



REPUBLIC OF KENYA



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**Nderi v Republic (Criminal Appeal 88 of 2020)  
[2025] KECA 2162 (KLR) (11 December 2025) (Judgment)**

Neutral citation: [2025] KECA 2162 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NYERI  
CRIMINAL APPEAL 88 OF 2020  
K M'INOTI, A ALI-ARONI & PM GACHOKA, JJA  
DECEMBER 11, 2025**

**BETWEEN**

**MICHAEL MUTHEE NDERI ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(An appeal from the conviction and sentence by the High Court of Kenya at Chuka (R. K. Limo, J.) dated 27th January 2020 And Republic Respondent in HCCRC No. 6 of 2019)*

**JUDGMENT**

1. Michael Muthee Nderi, the appellant herein, was charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. The particulars of the offence were that on 19<sup>th</sup> June 2019 at Ndumbini sub-location, Karimba location, within Maara sub-county, Tharaka-Nithi County, the appellant unlawfully murdered Jacob Mugendi Kaburu.
2. The appellant was arraigned in court on 15<sup>th</sup> July 2019. He entered a guilty plea to the charges preferred against him. The trial court cautioned the appellant on the consequences of pleading guilty to the offence, to which once again he responded: "It is true." The case was adjourned to 24<sup>th</sup> July 2019 for the reading of the facts to the appellant. On 24<sup>th</sup> July 2019, the facts were read over to the appellant. In response, the appellant stated that some facts were not true. As a result, the trial court entered a plea of 'not guilty.' The case was accordingly fixed for trial.
3. When the case came up for hearing on 27<sup>th</sup> January 2020, the appellant, through his counsel, informed the trial court that he wished to change his plea. The facts were read out to the appellant afresh in the Kiswahili language. The appellant's response was as follows: "The facts are true." Flowing from that response, the court directed that the facts be read out, to which the appellant stated once again that the facts were true.



4. The Judge, upon considering the appellant's mitigation and the victim's family's submissions, sentenced the appellant to 25 years' imprisonment. It is these findings that have galvanized into this appeal.
5. The appellant filed his notice of appeal dated 24<sup>th</sup> February 2020. He also filed undated grounds of appeal and a memorandum of appeal dated 9<sup>th</sup> June 2025. We have taken the liberty to summarize all the grounds espoused as follows: that the appellant was deceived into entering a guilty plea by his pro bono lawyer under the pretext that he would be forgiven; that his lawyer did not safeguard his interests; that the charge sheet was defective; and that the appellant ought to have been convicted of manslaughter instead of murder as the death occurred as a result of the provocative actions of the deceased.
6. Additional grounds were that the elements of the murder charge were not recorded to have been read out in a language that the appellant understood; that the mitigating circumstances were not considered and as a result, the sentence meted out was harsh and excessive; that the appellant was under the impression that he was entering a plea bargain and not a guilty plea; that the learned judge erred in convicting the appellant on his own plea; and that the pre- requisite requirements to convicting on a guilty plea were not proved beyond reasonable doubt.
7. In view of the foregoing, the appellant prayed that his appeal be allowed, his conviction quashed and sentence be set aside, and an order for retrial be issued.
8. The appeal was heard on 2<sup>nd</sup> September 2025. The appellant was present and represented by learned counsel Mr. Mwendwa, Advocate. Principal Prosecution Counsel, Ms. Mengo, was present and represented the respondent. Parties relied on their respective written submissions that were orally highlighted.
9. The appellant filed his written submissions and list of authorities, both dated 22<sup>nd</sup> May 2025. He submitted that the plea entered was equivocal, as it was entered through his counsel. He pointed out that from the record, learned counsel for the appellant was recorded as having submitted as follows on 27<sup>th</sup> January 2020:

“I have instructions that the accused wants to change his plea. On facts, I pray (sic) be read afresh to him.”
10. Mr. Mwendwa argued that since the admission of the facts did not originate from the appellant's mouth, it was improper for the trial court to enter a plea of guilty based on those words. Citing the decisions of this Court in *Jason Akhonya Makokha v Republic* [2014] KECA 23 (KLR) and *Wakianda v Republic* [2016] KECA 181 (KLR), the appellant argued that the words “the facts are true” were not akin to a guilty plea. In his view, the trial court convicted him on an assumed plea of guilty recorded on 15<sup>th</sup> July 2019.
11. Continuing, Mr. Mwendwa submitted that the appellant did not understand the proceedings and that the guilty plea was a nullity. He further faulted the trial court for failing to caution the appellant on the seriousness of the offence and the consequences of pleading guilty. For those reasons, he prayed that the appeal be allowed.
12. The respondent opposed the appeal. It relied on its written submissions dated 3<sup>rd</sup> June 2025 to submit that from the proceedings, the appellant's written submissions are misleading and untrue. Miss. Mengo continued that the authorities cited did not apply to the facts and circumstances of this appeal, adding that according to the trial proceedings, it was the appellant and not his counsel who entered a guilty



plea. In her view, the procedure leading up to the conviction complied with the requirements of the law and was bereft of any fault.

13. The respondent submitted that since the plea was unequivocal, the appellant could only challenge the legality of the sentence in line with section 348 of the Criminal Procedure Code. M/s Mengo added that the sentence meted out was lenient and legal and therefore ought not to be disturbed. Though urging this Court to dismiss the appeal for lack of merit, M/s Mengo, on being questioned by the Court, conceded that the appellant ought to have been convicted of the offence of manslaughter in light of the facts read out.
14. We have anxiously considered the diametrically opposed submissions, examined the record of appeal and analyzed the law. Our duty as a first appellate court is well settled. We are called upon to re-evaluate, re-analyze and re-examine the evidence afresh and arrive at our own independent findings while making due allowance to the fact that we did not have the advantage of hearing the witnesses and observing their demeanor. [See *Mark Oiruri Mose v Republic* [2013] KECA 67 (KLR)].
15. The appeal challenges the conviction entered on a guilty plea primarily on the ground that the plea was not unequivocal.

The main issue for determination is therefore whether the appellant's conviction was safe and whether the sentence meted out was lawful. The appellant lamented that the conviction was based upon an equivocal plea. In addressing this issue, we are alive to the principles enunciated in the celebrated case of *Adan v Republic* [1973] EA 445 that held as follows:

“When a person is charged, the charge and the particulars should be read out to him, so far as possible in his own language, but if that is not possible, then in a language which he can speak and understand. The magistrate should then explain to the accused person all the essential ingredients of the offence charged. If the accused then admits all those essential elements, the magistrate should record what the accused has said, as nearly as possible in his own words, and then formally enter a plea of guilty. The magistrate should next ask the prosecutor to state the facts of the alleged offence and, when the statement is complete, should give the accused an opportunity to dispute or explain the facts or to add any relevant facts. If the accused does not agree with the statement of facts or asserts additional facts which, if true, might raise a question as to his guilt, the magistrate should record a change of plea to “not guilty” and proceed to hold a trial. If the accused does not deny the alleged facts in any material respect, the magistrate should record a conviction and proceed to hear any further facts relevant to sentence. The statement of facts and the accused reply must, of course be recorded.”

16. Adopting those ruminations, this Court in *John Muendo Musau v Republic* [2013] eKLR further added:

“We want to add here that if the accused wishes to change his plea or in mitigation says anything that negates any of the ingredients of the offence he has already admitted and has been convicted for, the court must enter a plea of not guilty. That is to say that, an accused can change his plea at any time before sentence...”

17. According to the record before us, the appellant was arraigned in court on 15<sup>th</sup> July 2019. He pleaded guilty when the charges were read out to him. The trial court proceeded to caution him on the consequences of pleading guilty to the offence. In response, the appellant said: “It is true.” Come 24<sup>th</sup>



July 2019, the facts were read over to the appellant. Upon hearing the facts, the appellant pointed out that some of the facts were not true. This compelled the trial court to enter a ‘not guilty’

18. On 27<sup>th</sup> January 2020, the prosecution was ready to proceed.

However, the appellant’s advocate informed the trial court that the appellant intended to change his plea. Accordingly, the prosecution read out the facts as follows:

“On 19th June 2019 at around 7 pm, the accused met a lady called Gacheri at Kaanwa Market and the lady asked for a wire mesh from the accused since the wire mesh was at the home of accused. The accused hired a motorbike ridden by the deceased to take accused to his home to pick the wire mesh. The accused paid him 100/-. After dropping the wire mesh to the lady - Gacheri, the accused and deceased went back to Kaanwa and went to a pub and drank until 11 pm. At that time the accused requested the deceased to drop him at his home since the accused had no money to pay for the ride and the accused was to leave a mobile phone as collateral until he paid 200/- as fare. The deceased agreed on the terms and took possession of the mobile phone. He then gave a ride to the accused to his home. When they reached at his home the deceased changed his mind and returned the phone to accused and demanded to be paid 200/-. The two had heated argument and in the process the deceased slapped the accused and a fight ensued. The accused ran into his kitchen and took an axe and attacked the deceased by hitting the deceased on the head and deceased fell and died. We have the axe herein in court and postmortem and accused then took the axe to police at Kaanwa Police Post where he was arrested. The police went back to his house and found the deceased lying down motionless. The body was taken to Chuka Hospital mortuary. After postmortem the deceased died of cardiopulmonary arrest due to severe head injury from multiple head cuts on the head cuts (sic) on the head. The postmortem was done on 26/6/2019. The accused was then charged with the offence before the court.”

19. The Judge then recorded a plea of ‘guilty’ and the appellant submitted in mitigation. The court also allowed the mother of the deceased to give her opinion regarding the appellant’s sentence. As already stated, the appellant was then sentenced to 25 years imprisonment.

20. As earlier alluded to, only two issues fall for determination: whether the plea of guilt was unequivocal or not and whether we can interfere with the sentence that was meted out.

21. Turning to the question whether the plea of guilty was unequivocal or not, it is important to point out that the determination of that question largely depends on the facts as captured in the proceedings. In so doing, the duty of the appellate court is to establish the following: Was the charge read in the accused’s own language or in a language that he understood? Thereafter, did the trial court explain all the essential ingredients of the offence that he was charged with? If the accused admitted the offence, did the trial court record the response of the accused in words that are close to what the accused said? After that, the trial court is supposed to record a plea of guilty and the prosecutor is to read out the facts. At this juncture, the accused is to be given an opportunity to dispute any of the facts or make his remarks.

22. If the words of the accused in any way dispute or contradict any of the facts set out by the prosecution, the trial court should change the plea entered to one of ‘not guilty’. Finally, the Court shall confirm whether the accused admitted the facts without any reservation. In other words, was the accused fully aware of the charge, the ingredients of the offence and that after the entering of the plea, the only issue remaining is the mitigation before sentence? It is also important for the court to confirm whether, from the facts as read, the ingredients of the offence are established.



23. Having set out the principles, we now turn to the record of the proceedings at trial. Firstly, we note that in addition to the charge sheet, there is a notice to the appellant that reads as follows: "...copies of the evidence which the prosecution intends to adduce at your trial are attached herewith. Copies of the exhibits may be inspected by yourself... or your advocate by prior arrangements."
24. The record before us reveals that the appellant was charged on 1<sup>st</sup> July 2019. He informed the court that he could not afford an advocate, upon which the court directed the Deputy Registrar to appoint an advocate on a pro bono basis. The Deputy Registrar appointed one Mr. P.M. Mutani, Advocate.
25. On 15<sup>th</sup> July 2019, learned counsel Mr. Mutani appeared in Court. He is recorded as saying: "I have instruction (sic). The plea can be taken in Kiswahili my client understands Kiswahili."
26. The record shows that the trial Judge recorded that the charge and the particulars were read in Kiswahili language and the appellant stated: "it is true". The State Counsel then requested for an adjournment for 7 days to enable him to obtain the report of the Government chemist. The trial was then adjourned until 24<sup>th</sup> July 2019.
27. On 24<sup>th</sup> July 2019, the facts were read and the appellant in reply stated as follows: "the facts are not true. Some facts are not true." The Judge rightly entered a plea of not guilty and set a hearing date for the trial. On 27<sup>th</sup> January 2020, the prosecution was ready to proceed with 5 witnesses. However, Mr. Mutani, Advocate for the appellant, informed the court that the appellant wished to change his plea. He is recorded as saying: "I have instructions that the accused wishes to change his plea. On facts I pray (sic) be read afresh to him."
28. The facts were read out to the appellant once again and he is recorded saying: "the facts are true". The prosecutor then requested to produce the axe and the postmortem report as exhibits and the facts were read out to the appellant once again. He said: "the facts are true." A plea of guilty was then entered and the appellant, through his advocate, gave his mitigation.
29. We have painstakingly set out the record of the proceedings because the issue of an accused pleading guilty to a serious charge is not something to be taken lightly, taking into account the fact that the court atmosphere can be intimidating or confusing to litigants. In this appeal, there is no doubt that the appellant was given every opportunity to decide whether he understood the charge and the particulars. The charge was read out in Kiswahili language and his advocate confirmed that he understood it. At no point did the appellant state that he did not understand the language. Clearly, the submission that he never understood the language is an afterthought. We are satisfied that the facts as read disclosed all the ingredients of the offence. We therefore agree with the State Counsel that the plea of guilt was unequivocal and that the plea of guilty was properly entered by the trial judge.
30. We now turn to the sentence meted out by the trial court. We note that from the undisputed facts, the deceased died as a result of a head injury. The injury was inflicted by the appellant when they got into a fight with the deceased. However, it is clear from the record that the appellant and the deceased were drunk when they got into an altercation leading to the infliction of fatal injuries.
31. It is also clear from the record that it is the deceased who ignited the fight when he demanded to be paid in cash rather than keep the appellant's phone as had been earlier agreed. This raises the question whether the appellant was possessed with malice aforethought.
32. The appellant has urged this Court to consider that the absence of malice aforethought rendered the offence manslaughter and not murder. We are persuaded by that submission based on the fact that it was the deceased's actions that broke the fight. Gathered from the evidence before us, we find that the



element of malice aforethought was not proved beyond reasonable doubt. Accordingly, we set aside the conviction of murder and substitute the same with a conviction of manslaughter.

33. It is trite that the appellate court will not easily interfere with a 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. Even if the appellate Court feels that the sentence is heavy and that the appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless any one of the matters already stated is shown to exist. [See *Bernard Kimani Gacheru v Republic* [2002] KECA 94 (KLR).]
34. In sentencing the appellant to 25 years' imprisonment, the trial court considered his mitigation, as well as the prosecution and victim's submissions. However, though the trial judge stated that he considered the mitigation, it cannot be gainsaid that the plea of guilty ought to count for something. In addition, another material factor that the judge should have given weight to is the circumstances in which the offence was committed. There is no doubt, and the prosecution conceded that it is the deceased who triggered the fight. The appellant ought to have controlled himself, but in our view, these are material factors that were overlooked by the trial judge. We shall therefore interfere with the sentence.
35. Accordingly, we set aside the sentence of 25 years' imprisonment and substitute it with 15 years' imprisonment. The sentence shall be computed from the date the appellant was arrested as the record shows that he was never released on bond. The appeal succeeds to that extent only. Orders accordingly.

**DATED AND DELIVERED AT NYERI THIS 11<sup>TH</sup> DAY OF DECEMBER 2025.**

**K. M'INOTI**

**JUDGE OF APPEAL**

.....

**ALI-ARONI**

**JUDGE OF APPEAL**

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**M. GACHOKA C.Arb, FCI Arb.**

**JUDGE OF APPEAL**

I certify that this is a True copy of the original

Signed

**DEPUTY REGISTRAR**

