IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: VISRAM, KARANJA & SICHALE, JJ.A)

CRIMINAL APPEAL NO. 30, 31, 32 & 33 OF 2015

BETWEEN

MOHAMMED DADI KOKANE..................................1ST APPELLANT

ALFRED NJURUKA MAKOKO................................2ND APPELLANT

SAMWEL MWACHALA MWAGHANIA................3RD APPELLANT

JAMES CHACHA MWITA.......................................4TH APPELLANT

AND

REPUBLIC...RESPONDENT

(An appeal from the Judgment of the High Court of Kenya

at Mombasa (Odero, J.) dated 17th December, 2014

in

H.C.CR.C No. 21 of 2010)

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JUDGMENT OF THE COURT

1. Campell Rodney Bridges (deceased), a geologist by profession, pioneered the prospecting and mining of gemstones in the East African region. He began in Tanzania and eventually branched into Kenya in the year 1973 after obtaining an Exclusive Prospecting Licence under the ***Mining Act, Cap 306*** (***repealed by the Mining Act, 2016***). The licence in question which was extended from time to time, granted him exclusive rights to prospect for gemstones over a specified area in Kambanga situated in Taita/Taveta. Kambanga was eventually subdivided into ranches and transferred to private individuals. Nevertheless, the deceased still maintained exclusive processing rights over the initial demarcated area.

2. His venture proved to be viable and ultimately, he incorporated two companies namely, Bridges Exploration Company (BEC) & First Green Garnet Mining Company (FGG) under which he carried out the business of mining and exporting the gemstones. He then transferred the Exclusive Processing Licence to FGG. The deceased continued with his business without any hiccups until the year 2006 when some of the locals and/or ranch owners were no longer willing to allow him to continue mining the gemstones mainly due to the lucrativeness of the said business. They resorted to all manner of schemes to not only stop the deceased from mining but to also get him out of Taita/Taveta. This culminated with the locals and/or ranch owners engaging in mining without requisite licences, barring the deceased from mining and even issuing death threats to the deceased.

3. Mwasui Ranch Limited was one of the deceased's principal adversaries which challenged the issuance of the exclusive licence in favour of FGG. Be that as it may, the deceased remained steadfast and continued with his venture. Apparently, he later learnt that certain people were infringing on his prospecting rights by mining in the areas he was licenced to prospect. For that reason, he called upon his Mines Manager,

Joseph Mwango Kamande (PW4), to carry out investigations over the suspected illegal mining. Towards that end, on 10th August, 2009 the deceased and his son, Bruce Bridges (PW15), accompanied Joseph to one of the company's mining camps, that is, Scorpion Camp. Upon surveying the camp they noticed a number of illegal mines therein and even found the 4th appellant in the process of mining without his consent.

4. Thereafter, they decided to report the incident to the police but before they could get to the police station they ran into a *pickup* truck registration number KAQ 766D ferrying 8 men. The said truck blocked the road and all the men got out of the truck. Likewise, the deceased, his son and Joseph got out of his vehicle and came face to face with the 8 men. According to Joseph and Bruce, they recognized some of the men as the 1st, 2nd and 3rd appellants.

5. They heard the 2nd appellant, supposedly the then chairman of small scale miners in Taita/Taveta, ask the deceased why he was still interfering with the mines. In response, the deceased gave the 2nd appellant a letter dated 6th August, 2009 from the Commissioner of Mines and Geology wherein the Commissioner recognized the deceased's company as the only duly licenced entity authorized to carry out mining in the area. Further, the Commissioner declared all mining activities by the locals and/or ranch owners therein as illegal and issued an eviction notice against them. This did not please the 2nd appellant; at least as per Joseph and Bruce, the 2nd appellant threatened the deceased's life and promised that he would ensure he would not mine in the area. Afterwards, the 2nd appellant and his companions went back to the truck and drove off.

6. It appears that the eviction letter caused the situation to escalate from bad to worse. The following day, on 11th August, 2009 at around 10:00 a.m., FGG's Chief Security Officer, Amos Muange Kiamba (PW1), received information from one Shako that the route leading to Scorpion Camp had been blocked by certain people who had vowed to bar the deceased and/or his servants or agents from accessing the camp in question. He then decided to go to Wundanyi law courts to inform the deceased of the said development. The deceased, his son and Phillip Nzeya Syengo (PW2), a security manager at BEC, had accompanied the deceased's employees, John Mumo (PW3) and Peter Kasungulia Ngelu (PW5) who were facing trespass charges in the said law courts.

7. By the time Amos arrived the deceased had already been brought up to speed by Phillip. When the case against John and Peter did not take off the five of them escorted the deceased to the District Commissioner where he reported the incident. However, he was directed to lodge a complaint at the Wudanyi police station. The deceased's efforts to obtain police escort to the camp came to naught and left with no choice; the deceased, Bruce, Amos, Phillip, John and Peter drove to the camp.

8. When they got to the route which connected the ranches and Scorpion Camp they noticed that there were tree branches blocking the said road. They removed the branches and continued with their journey. After about a few meters they encountered another barrier on the road. This time trenches had been dug across the road and filled with boulders and trees. Nonetheless, they were able to manoeuvre their way around the barrier and continued heading towards the camp. Once again, when they arrived at Mwausi Ranch there was an enormous tree blocking the road and they all came out of the vehicle to remove the tree from the road.

9. Immediately, they were out of the vehicle they heard whistles and a crowd of about 20 or so men emerged from the bushes. In their evidence, Bruce, Amos, Phillip, John and Peter stated that the assailants were armed with pangas, rungus, knives, stones, bows, arrows and sticks. The assailants attacked them and inflicted injuries on them with the exception of John who managed to flee. During the attack one Dirya tried to stab the deceased with a spear but the deceased got hold of the same. As the deceased was struggling with Dirya, Salat stabbed the deceased on the left side of his chest with a knife causing him to fall down. Salat then exclaimed, *'nimeua Mzee Bridges'* which meant that he had killed the deceased. At that point, one of the assailants who was identified by Phillip as the 1st appellant suggested that they should leave before being apprehended. When the assailants left the deceased was bleeding profusely and Bruce attempted to administer first aid. Thereafter, they got the deceased into the vehicle and drove to Voi hospital where unfortunately, he was pronounced dead upon arrival.

10. On that very day, the superintendent of police, Abdul Mujika (PW18), and Sgt. Kenneth Sulubu (PW3) went to the hospital to interview the victims; they indicated that the assailants were people well known to them and even gave the names of some of them. Subsequently, the appellants together with 4 co-accused persons were apprehended in connection with the incident and charged with murder contrary to ***Section 203*** as read with ***Section 204*** of the ***Penal Code*** at the High Court in Mombasa. They all denied committing the offence let alone being at the scene of crime on the material day.

11. The trial court (Odero, J.) upon weighing the evidence on record found the appellants culpable and acquitted the co-accused persons for lack of evidence. She was convinced that the appellants had been placed at the scene of crime and were equally responsible for the deceased's murder as the person who stabbed him by virtue of the doctrine of common intention. The appellants were each sentenced to 40 years imprisonment.

12. Aggrieved with the said conviction, the appellants have preferred this appeal which is anchored on the grounds that the learned Judge erred in law and fact by:

a) Finding that the appellants had a common intention to murder the deceased.

b) Convicting the appellants on insufficient and incredible evidence.

c) Failing to resolve the material contradictions and inconsistencies in the prosecution's case.

d) Rejecting the appellants defence.

e) Finding that the prosecution had established its case to the required standard.

13. Mr. Mutua, learned counsel for the appellants, began by stating that the evidence on record was not sufficient to sustain the appellants' conviction. Expounding on that line of argument, counsel contended that firstly, it was not clear why the prosecution witnesses, despite testifying that the appellants were known to them prior to the incident did not give their names in their first report to the police. For instance, John admitted that he did not name any of the attackers in his initial report. Secondly, he was baffled by how the trial court could convict the appellants on one hand, and acquit their co-accused, on the other hand, based on the same evidence. He went on to pose the question, how then were the appellants' linked to the offence of murder? As far as he was concerned, the identification evidence was compromised due to what he termed as political interference.

14. The trial court was faulted for relying on what counsel asserted was contradictory evidence to convict the appellants. Giving an instance of contradiction in the prosecution's evidence, Mr. Mutua stated that there were contradictions with respect to how the appellants were armed.

15. Mr. Mutua took issue with the fact that the trial court relied on the doctrine of common intention to convict the appellants. According to him, the doctrine was inapplicable in this case and in that regard, he made reference to this Court's decision in ***Dickson Mwangi Munene & another vs. R*** **[2014] eKLR**. Last but not least, counsel submitted that the trial court failed to consider the *alibi* defence put forth by the appellants and urged us to allow the appeal.

16. Opposing the appeal, **Mr. Yamina**, the Principal Prosecution Counsel, argued that there was overwhelming evidence placing the appellants at the scene. Besides, their common intention to commit the offence in question was exhibited by the fact that before they attacked the deceased and his companions some of their accomplices had uttered the words to the effect that they had come to kill them. In Mr. Yamina's opinion, the trial court had properly evaluated the evidence before it and arrived at the correct conclusion. He added that taking into account the surrounding circumstances the sentence issued was sound in law.

17. We have considered the record, submissions made on behalf of the parties and the law. Our jurisdiction as the first appellate court is clearly spelt out in ***Kiilu*** & ***Another vs. R.*** **[2005] KLR 174**. Briefly put, it entails an exhaustive appraisal and re-evaluation of the evidence. In doing so, we are not merely called upon to scrutinize the evidence to see whether it supports the findings and conclusions of the trial court. On the contrary, we must weigh conflicting evidence, make our own findings and draw our own independent conclusion all the while bearing in mind that we did not have the benefit of observing the witnesses demeanour as they testified unlike the trial court.

18. It is common ground that the appellants' convictions were mainly based on identification and the doctrine of common intention both of which the appellants are challenging. Accordingly, the appeal herein turns on the following issues:

> ***i. Were the appellants positively identified as some of the assailants and/or were they placed at the scene of crime?***
>
> ***ii. Did the trial court err in invoking the doctrine of common intention?***
>
> ***iii. Was the offence of murder established against the appellants?***

19. Where the only evidence placing an accused person at the scene of crime, as in this case, is that of identification a court should be cautious and ensure that such evidence is watertight and free from error as reiterated by this Court in ***Wamunga vs. R*** **[1989] KLR 424**:

> ***"Evidence of visual identification in criminal cases can bring about miscarriage 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 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".***

Such caution should also be taken even where the identification evidence is in the form of recognition as opposed to identification of a stranger. See this Court's decision in ***Hamisi Swaleh Kibuyu vs. R*** **[2015] eKLR.**

20. Having perused the impugned judgment, we are satisfied that the trial court took into account the aforementioned caution. In point of fact, the trial court considered the circumstances under which the appellants were identified. In her own words, the trial Judge rendered herself and correctly so, as follows:

> ***"I deem it to be necessary to settle the question of whether there has been a clear positive and reliable identification of each of the accused persons, as having been present at the scene on that fateful day and as having participated in the attack on the deceased and his team.***
>
> ***The incident, the court is told occurred between 3.00 p.m. to 4.00 p.m. at Mwasui Ranch in Mwatate. Given the time it was broad daylight and visibility was good. The attack took a good amount of time. From the account given by the eyewitnesses, I would surmise that the whole attack lasted at the very minimum thirty minutes or so. As such, the witnesses had ample time and opportunity to see their attackers. None of the attackers was masked and none had covered their faces."***

21. Notwithstanding the aforementioned favourable circumstances it is not in dispute that some of the witnesses did not give the names or description of the appellants in their initial report. They simply testified that they had recognized the appellants as some of the assailants. What is the consequence thereof? Ideally, witnesses should give the description or name of an assailant he/she recognized/identified during an incident in his/her initial report because such description tests the veracity of the said identification and recognition evidence.

See this Court's decision in ***Maitanyi vs. R*** **[1986] KLR 198**.

22. In this case Phillip, John and Peter conceded that they did not give the description and/or names of the appellants in their initial reports. Furthermore, we could not tell from the record whether Bruce had given any description of the appellants in his first report. Nevertheless, we find that Amos' evidence corroborated the recognition of the appellants by the above mentioned witnesses since he gave their names in his initial report to superintendent of police, Abdul, a few hours after the incident. In that respect, the trial court observed:

> ***"PW1 told the court that he was well able to identify the attackers.***
>
> ***…***
>
> ***This witness was able to clearly point out and identify each of the persons whom he named before the court. PW1 told the court that he was sure of his identification because these are all men he had known from before.... The fact that PW1 was himself injured during this attack is not in any doubt. PW18 SUPERINTENDENT ABDUL MUJIKA the officer who received the victims at Voi District Hospital confirms that though injured PW1 was conscious and was able to talk. PW18 told the court that he questioned PW1 at the hospital and PW1 named their assailants as "Alfred Njuruka, Mohamed Dadi Kokane alias Gabo, Samuel Mwachala Mwagania, James Chacha Mwita, Daniel Mdachi Mnene, Salatt Jillo, Ramadhan Mwaluma, Diriye, Donald Madegu, Ferdinand Shuma and Mkunguzi".Thus barely an hour after the attack PW1 was able to name the attackers whom he saw and recognized. These are the very same persons who have been named by PW1 before the court. PW1 has not changed or altered his evidence with respect to those whom he identified in any manner whatsoever."***

23. The foregoing piece of evidence placed the appellants at the scene and displaced their ***alibi*** defence. Our position is fortified by the case of ***Victor Mwendwa Mulinge vs. R*** **[2014] eKLR** where this Court held:

> ***"It is trite law that the burden of proving the falsity, if at all, of an accused's defence of alibi lies on the prosecution; see Karanja v.R, [1983] KLR 501 … this Court held that in a proper case, a trial court may, in testing a defence of alibi and in weighing it with all the other evidence to see if the accused's guilt is established beyond all reasonable doubt, take into account the fact that he had not put forward his defence of alibi at an early stage in the case so that it can be tested by those responsible for investigation and thereby prevent any suggestion that the defence was an afterthought."***

24. In particular, the 1st and 4th appellants who contended that they were not involved in the incident were placed at the scene not only by Amos but by Phillip, John, Peter and Bruce. Similarly, the 2nd appellant who argued that he was in his farm on the material day was positively recognized by the aforementioned witnesses as having been part of the crowd that attacked the deceased.

25. As for the 3rd appellant, his defence to the effect that he was in Mwatate in the company of Mkunguzi who was charged as the 7th accused and Titus Mathenge (DW8) was not only displaced by the recognition evidence but the same proved to be incredible. This is because the 3rd appellant testified that the three of them sat under a tree discussing the issue of obtaining Mkunguzi's consent to mine

in the Mkuki Ranch. In the end, Mkunguzi prepared an agreement dated 11th August, 2009 to that effect which the 3rd appellant produced in court. Further, Titus agreed to finance him with Kshs.7,000 to undertake the project. Conversely, Mkunguzi at first disowned the agreement claiming he did not even understand its purport only to change his position during his re- examination. What is more, Titus' version was that he was not financing the 3rd appellant to undertake mining but had advanced Kshs.7,000 to him to erect a camp at the mining site. He stated that he was yet to discuss the issue of financing with the 3rd appellant. Titus also indicated, contrary to the 3rd appellant's assertion, that the alleged discussions took place at a local bar.

26. On the other hand, the trial court found that there was no evidence placing the 4 co-accused persons at the scene hence acquitted them on that basis. We concur with that finding and see no reason to interfere with the same. Equally, we find that the appellants have not demonstrated how their perceived political interference watered down or affected the recognition evidence.

27. It is clear from the record that there were contradictions in the witnesses' evidence with respect to the kind of weapon each appellant was armed with. According to Phillip and Bruce, the 2nd appellant was armed with a panga while Peter's evidence was to the effect that he was armed with an arrow. Additionally, Bruce stated that 3rd appellant was armed with a panga and Phillip testified that he was armed with a rungu. What is the effect of such contradictions?

28. We are conscious of this Court's position in ***Philip Nzaka Watu vs. R*** **[2016] eKLR**, that:

> ***"However, it must be remembered that when it comes to human recollection, no two witnesses recall exactly the same thing to the minutest detail. Some discrepancies must be expected because human recollection is not infallible and no two people perceive the same phenomena exactly the same way. Indeed as has been recognized in many decisions of this Court, some inconsistency in evidence may signify veracity and honesty, just as unusual uniformity may signal fabrication and coaching of witnesses. Ultimately, whether discrepancies in evidence render it believable or otherwise must turn on the circumstances of each case and the nature and extent of the discrepancies and inconsistencies in question."***

29. Applying the foregoing to the circumstances of this case, we are of the view that the aforementioned discrepancies neither went to the root of the appellants' conviction nor prejudiced their defence. The recognition evidence which placed them at the scene of the crime remained intact.

30. It is not in dispute that none of the appellants stabbed the deceased rather the prosecution witnesses were unanimous in their evidence that it was one Salat who inflicted the fatal injury on the deceased. Therefore, the trial court in linking the appellants to the deceased's murder

relied on the doctrine of common intention which is delineated under ***Section 21*** of the ***Penal Code*** as follows:

> ***"When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence."***

31. The essence of the doctrine was aptly stated by the predecessor of this Court in ***Wanjiru d/o Wamerio vs. R*** **22 EACA 521** as follows:-

> ***"Common intention generally implies premeditated plan, but this does not rule out the possibility of a common intention developing in the course of events though it might not have been present to start with***"

32. Did the trial court err in invoking the said doctrine? The essential ingredients which give rise to the doctrine of common intention were enunciated in ***Eunice Musenya Ndui vs. R*** **[2011] eKLR** as herein under:

> ***1) There must be two or more persons;***
>
> ***2) The persons must form a common intention;***
>
> ***3) The common intention must be towards prosecuting an unlawful purpose in conjunction with one another;***
>
> ***4) An offence must be committed in the process;***
>
> ***5) The offence must be of such a nature that its commission was a probable consequence of the prosecution of the unlawful purpose.***

33. It is without doubt that the appellants were in the company of others who are still at large. It is equally clear that they had formed a common intention to unlawfully bar the deceased and his agents from accessing Scorpion Camp by any means possible. Moreover, they were lying in wait and/or planned to ambush the deceased and his company when they were called upon to by the ring leaders. This is evidenced by utterances made to the effect that they were out to harm the deceased and his company coupled with the fact that they were armed with weapons. It was in the process of carrying out the above mission that a violent physical confrontation erupted which ultimately led to the deceased's death.

34. In light of the foregoing, we find that the appellants while acting in the manner they did must have intended the consequences of their actions especially bearing in mind that they viciously attacked the deceased and his companions. See this Court's decision in ***Stephen Ariga & another vs. R*** **[2018] eKLR**. As such, we find no fault on the part of the trial court in invoking the doctrine of common intention to convict the appellants for the deceased's murder.

35. Most importantly, we also find that malice aforethought was established on the part of the appellants by the virtue of the weapons used and the injuries inflicted on the deceased and his companions. In finding so, we are guided by the predecessor of this Court in ***Rex vs. Tuper S/O Ocher*** **[1945] 12EACA63** wherein, it held:

> ***"It (the court) has a duty to perform in considering the weapon used and the part of the body injured, in arriving at a conclusion as to whether malice aforethought has been established, and it will be obvious that ordinarily an inference of malice will flow more readily from the case, say of a spear or knife than from the use of a stick..."***

36. On the issue of sentence, we note that the trial court issued the same after taking into consideration the appellants' mitigation and exercising its discretion in accordance with the holding of the Supreme Court in ***Francis Karioko Muruatetu & another vs. R*** **[2017] eKLR**. In her own words, the learned Judge stated:

> ***"I have considered the mitigation and victim impact statement…. That having been said this offence is no doubt serious. The deceased lost his life at his prime leaving a widow and son. I am minded to give a stiff and deterrent sentence. I therefore sentence each of the accused person to serve forty (40) years imprisonment."***

In our view, the sentence is sound in law.

37. Accordingly, we find that the appeal herein lacks merit and is hereby dismissed.

Dated and delivered at Mombasa this 14th day of February, 2019.

ALNASHIR VISRAM

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

F. SICHALE

....

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR