Kithure v Republic (Criminal Appeal 63 of 2021)
[2025] KECA 1866 (KLR) (7 November 2025) (Judgment)

Neutral citation: [2025] KECA 1866 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NYERI

CRIMINAL APPEAL 63 OF 2021

W KARANJA, J MOHAMMED & LK KIMARU, JJA

NOVEMBER 7, 2025

BETWEEN

EDWARD MUNYUA KITHURE ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against the conviction and sentence of the High Court of Kenya at Chuka (Gitari, J.) delivered on 21st July, 2021 in Criminal Appeal No. 2 of 2020)

JUDGMENT

1. The appellant was arraigned before the Senior Principal Magistrate's Court at Marimanti, and charged with the offence of manslaughter contrary to Section 202 as read with Section 205 of the Penal Code. The particulars of the offence alleged that on 26th February, 2017, at Kithioroka Village in Turima Location in Tharaka South Sub-County within Tharaka Nithi County, the appellant unlawfully killed Harrison Mworia. The appellant denied the charges.

2. These were the brief facts of the case according to the prosecution: It was the evidence of PW2, Justa Kagendo, that on 26th February, 2017, she was on her way home when she met the appellant and Harrison Mworia (deceased) fighting. She tried to separate them. The deceased informed her that the fight was over a plate of chips which were being sold at the scene. PW2 testified that the two got back to the fight. During the tussle, the appellant pulled out a knife and stabbed the deceased. He thereafter fled the scene. PW2 stated that there were several people at the scene but that they all fled when the appellant stabbed the deceased.

3. PW4, John Kibaara, testified that he was at his hotel on the material date when he heard someone scream from a distance. When he went outside, he saw a person running away while holding a knife. He stated that he was not able to identify the assailant. PW3, John Mwathi M'Ringera, the deceased's father, told the court that on the material date at about 6.00 p.m., he was at home when a woman

informed him that Mworia had been killed. He proceeded to the scene where he found the deceased's body, which had a stab wound on the left side of the rib cage, and a cut between the thumb and the index finger.

4. PW1, IP Henry Kabera, was the arresting officer. It was his testimony that on 25th May 2017, he received a call from the area chief informing him that she had a suspect in her custody. The suspect was brought to the chief's office by members of the public. The suspect had allegedly killed someone in Marimanti and fled from the scene. PW1 stated that when he got to the chief's office, the members of the public informed him that the appellant had killed someone, but that they refused to record statements. PW1 took the appellant into custody.

5. PW6, Dr. Justus Kitili, from Chuka District Hospital, conducted a post mortem on the deceased's body on 7th March, 2017. It was his evidence that the deceased had blood in his mouth and nostrils. He also sustained bruises on his stomach and shoulders, and had a stab wound on the left side of his chest measuring about 4 cm. It was his conclusion that the deceased died due to a penetrative chest injury caused by a sharp object.

6. PW5, PC Joab Muhande, based at Marimanti Police Station, stated that he took over the case from CPL Henry Namanda who initially investigated the case. PW5 asserted that the appellant started a fight with the deceased, after the deceased declined to buy him a plate of chips, and had instead slapped him. He stated that the appellant pulled out a knife and stabbed the deceased on his rib cage. The victim died at the scene. PW5 testified that CPL Namanda visited the scene and collected the deceased's body. It was his evidence that the appellant was arrested on 26th May 2017 from the area chief's office, and was later charged before the trial court.

7. The appellant was placed on his defence. He gave sworn evidence.

   He testified that he could not have killed the deceased as he was in Meru when the offence was committed. He stated that PW2's testimony was the only evidence that connected him to the offence, but that PW2's evidence was not credible, as she had differences with his mother. It was the appellant's testimony that PW2 feuded with his mother because she refused to lease a parcel of land to her. The appellant maintained that the offence was committed by someone else, and that he was framed.

8. After full trial, the learned magistrate held that the prosecution had proved its case against the appellant, beyond reasonable doubt. The appellant was convicted as charged, and sentenced to serve life imprisonment.

9. Aggrieved by his conviction and sentence, the appellant proffered an appeal before the High Court at Chuka. In his amended grounds of appeal, the appellant faulted the trial magistrate for relying on the evidence of PW2, without warning himself of the dangers of relying on the evidence of a single identifying witness. The appellant was aggrieved that the trial magistrate failed to consider that a grudge existed between PW2 and his mother. He complained that crucial witnesses were not availed to give evidence, and further that the murder weapon was never recovered. He was of the view that the prosecution failed to prove their case to the required standard, which is beyond any reasonable doubt.

10. The learned Judge (Gitari J.), after re-evaluating the evidence adduced before the trial court, saw no reason to depart from the decision of the trial magistrate, with respect to the appellant's conviction. The learned Judge determined that the appellant was positively identified by PW2, and that his evidence was corroborated by that of PW4, as well as the doctor, PW6. The learned Judge was of the view that the prosecution sufficiently proved its case against the appellant. Regarding sentence, the learned Judge was of the view that the appellant, being a first offender, the maximum sentence of life

imprisonment meted by the trial court was manifestly harsh and excessive. The learned Judge set aside the life sentence and substituted it with a custodial sentence of twenty-five (25) years.

11. The appellant is now before us on a second appeal. He has advanced six grounds of appeal. The appellant was aggrieved that the learned Judge erred in law: by failing to find that his sentence was excessive in the circumstances; by failing to acknowledge that vital witnesses were not availed to give evidence; by failing to consider that the only evidence against him was that of a single witness; by failing to take into consideration the fact that a fight took place between the appellant and the deceased; and lastly, by rejecting his plausible defence without giving cogent reasons.

12. The appeal was heard by way of written submissions which were duly filed by both parties. The appellant appeared in person. It was his submission that PW2 was not a credible witness, and that his evidence, being that of a single identifying witness, ought not to have been considered. The appellant stated that members of the public who were said to have arrested him were not availed as witnesses before the trial court. He was of the view that the prosecution failed to prove its case against him, as no DNA test was done, the alleged murder weapon was not recovered, and no identification parade was conducted to connect him to the offence. He faulted the learned Judge for failing to consider his alibi defence, as well as the fact that PW2 held a grudge against his mother for failing to lease a parcel of land to her.

13. In rebuttal, Ms. Kitoto for the respondent, made submissions to the effect that the prosecution proved the ingredients of the offence of manslaughter against the appellant. It was her submission that the learned Judge appreciated that though PW2 was the only eye witness, the incident occurred in broad daylight, and her identification of the appellant was that of recognition. She stated that PW2's evidence was corroborated by that of PW4, who testified that the appellant and the deceased fought, and the assailant fled from the scene armed with a knife. Ms. Kitoto submitted that the prosecution availed all relevant witnesses necessary to prove its case. Regarding the appellant's defence, learned Prosecuting counsel stated that the appellant did not cross-examine PW2 on the existence of the alleged grudge, and that his alibi defence was properly dismissed as an afterthought. Ms. Kitoto submitted that the appellant's sentence was reviewed down by the first appellate court, and his appeal therefore had no merit.

14. We have carefully considered the record of appeal, the submissions by both parties, and the law. The duty of the second appellate court was stated by this Court in the case of Karingo vs Republic [1982] KLR 213 as follows:

> " A second appeal must be confined to points of law, and this Court will not interfere with concurrent findings of fact arrived at in the two courts below, unless based on no evidence. The test to be applied on second appeal is whether there was any evidence on which the trial court found as it did (Reuben Karoti S O Karanja versus Republic [1956 17EACA 146]."

15. We have considered the facts of this appeal in light of the submissions made by the parties to this appeal. We are also conversant of our mandate as a second appellate court, especially the mandate that we can only consider points of law and not facts. The issue for determination that came to the fore is whether the prosecution proved its case of the charge of manslaughter brought against the appellant to the required standard of proof. The second issue for determination is whether this Court should interfere with the sentence meted by the first appellate court.

16. The thrust of the appellant's appeal is that he was not at the scene when the deceased was stabbed to death. The appellant stated that he was in Meru at the time when the deceased was killed at Marimanti. This was an alibi defence. The appellant challenged the evidence of PW2 whom he claimed was a single

identifying witness and who had a grudge against him on account of disagreement that PW2 had with his mother over a lease of land.

17. According to PW2, on the material day of 26th February, 2017, she witnessed the appellant and the deceased fight. She went to separate them; she was able to glean from the two that their disagreement was over a plate of chips. She was unable to separate them. The two continued fighting. She saw the appellant remove a knife which he used to stab the deceased on his chest. The deceased collapsed and succumbed at the scene. PW6 conducted postmortem on the body of the deceased and confirm that indeed his death was caused by a penetrative chest injury caused by a sharp object.

18. From PW2's testimony, it was evident that the incident took place in broad daylight, she knew the appellant and the deceased prior to the incident. Although the appellant attempted to cast aspersion to PW2's testimony, that it was tinged with a grudge, we agree with the finding made by the two courts below that the appellant did not cross-examined PW2 on this aspect of his defence when she testified before the trial court. His alibi defence was introduced for the first time when the appellant testified in his defence.

19. It appeared to us that the appellant is challenging his conviction which was largely based on the testimony of PW2, a single identifying witness. This Court, differently constituted, in the case of Cleophas Otieno Wamunga v. Republic [1998] eKLR held that:

> " Evidence of visual identification in criminal cases can bring about miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimize this danger. Whenever the case against a defendant depends wholly or to a great extent on the correctness of one or more identifications of the accused which he alleges to be mistaken, the court must warn itself of the special need for caution before convicting the defendant in reliance on the correctness of the identification. The way to approach evidence of visual identification was succinctly stated by Lord Widgery C.J, in the well- known case of R. V. Turnbull [1976] 3 ALL E.R. 549 at page 552 where he said:
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> > "Recognition may be more reliable than identification of a stranger but, even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made."
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> This need for caution was also reiterated by the Court of Appeal for Eastern Africa in the case of Abdallah Bin Wendo v. R. 20 EACA 166 at page 168 thus:
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> > "Subject to certain well-known exceptions it is trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with the greatest care of evidence of a single witness respecting identification especially when it is known that the conditions favouring correct identification were difficult. In such circumstances what it needed is other evidence, where it be circumstantial or direct pointing to guilt, from which a Judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from the possibility of error."

20. In the present appeal, it was evident that PW2 knew the appellant and the deceased prior to the incident. In fact, the appellant confirmed that PW2 is well known to him having interacted with her mother over a land lease. PW2 was therefore not a stranger to the appellant. From her testimony, it

was clear that she witnessed the fight between the appellant and the deceased. It was in broad daylight; she was able to see and interact with the appellant and the deceased when she tried to separate them from the fight. She was unsuccessful. She saw the appellant fatally stab the deceased with a knife. Her identification of the appellant was recognition of someone whom she was familiar with. It was not of a total stranger.

21. We agree with the findings made by the two courts below that PW2 had no reasons to point out the appellant as the person who killed the deceased. Her testimony was cogent and truthful. Her testimony being that of single identifying witness, meets the criteria of proof and did not require corroboration as it was credible and truthful. We find no merit with the appellant's challenge to his conviction. Just like the first appellate court, we find no legal reason to upset a finding of facts made by the two courts below which properly applied their minds and reached the correct decision.

22. Being a second appeal, this Court's jurisdiction in sentencing is circumscribed by section 361(1) of Criminal Procedure Code.

23. This Court in Kirui v Republic (Criminal Appeal No 92 of 2017[2024] KECA(KLR) held that;

> " The appellant has also challenged the sentence of life imprisonment imposed upon him. In principle, as provided under section 361(1)(a) of the Criminal Procedure Code, our jurisdiction does not traverse the question of severity of sentence which is deemed to be matter of fact. Under section 361(1)(b) of the Criminal Procedure Code, we can only step into the arena of sentencing when a question about legality of a sentence has been raised."

24. In the present appeal, the appellant pleaded with the Court to interfere with the sentencing discretion of the first appellate court and sentence him to serve a lesser custodial sentence. The prosecution is opposed to the appellant's plea. It is of the view that the appellant has already benefited from a reduction of sentence by the first appellate court, no reasons have been advanced to persuade this Court that the first appellate court wrongly exercised its sentencing discretion or committed an illegality in sentencing to warrant interference by this Court.

25. We are unable to discern any breach of discretion by the first appellate court when it sentenced the appellant. Sentence is a matter of fact and therefore not amenable to consideration by this Court unless it is established that there was breach of the law. We formed the view that the sentence meted on the appellant fitted the crime. We will not interfere with it as the appellant did not establish any breach of the law.

26. The appeal lacks merit and it is dismissed both on conviction and sentence.

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

W. KARANJA

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JUDGE OF APPEAL JAMILA MOHAMMED

..... JUDGE OF APPEAL

L. KIMARU

..... JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

Deputy Registrar