Hussein v Republic (Criminal Appeal E015 of 2024)
[2025] KECA 1839 (KLR) (7 November 2025) (Judgment)

Neutral citation: [2025] KECA 1839 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MALINDI

CRIMINAL APPEAL E015 OF 2024

AK MURGOR, F TUIYOTT & P NYAMWEYA, JJA

NOVEMBER 7, 2025

BETWEEN

OMAR LOLA HUSSEIN ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against of the High Court of Kenya in Malindi - Garsen (R. Nyakundi, J.) delivered on 30th July 2021 in H. Cr. Case No. 11 of 2018)

JUDGMENT

1. On 28th September 2018, Issa Hussein Shidho (the deceased) succumbed to a stab wound, with Dr Otieno John Adul (PW7) who performed a post mortem on his body, returning an opinion that the cause of his death was "hypovolemic shock, and severe anaemia secondary to massive hemoperitoneum due to perforating abdominal injury with gut evisceration".

2. The death was blamed on Omar Lola Hussein (the appellant) who was charged and convicted for the offence of murder of the deceased contrary to section 203 as read with section 204 of the Penal Code by the High Court at Malindi (R. Nyakundi, J.). The information presented to the trial court alleged that the offence occurred on 28th September 2018 at Basuba location in Lamu East Sub-County within Lamu County.

3. Aisha Rashid (PW1) is a sister to Shida Rufi Alio (PW2). On the fateful night, at about 19:00 hours (7.00pm), PW1 visited PW2 when a disagreement broke out between them. It quickly deteriorated into a physical confrontation with PW1 attempting to hit PW2 with a stick. Their mother (Miriam) intervened and separated them.

4. At this point, the appellant stepped in and using a stick hit Miriam. When the namesake of the appellant Omar Hussein Shidho (PW3) heard distress noises from the direction of their home, he rushed there to find the appellant assaulting his mother. He came to her rescue and hit the appellant

with a stick. The appellant who appeared to retreat, left shortly for his home which was next door, returned with a knife with which he stabbed the deceased and hurriedly left the scene. Salim Salat Rufi (PW4) and Sorova Itware Sorova (PW5) also, saw the appellant stab the deceased.

5. This is a sketch of the case put together by nine prosecution witnesses.

6. In his defence, the appellant, a 67-year old man, denied the allegations. He is aware of a quarrel between PW1 and PW2 that took place near his home on that fateful day. Using sticks from timber intended for construction, the two got entangled in a physical confrontation. When he attempted to restrain them, Miriam, the mother of Issa, insulted him, calling him "shoga" (a homosexual). He got hold of her so that she would stop insulting him. The appellant also hit her with a piece of stick, she fell but he helped her up and retreated. At some point, he was attacked by the deceased, Issa Jillo, Mohamed Jillo and Omar. Omar hit him with a rungu. He became unconscious and when he came round, he learnt with shock that he was accused of killing the deceased.

7. The trial Judge (R. Nyakundi, J.) believed the version of the prosecution and held that: PW1, PW2 and PW3 saw the appellant stab the deceased; the post mortem report proved that the cause of death flowed from those injuries; and the retaliatory force allegedly used by the appellant in his defence was not commensurate or proportionate with the attack visited on him. Upon convicting him, the trial court sentenced the appellant to serve a 22-year jail term.

8. This is a first appeal in which the appellant assails the learned trial judge as erring in law and fact by failing: to appreciate the contradictions discrepancies and inconsistencies in prosecution case; to consider that the burden of proof had not been proven beyond any reasonable doubt; to consider that mens rea and actus reus were never established; and to appreciate the defences raised by the appellant

9. In this appeal, the appellant was represented by learned counsel Ms Maiga while learned prosecution counsel Ms Nyawinda appeared for the respondent.

10. The appellant argued that the conviction was fundamentally flawed, submitting that the learned trial judge's findings did not properly consider facts which demonstrated the prosecution's failure to prove the case beyond a reasonable doubt. The appellant's counsel characterised the entire incident as a family wrangle that transpired on the evening of 28th September, 2018, involving the appellant, the deceased, Miriam, the deceased's mother, brother, and sister. It was contended that this was a situation where four people ganged up against one person, the appellant, and that the appellant only became involved in the fight after being provoked by Miriam.

11. The appellant sought to point out what he termed as significant inconsistencies and contradictions in the prosecution's evidence, which, it was argued, created reasonable doubt. The appellant specifically targeted the testimony of PW1, as the only witness to allege that she saw the appellant stab the deceased. It was submitted that her testimony was unreliable because she gave inconsistent accounts of the point of injury, initially stating the deceased was stabbed on the back, but then changing her testimony during cross-examination to say it was on the hip, while the post-mortem report indicated the wound was on the right abdomen. It was also contended that the testimony of PW4 was inconsistent; during examination-in- chief, he claimed that the appellant stabbed the deceased, but during cross-examination, he stated he only saw the deceased on the ground and did not see the stabbing, leading to questions of whether he was confused or fabricating his testimony.

12. Regarding the scene of crime, it was argued that the investigating officer (PW9) confirmed that upon his arrival, the scene had been tampered with, the murder weapon was washed, and the deceased's body had been covered by family members. It was submitted that none of the witnesses testified that the appellant had tampered with the scene, raising the possibility that others were trying to hide or

plant evidence. The appellant also pointed to a direct contradiction regarding his whereabouts after the incident: PW1 testified that the appellant ran away, but PW9 stated that when he arrived at the scene at 1:00 am, the appellant was already under arrest, thus discrediting PW1's narrative. To support the argument that such inconsistencies were fatal to the prosecution's case, the appellant cited various decisions, including Kazungu Katana Ngoa v Republic [2017] KECA 129 (KLR) and Philip Nzaka Watu v Republic [2016] KECA 696 (KLR), for the proposition that discrepancies undermine the quality of evidence and Richard Munene v Republic [2018] KECA 186 (KLR), for the argument that such contradictions must be resolved in favour of the accused.

13. It was submitted, further, that since the events occurred at night, between 19:00hrs and 20:00hrs, the lack of any evidence regarding lighting, visibility, or the proximity of witnesses made it impossible for the witnesses to credibly identify the assailant. The appellant noted that PW5 stood at a distance but did not elaborate on how far, or if he had a clear view, making his evidence of identification questionable.

14. Regarding the fight, it was submitted that the prosecution could not prove beyond a reasonable doubt that the appellant, to the exclusion of any other person, committed the offence. The appellant contended that several prosecution witnesses, PW2, PW3, PW4, and PW5, all confirmed they did not see the appellant stab the deceased. It was also argued that the prosecution failed to call a key witness, Miriam, who started the fight by hitting the appellant and was central to the whole incident. Her absence, it was submitted, meant crucial exculpatory evidence was never adduced. Furthermore, the appellant highlighted that he himself was badly beaten and bruised in the altercation, a fact confirmed by PW9 during cross-examination, suggesting he was also a victim in the brawl.

15. In conclusion, the appellant argued that in the midst of the five- person brawl, the prosecution's case, riddled with material inconsistencies and lacking credible testimony, failed to prove the actus reus of the crime beyond a reasonable doubt. It was reiterated that PW1's testimony was unreliable and insufficient to support the charge. Citing the principle from Philip Nzaka Watu v Republic (supra) that a conviction cannot stand on evidence that is not cogent, credible and trustworthy, the appellant pleaded that we allow the appeal.

16. It was argued by the respondent that all the essential elements of murder under Section 203 of the Penal Code were sufficiently proved. The respondent contended that the death of the deceased was not in dispute, as it was confirmed by the testimony of multiple witnesses (PW1, PW2, PW3, PW4, and PW5) who stated that the deceased died on the spot after being stabbed. This was further corroborated by the post-mortem report (PEX 2) produced by PW7, the doctor, which detailed severe injuries including a 4x3cm cut wound to the abdomen, laceration of the gut, and injuries to the right lung and spine, with the cause of death being hemoperitoneum.

17. The respondent asserted that the appellant was responsible for causing these fatal injuries with eyewitness testimony from PW1, PW2, PW3, and PW4 consistently narrating the same sequence of events: a quarrel began, the appellant fought with the deceased's mother, and when the deceased came to his mother's aid, the appellant went to his house, retrieved a knife, and stabbed the deceased. The knife used in the stabbing was produced in court as an exhibit (PEX 1), solidifying the claim that there was sufficient eyewitness evidence to prove the appellant murdered the deceased.

18. On the crucial element of malice aforethought, the respondent argued that the appellant's actions clearly demonstrated an intention to cause death or grievous harm. Citing Rex v Tubere (Criminal Appeal No. 84 of 1945) [1945] EACA 16 and Hyam v DPP (1974) A.C. 55, the respondent asserted that the nature of the weapon used (a knife), the manner in which it was used (stabbing), and the part

of the body targeted (the abdomen, affecting vital organs) all pointed towards malice on his part. The severe nature of the injuries was clear evidence of the appellant's intent.

19. The respondent lauded the impugned judgement as thoroughly considering and rightly dismissing the appellant's defence. It was submitted that the judge analysed the appellant's claims of being assaulted by the deceased and others, but found them unconvincing. The respondent noted that when cross-examined, the appellant admitted he had no treatment notes to prove that he had sustained any injuries. The trial court, it was argued, correctly evaluated the potential defences of provocation and self-defence and found them inapplicable. Making reference to Stephen Kipkeror Cheboi v Republic [2002] KECA 300 (KLR) on the definition of provocation under section 208 of the Penal Code, the respondent submitted that the insult "shoga" came from the deceased's mother, not the deceased himself, and the appellant had enough time to regain self-control as he went back to his house to get a knife. Referencing Victor Nthiga Kiruthu & another v Republic [2017] KECA 251 (KLR) on the principles for determining self- defence, it was argued that the appellant used excessive and disproportionate force; while others were using sticks, he introduced a knife, yet he was not facing imminent danger to his life that would warrant such a response.

20. Finally, regarding the appellant's claims of contradictions and inconsistencies, the respondent submitted that the appellant failed to demonstrate any inconsistencies that were fatal to the prosecution case. Citing the case of Joseph Maina Mwangi v Republic [2000] KECA 282 (KLR), the respondent argued that while discrepancies are bound to occur in any trial, the ones alleged by the appellant were negligible and inconsequential to the conviction and sentencing, and did not cause any prejudice to him.

21. Our task as a first appellate court is to analyse and evaluate afresh all the evidence adduced before the lower court and draw our own conclusions while bearing in mind that we never saw nor heard any of the witnesses as restated in the case of Okeno v Republic [1972] EA 32:

> "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 appellant court's own decision on evidence. The first appellate court must itself 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."

22. The appellant concedes that he was caught up in a fight with some of his relatives but proposes that the evidence of the witnesses was inconsistent as to who struck the fatal blow on the deceased and fundamentally the trial court failed to discuss about the light and visibility of the scene when the offence was committed.

23. The evidence of the prosecution witnesses was that the assault took place in the night of 28th September 2018 ,sometime after 7.00p.m, presumably after darkness had set in. We have looked at the record and do not find any evidence as to lighting of the scene. What emerges, however, is that the fight look place in or near the house of Shida Rufi Alio (PW2) and although there is no indication of the source of light, it appears to have been sufficient because even the appellant, in his defence testimony, told court that he was able to see who was involved in the fight.

24. So, whilst it is crucially important for a Court to discuss and make findings of the source and quality of light, proximity of the witness to the incident and whether the view was clear when an incident happens at night or in circumstances where identification would be difficult (see for example Nzaro vs Republic (1991) KAR 212 and Kimotho Kiarie v Republic [1984] KECA 65 (KLR)), there would be circumstances when even the absence of such findings, would not weaken the strength of the prosecution case. As was the case here, where all witness including of the appellant are close relatives and gave evidence that they were able to see each other in close proximity, a clear indication of the existence of sufficient lighting. It also does matter, we think and find, that because all the people at the time of the fight were relatives it would be much the easer to recognise who did what in the fight that ensued.

25. Regarding the role of the appellant in the fight, PW1, PW2, PW3, and PW5 all saw the appellant assault the mother of PW4 and the deceased intervene to save her. These four witnesses also saw the appellant stab the deceased after leaving the scene shortly and returning with the knife. We do not agree with the appellant's counsel that there were material inconsistencies to the evidence of those eye witnesses. We have no difficulty endorsing the finding of the trial court that: -

> "By way of background, it should be remembered from the evidence of (PW1), (PW2), (PW4) and (PW5) the events of eminence are displayed which point to an initial fight and the requisite unlawful act of the accused. In this particular case, there is express testimonies of (PW1), (PW2), (PW3) which demonstrates that the accused in the course of the conflict left the battleground to go and arm himself with a knife."

26. While it is true that Miriam who was at the centre of the fight was not called to testify, the evidence of the other witness was sufficient to safely implicate the appellant and was sufficient even in the absence of the evidence of Miriam to prove that the circumstances and manner in which the appellant stabbed the deceased. Given that no number of witnesses is required to prove the offence of murder(section 143 of the *Evidence Act*), the absence of the evidence of Miriam is not fatal.

27. In the submissions before us the appellant chose to concentrate on the argument that the evidence on record did not prove that he is the one who stabbed the deceased, an argument which we have demonstrated is not plausible in the face of the evidence before the court. The appellant did not attempt to fault the findings of the trial court that the defence of provocation and self-defence were not available to him and we have no reason to disturb those findings.

28. As the evidence implicating the appellant is ironclad and there was no appeal against sentence, we come to conclusion that this appeal is without merit. We accordingly dismiss it.

DATED AND DELIVERED AT MOMBASA THIS 7TH DAY OF NOVEMBER 2025.

A. K. MURGOR

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JUDGE OF APPEAL

F. TUIYOTT

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JUDGE OF APPEAL

P. NYAMWEYA

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR.