IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WAKI, KARANJA & J. MOHAMMED, JJ.A)

CRIMINAL APPEAL NO. 124 OF 2012

.....

BETWEEN

JOHN OUMA AWINO .....APPELLANT

SAMUEL OTIENO AGOT .....APPELLANT

AND

REPUBLIC…….RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Nairobi (Mwilu, J.) dated 29th November, 2011

in

H.C.CR.A. NO. 55 OF 2007)

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JUDGMENT OF THE COURT

1. On 29th November, 2011, the High Court, Mwilu, J. (as she then was) convicted ***John Ouma Awino*** (Ouma) and ***Samuel Otieno Agot*** (Otieno) for the offence of murder contrary to ***Section 203*** as read with ***Section*** **204** of the Penal Code. It had been alleged in the Information filed by the Attorney General that on the 20th day of April, 2007 at Soweto Village in Kayole, Nairobi, they jointly murdered ***Quantine Mutua Musuvali*** (the deceased). Upon their conviction they were sentenced to suffer the death penalty. They were aggrieved by both the conviction and sentence, hence the appeal now before us.
In this appeal Ouma is represented by learned counsel Mr. F. M. Njanja, Otieno is represented by learned counsel Mr. Vincent Nyangayo, and the Republic is represented by learned Assistant Director of Public Prosecutions (ADPP) Ms. Mary Oundo.

2. As this is a first appeal, it is our duty to subject the evidence on record to a fresh evaluation in order to reach our own conclusions but always bearing in mind that the trial court had the

advantage, which we do not have and must give allowance for it, of seeing and hearing the witnesses and was therefore a better judge of the credibility of those witnesses. See **Okeno v. Republic [1972] EA 32** and **Mwangi v. Republic [2004] 2 KLR 28**.

3. What are the underlying facts?
On the 19th April, 2007, the deceased's sister ***Judith Ngali Musuvali*** (PW2) met him at about 7.30 pm and he promised to go to her house for dinner. They lived in separate houses in Patanisho Village in Soweto, Kayole. He never turned up. The next time Judith saw her brother was about 7.30 am on 21st April, 2007. She was called by neighbors from her house and informed that someone bearing the deceased's description was lying prostrate about 10 minutes' walk from her house. In the company of a neighbour, ***Michael Marura Ojienga*** (PW6), they found the deceased lying on a muddy spot that had not been disturbed. He could not talk or turn but just looked at them. They saw his swollen face, injuries at the back of his head, bleeding through the ears, and other injuries on his elbows. They took him to Huruma Nursing Home but he was dead within one hour.

4. When the pathologist, ***Dr Francis Maina Ndiagui*** (PW10) examined the body of the 24 year-old one week later on 27th April, 2007, he found one external injury on the forehead. Internally, he found bleeding under the skin on both sides of the head (scalp haematoma). When he opened the head, he saw massive right sided bleeding under the brain covering (Sub-arachnoid haemorrage) which he described as serious head injury. He found no other injuries. In his opinion, the cause of death was sub-archnoid haemorrage due to blunt trauma. He attributed the trauma to a force on the head or a heavy fall or a hard kick.

5. The matter was investigated by ***Sergeant Rajab Juma*** (PW9) of Soweto Police Post. He received information that the deceased was seen on the evening of 20th April, 2007 at a *busaa* club which was about 150 meters away from where he was found on the morning of 21st April, 2007. The club was Ingo Busaa Club, also known as Jungle. The *busaa* brewer managing the club was ***Martin Mukuyani Khisa*** (PW1) and he confirmed that he saw the deceased, whom he had seen at the club three times before, seated at the club that evening. The deceased used to take soda not *busaa*. There were also 20 - 30 other customers at the club and there was music, dancing and noise.

6. At about 6 p.m., a commotion arose when one of the customers known as ***Owiti*** claimed that his phone had been taken. Owiti had placed it on top of the T.V monitor as he danced to music. The deceased told Owiti that it was Samuel Otieno who had taken it. Samuel Otieno is the 2nd appellant and was also nicknamed "soldier" because he was a former military man. Owiti and the deceased went out of the club through the front door to look for Otieno and shortly after they returned inside, with Owiti shouting that he had found his phone. The other customers were not happy about Owiti's shouting and he was told to leave. He left through the back door. Just then, Otieno entered the club and went where the deceased was and asked him where Owiti went. The deceased pointed at the back door. Otieno went up to the door, looked outside, and returned to where the deceased was sitting. He hit the deceased on the jaw with a fist and the deceased stood up to run away through the back door. But John Ouma stood at the door in front of him. According to Martin, he either wanted to block the deceased's exit or to start a fight. John Ouma is the 1st appellant. The deceased managed to get past and ran into the store used by Martin to brew *busaa*, at the back of the club. Otieno followed him there, and was followed by Ouma. The two were regular customers at the club and were known to Martin for two years or so. A waitress at the club, ***Christine Apiyo Ogutu*** (PW5) confirmed that there was a fracas involving the loss of a phone and Otieno was part of it. Her recollection was that it was Otieno who was saying it was the deceased who had taken Owiti's phone.

7. Shortly after the deceased ran out followed by Otieno, a girl attendant alerted Martin that someone was being killed in the store. Martin rushed there and found Ouma standing at the door. According to Martin, he was preventing other customers from getting in. But Martin pushed his way through

as he was the owner. The deceased was lying face-down in the inner room and Otieno was standing at his feet. Martin asked the two why they wanted to kill the deceased but there was no answer. He went in and tried to raise the deceased up, but Otieno slapped him on the face and snatched the deceased from him. It was then that Otieno stepped hard on the deceased's head and below the neck using his heel. There was no resistance from the deceased and he was not talking. Otieno then dragged the deceased out of the store and when the other patrons saw the state of the deceased they said he had died and they left the club. Otieno and Ouma also left. That was about 10 p.m.

8. Another worker joined Martin as they tried to wash the deceased's face and some thick stuff like clotted blood which had started oozing out of his mouth and nose. Christine also came and found the deceased bleeding through the mouth and nose. They laid him down on a sack inside the club to recuperate. That other worker was ***Alex Omondi Okeyo*** (PW4) who was the disc jockey (DJ) at the club. Alex was told by Martin what he had witnessed at the rear store and Alex suggested that Otieno should arrange to take the deceased to hospital. He went out looking for Otieno and found him. When he told Otieno to go back and take the deceased to hospital, Otieno became angry and wanted to beat him up. Otieno disappeared.

9. Martin closed the club at about 10.30 p.m. and went to sleep at the back of the club. He left the deceased lying in the same position inside the club. The main door was normally closed using a 50kg, 9"x9" building stone supported by a table. The following morning, Martin was awakened by another worker asking him why he had left the club's main door ajar. When he went to check, he found the deceased had left in the night leaving his key and jacket.

10. The search for Otieno and Ouma started in earnest upon the death of the deceased by visiting their homes in Soweto and Kayole severally but to no avail. According to the investigating officer, they had moved out. On 3rd June, 2007, on information received, ***Pc Wilson Peter Bulinga*** (PW8), went to Jungle pub and found Otieno whom he knew before. On seeing him, Otieno took off and Pc Bulinga gave chase through the streets of Soweto. He caught up with him after a while and wrestled him down despite strong resistance. Fortunately, Pc Bulinga was a former Olympic boxer. He locked him up at Soweto Police Post and was later charged with the offence of murder. Pc Bulinga also received information on the whereabouts of Ouma on 5th August, 2007 and went to arrest him. Ouma did not resist arrest. He was also charged with the offence of murder and later the two cases were consolidated.

11. In his defence Otieno stated that he arrived at his house in Kayole at 7 a.m. on 20th April, 2007 after working overnight at Morris & Co in Industrial Area. He slept until 12.45 p.m. when he went to Ingo Club for some *busaa*. He later went home for change of clothes to attend a fundraiser in Mbotela until 8.30 p.m. when he headed for a bar in Kayole called Zebu where he arrived at 9.30 p.m. There he found Martin (PW1), Pc Bulinga (PW8) and the owner of Ingo Busaa Club. He took some beer there and took away some of it as he headed to Ingo Club. He found four of his friends at Ingo (Odago, Omosh, Otoyo and Peter Owiti). Christine (PW5) gave him a seat and he ordered some *busaa*.

12. A quarrel then arose about a phone. ***Odago*** punched someone and the *busaa* Otieno was drinking poured on him. Patrons then ran out shouting thief and he overheard a waitress saying someone was being beaten at the store. She was calling out for assistance and Otieno went out only to find that it was his four friends beating up a man. He separated them and stopped the fight. A crowd was milling around but Otieno told them it was pointless to fight since the phone had been found. Martin came and said that was a bad day for the club since that was the second fight that day. He left to go home with Peter Owiti but on the way met Martin and Alex.

13. On 3rd June, 2007, he was drinking at Zebu Bar and later moved to Jungle Club where Pc Bulinga arrested him after taking away his Ksh. 4,700/=. He denied the offence.

14. Ouma, in his sworn defence, said he was working at Karen on 20th April, 2007 after which he went home to Kayole arriving at 10 p.m. As it was raining, he went to Ingo Busaa Club to take shelter. He found many patrons, some drinking, others dancing. He sat at the rear of the club and ordered some *busaa* which he drank as he danced to Tony Nyadundo music on his chair. Then suddenly, he saw customers running helter skelter through the back and front of the club. Seats, tables and drinks were strewn all over. He did not know what caused the commotion, but then saw people going towards the store at the rear of the club. He also went there and heard that it was someone who had stolen a phone and hidden there. He did not witness any fighting. He did not know Otieno but used to see him as a common figure at Ingo Club. He saw him on 20th April, 2007 but did not speak to him. He was arrested on 5th August, 2007 and denied the offence.

15. On the totality of that evidence, the trial court found as a fact that the person who was found semiconscious by his sister on 21st April, 2007 and subsequently died, was the same person who was assaulted at Ingo Busaa Club, also known as Jungle. The person was the deceased herein and the injuries inflicted during the assault at Ingo club were the direct result of his death. The trial court also found as a fact that it was Otieno and Ouma who assaulted and occasioned the death of the deceased. In making this finding, the court believed the evidence of Martin and the circumstantial evidence attendant to the commission of the offence.

16. The court reasoned as follows:-

> **"All evidence that led to the effect that it was the two accused persons who beat up the deceased in that store is hard, clear and uncontroverted and I believe it. The defence case is at best escapist and evasive. The two accused persons admit to having been at the scene, irrespective of the times of arrival there, as they admit to having been present when they heard some commotion. Their assertions that they did not take part in the commotion is completely destroyed by the prosecution evidence of PW1 and PW4 and to a large extent their own admission of their presence at the scene. PW4 went after Accused Two to ask him to go back and pick his victim to take him to hospital. Why was Accused Two threatening to beat up PW4? A guilty mind, that is what I find. There is no doubt created that it was the two accused persons herein who beat up the deceased herein in the inner store of Jango**(sic) **Club leading him to sustain serious head injuries that he later succumbed to. It is of course true that the only beating of the deceased that PW1 witnessed was when accused two grabbed the deceased from the grip of PW1, dropped him back on the floor and hit him/kicked him hard on his head and neck. Even at that time the deceased was not resisting the beating, he was not talking, he had been rendered unconscious by the acts of beating by the accused persons."**

17. The trial court was conscious that, on the evidence, it was only Otieno who was seen physically assaulting the deceased. It, nevertheless, held Ouma culpable on the following reasoning:-

> **"Accused One was not actually seen beating the deceased. So then what role did he play in the causation of the crime? When Accused Two chased after the deceased from Jango** (sic) **Club and into the store where the deceased sought refuge, Accused One followed Accused Two into that store where the deceased was beaten. Accused One had initially attempted to block the deceased from running to safety from inside the Jango** (sic) **Club. But when he managed to sneak out the Accused One followed him and was once again found blocking the door to the store from inside of which the deceased was beaten unconscious. These acts of the First Accused were as criminal as those of the Second Accused who was caught/seen red- handed hitting the deceased on the jaw, head and neck which led to hislater death. My finding is that these two accused persons acted in concert in inflicting the fatal**

injuries on the deceased, the Second Accused in actually beating the deceased and the first in blocking any escape of the deceased, if he was in any state to escape and in blocking patrons from coming to his rescue, and finally the second accused declining to take his victim for medical assistance. My finding is that the accused persons acted with a common intention in the commission of crime

18. Finally the trial court found support for the conclusion that it was the two appellants who were responsible for the deceased's death because of their disappearance from their residences and remaining in hiding until their arrest. The court stated as follows:-

> **"Another issue that calls for consideration as to the accused persons' culpability is their disappearance from their known residences since the commission of the offence until their arrest two months later in the case of second accused and four months later in the case of the first accused. The evidence of PW9 Rajab Juma the investigating officer herein as to the police search for the accused persons with a view to arresting them was not contested in cross examination and the conclusion to be derived is that the accused persons hid from the law for such time as they thought their deeds had been forgotten or ignored only for them to be rudely awoken by the late arrests. And why was Accused Two resisting arrest from the arresting officer PW8 Pc Wilson Peter Bulinga? Why would an innocent person run away from the law enforcers? The only reason can be that Accused Two knew that the hour of reckoning with what he had done on 20/04/2007 had come and wrongly thought he could once again escape as he had done since that 20/04/2007 until 5/8/2007. Due to the boxing prowess of PW8 the Accused Two was not lucky."**

19. All those findings are challenged by both appellants on different grounds in their memoranda of appeal. But there is a common issue which we shall first deal with. The contention on that issue is that both appellants did not understand the language in which the proceedings were conducted because there is no record of it. Furthermore, there was no interpretation during the court proceedings. According to learned counsel, Mr. Njanja, who received support from Mr. Nyangayo, the language of the court was recorded only once during the plea, and thereafter there is no record either of the language used or the interpretation of it. In his submission, the law requires that language be stated at every stage of the proceedings and he cited the cases of **Anthony Kibatha v. R Cr App. No.24/2005 (ur)** and **Chaka Tsuma Chaka v. R Cr. App. No. 45/1998 (ur**) in support. For those reasons, they concluded, the trial must be declared a nullity without ordering for a retrial because there was no sufficient evidence on record to support any conviction against the appellants.

20. In response to the submissions, Ms. Oundo drew our attention to the record which shows that Otieno, who was the first to be taken to court, chose the *English* language during his plea and further, when the charges were consolidated, both appellants chose *English and Kiswahili* as their preferred languages with interpretation undertaken by the court. When the witnesses testified, there was also an indication of language, and in addition there was a court clerk throughout as well as defence counsel. No complaints were raised during the trial and so, in her view, this ground of appeal was an afterthought which should be rejected. The authorities cited, in her submission, were distinguishable.

21. We have considered this ground of appeal and we find no merit in it for the following reasons:-

There are many decisions of this Court, including the ones cited by Mr. Njanja before us, that emphasize that the language in which criminal proceedings are conducted are a fundamental requirement. It is indeed

a. factor of fair trial by an independent and impartial court which is a jealously guarded human right under the current and the retired Constitutions. We may underscore that imperative from the case of **Boniface Mungai Machanga v. Republic Cr. App. No. 310/2005 (ur)** where the Court stated thus:-

> **"The issue of "language" in criminal trials has been severally examined by this Court and strong expressions made about compliance with the requirements of the law. As recently as May, 2007, the Court in Degow Dagane Nunow v R. Cr. A. 223/05 (ur) revisited the issue and delivered itself thus: -**
>
> > **"On this aspect of the matter, the burden is on the trial court itself to show that an accused person has himself selected the language which he wishes to speak and in which proceedings are to be interpreted to him. As we have repeatedly pointed out, these are not mere procedural technicalities. There is, first, *section 198* of the Criminal Procedure Code and that section provides:-**
> >
> > ***"198 (1). Whenever any evidence is given in a language not understood by the accused, and he is present in person, it shall be interpreted to him in open court in a language which he understands.***
> >
> > ***2. If he appears by advocate and the evidence is given in a language other than English and not understood by the advocate it shall be interpreted to the advocate in English."***
>
> **The provisions show that the question of interpretation of evidence to a language which an accused person understands is not a matter for the discretion of a trial magistrate – it must be done and the only way to show that it has been done is to show from the beginning of the trial the language which an accused person has chosen to speak. *Section 77* of the Constitution is in relevant parts, in these terms:-**
>
> > ***"77 (2) Every person who is charged with a criminal offence –***
> >
> > ***(a).....***
> >
> > ***(b)shall be informed as soon as reasonably practicable, in a language that he understands and in detail of the nature of the offence with which he is charged;***
> >
> > ***(c) .....***
> >
> > ***(d).....***
> >
> > ***(e).....***
> >
> > ***(f)shall be permitted to have without payment the assistance of an interpreter if he cannot understand the language used in the trial of the charge."***
>
> **It is the responsibility of trial courts to ensure compliance with these provisions. Trial courts are not only obliged to ensure compliance with the provisions; they are also obliged to show in their records that the provisions have been complied with. There is no reason why a trial court should leave an appellate court to presume that the provisions must have been complied with while it can easily be demonstrated by the record that compliance did in fact take place."**

22. This Court also stated in the case of **Rwaru Mwangi v. Republic Cr. App. No. 18/2006** that "*the only way a trial court would demonstrate compliance with the Constitutional provisions is to show, **on the face of the record at the beginning of the trial**, the language which the accused person has chosen to speak*" (emphasis added). The trial in this matter took place between August, 2007, when the first plea was taken, and November, 2011, when the judgment was delivered. Did the trial court comply with the Constitution?

23. We have cross-checked the record and confirmed, as stated by Ms. Oundo, that the issue of language was given the attention it deserved. At the **'Plea'** by Otieno on 5th September, 2007, which was the earliest opportunity, it is recorded that "*He chose the English language for the purposes of taking plea.*" Later, when the two cases were consolidated and the case was ripe for hearing before Ochieng J. the following record appears:-

> *"11/3/2010*
>
> *Before: Ochieng J.*
>
> *Mosinko court clerk, Kiswahili/English.*
>
> *Imbali for state.*
>
> *Nyangweso for 1st accused.*
>
> *Mrs. Wangombe for 2nd accused.*
>
> *Accused – Both present.*
>
> *Nyangweso – I do sincerely apologize for my absence yesterday. I had inadvertently omitted the case from my diary yesterday. I was called by Mrs. Wangombe after the matter was put off today.*
>
> *Court – apology accepted.*
>
> ***F.A. OCHIENG***
>
> ***JUDGE***
>
> *Imbali – I have six witnesses in court. I am ready to proceed.*
>
> *Mrs. Wangombe – I too am ready.*
>
> *Court – Accused, what languages do you understand?*
>
> *1st accused – English and Kiswahili.*
>
> *2nd accused – Kiswahili*
>
> *Court – On 11/12/07 when plea was taken, what language were the proceedings in?*
>
> *1st accused – For me, it was English.*

2nd accused – for me it was Kiswahili.

Court – In the light the foregoing, the court clerk will also serve as the English/Kiswahili interpreter.

F.A. OCHIENG

JUDGE

24. The case was recommenced before Mwilu J. (as she then was) on 3rd March, 2011 and she heard six witnesses on that day recording for each witness that they testified in *"Kiswahili"*. At the resumed hearing on 9th May, 2011, three more witnesses testified and there is a record that one spoke in *Kiswahili*, another in *English & Kiswahili* and the other in *English*. The last of the prosecution witnesses was heard on 25th May, 2011 and he spoke in *English/Kiswahili*. That, in our view, is not the kind of record described by counsel for the appellants as containing no mention of the language used. It is a far cry from the records in the authorities cited before us which are distinguishable. The record also shows that there was a court clerk whose task is to conduct interpretations and learned defence counsel who represented the appellants throughout. The mandatory requirements under the law were to inform the appellants the nature of the offence in a language they understood, and to provide an interpreter if they did not understand the language of the court. In this case, they expressly chose the language themselves and never complained about any change of it or their failure to follow the proceedings. We find and hold, in the circumstances, that there was compliance with the Constitution and we decline the invitation to declare the trial a nullity. That ground of appeal fails.

25. We may now revert to the substantive ground of appeal raised by Ouma, that is, **Ground 3**, which states as follows:-

> "3. *The learned trial judge erred in law and fact by holding that the appellants in this case had a common intent to commit the alleged crime in that;*
>
> i. *No evidence was presented to link the conduct of the appellants in this case to a common intent prior to the commission of the offence.*
>
> ii. *No evidence was given to the effect that the appellant was at any time seen sitting together, talking or in anyway doing joint activities in the club together with the said Samuel Atieno Ogot."*

That ground is substantially the same in wording as **ground 4** in the memorandum of appeal drawn by Otieno. We shall therefore discuss them together as Mr. Nyangayo adopted the submissions made by Mr. Njanja in that regard.

26. Mr. Njanja submitted that there was no evidence that the person who attacked the deceased was with Ouma. He also submitted that Ouma was not implicated in the beating of the deceased. It was therefore erroneous for the trial court to accept the evidence of Martin (PW1) which was at best mere conjecture and speculative. He referred to the provisions of ***Section 20*** of the Penal Code relating to aiding and abetting, which the trial court called in aid to find Ouma culpable and submitted that it was cited and applied out of context. In his view, by invoking that section, the trial court was importing a theory which was not canvassed in evidence or submissions of counsel. This, on the authority of **Okethi Okale & Another v. R [1965] EA 555**, was contrary to the law.

He also cited the case of **Dickson Mwangi & Another v. R [2014] eKLR** and submitted that ***Section 21*** of the Penal Code was the applicable section covering common intention and would absolve Ouma from culpability, just as it did the appellant in that case.

27. In response, Ms. Oundo supported the findings of the trial court submitting that even if the two ***Sections 20*** and ***21*** of the Penal Code were applied they would be borne out by the evidence against Ouma and make him culpable. He was not innocent.

28. Was it '*aiding and abetting'* or '*common intention*' or both? That is the issue before us. The trial court cited and relied on both provisions of the Penal Code. In reliance of ***Section 20***, it stated as follows:-

> **"I borrow strength from section 20 of the Penal code which provides:**
>
> **20(1) When an offence is committed, each of the following persons is deemed to have taken part in committing the offence and to be guilty of the offence, and may be charged with actually committing it, that is to say-**
>
> > **(a) Every person who actually does the act or makes the omission which constitutes the offence;**
> >
> > **(b) Every person who does or omits to do any act for the purpose of enabling or aiding another person to commit the offence;**
> >
> > **(c) Every person who aids or abets another person in committing the offence;**
> >
> > **(d) Any person who counsels or procures any other person to commit the offence; and in the last mentioned case he may be charged either with committing the offence or with counseling or procuring its commission."**
>
> **The drafter of that law had Accused One in mind in 20 (b) and 20 (c) above for, it is my fining that, Accused one blocked the door to the store thereby enabling Accused Two to inflict fatal injuries to the deceased. By virtue of the above provision of the law the two accused persons are guilty in equal measure."**

29. In reliance of ***Section 21*** , the court stated as follows:-

> **"Further Section 21 of the same Penal Code Cap 63 Laws of Kenya binds these two accused persons together in the following words: -**
>
> > **"21. 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 is commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence."**
>
> **That then settles the fate of the two accused persons in the commission of the offence herein. They are equally guilty in like measure in the different roles that they played and which led to the death of the deceased herein."**

30. It becomes necessary therefore to consider whether the two sections can be applied to the same facts to produce the same result. The Sections appear under **"Chapter V"** of the **Penal Code** which covers "**PARTIES TO OFFENCES."** But ***Section 20*** defines ***"Principal offenders"*** while ***Section 21*** refers to ***"Joint offenders in prosecution of common purpose***." The two are different, not only in **21**content but also in their application. Common intention under ***Section 21*** connotes a

situation where there are two or more parties that intend to pursue or to further an unlawful object or a lawful object by unlawful means and so act or express themselves as to reveal such intention. It implies a pre-arranged plan. Although common intention can develop in the course of the commission of an offence, it normally precedes the commission of the crime showing a pre-meditated plan to act in concert. It comes into being, in point of time, prior to the commission of the act.

31. The application of the section has been considered in several decisions but we take it from the case of **Dickson Mwangi Munene & Another v. Republic Cr. App. No. 314 of 2011**, where the Court stated as follows:-

> **"This provision has been interpreted and the doctrine of common intention dealt with by our courts in several cases. In Solomon Mungai v. Republic [1965] E.A 363, the predecessor of this Court held that in order for this section to apply, it must be shown that the accused had shared with the other perpetrators of the crime a common intention to pursue a specific unlawful purpose which led to the commission of the offence charged.**
>
> **In Njoroge vs. Republic, [1983] KLR 197 at p. 204, the Court of Appeal stated that: -**
>
> **"If several persons combine for an unlawful purpose and one of them in the prosecution of it kills a man, it is murder in all who are present whether they actually aided or abetted or not provided that the death was caused by the act of someone of the party in the course of his endeavours to effect the common object of the assembly."**
>
> **As to its proof, referring to its earlier decision in R. Vs. Tabulayenka s/o Kirya (1943) EACA 51, it continued to state that: -**
>
> > **"The common intention may be inferred from their presence, their actions and the omission of either of them to disassociate himself from the assault."**
>
> **56. As we have stated, common intention does not only arise where there is a pre-arranged plan or joint enterprise. It can develop in the course of the commission of an offence. In Dracaku s/o Afia Vs. R. [1963] E.A 363 where "there was no evidence of any agreement formed by the appellants prior to the attack made by each" it was held that "that is not necessary if an intention to act in concert can be inferred from their actions" like "where a number of persons took part in beating a thief."**

32. In that court's view, the prosecution has to prove the following elements of the offence:

> *(a) a criminal intention to commit the offence charged jointly with others,*
>
> *(b) the act committed by one or more of the perpetrators in respect of which it is sought to hold an accused guilty, even though it is outside the common design, was a natural and foreseeable consequence of effecting that common purpose, and that*
>
> *(c) the accused was aware of this when he or she agreed to participate in that joint criminal act."*

33. We have carefully reassessed the record and we find that the evidence relied on was insufficient to prove those elements which constitute the offence charged. To that extent, we agree with Mr. Njanja that the provisions of ***Section 21*** were misapplied in this case. It was neither proved beyond doubt that Ouma had agreed with Otieno to carry out the joint criminal act nor did a common intention arise in the cause of commission of the offence. In the ***Dickson Munene case*** (supra) the court relied on the following criteria which was set in the earlier decisions of **Abdi Ali**

v. R (1956) 23 EACA 573 which was cited with approval in **R v. Cheya [1973] EA 500**:-

> **"[T] he existence of a common intention being the sole test of joint responsibility it must be proved what the common intention was and that the common act for which the accused were to be made responsible was acted upon in furtherance of that common intention. The presumption of constructive intention must not be too readily applied or pushed too far. The mere fact that a man may think a thing likely to happen is vastly different from his intending that that thing should happen. The latter ingredient is necessary under this section, the former by itself is irrelevant to the section. It is only then a court can, with some judicial certitude, hold that a particular accused must have preconceived or premeditated the result which ensured or acted in concert with others in order to bring about that result that this section can he applied."**

34. Having dealt with ***Section 21***, we think ***Section 20(1) (c)*** (supra) squarely covers the situation before us. There was evidence, that Ouma at first attempted to block the escape route of the deceased before following him to the place where the fatal blow was inflicted. At the store where the fatal blow was inflicted, Ouma stood guard preventing other people from accessing the store. He may not have inflicted the blow himself, but in preventing other people from assisting the deceased or himself omitting to assist, he was aiding and abetting the crime. He was not an innocent bystander or a separator of a fight as he testified. Mr. Njanja submitted that the evidence of Ouma's complicity came from Martin (PW1) and was at best speculative, suggesting that it ought to be disregarded. In our view, however, the evidence was properly accepted by the trial court after due consideration, based on its positive assessment of the witness's credibility which we have no basis for impeaching.

35. Aiding and abetting generally means somehow to assist in the commission of a crime or to be an accomplice. The elements of the offence have been variously expressed in different jurisdictions of the world, but they encompass proof that the person knew that his acts would assist the commission of the crime by the perpetrator or that he was aware of the substantial likelihood that his acts would assist the commission of a crime by the perpetrator. It is not necessary that the aider and abettor had knowledge of the precise crime that was intended and which was actually committed, as long as he was aware that one of a number of crimes would probably be committed, including the one actually committed. In this case, Ouma knew that the deceased was being assaulted. The definition of causing death in ***Section 206*** of the Penal Code includes the possibility of grievous harm. The circumstances surrounding the offence establish that Ouma intended the consequences of his acts, and must take responsibility for them. Under the law, he was a principal offender.

36. The next broad ground of appeal was similarly raised by both appellants. It is **grounds 4 and 5** in the memorandum of appeal filed by Ouma and **grounds 2 and 3** in Otieno's. In summary, it was that the trial court improperly filled in gaps in the prosecution case which was full of reasonable doubts. In particular, Mr. Njanja and Mr. Nyangayo singled out the failure to call several witnesses including the owner of Ingo Busaa Club, the owner of the phone which was the cause of the assault on the deceased, the barmaid who witnessed the first assault before raising the alarm, and the other customers who were at the scene. All these people, in their view, were necessary witnesses as stated in the case of **Bukenya v. Uganda [1972] EA 549** which was relied on.

    The other improper filling of gaps by the trial court was in the inconsistent evidence that the injuries on the deceased were not visible at Ingo Busaa Club in the evening but were noted when the deceased was found lying semiconscious in an open yard away from the club the following morning. The criticism was that the trial court explained away the gap between the two, despite the possibility that there were two different incidents, none of which implicated the appellants.

37. In response to those submissions, Ms Oundo submitted that the evidence of the witnesses who

were not called would not have advanced the case further. The owner of the phone had left the scene and the issue was not the ownership of the phone but who killed the deceased. According to her, the prosecution was within its rights under ***Section 143*** of the Evidence Act to call only those witnesses who would prove their case beyond doubt and not a plurality of witnesses. In this case, she asserted, there was no deliberate omission to call any necessary witness.

38. We have considered the ground of appeal and the submissions of counsel. The cited authority of ***Bukenya case***, as far as is relevant to this case, made the following statement:-

> **"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 the 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. If they had disappeared, the prosecution could easily have called evidence to show that reasonably exhaustive enquiries had been made to trace them, but without success."**

In the **Bukenya case** the trial court relied on the evidence of a single witness but the Court of appeal did not fault such reliance.

39. In this case, there was a total of ten witnesses called by the prosecution. It is not apparent that they were barely adequate as stated in the ***Bukenya case***. The bar-owner who was not present at the scene would, as asserted by the prosecution have been superfluous while the phone owner would have testified on the motive for the assault. However, the motive by which a person is induced to do or omit to do an act, or to form an intention, is immaterial so far as regards criminal responsibility. That is ***Section 9*** of the **Penal Code**. On the evidence which was believed, the phone owner was not at the scene when the offence was committed. It is also not apparent that the prosecution was able to call the customers who were at the scene or that there was a deliberate effort not to call any witness. We do not find substance in that complaint.

40. As for the alleged inconsistency between the injuries noted on the deceased, we think the trial court was entitled to draw the inference, particularly upon the finding that Martin (PW1) and Alex (PW4) were truthful witnesses who knew both appellants and the deceased, and from all the circumstances, that the blow on the deceased's jaw at the scene was consistent with the swollen face noticed by the pathologist as the only visible external injury, and that the bleeding through the mouth and ears was consistent with the finding by the pathologist that there was an internal, and therefore invisible, serious head injury. On our own assessment, there is no serious inconsistency on the evidence about the injuries suffered by the deceased. That ground of appeal also fails.

41. We now turn to the final ground of appeal raised by Otieno alone as **ground 5** stating:-

"5. That the learned trial judge erred in law and fact by referring to character evidence of the appellant at the trial without any proof in that: -

i. *That the appellant was a violent ex soldier who beat customers yet no prove (sic) was given.*

ii. *That the appellant caused violence each time he visited the pub yet he was never reported.*

iii. *No evidence was presented to show that the appellant was at anytime arrested or convicted of violence offences."*

42. The basis for that complaint, it would appear, was the evidence recorded from the arresting officer Pc Bulinga (PW8). The witness had said in his evidence- in-chief that he knew the appellant before "*as a proud person who had previously beaten a police officer in full uniform in Soweto"*. That is how he recognized him at the bar before arrest. In cross-examination, further damning statements were extracted from the witness by the appellant's advocate when the witness

illustrated the beating of the officer stating that Otieno was "*a very bad person, rude and a bully*." He said the case of beating the officer was in police records but was settled. Explaining the rudeness, the witness said Otieno would say "hakuna mahali mtanipeleka". He was a former Kenya Army Officer, hence the use of the witness's former boxing skills during arrest since there was violent resistance. That was the evidence summarized by the trial court. In Mr. Nyangayo's submission, the evidence was prejudicial to the appellant, but he did not demonstrate where in the judgment the trial court used it to found a conviction for the offence charged or in considering the sentence.

43. ***Section 57*** of the **Evidence Act**, **Cap 80**, prohibits evidence of bad character in criminal cases in these terms:-

> **(1) In criminal proceedings the fact that the accused person has committed or been convicted of or charged with any offence other than that with which he is then charged, or is of bad character, is inadmissible unless**
>
> **(aa) such evidence is otherwise admissible as evidence of a fact in issue or is directly relevant to a fact in issue; or**
>
> **(a) the proof that he has committed or been convicted of such other offence is admissible under section 14 or section 15 of this Act to show that he is guilty of the offence with which he is then charged; or**
>
> **(b) he has personally or by his advocate asked questions of a witness for the prosecution with a view to establishing his own character, or has given evidence of his own good character; or**
>
> **(c) the nature or conduct of the defence is such as to involve imputations on the character of the complainant or of a witness for the prosecution; or**
>
> **(d) he has given evidence against any other person charged with the same offence:**
>
> > **Provided that the court may, in its discretion, direct that specific evidence on the ground of the exception referred to in paragraph (c) of this subsection shall not be led if, in the opinion of the court, the prejudicial effect of such evidence upon the person accused will so outweigh the damage done by imputations on the character of the complainant or of any witness for the prosecution as to prevent a fair trial.**

(Emphasis provided)

44. It is implicit in the section that it addresses fair trial, which is a human right jealously protected by our Constitution. The adduction of evidence of bad character must therefore conform to the exceptions provided for under the law. Evidence of bad character which has no relevance to the issues at hand must be excluded. The evidence complained of in this matter was given by the arresting officer only. Much of it was extracted by the appellant himself during cross examination. The relevant issue under consideration was the manner of the appellant's arrest; whether the arresting officer knew him and why he had to use force. We think in the circumstances, that the exceptions stated in ***sub-sections (aa)***, ***(b),*** and ***(c*)** above would apply. More importantly, other than the trial court indicating in the judgment what the witness stated, there is no demonstration by the appellant that the court was influenced or otherwise motivated by thatevidence to convict for the offence charged or to enhance the sentence.

45. On the totality of the evidence on record, it is our finding that the two appellants were convicted

on sound evidence and their defences were properly rejected. Accordingly, the two appeals have no merit and we order that they be and are hereby dismissed.

Dated and delivered at Nairobi this 17th day of October, 2014.

P.N. WAKI

.....

JUDGE OF APPEAL

W. KARANJA

.....

JUDGE OF APPEAL

J. MOHAMMED

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR