Martin v Republic (Criminal Appeal E004 of 2024)
[2025] KECA 1825 (KLR) (7 November 2025) (Judgment)

Neutral citation: [2025] KECA 1825 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MOMBASA

CRIMINAL APPEAL E004 OF 2024

AK MURGOR & P NYAMWEYA, JJA

NOVEMBER 7, 2025

BETWEEN

PAPA BOUTROS MARTIN ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against the judgment of the High Court of Kenya at Mombasa (A. Onginjo, J.) delivered on 13th June,2023 in High Court Criminal Case No. E007 of 2020)

JUDGMENT

1. The Appellant, Papa Boutros Martin was charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars of the information were that the Appellant on the 25th September 2020 at Mrima Primary School, in Likoni Sub County within Mombasa County, murdered Hussein Mwakavi Daniel (the deceased).

2. The Appellant pleaded not guilty and the matter proceeded to hearing where the prosecution called 7 witnesses.

3. A narration of the facts are that on 25th September, 2020 at about 10.00 p.m. Muli Daniel Mwangangi (PW1), the deceased's brother, was sleeping when his wife woke him up and told him that Abdalla Omar and Joseph Allan Kilonzo had come to visit him. They told him that his brother had been stabbed and that he was lying in Kamau area near Mrima Primary School.

4. They boarded a motorbike and proceeded to the scene where PW1 found the deceased lying in a pool of blood and his clothes were blood stained. At the scene, Peter Okanga (PW2), pulled him aside and told him that a person who went to drink tea in his hotel had a knife and when he inquired why the person had a knife, the person told him he was looking for a young man who had stolen his phone; that the person left and later returned and informed him that he had found the young man who stole his phone and that he was going to report to the police.

5. The person was identified to him as the Appellant, after which they took him to the police station. He stated that soon thereafter, the police visited the scene, and the body was taken to the mortuary and that he attended the postmortem examination and identified the body.

6. PW2 testified that on 25th September 2020, the Appellant went to his hotel and served himself with half a cup of tea and one mandazi which he ate while standing. He stated that he politely requested him to sit, but the Appellant produced a knife which he placed on the table. It was PW2's evidence that when he inquired why he had the knife the Appellant told him that 2 young men went to his house and while one held him the other stole his phone. The Appellant told him that he knew one of the assailants. He stated that the Appellant had vowed that if he found them, he would either be shown where his phone was or he would tear apart the intestines of the person who stole his phone. The Appellant left shortly before 8.00 a.m. A few minutes later, a lady known as Mdogo, a fish vendor came and told him to call PW1 and inform him that his brother had been stabbed. He went on to state that the Appellant had passed by later and told him that he had found the person who took his phone and that he was going to report to the police station.

7. Mike Kibwana, PW 3, was at home cleaning when he heard a commotion outside, and someone crying and calling for help, saying that they were being killed. He left the house and found 2 people struggling with each other. One was holding a knife. PW 3 strenuously tried to force them apart but the person with knife pinned the deceased against the wall, and when he managed to disengage the person from the deceased, he saw blood on the deceased's T-shirt and the deceased fell down. After stabbing the deceased, the person with knife slipped away when members of the public began to gather. He said he was going to report to the police. PW 3 stated that the assailant went away with the knife.

8. PW 3 went to report the incident to the village elder, but did not find him. He thereafter returned to the scene where he found that the deceased had already died. Following a report, the police collected the deceased's body. PW 3 recorded his statement at the police station. He stated that the fight lasted about 3 minutes and he intervened for about 2 minutes. He identified the T-shirt the deceased was wearing and the jeans short trouser the Appellant was wearing. PW 3 identified the Appellant as the person who had the knife. He said he picked a stone to threaten the Appellant who wanted to stab the deceased, but he was also fearful; that after he separated the Appellant from the deceased, the deceased fell to the ground.

9. Irene Furaha Mwaringa, PW 4 Government Analyst produced a Report in which she said the DNA profile generated from the blood stains on the Appellant's short trouser matched the DNA profile generated from the deceased person's blood.

10. Cpl Emanuel Kondo, PW 5, processed photographs taken at scene of crime by CPL Nyamai which he had certified for production as exhibits.

11. Dr. Nizla Ali, PW 6 produced postmortem report prepared by Dr Mohammed who conducted postmortem on the body of the deceased and concluded that he died as a result of internal exsanguination – massive loss of blood – secondary to stab wound to the heart.

12. Peter Mogaka, PW 7, investigated the murder and preferred charges against the Appellant. He stated that the Appellant went to the police station to report a stolen phone after he had stabbed the deceased.

13. When placed on his defence the Appellant gave a sworn statement where he stated that the deceased was his neighbour; that on 25th September 2020 he went to buy a mandazi to have with his breakfast. On his way to work, he met a man who had stolen a phone from him and he told him to return his phone which he claimed to have bought for Kshs 22,000; that the person threatened to kill him for reporting to the police; that the man thereafter produced a knife and approached him as if to stab him,

but he held his hand and they began struggling; that the person was stronger than him and he fell down. He stated that as the person fell on top of him, he fell on the knife which stabbed him. As a result, the Appellant stated that he managed to escape, whereupon he went straight to the police station and reported the incident. He also gave the OB Number for the theft of his phone.

14. He also stated that when he went to the crime office and did not find Mr. Ochieng who was investigating the case of theft of his phone, he waited for 15 minutes and then decided to go to his brother-in-law and report what had happened and call his wife. At Corner Police near Bethama he met the brother of the deceased in the company of a boda-boda rider and when he approached them, they told him to go back to the police station. He boarded their motorbike and returned to the police station where he learnt that the person had died. He said he was placed in cells for 3 months and taken to the prison remand on 16th December 2020.

15. He stated that he had never quarreled with the deceased; that the deceased would eat at his house as they were neighbours; that whenever the deceased borrowed Kshs. 20 from him to buy chapatti he always gave him. He claimed that the deceased was like his child, but was a drug addict and when they met on the fateful morning, he was under the influence of drugs and that is why he reacted in that manner.

16. He further testified that PW 2 was his neighbor and that he usually fetched water from his place. He denied having gone to take tea in PW 2's hotel on the material morning. He admitted having told PW 2 that his phone was stolen on 23rd September, 2020, and that he knew one of the people who stole his phone.

17. Upon considering the evidence, the trial Judge, convicted the Appellant for the offence of murder and sentenced him to serve 30 years imprisonment.

18. Aggrieved the Appellant has filed an appeal to this Court on grounds that; the learned Judge convicted him without appreciating that he was not properly identified as the identification by a single identifying witness took place in difficult circumstances that were not free from the possibility of error; that the learned Judge failed to appreciate that the elements for the offence were not proved against the Appellant to the required standard; and in convicting the Appellant without adequately taking into account his defence; and finally that the sentence imposed was not only harsh, but also degrading and against the apparent constitutional right under Article 50 (2) (p), (n) and (q) of *the Constitution*.

19. Both the Appellant and the Respondent filed written submissions. When the appeal came up for hearing on this Court's virtual platform, learned counsel Mr. Mutwiri appeared for the Appellant while learned prosecution counsel for the State Ms. Nyawinda appeared for the Respondent.

20. Briefly highlighting the submissions, counsel for the Appellant begun by stating that the trial Judge disregarded the Appellant's defence as at no point in the Judgment did the trial Judge address the question that the Appellant acted in self defence or that the deceased's death was accidental.

21. Turning to whether the prosecution proved its case to the required standard, it was argued that the prosecution did not adduce cogent and adequate evidence to prove that the Appellant was properly identified as the person who attacked the deceased; that none of the prosecution witness testified to having seen the fatal stabbing that occasioned the death of the deceased; that despite having witnessed the altercation between the deceased and his attacker, PW3 was able to successfully separate the combatants, after which the situation became calm. It was submitted that, it was not clear when the deceased sustained the fatal injury as PW3 did not witness the actual stabbing which could have happened before the fight or after PW3 left to go to the police station; that for this reason, the trial court was in error in concluding that PW3 was an eyewitness to the stabbing of the deceased.

22. With respect to PW 1's testimony that the attacker had blood on his clothes, it was submitted that no mention was made by the arresting officers that the Appellant had blood on him, that the fact that the Appellant's clothes were not bloody at the time of his arrest cast doubt on whether he was the attacker. Counsel cited the case of Samuel Omaiyo Kasimiri vs Republic [2016] eKLR in support of the proposition that it is trite law that a fact must be proved by the testimony of a single witness but the rule does not lessen the need for testing with greatest care the evidence of a single witness respecting identification, especially where it is shown that the conditions favouring a correct identification are difficult. It was submitted that in the two minutes that PW 3 witnessed the fight, he had only a few seconds to identify the attacker who was someone he did not recognize; that the trial Judge did not take into consideration the fact that in such circumstances, not only would the time have been insufficient for PW3 to properly identify the Appellant, the circumstances would also not have been favourable for a positive identification, given the high level of stress that PW3 was under.

23. It was also submitted that the trial Judge was in error in relying on the evidence of the Government Analyst to identify the Appellant as the attacker, because PW3 had testified that the Appellant was wearing a blue short jeans trouser, yet the Government Analyst testified that she conducted tests on a black short jeans trouser; that the prosecution did not clarify this glaring discrepancy and as a result, the evidence of the black jeans tested by PW4 did not connect the Appellant to the offence.

24. It was further submitted that the learned Judge misdirected herself in finding that PW2 had seen the Appellant holding the knife that was used to stab the deceased on the fateful morning yet PW2 did not give a description of the knife that he claimed he saw the Appellant carrying.

25. On malice aforethought, counsel contended that PW3 did not witness the actual stabbing and there was no evidence that could lead the prosecution to conclusively establish that he stabbed the deceased deliberately or whether the deceased fell on the knife; that without direct eyewitness testimony as to the actual stabbing, the trial court did not have a basis upon which to return a finding that the attacker had targeted the deceased's heart or any other delicate organ of the body; that on this basis, malice aforethought was not established.

26. As to whether the Appellant had a valid defence, of self defence, it was submitted that the test which ought to be applied subjectively is whether the accused person perceived the surrounding circumstances as a danger to himself; that the Appellant testified that the deceased was a drug addict which testimony was not controverted by the prosecution in cross-examination, and that in such circumstances, the Appellant was well within his right to believe that he was in danger from an erratic and unpredictable person; that it is clear that the Appellant only used enough force to stem the attack by the deceased, notwithstanding that it resulted in his death; that the Appellant was well within his right to defend himself. Citing the case of Republic vs Daniel Okello Rapuch [2017] KEHC 5921 (KLR) it was submitted that the defence of self defence is an absolute defence for a charge of murder provided that excessive force was not used; that in the present case, the Appellant only used enough force to end the attack which is evident from the single stab wound inflicted on the deceased.

27. Turning to whether the sentence imposed was harsh and degrading, it was submitted that, the circumstances surrounding the death of the deceased were insufficient as to warrant the sentence of 30 years; that the trial Judge disregarded the fact that the Appellant was a first offender who had a young family; that the death occurred as a result of a single stab wound and consequently it could not be considered a vicious sustained attack that warranted the maximum sentence.

28. In response, counsel for the Respondent also briefly highlighted the submissions and stated that the offence of murder was proved, since the evidence of PW1, PW2 and PW6 - the doctor, all who

produced the postmortem report confirmed that the cause of death was exsanguination secondary to a stab wound to the heart.

29. As to whether the Appellant was responsible for the deceased's death, it was submitted that PW2 and PW3 saw the Appellant with a knife, and PW2 heard the Appellant say that he would use the knife to tear apart the person who had stolen his phone. In addition, the Appellant confronted and stabbed the deceased outside PW3's house and PW3 saw the Appellant struggling with the deceased, pin him against a wall and when he released him, there was blood on the deceased's T-shirt. There were also blood stains on the Appellant's short jeans trouser that the Government Analyst report confirmed belonged to the deceased. It was submitted that when the evidence is considered together, it identified the Appellant as the cause of the deceased's death.

30. Concerning the Appellant's contention that the trial Judge was wrong to rely on the evidence of a single witness, it was submitted that the trial Judge relied on direct and circumstantial evidence to reach a finding that the Appellant caused the deceased's death. Counsel submitted that PW2 stated that he knew the Appellant well, having known him for many years; that when PW1 met with the Appellant, a person he had known for many years, he was wearing a short trouser which had a blood stain; that when the blood stain on his trouser was analysed and compared with the deceased blood, it matched the DNA profile of the deceased's blood. It was submitted that the Appellant's defence largely corroborated the prosecution case, in that the Appellant placed himself at the murder scene where he fought with the deceased and where the deceased was stabbed and died.

31. With respect to whether malice aforethought was established, it was submitted that PW2 stated that he saw the Appellant with a knife which he said he would use to tear apart the intestines of the person who had stolen his phone; that the deceased died from a stab wound to the heart inflicted by a knife that the Appellant was holding; that there was no doubt that the Appellant intended to inflict grievous harm or death on the deceased with the result that malice aforethought was established.

32. This is a first appeal, and our duty as a first appellate court is to re-evaluate and re-analyse the evidence adduced before the trial court. In so doing, the court is obligated to bear in mind that it neither saw nor heard the witnesses testify for which we should give due allowance. This mandate was explained in Okeno vs Republic [1972] E.A. 32 where it was stated:

> " The first appellate court must itself weigh conflicting evidence and draw its own conclusion (SHANTITLAL M RUWALA V R, [1957] EA 57). It is not the function of a first appellate court merely to scrutinise the evidence to see if there was some evidence to support the lower courts' findings and conclusions; it must make its own findings and draw its own conclusion 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 witness."

33. After considering the record of appeal, the respective rival submissions and the law, the issues for determination that emerge are:

    i) whether the prosecution proved the offence of murder to the required standard;

    ii) whether the Appellant was identified as the perpetrator of the offence;

    iii) whether the trial court disregarded the Appellant's defence of self defence; and

    iv) whether the sentence imposed on the Appellant was harsh and degrading.

35. Under Section 203 of the Penal Code, for the offence of murder to be established, the prosecution must prove three main elements. First, that the death of the deceased occurred, second, that the death was caused by an unlawful act or omission on the part of the accused person and third, that the accused person had malice aforethought in causing the act or omission.

36. The above stated ingredients were identified by this Court in the case of Roba Galma Wario vs Republic [2015] eKLR where it was observed:

> " For the conviction of murder to be sustained, it is imperative to prove that the death of the deceased was caused by the appellant; and that he had the required malice aforethought. Without malice aforethought, the appellant would be guilty of manslaughter, as it would mean the death of the deceased during the brawl was not intentional."
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> See Anthony Ndegwa Ngari vs. Republic [2014] eKLR.

37. To begin with, the death of the deceased was not disputed. The evidence of PW1, PW2 and PW6, the doctor who produced the postmortem report confirmed that the deceased died and that the cause of death was exsanguination secondary to a stab wound to the heart.

38. As to whether the Appellant was identified as the perpetrator, the Appellant asserts that PW3 did not see who actually killed the deceased when he was pinned against the wall, since PW3 was behind the attacker, and therefore he did not see who was responsible for the deceased's death; that the learned Judge did not take into account that identification by PW3, as a single identifying witness, was undertaken in very difficult circumstances arising from the ongoing struggle between the Appellant and the deceased, and therefore could not have identified the Appellant as the attacker.

39. It was further argued that the trial Judge was in error in relying on the evidence of the Government Analyst to identify the Appellant as the attacker, as the evidence disclosed that, the blood stains were lifted from a black short jeans trousers yet PW3 stated that the Appellant was wearing a blue short jeans trousers; that since the blood stains were on the black trousers, this did not link the Appellant to the offence.

40. In analysing the evidence to establish whether the Appellant was properly identified, the learned Judge stated:

> " 25. PW2 said the accused had a knife on the material morning and when he enquired why the accused was carrying a knife the accused said he knew the person who stole his phone and he was going for him and it was either the phone was to be produced or the person would carry his intestines on the hands. He left and returned after short while and said that the person who stole his phone wanted to beat him and he was going to report to the police. He didn't tell PW2 that the person who stole his phone had fallen on a knife and was stabbed.
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> 26. PW3 heard a distress call from someone who was being hit against the wall to his house and on coming out he found the accused had pinned the deceased against the wall and when he tried to stop the accused from assaulting the deceased the accused was very enraged and aggressive. PW3 said he used a lot of force to separate them and that it is the accused who had a knife with one hand and pinned the deceased to the wall with another hand.

27. That by the time he managed to separate the accused from the deceased, the accused had already stabbed the deceased and the deceased who had been pinned to the wall fell. He said the accused then slipped away when members of public started gathering.

28. PW2 said that a lady who sells fish went to ask if he had alternative number for PW 1 as his brother had been stabbed dead by Mteso the accused here in PW2 & PW3 confirmed that it is the accused who had a knife and it is the accused who stabbed the deceased on allegations that the deceased and another had stolen his phone. The accused didn't question PW3 as to who was the aggressor because his version of the events that took place on that day were an afterthought".

41. Just like the trial Judge, our reevaluation of the evidence points to the Appellant as having been identified as the perpetrator for the reasons that, firstly, he was in possession of a knife on the fateful morning. According to PW2, the Appellant had told him that his phone was stolen, and that he knew who had stolen it; that he intended to use the knife he was carrying on the person who stole his phone, and it was either that the phone was produced or that he would tear the person's intestines apart. What happened next was that the Appellant met the deceased, a struggle ensued, and the deceased was stabbed with a knife.

42. The presence of the knife was corroborated by PW3 who came out of his house after he heard a commotion and someone crying and calling for help, saying that they were being killed. He saw 2 people struggling and one, the Appellant was holding a knife that he used to stab the deceased. Both PW2 and PW3 clearly saw the Appellant with a knife. PW3 witnessed the events as the fight ensued. He saw and identified the Appellant and the deceased, as they were struggling with each other. Thereafter, PW3 saw the Appellant while still holding the knife, pin the deceased against the wall, and when he finally separated them, the deceased had been stabbed. He died shortly afterward from the stab wound.

43. It is not lost on us that although he had his back to PW3 whilst he pinned the deceased against the wall, that PW3 was clear that at all times it was the Appellant and the deceased who were struggling with each other, and it was the Appellant who pinned the deceased against the wall and stabbed him.

44. Secondly, there was further evidence that pointed to the Appellant as the perpetrator, which is that the fight between the Appellant and the deceased was over a phone that the Appellant alleged was stolen from him. He informed PW2 about it and later made a report of a stolen phone at the police station, and he produced an OB number. When this evidence is considered alongside his defence that he confronted the deceased about his stolen phone, this would distinctly point to him as the person who attacked the deceased on account of the stolen phone.

45. Third, the evidence of the Government Analyst also conclusively identified the Appellant as the perpetrator. The report showed that the DNA profile generated from the blood stains on the Appellant's short trouser matched the DNA profile generated from the deceased person's blood. In addressing this issue, the learned Judge stated:

46. PW4 the government analyst analysed the accused person short trouser and generated DNA profile from the blood stain on the said trouser and found that it matched the DNA profile of the deceased which was generated from deceased blood sample. The accused was therefore properly identified as the person who inflicted the injuries that led to the deceased death".

47. We have no reason to disagree with the learned Judge's conclusion that the blood stain on the Appellant's short trouser identified him as the perpetrator. However, the Appellant has gone further to argue that since the jeans shorts trousers in question were of different colours, this would mean that the Appellant, who PW3 stated was wearing blue jeans was not the same person who stabbed the deceased, because, the blood stains test were carried out on black jeans and not his blue jeans.

48. In the case of Joseph Maina Mwangi vs Republic CA No. 73 of 1992 [UR], this Court held that:

> In any trial there are bound to be discrepancies. An appellate court in considering those discrepancies must be guided by the working of Section 382 of the Criminal Procedure Code, viz whether such discrepancies are so fundamental as to cause prejudice to the Appellant or they are inconsequential to the conviction and sentence."

49. The evidence is clear that the Appellant who is a short person was wearing short jeans trousers on the day in question, which he has not denied. The DNA profile relied upon by the trial Judge was not in any way controverted. The short jeans from where the DNA sample was lifted, when tested had the same DNA profile as that of the deceased's blood. When this evidence is considered together with the fact that the Appellant placed himself at the scene, and PW2 and PW3 saw that he was in possession of a knife, in totality it unequivocally points to the Appellant as the person who killed the deceased. And notwithstanding that there was a discrepancy in the evidence in respect of the colour of the trousers, from where the DNA sample was lifted, we are satisfied that this inconsistency did not in any way prejudice the Appellant or go to the root of the prosecution's case.

50. Turning now to the Appellant's claims that his actions were in self defence against the deceased, at the outset, it is observed that the proceedings do not disclose that the Appellant raised the defence of self defence. Further, upon analysis of his defence, we find the notion that he acted in self defence to be unavailable to him, and an afterthought. This is for the reasons that, first, none of the prosecution witnesses saw the deceased holding a knife during the struggle. It was only the Appellant who had a knife. Secondly, PW3 heard the deceased calling for help, saying he was about to be killed. As a result, the scenario as presented did not disclose that the Appellant was in any danger of being harmed by the deceased. To the contrary, the evidence would infer that it was the Appellant who at all times was intent on causing grievous harm or death to the deceased. This ground is without merit and accordingly fails.

51. As to whether malice aforethought as provided under Section 206 of the Penal Code was established, we agree with the learned Judge that the Appellant was seen carrying a knife which he stated was for the specific purpose of causing grievous harm or death to the person who had stolen his phone. On the fateful morning when he came upon the deceased, whom he accused of stealing the phone, the Appellant used the knife to stab the deceased with a view to causing him grievous harm or even death. From the fatal injuries inflicted on the deceased, it is clear that the Appellant intended to cause death or grievous harm to the deceased with the result that, malice aforethought was proved to the required standard. See Katana vs Republic [Criminal Appeal 48 of 2021] [2024] KECA 463 (KLR).

52. On the sentence, and whether it was harsh and degrading, as stated in the case of Bernard Kimani Gacheru vs Republic [2002] eKLR, ordinarily, sentencing is at the discretion of the trial court and an appellate court ought not to interfere with the 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."

53. Though the Appellant has faulted the learned Judge for failing to consider that he was a first offender, with a young family, and that the deceased's death occurred as a result of a single stab wound which could not be considered a vicious sustained attack as to warrant the maximum sentence, the ruling

on sentence following his conviction shows that the learned Judge took all the material factors into account before arriving at the sentence.

54. We therefore do not find that the learned Judge failed to take into account relevant factors or took into account irrelevant factors, or acted on wrong principles in exercising her discretion to sentence the Appellant to 30 years' imprisonment, instead of the death sentence which is by law prescribed. Given the circumstances of the case, we further find that the sentence was not harsh or degrading, and as a consequence, there is no basis upon which to interfere with the sentence.

55. In sum, the appeal against the conviction and sentence is lacking in merit and is accordingly dismissed.

56. Lastly, this judgment is delivered and signed under Rule 34(3) of the Court of Appeal Rules (2022), following the untimely death of the Hon. Mr. Justice Fred Ochieng JA prior to its delivery.

It is so ordered.

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

A. K. MURGOR

.....

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