



**Sagaray & 3 others v Republic (Criminal Appeal E079 of 2023)
[2025] KECA 441 (KLR) (7 March 2025) (Judgment)**

Neutral citation: [2025] KECA 441 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CRIMINAL APPEAL E079 OF 2023
A ALI-ARONI, LA ACHODE & JM MATIVO, JJA
MARCH 7, 2025**

BETWEEN

**DWIGHT SAGARAY 1ST APPELLANT
AHMED MUJIVANE OMIDO 2ND APPELLANT
ALEX SIFUNA WANYONYI 3RD APPELLANT
MOSES KIPROTICH KALYA 4TH APPELLANT**

AND

REPUBLIC RESPONDENT

*(Being an appeal from the Judgement of the High Court of Kenya at Nairobi
(R.L. Korir, J.) delivered on 25th January 2023 in HCCR. No. 61 of 2012)*

JUDGMENT

1. The murder of ambassador Olga Fonseca (deceased), was most horrific and a big embarrassment to the nation of Kenya. It was on the 27th of July 2012, when Kenyans woke up to the news of an ambassador having been gruesomely murdered the night before, in an otherwise well-guarded home within the leafy suburb of Runda, Estate in Nairobi. 10 years later, the appellants are before this Court pursuing their appeals, pleading their innocence.
2. The appellants, Dwight Sagaray, Ahmed Mujivane Omido, Alex Sifuna Wanyonyi and Moses Kiprotich Kalya and one other (since acquitted) were charged before the High Court, Nairobi, with the offence of murder, contrary to Section 203 as read with Section 204 of the *Penal Code*. The particulars of the offence were that, on 26th and 27th July, 2012, at the residence of the Venezuelan ambassador in Runda Estate, within Nairobi County, they jointly murdered Olga Fonseca. The deceased was discovered dead when the security company manning the ambassador's residence went to change the day guard as she had requested the previous day.



3. The deceased arrived in Kenya hardly two weeks before her untimely death as the new ambassador for Venezuela. As will be seen from the evidence advanced by the prosecution, before the incident, there was a power struggle between the deceased and the 1st appellant, who was the 1st secretary at the embassy and who had been overseeing the embassy after the previous ambassador Geraldo, the deceased's predecessor, was recalled.

In a bid to establish its case, the prosecution called 41 witnesses.

4. PW1, 2, 9, 10, 11, 15, 16 & 17, who were employees of the Venezuelan Embassy at the time, in the office and the residence of the ambassador, painted a picture that showed the 1st appellant was unhappy with the posting of the deceased as the head of mission. The witnesses portrayed the reception given to the deceased on her arrival into the country by the 1st appellant, to have been hostile both at the residence where she was not introduced to the domestic staff as the new ambassador, to the office where she was not formally introduced, or had an official handover of the embassy business or bank accounts. From the evidence of Francis Muigai Mwangi (PW1), who was the official ambassador's driver, upon the deceased's arrival at the Jomo Kenyatta International Airport, he was instructed by the 1st appellant to take her to a hotel and not the ambassador's residence, which the deceased objected to. The 1st appellant, however, persuaded her and she stayed at the hotel for a couple of days.
5. The other staff equally spoke to the hostility between the two. In the office, there was a clear struggle between the two of them over who was in charge, including who was to control the finances of the embassy. Both wrote to the bank claiming to be the rightful signatory to the embassy accounts. PW35 Danson Wamburu Gitahi, of the Commercial Bank of Africa confirmed the tussle over the embassy's account. This bad blood was witnessed by people outside the Embassy. PW14, who was a representative of the landlord, testified that the deceased had complained to her about the 1st appellant and the hostility she faced from the domestic staff who did not recognize her as their boss and instead took instructions from the 1st appellant. PW22, the chairman of the company leasing out the ambassador's residence, also testified that upon paying a visit to meet the new ambassador at the residence, the deceased complained of living under challenging circumstances, not having been given all the keys to the house, looking fearful and saying that she feared for her life. PW7, Jane Njeri Muchai, an advocate the embassy had previously engaged was telephoned by the deceased, who indicated to the witness that she had problems with the staff. The witness visited the embassy the following day, where they discussed the issue of domestic workers, and she advised the deceased on what action to take. She went further to testify that the deceased complained that the 1st appellant had left with some of the employees she had an issue with, that he did not cooperate with her, and that he had refused to hand over the accounts and business of the embassy. Further, before her arrival, the 1st appellant had moved to the ambassador's residence, which he ought not to have done, and she was suspicious of him. The deceased, Jennifer and Hose, both staff of the embassy, who were with the deceased, also mentioned Mohammed Ahmed Hassan Mohamed (Mohammed), a friend of the 1st appellant, who the 1st appellant had invited to stay with him at the residence.
6. In the mix of this hostility was the said Mohammed, said to be a Somali by tribe, and a close associate of the 1st appellant. Mohammed openly showed hostility towards the deceased to the staff at the residence, insinuating that she had come to take the job of the 1st appellant. He instigated the domestic staff against the deceased and told them that he would see that the Kenyan authorities do not accept her. Mohammed appeared very close to the 1st appellant and the affairs of the Venezuelan embassy.
7. The fear the deceased had is also seen in the instructions she gave Securex, the security company manning the residence on July 26, 2012. PW4 John Chege Kangethe, a guard with Securex, saw the



letter written to the company giving the names of the persons allowed to the residence. Apart from the deceased herself, the names were those of Francis PW1, Peter PW16, Angelina PW9, Zipporah PW10, Melissa, the 3rd secretary, her husband Miguel, and Jennifer, the 2nd secretary. Dwight's and Mohammed's names were left out.

8. The prosecution also led evidence to show that Mohammed, in cahoots with, for and on behalf of the 1st appellant, engaged the 2nd appellant, who in turn recruited his friends, the 3rd and 4th appellants, and who jointly planned and executed the elimination of the deceased in her residence on the 26th of July 2012.
9. The prosecution case was mainly based on circumstantial evidence. Apart from the testimony of PW1 & PW16, implicating Mohammed, the suspect at large, there was no direct evidence of who may have killed the deceased. Of importance to the prosecution's case were the statement under inquiry said to have been made by the 3rd appellant written by PW24, C.I. Kennedy Limera, and the retracted confession allegedly made by the 4th appellant and documented by PW18, C.I. Anne Gitahi.
10. PW32 Joyce Wairimu Njoya is an Assistant Government Chemist at the toxicology laboratory. She testified that she was requested to examine samples sent to the chemist for toxic substances extracted from postmortem examination. PW33 Ann Wangechi Nderitu, also an analyst with the Government Chemist Department, carried out further DNA analysis on clothing of the deceased and other items collected from the residence by PW36 Peter Mungai, a superintendent of police. The reports produced after both analysis did not yield much in terms of assisting with the investigations.
11. Dr. Oduor Johansen, PW28, the head of forensics at the Ministry of Health, produced the postmortem results of the deceased. He testified that in the exercise he had been joined by Dr. Kizzy Shako of the pathology department and Dr. Gachie, who came in as a private pathologist. The three of them unanimously came up with one verdict after the postmortem examination as follows:

Externally

The deceased had a serious amount of blood on the back There was a telephone wire cord on the neck and ankles. It was 5 meters long

She had multiple bruises on the left cheek measuring 4 cms. On the left neck she had a group of bruises measuring 6x3 cms. She had a post-mortem ligature mark, meaning she was tied after death.

The tongue was protruding, and the lower lip was drying. There was bleeding of the lower part of both eyes.

She had bluish discoloration of the nails (fingers), cyanosis

Internal findings

Neck-multiple hematoma bleeding below the skin on the neck Haemotoma on the thyroid gland (front of the neck) Haemotoma in the (Adams apple) front of the neck.

Opinion: Cause of death was asphyxia (lack of oxygen due to strangulation).

12. At the close of the prosecution case, the court found the appellants had a case to answer and placed them on their defence.

Dwight Asprubal Sagaray Covault, the 1st appellant testified that he is a Venezuelan citizen. He first came to Kenya in 2010 as a diplomat and at the time of the incident, he was the 1st secretary at the Venezuelan Embassy. He informed the court that he took over from Gerardo, and the deceased took over from him. Though his diplomatic passport was cancelled, his diplomatic status was not, and he



is still entitled to diplomatic privileges and obligations and, therefore, could not give information that would amount to treason in his country.

Further, the cancellation of his diplomatic passport was not done procedurally as the protocol directorate did not do so.

13. Further, it was his case that none of the prosecution witnesses testified to have seen him at the ambassador's residence on the material day or the evening get-together at the ambassador's residence. That neither Francis Mwangi PW1 nor Peter Gisienya PW15 saw him. There was no forensic evidence linking him to the crime, nor did the confession of the 4th appellant adduced in evidence mention him. He contended further, that he was arraigned in court because of his association with Mohammed. He denied having opposed the deceased as the new ambassador. According to him, the evidence of PW1, PW9, PW10 and PW13 indicated that he had introduced the deceased and had asked them to assist her. He, however, admitted writing to the bank but stated that there were procedures to be followed, which he wanted to abide by. He stated that he had to obtain a diplomatic identity card and pin for the deceased, which was yet to be done before the deceased could become a signatory to the accounts. He eventually helped her become a signatory.
14. Further, he testified that he was the one who picked up the deceased from the airport and took her to the Tribe Hotel first, as the residence was being prepared. That 2nd secretary, Jennifer, had refused to receive the deceased, as did the protocol officer. He had asked Mohammed to take him to the airport and he agreed. He confirmed that there were complaints of sexual harassment which had not been resolved, and the staff were unhappy, hence he was concerned with the deceased's security. He also testified that there was an issue with the tenancy as the landlord wanted to terminate the tenancy arising from the sexual harassment claims. He had asked Mohammed to intervene, and the landlord had asked to meet the person who was coming to live there first, and that is one of the reasons he did not want to take the deceased to the residence first, including the fact that the deceased was a female, had come to Kenya alone, and had never been to Kenya before. He took all these factors into account. It was not their first time to accommodate their diplomats at the Tribe Hotel.
15. He testified that he was not in the ambassador's residence on the fateful night and had no reason to kill the deceased. He had not met any other appellants before and thus could not have had any criminal enterprise with them. He denied giving Mohammed the official motor vehicle and testified that the latter only rode the car with the 1st appellant. He also testified that on the 26th of July, 2012, between 4:00 pm and 5:00 pm, he had gone to see a doctor at the Sarit Centre and left for Parklands Campus around 7:00 pm where he finished and left about 8:00 pm and went to his house in Runda, where he slept until 27th July when he received news of the deceased death.
16. He admitted that he knew Mohammed, who would occasionally stay in his house. He informed the court further that he met Mohammed at a diplomatic get-together, Mohammed introduced himself to him as an employee of the Ministry of Foreign Affairs, a diplomat of Kenya to Pakistan and was in transition to another position. In cross-examination, he confirmed that Mohammed's clothes, documents, and photographs were found in his house. He stated that even before he became the 1st secretary, Mohammed would hang around at the embassy. He denied having discussed with Mohammed any scheme to kill the deceased, was not aware of any such plan and had nothing to do with the murder.
17. He denied PW1's statement that he was the one who introduced Mohammed to them. He admitted staying at the ambassador's residence but qualified that he only did so sometimes. He denied having lived there with Mohammed. He also denied that he allowed Mohammed to meddle with the affairs of the embassy.



18. It was also his evidence that he did not see Mohammed at his residence on the 26th of July, 2012. He denied that Mohammed used his car on the night of the murder. That he did not see or interact with Mohammed the morning of 27th July 2012, although he may have been in his room. Further, that the grey RAV4 silver in color being referred to was Jenifer's car. Mohammed was also a friend to ambassador Gerardo and Miguel, Jenifer's husband, and Melissa was the only person who was not close to Mohammed. He confirmed that Mohammed had wanted someone employed at the embassy.
19. Ahmed Mujivane Omido – 2nd appellant testified that he is a businessman and operates a family real estate business. He informed the court that he had never met nor communicated with the Venezuelan ambassador and had only met the 1st appellant in court. He knew Mohammed as he would see him at the mosque in Nairobi West, where they prayed together. Mohammed used to be driven in a car with diplomatic number plates. He met the 3rd appellant through a mutual friend; Majid, a Ugandan motor vehicle spare parts dealer, who requested him to assist the 3rd appellant get a job. He met the 4th appellant, when he came to him with 3rd appellant. He met Kipng'eno Kirui Chelogoi, (since acquitted) in court. He had not been to the ambassador's residence before. He only went to the residence when the court visited the place.
20. Although no witness singled him out he was arrested on the 31st of October 2012. After he received a call from DCIO Langata and told that he was wanted for questioning concerning the murder of the Venezuelan ambassador. He was asked to present himself and he obliged. He was interrogated him before being transferring to the Nairobi area police.
21. He further testified that on a date he could not recall, he met the DCIO Gigiri and explained to him where he was on 26th and 27th July 2012. The DCIO sought to search his house, though he did not have a search warrant. The police also interrogated his ailing father, and viewed the CCTV camera on the property. He could not remember whether they carried it. His Nokia Ideos phone was confiscated along with two SIM cards, Nos. 0722XXX869 and 072XXX450. However, the numbers did not show a transfer or receipt of money or calls made by him or the other appellants. He had fully cooperated with the investigating officers. He did not know why he was charged and was unaware of any cash paid to anyone for whatever reason. He had no reason to participate in the murder of the deceased. He denied having discussed the murder scheme or being hired by Mohammed. He was not in contact with Mohammed.
22. In cross-examination, he stated that he had attended a wedding with Mohammed held at the mosque. He was not aware that 4th appellant had written a confession. He denied that he was referred to in the 3rd appellant's statement. He also denied being in a meeting to discuss elimination of the deceased. He admitted being in a meeting where he introduced Alex to Mohammed for purposes of a job. He did not know Moses; he only met him when he accompanied Alex when Alex took his CV to him. He denied having been a police officer before. He denied that he was a person for hire and reiterated that he was a businessman. He denied that he was paid Kshs. 468,000 to eliminate the deceased. He had known Alex for about 6 months.

He knew Mohammed was a Somali and believed he was a diplomat as he would be driven in a diplomatic vehicle.
23. Alex Sifuna Wanyonyi the 3rd appellant testified that he was in a hardware business and lived in Njiru along Kangundo road. He was arrested on 31st October 2012 alongside Moses Kiprotich Kalya, (the 4th appellant) at Yala Towers, in the CBD, in a shop, and was informed that he was a suspect in this murder case. They were beaten and driven to the Nairobi area police, where they were told to record



statements so that the matter could come to an end. He did not know that his statement would be used in court and therefore sought not to rely on the same.

24. He knew the 2nd appellant through a mutual friend, Majid, a spare parts dealer who ran a business selling laptops and other accessories. He had requested the assistance of the 2nd appellant in securing a job. He confirmed that he had shared with his friend, the 4th appellant, that the 2nd appellant had informed him that a job opportunity had arisen at the Venezuelan embassy and the 4th appellant accompanied him as he went to deliver his CV to PW2 for a clerical job he had applied for.
25. He further testified that the 2nd appellant introduced him to a man who had a car with diplomatic number plates and told him that the person worked at the Venezuelan embassy and could assist him get a job. The man introduced himself as "Ahmed", at which point they exchanged numbers, and the man (Mohammed) told him to keep in touch. The man only called him once, informing him that he wanted to take him to the embassy. He thereafter called the man several times, but he did not answer. He had never been to the Venezuelan embassy, and did not know the ambassador. He had not spoken to Mohammed after their only call, and the phone records produced in court showed no communication between them.
26. In cross-examination, he stated that he met the 1st appellant for the first time in court. He thought Mohammed was a diplomat because of the diplomatic number plate on the silver RAV4. According to him, Mohamed was Arab-looking.
27. Moses Kiprotich Kalya, the 4th Appellant testified that he was an active politician and a farmer. He is a retired police officer having served for about 14 years in the General Service Unit, Recce Squad. He was set to join the US Marines in January 2013. He was arrested on 31st October 2012 at Yala Towers on Biashara Street alongside the 3rd appellant, where he had gone to purchase clothes for his son. After his arrest, he was taken to the Nairobi Area Police, where Chief Inspector Mang'era kicked him. He was then moved to Gigiri while his friend the 3rd appellant was taken to Kasarani. On 1st November 2012, a friend took an advocate named Evans Ondieki to him. The advocate advised him not to write any statement in his absence. He was taken to court on Friday 2nd of November 2012.
28. He denied recording a statement on 1st November 2012 while in Gigiri and stated that he only saw it when it was presented in court. It was also his testimony that the only officer he met at Gigiri on 1st November 2012 was Sergeant Njeru who later escorted him to CID Headquarters alongside C.I. Juma to be seen by a doctor and later, escorted by Sergeant Njeru and PC Kirui to C.I. Anne Gitahi at Parklands Police Station. He did not know whether C.I. Anne Gitahi wrote a statement, nor was he cautioned. He pointed out that the phone numbers and ID numbers on the statement were not his. He also denied signing any confession and was unaware of its origin, that his wife was not present during the session, and that no handwriting expert confirmed that the signature was his. He said he met the 3rd appellant near Jamia mosque when the 3rd appellant handed him his CV. He denied giving details of any meeting in Muthaiga. He also denied knowledge of a deal to eliminate the deceased. He denied having met Mohammed or the deceased.
29. Having heard the evidence of the prosecution and the defence, the trial judge isolated the following issues for determination: -
 - i. Whether the 1st appellant enjoyed diplomatic immunity against the present proceedings.
 - ii. Whether the death of the deceased and the cause thereof was proved.
 - iii. Whether the prosecution proved motive on the part of the 1st appellant.



- iv. Whether the court properly admitted the confession statement of the 4th appellant.
 - v. Whether the confession statement linked the appellants to the offence.
 - vi. Whether the five appellants were positively identified as the persons who caused the unlawful death of the deceased and acted with common intention; and
 - vii. Whether the five appellants acted with malice aforethought.
30. After hearing on the question of the 1st appellant's immunity, the trial court was of the view that there was clear communication between Kenya and Venezuela and that the 1st appellant had been stripped of his diplomatic status as 1st secretary to the Venezuelan Embassy. Under Article 43(a) of the Vienna Convention, having been stripped of his diplomatic status, the 1st appellant could no longer enjoy diplomatic powers and privileges, including immunity. She found therefore that there was no bar to his prosecution, and he was properly arraigned before the court to face trial alongside his co-accused.
31. Ultimately the trial court found that the prosecution had proved the charge of murder against the 1st, 2nd, 3rd and 4th appellants, convicted them of the offence and sentenced them each to 20 years' imprisonment. The court having formed the view that the prosecution had failed to prove the charge of murder against the 5th accused, acquitted him under section 215 of the [Criminal Procedure Code](#).
32. Aggrieved by the conviction and sentence, the appellants filed separate memoranda of appeals. We have considered the memoranda before the court, we noted that they raise several common grounds. We have therefore collapsed the common grounds and summarized the grounds of appeal by the appellants as follows, that the trial court erred in law and fact by; -
- i. Convicting the appellants yet the prosecution failed to prove the charge against the appellants beyond reasonable doubt.
 - ii. Failing to warn itself and relying on a retracted confession statement of the 4th appellant, which was not corroborated by independent evidence and was riddled with inconsistencies.
 - iii. Failing to apply the principle of last seen as there is a possibility that other persons were involved in the crime.
 - iv. Disregarding the evidence placed before the court, including the alibi evidence raised by the appellants.
 - v. Failing to rely on crucial documents before the court.
 - vi. Failing to call crucial witnesses.
 - vii. Failing to consider that the communication charts produced in evidence did show communication amongst the appellants at the material time.
 - viii. Failing to consider the pathologists finding that the deceased did not have any defensive marks and her undergarments had semen and for the court to determine if there was rape; and failure by the investigators to subject the appellants to DNA tests.
 - ix. Placing reliance on a document (note) unprocedurally obtained which purportedly waived the status of the 1st appellant as a diplomat, wrongly applying the Vienna Convention and finding that the 1st appellant was properly before the court.
 - x. Limiting the possible motive and malice aforethought in the court's exposition thus arriving at a wrong conclusion.



- xii. Finding that there was common intention amongst the appellants without sufficient evidence.
 - xiii. Wrongly relying on circumstantial evidence that did not meet the required threshold.
 - xiii. Shifting the burden of proof.
33. The proceedings were heard on the court's virtual platform in the presence of the appellants and their respectful counsel, who highlighted the submissions on record. Mr. Maingi appeared the first appellant, Dr. Khaminwa, Mr. Olewe, and Miss Nambale appeared for the 2nd appellant, Mr. Swaka appeared for the 3rd appellant, and Prof. Nandwa appeared for the 4th appellant, whereas Miss Proscovia Vitsengwa appeared for the state.
34. Learned counsel for the 1st appellant filed submissions dated 16th October 2023. He submitted that the court failed to consider evidence and documents produced by the 1st appellant, such as the two logbooks for motor vehicles 93CD5K white in colour and belonging to the 1st appellant and 93CD7K silver in colour belonging to Jennifer. He contended that this evidence was significant as the grey vehicle was in use on the night of the murder; the testimony of PW1, that the 1st appellant told them that the new ambassador would sack them due to the sexual scandal, and on being cross-examined, he changed to say that it was Mohammed who told them; the testimony of PW1 that Mohammed told him that he could kill the 1st appellant, which the witness did not reveal to the 1st appellant; Mohammed's statement that he would use his influence to stop the deceased from coming; PW2's evidence that when he called PW1 on phone, Mohammed answered the call and told him that the deceased had left the country and that the 1st appellant was not aware, but Mohammed wanted it to be a surprise; the evidence that there was access to the embassy, a culture of outsiders being involved in the embassy's affairs; the evidence of PW34, that the letters produced in evidence purporting to waive the 1st appellant's immunity did not show that diplomatic privileges and immunity had been lifted and that the protocol office had written no letter on the lifting of diplomatic immunities, the letter dated 3rd August 2023 was authored by someone attached to the Protocol Directorate; and the prosecution failed to challenge the 1st appellant's defence of alibi.
35. Learned counsel further submitted that the trial court made a wrong inference of the facts and the law by concluding that the 1st appellant was part of a joint enterprise with the 2nd, 3rd, and 4th appellants. However, there was no evidence showing that the 1st appellant met his co-appellants to plan and discuss the murder or that he murdered the deceased. None of the prosecution witnesses led evidence suggesting that the 1st appellant had discussed the elimination of the deceased with Mohammed or any incidence involving the issuance of threats by the 1st appellant to the deceased. That there was a possibility that the 1st appellant was not aware of the scheme if any. Learned counsel further contended that foreseeability and knowledge of any impending offence are critical facets of common intention or joint enterprise doctrine. In support of this contention, learned counsel relied on the cases of *Chan Wing-Siu & Others vs. The Queen* [1984] 3 ALL ER & *Dickson Mwangi Munene & Another vs. Republic* [2014] eKLR, where the courts held that there is need to for one to know of the common intention and that the act in question was in furtherance of that intention.
36. Learned counsel further submitted that mere association with an alleged offender should not infer guilt upon the other party. He was emphatic that the 1st appellant was convicted due to his association with Mohammed.
37. Learned counsel contended regarding the question of immunity, that the 1st appellant maintains his diplomatic immunity and if the same was purportedly lifted or waived, then the same was not done procedurally. Learned counsel submitted that the Vienna Convention on Diplomatic Relations 1961,



was domesticated in Kenya through the *Privileges and Immunities Act* pursuant to Article 2(5) of *the Constitution* of Kenya [2010]. He further submitted that the 1st appellant does not posit that his immunity is absolute; instead, the waiving of the immunity and his arrest were not procedurally executed, which goes to the root of the court's jurisdiction for trying him for the said murder. Article 31 of the Vienna Convention states that a diplomatic agent shall be immune from the criminal jurisdiction of the receiving state and shall not be obliged to give evidence. Further, termination of immunity under Article 32 entails a waiver by the sending state, and such a waiver must be expressly made.

38. Learned counsel invited this Court to review the two letters dated 27th July 2012. He submitted that the letter purporting to be from the sending state was ambiguous and not an express waiver of the diplomatic immunity of the appellant as contemplated under Article 32(2) of the Convention, and therefore, the court has no jurisdiction over him. In support of this proposition, learned counsel relied on the case of *R vs. Madan* [1961] IALL ER, where the court held that proceedings against a person enjoying diplomatic immunity were without jurisdiction unless there was a waiver.

Further, learned counsel contended that the 1st appellant could not be arrested or charged, even assuming in the unlikely event that his immunity was waived under the said provision, it would remain valid until he left the country.

39. On circumstantial evidence learned counsel submitted that the trial court overlooked several possibilities regarding the murder, for instance, the exculpatory evidence which was overwhelming in favour of the 1st appellant. Even if the trial court strongly suspected the 1st appellant's involvement, that was not enough to convict him. He urged that any fact or evidence that breaks the chain of causation weakens the inference of guilt sought to be drawn from those circumstances. Further, he submitted that the prosecution never discharged the threshold required for reliance on circumstantial evidence. In enhancing this proposition, learned counsel relied on the case of *Republic vs. Ahmad Abolfathi Mohammed & Another* [2019] eKLR, in which the Supreme Court held that caution was necessary when relying on circumstantial evidence. He also relied on the cases of *Godana vs. Republic (Criminal Appeal 1 of 2020)* KECA 16 (KLR) & *Chiragu & Another vs. Republic* [Criminal Appeal 104 of 2018] [2021] KECA 342, where the courts were of the view that there is need of certainty in circumstantial evidence to the exclusion of any reasonable doubt or the existence of any other existing circumstances or gaps that would destroy or weaken the inference to be drawn.
40. Lastly, on the ground of misapprehension of motive and suspicion, learned counsel submitted that the workings in the embassy evinced a confluence of competing personal interests where everybody involved was a possible suspect. This fact should have found an acquittal based on the burden of proof on reasonable doubts. He contended that the 1st appellant was convicted owing to suspicion. The fact that he differed with the deceased did not mean he was the possible suspect. It was unsafe to convict him based on mere suspicion. In expounding on this point learned counsel referred to the cases of *Joan Chebichi Sawe vs. Republic* [2003] eKLR & *Moingo & Another vs. Republic* [Criminal Appeal 90 of [2018] [2022] KECA 6 [KLR], where the court stated that suspicion cannot be the basis of a conviction and the need for cases to be proved beyond a reasonable doubt.
41. In the supplementary submissions dated 7th December 2023, learned counsel submitted further that the importance of the 1st appellant's testimony and the evidential weight of the documents he presented to the court had an immense bearing on the principles of circumstantial evidence, the 'culpable mind' and 'culpable action' considering the conviction turned on the same, and that had the trial court considered and analyzed the said documents and oral testimony of the 1st appellant, the court would have deciphered the apparent doubt, in the prosecution case. Learned counsel referred to the case of



Philip Muiruri Ndaruga vs. Republic [2016] eKLR, where the court stated that there need not be several circumstances creating doubt, even one would suffice.

42. Learned counsel also submitted that the evidence of the prosecution witnesses was full of contradictions and inconsistencies. If the trial court had been alive to this fact, the 1st appellant would not have been convicted. In support, the learned counsel relied on the case of MTG vs. Republic [2022] KEHC 189 (KLR).
43. On the part of the 2nd appellant, learned counsel filed submissions dated 4th September 2023 and a list of authorities. Learned counsel contended that the trial court relied on the 4th appellant's retracted confession to convict the 2nd appellant. However, contrary to what was expected, the confession maker failed to plead guilty to the charge facing him. Secondly, the trial court did not warn itself of the dangers of relying on the repudiated confession. Neither did the court consider the circumstances under which the confession was made. In support of this contention learned counsel cited several cases including Sango Mohamed Sango & Another v Republic [2015] eKLR, & Tuwamoi vs Uganda [1967] E.A. Further, counsel stated that for a confession to be credible, independent evidence must exist to corroborate the content of the confession. In support learned counsel cited the case of Yassin vs. King Emperor [1901] ALR 28 Cal 689, where the court stated that a confession by a prisoner which involves another, if unsupported by other evidence, is of the weakest possible kind. Further, for a confession to be credible, it must be supported by independent evidence that corroborates the content of the confession.
44. He further contended that the court did not consider the 2nd appellant's alibi defence offered in his oral testimony, though it considered the 3rd and 4th appellants' alibi. That the court needed to consider whether the prosecution had discredited the alibi. In this regard, learned counsel referred to the case of Ssentale vs. Uganda (1968) 1 E.A.
45. Further, learned counsel submitted that the trial court relied wholly on circumstantial evidence in linking the 2nd appellant to the offence even though the said evidence did not point at him. There was an attempt to link the 2nd appellant with Mohammed, which link must fail. Further, though there was an admission that the 2nd appellant met Mohammed on two occasions and at a wedding at the South C mosque, it was argued that to plan and execute the murder of an ambassador requires great planning and grit. The confession does not provide any details of how the murder was planned and executed by the appellants. Though the figure of Kshs 468,000 was mentioned, no further details are given over the sum. Learned counsel relied on the case of Kalunde Semakula vs. Uganda Criminal Appeal No. 11 of 1994, where the court spoke to the need to examine circumstantial evidence narrowly because such evidence may be fabricated to cause suspicion on another. Counsel also relied on several other cases, including the cases of Chebichii Sawe vs Republic (2003) KLR & Michael Mbugua vs. Republic (2015) eKLR.
46. Learned counsel also submitted that the last persons to be seen with the deceased were Jennifer and her husband Miguel, yet no evidence was advanced of them leaving the compound. A duty was placed on the two in such circumstances and failure of which an inference may be drawn. Learned counsel in support of this contention referred to the case of Moses Jua vs. The State [2007] LPELR-CA/II/42/2006 & Stephen Haruna vs The Attorney General of the Federation [2010] 1 iLAW/CA/A/86/C/2009, where the courts were of the view that the person last seen with a deceased is required to make explanation of how the deceased met her death. Learned counsel further argued that the prosecution had a chance to call the two-night guards, who were on duty on the night of the murder, as witnesses but chose not to, as they would have shed light as to the time the two guests left.



47. Lastly, counsel contended that the prosecution failed to prove its case beyond reasonable doubt, referencing several cases including the all-time classical case of *Woolmington vs. DPP* [1935] A.C. 462 at 481, where Viscount Sankey L.C. stated that the prosecution must prove the prisoner's guilt beyond all reasonable doubt.
48. In submissions dated 11th October 2023, learned counsel for the 3rd appellant submitted that the prosecution has a duty to prove its case beyond reasonable doubt, the ingredients of the offence, and it is important for the court to be satisfied that the evidence before it rules out the innocence of the 3rd appellant. He argued that the prosecution failed to raise cogent evidence implicating the 3rd appellant. In support, learned counsel referred to the case of *Republic vs. Andrew Omwenga* [2009] KLR, where the court reiterated the need to prove the ingredients of the offence of murder, namely, that the accused caused the murder of the deceased by an unlawful act or omission and with malice aforethought. On the act of killing; actus reus, learned counsel urged that from the evidence adduced by the prosecution witnesses, none positively identified the 3rd appellant as having planned, collaborated, entered the Venezuelan residence, or killed the deceased.
49. On the intention to kill, mens rea, learned counsel submitted that none of the prosecution witnesses gave any concrete evidence on whether the deceased and the 3rd appellant had ever met, or whether there was any evidence adduced that the deceased provoked the 3rd appellant in a way that would have resulted in her death. Further, the 3rd appellant did not have any motive nor malice aforethought to kill the deceased as he had no reason to; that the only evidence adduced by the prosecution claiming that it linked the 3rd appellant to the commission of the crime was the confession by the 4th appellant, and who during his defence expressly denied having made or signed the confession written by PW18, despite it being adduced as evidence.
50. Further learned counsel contended that the only evidence implicating the 3rd appellant was the retracted confession of and the alibi statement of the 4th appellant. He relied on Section 25 of the [Evidence Act](#) and Evidence (out of Court Confession) Rules, 2009, to argue that since the 4th appellant retracted the confession, it was not safe for the court to have relied on it. Further, the trial court failed to caution itself of the danger of relying on such evidence. In castigating reliance on the repudiated confession, learned counsel referred to the cases of *Tuwamoi vs. Uganda* (supra), *Anyunga & Others vs. Republic* [1968] E.A & *Peter Kinyua Ireri vs. Republic* [2016] eKLR.
51. It was further submitted that the investigating officer PW36 arrested the 3rd appellant on mere suspicion based on call logs obtained during the investigation of the main suspect, Mohammed, which revealed that he had contacted Mohamed 11 times on 27th July 2012, in addition to the confession and the alibi. Learned counsel stated that the trial court, in a bid to fill in gaps in the prosecution case, relied on extraneous matters, placing the 3rd appellant at the scene of the crime or as part of the individuals who planned the murder. Further, the trial court relied on the alibi statement to give credence to the confession, yet they were dissimilar.
52. Learned counsel further submitted that the trial court purely relied on circumstantial evidence in convicting the 3rd appellant, yet none of the 36 prosecution witnesses directly placed the 3rd appellant at the scene of the crime either during the day or at night on 26th July 2012 and/or the morning of 27th July 2012; that the prosecution's case indicates the presence of multiple individuals at the residence on the night the deceased was murdered, which in itself indicates the probability of the murder having been committed by other parties other than the appellants. In support of the proposition that there were limited circumstances to demonstrate that the 3rd appellant had any motive to kill a person he did



not know and had never met, learned counsel cited the cases of R vs. Kering Arap Koske & Another [1949] 16 EACA & Ahamad Abolfadhi Mohamed & Another vs. Republic [2018] eKLR.

53. Learned counsel also took issue with why Jennifer and her husband, who were last seen with the deceased and the two-night guards, were not called to explain how the deceased met her death. He submitted that the 'doctrine of last seen' placed a statutory burden on them.
54. Learned counsel Prof. Nandwa for the 4th appellant filed submissions and a list of authorities dated 30th October 2023. He submitted that the prosecution failed to prove its case against the 4th appellant beyond reasonable doubt. He contended that the investigation team failed to apprehend the culprit, one Mohammed and failed to conduct proper investigations to establish the persons who caused the death of the deceased and relied on circumstantial evidence that was inconsistent and which did not link the 4th appellant to the death of the deceased. Further, that the prosecution entirely relied on the statement purportedly made by the 4th appellant and which did not amount to a confession and which failed to explain the role of the appellant in causing the death of the deceased. Further, the prosecution failed to produce evidence of the persons at the deceased's residence, what time they left the premises and whether the two security guards saw or heard what happened that night. Further, the prosecution did not inform the court which evidence led to the arrest of the 4th appellant. Neither did DNA samples and fingerprints lifted from the scene of crime link the 4th appellant to the death of the deceased.
55. Learned counsel submitted the statement recorded by PW18 did not amount to a confession. In the said statement, the 4th appellant never admitted having killed the deceased. He only stated that Mohammed wanted to engage the 2nd and 3rd appellants to kill the deceased. However, he declined and convinced the 3rd appellant not to be involved. Learned counsel argued that the statement by itself does not amount to an admission of any element of the offence of murder, in any event, the 4th appellant denied the signature on the statement, but the trial court erroneously admitted the same after conducting a trial within a trial. The statement contained falsehoods. For example, it stated that the 2nd appellant was a police officer at Langata Police Station, an allegation that was not true since no evidence was adduced in support.
56. He further submitted that the failure to capture the details of the 4th appellant's movement from one police station to another, and to give details of the investigations that led to his arrest, should have been a reason not to admit the statement under the confession rules. PW18 ought to have made enquiries, needed to have satisfied herself that there was no undue influence leading to the recording of the statement.
57. Learned counsel argued that the retracted statement cannot be admitted as a confession. It is good practice that repudiated confessions be corroborated and that the trial court should warn itself before relying on such evidence; that the trial judge, upon erroneously admitting the confession, did not warn herself of the risks implied on relying on such statement and went ahead and based her conviction on it; that the repudiated confession ought to have been corroborated by independent evidence such as communication data placing the 4th appellant at the scene of murder or forensic evidence linking him to the scene and that other than the inconsistent statement, nothing else points to the guilt of the 4th appellant without any corroboration.
58. Learned counsel submitted further that the evidence adduced by the prosecution was entirely circumstantial and that no direct evidence was available since nobody witnessed the deceased being killed. The prosecution produced a post-mortem report indicating that the deceased died as a result of strangulation. The circumstantial evidence before the court failed to fulfill the criteria laid down by



this Court in the cases of Joan Chebichi Sawa vs. Republic [2003] eKLR & Mamush Hibro Faja vs. Republic [2019] eKLR.

59. Critical witnesses such as the two-night guards on the night of 26th July 2012 at the ambassador's residence were not called to testify; that Jennifer, her husband and Melissa did not testify yet they were the last persons to be seen with the deceased according to the testimony of PW9, PW10 and others; that this inconsistent evidence fails to link the 4th appellant to the murder and falls short of explaining his role in the commission of the murder and further fails to dislodge his alibi defence. It does not rule out that Mohammed executed the murder with other persons other than the 4th appellant.
60. The respondent filed its submissions dated 16 October 2023. Learned state counsel contended that the prosecution witnesses tendered evidence exhibiting bad blood between the deceased and the 1st appellant, which revolved around a power struggle that led to the 1st appellant planning for the deceased's elimination.
61. Learned counsel identified three key issues for consideration: first, whether there was mens rea; second, whether there was actus reus or common intention; and third, whether the information provided to the police by the 4th appellant, which led to the discovery of material evidence, is admissible under section 25A of the *Evidence Act*.
62. He argued further that section 206 of the *Penal Code* specifies the circumstances under which malice aforethought is established and shall be deemed to have been established. This includes the intention to cause death or to inflict serious harm on any person regardless of whether that individual is killed. It also encompasses the knowledge that an act or omission is likely to result in death or serious harm to someone, regardless of whether that person is the one who is killed. Additionally, it includes an intent to commit a felony. Learned state counsel further argued that this legal provision has been interpreted in various case laws, establishing that both intentional and reckless acts can constitute malice aforethought. He cited the case of John Mutuma Gatobu vs. Republic [2015] KECA 101 (KLR) & Dickson Mwangi Munene & Another vs. Republic [2014] KECA 774 (KLR) where this Court was of the view that the definition of malice aforethought under section 206 is used in a technical sense and does not denote the usual meaning of ill will or wishing harm or malice and ought not to be confused with motive, plan or desire to kill. However, the existence of the same may prove the offence. Further, it comprises not only the intentional but also reckless acts causing grievous harm committed with indifference of their consequences.
63. The respondent's counsel contended that the evidence presented by the prosecution witnesses from the embassy and the ambassador's residence established that the 1st appellant and the deceased did not have a good relationship. The deceased felt compelled to assert her authority as the person in-charge of the Venezuelan Embassy as captured in the evidence of PW1, PW7, PW10, PW13 & PW14. He contended further that the witnesses established that; -The 1st appellant was the chief architect of the scheme together with Mohammed Ahmed Mohammed Hassan, who moved with him into the ambassador's residence. The 1st appellant was to be the primary beneficiary. The 1st appellant was desirous of heading the mission, so he made changes to the bank accounts, initially blocked the deceased from the ambassador's residence. Viewed the deceased as a stumbling block.
64. Learned counsel further argued that, according to Section 20 (1)(c) and 20(1)(d) of the *Penal Code*, the 1st appellant aided and abetted in the murder of the deceased by initiating the plan through his friend, Mohammed. Under the 1st appellant's instructions, Mohamed, who was well known to both the 2nd and 3rd appellants, carried out the murder. The 2nd and 3rd appellants were involved after being promised money for their participation in the crime, as well as jobs at the embassy once the 1st appellant



assumed control. They also attended a meeting convened to plan the deceased's murder, fully aware of the meeting's purpose. He referred to the case of Milton Kabulit & 4 Others vs. Republic [2015] KECA 105 (KLR) where this Court referred to the case of Wanjiro d/o Wamario vs. Republic 22 EA CA 521, where the predecessor of this Court, the Court of Appeal for Eastern Africa was of the view that common intention generally implies a premeditated plan but this does not rule out the possibility of common intention developing in the course of events. Though the common intention may not have been present at the beginning, it seems to have developed with promises of jobs at the embassy.

65. In support of the confession, learned counsel referred to the case of the Ahamad Abolfathi Mohammed & Another vs. Republic [2018] KECA 743 (KLR) & John Kipsesat Chepyator vs. Republic [2019] KECA 268 (KLR) to support the contention that the confession was admissible as evidence.

66. This is a first appeal. Our mandate involves considering the evidence presented to the trial court afresh, conducting our independent analysis and drawing our own conclusion. We have acknowledged as is required that the trial court had the privilege of seeing and hearing the witnesses first-hand and we shall give due regard therefor. The role of the first appellate court was aptly stated in the case of Okeno vs. Republic (1972) EA 32, where this Court succinctly noted as follows:

“An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya vs. R [1959] EA 336) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions Shantilal M. Ruwala - vs- R [1975], EA 570. It is not the function of the 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. Only then can it decide whether the magistrate's findings should be supported”.

67. We have subjected the record to afresh analysis, exhaustively examined the evidence placed before the trial court, considered case law cited and the law and are of the considered view that this case turns on the following issues for our determination:

- i. Whether or not the 1st appellant enjoyed diplomatic immunity and could be tried for murder.
- ii. Whether the prosecution proved the ingredients of the offence of murder against the 4 appellants beyond all reasonable doubt.
- iii. Was the retracted confession of the 4th appellant properly admitted in the evidence?
- iv. Whether the conviction and sentence were safe.

68. The 1st appellant, Dwight Sagaray was at the time the murder herein occurred, the 1st Secretary in the Venezuelan Embassy in Kenya. He was suspected to have jointly hatched the plan and executed the deceased's murder, together with the other appellants and one at large Mohammed Ahmed Hassan. The four appellants and one since acquitted were charged with the offence of murder. The 1st appellant, though pleading innocence, maintained at trial and does so in this Court that he enjoyed diplomatic immunity at the time the murder was committed, and that his arrest and eventual appearance in court went against the immunity he enjoyed under the Vienna Convention (1961).

69. In paragraph 103 of the trial court's judgment, the trial judge indicated that the diplomatic status of the 1st appellant was raised as a preliminary issue and kept popping up throughout the proceedings. Learned counsel Mr. Katwa, who acted for the 1st appellant in the High Court, had argued that the



court lacked jurisdiction to try him as he enjoyed diplomatic status, which had not been lifted or waived, save for cancellation of his diplomatic passport.

70. The prosecution, on the other hand, argued that the appellant's diplomatic status ceased to exist as the sending state had waived it through communication to the Kenyan Foreign Affairs Ministry.
71. The trial court considered this issue at length the evidence on record. The judge referred to the evidence of PW34, who testified that the Ministry of Foreign Affairs had received a letter dated 28th July 2012, cancelling the diplomatic immunity of the 1st appellant; compared decisions from various jurisdictions; and analyzed old and recent cases, arriving at a decision that the jurisprudence on the doctrine of immunity has evolved. That diplomatic immunity enjoyed is not absolute, and in any event the 1st appellant's immunity was waived by the sending country's withdrawal of his diplomatic status and cancellation of his diplomatic passport.
72. This issue has resurfaced again before us. The 1st appellant raised two grounds of appeal on this issue: that the learned judge placed reliance on an unsubstantiated and unprocedural note of verbal communication purportedly from the Venezuelan Ministry of Popular Power for Foreign Relations waiving his immunity; and that the judge erred in law and fact by misapprehending and misapplying the principles on diplomatic immunity under the Vienna Convention.
73. Learned counsel for the 1st appellant seems to agree with the trial court that jurisprudence on diplomatic immunity has evolved, so no one enjoys absolute immunity. The 1st appellant's position is that his diplomatic status was not waived, but only his diplomatic passport was cancelled. Even if his immunity was waived, the status ought to continue until he leaves the country.

In contrast, the prosecution argues that the 1st appellant's immunity was waived through correspondence between the Ministry of Popular Power for Foreign Relations and its counterpart in Kenya.

74. PW34 Adam Ngurati Suleiman, a Protocol Officer at the Ministry of Foreign Affairs, informed the court that the CID had requested a waiver of immunity for the 1st appellant, and there were correspondences on the issue. He referred to a letter dated 27th July 2012, seeking a waiver of immunity. In return, Venezuela waived the Diplomatic status and cancelled his diplomatic passport. He also testified that as investigations on the murder continued, the ministry ceased to accord the 1st appellant diplomatic immunity. This is seen in a letter dated 28th July, 2012 from the Ministry of Foreign Affairs Nairobi to the Commissioner of Police, the Police Commissioner was advised of the cancellation of the diplomatic immunity of the 1st appellant following the cancellation of his diplomatic status.
75. In a note addressed to the Ministry of Foreign Affairs dated 27th July 2012, the Ministry of Popular Power for Foreign Relations, Department of Protocol Affairs indicated that the 1st appellant's diplomatic passport had been canceled as his services to Kenya as a diplomat in the Embassy of Venezuela had been terminated.
76. The Vienna Convention on Diplomatic Relations (1961), the convention or agreement recognized by the international community for the accreditation of heads of mission and their staff and diplomatic relations was ratified by Kenya and adopted in section 4 of the *Privileges and Immunities Act*, Chapter 179 of the Laws of Kenya. Section 4 provides that:
- (1) Subject to section 15 of this Act, the Articles set out in the First Schedule to this Act (being Articles of the Vienna Convention on Diplomatic Relations signed in 1961) shall have the force of law in Kenya and shall for that purpose be construed in accordance with the following provisions of this section



...

77. Article 31 of the Vienna convention states that:

1. A diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving State. He shall also enjoy immunity from its civil and administrative jurisdiction, except in the case of:
 - a. A real action relating to private immovable property situated in the territory of the receiving State, unless he holds it on behalf of the sending State for the purposes of the mission;
 - b. An action relating to succession in which the diplomatic agent is involved as executor, administrator, heir or legatee as a private person and not on behalf of the sending State;
 - c. An action relating to any professional or commercial activity exercised by the diplomatic agent in the receiving State outside his official functions.
2. A diplomatic agent is not obliged to give evidence as a Witness.

Article 32 of the Vienna Convention states that:

1. The immunity from diplomatic agents' jurisdiction and persons enjoying immunity under Article 37 may be waived by the sending State.
2. The waiver must always be express.

78. In Paragraph 125 and 126, the trial court's judgement states:

125. From the above, it is clear that there was express communication between the two Ministries to the effect that the 1st accused no longer held an official diplomatic capacity and had been relieved off his duties as First Secretary by his sending home country, Venezuela. It follows then and in accordance with Article 43(a) of the Vienna Convention, that his function had ceased and he could no longer be a diplomat so he could no longer enjoy diplomatic powers and privileges including immunity. His immunity was therefore not waived but ceased to exist the moment his official duties and position were terminated by his government. As the case law I have painstakingly reviewed has shown, diplomatic immunity was no longer a bar to prosecution where a diplomat engaged in criminal acts outside their official duties.

126. It is therefore the finding of this Court that Dwight Sagaray (1st accused) was properly arraigned before the court to face trial alongside his co-accused as he no longer enjoyed diplomatic immunity.

79. We agree with the trial court's finding above that there was communication between the two states. Venezuela's communication was twofold, cancellation of the diplomatic passport and termination of the 1st appellant's service in Kenya.

The message is very clear; the 1st appellant was stripped of his diplomatic status by the sending country, his mission to Kenya terminated and his diplomatic passport cancelled. The events leading to the cancellation and termination follow the killing of the deceased and quite obviously the suspicion that the 1st appellant was involved.



80. Cumulatively, the termination of the 1st appellant's services at the mission and cancellation of his diplomatic status mean that he no longer enjoyed the diplomatic status that goes with diplomatic immunity.

Therefore, it is a facade to say that though the sending state had waived the 1st appellant's immunity and terminated his services, the immunity continued until he left the country, when the request for the waiver was to allow for his prosecution, as seen from the back-and-forth between the police, Ministry of Foreign Affairs, and the Venezuelan authorities.

81. Immunity belongs not to an individual but to the sending state. Although waiver of immunity is not a usual occurrence, states have the option to recall and punish their citizens or opt to waive immunity, as is the case here. Therefore, we cannot fault the trial court's finding. We do find equally, that there was waiver of the 1st appellant's immunity by Venezuela, allowing Kenya to prosecute him for the offence of murder where he was a suspect. The 1st appellant was therefore properly charged and tried.

82. The other area of contention was the retracted confession of the 4th appellant which played a central role in this case. Through it some of the appellants were implicated, leading to their arrest. The prosecution's position was that upon his arrest, the 4th respondent opted to confess and offered his wife to be present while he recorded a confession. Evidence before the court is that the 4th Appellant was taken to PW18, a Chief Inspector of Police, who took him through the motion, cautioned him, and wrote the confession, which the 4th appellant signed and she signed the certificate. However, the 4th appellant denied having recorded a confession and claimed that his wife was nowhere to witness it.

83. The 4th appellant having repudiated the confession, the trial court conducted a trial within a trial, where the prosecution called four witnesses. Ultimately, the trial court found that the confession was made voluntarily and the repudiation was an afterthought, thus admitting it in evidence.

84. The trial court's analysis of the confession showed how the 2nd, 3rd and 4th appellants and Mohammed met and discussed not only the affairs of the embassy but also the intention of eliminating the ambassador. It was an admission of the participation and involvement of the 2nd, 3rd and 4th appellants in the planning and execution of murder, which demonstrated common intention.

85. Learned counsel for the 2nd appellant criticized the confession stating that one would have expected the 4th appellant to plead guilty to the confession but instead he retracted the same. Learned counsel relied on this Court's decision in *Sango Mohammed Sango & Another vs. Republic* (supra), where the court stated that there is a need for a court to warn itself when relying on a retracted statement and the need to consider the circumstances under which the confession was made. Learned counsel submitted that the trial court did not warn itself of the danger of relying on such a statement or even address its mind to the reliability of such a confession. In propounding this argument learned counsel quoted the cases of *Tuwamoi vs. Uganda* [1967] EA 84, *Yasin vs. King Emperor* [1901] ALR 28 Ca1 689, *Joseph Odhiambo vs. Republic Criminal Appeal No. 4 of 1980*.

86. Learned counsel further argued that the court should have noted that the statement and confession by the 3rd and 4th appellants materially differed from the evidence in chief of the two appellants.

87. On his part, the 3rd respondent's learned counsel took issue because the signature of the 4th appellant was not appended on the certificate. He also asserted that the trial court had failed to warn itself of the dangers of relying on a retracted statement. Further, learned counsel asserted that the confession against the other appellants was the weakest evidence and must have been corroborated.

88. Learned counsel for the 4th appellant submitted that the 4th appellant repudiated the confession, stating that he did not voluntarily give the same on his own free will. Further he never admitted participating



in the murder. In the alleged confession the 4th appellant only stated that Mohammed wanted to engage him, the 2nd and 3rd appellants to kill the deceased, however, he refused and went back home in Kasarani. That he did not enter into any arrangement and dissuaded the 3rd appellant and therefore the statement does not amount to an admission of the offence. He equally submitted that the court failed to warn itself on reliance on the repudiated confession and the need to corroborate it.

89. Conversely, PW18 testified that she recorded a statement from the 4th appellant in November 2012. That Cpl. Njeru of CID Gigiri brought in the 4th appellant to the witness for her to take down his confession. She read him his rights. He seemed to be okay, they conversed for a while and he told her he was an ex-officer. He requested his wife, who was around, to witness him recording the confession. She cautioned him and he confirmed that he wanted to confess. She then wrote the statement. She signed and so did the 4th appellant and his wife. Further, she stated that in the course of writing, they would take intervals where the 4th appellant relaxed and at one time asked to go for a short call. She confirmed signing the requisite certificate.
90. The state, on the admissibility of the retracted statement, submitted that the information provided to the police by the 4th appellant, which led to the discovery of material evidence, is admissible under Section 25A of the *Evidence Act*. Learned state counsel referred to the case of the Ahamad Abolfathi Mohammed & Another vs. Republic [2018] KECA 743 (KLR) & John Kipsesat Chepyator vs. Republic [2019] KECA 268 (KLR).
91. The *Evidence Act*, Chapter 80 of the Laws of Kenya and the Evidence (Out of Court Confessions) Rule 2009 define confession and how the same ought to be managed:
Section 25 to 26 of the *Evidence Act* states:
25. A confession comprises words or conduct, or a combination of words and conduct, from which, whether taken alone or in conjunction with other facts proved, an inference may reasonably be drawn that the person making it has committed an offence.
25. A confession or any admission of a fact tending to the proof of guilt made by an accused person is not admissible in a criminal proceeding if the making of the confession or admission appears to the court to have been caused by any inducement, threat or promise having reference to the charge against the accused person, proceeding from a person in authority and sufficient, in the opinion of the court, to give the accused person grounds which would appear to him reasonable for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him. (emphasis added)
92. Under the Evidence (Out of Court Confessions) Rules the recording officer is required to:
- a. Caution the accused person that anything he says may be taken in evidence and the accused has an option of keeping quiet.
 - b. Record in writing or electronically the statement. If it is in writing the accused is to be given an option to write or have it recorded for him.
 - c. The accused must at the end be given an opportunity to clarify the statement or make additions.
 - d. Be recorded in the presence of a third party nominated by the accused. The particulars of third party and relation to the accused recorded.
 - e. A certificate of confession shall be signed by the recording officer.



93. We have also considered the holding by the predecessor of this Court in the case of *Tuwamoi vs Uganda* (1967) E.A. where it held:

“We would summarize the position thus- a trial court should accept any confession which has been retracted or repudiated with caution and must before founding a conviction on such a confession be fully satisfied in all the circumstances of the case that the confession is true. The same standard of proof is required in all cases and usually a court will only act on the confession if corroborated in some material particular by independent evidence accepted by the court. But corroboration is not necessary in law and the court may act on a confession alone if it is fully satisfied after considering all the material points and surrounding circumstances that the confession cannot but be true.”

Equally we have considered the case of *M’Riungu vs. R* [1983] KLR, where this Court stated:

“As was stated in *R-vs- Baskerville* (1916) 2 KB 658 that corroboration need not be direct evidence that the accused committed the crime; it is sufficient if it is merely circumstantial evidence of his connection with the crime, and we agree that it must be independent testimony which affects the accused by connecting or tending to connect him with the crime. In other words, it must be evidence which implicates him that is, which confirms in some material particular not only the evidence that the crime has been committed but also that the prisoner committed it.”

94. We note that the procedural requirements of how to prepare and by whom the confession was to be taken were properly followed. The officer who recorded the confession was a Chief Inspector of Police. She cautioned the 4th appellant, invited a third party he nominated, recorded the confession, and signed the certificate. There is no requirement for the 4th appellant to sign the certificate (see rule 25(e)). There was no indication of coercion or inducement for the 4th respondent to write the statement.

95. In the confession, the 4th appellant alluded to being introduced to the 2nd appellant by his friend the 3rd appellant and thereafter the 2nd appellant introduced him to Mohammed. During their meetings, Mohammed had castigated the deceased and told them that he had enlisted the 2nd appellant to eliminate the ambassador and had given him Kshs. 468,000/-.

The statement ties in with 3rd appellant’s statement on how the 2nd appellant took them to Muthaiga, where they met Mohammed. They had two meetings in Gigiri, one on the fateful night of July 26th, 2012, when they left at 3:30 a.m. for Kahawa Sukari. The plot to kill appears in the confession and the statement by the 3rd appellant.

96. The 3rd appellant admitted having written a statement. In his testimony, he claimed not to have been cautioned that the statement would be used in evidence, and for that reason, he did not want to rely on it. He stated that he knew the 2nd appellant as he was introduced to him by a common friend, a Ugandan known as Majid. He further stated that the 4th appellant introduced him to the 2nd appellant in mid-2012.

97. In the statement under inquiry, the 3rd appellant stated inter alia concerning the engagement between the 2nd appellant, himself, the 4th appellant and Mohammed:

“.... I joined him he was with three people in the car. We left town and went to Total Muthaiga. He was speaking in Arabic. I could not understand well. I was left with one man whom I did not now (sic) the total petrol station... After 2 days he called again. We proceeded to



Muthaiga with my two friends Moses and Evans. As we were going he said he had a job and asked if we are able to do it then we declined his offer and he said then we escort him to meet his friend. After arriving at the station he left us in his car and joined his friends in their car. They talked for a while and he called me in their car they were two men and him (Ahmed from Langata) he just told me everything was okay then he told me to go to his car...”

98. In the confession, the 4th appellant had this to say about the 2nd appellant, the 3rd appellant, himself and Mohammed:

“... One day he called me through the phone and requested me to join him in town. We met and he told me that I should join him and proceed to Muthaiga to see a certain business but he did not disclose the business. We proceeded upto and alighted at Total Petrol Station....

Alex went to a car next to Toyota which was a RAV4 silver in colour with red number plates (diplomat). Alex came he was accompanied by one person who was introduced to me as Ahmed a police officer stationed at Langata Station.

... Ahmed drove us to town and Alex and I alighted.... I asked Alex how they’re going to eliminate her and he said that men are planning to kill her. I asked if that is the business that we went for. He responded that it is good to listen.

... After 2 days Alex called me to accompany him to Gigiri Java at about 9. We sat up to 12:00 am. Alex told me the person we were waiting for has arrived I checked at the parking I saw a RAV4 silver in colour in the diplomatic Registration number.

... A gentle man joined us wearing a black suit and a tie. He greeted Alex in Kiswahili language and later Alex introduced to me as Mohammed the Venezuelan embassy administrator. Mohammed received a call from Ahmed and they were speaking in Arabic....

Mohammed told Alex that the newly posted lady is a nuisance because even people at the embassy don’t sleep. He went ahead to say the lady had changed the drivers, cooks, flag. Mohammed left us taking sodas....

Alex and I boarded a matatu to town. The following morning Alex called me.... he told me to join him and proceed to Java – Gigiri. So we joined at Nation Centre and proceeded to Java. Here we stayed upto 7:30 pm and Mohammed was brought by a driver in the same RAV4 and the driver left. Mohammed was always on the phone....

I asked Alex what was happening to his friend Mohammed and Alex told me that don’t you remember that I told you there was a plan to eliminate the newly posted ambassador. The three of us ate super bought by Mohammed. Mohammed started saying that he had given Ahmed money and he does not know whether he will do the job...”

99. We have warned ourselves of the dangers of relying on a retracted confession. With that in mind, we find the convergence of the issues raised in the statement of the 3rd appellant and the retracted confession of the 4th appellant cannot be wished away as a coincidence. The similarities are too prominent. The confession speaks of the ambassador making life difficult for the employees. The similarity of the evidence is too much of a coincidence. The confession could not have been cooked up, as the appellants would like the court to believe.

100. Further, we find that the evidence of the prosecution witnesses, and some of the appellants, corroborate the confession.



Therefore, it was safe for the trial court to have admitted it as evidence. We, too, have relied on it in our own judgment.

101. Having settled the two crucial issues above, we now consider if the ingredients of the offence of murder were proved. The prosecution ought to prove that the appellants caused the death of the deceased and that the said death was caused with malice aforethought.

Section 203 of the *Penal Code* provides as follows:

Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.

Section 206 states malice aforethought 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.

102. There is no doubt that the deceased was found dead in the ambassador's residence on the morning of 27th July, 2012. The postmortem report that is not in dispute showed that the death was caused by strangulation.
103. The prosecution led evidence implicating Mohammed as the main suspect, he remains at large. Several witnesses, including staff of the Venezuelan Embassy and the 2nd, 3rd, and 4th appellants, described him as a close friend and associate of the 1st appellant, and due to this close association many mistook him as staff of the Venezuelan embassy. As earlier indicated, the prosecution's case is that on behalf of the 1st appellant, Mohammed enlisted the services of the 2nd, 3rd, and 4th appellants.
104. Mohammed was seen at about midnight in the ambassador's residence where he was a persona non grata according to the security records. PW1, the driver and PW16, the cook described the circumstances under which they saw Mohamed as strange and harrowing.
105. Before the incident, at the ambassador's residence, both PW1 and PW2 testified that on the 26th July 2012, upon dropping the 1st appellant home from the Parklands Campus, they found Mohammed, who asked to be dropped at Magis as he was meeting some people from foreign affairs who were to discuss the deceased's exit from Kenya. At 10:30, they left the key to the vehicle Reg. 93CD5K with Mohamed, who gave each of them a taxi fare home.



106. The testimony of PW1 and PW2 on Mohamed joining some friends at Magis in Gigiri is similar to the information in the 4th appellant's confession and the statement by the 3rd appellant. The 3rd appellant, in his statement stated:

“Another day again Ahmed from Langata called me to join them at Java Gigiri and we went with Moses. We met them there. They had two cars. They told us to take coffee, they were working on something. We sat until Java closed. We went to the restaurant we sat for a long time calling them. We sat till past mid night ...”

In the confession, the 4th respondent was more detailed as follows; -

“...The following morning Alex called me through the phone and told me to join him and to proceed to Java- Gigiri. So we joined at Nation Centre and proceeded to Java. Here we stayed upto 7.30p.m. and Mohammed was brought by a driver in the same Rav 4 and the driver left.

.... Mohamed joined us and after a few minutes he left. After ten minutes he came back and it was about 12.30 a.m. and he had already changed his clothes. He was wearing a jacket, tshirt and sports shoes...” (emphasis added)

107. The confession by the 4th appellant and the statement by the 3rd appellant both mention the visit to Java on the night of July 26, 2012, which is corroborated by evidence from PW1 and PW2. PW1 and PW2 never got to see the friends that Mohammed met in Gigiri. However, on the fateful night Mohammed was spotted at the ambassador's residence by PW1 who testified as follows:

“During the night I heard a commotion outside. I opened my door – my door to Peter's is one meter. When I opened my door, I saw Peter in underwear. Security lights were on. He shouted at me “go back, go back.” He was shaking. I went back to my room. I switched off my light and left my door half-open. I saw somebody between my door and Peter's door. He told me “go back, go back. It is me “Francis.” He told me “go back, go sleep.” because of the lights I noticed it was Mohamed. The light was clear. I saw he was dressed in jeans and had no coat. He also had a cap. He called my name.

.... Early in the morning, around 6:00 a.m., Mohamed called me. Mohamed told me there was a document he needed from Olga. At 6 a.m., Mohamed called and told me to go and take Dwight to the hospital.

.... I found Mohamed outside in Dwight's car. Mohammed told me that Jennifer, her husband, had taken Olga to the airport. When I entered the car, Mohamed told me to take him somewhere on Kiambu road, Mobil Plaza to pick somebody.”

.... Before I went in the morning, I talked to Peter. Peter told me that he was almost killed and Mohamed saved him. He did not know what happened.

108. The description of how Mohammed was dressed the fateful night as described by PW1 (casually dressed) fits the description of how Mohammed was dressed as described in the 4th appellant's confession. The meeting at Java was before Mohammed and his team left for the mission. All evidence points to Mohammed as the man at the center of the crime. The confession and the statement point the 2nd appellant as having been part of the scheme, he was part of the meeting in Muthaiga, Garden Square and twice at Java in Gigiri. Mohammed disclosed that the 2nd appellant had been paid. Further evidence shows that the 2nd appellant recruited the 3rd and 4th appellants to join them in the scheme. The two



followed Ahmed to subsequent meetings, including the fateful night. Having known that Mohammed and Ahmed had suggested recruiting them in the murder scheme, why did they keep meeting with the two if they did not want to be part of the scheme? The only inference to draw from the meetings the two consistently attended is that they had agreed to the job and therefore were part and parcel of the scheme to kill the deceased. There is also evidence on the call logs from the 3rd appellant's phone indicating that he communicated with Mohamed 11 times on the 27th of July 2012.

109. Based on the above it is clear to us that the 2nd, 3rd and 4th appellants severally met Mohammed to plot how they would execute the deceased. The 1st appellant is said to have been in the meeting in Muthaiga where he sat in the car with the diplomatic number plate. The 2nd appellant who met with Mohamed said the 'ambassador' was in the car, and although the 1st appellant was not present in other meetings his hand is seen.

As submitted by the state, the 1st appellant was the overall beneficiary and chief architect of the actions of his co-appellant and Mohammed. This is seen by his conduct as described by PW1, PW2, PW10, PW13, and other embassy staff.

PW1 stated:

"Dwight had a friend called Mohamed.... I drove them together sometime.

.... Dwight moved into the residence and Mohammed came to stay in the residence, and Mohammed came to stay with him in the residence."

"... I did not know that Mohammed was not a staff of Venezuelan Embassy. Mohammed used to go the offices of the Venezuelan Embassy. He mostly used to go in the evening and sometimes on weekends.

I remember on 15th July 2012 Dwight told me that we (myself and him) go to the airport to pick a visitor.... Dwight told me that he was still the boss. He meant that he was still the boss although the visitor was coming."

.....

"Later the Lady Fonseca called me to the office and told me she is the Boss. She told me that it seems we the people at the residence do not recognize her... I was surprised because Dwight did not tell me who she is."

.....

"Dwight told us that he was the boss. I was confused when Olga told us that she was the boss. Mohamed did not come to the residence again. I saw him in the residence of Dwight when I went to pick Dwight.

Mohammed told me that Olga was going back to her country because the Kenya Government did not want her. That Dwight was recognized as the ambassador." (emphasis added)

110. PW2 confirmed the bad blood between the 1st appellant and the deceased. He further stated that the 1st appellant had on the 23rd July, 2012 sent him to the bank to take a letter indicating that he was the sole signatory to the account and the lady who received the letter at the bank made a comment, "What kind of war is going on at the embassy. Miss Olga has written to say she is the signatory and now this letter is saying Dwight is the signatory."



111. PW9, on her part, stated that they had not been told that the deceased was the boss, and that they learnt of the same from the landlord's daughter. PW10 reiterated the same, saying that the embassy did not inform them that the deceased was the new ambassador, and they got the information from the landlord's daughter.
112. PW13, Lucy Ojwang, a secretary at the embassy, stated that on arrival Olga introduced herself as the ambassador. She did not see any official handover. She was aware of the issue at the bank. This is what she said:
- “There was one time when they were yelling about cheques. Their tones were high – all I could hear was check check (sic). They were in their office. I could hear the argument from the ambassador's office. After that Mr. Dwight went back to the office. Miss Olga went to the bank and came back with the new check (sic) books.”
113. PW14 Alice Milimi Muthama, daughter of PW22 and managing director of JNMH Holdings and Markland Kenya Limited and landlords of the ambassador's residence, said that she was initially introduced to Dwight by Mohammed whom she had previously known. She recalled a phone call from the 1st appellant to her saying that a new ambassador had come, but he needed to verify if she was and that PW14 should not take any call. Mohammed reiterated the same, indicating the new lady had wanted to take Dwight's job. PW14 tried to call and seek to meet the new ambassador, and the embassy staff fixed a meeting at the ambassador's residence where she was introduced to the ambassador. She further testified that the deceased told her that the 1st appellant had told the deceased that the landlord did not want to meet her, which was a lie. On cross examination she confirmed that the 1st appellant did not want her to talk to the deceased.
- PW16 confirmed what PW14 had said. He was an IT manager at the embassy. He also confirmed that he would hear the deceased and the 1st appellant raise their voices.
114. PW22 Johnson Muthama (then a Senator for Machakos County) and owner of the ambassador's residence recalled that when the 1st appellant went to see him he was in the company of Mohammed, who told him that he worked for the Venezuelan Embassy. He further stated that the deceased had told him that she lived under unacceptable conditions; she had been told not to live in the house, and when she moved in, she was not given all the keys. He noted that the deceased had a lot of fear, and the deceased mentioned that her life was in danger. He advised her to report to the diplomatic police.
115. From the above evidence, it is clear that the 1st appellant did not take it well when the deceased was posted as the new ambassador as he had hoped to be the one. He created a fight between the deceased and the domestic workers; he did not want her at the residence and blocked the landlord's representative from accessing her; he did not introduce her to the staff at the office or residence and he did not give her all the keys to the house, which then explains how the kitchen door was opened, thus giving access to the assailants.
116. The hostile reception arising from the 1st appellant's disappointment led to the plot by him and his associate Mohammed initially having the deceased rejected as the ambassador, which seemed to have failed, culminating in the deceased's elimination. The 1st appellant, as stated elsewhere in this judgment, may not have been physically present and exposed to the 3rd and 4th appellants, but his hand is seen in the entire plot.
117. As alluded to by the prosecution and the defence, the evidence before the court is mainly circumstantial. There was no evidence implicating the residence's staff, the security agencies, or the embassy staff. There is also sufficient evidence before the court that the three guests from the embassy



who were with the deceased on the fateful night left at around 10 pm, thus, in our view, explaining the last scene principle that the defence attempted to use in their defence.

118. As stated by the trial court, the celebrated case of *Abanga alias Onyango vs. R* Criminal Appeal No. 32 of 1990, restated the parameters to be considered when relying on circumstantial evidence. In the case, this Court held as follows:

“It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests;

- i. The circumstances from which inference of guilt is sought to be drawn, must be cogently and firmly established;
- ii. Those circumstances should be of a definite tendency and erringly pointing towards the guilt of the accused;
- iii. The circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that the crime was committed by the accused and none else within all human probability.”

119. The evidence before the court showed that the 1st appellant was unhappy as a new ambassador had been posted. He gave her a hostile reception. His friend Mohammed was not happy as his friend would no longer be in charge. They perceived the deceased to have come to take away the 1st appellant’s job. They instigated domestic workers against her, Mohammed said to the staff that he had influence and would get her sent packing.

There were meetings between Mohammed, the 2nd, 3rd and 4th appellants where discussions were held of eliminating the deceased. The 2nd, 3rd and 4th attend all, including the fateful night. Although the 2nd, 3rd and 4th deny their involvement, it is not comprehensible why they would attend all the meetings, if they had not been recruited to be part of the scheme and why the 3rd and 4th would go all the way and be left out at the point of execution, why were there calls after the murder to Mohammed? As for the 1st appellant, he disliked the deceased; he made her life difficult; he was to be the primary beneficiary if the deceased was out of the way; he did not give her all the keys to the house; was very close to Mohammed, and he expects the court to believe that Mohammed would orchestrate and execute the plan without his knowledge? All this appears farfetched. The circumstances of this case, taken cumulatively, form a chain that leaves no doubt in our minds that the 1st appellant, Mohammed, the 2nd, 3rd, and 4th appellants were involved in hatching, planning and executing the murder together. The mastermind, the 1st appellant and Mohammed, roped in the 2nd appellant and he recruited his two friends, the 3rd and 4th respondent.

120. In the end, we do not fault the appellants’ conviction by the trial court. For the heinous crime the appellants were only sentenced to serve a very lenient sentence of 20 years in prison. In our view, considering the gravity of the offence, we would have considered enhancing the sentence. However, we note that there is no cross-appeal before us, nor did the state file a notice of enhancement of sentence.

121. The appeal fails. It is dismissed for being devoid of merit.

DATED AND DELIVERED AT NAIROBI THIS 7TH DAY OF MARCH, 2025.

ALI-ARONI

.....

JUDGE OF APPEAL



L. ACHODE

.....

JUDGE OF APPEAL

J. MATIVO

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

