Oketch v Republic (Criminal Appeal E004 of 2024) [2025] KEHC 5513 (KLR) (5 May 2025) (Judgment)

Neutral citation: [2025] KEHC 5513 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT SIAYA

CRIMINAL APPEAL E004 OF 2024

DK KEMEI, J

MAY 5, 2025

BETWEEN

SAMUEL OKOTH OKETCH .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(Being an appeal from the judgment of Hon. M.O. Wambani (CM) delivered on 13/11/2023 in Criminal case No. 1177 of 2019)

JUDGMENT

1. The Appellant herein Samuel Okoth Oketch, was charged with an offence of manslaughter contrary to Section 202 as read with Section 205 of the *Penal Code*. The particulars are that Samuel Okoth Oketch on 25th day of November 2019 at about 0400 hours at Mbaga village in Siaya Sub-County within Siaya County, unlawfully killed Kennedy Oduor Omondi.

2. The Appellant denied the charge, and the matter proceeded to a full hear. Eventually, the Appellant was found guilty as charged and sentenced to 30 years' imprisonment.

3. Aggrieved by the conviction and sentence, the Appellant has filed a petition of appeal dated 19/2/2024 wherein he raised the following grounds of appeal:

    i. That the learned trial magistrate failed in law and in fact by proceeding with the hearing of the case without ensuring that the Appellant was provided with written documents to be relied upon by the Respondent in advance or at all as provided under Article 50 (2) (j) of *the Constitution* of Kenya 2010 and thereby violated his constitutional right.

    ii. That the learned trial magistrate erred in both law and fact in convicting the appellant whereas the prosecution failed to prove all the ingredients of the offence of manslaughter beyond reasonable doubt as is required by the law.

iii. That the learned trial magistrate failed in both law and fact in convicting the Appellant on the face of material contradiction and inconsistency of the evidence by the prosecution.

iv That the learned trial magistrate erred in law and fact by convicting the Appellant for the offence of manslaughter on the evidence of a single witness without corroboration by another witness.

v That the learned trial magistrate erred in both law and fact by failing to find that failure to call the investigating officer whose evidence was crucial to corroborate the existence of the element of the offence of manslaughter was fatal for the prosecution's case.

vi. That the learned trial magistrate misunderstood, misapprehended and misapplied the principle of recognition under the circumstances of the case before it and in particular improperly accepting the evidence of PW2 without corroboration.

vii. That the learned trial magistrate erred in law and in fact in convicting the appellant without considering extenuating circumstances of the case.

viii. That the learned trial magistrate erred in law and fact in convicting the Appellant for the offence of manslaughter on the basis of circumstantial evidence and drawing inference of accused's guilt from circumstantial evidence without establishing whether there were co-existing circumstances which could weaken or destroy the inference.

ix. That the learned trial magistrate erred in law and fact in finding that the testimony of PW2 who was the sole witness who claimed to have witnessed the Appellant and six persons assaulting the deceased was believed yet the trial magistrate did not hear their testimonies nor observed their demeanour in order to establish the credibility or implausibility of their testimonies as the testimonies of all the prosecution witnesses were taken by another magistrate.

x. That the learned trial magistrate erred in both law and fact in passing a sentence which was excessive and harsh contrary to the law and the Judiciary Sentencing Policy Guidelines.

The Appellant thus prayed that the appeal be allowed, conviction quashed and the sentence be set aside and that he be released forthwith unless otherwise lawfully held.

4. This being a first appeal, this Court must reconsider and re-evaluate the evidence adduced before the trial Court so as to arrive at its independent findings and conclusions. (See Okeno v Republic [1972] EA 32. In doing so, this Court is required to take cognizance of the fact that it neither saw nor heard the witnesses as they testified before the trial court and, therefore, it ought to make due allowance in that respect as was held in Ajode v Republic [2004] KLR 81.

5. The facts of the case are that on 25/11/2019 at about 1.00 pm the deceased in the company of his brother (PW2) went to show him a land parcel the deceased was intending to lease to someone. That on their way back at about 8.00 pm, the deceased was very tired and a little drunk as they had taken chang'aa. PW2 testified that at that point, the deceased gave PW2 his phone and that PW2 went ahead leaving the deceased who was walking slowly behind him. When PW2 arrived at his home, he found the Appellant herein with about six people. That the Appellant, who was the village elder, inquired about the whereabouts of the deceased and proceeded to call the deceased's number which rang in PW2's pocket. The Appellant then assaulted PW2 by slapping him with a panga. He then ordered PW2 to board onto a motorbike with him and that they searched for the deceased but in vain. That the Appellant and his group then tortured PW2 until about midnight, threatening to kill him. Then they locked PW2 inside a house near animal slaughter area.

6. Later, at about 4:00 A.m., the Appellant, together with a lady village elder, went to where PW2 had been locked up, removed him, and took him to another place near a river, where they brought his brother, the deceased, while still alive. That the Appellant claimed that the deceased had stolen a TV set which they ordered him to produce. The deceased's hands were tied. They used the same rope to tie PW2. They then beat them with pangas and rungus until 0600hrs when the Appellant herein asked PW2 to carry the deceased home. By then, the deceased legs and hands were broken. The deceased was then crying and then claiming that the Appellant had killed him for no good reason. The deceased asked his brother, (PW2) to bring him water, and when PW2 brought the water from the river, he found that his brother had died. That it was then that the Appellant called the assistant chief of Komolo-North Alego, Felix Orwenyo (PW1) and briefed him about the operation that had been carried out the previous night at Mbaga village and who rushed to the scene and found the body of the deceased and who called the OCS Siaya who sent police officers to the scene and the body collected.

7. It was PW2's testimony that the Appellant came from Mulaha area and not Mbaga where they lived. PW2 then informed his village elder who went to the scene. That the police came and collected the body. That he also saw one Victor Oyugi but he did not know the rest of the assailants by the names but by appearance and that he was very sure about the involvement of Samuel Okoth the Appellant herein. The witness PW2 also testified on cross examination that the deceased had lend the Appellant Ksh 50,000/= with which to build his (Appellant's) house and that when the deceased demanded for refund of the money, he killed him. That the Appellant locked him inside her house and when the Appellant opened it, he saw the Appellant beating the deceased and that the Appellant was in company with another village elder. That he walked with the Appellant from 8.00 pm to 12.00 midnight and that he had lit a lamp which enabled him to identify the Appellant who had been a frequent visitor to the deceased and that he (PW2) had gotten used to the Appellant's voice that the Appellant threatened to kill him if he did not show him the deceased. That the Appellant took the deceased's mobile phone which he had after assaulting him (PW2).

8. PW2's testimony seemed to be corroborated by that of No. 229447 Pc Odipo from Siaya Police Station who testified that on 25/11/2019 at 1000hrs she was asked by the OCS to accompany her to a scene of crime at Mbaga. That the incident had been reported by Samuel Oketch (the Appellant) to the effect that a thief had been killed in his village. Upon arrival at the scene, they found a crowed wailing while carrying twigs. That the Appellant alighted from the police vehicle and when the crowd saw him, they threatened to lynch him claiming that he was the killer. That they were forced to take the Appellant back to the station while the body of the deceased Kennedy Oduor was taken to the mortuary.

9. The autopsy report was done by the Dr. Juma Gabriel Wekesa (PW4) who performed the post mortem on the body of Kennedy Oduor Omondi. That on examination, the doctor found that there was a fracture on the right lower limb, both wrist joints were swollen, hematoma on the head measuring 10 cm in diameter. Internally, on the head specifically the brain, there were signs of increase cranial pressures as evidenced by tense dura. The said pathologist concluded that the cause of death was severe head trauma caused by a blunt object, with intra cranial hemorrhage and increased intra cranial pressures inside the skull. He produced the autopsy report as Exhibit – 1.

10. The trial court later ruled that a prima facie case had been established against the Appellant who was subsequently placed on his defence.

11. The Appellant chose to give unsworn statement. That on the 24/11/2019 he was not at home as he was with his other wife's place at Awelo. That on 25/11/2019 his wife at Mbaga was attacked. That he informed the chief who advised him to report to the police. That he reported and that the OCS

asked him to wait for the OB desk and that it was safe to stay in police custody. That he did not kill the deceased. He closed his case without calling any other witness.

12. The appeal was canvassed by way of written submissions. However, it is the Appellant who complied. The Appellant submitted that his right to fair trial was jeopardized. That he was not informed about his charge prior to his arrest and that his rights under Article 50(2) of *the constitution* were infringed as he was not supplied with witness statements in order for him to defend himself in the case. He submitted further that the prosecution failed to prove its case beyond reasonable doubt as the evidence of PW2 was not corroborated at all since the prosecution failed to call other crucial witnesses such as the investigating officer and further that the alleged incident took place at night and thus the identification of the Appellant was not properly established.

13. I have given due consideration to the record of appeal and submissions and find that the issue for determination is whether the case against the Appellant was proved beyond reasonable doubt.

14. The offence of manslaughter is found in section 202(1) as read with section 205 of the *Penal Code* which provide as follows:

    Section 202- Any person who by an unlawful act or omission causes the death of another person is guilty of the felony termed manslaughter.

    Section 205- Any person who commits the felony of manslaughter is liable to imprisonment for life.

    Unlike the offence of murder, the offence of manslaughter entails causing the death of a person without malice aforethought. The description of the word ''unlawful omission" in section 202(1) is an omission amounting to culpable negligence to discharge a duty tending to the preservation of life or health, whether such omissions is or is not accompanied by an intention to cause death or bodily harm. The evidence of PW2 placed the Appellant at the scene of crime, as being the mastermind and having fully participated in the murder of the deceased. The pathologist (PW4) described the injuries incurred by the deceased before his death and concluded that the cause of death was severe head trauma caused by a blunt object, with intracranial hemorrhage and increased intracranial pressure inside the skull. PW 3's testimony is that upon the Appellant reporting the death of the deceased and leading them to the scene where the body was, the Appellant was almost lynched by the villagers who accused him of causing the death of the deceased. The Appellant in his defence evidence however did not manage to cast doubt on the evidence of PW2, PW3 and PW4. In my view, the defense statement by the Appellant was full of mere denials and that his alibi defence did not cast any doubt or shake the evidence of the Respondent which was quite overwhelming against him.

15. It was contended by the Appellant's learned counsel that the evidence of the single witness (PW2) was not sufficient to sustain the conviction against the Appellant. I find that there is no hard and fast rule that the evidence of a single witness should not be sufficient as circumstances of each case differ. In the present case, it was the evidence of PW2 that he witnesses the killing of the deceased by the Appellant who was the village elder and who organized the villagers to kill the deceased while in the lead on the basis that the decased had been suspected of being a thief. The said witness further added that he too was also assaulted in the process. It is instructive that the Appellant presented himself to the police at Siaya and lodged a report to the effect that a certain person had been killed and that he led PW3 and other officers to the scene whereupon the irate villagers bayed for his blood for having been responsible for the death of the deceased and which forced the Appellant to seek refuge with the police. Indeed, the Appellant in his evidence stated that he had to remain at the police station for his own safety. It is noted that the prosecution did not call the investigating officer to testify. The record shows that several attempts to bond the said witness was in vain even after a warrant of arrest was issued against him. It is instructive that an investigations officer's role is limited to recording statements of

witnesses and collection of exhibits and presenting them to court. In the present circumstances, the said investigating officer would have only presented evidence on what he received from the witnesses which would basically be hearsay evidence. As there were no exhibits to be produced by him, I find the prosecution's failure to call him to testify was not fatal to its case as the evidence of the witnesses so far called was quite sufficient to prove the charge.

The Appellant has raised the issue that he was not supplied with witness statements and thus his rights were vilated. Indeed under article 50(2) of *the constitution*, an accused person is entitled to be informed in advance of the evidence the prosecution intends to rely on and to have reasonable access to that evidence. Sub article (c) thereof provides that the accused has the right to have adequate time and facilities to prepare for his defence. A perusal of the record shows that the A ppellant on several occasions sought to be supplied with statements of witnesses and that the trial court directed the prosecution to supply the same. The proceedings of 19/10/2020 indicated that the case was to begin in earnest and that the Appellant indicated that he was ready to proceed with the matter and did cross-examine PW1and likewise the rest of the witnesses during subsequent hearing dates. It is clear that the fact that the Appellant agreed to proceed with the matter is a confirmation that he had been supplied with the statements. It is instructive that throughout the hearing, he did not raise any issue to do with lack of witness statements. I find that the Appellant's rights under article 50(2) of *the constitution* were not violated as claimed sine he was able to cross-examine all the witnesses at length and tendered his defence evidence.

Finally, the Appellant has challenged the issue of his identification at night. It must be noted that PW2 testified that he accompanied the Appellant and his group for the better part of the night as they searched for the deceased and that the Appellant and his group attacked the deceased in his presence and that he tried to dissuade the Appellant from harming the deceased. The said PW2 further stated that the Appellant also attacked him and locked him in a certain structure for some hours as the Appellant went in search of the deceased. The said PW2 knew the Appellant as the area clan elder and hence the identification was through recognition. Being guided by the authority in Wamunga v R [1989] KLR 426, I have to examine the evidence of PW2 and be satisfied that the circumstances of identification at the time were favourable and free from the possibility of error. Iam satisfied that the evidence of PW2 was free from many error or mistaken identity since the Appellant was well known to him. PW2 had indicated on cross-examination that he was aware that the deceased had lent him Kshs 50, 000/ with which to construct a house and that the Appellant turned against the deceased when he demanded for refund of the same. It is clear that PW2 had no problem identifying the Appellant as they were together throughout the night while in search of the deceased. In the case of Anjononi v R [1980] EKLR it was held that recognition of an assailant by someone who knows them is more satisfactory, reassuring and reliable than identification of a stranger. I find that the circumstances obtaining in this case was that PW2 knew the Appellant quite well. Indeed, the Appellant upon reporting at the police station led the officers to the scene where the body was found and thus PW2's recognition of the Appellant was thus backed up as the person who had been actively involved in the killing of the deceased herein.

16. The sum total of the foregoing observations, it is my finding that the trial magistrate addressed her mind well on the facts, the resultant issues and the law applicable in convicting the Appellant. The said conviction was sound and must be upheld.

17. On the issue of sentence, it is trite that sentencing is a reserve of the discretion of the trial magistrate or trial judge. It is trite law and based on the doctrine of stare decisis that an appellate court will not normally disturb the sentence imposed by a trial court save where the said sentence is illegal, unlawful, or out rightly excessive in the circumstances.

18. This position was stated succinctly stated by the Court of Appeal for East Africa in the case of Ogola S/O Owuor v Regina [1954] 21 270 as follows: -

> " The principles upon which an Appellate Court will act in exercising its jurisdiction to review sentences are firmly established. The Court does not alter a sentence on the mere ground that if the members of the Court had been trying the appellant they might have passed a somewhat different sentence and it will not ordinarily interfere with the discretion exercised by a trial Judge unless, as was said in James v R., [1950] 18 E.A.C.A 147: "It is evident that the Judge has acted upon some wrong principle or overlooked some material factor."
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> To this, we would also add a third criterion, namely, that the sentence is manifestly excessive in view of the circumstances of the case: R. v Sher Shewky, [1912] C.C.A. 28 T.L.R. 364."

19. Ogola s/o Owuor's case has been accepted and followed by the Court of Appeal and the High Court on matters of sentence for many years. What was stated there still remains good law to-date.

20. Section 205 of the *Penal Code* provides for a punishment of life imprisonment for anyone convicted of the offence of manslaughter. However, the same is for the worst offenders. It is noted that the learned trial magistrate passed a sentence of 30 years' imprisonment for the said offence. I find the sentence to be commensurate with the moral blameworthiness of the Appellant and that i see no reason to interfere with the same. It is instructive that the Appellant, being the village elder, was expected to present the deceased to the police so that he could be dealt with in accordance with the law if at all he had committed an offence. The Appellant instead decided to take the law into his hands together with his vigilante group and carried out a mob injustice on the deceased. The conduct of the Appellant was abhorrent and left no doubt that it was alright and fashionable for villagers to take the law into their hands whenever they come across any alleged wrongdoer in the village and not to bother to report to the police for action. It is instructive that upon the death of the deceased, the Appellant proceeded to the police station to inform the police of the death. If such a practice is allowed to take root in the society then the villagers would simply lynch suspects and then report to the police to come and collect dead bodies. This is a very dangerous scenario and should not be allowed to take root. The deceased did not deserve to die in the manner that he did. Had the Appellant handed the deceased to the police, he would be alive today but his life was cut short thanks to the actions of the Appellant. I find that the Appellant deserves to serve the custodial sentence imposed by the trial court which is neither harsh nor excessive. It is also noted that the Appellant posted bail soon after taking the plea and thus he did not remain in custody during the trial and thus the application of section 333(2) of the *Criminal Procedure Code* does not arise.The sentence imposed is thus upheld.

21. In the result, it is my finding that the Appellant's appeal lacks merit. The same is dismissed.

    Orders accordingly.

DATED AND DELIVERED AT SIAYA THIS 5TH DAY OF MAY, 2025

D. KEMEI

JUDGE.

In the presence of:

N/A Samuel Okoth Oketch.........Appellant

M/s Ngire..........for Appellant

Soita................for Respondent

Okumu.............Court Assistant