Nyongesa & 2 others v Republic (Criminal Appeal 114 of 2020) [2025] KECA 2003 (KLR) (21 November 2025) (Judgment)

Neutral citation: [2025] KECA 2003 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 114 OF 2020

MS ASIKE-MAKHANDIA, HA OMONDI & LK KIMARU, JJA

NOVEMBER 21, 2025

BETWEEN

JOSEPHAT WASWA NYONGESA .... 1ST APPELLANT

JOB OWEN NATEMBEA .... 2ND APPELLANT

HESBON IKOBO WAMUKOTA .... 3RD APPELLANT

AND

REPUBLIC .... RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Bungoma, (Aroni, J.) dated 10{{^th}} June, 2019 in HCCRC No. 28 of 2016)

JUDGMENT

1. On the evening of 4th October, 2016, Isaac Wafula Soita, “the deceased”, was found dead near Mukokholo Junction in Bungoma County. The prosecution alleged that his death resulted from a premeditated attack orchestrated by three individuals being Josephat Waswa Nyongesa, Job Owen Natembea, and Hesbon Ikobo Wamukota, “the 1st, 2nd and 3rd appellants respectively”. Apparently, the death had been motivated by a love triangle involving Naomi Nafula Wafula,(PW2), who was reportedly in a relationship with both the deceased and the 3rd appellant.

2. Earlier that day, PW2 had been seen with the 3rd appellant, who were later joined by the other two appellants. According to PW2, the appellants accosted the deceased near a hotel close to where his body was subsequently discovered and beat him up. As the deceased resisted their aggression, the 3rd appellant instructed her to run home and not speak to anybody regarding the incident.

3. Multiple witnesses corroborated this account by PW2. Tony Wabomba (PW3), a friend of the deceased, confirmed seeing the deceased and 3rd appellant quarrel earlier that evening and had intervened and separated them. Ruth Juma (PW7), a sister to PW2, alleged that PW2 mentioned

to her about the aforesaid fight upon returning home; and later woke her up saying people were crying out there; and that the deceased might have been killed. Herbert Wafula Kakai (PW4), a hotel operator, discovered the deceased's body near his hotel and reported the incident to the local authorities. John Soita Samson (PW5), the deceased's father, and Evans Soita Wafula (PW6), his brother, identified the body to the pathologist (PW1) Dr Haron Ombajo, for purposes of postmortem and who upon examination concluded that the cause of death was cardiopulmonary trauma leading to cardio haematoma.

4. Francis Waswa Wandabwa (PW8), the Assistant Chief of the area led the arrest of the appellants, based on the information provided by PW2 and other members of the public. He claimed that the 3rd appellant admitted to killing the deceased; and that he had executed it with the assistance of the 1st and 2nd appellants. PC Justin Kaitany (PW9), the investigating officer visited the scene, took photographs, and recorded statements, whereupon he arrested and charged the appellants.

5. In their defences, the appellants denied their involvement in the commission of the offence. The 1st appellant claimed that on the material day he worked throughout the day as a boda boda rider and returned home, only to be arrested later without explaination. The 2nd appellant, also a boda boda rider, admitted to ferrying PW2 and 3rd appellant on his motorbike to the scene of crime but denied any involvement in the murder, stating he dropped them off and went home. His wife, Magdalene, DW3 confirmed that the appellant was home by 6:30 p.m. and never left.

6. The 3rd appellant on his part denied knowing the deceased or having any romantic relationship with PW2, and claimed that he was assaulted during arrest.

7. The trial court upon evaluation of the evidence presented by the prosecution as well as the appellants concluded that the deceased died from cardiopulmonary arrest trauma leading to cardio hematoma. It concluded that the appellants were the last persons seen with the deceased and that the attack was premeditated, motivated by romantic rivalry. The court found PW2's testimony credible and corroborated by other witnesses. The defences were deemed mere denials and insufficient to rebut the strong case mounted by the prosecution. Consequently, the appellants were convicted on the information of murder and sentenced to 25 years imprisonment each.

8. The appellants being dissatisfied with the above judgment have all preferred this joint appeal against both the conviction and sentence. They contend that the trial court erred in law and fact by: failing to properly evaluate the evidence tendered by both sides; wrongly relying on identification evidence without adequately considering the prevailing conditions which rendered accurate identification implausible; failing to give due consideration to their respective defences and imposing harsh and excessive sentences.

9. When the appeal was called out for plenary hearing, the appellants were represented by Mr. Mirembe, learned counsel whereas Ms. Mwaniki, learned Senior Assistant Director of Public Prosecutions appeared for the respondent. The parties elected to rely entirely on their respective written submissions that they had filed and exchanged in arguing the appeal.

10. Counsel for the appellants, submitted that the prosecution failed to discharge its burden of proof beyond reasonable doubt, against the appellants particularly on the elements of identification and malice aforethought.

11. He submitted that the incident occurred at night, under poor lighting conditions, rendering their visual identification and or recognition unreliable. Counsel relied on the case of Wamunga v Republic [1989] KLR 424, to posit that identification evidence must be scrutinized with utmost care to avoid mistaken identification. Further that in the case of Nzaro v Republic [1991)] KAR 212, the Court held

that nighttime recognition as in this case, must be "absolutely watertight" to justify conviction. He also cited the case of Daniel Kipyegon Ng'eno v Republic [2018] eKLR, which outlines a comprehensive set of factors for assessing the reliability of identification, including lighting conditions, distance between the witness purporting to identify and the person being identified, duration of observation before the identification, and the witness's emotional state at the time; that the star prosecution witnesses being PW2, PW4, and PW7 gave conflicting and inconclusive accounts rendering their purported recognition of the appellants at the scene questionable.

12. On malice aforethought, counsel argued that the prosecution failed to establish malice aforethought as required under Section 206 of the Penal Code. He cited the case of Dickson Mwangi Munene & another v Republic [2014] eKLR, to posit that though malice aforethought may be inferred from intentional or reckless acts of the accused, it must however, be proved to the requisite legal standard which was not the case here. He further relied on the case of Kimani Njau v Republic [2014] eKLR, where the Court found that unclear motives and ambiguous circumstances surrounding a fatal incident undermined the mens rea for murder. In the present appeal, he contended that the circumstances leading to the alleged attack on the deceased remained vague and unsubstantiated; that the prosecution did not present any coherent narrative or motive for the fatal attack, and the testimonies therefore failed to establish the mental element necessary for conviction on the information of murder.

13. On their defences, counsel submitted that they had each presented alibi evidence placing them very far away from the scene of crime that in any event, no incriminating evidence such as bloodstained clothing or murder weapons had been recovered from any of them. Counsel adverted to the case of Joseph Maina Mwangi v Republic Criminal Appeal No. 73 of 1992, in submitting that discrepancies in witness testimony must be fundamental to affect the conviction. In this case, the contradictions in the testimonies of PW2 and PW7 regarding the presence and identification of the appellants were material and failure of the trial court to treat it as such was prejudicial to the appellants.

14. Turning to sentence, counsel submitted that in the event that the Court upheld the conviction, then we ought to consider a reduction of the sentence imposed on them. He urged the Court to consider their mitigating circumstances as they were young fathers with families and have prospects for rehabilitation

15. Counsel ultimately prayed that the appeal be allowed, the convictions be quashed and sentences imposed be set aside. In the alternative, he sought a reduction of the sentence so as to reflect their mitigating circumstances.

16. In opposition to the appeal, the learned prosecution counsel for the respondent submitted that the conviction and sentence imposed by the trial Court were sound in law. Counsel submitted that all the elements for the offence of murder were established; that the pathologist (PW1) confirmed the death and its cause; that the identification of the appellants was one of recognition, which is more reliable than identification of strangers in difficult circumstances. She relied on the cases of Omoto v Republic [2025] KECA 9 (KLR), Gerald Muchiri Mathenge & 2 others v Republic [2014] KECA 483 (KLR), and Anjononi & Others v Republic [1976–80] 1 KLR 1566, for the above proposition; and that PW2, who had a romantic relationship with both the deceased and the 3rd appellant, positively identified all three appellants engage in a scuffle with the deceased and pulled him towards the hotel of PW4, where his deceased's body was eventually later found. She also testified that the appellants warned her not to disclose the incident to anybody further corroborating their involvement.

17. In support of malice aforethought, counsel cited the case of Sango Mohamed Sango & another v Republic [2015] KECA 178 (KLR), where the Court held that malice aforethought may be inferred from the nature of injuries, the weapon used, and the part of the body targeted. In this case, the deceased

sustained fatal head injuries inflicted with a panga, resulting in a fractured skull and leakage of brain matter, which counsel argued was consistent with an intention to cause death or the very least grievous harm.

18. Regarding the appellants' defences, counsel submitted that the trial court correctly dismissed them as mere denials lacking in substance. Citing the case of Roba Galma Wario v Republic [2015] KECA 521 (KLR), counsel maintained that a defence that fails to dislodge the prosecution's case may be rejected, especially where the prosecution's evidence is consistent and credible as was in this case.

19. In conclusion, counsel maintained that the trial court properly evaluated the evidence and arrived at a proper result. She therefore urged this Court to dismiss the appeal in its entirety.

20. This is a first appeal arising from the judgment of the trial court.

    That being the case, this Court bears in mind the well-established jurisdiction, that is to re-evaluate the evidence afresh and draw its own conclusions, while bearing in mind that it did not have the benefit of observing the demeanor of witnesses and make due allowance for it. See Okeno v Republic [1972] EA 32.

21. We also reiterate that this Court shall not lightly interfere with the findings of fact by the trial court unless it is shown that such findings were based on no evidence, were plainly wrong, or were influenced by misapprehension of the law or facts.

22. Having considered the record of appeal, the grounds of appeal raised, the written submissions of both parties and the law; the following four issues arise for our determination, whether the: prosecution proved its case against the appellants beyond reasonable doubt; trial court properly evaluated the evidence of identification; respective defences were given due consideration and whether the sentence imposed was lawful.

23. On the first issue, the law is that the prosecution must establish both the actus reus and mens rea for the information of murder to hold. Section 203 of the Penal Code defines murder as the unlawful killing of a person with malice aforethought. The unlawful killing is the actus reus whereas malice aforethought is the mens rea. The death and its cause were not disputed at all by the appellants. If anything, the appellants concede this fact in their submissions. Their only point of departure is that they were not responsible.

24. But did the appellants cause it? The law requires that the evidence of identification and or recognition, especially under difficult conditions, be treated with caution. In the case of Wamunga v Republic (supra), this Court warned that mistaken identification/recognition of an accused is real and therefore such evidence of identification/recognition must be scrutinized carefully to eliminate such eventuality. Similarly, in the case of Nzaro v Republic (supra), the Court held that identification at night must be "absolutely watertight" in order to found a conviction. The Supreme Court in in the case of Peter Ngugi v Republic [2021] KESC 12 (KLR) reiterated that courts must consider factors such as lighting, distance, duration of observation, and familiarity between the witness and the accused before concluding that identification/recognition is credible enough to rely on in convicting an accused.

25. In this case, the appellants challenged the reliability of PW2's identification/recognition, citing poor lighting conditions and inconsistencies in witness accounts. The trial court found PW2's testimony credible and corroborated by other witnesses. Although the appellants cited the case of Wamunga v Republic (supra) and Nzaro v Republic (supra) to challenge the reliability of identification/recognition, the circumstances in this case, particularly the prior interaction between PW2 and the appellants, distinguishes it from the facts of these other cases. This Court in the case of Anjononi & Others v Republic (supra), emphasized that recognition by someone known to an accused is

more reliable than identification of strangers. We find no error in the trial court's acceptance of the identification/recognition evidence by PW2 that she knew all the appellants as they were her acquaintances . Further she had been with them for sometime shortly before the deceased met his death. Indeed, she saw them assault the deceased and drag him towards the hotel, where his body was eventually found. As they assaulted the deceased in her presence, they ordered her to leave the scene and not to divulge to anybody regarding what she had witnessed. Lastly, she acknowledged her involvement in a love triangle with the deceased and the 3rd appellant.

26. The four having spent almost the whole day together; whether the lighting conditions were favourable for positive identification or recognition is therefore neither here nor there. The appellants alibi defences confronted with the above evidence ring hollow to our mind. The appellants did not explain why of all the people, PW2 would settle on them as the persons whom she saw assaulting and dragging the deceased towards PW4's hotel. They did not allege a grudge or any other reason that would have compelled this witness to falsely bear witness against them. Although the 3rd appellant denied knowing the witness or the deceased, he did however, not explain why 2nd appellant would say in his defence that he had on the material day ferried him and PW2 on his motorcycle to the scene of crime and left them there. We also note that he did not at all impugn this evidence.

27. In the case of Anthony Ndegwa Ngari v Republic [2014] eKLR, this Court emphasized that malice aforethought must be proved through either direct or circumstantial evidence. In the present case, the trial court found that the deceased sustained fatal head injuries inflicted with a blunt object, consistent with an intention to cause death or at the very least grievous harm.

28. The nature of the injuries, the sequence of events, and the corroborated testimony of key witnesses support the inference of malice aforethought under Section 206 of the Penal Code. The trial court's reliance on the case of Sango Mohamed Sango & another v Republic (supra), was therefore apt.

29. On the final issue, we note that the trial court exercised discretion in imposing a custodial sentence of twenty-five years rather than meting out the maximum sentence of death. The sentence was within the lawful range and reflected the gravity of the offence. While the appellants raised mitigating factors, including their youthful status and family responsibilities, we are satisfied that these were considered by the trial court. We also appreciate the Supreme Court's sentiments in the case of Francis Karioko Muruatetu v Republic [2017] eKLR which echoed that sentencing must be individualized, but also proportionate to the offence. In this case, the sentence imposed was neither harsh nor excessive and does not therefore warrant interference.

30. In the result, we find no merit in the appeal. It is accordingly, dismissed in its entirety.

DATED AND DELIVERED AT KISUMU THIS 21ST DAY OF NOVEMBER, 2025.

ASIKE-MAKHANDIA

JUDGE OF APPEAL

……………………………………

H.A. OMONDI

JUDGE OF APPEAL

……………………………………

L. KIMARU

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR.