



**Mohamed v Republic (Criminal Appeal 47 of 2022)  
[2025] KECA 1702 (KLR) (24 October 2025) (Judgment)**

Neutral citation: [2025] KECA 1702 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT MALINDI  
CRIMINAL APPEAL 47 OF 2022  
AK MURGOR, SG KAIRU & KI LAIBUTA, JJA  
OCTOBER 24, 2025**

**BETWEEN**

**SALIM MOHAMED ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal from the Judgment of the High Court of Kenya at Malindi (Chitembwe, J.) dated 25th July 2018 in HC. CRC. No. 4 of 2015)*

**JUDGMENT**

1. The appellant, Salim Mohamed, was charged 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 the night of 17<sup>th</sup> January 2015 at Sikomani area along Mpeketoni-Uziwa road in Lamu West Sub-County within Lamu County, he murdered Margaret Njeri Njuguna. He was tried before the High Court at Malindi (Chitembwe, J.). In a judgment dated 25<sup>th</sup> July 2018 and delivered on 4<sup>th</sup> October 2018, he was convicted for the lesser offence of manslaughter and subsequently sentenced to imprisonment for a term of 12 years.
2. The factual background and the evidence led before the trial court was that, on 17<sup>th</sup> January 2015 at about 6.00 pm, George Migwi Wachira (PW1), a boda boda (taxi) operator at Mpeketoni, Lamu, received a call from Margaret Njeri Njuguna, the deceased, who requested him to pick her up from near Shepherd Academy and take her home to Sikomani. He did so and, on the way to her home, they came across police officers in uniform. In the words of PW1:

“I saw two police officers ahead. One of them was holding a gun and he swung it towards us. The gun hit the deceased and said: “George nukufa”. The police officer held the gun on the slender side and swung it. It is the side with the magazine which hit the deceased. It was



now about 6:00 PM and it was still bright. I could see properly. I did not know the type of the gun... The deceased fell down.”

3. Fearing for his life, PW1 did not stop his motorcycle and sped off, but surrendered himself at a police station days later.

4. The incident was witnessed by another boda boda rider, Paul Maina Chege (PW4), who encountered the same police officers while on his way taking Regina Wanjiru Kimani (PW2) and her daughter Lucy Njeri Kimani (PW3) home at Uzima. The police officers stopped him (PW4) after which his pillion passengers PW2 and PW3 disembarked. The police officer arrested and detained PW4 in the police vehicle that was parked nearby. After disembarking from PW4's motorcycle, PW2 heard another motorcycle approach. PW2 narrated that:

“...one police officer swung his gun. The cyclist dodged and it hit the deceased. The police officer held the muzzle of the gun and swung it. The rider stooped low and dodged. The gun hit the deceased and she fell down.”

5. PW3, on her part, stated that the rider of the second motorcycle defied an order to stop and that:

“...one officer swung his gun and it hit the deceased. The officer held the gun on the muzzle side and swung it. The deceased was hit and she fell down. We walked away.”

6. Police Constable Alex Njehu Wairimu (PW10) and Police Constable Kelvin Sikolia (PW14) were at the material time based at Mpeketoni Police Station. On 17<sup>th</sup> January 2015, they were on patrol along Uzima-Mpeketoni Road with other police officers, including the appellant, having left the police station at about 6.10 pm. They stopped at a T-junction of the road. They saw a motorcycle carrying two pillion passengers (PW2 and PW3) approaching. They flagged it down. The motorcyclist (PW4) complied and stopped. PW2 and PW3 disembarked and were allowed to proceed on their journey on foot. PW4 was detained. Shortly thereafter, another motorcycle (driven by PW1) carrying a pillion passenger (the deceased) approached. They attempted to stop it, but the motorcyclist, PW1, defied the order and sped off. The appellant, who was with PW14, were slightly ahead on the road, also tried to stop PW1. PW10 explained:

“Salim went and stopped at the middle of the road. I looked at the motorcycle after it passed us.

Salim tried to intercept the motorcycle so that it could stop. He tried to stop it with his hand but the cyclist increased his speed. P.C. Salim noticed that the cyclist would hit him. P.C. Salim tried to move backwards while holding his gun on the muzzle...

...P.C. Salim left the rifle extended on the road while holding it. The rider of the motorcycle saw the rifle and tried to evade it. I saw the pillion passenger at an incline position. The legs were on one side of the motorcycle. I had seen the passenger when the cyclist sped passed me and PC Konzo. P.C. Salim was holding the gun with both hand with the muzzle and the back (sic). P.C. Salim standing on the left of the cyclist. I then saw the pillion passenger falling down and she rolled several times. I did not see the gun hitting the deceased. I cannot tell if the gun hit the deceased. The...passenger fell and roll (sic) and the cyclist accelerated and sped off.”

7. PW10 went on to explain that, after the deceased fell, the appellant run to check on her and to assist the deceased.



8. Police Constable Kelvin Sikolia (PW14) explained that, at the material time, he was based at Mpeketoni Police Station and was on patrol on 17<sup>th</sup> January 2015 alongside other officers “maintaining curfew order for Mpeketoni which orders were for 6.30 pm to 6.30 am.” His testimony substantially echoed that of PW10. He explained the attempt made by the appellant to stop the second motorcyclist (PW1). He narrated:

“The cyclist evaded and moved from the left side where the police were to the right side. Police constable Salim who was also at the Kiosk moved to the road. The cyclist saw that there were other officers ahead of him and accelerated his speed. The cyclist was carrying a pillion passenger whose legs were facing sideways. The passenger was a lady. The cyclist tried to evade police constable Salim by moving to the right. Salim held his rifle on the muzzle side. He swung the rifle while holding the rifle. The cyclist evaded the part of the rifle that was swinging. The cyclist opted to bend his head. The passenger could not see the rifle and it hit her on the head. The passenger fell down and rolled severally. She landed on the grass besides the road”.

9. After the deceased fell off the motorcycle, the police officers tried to assist her, and to administer first aid, and then took her to Mpeketoni Sub-District Hospital. While at the hospital, the deceased's phone, which the police officers had picked up at the scene of the accident, rung. The police officers answered the call. It turned out that the caller was Miriam Njeri Irai (PW5), the mother of the deceased. After explaining to her what had transpired, the officers proceeded to the home of PW5, picked her up and took her to the hospital. There, PW5 found her daughter (the deceased) “was bleeding on the head and was not talking.” From there, the deceased was taken to Coast General Hospital and then to Pandya Hospital.
10. At Pandya Hospital, the deceased was treated by Dr. Lawrence Gikonyo Gathua (PW16), who observed that the deceased had “a very severe head injury”. PW16 explained that “the brain material and blood was oozing out” and that the deceased “could not talk”. He stated that he performed an immediate operation on the deceased and called in Dr. Gregory Kaluki Mulunga (PW12) a neurosurgeon to assist in operating on the deceased to seal the exposed brain. The deceased remained hospitalized for 40 days and died in hospital on 28<sup>th</sup> February 2015.
11. Dr. Ngali Mbuko (PW11), a pathologist based at Coast General Hospital, Mombasa, performed the postmortem on 7<sup>th</sup> March 2015. Thomas Irai (PW6) and Ann Njoki Njuguna (PW7), the deceased's cousin and sister, respectively, identified the body of the deceased for purposes of the postmortem. PW11 formed the opinion that “the cause of death was blunt injury to the head that led to traumatic brain damage which led to infection and swelling of the brain leading to death.” He produced photographs that he took as well as his postmortem report as exhibits before the trial court.
12. Other witnesses who testified for the prosecution included Sergeant Paul Maina (PW9), who was at the time based at Mpeketoni Police Station. He oversaw issuing firearms to the police officers. He testified that the appellant was issued with a rifle on 11<sup>th</sup> January 2015, Serial No. 011893, and that the appellant had it until 27<sup>th</sup> January 2015. Police Constable Ernest Menjiro (PW8), also of Mpeketoni Police Station, on instructions from PW9 and on direction from the appellant, collected the said rifle from the appellant's house alongside the ammunition and took the same to PW9.
13. Senior Superintendent of Police Johnstone Musyoki Mwangela (PW13), a ballistics expert with Criminal Investigation Department, produced a ballistics report on behalf of its author, Mr. Mwandawiro, confirming that the rifle used by the appellant was indeed a G3 rifle in good general and mechanical condition.



14. On 12<sup>th</sup> March 2015, at about 5.00 pm, the appellant accompanied by his advocate surrendered himself to the police. Corporal Kariuki Njeru (PW15), who was at the time stationed at C.I.D. Office Malindi arrested him. He was later taken by a police officer from Lamu Police Station.
15. Corporal John Wambua (PW17), a scene of crime officer based at C.I.D office Lamu, visited the scene of accident on 19<sup>th</sup> January 2015 in the company of police officers from CID Mpeketoni, took photographs of the scene. He also visited Pandya Hospital Mortuary Mombasa where the postmortem was performed and took photographs of the deceased. He produced a booklet with the photographs as an exhibit.
16. The Investigating Officer, Police Constable Oliver Nabonwe (PW18) was based at DCI Office at Mpeketoni as an investigator between July 2014 and April 2016; he visited the scene of the accident; drew sketch plans; interviewed witnesses; and attended the postmortem. Based on his investigations, he concluded that the appellant acted unprofessionally and recklessly in blocking the motorcyclist with his gun, and that he was responsible for the death of the deceased. Thereafter, the appellant was charged with the offence of murder.
17. Put to his defence, the appellant in his sworn testimony stated that he is a police officer who at the material time was based at Mpeketoni Police Station; that, on 17<sup>th</sup> January 2015 at about 6.30 pm, he was among nine police officers who left the station to enforce curfew orders; that he was on the road when he heard his colleagues shouting towards a motorcyclist who had defied orders to stop; and that the motorcyclist went towards him. The appellant explained that:

“He came towards me in a zig zag manner. I got shocked. There was tension at Mpeketoni. That time due to the Al-Shabaab attack. As a police officer I decided to take action. I had my rifle at the back hanging on a sling. I timed the motorcyclist with a view to intercept and arrest him using reasonable force. I pulled my rifle from the back. The rifle was hanging facing downwards. I could not wait for the cyclist to pass and shot at him. I decided to change the rifle so that I hit the cyclist using the butt of the rifle. I was following the rider and he was coming towards my direction. I jumped backwards. The cyclist swerved towards the right side. It was too late as my rifle butt was hit by the left hand side of the steering of the motorcycle. The rifle fell about four (4) meters away. The cyclist had a passenger who was seated facing the left hand side of the motorcycle. Due to the swerve, the passenger lost balance and she fell about 15 meters from where I was. She clung to the rider but she did not make it. She fell down by the head. The cyclist was at a very high speed. She rolled towards the right hand side of the road. I picked my rifle. I went to check on the passenger. It was a lady. She was lying on the grass. She had injuries on the left side of the head and knees. She was bleeding profusely. She was unconscious. I administered first aid on her.”
18. He went on to explain that his colleagues joined him and they took the deceased to Mpeketoni District Hospital, and that he thereafter returned to the police station with his colleagues; that a complaint was then made at the police station by the area MCA complaining that “a police officer had acted unprofessionally the day before”; that later, accompanied by his advocate, he surrendered himself to the police. The appellant maintained that his extended rifle was hit by the steering of the motorcycle “and did not hit anyone.”
19. Upon reviewing the evidence, the learned trial judge framed the question whether the prosecution proved it#s against the appellant beyond reasonable doubt. In that regard, the judge found that the appellant swung the rifle, but that, whether or not the appellant did so, the circumstances did not call for the use of firearm, a lethal weapon, as the appellant and his colleagues were not facing any immediate



- danger. The judge found as a fact that the appellant swung his gun and hit the deceased, and that the deceased could not have died had the appellant not used his rifle.
20. The learned judge went on to state that “the main ingredient of murder is malice aforethought” and, in that regard, found that “there was no intention to cause the death or to commit a felony on the part of the [appellant]” and, citing Section 202 of the Penal Code, stated that the appellant “is guilty of the offence of manslaughter” as the “prosecution evidence does not establish any malice aforethought on the part of the [appellant].”
  21. The appellant has challenged the judgment on grounds that the trial judge failed to consider that malice aforethought was not proved beyond reasonable doubt; that the judge also failed to consider that there was no formal document produced to prove the cause of death; that his defense, which was not challenged by the prosecution, was not considered; and that the prosecution failed to prove its case to the required standard.
  22. Counsel for the appellant submitted that, despite the prosecution witnesses testifying within a period of two years from the date of the incident, their testimonies were not consistent; that malice aforethought was not proved beyond reasonable doubt as the ingredients thereof under Section 206 of the Penal Code were not present; that the incident occurred during the season of curfews that were running from 6:00 PM to 6:00 AM and the appellant, a police officer who was on patrol together with his colleagues, was effecting an arrest when the deceased fell off the motorcycle and sustained injuries. It was submitted that the appellant had neither the knowledge nor the intent of causing the death of the deceased.
  23. It was submitted further that the identification evidence was not safe to form the basis of conviction; that it was dark when the incident occurred, and that the appellant was not identified as the person who hit the deceased causing her death; that no document was produced to prove the cause of death, and that neither was evidence produced to show that the appellant was the person responsible for the death of the deceased.
  24. Counsel urged that the trial court did not consider the evidence tendered by PW11 showing that the deceased sustained injuries because of falling to the ground; and that the appellant’s defence that he was only effecting an arrest as part of his duties was not considered.
  25. Counsel concluded by urging that the prosecution failed to prove its case beyond reasonable doubt and, further, that the period the appellant was in remand custody was not considered in sentencing him to 12 years’ imprisonment.
  26. Counsel for the respondent submitted that, for an accused person to be convicted for the offence of murder under Section 203 of the Penal Code, the prosecution must prove, beyond reasonable doubt: the death of the deceased; that the death was through unlawful acts or omission of the accused; and that the accused had malice aforethought. That, in the present case, the appellant was convicted for the offence of manslaughter, and that malice aforethought need not have been proved.
  27. As regards the death of the deceased, counsel submitted that it was established that the deceased sustained fatal head injury; that PW11 produced the post mortem report based on which it was established that the deceased died due to a blunt injury to the head leading to brain damage leading to infection and swelling of the brain leading to death; that regarding how the deceased sustained the head injury, the testimonies of PW1, PW2, PW3, PW10, PW14, PW18, as well as the appellant’s own testimony, established to the required standard that the appellant hit the deceased on the head with the butt of his G3 rifle before she fell onto the ground; that, on the face of that evidence, the appellant’s version of events as to how the deceased sustained the fatal injuries was fabricated; and that the High



Court was right in its finding that “causation of the deceased injury was a result of the appellant using his firearm unlawfully.”

28. We have considered the appeal and the submissions. The duty of the Court on a first appeal is established. As the Court stated in *Mark Oiruri Mose v Republic* [2013] KECA 67 (KLR):

It has been said over and over again that the first appellate court has the duty to revisit the evidence tendered before the trial court, afresh analyse it, evaluate it and come to its own independent conclusion on the matter but always bearing in mind that the trial court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and to give allowance for that. The well known case of *Okeno vs Republic* (1977 EA 32 which sets out that principle has been referred to in several decisions of this Court and of the High Court.”

29. With those principles in mind, the appellant has complained that his defence was not considered. In that regard, the learned trial judge correctly noted in the judgment that there were two versions of how the incident occurred. The first version, the prosecution version, being that the appellant held the rifle on the muzzle and swung it. PW1, at whom it was aimed, saw the appellant swing the rifle at him, and bent down, missed him and it got his passenger, the deceased who, on impact, exclaimed to PW1 “George Nakufa.” The second version of events was according to the appellant as he advanced it in his defence, which is not radically different in material respects to that of the prosecution, was that he extended his rifle on the butt side aiming to stop the motorcyclist (PW1), but that the rifle „was hit by the motorcycle and it fell.#

30. The point of departure between the two versions is that there was no contact between the rifle and the deceased, but rather that the rifle made impact with the motorcycle. The appellant maintained that the deceased lost balance, fell and injured herself as a result of the motorcycle swerving. He stated that he changed the position of his rifle:

“...so that I hit the cyclist using the butt of the rifle. I was following the rider and he was coming towards my direction. I jumped backwards. The cyclist swerved towards the right side. It was too late as my rifle butt was hit by the left hand side of the steering of the motorcycle. The rifle fell about four (4) meters away. The cyclist had a passenger who was seated facing the left hand side of the motorcycle. Due to the swerve, the passenger lost balance and she fell about 15 meters from where I was. She clung to the rider but she did not make it. She fell down by the head. The cyclist was at a very high speed. She rolled towards the right hand side of the road. I picked my rifle.”

31. The learned trial judge, who had the benefit of observing the witnesses as they testified, considered and analyzed the evidence. The judge stated that, in light of the two versions of events, he had to “consider what was the cause of the deceased#s fall from the motorbike was it the effect of the impact from the gun or was it the result of the swerving or acceleration of the motorbike”. The judge expressed that, whether the rifle was swung or not, the appellant used his rifle when there was absolutely no reason to use it, and on the evidence found “that the [appellant] swung his gun and hit the deceased” and that “the deceased could not have died had the [appellant] not used his rifle” and that “the cause of death is the use of the rifle by the [appellant]”.

32. Based on the foregoing, it is evident that the trial judge did consider the appellant#s defence, and the complaint that his defence was not considered has no merit.



33. There is then the complaint by the appellant that the trial judge failed to consider that malice aforethought was not proved beyond reasonable doubt. With respect, this complaint has no foundation. Having found as a fact that the appellant swung his gun and hit the deceased, and that he was reckless and negligent in doing so, the learned judge went on to state that “the main ingredient of murder is malice aforethought” before concluding that the “prosecution evidence does not establish any malice aforethought on the part of the [appellant].” The judge found that “there was no intention to cause the death or to commit a felony on the part of the [appellant]” and, citing Section 202 of the Penal Code, stated that the appellant “is guilty of the offence of manslaughter.” There is therefore no merit at all in the complaint that the judge failed to consider that malice aforethought was not proved beyond reasonable doubt.
34. The next complaint by the appellant is that the judge failed to consider that there was no formal document produced to prove the cause of death. For a start, the learned judge held, correctly in our view, that “the deceased did not simply fall from a moving motorcycle” but, rather, that “she fell after the [appellant] used his gun” which he extended to the road and that the cause of death was attributed to his action.
35. As already stated, Dr. Gathua (PW16) and Dr. Mulunga (PW12) testified on the nature of the head injuries the deceased sustained and the treatment they administered on the deceased in hospital before her demise. They produced their reports as exhibits. Similarly, Dr. Mbuko (PW11), the pathologist, produced the postmortem report indicating that the deceased had a fractured skull and that the cause of death was a “blunt injury to the head that led to traumatic brain damage which led to infection and swelling of the brain leading to death.”
36. Therefore, the complaint that there was no formal document produced to prove the cause of death lacks merit.
37. On identification, there is no question, and the appellant readily accepted that he was at the scene of the incident and swung his rifle, albeit he claims it hit the motorcycle and did not hit the deceased. There is no basis for his complaint that he was not positively identified.
38. As regards the sentence, in the case of Bernard Kimani Gacheru vs. Republic [2002] KECA 94 (KLR), the Court expressed 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 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, anyone of the matters already stated is shown to exist.

The position was stated succinctly by the Court of Appeal for East Africa in the case of Ogola S O Owoura Vs Reginum (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.#

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.”

39. It has not been demonstrated that the trial court acted on wrong principles, or that the sentence of 12 years meted out by the trial court is manifestly excessive in the circumstances to justify interference with the exercise of discretion by the trial court.
40. All in all, the appeal fails and is hereby dismissed in its entirety.

**DATED AND DELIVERED AT MOMBASA THIS 24<sup>TH</sup> DAY OF OCTOBER 2025.**

**S. GATEMBU KAIRU, FCIArb**

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**JUDGE OF APPEAL**

**A.K. MURGOR**

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**JUDGE OF APPEAL**

**DR. K. I. LAIBUTA, Carb, FCIArb.**

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**JUDGE OF APPEAL**

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

Signed

Deputy Registrar

