picking up a man from his house and proceeding to beat him mercilessly leading to his death is an unlawful act and that act led to the death of the deceased. The appellants must have known that their actions could result in the death of the deceased. They must be held to account for their actions.

**iii) Malice aforethought**

This is set out at **section 206** of the **Penal Code** 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.”*

The deceased was repeatedly assaulted by the 2 appellants and their accomplice, dragged on the ground after being tied up with a rope and

eventually left either dead or unconscious at a shopping centre. There was blood oozing from the ears, mouth and nose. The weapons used were rungas, sticks and fists. They set out, armed, to assault the deceased, they had a common intention and they knew that the assault would cause death of or grievous harm to the deceased. They had malice aforethought.

It was held in the case of *Lucy Mueni Mutava vs. Republic [2019]eKLR*:

**“...the appellant’s actions and more specifically the vicious nature she attacked the deceased and the resulting injuries are indicative of malice aforethought on her part as defined in section 206 of the Penal code.”**

In the case of *Ibrahim Maramba Mukabane vs. Republic [2020] eKLR* this Court citing the case of *Republic vs. Tubere s/o Ochen [1945] 12 EACA 63* acknowledged that in determining whether malice aforethought has been proved the following elements should be considered:

**“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 either a single stab/wound or multiple injuries; the conduct of the accused before, during and after the incident.”**  
See also: *George Ngotho Mutiso v Republic [2010] eKLR*, *Republic v Ernest Asami Bwire, Abanga alias Onyango v Republic Cr. Appeal No. 32 of 1990*, *Karani & 3 Others v Republic [1991] KLR 622.*”

Our jurisprudence also recognizes that where 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 proper consequence of the prosecution of such purpose, each of them is deemed to have committed the offence – see **section 21, Penal Code**.

In *Rex versus Mikaeri Kyeyune & 4 Others 8 EACA 84* the predecessor of this Court observed:

**“Any person identified as having taken part in the beating must be regarded as linked by a common intention.”**

Finally, for this appeal, the predecessor of this Court in the case of *Republic vs. Gusambizi Wesonga v Republic [1948] 15 EACA 65* stated:

**“Homicide, unless accidental, will always be unlawful except in circumstances which makes it excusable.”**

There was no reasonable excuse for the way the appellants acted when they set out with a common intention to go to the deceased home and attack him the way they did. They committed murder and there was malice aforethought.

Having reviewed the whole record, we are satisfied that the trial Judge reached the correct conclusion that the appellants were guilty of the offence of murder. They were properly convicted.

The appeal has no merit and we dismiss it.

**Dated and delivered at Nairobi this 5th day of February, 2021.**

**D. K. MUSINGA**

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**JUDGE OF APPEAL**

**J. MOHAMMED**

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**JUDGE OF APPEAL**

**S. ole KANTAI**

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**JUDGE OF APPEAL**

*I certify that this is a true*

*copy of the original.*

*Signed*

**DEPUTY REGISTRAR**