



**was flawed hence incapable of returning a guilty verdict.**

- ii. That the trial magistrate erred in law and fact by relying on the prosecution's evidence that was marred with inconsistencies and contradictions in convicting him.**
- iii. That the trial magistrate erred in law and fact by convicting him yet the prosecution did not prove its case beyond any reasonable doubt.**
- iv. That the trial magistrate erred in law and fact by failing to consider his mitigation thus meting out a harsh sentence.**
- v. That the trial magistrate erred in law and fact by failing to invoke section 333(2) of the CPC when meting out the sentence.**

- 5. The appeal was canvassed by way of written submissions.
- 6. The appellant submitted that during the trial he had not been represented by an advocate and that the trial court had equally failed to inform him of his right to legal representation. He argued that the omission amounted to a violation of his constitutional rights under Article 50(2)(g), contending that such failure occasioned an injustice. He further maintained that the elements of the offence charged had not been proved and that the conviction by the trial court was therefore unsafe. In addition, he asserted that the prosecution's evidence was riddled with contradictions and inconsistencies, rendering it incapable of sustaining a conviction.

7. On sentencing, the appellant faulted the trial court for meting out a stiff sentence notwithstanding that he was a first offender. He stated that in as much as sentence is a discretion of the court, the sentence meted against him was not in congruence with the circumstances under which the offence was allegedly committed. He thus urged this court to allow his appeal as prayed.
  
8. The respondent in its written submissions urged while relying on the case of **Republic vs Daniel Okello Rapuch [2017] eKLR** where it was held that:

**“In accordance to section 202 of the Penal Code, any person who by unlawful act or omission causes the death of another person is guilty of the felony termed as manslaughter. From this definition, the offence of manslaughter can be broken into three elements: there must be an unlawful act; the unlawful act must be dangerous and the unlawful act must cause death.”**

9. The prosecution submitted that it had proved its case beyond reasonable doubt. It was stated that on 8th July 2024, following a quarrel between the appellant and the deceased, the appellant pushed the deceased into the swollen Tana River, which resulted in the death of the deceased. The prosecution argued that the act of pushing the deceased into the river was dangerous and that it directly led to his death. It was further reported that the body of

the deceased had not been recovered despite efforts to retrieve it. On that basis, the learned prosecutor urged the court to uphold the trial court's findings and dismiss the appeal.

10. Having carefully considered the record of appeal, submissions by the respective parties, the authorities cited and the law, the issues for this Court's consideration are:

**i. Whether the prosecution proved its case beyond reasonable doubt.**

**ii. Whether the trial court failed to take into consideration the mitigation offered by the appellant**

**iii. Whether the sentence imposed is harsh and excessive in the circumstances of this case.**

11. PW1, Munuve John, a watchman at Bar Gate and a resident of Madogo, stated that Joseph Muthui was his cousin since their mothers are sisters. He explained that on 8.07.2024, at about 8:30 a.m., he was at work having reported at 8:00 a.m., when he received a telephone call from a lady who asked him to go to Mororo immediately as his cousin had drowned. He said that he went to the back of the club where he found many people gathered, among them the appellant.

12. When he asked the appellant what had happened, he told him that his cousin had entered the river and had been snatched by crocodiles. He further said that he asked the appellant whether they had been fighting. He recalled that police officers arrived at the scene and arrested the appellant while together with us, they

continued to search for his cousin's body in vain. He added that there was another witness who had observed what transpired between the appellant and the deceased. The witness stated that he had known the accused prior to the incident, having seen him at Mororo, although he did not know the nature of the accused's occupation.

13. In cross-examination, he stated that he did not see the accused throw Mutia into the river. He said that the accused had spots of blood on him and denied the allegation that together with others, they were responsible for the scars on the appellant's body. He observed that blood was flowing from the appellant's left arm downward, suggesting a serious injury, but insisted that he had not injured the accused. On re-examination, he reiterated that he neither attacked the appellant nor caused him any bodily injuries, and that he had found the accused already injured when he arrived at the scene.
14. PW2, Meshack Njuguna Njoroge testified that on 8.07.2024, between 7:30 a.m. and 8:00 a.m., he was at Makuti premises, a bar and restaurant located at Mororo near Tana River. He explained that the premises were divided into three sections and that he had been seated near the back wall, from where he could see both the front gate and the river. He stated that at that time, he saw a man sweeping the compound and sprinkling water, which he fetched from the river. As the man went to fetch water, the appellant passed along the narrow footpath at the back of the premises, a path that lay between the building and the river and was only wide enough for one person.

15. He stated that the appellant walked along the footpath while bending over, and thereafter, he sat briefly on a slab built over the sewage, before turning back in the direction from which he had come. On his way back, the appellant met the man who was sprinkling water and slapped him. Njoroge explained that he later came to know the appellant's name as Abdul Fakir, also known as Abdifatah, and that he had previously seen him around and was familiar with him.
16. He recounted that when the appellant and the sprinkler met, they spoke and that there was no sign of a misunderstanding. However, moments later, they began pushing each other with their hands, an act which caught his attention. He stated that he could not hear what the duo were saying because of the distance, but he saw the appellant push the sprinkler on the chest, forcing him backwards until they were about a meter apart. Since the sprinkler was standing close to the river, he then pulled out a knife and stabbed the appellant on the left side of his hand. It was his further evidence that the appellant jumped at the sprinkler, Mutia, thus throwing him forcefully towards the river. He observed that the appellant all the while was bleeding and so, he wiped the blood using the water that Mutia had fetched. He stated that he did not see Mutia come out of the river.
17. He went on to state that the appellant entered the Makuti bar and restaurant and had called out for "Mamba," a known good swimmer, to help him remove a person from the river. Njoroge explained that when he did not see Mutia emerge, he ran towards

the appellant and met him at the gate where he noticed that the appellant's left side was covered in blood. He said that people gathered and so, he informed them not to allow the appellant escape since he had thrown someone into the river. Because the appellant was bleeding, people discouraged Mamba from involving himself in the incident. He emphasized that Abdifatah had thrown Mutia into the river and that Mutia disappeared since that day.

18. On cross-examination, Njoroge maintained that he had recorded a statement with the police and that he knew the appellant well, having seen him before. He insisted that he was the only witness to the incident and that he saw the appellant throw Mutia into the river. He admitted that Mutia stabbed the appellant but denied the suggestion that it was him or the workers at Makuti who stabbed the appellant.
19. PW3, Ibrahim Aharika Burale, a bus conductor, testified that on 08.07.2024 he was resting when the appellant approached and called him by his alias name "Mamba," asking him to assist because a man had disappeared. He stated that when the appellant spoke to him, he noticed that he was wet and bleeding from his left hand and knee. He explained that he followed him into Makuti Restaurant and then towards the river, where he observed two buckets of water and footprints near the riverbank. He said that when he asked who had disappeared, the appellant pointed towards the river and told him that a person had gone into the water.

20. The witness continued that he removed his clothes in readiness to rescue the drowning person, but before he could enter the river, some people arrived and stopped him, warning him not to involve himself in the matter. He added that as they moved towards the river, more people gathered and attempted to attack the appellant, but police officers arrived in time and arrested him. On cross-examination, he confirmed that the appellant and him knew each other well only that, he did not see the appellant throw the deceased into the river.
21. PW4, John Muthui from Kitui County, stated that he knew Joseph Mutia Muthui, his fourth son having been born in the year 1986. He explained that he last saw his son in June 2024 when the deceased visited him. He said that in August 2024, while he was at home, he received news of his son's disappearance. At the time, both his and his wife's cellphones had no charge, but some people from Mororo who came from his village telephoned his neighbour with the information that his son had disappeared into the river. The neighbour then informed his wife, who in turn informed him. He added that Mutia lived with his wife and children at Mororo.
22. He recounted that on the following day, he travelled to Mororo, where he found that the incident was the talk of the village. He said that a person named Mamba told him that they tried to rescue Mutia in vain. He went to Madogo Police Station, where he met the appellant herein, who appeared to have blood and injuries on him.

23. PW5, Kabui Stanley Erimba, a businessman at Mororo testified that on 08.07.2024 at about 8:30 a.m., he was drinking soup in a hotel next to Makuti Bar when he saw people heading towards the river. He said that he met Abdifatah, who was bleeding on his left arm and on his knee. When he asked Abdifatah what the problem was, Abdifatah did not reply. He added that officers from Mororo Police Station arrived and took the appellant away.
24. He recounted that when he went to the river, he heard people saying that Mutia had disappeared. He said that he had known Mutia well for eight years. In cross-examination, he stated that he did not witness the appellant throw Mutia into the river.
25. PW6, No. 70851 Corporal Anthony Murugi, the investigating officer testified that on 11.07.2024 at about 12 p.m., he received a telephone call from the OCS, Inspector Wambui, who informed him that someone was in the cells for throwing another person into the water at the bridge near Mororo Shopping Centre at Makuti Bar. He said that he was told the body was never recovered but there was a witness, Njuguna, who saw the incident. According to the information, the witness had seen the deceased and the suspect fight consequent to which, the appellant threw the deceased into the water.
26. He stated that he commenced investigations into the case and consequently, charged the appellant. He added that he visited the scene of the offence and took photographs, which were handed over to the scene of crime personnel, though they had not yet been processed.

27. From his investigations, he found that the deceased had been fetching water from the river and on his way back from the river, met the appellant who blocked his path. He said that the deceased stabbed the suspect with a knife on the leg, on the biceps of the left hand, and on the left side of the eye before leaving. He explained that this indicated that there had been a fight and struggle. He further stated that after being stabbed, the appellant turned on the deceased and threw him into the water. He confirmed that the body of the deceased has never been recovered to date. He added that he visited the scene and recorded statements from witnesses and that the photographs remained with the scene of crime support personnel but were not yet ready.
28. DW1, Abdifatah Mohamed, a motorcycle and small vehicle repairer living in Mororo stated that on the night of 7th to 8th July 2023 he was at his place of work at G-Coach booking in Garissa town from 7 p.m. until 6 a.m. the following morning. After finishing work, he went to Makuti Bar in Mororo while chewing miraa and ordered water and an energy drink as he watched television. He said that at about 8 a.m. he felt pressed by a call of nature after finding someone cleaning the toilet, he decided to go behind the bar near the rubbish area to relieve himself. He reported that while there, he heard screams from the river and saw a person struggling in a dangerous spot. He claimed that he attempted to help but slipped on a rock which gave way, injuring his left leg, though he managed to hold onto

stones at the riverbank. He said the drowning person was swept away by the current.

29. He narrated that he returned to the hotel bleeding and informed the people that someone had drowned but to his dismay, the said people started beating him while claiming that he had drowned someone. He went further to state that the waiters stabbed his left hand with a knife. He added that police officers from Mororo Police Post rescued and took him to hospital, and later to Madogo Police Station where the deputy OCS stated that there was no case or evidence against him.
30. On cross-examination, he maintained that he had left work at 6 a.m. and gone to Makuti Bar, which was only two steps from the river. He explained that when he went behind the bar, there was no one there and the back could not be seen from inside. He said there was music playing in the bar since it was a Monday, and that when he screamed on returning, people inside heard him. He insisted that he did not see the drowning victim before going behind the bar and that he was beaten merely for relaying bad news.
31. This is the first appellate court. As expected, I must re-analyze and re-evaluate all the evidence adduced before the lower court afresh and arrive at an independent decision bearing in mind that I neither saw nor heard any of the witnesses testify to be able to assess their general demeanor. See the celebrated case of **Okeno vs Republic [1972] EA 32.**

32. The appellant was charged under Section 202 (1) of the Penal Code which stipulates that:

**(1) Any person who by an unlawful act or omission causes the death of another person is guilty of the felony termed manslaughter.**

33. It is trite law that in criminal cases, the burden of proof always lie with the prosecution which must prove its case beyond reasonable doubt. The court of appeal in a more recent case of **Wafula vs. Republic (Criminal Appeal 110 of 2019) [2023] KECA 131 (KLR) (10 February 2023)** stated thus:

**“It is trite law that the legal burden of proof in a criminal case rests throughout, with the prosecution. There was no burden whatsoever, on the appellant to prove his innocence. In Woolmington vs. DPP, (1935) AC462, the Court held:**

**But while the prosecution must prove the guilt of the prisoner, there is no such burden laid on the prisoner to prove his innocence and it is sufficient for him to raise a doubt as to his guilt, he is not bound to satisfy the jury to his innocence.”**

34. In order to prove the offence of manslaughter, the prosecution is duty bound to establish that; the deceased died and that the death was caused by an unlawful act or omission of the accused. Unlike murder, proof of malice aforethought is not necessary.

35. In the instant case, the evidence on record is that the deceased was pushed by the appellant off the edge of the river into a

crocodile infested river Tana consequences whereof he drowned and disappeared. The body was never recovered. Pw1 and Pw2 confirmed to that extent. Equally the appellant confirmed that the deceased drowned and his body was not recovered. Therefore, there is no doubt that the deceased died.

36. What was the cause of his death? As stated by pw1, pw2 and the appellant, the deceased died out of drowning. It is for that reason that no postmortem was done as there was no body recovery.
37. Who caused his drowning and the eventual disappearance of his body? From the evidence of pw2, it was the appellant who pushed the deceased into the river after a fight between the two which led to the appellant being injured. There is no dispute that the incident took place during day time hence identification was not hindered by lack of sufficient light. Pw2 stated that he was familiar with both the deceased and the appellant before. The accused denied committing the offence in as much as he admitted that he saw the deceased drown but denied involvement.
38. The Court of Appeal while addressing the issue of identification in the case of **Maitanyi vs Republic [1986] KLR 198** stated that:

**“It must be emphasized that what is being tested is primarily the impression received by the single witness at the time of the incident. Of course, if there was no light at all, identification would have**

been impossible. As the strength of the light improves to great brightness, so the chances of a true impression being received improve. That may sound too obvious to be said, but the strange fact is that many witnesses do not properly identify another person even in daylight. It is at least essential to ascertain the nature of the light available. What sort of light, its size, and its position relative to the suspect, are all important matters helping to test the evidence with the greatest care. It is not a careful test if none of these matters are known because they were not inquired into. In days gone by, there would have been a careful inquiry into these matters, by the committing magistrate, state counsel and defence counsel. In the absence of all these safeguards, it now becomes the great burden of senior magistrates trying cases of capital robbery to make these enquiries themselves. Otherwise who will be able to test with the 'greatest care' the evidence of a single witness?

There is a second line of inquiry which ought to be made and that is whether the complainant was able to give some description or identification of his or her assailants, to those who came to the complainant's aid, or to the police. In this case no inquiry of any sort was made. If a witness receives a very strong impression of the features of an assailant, the witness will usually be able to give

**some description. If on the other hand the witness says that he or she could not identify or recognise the person, then a later identification or recognition must be suspect, unless explained. It is for the magistrate to inquire into these matters.”**

39. Likewise, the High Court of Kenya at Voi in **AHM vs Republic [2022] KEHC 12773 (KLR)** correctly observed that:

**“... the accuracy of a witness's testimony identifying a person also depends on the opportunity the witness had to observe and remember that person, and whether the victim knew the accused before.”**

40. In the instant case, PW2, testified that he saw the appellant, a person well known to him throw the deceased into the river after some quarrels which led the deceased to stab the appellant on the leg. PW3 corroborated the evidence of PW2 by stating that after the incident, the appellant approached him and sought for assistance from him stating that a man had disappeared into the river.
41. According to PW3, the appellant was bleeding from his left knee and noting that he was a known swimmer, the same made the appellant seek for help from him. The appellant did not deny being at the scene of crime only that he defended himself that while there, he heard screams from the river and saw a person struggling in a dangerous spot. He claimed that he attempted to help but slipped on a rock which gave way, injuring his left leg,

though he managed to hold onto stones at the riverbank. He said the drowning person was swept away by the current.

42. In my view, a review of the prosecution's evidence in totality points out a well woven pieces of evidence that corroborates each other. The same pointed at the appellant as the person who through his unlawful act of thrusting the deceased into the river, caused the death herein. Although the only direct evidence available is that of pw2, the court was convinced that his testimony was sufficient as corroborated by the rest of the witnesses.
43. It is trite that a court can safely convict based on the evidence of a single witness as long as it cautions itself of the consequences of such reliance. See the case of **Abdulla Bin Wendo & Another vs Reg (1953) 20 EACA 166 followed in Roria vs Rep (1967) EA 583** where the court stated that;
- “Subject to 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 the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult. In such circumstances what is needed is other evidence, whether 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.”**

44. Taking into consideration the totality of the evidence on record, I am convinced beyond reasonable doubt that the incident was reasonably foreseeable with the full knowledge that there was a possibility that the deceased was likely to drown into the river and possibly die in a highly crocodile infested river. The appellant cannot escape culpability. His defence does not exonerate him from liability. He was clearly identified by pw2 push the deceased into the river. To that extent, I do not find any fault in the finding of the trial court.
45. As such, I find that indeed the conviction of the appellant was not only sound but also legal as it captures the appellant's unlawful act which led to the loss of the deceased's life.
46. On whether the sentence was in the circumstances of this case, harsh and excessive, it is trite that an appellate court cannot interfere with the sentencing discretion merely because it would have imposed a different sentence. It can only do so where there has been a material misdirection with regard to the sentence. In **Shadrack Kipkoech Kogo vs Republic Eldoret Criminal Appeal No.253 of 2003**, the Court observed that:

**“Sentence is essentially an exercise of discretion by the trial court and for this court to interfere it must be shown that in passing the sentence, the sentencing court took into account an irrelevant**

**factor or that a wrong principle was applied or that short of these, the sentence itself is so excessive and therefore an error of principle must be interfered [see also *Sayeka v R* [1989 KLR 306].”**

47. Section 205 of the Penal Code provides as follows:

**Any person who commits the felony of manslaughter is liable to imprisonment for life.**

48. What I gather from the case herein is that there ensued a quarrel between the appellant and the deceased before the appellant thrust the deceased into the river. Of importance to note is the fact that the deceased stabbed the appellant during the said quarrel.

49. In as much as the appellant contends that his defence was not considered, the social inquiry report stated that he did not have a close family. The foregoing notwithstanding, in the very least, it was important to note that the appellant was a first time offender and further, the circumstances under which the deceased met his death.

50. In the case of **Republic vs Mwebi (Criminal Case 48 of 2018) [2025] KEHC 141 (KLR)**, the appellant had been convicted of the offence of manslaughter and wherein, the trial court sentenced him to 5 years' imprisonment to take effect from the date of the judgment.

51. In the case of **Republic vs Etiang (Criminal Case E008 of 2022) [2024] KEHC 4827 (KLR)**, the accused was convicted of the offence of manslaughter and sentenced to serve 7 years imprisonment.
52. In **V M K vs Republic [2015] eKLR** ten years in jail was given for manslaughter. The court noted that the trend has been that when the accused person uses a dangerous weapon in committing the crime, the court is likely to sentence the accused to life imprisonment. To my mind the appellant herein thrust the deceased into the river after the deceased stabbed him following a quarrel. To some extent, the deceased did contribute to the incident which led to the appellant sustain injuries.
53. According to pw2, the appellant was not armed. He reasonably defended himself by pushing the deceased which unfortunately led to his drowning as they were fighting at a narrow path next to the river. In the circumstances and taking into account the period spent in remand custody from 22-08-2024 when he was arraigned in court till conclusion of the trial, I find the sentence of seven years sufficient. Accordingly, the appeal against conviction is dismissed and the trial court's conviction upheld. The sentence of 12 years is set aside and the same substituted with that of 7 years to run from the date of sentence before the trial court.

ROA within 14 days.

Dated, signed and delivered this 18<sup>th</sup> day of December 2025

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**J. N. ONYIEGO**

**JUDGE**