Korir v Republic (Criminal Appeal 303 of 2019)
[2025] KECA 2002 (KLR) (21 November 2025) (Judgment)

Neutral citation: [2025] KECA 2002 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 303 OF 2019

MS ASIKE-MAKHANDIA, HA OMONDI & LA ACHODE, JJA

NOVEMBER 21, 2025

BETWEEN

BENARD KIPKURUI KORIR ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an Appeal from the Judgment of the High Court of Kenya at Kisii (Majanja J) dated 14th June 2019 in HCCRC No. 42 of 2018)

JUDGMENT

1. The appellant was charged before the High Court of Kenya at Kisii with the offence of murder contrary to Section 203, as read with Section 204 of the Penal Code. The particulars were that, on 24th November 2018 at Mamboleo shopping centre, Emurua Dikirr Location of Transmara East Sub-County, within Narok County, he murdered Julius Kiprono Maritim.

2. The appellant pleaded not guilty and the matter proceeded to a full trial. The prosecution availed a total of seven (7) witnesses and to bring this appeal into perspective it is prudent that we render a brief summary of the case that was presented before the trial court.

3. Joseph Cheruiyot Langant, PW1, was a farmer and resident of Dikirr. He knew the deceased as a resident and businessman thereat, and the appellant as a young man who hailed from the same locality. On 28th November 2018, at about 9pm, he was within his homestead checking on his cattle when he heard the sound of muffled screams, coming from a nearby church. He passed through his fence and as he moved towards the noise, he saw the appellant stabbing the deceased with a knife. The appellant fled when PW1 threatened to shoot him with arrows, although PW1 was not carrying any arrows. PW1's screams rent the air, as he pursued the appellant attracting the attention of fellow villagers who came to his aid and helped him arrest the appellant. They went back to the scene of the attack where they found the deceased badly injured. They called the deceased's brother and he came and took him to hospital.

4. Richard Kiprono Chelule, PW2, was the area village elder who was called to the scene of the attack on the ill-fated night by the Area Chief. He observed that the deceased's head was injured and bloodied and his relatives were in the process of putting him in a car to take him to hospital. He identified one of the two caps recovered at the scene as belonging to the appellant whom he had known since childhood. He was also present the following day when the police recovered blood stained boots from under the appellant's bed and a blood stained sword in the nappier grass next to his house.

5. Richard Kipkemoi Maritim, PW3, was the brother of the deceased who rushed to the scene and took him to hospital after the attack, but the deceased succumbed to the injuries he had sustained and was pronounced dead on arrival.

6. Leonard Kipkemboi Ngetich, PW4, a village-mate of both the appellant and the deceased served them both with tea on the material evening. He was later to hear the ominous screams at about 9pm and rushed to the scene, only to find the deceased lying on the ground badly injured.

7. Doctor Donald Kibet of Bomet County Government Hospital was PW5. He performed the postmortem on the body of the deceased on 26th November 2018 at Longisa Referral Hospital mortuary. He noted seven deep cut wounds on the left side of the scalp penetrating into the brain, and exposing the menengis and parts of the brain in the parietal area. Other wounds were on the left side of the ear, neck, left shoulders and left mandible exposing the molars. He concluded that the cause of death was due to open head injury, secondary to massive bleeding due to massive head injuries.

8. PC George Ojwang, PW6, conducted the investigations and recovered two caps and the blood stained safari boots, Masai club and sword. He arrested the appellant and recorded witness statements.

9. Richard Langat the Government Chemist testified as PW7. He analyzed the blood samples supplied to him and found that the blood on the safari boots and a jacket belonged to the appellant. The blood on the sword belonged to the deceased alone while blood on the Masai club came from two different persons.

10. At the close of the prosecution case, the Court found that a prima facie case had been established against the appellant and placed him on his defence. The appellant opted to give sworn testimony and called no witnesses. He told the court that he and the deceased were related by marriage. Their wives were sisters. He testified that his wife had left him and the deceased was having an affair with her and supporting her financially, making it difficult for the appellant to reconcile with her. It was his testimony that the deceased struck him first and further that the deceased tripped and fell on his own sword and cut himself.

11. Upon considering the evidence before him, Majanja J. found the appellant guilty and convicted him as charged. He considered the appellant's mitigation and sentenced him to 20 years imprisonment.

12. Displeased with the foregoing judgment, the appellant filed this appeal contesting both conviction and sentence. He raised three grounds of appeal stating that: he was not properly identified, and no identification parade was held; that the trial Judge failed to take cognizance of his defence of self defence; and, that the requirements for a conviction for the offence of murder were not met, and the offence should have been reduced to manslaughter.

13. The firm of Ondima, Omwoma & Co Advocates, filed submissions dated 15th May 2025, on behalf of the appellant. The respondent opposed the appeal through the submissions dated 28th January, 2025 filed by Mr. Joseph Kimanthi Senior Assistant Director of Public Prosecution. We shall analyze the submissions under each issue.

14. Our mandate on first appeal as prescribed under Section 379

    1. of the Criminal Procedure Code is akin to a re-trial. We are mandated to reconsider the facts and the legal principles relevant to the conviction and sentence; and are expected to conduct a thorough and fresh examination of the evidence and carefully weigh conflicting testimonies, to arrive at our own independent conclusions. In so doing, we are alive to the fact that we did not have the opportunity of hearing and observing the witnesses as they testified in order to gauge their demeanor. Consequently, we must give room to that fact. (See Mark Oiruri Mose vs. Republic [2013] eKLR).

15. We have considered the record and grounds of appeal, together with the rival submissions and the law and the issues that arise for determination are whether all the elements of the offence of murder were proved beyond reasonable doubt and whether the appellant's defence was considered.

16. The appellant was convicted for the offence of murder contrary to Section 203 of the Penal Code which provides that:

> " Any person who of malice aforethought causes the death of another person by an unlawful act or omission is guilty of murder."

17. To sustain a murder charge therefore, the prosecution must prove beyond reasonable doubt, the fact of the death of the deceased person and its cause; that the death of the deceased was caused by an unlawful act or omission on the part of the accused person, and that such an unlawful act or omission was committed with malice aforethought.

18. These elements were enumerated in the decision of this Court in Anthony Ndegwa Ngari v Republic [2014] eKLR, as follows:

> " For the offence of murder, there are three elements which the prosecution must prove beyond reasonable doubt in order to secure a conviction. They are: (a) the death of the deceased and the cause of that death; (b) that the accused committed the unlawful act which caused the death of the deceased and (c) that the Accused had the malice aforethought. (See Nyambura & Others-vs- Republic, [2001] KLR 355)."

19. In this appeal, it is not in dispute that the deceased's life ended prematurely through an unlawful act. This is evident from the postmortem report of Doctor Donald Kibet PW5, tendered in evidence. It indicated that the cause of death was due to open head injury, secondary to massive bleeding due to massive head injuries. There is also the evidence of PW1 that when he arrived at the church, attracted by screams, he found the deceased in the process of being stabbed.

20. The more difficult issues that we must unravel are whether the appellant was identified beyond reasonable doubt as the person who ended the deceased's life, and if so, whether he did so with malice forethought.

21. On identification, the appellant submitted that the offence occurred at 9pm and none of the prosecution witnesses identified the appellant, or placed him at the scene of crime, or said they saw him and the deceased having a confrontation. He contended that PW1 did not explain how he was able to

see the act of stabbing in the darkness using only a torch. He relied on the case of Roria vs R, [1967]EA 583, where Sir Clement de Lestang, VP stated that:

> " There may be a case in which identity is in question, and if any innocent people are convicted today, I should think that in nine out of ten, if there are as many as ten it is in a question of identity."

The appellant submitted that there were questions regarding his identification; and urged this Court to hold that the trial court erred in its finding on this ground.

22. The respondent submitted that the testimony of PW1 was that on 24th November, 2018, when he went to check on the source of the screams he had heard coming from a nearby church, he came upon and saw the appellant stabbing the deceased. The evidence shows that the appellant was well known to PWI since childhood and that PW1 was able, with the help of a torch and being only 3 metres away, to clearly see and recognize the appellant as the person who was stabbing the deceased.

23. We examined the record to establish whether the trial court scrutinized the evidence of PW1, the sole identifying witness, in accordance with the principles set in Maitanyi v. Republic [1986] eKLR. In Maitanyi (supra) this Court held that identification of a suspect under difficult conditions must be carefully examined alongside other evidence to eliminate the possibility of error and, or mistaken identification. We also called to mind the case of Simon Materu Munialu v Republic [2007] eKLR, where it was held that convictions based solely on identification, particularly at night, or under challenging circumstances, require heightened scrutiny by the trial court.

24. Besides the evidence of PW1 on identification the Government Chemist PW7, testified that the Maasai club and Maasai sword were heavily stained with human blood. He analyzed the blood samples and found inter alia, that the blood on the Maasai club was from two different persons, while the blood on the Maasai sword belonged solely to the deceased. The respondent submitted that the trial Judge observed rightly in his judgment, that in view of the fact that the Maasai club had the blood of the appellant and the deceased, while the sword had only the deceased's blood, then it was the appellant who injured the deceased.

25. The appellant's explanation was first, that the deceased was the aggressor. Secondly, that the deceased tripped and fell on the sword and injured himself and thirdly, that the appellant too was injured on the leg and hand and if he injured the deceased it was in self defence.

26. We have analyzed the evidence, and the logical inference we draw from the evidence of the blood stains on the sword is that, it is the deceased who was injured by the sword. The appellant's explanation that the deceased tripped and fell on the sword flies in the face of the injuries described by PW5 in the postmortem report. PW5 noted multiple deep cut wounds on the left side of the deceased's head with the largest measuring 16 cm long and the smallest 8cm long. ln total, he noted seven cut wounds on the left side of the scalp, left ear, left mandible with the teeth exposed, and left side of the neck. Most of the cut wounds penetrated to the brain exposing the meninges and part of the brain. We find that these injuries are not in tandem with a fall on the sword. We also took into account the recovery of blood-stained boots under the appellant's bed and the fact that a blood stained sword was also recovered in the nappier grass next to his house.

27. Taking into account the testimony of PW1 as follows:

> " I...saw the accused stabbing the deceased with a knife. When I saw him I tried to scare him away. I only had a torch. I told him I am going to shoot him with arrows as a way of scaring him..."

And the appellant's own admission in his sworn defence that he fought with the deceased and did not intend to kill him as follows:

> " .... I later learned that Julius died on his way to the hospital. I did not plan to kill him He is the one who started the fight."

We find that there is no room for doubt that it is the appellant who inflicted the fatal injuries that prematurely ended the deceased's life.

28. On whether there was malice aforethought, or the offence of murder ought to have been substituted with manslaughter, the appellant submitted that he and the deceased fought. That unfortunately, the deceased sustained more serious injuries to which he succumbed, while the appellant survived and was subsequently charged. The appellant asserted that there was no mens rea, or malice aforethought and urged the Court to invoke Section 179(2) of the Criminal Procedure Code and find him guilty of the lesser offence of manslaughter, and thus vary or alter the sentence. In the alternative, set him free under the relevant law.

29. The respondent on the other hand submitted that the postmortem report shows that the deceased suffered multiple massive injuries which resulted in his death; that the appellant, by inflicting this nature of injuries, knew or ought to have known that they were likely to cause grievous harm, or loss of life that the appellant's actions were calculated to kill the deceased and therefore, malice aforethought as defined under Section 206 of the Penal Code was firmly established. The respondent urged that the learned Judge correctly held that the multiple stab wounds demonstrated malice aforethought.

30. For the offence of murder to stand, the existence of malice aforethought must be established, besides the fact of death and the act or omission that resulted in the death of a person. Section 206 of the Penal Code defines malice aforethought as follows:

> " Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances—
>
> a. an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;
>
> b. knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;
>
> c. an intent to commit a felony;
>
> d. an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.

31. The Court of Appeal summed up what constitutes murder in the case of Joseph Kimani Njau v R [2014] eKLR, as follows:

> "Before an act can be murder, it must be aimed at someone and in addition, it must be an act committed with one of the following intentions, the test of which is always subjective to the actual subject;
>
> i. The intention to cause death;

ii. The intention to cause grievous bodily harm;

iii. Where the accused knows that there is a serious risk that death or grievous bodily harm will ensue from his acts, and commits those acts deliberately and without lawful excuse with the intention to expose a potential victim to that risk as the result of those acts.

> It does not matter in such circumstances whether the accused desires those consequences to ensue or not. In none of these cases does it matter that the act and intention were aimed at a potential victim other than the one who succumbed....."

32. The events that occurred on 24th November 2018 at Mamboleo shopping centre, Emurua Dikirr at 9pm began innocently when the deceased and the appellant agreed to meet on the grounds of the church as a neutral ground, to discuss the appellant's strained relationship with his wife. Later however, tempers rose and whether or not the two men fought is not clear, since there was no one nearby to witness what transpired. All that the first responder to the screams saw when he arrived at the scene was the appellant stabbing the deceased.

33. The appellant showed the trial court a scar on his leg and another on the left hand which he said he sustained in the fight. PW6 the investigating officer described the injury on the appellant's hand as a minor scratch. At that point the appellant did not indicate that he had any injury on the leg.

34. The postmortem report described multiple deep cut wounds on the deceased's head. One wound measured 16 cm long and another 8cm long. There was a total of seven cut wounds on the left side of the scalp, left ear, left mandible with the teeth exposed, and a deep stab the neck measuring 5cm x 6cm 8cm deep. Some of the wounds penetrated to the brain exposing the meninges and part of the brain. From the injuries the appellant inflicted upon the deceased he ought to have known that there was a serious risk that death, or grievous bodily harm would ensue from his acts.

35. The fact that the appellant directed the assault at the head and neck of the deceased coupled with the ferocity of the injuries, points to the intention to cause death or at least, grievous bodily harm. We are therefore, satisfied that the ingredient of malice, was proved and we find no basis to fault the learned Judge for convicting the appellant for the offence of murder.

36. Lastly, the appellant submitted that his defence, that he acted in self - defence, was not considered. That it is the deceased who first attacked the appellant with a nut. He mused that since no witness saw the events leading up to the death of the deceased, it was possible that he was provoked and therefore, acted in self-defence. He alleged that the deceased attacked him with a sword and the appellant used the same sword in self-defence. That both were injured and the force used was equal and not excessive.

37. The case of Ndungu Kimanyi vs R 1979 KLR 282, was cited to assert that provocation is established when there is a wrongful act, or insult of such a nature as to likely, when done to an ordinary person, deprive him of the power of self-control and induce him in the heat of passion and before there is time for that heat to cool, to assault the person by whom the act or insult is done or offered.

38. The learned Judge considered the evidence as a whole and had this to say about the defence proffered by the appellant.

> " The accused's case was that he was attacked by the deceased and that the injuries the deceased sustained were accidental. He explained that when he tripped the deceased, he fell on the sword and injured himself. On consideration of the evidence of the injuries, I reject that line

of defence as the cause suggested by the appellant is inconsistent with the injuries sustained by the deceased, which could not have been caused by a single fall on the sword. .....

..... The other possible defence emerging from the evidence is that of self defence, as the accused narrated how the deceased attacked him when he confronted him about having a relationship with his wife."

39. The learned Judge cited the Court of Appeal decision in Ahmed Mohammed Omar & 5 Others, [2014] KECA 515 (KLR) in which the Court discussed the common law principles relating to self defence as followed in the case of R V McINNES, 55 Cr App. R. 551. Lord Morris delivering the judgment of the board said:

> " This is both good law and good sense that a man who is attacked may defend himself. It is both good law and common sense that he may do, but may only do, what is reasonably necessary. But everything will depend upon the particular facts and circumstances. .... Some attacks may be serious and dangerous. Others may not be. If there is some relatively minor attack, it would not be common sense to permit some act of retaliation which was wholly out of proportion to the necessities of the situation. If an attack is serious so that it puts someone in immediate peril, then immediate defensive action may be necessary. If the moment is one of crisis for someone in immediate danger, he may have to avert the danger by some immediate reaction. If the attack is over and no sort of peril remains, then the employment of force may be a way of revenge or punishment or by way of paying off an old score or may be pure aggression. There may be no longer any link with a necessity of defence. .... The defence of self defence either succeeds so as to result in an acquittal or it is disproved, in which case as a defence it is rejected. In a homicide case the circumstances may be such that it will become an issue as to whether there was provocation so that the verdict might be one of manslaughter.

40. Upon considering the principles in McINNES (supra) we are of the considered view that the appellant did not demonstrate any immediate danger or peril that would necessitate the kind of reaction that he visited upon the deceased. We are satisfied that the learned trial Judge correctly determined that the appellant did not act in self defence.

41. Having considered the evidence on record and re-evaluated it to draw our own conclusions, we find no basis to interfere with the findings of the trial court.

The upshot is that the appeal is without merit and is hereby dismissed in its entirety.

DATED AND DELIVERED AT KISUMU THIS 21 ST DAY OF NOVEMBER, 2025 ASIKE-MAKHANDIA

..... JUDGE OF APPEAL

H. A. OMONDI

..... JUDGE OF APPEAL

L. ACHODE

..... JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR