Onyancha & 2 others v Republic (Criminal Appeal 92 of 2019)
[2025] KECA 1903 (KLR) (7 November 2025) (Judgment)

Neutral citation: [2025] KECA 1903 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 92 OF 2019

MSA MAKHANDIA, HA OMONDI & LA ACHODE, JJA

NOVEMBER 7, 2025

BETWEEN

MICHAEL KEMOSI ONYANCHA ..... 1ST APPELLANT

PHILEMON MOMANYI OMWANSA ..... 2ND APPELLANT

EVERLINE KWAMBOKA OMWANSA ..... 3RD APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an Appeal from the Judgment of the High Court of Kenya at Nyamira, (Maina, J.) dated 27th September 2018 & Sentence dated 12th October 2018)

JUDGMENT

1. This is a first appeal against the judgment of the High Court of Kenya at Nyamira dated 27th September, 2018, in which the appellants; Michael Kemosi Onyancha, Philemon Momanyi Omwansa and Everline Kwamboka Omwansa were charged, tried and convicted on the information of murder contrary to Section 203 as read with Section 204 of the Penal Code and consequently sentenced to thirty years' imprisonment each. The particulars of the information were that on the 14th day of June 2014, at Eronge village in Timi Sub-location within Nyamira County, the appellants, jointly with others not before the court, murdered one Charles Mogoi Makori, "the deceased".

2. The evidence led by the prosecution in support of the information was that the deceased, a 68-year-old village elder and member of the local community policing unit, was part of a team assembled by the local Assistant Chief Patrick Birisio Shibuoga (PW1) to conduct a crackdown on illicit brew in Eronge village. Acting on a tip off that local brew commonly known as chang'aa was being brewed at the home of the 1st appellant, the group, which included PW1, PW2 (Alfred Morara Nyangori), PW3 (Wilson

Okari Arasa), and others invaded the homestead. Some members of the public who were partaking of the brew, upon seeing them fled into the nearby tea bushes while others ran to neighbouring homes.

3. In the meantime, the 3rd appellant, raised a false alarm claiming they were being attacked by thieves. In the ensuing melee, the 1st appellant got a panga from his wife and attacked PW1, cutting him on the hand. Fearing for his life, PW1 and other members of his group took to their heels. PW1 took cover in a nearby tea plantation while the deceased, as he attempted to escape, stumbled and fell. He was then set upon by the appellants and other members of the public with sticks, pangas, and stones. According to PW1, he clearly saw the 1st appellant strike the deceased with a panga, and that the 2nd appellant proclaimed that he "knew how to kill someone," before hitting the deceased with a stick. The 3rd appellant was said to be involved in the assault as well.

4. PW2 corroborated this account, stating that he also saw the 1st appellant strike the deceased with a panga and that the 2nd and 3rd appellants were part of the group that simultaneously attacked the deceased. PW3, who was on the roadside during the operation, also confirmed seeing the 1st appellant assault PW1 as well.

5. PW5 James Obuki Kiage, though not a member of the local policing group nonetheless upon entering the appellants' compound saw the 1st appellant take a panga and attack the deceased. He asserted that the 1st appellant led the assault, the 2nd appellant was among those hurling stones, and the 3rd appellant was handing weapons to the other assailants.

6. PW4 James Mageto Makori, identified the body of the deceased who was his brother to the pathologist, Dr. Asava, for purposes of postmortem.

7. PW7, Dr. Onjoke Verabeck, tendered the postmortem report on behalf of the original pathologist, Dr. Asava. The cause of death was attributed to multiple head and abdominal injuries due to blunt force trauma.

8. The investigating officer, PW8 Cpl Kabuti Kamuren, confirmed that upon being dispatched to the scene of crime, he found the deceased bleeding from the head and PW1 injured. He facilitated their transfer to Nyamira County Hospital where the deceased was admitted. Upon the deceased's death the following morning, he investigated the matter further, collected statements from witnesses, arrested the appellants and subsequently charged them with the information.

9. Put on their defence, the appellants in all their unsworn statements of defence advanced alibis asserting that they were elsewhere minding their own businesses at the time of the alleged incident.

10. After considering the entirety of the prosecution as well as defence evidence, the trial court found that the prosecution had discharged its burden of proof against the appellants beyond reasonable doubt. The court observed that the deceased died as a result of multiple head and abdominal injuries caused by blunt force trauma, as corroborated by the postmortem report. These injuries were consistent with the manner of assault described by the prosecution witnesses, all of whom placed the appellants at the scene and implicated them directly in the fatal attack. The court emphasized that the incident occurred during daylight and that the key prosecution witnesses, particularly PW1 knew all the appellants very well as his subjects in the sub-location. Their evidence was found to be reliable and credible, especially as the identification was one of recognition as opposed to identification of a stranger in difficult circumstances.

11. The court rejected the alibi defence put forward by each appellant terming them uncorroborated and dislodged by the direct, consistent, and clear evidence of the prosecution witnesses. The court further held that the actions of the appellants demonstrated a shared intention to inflict grievous harm or death

upon the deceased. Their coordinated use of crude weapons including sticks, pangas, and stones and the nature of the injuries inflicted led the court to conclude that they acted with malice aforethought as defined under Section 206 of the Penal Code. Ultimately, as already stated, the court was satisfied that the charge of murder against each of the three appellants had been proved, convicted all them and sentenced each of them to serve thirty years' imprisonment.

12. The appellant being dissatisfied with the conviction and sentence, has appealed to this Court on grounds that the trial court erred in law and fact in: holding that the prosecution had proved its case against the appellants beyond reasonable doubt; relying on contradictory, inconsistent and uncorroborated evidence of the prosecution witnesses; rejecting the appellants' alibi defences without giving any plausible reasons; relying on untested, doubtful and unreliable identification of the appellants and that the sentence imposed on the appellants was manifestly harsh and excessive.

13. When the appeal came up for plenary hearing, parties agreed to canvass it solely by way of written submissions. Ms. Nduhukire, learned counsel appeared for the appellants, whereas, Mr. Mwangi learned Senior Prosecution counsel appeared for the respondent.

14. Ms. Nduhukire submitted that even if the appellants had knowledge that grievous harm was likely to result from their conduct, this alone was insufficient to sustain a conviction for murder. She referred to the case of Hyman v Director of Public Prosecutions [1975] AC 55, to argue that it does not matter whether the act and intention was aimed at the actual victim who died; what matters is the presence of deliberate intention, which she contended was lacking in the circumstances of this case. She also asserted that the appellants' respective alibi defences were uncontroverted by the prosecution. In this regard, she relied on the case of Argut v Republic (Criminal Appeal No. 205 of 2017) [2023] KEHC 2690 (eKLR), for the proposition that once an accused raises an alibi, the prosecution bears the sole responsibility to tender evidence to dislodge or counter it. Failure to do so may raise reasonable doubt in the prosecution's case that ought to be resolved in favour of the appellants.

15. It was submitted that the alibi defences raised by each appellant were not displaced and should have tilted the scales of justice in their favour. Counsel also contended that the court erred in sentencing the appellants to thirty years' imprisonment each, terming it harsh, excessive, callous, and capricious in the prevailing circumstances. She further submitted that the appellants had gained substantial rehabilitative progress while in custody, displaying exemplary conduct and benefiting from correctional programs in the facilities they are held in. In support of their plea for leniency as regards sentence, counsel cited the case of Wilson Waitegei v Republic [2021] eKLR, where the court reconsidered a lengthy custodial sentence in light of the appellant's demonstrable reform. Counsel therefore prayed for a significant reduction in sentence, arguing that the sentence imposed amounted to life imprisonment in practical terms.

16. Opposing the appeal, Mr. Mwangi submitted that the identification of the appellants was by way of recognition, and not mere visual identification of strangers in difficult circumstances. He noted that PW1 knew all the appellants as residents within his jurisdiction and that they were even related. According to his testimony, the assault took place around 6:30 p.m. when there was still adequate daylight, allowing him to clearly see the appellants as they assaulted them. This evidence was corroborated by PW2, PW3, and PW5 who also identified the appellants as members of their own community, thus making their identification by recognition credible. Counsel submitted that this direct testimony ruled out the possibility of mistaken recognition.

17. Regarding the offence itself, counsel stated that the evidence on record clearly showed that the deceased died as a result of multiple head and abdominal injuries caused by blunt force trauma, a fact confirmed by the postmortem report. He argued that the conduct of the appellants constituted a retaliatory and

coordinated attack against the deceased following the interruption of their illicit brewing activities. That the trial court found that the appellants had raised a false alarm and mobilized a mob, during which the deceased, a known member of the local community policing team, was fatally assaulted. Relying on Section 21 of the Penal Code, counsel argued that the appellants acted in furtherance of a common intention, making them all equally liable as joint offenders, mattering not who delivered the fatal blow. Regarding the alibi defences, counsel submitted that they were raised late in the proceedings, and in such circumstances, the court was entitled to weigh the alibi against the totality of the prosecution evidence, as was held in the case of Juma Mohamed Ganzi & 2 others v Republic [2005] eKLR and Wang'ombe v Republic [1980] KLR 149. Counsel maintained that the trial court properly evaluated the defences and found them lacking in credibility.

18. On sentence, counsel submitted that the sentence of thirty years' imprisonment was lawful and was properly imposed. He drew the court's attention to the cases of Ngao v Republic (Criminal Appeal No. 5 of 2020) [2021], Juma Abdalla v Republic (Criminal Appeal No. 44 of 2018) and Francis Karioko Muruatetu & Another v Republic [2021] eKLR, with regard to sentencing in murder cases and contended that the sentence imposed was not excessive or arbitrary. In the end counsel urged the Court to uphold both the conviction and the sentence and dismiss the appeal in its entirety.

19. As the first appellate court, our duty is to conduct a fresh and exhaustive re-evaluation of the evidence on record and to arrive at our own independent conclusions, while bearing in mind that we neither saw nor heard the witnesses testify first-hand and make due allowance for such. See the case of Okeno v Republic [1972] EA 32.

20. We have laid down the facts of the case and the evidence as presented in the trial court in our bid to discharge this duty. Having carefully considered the record, the submissions of both parties, the authorities cited and the law, the issues that arise for determination in this appeal are threefold whether: the elements constituting the offence of murder were proved beyond reasonable doubt; the appellants were positively identified as the perpetrators of the offence; and whether the sentence imposed by the trial court was harsh and excessive in the circumstances.

21. On the first issue under Section 203 of the Penal Code, the offence of murder is committed where any person, of malice aforethought, causes the death of another by an unlawful act or omission. To prove the offence therefore, the prosecution must establish three essential elements: the fact of death and its cause; that the death was caused by an unlawful act or omission attributable to the accused; and third, that the accused committed the said act or omission with malice aforethought. The above attributes were buttressed in the case of Chai v Republic [2022] KECA 495 (KLR), The Court emphasized that failure to prove any one of these elements was fatal to the prosecution's case.

22. In the instant appeal the fact of death was never disputed by the appellants. All they said was, yes the deceased died but they were not responsible. In any event, the deceased brother PW4 identified the deceased body to the pathologist for purposes of postmortem, the investigating officer also saw the body of the deceased and finally, the pathologist upon examining the deceased's body prepared a postmortem report which confirmed that the deceased died of blunt force trauma as a result of multiple injuries to the head and abdomen. As regards the culprits, the prosecution led consistent testimony from PW1, PW2, PW3, and PW5 indicating that the 1st appellant struck the deceased with a panga while the 2nd and 3rd appellants joined in with sticks and stones. These were people who were well known to these witnesses. The events occurred within the compound of the appellants at about 6.30pm when it was still daylight. The appellants did not camouflage themselves at all as to make their identification, nay recognition difficult.

23. More crucially, PW1 stated that he had long-standing familiarity with all three appellants as they were even relatives. He personally saw the 1st appellant assault him with a panga and then turn to attack the deceased. Other prosecution witnesses, namely PW2, PW3, and PW5, also recognized the appellants as individuals they knew from the community. This consistent, multi-witness recognition strongly diminishes the risk of mistaken recognition of the appellants in the commission of the offence. Additionally, no witness relied on a fleeting glance or uncertain visual recollection; rather, their testimonies were founded on personal familiarity with the appellants over a long period of time. The trial court therefore properly appreciated that the identification was based on recognition.

24. We reaffirm the legal distinction between recognition and identification. While both fall within the broader evidentiary framework of visual perception, recognition refers to the identification of individuals previously known to the witness, and is generally regarded as more reliable than identification of total strangers. Recognition has been claimed to be more "satisfactory, more assuring and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or another..." see Anjononi v Republic [1980] eKLR. Nevertheless, even in recognition cases, courts are enjoined to exercise caution. See the most celebrated case of, R v Turnbull [1977] QB 224.

25. In light of the testimony of multiple witnesses and guided by settled law, we are satisfied that the finding by the trial court that the appellants were positively identified and more accurately, recognized as the persons who participated in the fatal assault of the deceased was sound and must therefore be upheld.

26. The court in Nzuki v Republic [1993] KLR 171 stated that malice aforethought can be inferred from the nature and extent of injuries suffered by the deceased, the weapons used, and the conduct of the accused before, during and after the incident. Besides Section 206 of the Penal Code defines malice aforethought and gives various scenarios that justifies inference of malice aforethought. In this case, the deceased was unarmed and attempting to flee, yet he was pursued by the appellants and fatally assaulted. The coordinated and repeated blows inflicted with crude weapons by the appellants on the vulnerable part of the deceased's body being the head and abdomen could only have intended to cause the death of the deceased or at the very least inflict grievous harm.

27. Section 21 of the Penal Code provides that where two or more persons form a common intention to pursue an unlawful purpose and death results therefrom, they are all equally liable. It does not therefore matter who among the appellants delivered the fatal blow to the deceased. Contrary to the submissions of counsel for the appellants, they were all culpable as principal offenders and cannot be heard to proclaim that the person who delivered the fatal blow should be the only one to be held to account.

28. On alibi defences, we note that they were raised for the first time during the defence hearing and therefore too late in the day. The prosecution was therefore denied opportunity to interrogate them. Be that as it may, and as held in the case of Juma Mohamed Ganzi & 2 Others v Republic (supra) and reiterated in the case of Wang'ombe v Republic (supra), such a defence even if raised late in the day must be weighed against the totality of prosecution evidence. The trial court indeed weighed the alibis in this context and rejected them, and we find no fault in its analysis. We have no reason to interfere or impugn those conclusions.

29. On sentence imposed, Section 204 of the Penal Code prescribes the sentence for the offence of murder as death. However, following the Supreme Court's decision in Francis Karioko Muruatetu & Another v Republic [2017] eKLR, and its subsequent directions in Francis Karioko Muruatetu (supra), sentencing for murder is now discretionary. Courts are expected to take into account mitigating and aggravating factors in considering the appropriate sentence to impose.

30. The appellants were sentenced to thirty (30) years' imprisonment.

They have argued that this was excessive, particularly in light of their status as first offenders, and their alleged rehabilitation. However, the trial court considered these mitigating factors and imposed a sentence less than the maximum permitted. Given the brutality of the attack, the vulnerability of the victim, and the fact that the act was retaliatory and unprovoked, we do not consider the sentence to be manifestly harsh, excessive, or illegal as to call for our intervention. In the premises we find no justification at all for interfering with the sentence meted by the trial court. Finally, and in any event, an appellate court will not easily disturb or interfere with the sentence imposed by the trial court unless the sentence is manifestly excessive in the circumstances of the case or that the trial court overlooked some mutual factors or took into account some wrong material or cited upon a wrong principle. See Sichei v Republic [2025] KECA 152 (KLR). We discern no such misgivings in the circumstances of this case.

31. In view of all the foregoing, we find the appeal devoid of merit and is accordingly dismissed in its entirety.

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

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

H.A. OMONDI

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JUDGE OF APPEAL

L. ACHODE

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Deputy Registrar