



**Karaya & 2 others v Republic (Criminal Appeal 333 of 2019)
[2025] KECA 1771 (KLR) (24 October 2025) (Judgment)**

Neutral citation: [2025] KECA 1771 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CRIMINAL APPEAL 333 OF 2019
MSA MAKHANDIA, HA OMONDI & LA ACHODE, JJA
OCTOBER 24, 2025**

BETWEEN

JAMES OKARA KARAYA 1ST APPELLANT

MERCY MORAA OKARA 2ND APPELLANT

MELLEN KWAMBOKA GISEMBI 3RD APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal from the judgment of the High Court of Kenya at
Nyamira (E.N. Maina, J.) dated 29th July, 2019 in HCCRA No. 14 of 2018)*

JUDGMENT

1. The appellants James Okara Karaya, Mercy Moraa Okara and Mellen Kwamboka Gisemba were jointly charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. They were alleged to have murdered Zablon Mose Bosire (deceased) on the 4th October 2018 at Rikenye village, Masaba North Sub-County in Nyamira County.
2. The appellants pleaded not guilty and a fully-fledged hearing ensued. At the conclusion of the trial, the learned judge convicted the appellants and sentenced them to 30 years imprisonment each. Dissatisfied, the appellant preferred the present appeal against the whole decision.
3. In a bid to prove their case against the appellants, the prosecution called a total of four (4) witnesses. Briefly, the facts of the prosecution case were that on 4th October 2018, at around 1:00 p.m., the deceased and his nephew, Edward Ogongo Bosire (Edward), went to the home of the 1st appellant, who brewed chang'aa, to drink. At the house, they met the 1st appellant's wife (the 2nd appellant), who served them alcohol. Since it was hot outside, they chose to sit inside, although other patrons were seated outside.



4. After a short while, the 2nd appellant demanded payment and ignored their request for more time. When she insisted, the deceased handed her a Kshs. 500/- note. As they waited for their change, the 1st appellant returned home. Standing at the door, he asked the 2nd appellant for food, but she replied that she had not eaten either and continued with her chores. This response allegedly angered the 1st appellant, who accused her of entertaining men in the house while neglecting him. Armed with a slasher, he immediately attacked Edward (PW1) and the deceased. He struck Edward on the legs, back, and hands, but according to Edward, the deceased bore the heavier assault. The 1st appellant hit the deceased repeatedly all over his body, after which the 2nd appellant picked up a wooden plank and struck him on the legs.
5. Seeing this violence, the customers sitting outside fled and hid in a nearby maize field. The 3rd appellant, the mother of the 1st appellant, allegedly came from her house and joined the confrontation. She screamed, accusing Edward and the deceased of destroying her family, before kicking the deceased on the back. A further blow from the 1st appellant forced Edward out of the house, but the deceased remained inside. Witnessing Edward being attacked, [PW2] Francis Ongaro Nyakina (Francis) and Jackson Omosa intervened, rescuing him. They escorted Edward to safety before leaving him to walk the remainder of the way to his home.
6. Paul Bosire Gwaro [Paul] told the court that Edward had injuries on the face and back; and that he was drunk. After escorting Edward, they went back to the house of the 1st appellant and this time found villagers who told them that Edward had been in the house with the deceased. Immediately after that, they saw the deceased being carried by three of his brothers, who took him to the hospital. Paul stated that the deceased had injuries on the legs one of which was almost decapitating. Later, at about 8 pm, while in his home about one kilometre away, he heard people at the deceased's home wailing and shouting that the deceased had died. Paul stated that he did not personally see the 1st appellant at his home at the point when the deceased's brothers came out carrying the deceased.
7. Paul further testified that when word reached him that the deceased had been beaten, he went and found him lying on his belly. He stated that the deceased was in a lot of pain, and when he inquired what had happened, the deceased told him that the accused persons had assaulted him. He stated that the deceased looked weak, his left cheek was swollen, his left leg broken and he had a wound on the nape of his neck which was bleeding. He also had bruises on his back and he appeared to have been dragged along some surface as his shirt was stained and the deceased succumbed on the way to the hospital.
8. PC Peter Kariuki conducted the investigations and charged the appellants with the murder of the deceased. He further produced a post-mortem report in respect of the deceased. The autopsy was conducted at Gucha Memorial Hospital Mortuary by Dr. Morebu, who formed the opinion that the cause of death was severe head injury secondary to blunt force.
9. Placed on their defence, the appellants gave unsworn testimony, denying their involvement. The 1st appellant claimed he was at work and only went to the police after his wife reported being attacked, but they were later implicated and arrested despite contradictions in witness accounts. The 2nd appellant stated that she found a stranger in her house, raised the alarm, and later went to the police with her husband, where they were detained after learning the man had died. The 3rd appellant said she returned home in the evening, found only the children, and was later arrested when police linked the incident to her home, although she denied any role.
10. In support of the appeal, the appellants contend that the ingredients of the offence of murder were not established. Regarding the cause of death, it was submitted that the post-mortem report indicated that the deceased died as a result of a road traffic accident; that to sustain the murder charge, the prosecution



- ought to have proved a causal link between the injuries sustained by the deceased and an act or omission on the appellants part. It is contended that the doctor who conducted the post-mortem on the deceased was not called to testify; and that such failure was fatal to the prosecution's case.
11. Whilst reiterating that the cause of death was a road traffic accident, the appellants point out that the other injuries noted on the body were multiple linear lacerations on the upper and lower limbs and on the trunk; with no fractures contrary to PW3's evidence that the left leg was broken.
 12. Regarding the dying declaration made to PW3, it is contended that the same ought to be corroborated, as it was made in the absence of the appellant. Further, since PW1 was the only witness to the said attack, he was drunk as such his state of mind was affected by the drink at the time and he cannot be said to be a credible witness to provide corroboration to a dying declaration.
 13. The appellants complain that in her determination, the learned judge disregarded their evidence and defence on the grounds that it did not have much probative value as compared to the prosecution evidence. Relying on the case of *R vs. Hale* and *R vs Coughlan* [1977] 64, the appellants contended their testimony ought not to have been brushed aside in its totality. In failing to consider the evidence, the trial court is faulted saying it led to a miscarriage of justice, bearing in mind that unsworn testimony is also valid evidence.
 14. In opposing the appeal, the respondent filed written submissions dated 16th January 2025 in which it contended that the 3 ingredients of murder were proved. The fact that death occurred was confirmed by the post-mortem report produced which corroborated the eyewitnesses' evidence that the cause of death was due to severe head injury secondary to blunt force to the head.
 15. The postmortem confirmed the deceased had multiple injuries, not limited to the head, consistent with PW1's testimony that he was beaten all over. The suggestion that the injuries were from a road accident was unsupported, as the report made no such finding. The defence did not object to or question the report indicating acceptance of its contents. The death of the deceased was therefore not disputed and the first element of murder that death occurred was proved.
 16. As to who caused the death of the deceased, PW1 who was with the deceased, testified as an eyewitness that the appellants jointly assaulted the deceased at the 1st and 2nd appellants' home, thereby causing his death.
 17. On malice aforethought, the respondent contends that the same was proved as all the appellants beat the deceased all over the body and could not stop beating him despite him being helpless which is a confirmation that they were determined to harm and murder the deceased yet the deceased did not even try to defend himself.
 18. The claim that the dying declaration lacked corroboration is unfounded, as PW1 witnessed the assault and PW2 and PW3 confirmed the deceased's injuries. PW1's credibility was not diminished by allegations of drunkenness since he gave a coherent account consistent with other witnesses. The deceased's dying declaration also implicated the appellants. Thus, this ground of appeal fails.
 19. Lastly, the appellants faulted the learned judge for disregarding their defence. This is not true as in the judgment, their accounts were duly considered. Their flight to the police station reflected a guilty mind pricked by their actions on the material day; and police investigations later established that they were responsible for the deceased's death, leading to their prosecution.



20. 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 *Okeno vs. Republic* [1972] EA 32, where the Court stated 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 v. R.*, [1957] E. A. 336) and to the appellate court's own decision on the evidence. The first appellate court must weigh conflicting evidence and draw its own conclusions. (*Shantilal M. Ruwala v. R.*, [1957] E.A. 570). It is not the function of a 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. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see *Peters v. Sunday Post*, [1958] E. A. 424”

21. Having carefully considered the record of appeal, submissions by counsel, the Court's mandate and the law, the main issue that falls for determination is whether the prosecution proved the ingredients of the offence of murder beyond a reasonable doubt against the appellant.

22. The appellant was charged with murder under Section 203 of the Penal Code. The section provides that:

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

23. To sustain a charge under the said provision therefore, the prosecution has to prove three things. First, the death of the deceased, and cause of death; second, that the death of the deceased was a result of an unlawful act or omission on the part of the accused person; and third, that the unlawful act or omission was committed with malice aforethought. (See *Roba Galma Wario vs. Republic* [2015] eKLR).

24. It is not in dispute that the deceased died, as several prosecution witnesses testified that the deceased died while on the way to hospital. This evidence was corroborated by the post-mortem report by Dr. Morebu who opined the cause of death to be severe head injury secondary to blunt force on the head.

25. The next question is whether the death of the deceased occurred as a result of the unlawful act or omission of the appellants and whether there was malice aforethought.

26. Edward told the court that on the fateful day at around 1:00 pm, he went with the deceased to the 1st and 2nd appellant's house to partake of changaa, where the 2nd appellant served them. While waiting for change after paying, the 1st appellant arrived, quarreled with his wife, and, armed with a slasher, attacked both Edward and the deceased, the deceased receiving more severe blows. The 2nd appellant also struck the deceased with a wooden plank, while the 3rd appellant joined in by kicking him and accusing the two of destroying her family. Edward was eventually forced out of the house, but the deceased remained inside.

27. The appellant's recognition by Edward remains uncontested them being well known to each other. This was a case of recognition as opposed to identification of a stranger. On the issue of recognition, *Madan JA. in Anjononi and Others vs Republic* [1980] KLR had this to say;

“.... This, however, was a case of recognition, not identification, of the assailants; recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of



a stranger because it depends upon the personal knowledge of the assailant in some form or other.”

28. It is evident that the appellants were not strangers to Edward.

Accordingly, the learned Judge was not at fault in concluding that the appellants were positively identified/recognized as the persons responsible for the fatal injuries inflicted on the deceased when she stated that:

“I have evaluated the evidence before me carefully. I have also considered Counsel’s arguments both at the close of the prosecution’s case and in closing and I am satisfied there is proof that the accused persons killed the deceased. The offence was witnessed by Edward (Pw1) who had accompanied the deceased to drink chang’aa in the house of the 1st and 2nd accused. Edward (Pw1) vividly narrated what transpired in the house from the time they went there to the time a blow he got from the 1st accused propelled him outside the house where he was rescued and escorted home by PW2. The incident occurred in broad daylight and Edward (Pw1) knew the accused persons well enough and there was therefore no possibility that he was mistaken. The accused persons themselves admitted that something had happened in their house that day. The 2nd accused claimed that she found a stranger in her house and that when she raised the alarm the stranger was apprehended. They seemed to suggest that the stranger was then lynched in their home. However, this court believed the testimony of Edward. It was corroborated in all material particulars by Francis Ongaro Nyakina (PW2). This witness testified that he was passing near the house of the accused on his way to the shop when he saw the 1st accused beating Edward (Pw1) with a slasher. He stated that the 1st accused struck Edward (PW1) on the back and that he and Jackson Omosa went and stopped the 1st accused and escorted PW1 away. PW2 stated that it was at 5 pm so it was still daytime and again, I am satisfied that he could not have been mistaken as he knew the home and the 1st accused’s family well. Pw2 also confirmed that he saw the deceased being carried out of the home of the accused persons. He stated that he saw that the deceased had injuries. It was during the day, and he could see properly. I believed him and I am satisfied that his evidence offers crucial corroboration for that of Edward (PW1).”

29. The prosecution having established the identity of the appellants as the people responsible for the fatal injuries inflicted on the deceased, the remaining ingredient to be determined is whether the appellants had malice aforethought when they killed the deceased.

30. In this regard, the crucial evidence was that of Edward. He stated that he was in the 1st and 2nd appellant’s house with the deceased when the 1st appellant came and a quarrel between the 1st and 2nd appellant ensued. The 1st appellant then attacked Edward and the deceased with a slasher he was holding. Edward was hit on the legs, back and hands while the deceased was hit all over the body by the 1st appellant before the 2nd appellant took a plank of wood and hit him on the legs, while the 3rd appellant kicked the deceased on the back.

31. In Republic vs. Tumbe S/O Ochen (1945) 12 EACA 63, the court outlined several factors essential in determining malice aforethought, including the nature of the weapon used, the manner in which it was applied, the specific body part targeted, and the conduct of the accused before and after the incident. In the present case, the appellant wielded a knife, a dangerous weapon, and deliberately inflicted a single penetrating injury to the abdomen, of the deceased, a critical part of the body containing vital organs. The circumstances indicate that the act was neither accidental nor impulsive but rather intentional and premeditated. Given the vicious nature of the injuries that were inflicted on the deceased causing him



severe injuries to the body and head, connotes malice aforethought. It is evident that the appellants intended to cause either grievous harm or death to the deceased and therefore malice aforethought was properly inferred under Section 206(a) and (b) of the Penal Code.

32. As regards the failure to call Dr. Morebu who conducted the autopsy, the duty of the prosecution when calling witnesses is set out in section 143 of the *Evidence Act*, which specifies that no particular number of witnesses is required to prove a fact. The Court of Appeal in *Julius Kalewa Mutunga vs. Republic* [2006] eKLR stated as follows:

“...As a general principle of law, whether a witness should be called by the prosecution is a matter within their discretion and an appeal court will not interfere with the exercise of that discretion unless, for example, it is shown that the prosecution was influenced by some oblique motive.”

33. The evidence tendered in the trial court by the prosecution witnesses was sufficient to prove that the appellants assaulted the deceased on the day in question. Indeed, as stated in the case of *Nganga vs. Republic* [1981] KLR 483, the prosecution is not obligated to call every possible witness, provided that the evidence presented is sufficient to sustain a conviction. In addition, there is nothing to attribute the failure to call the alleged witnesses to an ulterior motive by the prosecution. Therefore, whether or not Dr. Morebu was called to testify would not have in any way displaced the prosecution’s case as the post mortem was produced by consent of the appellant’s counsel on record.

34. Upon a careful evaluation of the evidence and the appellants’ defence, the facts are wholly inconsistent with their innocence and admit to no other reasonable hypothesis than that of their guilt. The learned trial judge, therefore, cannot be faulted for so holding either in law or fact. The upshot is that appeal lacks merit and is dismissed in its entirety

DATED AND DELIVERED AT KISUMU THIS 24TH DAY OF OCTOBER, 2025.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

H. A. OMONDI

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JUDGE OF APPEAL

L. ACHODE

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR

