

**IN THE COURT OF APPEAL
AT KISUMU**

(CORAM: ASIKE MAKHANDIA, OMONDI & NYAMWEYA JJ.A.)

CRIMINAL APPEAL NO. E036 OF 2021

BETWEEN

BENARD ONYANGO OGANGO Alias BOSS.....APPELLANT

AND

REPUBLIC.....RESPONDENT

*(Being an Appeal against the Judgment of the High Court of
Kenya at Kisumu (Ochieng, J.) dated 17th December,
2020*

in

HCCRC No. 9 of 2017)

JUDGMENT OF THE

COURT

1. The background to this appeal stems from the point at which Benard Onyango Ogango, the appellant herein, was charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. The information stated that on 21st March, 2017 at Tura Sub Location, Kakola Location in Nyando sub- county within Kisumu County, jointly with another not before the Court, murdered James William Gor, deceased.

He pleaded not guilty to the information and in the ensuing trial, the prosecution

called a total of seventeen witnesses while his defence rested on his sole testimony. At the conclusion of the trial, he was convicted and sentenced to 30 years.

2. The appellant is aggrieved by the said verdict, and seeks to overturn both the conviction and sentence in this appeal, essentially faulting the trial Judge for failing to find that the offence was not proved to the required standards; convicting him without proper identification, failing to note the contradictions in the prosecution case and failing to consider the appellant's mitigation thus meting out a harsh sentence.
3. Briefly, the prosecution's case was that on the material day, Nancy Achieng Gor [Nancy], the deceased's wife who testified as PW1, was at Ahero Market selling vegetables. When she returned home from the market, she found her husband seated on a chair, bleeding from three cuts on his head, with his left hand swollen. The deceased told her that some neighbours had come to his home and assaulted him. When asked whether he could identify the assailants, the deceased named them as Boss and Omondi.

4. FBO¹, the deceased's 9-year-old son testified as PW2, and stated that on the said day, he was at home when Boss and Omondi arrived at their family house. Incidentally, Omondi is the son of the deceased. Upon arrival, Omondi and Boss questioned the deceased regarding the whereabouts of a radio; and they started assaulting the deceased. Upon being cross-examined, FBO stated that the appellant was well-known to him and that he had arrived at their house around 5:00 pm. FBO maintained that his father was assaulted by the appellant, who was well known to him.
5. Eight year old QA the deceased's daughter testifying as PW told the trial court that on the material day, she was asleep together with her brother FBO, when at about 7pm, they heard the sound of a door opening and realized that Omondi and the appellant had entered into the house. They were demanding that their deceased father gives them the radio. On being questioned about the radio in question, QA stated that they did not have a radio at their house.
6. Maureen Adhiambo Otieno[Maureen], PW4, told the court that she got home around 6:30 on the fateful day. While at her house, she

¹ Initials used to protect the identity of the minor

heard some noise and ran to the place where it was emanating from. When she arrived at the scene, she saw the appellant and Erick Omondi Ogango beating the deceased with sticks. She was able to identify the assailants as it was not yet dark, and she went close to where they were.

7. PW5, Brian Ouma Ngeso [Brian], a boda boda operator, ferried the appellant's wife to her home on the day in question. Upon arrival, they did not find anyone inside, as everyone was behind the house. When they saw their mother, the appellant's children rushed to her and told her that their father was being beaten by Clinton's father. When Brian went over to see what the children described, he saw the appellant continuing to beat the deceased. Brian stated that he tried to intervene, but the appellant threatened to beat him too. During cross-examination, Brian maintained that only two people were beating the deceased, while others stood, just watching. He further explained that when he arrived, it was not yet dark, and he only used the torch on his phone's light to see the injuries inflicted on the deceased. Brian was able to identify the appellant because they are close relatives, calling him brother.

8. Dr. Dickson Muchana Mwaludini, PW6, a Consultant Pathologist conducted the autopsy on the body of the deceased and noted three lacerations on the scalp, and extensive bruises and grazes on both upper limbs, on the front of the right chest and the back of the trunk. Internally, there was bleeding and bruising with pus formation in the right lung, an infected spleen, and a swollen brain. Dr Muchana formed the opinion that the cause of death was complications of acute lung injury secondary to blunt trauma due to assault.
9. PW7, Thomas Omondi Gor, the deceased's brother rushed home upon being informed that the deceased had been beaten. Upon arrival, the deceased told him that he had been beaten by Boss and Omondi.
10. CPL Naftaly Kamau the Investigating Officer testified that the deceased reported a case of assault on his person at the Ahero Police Station. The deceased cited his 2 assailants as Eric Omondi and Bernard Onyango. In his investigations, he noted that the assault on the deceased began at his house, where the 2 children of the deceased witnessed it. He further noted that there was a pool of blood 300 metres away from the home of the deceased at a

place which he described as being the home of Eric Omondi, and although his investigations led him to conclude that both Omondi and the appellant had assaulted the deceased, and whereas the appellant was then arrested the whereabouts of Omondi remained unknown.

11. After the close of the prosecution's case, the appellant was put to his defence, and he gave a sworn statement. It was his testimony that on the evening in question, he found the deceased drunk and shouting about being assaulted near Eric Omondi's home. As he knew the deceased, he escorted him home. The appellant further claimed that Maureen [PW4] disliked him due to personal conflicts, including his past drinking with her husband, a prior reprimand, and an incident where he prevented her from selling his father's cow. The appellant attributed the case to a grudge between him and Nancy, Maureen, and Bruce. The appellant denied killing the deceased.

12. During the virtual hearing of this appeal on 6th May 2025, learned counsel, Mr. Wangonda appeared for the appellant, while Mr. Okango, learned Assistant Director of Public Prosecutions

appeared for the respondent. Both counsel relied on their respective written submissions.

13. It was submitted for the appellant that the ingredients of murder were never proved; that there was no direct evidence connecting the appellant to the death of the deceased as Dr. Muchana opined that the cause of death was due to complications of an acute lung injury secondary to blunt trauma due to assault.
14. Regarding the contradictions, it is submitted that although PW2, PW3, PW4 and PW5 alleged to have witnessed the assault, their evidence contradicted these claims. It is pointed out that according to PW2, on the said date, her father was in Migori and that he was beaten at Omondi's house, but she did not witness the assault; that PW3 on her part testified that there was darkness at 7 pm, and she could not recall how she saw the appellant in the darkness. On the other hand, PW4 stated that he did not witness how the beating started but only appeared when the appellant was assisting the deceased to his home. Lastly, in his evidence, PW5 told the court that when he arrived at the deceased's home, he heard some commotion. He stated that he used the light from his mobile phone to

see the injuries the

deceased had sustained but did not identify the appellant in the dark.

15. On malice aforethought, it is submitted that the same was not proved as the appellant was never placed at the scene of the crime; further, the murder weapons were never produced to the court to assess the intention. It is submitted that in his evidence, PW4 told the court that the sticks used were the size of the arm, thus the assailants did not have the intention to cause the death of the deceased; and there was no evidence tendered to suggest that the appellant had malice aforethought.
16. Lastly, on sentence, the learned judge is faulted for failing to consider the appellant's mitigation, therefore passing a harsh and excessive sentence in the circumstances. The appellant urges the court to consider the mitigation on record and review the sentence or refer the matter back to the high court for resentencing.
17. In opposing the appeal, the respondent maintained that the prosecution case was proved to the required standard of beyond a reasonable doubt.; that the appellant was placed at the scene by PW2, PW3, PW4 and PW5 who witnessed the

assault. It is submitted that contrary to the appellant's allegations, there were

no contradictions in their testimonies; that PW2 saw the appellant who came and called out the deceased; went to the house and picked an iron sheet and struck the deceased with it. It is argued that the evidence was corroborated by PW3 who witnessed the deceased being called and assaulted. The respondent contends that the fact of the deceased being in Migori was clarified by PW2 that her dad had been in Migori but was beaten up at Omondi's home.

18. As regards identification, the respondent contends that the appellant was identified at the scene before darkness fell; and he admitted to being present, interacting with the deceased, and meeting (PW4); and therefore, he cannot claim that poor visibility hindered his identification. The respondent maintains that there was sufficient evidence showing the deceased succumbed to force trauma inflicted by the appellant and his accomplice, Omondi. As they acted together in a joint criminal enterprise, both are equally responsible under the doctrine of common intent, regardless of who caused the fatal injury.
19. On malice aforethought, the respondent contends that the injuries inflicted on the deceased were within the legal definition of malice

aforethought. Further, there is evidence on record that the appellant and his accomplice set out to 'discipline' the deceased for allegedly stealing a radio hence they had the intention to cause him grievous harm.

20. Lastly, on sentence, it is contended that sentencing is an exercise and an appellate court will ordinarily not interfere with that exercise unless it was exercised whimsically. In his determination, the learned judge considered the mitigation and the circumstances of the case and sentenced the appellant to 30 years imprisonment, which sentence is not excessive in the circumstances. The sentence cannot be reviewed as it falls outside the parameters of review of exercise of discretion, which parameters have not been demonstrated in this appeal.
21. This being a first appeal, this Court should be mindful of its duty as 1st appellate court. This duty was well articulated by this Court in **Dickson Mwangi Munene & Another vs. Republic [2014] KECA 774 (KLR)** where it was held that:

“This being a first appeal, this Court is obliged to re- evaluate the evidence on record to determine if the trial court’s decision was based on evidence and is legally sound. On matters of fact, as appellate court we have to bear in mind the caution that having not heard and seen the witnesses testify, the trial court was better

placed to assess their demeanor. We should therefore be slow to reverse the trial judge's finding of fact unless it is supported by the evidence on record. See Okeno v. Republic [1972] EA 32 and Mwangi v Republic 2002] 2 KLR 28."

22. Having carefully considered the grounds of appeal, the respective submissions and the record, the issues that fall for determination are;

- (i) Whether the Prosecution proved its case to the required standards;***
- (ii) Whether there were contradictions and in the prosecution witnesses' evidence and***
- (iii) Whether the learned Judge meted out a punitive, harsh, and excessive sentence.***

23. To prove the offence of murder, there are various elements of the charge that the prosecution ought to prove beyond a reasonable doubt to render a safe conviction for the offence of murder. Section 203 of the Penal Code provides for the ingredients of the charge of murder which are;

- (i) the fact and cause of death of the deceased person;***
- (ii) that the death of the deceased was as a result of an unlawful act or omission on the part of the accused person; and***
- (iii) that such unlawful act or omission was committed with malice aforethought.***

24. These ingredients were aptly stated by this court in the case of

Roba Galma Wario vs. Republic [2015] eKLR thus;

For the conviction of murder to be sustained, it is imperative to prove that the death of the deceased was caused by the appellant and that he had the required malice aforethought. Without malice aforethought, the appellant would be guilty of manslaughter, as it would mean the death of the deceased during the brawl was not intentional.”

25. In the instant case, the fact of the deceased’s death is not in dispute. This was proved by the oral testimony of Nancy, Thomas, CPL Kamau, the investigating officer and Dr. Dickson Muchana the pathologist who performed the autopsy and indicated in the post-mortem report that the cause of death was complications of an acute lung injury secondary to blunt trauma due to assault.
26. On identification, the appellant was placed at the scene of the crime by FBO, Maureen, Bruce and QA whose evidence was that they saw the appellant together with another beating the deceased. The incident happened at around 6 pm when there was sufficient natural light and the appellant was a person well known to the witnesses. Thomas and Nancy told the court that the deceased informed them that the appellant had assaulted him. When the deceased reported the assault at Ahero Police Station, he gave the name of the appellant as one of his assailants. This evidence ran through all the other witnesses

and was never

controverted by the appellant therefore, his identification was one of recognition as opposed to the identification of a stranger which is more satisfactory, reassuring and more reliable because it depends upon personal knowledge of the assailant in some form or another. See **Anjononi & Others vs. Republic [1980] KLR 59.**

27. In his defence, the appellant denied assaulting the deceased but confirmed that he was present at the scene; and that he assisted the deceased who was drunk and shouting about being assaulted by some people.
28. Lastly, the prosecution is required to prove that the death was caused with malice aforethought on the part of the appellant. Under Section 206 of the Penal Code malice aforethought is proved in the following terms:

"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.”

29. In **Rex vs. Tubere s/o Ochen [1945] 12 EACA 63**, the Court of Appeal for East Africa observed that:

“In determining the existence or non-existence of malice, one has to look at the facts proving the weapon used, the manner in which it is used, and part of the body injured.”

30. From the record of the injuries inflicted on the deceased, it is clear that the appellant intended to cause the death of or to cause grievous harm to the deceased. Dr. Willis Ochieng noted multiple injuries on the deceased's body which were inflicted on the deceased and concluded that complications of acute lung injury secondary to blunt trauma due to assault caused the death of the deceased.

31. In any event, the evidence from the witnesses' account was corroborated by the dying declarations made by the deceased to PW1 when upon her inquiry from the deceased as to what had happened, he informed her that some neighbours had come to his home and assaulted him, on further probing, the deceased gave their names as Boss and Omondi. This was

fortified by the

evidence of Corporal Naftali Kamau, PW8, who informed the trial court that at the time of making the report, the deceased named Eric Omondi and Bernard Onayngo as his assailants. From the foregoing, ***mens rea*** of the appellant was proved beyond a reasonable doubt, and the identity of the perpetrators was not in doubt, as confirmed by the witnesses as well as the deceased's dying declaration. The learned Judge did not err when he found that the injuries on the deceased were intended to cause him grievous harm, and therefore constituted malice aforethought.

32. Consequently, from the foregoing analysis, the prosecution proved all the ingredients of murder beyond a reasonable doubt, and therefore the conviction was properly founded.

33. On the alleged contradictions in the prosecution's case, this Court stated in the case of ***Philip Nzaka Watu vs. Republic***

[2016] eKLR that:

“However, it must be remembered that when it comes to human recollection, no two witnesses recall exactly the same thing to the minutest detail. Some discrepancies must be expected because human recollection is not infallible and no two people perceive the same phenomena exactly the same way. Indeed, as has been recognised in many decisions of this court, some inconsistency in evidence may signify veracity and honesty, just as

unusual uniformity may signal fabrication and coaching of witnesses. Ultimately,

whether discrepancies in evidence render it believable or otherwise must turn on the circumstances of each case and the nature and extent of the discrepancies and inconsistencies in question”.

34. A re-evaluation of the evidence on record shows that no contradictions or discrepancies go to the root of the prosecution’s case against the appellant. In as much as there were discrepancies, for instance, the weapons used in assaulting the deceased and whether the deceased was in Migori at the time of the assault, the discrepancies are minor and incapable of vitiating the prosecution’s evidence, particularly on the ingredients of the offence.
35. On sentence, the appellant submitted that the sentence imposed was harsh and excessive in the circumstances. The appellant attributes it to the fact that the trial judge failed to consider his plea in mitigation before meting out the sentence. However, a perusal of the record indicates that the mitigation was considered when he stated thus:

“The accused is 34 years old and is married. Their union has begotten 3 children aged 6,8 and 9 years, respectively. As the wife of the accused is unemployed and because he was the sole breadwinner, the accused asked the court to be lenient when sentencing him. I have taken into account the fact that the accused was

a first offender. I have also considered the mitigating factors cited by the accused.

**““
Having taken into account the circumstances in which the offence was committed and the mitigation herein, I now sentence the accused to thirty 30 years imprisonment”**

36. The maximum sentence for the offence of murder is death. The learned judge, in his discretion, sentenced the appellant to 30 years' imprisonment.

37. This Court in the case of **Bernard Kimani Gacheru vs. R.** [2002] eKLR held that:

“It is now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with the sentence unless that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account, some wrong material, or acted on a wrong principle. Even if, the Appellate Court feels that the sentence is heavy and that the Appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless any one of the matters already stated is shown to exist...”

38. In the instant appeal, the appellant has not faulted the learned Judge for failing to consider some material factors, or taking into account irrelevant factors, or acting on wrong principles.

In his determination, the learned judge considered all the relevant facts as such, applied the appropriate legal principles and the law; we find no basis whatsoever for interfering with the sentence. Ultimately, the appeal lacks merit and is dismissed in its entirety.

Dated and delivered at Kisumu this 3rd day of October 2025.

ASIKE-MAKHANDIA

.....
JUDGE OF APPEAL

H. A. OMONDI

.....
JUDGE OF APPEAL

P. NYAMWEYA

.....
JUDGE OF APPEAL

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

DEPUTY REGISTRAR