



**Okwiri v Republic (Criminal Appeal E267 of 2022)
[2025] KECA 1773 (KLR) (24 October 2025) (Judgment)**

Neutral citation: [2025] KECA 1773 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CRIMINAL APPEAL E267 OF 2022
MSA MAKHANDIA, HA OMONDI & AO MUCHELULE, JJA
OCTOBER 24, 2025**

BETWEEN

ISIAH OTIENO OKWIRI APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an Appeal from the Judgment of the High Court of Kenya at Siaya,
(Aburili J.) dated 19th day of January, 2021. in HCCRC No. 19 OF 2018)*

JUDGMENT

1. This is an appeal from the judgment of the High Court of Kenya at Siaya, (Aburili J.), (“the trial court”), in Criminal Case No. 19 of 2018. The appellant, Isaiah Otieno Okwiri, was charged, tried and convicted by the trial court for the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. Upon conviction, he was sentenced to 40 years imprisonment. The information arose from the fatal assault of Mary Onyango Oluoch, (“the deceased”), on 2nd May, 2012 in Ambira village, Ugunja sub-county, Siaya County, allegedly by the appellant and another individual who was not before the court. The prosecution’s case was built upon the testimonies of eight witnesses and supporting documentary evidence, including a postmortem report and exhibits collected at the scene.
2. The record sets out in detail the sequence of events surrounding the commission of the offence through eyewitness accounts, medical evidence and the appellant’s defence. Being a first appeal, it is imperative that we undertake a fresh and exhaustive examination of the entire record, re-evaluate the evidence independently, and draw our own conclusions as to the facts and the law, while bearing in mind that we did not have the benefit of seeing or hearing the witnesses firsthand as they testified. See *Okeno vs Republic* (1972) E.A. 32. In doing so, we must set out the evidence tendered in the trial court albeit in an abridged version.



3. Andrew Owino Oluoch, (PW1), the son of the deceased on the material day at around 5pm, was informed that his parents had been attacked by the appellant and one, Bernard Otieno alias “Pokot,” who are both his cousins. Rushing home, he found his mother seriously injured, with a deep cut on the head and exposed intestines. The deceased told him that the appellant and Pokot had broken into the house and assaulted her with a panga and a jembe. PW1, with the help of Claris Auma Opondo (PW3) and the deceased’s grandchildren, ferried her to Ambira Sub-County Hospital, where his father, Lucas Oluoch and husband of the deceased, had earlier been admitted having been similarly attacked and injured by the appellant and Pokot. The deceased was later transferred to Kisumu Hospital, but she succumbed to the injuries en-route at Kisian.
4. PW1 subsequently reported the incident at Ugunja Police Station.
Pokot later surrendered to the police, was arrested, charged, prosecuted and upon conviction was sentenced to death but on appeal, the sentence was however reduced to 30 years imprisonment. However, the appellant went into hiding for about six years until sometimes in 2015 when he reappeared and was arrested and charged.
5. According to Jacinta Akoth, PW2, and a neighbour to the deceased, she saw the appellant and Pokot holding a panga and a jembe respectively. She observed them as they forcefully broke into and entered the deceased’s house. They re-emerged shortly thereafter and she saw the appellant wiping panga which had blood thereon on the grass as they left. She proceeded to the deceased’s house and once inside found the deceased seriously injured who told her that “Ongoma” (a name by which the appellant was known in the neighbourhood) and Pokot had assaulted her. Together with Claris Auma Opondo PW3, they secured her intestines which were protruding with a leso until PW1 arrived and took the deceased to Ambira Sub-County hospital. PW2 confirmed that she had known the appellant and Pokot for many years and positively recognized them at the scene.
6. Claris Auma Opondo, PW3, saw the appellant and Pokot attack Lucas Oluoch, the deceased’s husband with a panga. She fled the scene when the appellant confronted her. She later saw the two, break into the deceased’s house and assault her. The appellant used a knife to stab the deceased in the stomach and Pokot hit her on the head with a jembe. PW3 immediately ran to the nearby market and PW1 upon being of the occurrence, went and took the deceased to Ambira Sub-County hospital. PW3 later learned of her death the following morning. She confirmed that she witnessed the events from a distance of approximately 15 metres in broad daylight.
- [7] Dr. Okun Benjamin Ochieng, PW4, a pathologist, produced the postmortem report on behalf of Dr. Lavender KG, who had conducted the postmortem. According to the report the cause of death was severe head trauma from a heavy bladed object.
8. Geoffrey Ouma Onyango, PW5, the grandson of the deceased, saw the appellant and Pokot attack his grandfather, Lucas Oluoch. He later escorted him to Ambira Sub-County Hospital where he subsequently received news of the assault on the deceased and was brought to the hospital with head and abdominal injuries. He was thereafter transferred to Kisumu but died enroute. He had known the appellant and Pokot since birth.
9. Praxedes Achieng Owino, PW6, a minor at the time and a granddaughter of the deceased was on the way to fetch firewood when she heard screams and saw the appellant with a panga and Pokot with a jembe. The appellant threatened her with the panga, causing her to flee. When she returned, she found the injured deceased who declared to her that “Ongoma has killed me.” She immediately informed those present, who then prepared the deceased for hospital. She later learned that the deceased had passed on.



10. PC. Chrispinus Lumwaji, PW7, whilst at Ugunja Police Station received Pokot, who had surrendered at the police station and who upon interrogation confessed to killing the deceased. He immediately placed him in custody, and in the company of the Deputy officer Commanding Police Station and the deceased's son, PW1 visited Ambira Sub-County Hospital and the crime scene. Pokot was subsequently charged with attempted murder and later with murder after the deceased's death in Kisumu HCCRC No. 31 of 2012. Following full trial, he was convicted and sentenced to death but on appeal, the sentence was reduced to 30 years imprisonment.
11. Linah Akoth, PW8, Deputy Registrar of the High Court of Kenya at Kisumu, confirmed the foregoing from the court record in her possession being Kisumu HCCRC No. 31 of 2012. which she tendered in evidence.
12. The appellant, in his sworn defence, denied committing the offence.
He raised an alibi claiming that on the material day he had been away fishing since 2nd May, 2012, and on his return, he learned that the deceased had died and had been buried. He described the deceased as his uncle's wife with whom he had no animosity. He confirmed that he had been arrested for allegedly assaulting, the deceased and her husband, but that the issue was later withdrawn. He was surprised to be charged with murder and attributed the information to the land disputes and personal animosities involving the appellant and the deceased's family.
13. The trial court in its judgment found that the prosecution had established all the essential elements of the offence being death and its cause. Second, the unlawful act causing the death was traced directly to the appellant and Pokot. Third, the court was satisfied that the death was committed with malice aforethought, as required under Section 206(b) of the Penal Code.
14. The appellant's alibi defence was dismissed as an afterthought and a mere denial. The trial court found it unconvincing in the light of the credible and consistent prosecution evidence placing him at the scene and identifying him as one of the perpetrators. The appellant was found to have gone into hiding after the crime, which the court deemed further indicative of his guilt.
15. Making reference to Kisumu HCCR No. 31 of 2012, "the Kisumu file" where Pokot had already been tried, convicted, and sentenced for the same offence, the trial court concluded that the appellant had jointly with Pokot participated in the unlawful killing of the deceased. Accordingly, the appellant was convicted of the offence and as already stated was sentenced to 40 years imprisonment.
16. Aggrieved by the conviction and sentence, the appellant has appealed the decision in this Court. Through the memorandum of appeal, the appellant complains that: his constitutional right to a fair trial under Article 50(2)(c) and (j) was violated when the trial court allowed the production of the Kisumu file without prior notice to the defence; the conviction and sentence breached the rule against double jeopardy given that Pokot had already been tried and convicted for the same offence in a prior case; the prosecution had not proved its case beyond reasonable doubt; the trial court relied on inconsistent and contradictory prosecution evidence; and that the sentence of 40-year imprisonment was not justified considering that Pokot was sentenced to 30 years.
17. The appeal was canvassed by way of written submissions with limited oral highlights. During the plenary hearing, the appellant was represented by Mr. Ogenga, learned counsel while Ms. Kanyitta, learned Prosecution counsel appeared for the respondent
18. Mr. Ogenga submitted that the appellant's constitutional right to a fair trial under Article 50(2)(c) and (j) of *the Constitution* was violated when the prosecution failed to disclose in advance that, the Kisumu file was to be tendered in evidence. This omission, counsel maintained, denied the appellant and his



counsel the opportunity to prepare an adequate defence, especially considering that the file was central to the conviction of the appellant.

19. Counsel relied on the case of *R v Judith Ward* [1993] 96 Cr. App. R. 1, and *Ahmad Abolfathi Mohammed & another v Republic* [2018] KECA 743 (KLR), to posit that undisclosed material evidence infringes on fair trial rights. Citing also the case of *Isiaho v Republic* (Criminal Appeal 184 of 2016) [2022] KECA 369, he further submitted that the appellant's conviction violated the principle against double jeopardy under Article 50(2)(o) of *the Constitution*, since Pokot had already been convicted and sentenced for the same offence in Kisumu file. Counsel cited the case of *Connelly v DPP* [1964] 2 All ER 401, for the proposition that a person cannot be charged or punished twice in respect of the same offence, and the case of *Regina v Z* [2005] 3 All ER 95, which reaffirmed that punishing a person again for an offence already adjudicated upon infringes the rule against double jeopardy.
20. In relation to the rest of the grounds, counsel submitted that the trial court relied on materially inconsistent and contradictory testimonies, particularly with respect to the dying declaration which was not raised in the Kisumu file but was introduced in this case after an eight-year hiatus. He relied on the case of *John Mutua Munyoki v Republic* [2017] KECA 376, to submit that a conviction based on uncorroborated and inconsistent evidence can be overturned. On sentence, counsel argued that the 40-years imprisonment imposed was harsh and disproportionate, noting that Pokot's sentence had been reduced to 30 years by this Court on appeal. He urged the court to apply the sentencing framework set out in the case of *Francis Karioko Muruatetu & another v Republic* [2021] KESC 31 (KLR), where the Supreme Court emphasized individualized sentencing and consideration of mitigation in capital offences. In the ultimate, he prayed that the appeal be allowed, the conviction quashed, and the sentence imposed be set aside. In the alternative, he pleaded for a retrial in the light of the above constitutional violations.
21. In opposing the appeal, Ms. Kanyitta, submitted that the appellant's right to a fair trial under Article 50(2)(j) and (c) of *the Constitution* was not infringed at all. The production of the Kisumu file was lawful and served as corroborative evidence only. It was not used to introduce new or incriminating evidence against the appellant. That in any event, the file was an official court record, admissible under Sections 60 and 80 of the *Evidence Act*, and did not prejudice the appellant's defence at all. Notably, the appellant neither objected to its production nor sought access to or adjournment when it was introduced. The appellant's conviction was in any event, not based on that file but rather on credible and consistent eyewitness accounts.
22. On double jeopardy, counsel submitted that the appellant was not a party to Kisumu file and had never been convicted or acquitted for the offence prior to his case. That Pokot was tried separately due to the appellant's prolonged evasion of justice, and the prosecution against the appellant only commenced upon his arrest in 2018. Separate trials in such circumstances are standard and lawful.
23. On whether the case against the appellant was proved beyond reasonable doubt, counsel submitted that nine witnesses, including multiple eyewitnesses, positively placed the appellant at the scene of crime. There was also a dying declaration by the deceased naming the appellant and Pokot as the ones who had fatally assaulted her. That the postmortem confirmed the cause of death which was consistent with the injuries described. The absence of a murder weapon did not undermine the prosecution case. As held in the case of *Karani v Republic* [2010] 1 KLR 73, a conviction can be sustained based on credible testimony despite the absence of physical exhibits, counsel maintained.
24. That the alleged contradictions raised by the appellant were immaterial and did not go to the root of the prosecution case. Citing the case of *Njagi alias Uncle Sam v Republic* [2024] KEHC 13083,



counsel submitted that minor discrepancies in evidence are not fatal unless they cause prejudice to the accused. In this case there was no such prejudice.

25. Lastly, on sentence, counsel submitted that the trial court exercised its discretion lawfully and judiciously. The 40-years imprisonment sentence imposed was proportionate, considering the appellant's aggravated conduct, including his evasion of justice for six years and the brutal nature of the offence. The disparity with Pokot's reduced sentence was justified by their differing post-offence conduct. In view of these aggravating factors, counsel cheekily even invited this Court to consider re-imposing the sentence of death. Counsel concluded by urging that the conviction and sentence of the trial court be upheld and the appeal be dismissed for lack of merit.
26. As already stated, this is a first appeal. With the circumscribed remit already set out elsewhere in this judgment in mind and after going through the record, the submissions by the respective counsel, the cited authorities and the law, the issues that arise for our determination are whether: the appellant's constitutional right to a fair trial was violated; the appellant's conviction contravened the injunction against double jeopardy; the prosecution proved the information of murder against the appellant beyond reasonable doubt; and whether the sentence imposed was excessive or unlawful in the circumstances.
27. On the first issue the appellant contended that the belated introduction of the Kisumu file during his trial prejudiced his defence. The right to a fair trial is a non-derogable right under Article 25(c) of *the Constitution*. However not every irregularity amounts to a violation of that right. In the case of *Tom Ojienda v Ethics and Anti-Corruption Commission & another* [2016] eKLR, the Court emphasized that a violation must occasion actual prejudice that affects the fairness of the proceedings. In the present case, and contrary to the submissions of the appellant, the introduction of the Kisumu file was never by surprise. Reference to the file was made early in the proceedings by both PW1 and PW7. This ought therefore to have put the appellant and his defence team on notice that those proceedings were likely to be introduced in the trial.
28. In other words, the file's production was foreseeable given that the prosecution of the appellant arose from the same set of facts and transaction as that of Pokot in the Kisumu file. Further, from the information, there was a list of the possible witnesses that the prosecution intended to call. Though, there was no indication that PW8 was to be called to produce the file, there was nonetheless an indication that the list of witnesses was incomplete and that other witnesses were to follow. More importantly, the appellant was throughout the trial represented by counsel. The record does not show that at the point of the introduction of the Kisumu file, counsel ever objected, nor did he apply for an adjournment to inspect, access, peruse or to respond to the production of the file before further hearing.
29. These acts of omission or commission renders the credibility of the appellant's assertion regarding constitutional violations hollow. In any event and as has been constantly stated constitutional violations must generally be raised at the earliest opportunity during the trial so that appropriate remedial measures may be undertaken. Importantly, an appellant alleging a violation of the right to a fair trial must go beyond mere allegations and demonstrate actual prejudice occasioned by such violation. The appellant failed to do so and he only has himself to blame. Moreover, the evidence adduced in the Kisumu file was not adopted or admitted as part of the record of the appellant's trial.
30. It is not lost on us that the Kisumu file was in any case produced as a public court record. The legal framework governing admissibility of public records is found in Section 60 and 80 of the *Evidence Act* which allows courts to take judicial notice of official court proceedings. The introduction of the Kisumu file in this case fell squarely within these statutory provisions and was procedurally and



substantively proper. It was not used to tender new or incriminating evidence against the appellant but merely to provide contextual background relating to the prosecution of Pokot, the appellant's accomplice. After all the information charging Pokot with murder indicated that he was involved in the murder with another one not before court.

31. In our view, appellant did not point out to any specific content in the file that directly implicated him or was relied upon by the court in finding him guilty. If anything, it went a long way in assisting him in his defence in his attempt to impugn the dying declaration of the deceased. In any event, the trial court only made passing reference to the file when it stated "the death of the deceased was therefore proved beyond reasonable doubt to have occurred due the unlawful act on the part of the accused herein and one, Bernard Otieno Okello, his accomplice who was convicted in Kisumu HCCRC case No 31 of 2012 with the murder of the same deceased and sentenced to death". In our view, the trial court was simply reiterating the obvious. All said and done, we are satisfied that no prejudice was occasioned to the appellant by the production of the Kisumu file.
32. On double jeopardy, the appellant contends that his trial and subsequent conviction violated the constitutional protection against double jeopardy, as the offence for which he was convicted and sentenced arose from the same transaction in which another accused, Pokot, had already been tried, convicted and sentenced in the Kisumu file. He claimed that trying him separately for an offence allegedly concluded in an earlier trial contravened Article 50 (2) (o) of *the Constitution*. That article provides that "Every accused person has a right to a fair trial which includes the right...not to be tried for an offence in respect of an act or omission for which the accused person has previously been either acquitted or convicted...."
33. Our understanding of the application of the doctrine of double jeopardy, is that the accused must have been an accused person in two cases, earlier and present. He must have been charged, tried, convicted and sentenced or acquitted in the earlier case and both cases must have arisen from the same set of facts and the earlier court was competent to entertain the case. See *Republic v Mohamed Abdow Mohamed* [2013] eKLR.
34. In the case of *Republic v Danson Mgunya* [2016] KECA 59 KLR, the essence of double jeopardy or *autofois acquit* or *autrefois convict* for that matter was explained thus "...First, the plea of *autrefois acquit* is grounded on the universal maxim of common law of England that no man is to be brought into jeopardy of his life, more than once, for the same offence. And hence he is allowed as a consequence, that when a man is once found fairly not guilty upon indictment or other prosecution, before any court having jurisdiction of the offence, he may plead such acquittal in a bar of any subsequent accusation for the same crime...".
35. In the circumstances of this case, the appellant was not an accused person in the Kisumu file. The case involved a different person, Pokot, who was arrested shortly after the incident, tried and convicted. The appellant had by then fled and was a fugitive from Justice for over six years until his arrest in 2018. Consequently, the appellant cannot say that he was previously tried, convicted or acquitted of the offence. The doctrine only applies to a person who has already been subjected to a prior trial which is not the case here. The appellant's separate trial commenced only after his arrest. It was thus legally permissible and necessary to conduct an independent trial to determine his culpability, irrespective of the fact that the offence arose from the same transaction. The fact that Pokot was tried earlier does not in any way bar the prosecution of the appellant separately where there is no previous trial and conviction against him. Ultimately, we are satisfied that this ground of appeal is fundamentally flawed and totally misconceived and must fail.



36. On whether the information of murder was proved beyond reasonable doubt, against the appellant, we note that the legal standard for proof in criminal cases is well settled. The prosecution bears the sole burden of establishing all the essential elements of the offence charged, and must do so beyond reasonable doubt. This standard does not however demand absolute certainty but proof beyond all reasonable doubt. As stated in the case of *Kiremi v Republic* [2022] KEHC 16639 (KLR), it simply means that the evidence must be such that no reasonable doubt exists in the mind of the court as to the accused's guilt. In a case of murder, the prosecution is expected to prove the fact of and cause of death; that the death resulted from unlawful act of omission or commission by the accused; and in so doing, he was actuated by malice aforethought as defined under Section 206 of the Penal Code.
37. Several witnesses were actually eyewitness to the brutal assault and eventual death of the deceased. Their testimonies were clear, consistent and credible, particularly those of PW1, PW2, PW3, and PW6. Their evidence revolved around the circumstances before, during and after the death of the deceased. The cause of death was however confirmed by PW4, the pathologist who tendered in evidence the post mortem report which concluded that the cause of death was severe head trauma from a heavy bladed object. As already stated, the appellant was identified, recognized at the scene of crime in broad daylight by multiple witnesses known to him. All the witnesses knew the appellant personally thereby eliminating any possibility of mistaken identity. The attack occurred in daylight around 4pm, which permitted positive visual identification and or recognition. Similarly, the deceased made a dying declaration to four witnesses, naming the appellant as one of her attackers. Section 33(a) of the *Evidence Act* permits the admission of a statement made by a deceased person relating to the cause of death. Though the law does not require corroboration, the Court must approach such declarations with caution, as was held in the case of *Choge v Republic* [1985] KLR 1.
38. Nonetheless, in this case, the declarations were independently corroborated by eyewitness testimony and forensic evidence. The injuries sustained by the deceased, as confirmed by PW4, were consistent with the weapons said to have been used by the appellant and Pokot. The appellant's alibi that he was away fishing was reasonably discredited by the cumulative evidence. In essence therefore, the appellant did not lead any meaningful defence to displace the strong Prosecution case against him. More significantly, the appellant absconded immediately after the commission of the offence and remained at large for over six years. This prolonged flight from Justice strongly suggested consciousness of guilt. All that we have stated so far answers to the twin issues whether the death was as a result of an unlawful act of omission or commission by the appellant. As to malice aforethought, there is no doubt that the nature of the injuries inflicted on the deceased by the appellant; deep abdominal stab wounds, resulting in exposed intestines, and a fractured skull all manifested a clear intention to cause death or at the very least grievous harm to the deceased in terms of Section 206 of the Penal Code.
39. On the alleged contradictions and inconsistencies in the prosecution witnesses which were attributed to the testimonies of PW1, PW2 and PW3 regarding events preceding, during and after the death of the deceased as well as the Kisumu file, yes, we acknowledge that, there may have been contradictions and inconsistencies in the testimonies of some of the witnesses. However, it is trite law that not all such contradictions, variations and inconsistencies are fatal to the prosecution's case. Courts have consistently distinguished immaterial or peripheral discrepancies and those that go to the root of the prosecution case.
40. The key inquiry is whether any such inconsistencies are material enough to create a reasonable doubt in the mind of the court. Accordingly, it is the quality, not the absolute uniformity, of the evidence that determines whether the prosecution has discharged its burden of proof. See *Njagi alias Uncle Sam v Republic* [2024] KEHC 13083 (KLR). It should never be forgotten that the appellant fled the scene immediately after the commission of the offence and remained at large for over six years. Any minor



gaps or variations in witness recollection are entirely natural and expected over such a period of time and do not, on their own, imply fabrications or deliberate contradictions. We do not think that the appellant, should in any event benefit from the inconsistencies brought about by his own mischief.

41. On sentencing, death penalty is the maximum but not necessarily mandatory sentence following the Supreme Court's decision in Francis Karioko Muruatetu & another v Republic [2021] KESC 31 (KLR). The trial court imposed a custodial sentence of 40 years imprisonment. The court considered the brutality of the offence, the lingering trauma caused to the victim's family, and the appellant's evasion of justice for over six years. Under Section 26 of the Penal Code and guided by proportionality principle emphasized in the case of Mutiso v Republic [2008] KLR 843, we are persuaded that the custodial term of 40 years imposed on the appellant warrants interference. Whereas sentencing is a discretionary exercise, it must be guided by the principles of proportionality, parity, and consistency.
42. In Mutiso v Republic (supra), the Court emphasized that sentencing must be individualized but also fair and rational in light of comparable circumstances. The appellant's accomplice, Pokot, who was convicted for the same offence arising from the same transaction, had his sentence reduced on appeal to 30 years. Although the appellant remained at large for several years, the principle of parity in sentencing requires that similarly situated offenders should not be subjected to markedly disparate sentences unless justified by material differences in culpability or aggravating factors.
43. In the absence of such justification, and in the interest of consistency and fairness, we find it appropriate to reduce the appellant's sentence to thirty (30) years imprisonment from the date of his arrest. To that limited extent, the appeal on sentence succeeds.

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

A.O. MUCHELULE

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR

