Ekeya v Republic (Criminal Appeal E035 of 2020)
[2025] KECA 2301 (KLR) (19 December 2025) (Judgment)

Neutral citation: [2025] KECA 2301 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL E035 OF 2020

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

DECEMBER 19, 2025

BETWEEN

STEPHEN EKEYA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Busia (W. Kiarie, J.) dated 16th December, 2020 in HCCRA No. 5 of 2019)

JUDGMENT

1. Stephen Ekeya, the appellant, 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 alleged that on 2nd February, 2019, at Kamnoit Sub-Location, in Teso South Sub-County, within Busia County, the appellant murdered Edwin Edukat.

2. A plea of not guilty was entered. The prosecution called two witnesses. The prosecution's case was that the appellant killed his brother. PW1, Peter Okware, told the court that on 2nd February, 2019, at about 2.30 p.m., he was going about his day when he heard someone screaming 'thief!'. He looked in the direction the screams were coming from, and he saw the appellant, who was armed with a machete, coming from the deceased's homestead. The deceased was the appellant's brother. PW1 stated that the appellant went to his compound, picked up a child and left the scene on a motor vehicle that picked them up. PW1 rushed to the deceased's homestead and found him lying in a pool of blood outside his house. He was bleeding from an injury on his head. The deceased was rushed to Amukura Health Centre. PW1 stated that the deceased informed him that his brother, the appellant, had cut him.

3. PW2, Sergeant Samson Kibiwott, investigated this case. He stated that he was assigned the case on 3rd February, 2019. He re-arrested the appellant who had surrendered himself at Kotur Police Station, together with the machete which was the alleged murder weapon. He also visited the scene of crime and

documented the same. He stated that he found the appellant's and deceased's sister at the deceased's home, and she showed him the place where the two fought. PW2 stated that he forwarded exhibits to the government analyst, and later attended the deceased's post mortem, but he did not have the exhibits with him in court. The prosecution's case was closed by the Court before all the witnesses testified.

4. The appellant was placed on his defence. In his sworn statement, he stated that on the material day of 2nd February, 2019, he was at Machakusi Secondary School, where he was employed as a teacher. He was administering exams. He stated that he left work at about 4.30 p.m. Later in the day, police officers from Kotur Police Station arrested him at his house. He denied being involved in his brother's death. Upon cross- examination, the appellant told the court that PW1 was his neighbour, and that they had no bad blood. The appellant availed DW2, Silas Okwako Emase, who was his colleague at Machakusi Secondary School. DW2 told the court that he was with the appellant at the school on the material day, as they were supervising mock examinations. He testified that he left the school at 4.00 p.m., and that the appellant was still at the school when he left.

5. After full trial, the learned Judge held that though the prosecution sufficiently established that the appellant killed his brother, they failed to prove the element of mens rea. The appellant was consequently convicted of the lesser charge of manslaughter, and was sentenced to serve fifteen (15) years imprisonment.

6. The appellant, dissatisfied by this decision, lodged this appeal.

   He proffered nine grounds of appeal. He was aggrieved that the learned Judge failed to properly evaluate the evidence on record, and thereby convicted him on the basis of hearsay and circumstantial evidence. He took issue with the fact that no exhibits were produced before the trial court, including the postmortem report. He faulted the trial court for failing to consider his cogent alibi defence, which was not challenged by the prosecution. He was of the view that the prosecution failed to discharge its burden of proof, and that the learned Judge erred in convicting him on the basis of the evidence of a single identifying witness, which evidence was not corroborated. He faulted the trial court for failing to consider his mitigation, as well as emerging jurisprudence on sentencing for the offence of manslaughter, and thereby imposing an excessive sentence. The appellant urged us to allow his appeal, quash his conviction, and set aside the sentence that was meted upon him by the trial court.

7. The appeal was heard by way of written submissions. Mr. Ogenga, counsel for the appellant, argued that the trial court convicted the appellant on the basis of uncorroborated circumstantial evidence from a single witness, who was not present at the scene of crime. It was his submission that PW1 testified that he saw the appellant flee the scene, and that he did not witness the fight between the two brothers. Counsel argued that the prosecution failed to avail material witnesses, as well as exhibits, such as the recovered machete, photographs of the scene, or the report from the Government Chemist, to establish its case. He submitted that no post mortem report was produced to establish the death of the deceased, and that none of the deceased's relatives were availed as witnesses to identify the body of the deceased, and to establish the prosecution's case beyond reasonable doubt. He maintained that the prosecution was obligated to make available all witnesses necessary to establish its case. With respect to sentence, counsel faulted the learned Judge for failing to take into account the appellant's mitigation.

8. Ms. Mutellah, learned prosecution counsel, opposed the appeal. It was her submission that a conviction can be founded on the evidence of a single identifying witness, if the court is satisfied that the identification is watertight. Ms. Mutellah urged that it was not contested that the appellant was a neighbour to PW1, and the appellant being well known to the witness, an identification parade was unnecessary. She stated that PW1 saw the appellant, armed with a machete, fleeing from the deceased's house, and that when he went to the said house, he found the deceased lying in a pool of blood.

Counsel submitted that the incident occurred in broad daylight, leaving no room for mistaken identity. It was her submission that the deceased's dying declaration was properly admitted in evidence, as per the provisions of Section 33(a) of the *Evidence Act*, and that the circumstantial evidence on record irresistibly pointed to the appellant as the person who killed the deceased.

9. With regard to the non-production of exhibits, learned Prosecuting counsel explained that the evidence on record was sufficient to sustain the appellant's conviction. She reiterated that the deceased's death was established by eye witness account. She asserted that PW1 saw the appellant leave the deceased's house, carrying a machete, and that when he went to the deceased's house, he found him lying on the ground, bleeding from an injury on his head. The deceased told him that his brother had cut him. Counsel argued that the appellant's alibi defence was considered and duly rejected, since PW1 placed him at the scene of crime, while PW2 testified that the appellant surrendered himself to the police on the material day at Kotur Police Station, while in possession of a machete. It was her submission that the alibi defence was an afterthought, as the appellant did not raise it during cross-examination of the prosecution witnesses.

10. On sentence, Ms. Mutellah submitted that Section 205 of the Penal Code prescribes a maximum penalty of life imprisonment for persons convicted of manslaughter, and therefore the appellant's custodial sentence of fifteen (15) years was not excessive. She invited us to dismiss the appeal on both conviction and sentence.

11. We have carefully considered the record of appeal, the submissions by both parties, and the law. The duty of the first appellate court was stated by this Court in Gabriel Kamau Njoroge v Republic [1987] eKLR as follows:

> " As this court has constantly explained, it is the duty of the first appellate court to remember that the parties to the court are entitled, as well as on the questions of facts as on questions of law, to demand a decision of the court of first appeal, and that court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions, though it should always bear in mind that it has neither seen or heard the witnesses and to make due allowance in this respect. (see Pandya v R [1957] EA 336, Ruwalla v R [1957] EA 570)".

12. The issues falling for determination by this Court can be summed up as follows:

    i. Whether the prosecution established the ingredients of the offence of manslaughter, beyond any reasonable doubt; and,

    ii. Whether the appellant's sentence was excessive.

13. The prosecution relied on circumstantial evidence to prove its case against the appellant. Before a court can rely on circumstantial evidence to convict an accused person, the said evidence is required to meet a certain threshold. This threshold was aptly stated by this Court in Abanga alias Onyango v. Republic Cr. Appeal No. 32 of 1990 as follows:

> " It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests:
>
> i. the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;
>
> ii. those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;

iii. the circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else."

14. This threshold was further amplified in Sawe v Republic [2003] KLR 364 where this Court observed as follows:

> "In order to justify on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt. There must be no other co-existing circumstances weakening the chain of circumstances relied upon. The burden of proving facts that justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence remain with the prosecution. It is a burden which never shift to the party accused."

15. In the instant case, PW1 placed the appellant at the scene of crime. It was his evidence that he was outside his house fetching water, when he saw the appellant running from the deceased's house, carrying a machete. When he went to the deceased house, he found him lying in a pool of blood outside his house. He was bleeding from an injury to his head.

16. Evidence was adduced to the effect that the deceased's house was about a hundred meters from where PW1 was standing. The incident occurred at 2.30 p.m., in broad daylight. The appellant was well known to PW1. The appellant in his defence conceded that PW1 was his neighbour. The appellant was identified as the last person seen coming from the deceased's house, before the deceased was discovered on the ground bleeding from his head. In addition, the deceased was armed with a machete, when he was seen fleeing the scene. PW2 testified that the appellant turned himself in at Kotur Police Station, in possession of a machete.

17. Another piece of circumstantial evidence was the deceased's dying declaration, where he named the appellant as his assailant. Under Section 33(a) of the *Evidence Act*, a statement made by a deceased person relating to his cause of death is admissible in evidence. It provides as follows:

> "When the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question. Such statements are admissible whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question."

18. This Court in the case of Philip Nzaka Watu v. Republic [2016] KECA 696 (KLR) held as follows on admission and reliance on a dying declaration:

> "Under section 33(a) of the *Evidence Act*, a dying declaration is admissible in evidence as an exception to the rule against admissibility of hearsay evidence. Under that provision, statements of admissible facts, oral or written, made by a person who is dead are admissible where the cause of his death is in question and those statements were made by him as to the cause of his death, or as to any of the circumstances of the transaction leading to his death. Such statements are admissible whether the person who made them was or was not expecting death when he made the statements.

> .... While it is not the rule of law that a dying declaration must be corroborated to found a conviction, nevertheless, the trial court must proceed with caution and to get the necessary assurance that a conviction founded on a death declaration is indeed safe."

19. After PW1 saw the appellant flee the scene, he rushed to the deceased's house, and found him lying on the ground, with an injury on his head. He rushed the deceased to Amukura Health Centre where the deceased informed him that the appellant was the person who inflicted cut injuries on his head. As observed earlier in this judgment, the incident occurred in broad daylight, which enabled the deceased identify his assailant. Given that the appellant was the deceased's brother, there was no chance of mistaken identity. The circumstantial evidence adduced by the prosecution when analyzed together pointed unerringly to the appellant, and no one else, as the assailant. It sufficiently corroborated the deceased's dying declaration.

20. One of the appellant's bone of contention was that the alleged recovered machete was not produced in court as an exhibit. This Court in the case of Chris Kasamba Karani vs. Republic [2010] eKLR delivered itself as follows:

> "The offence as charged could have been proved even if the dangerous weapon was not produced as exhibit as indeed happens in several cases where the weapon is not recovered. So long as the court believes, on evidence before it, that such a weapon existed at the time of the offence, the court may still enter and has been entering conviction without the weapon being produced as exhibit".

21. PW1 was categorical that the appellant was armed with a machete as he fled the deceased's house. Further, when the appellant turned himself in to the Police at Kotur Police Station, he was in possession of the said machete. PW1 stated that the deceased had a cut wound on his head where he was bleeding from. In addition, the deceased told PW1 that the appellant had cut him. There is no doubt in our minds that the appellant was armed with a machete when he attacked the deceased. Evidence was adduced how the deceased later succumbed to his injuries at the hospital.

22. Other than the murder weapon, the prosecution's handling of the case was regrettably marred by its failure to ensure that the post-mortem report was produced in evidence. This omission reflected a lack of diligence in presenting a case of such seriousness and exposed a troubling gap in the management of critical evidentiary material. Such an omission denotes a lapse in prosecutorial diligence and falls below the standard expected in the conduct of criminal proceedings.

23. Nevertheless, we are alive to the fact that there are some cases where cause of death can be established without medical evidence. This Court in the case of Benson Ngunyi Ndungu v Republic [1985] KECA 51 (KLR) held as follows:

> "Of course, there are cases, for example where the deceased person was stabbed through the heart or where the head is crushed, where the cause of death would be so obvious that the absence of a post-mortem report would not necessarily be fatal. But even in such cases, medical evidence of the effect of such obvious and grave injuries should be adduced as opinion expert evidence and as supporting evidence of the cause of the death in the circumstances relied on by the prosecution."

24. Although no post-mortem report was tendered, the evidence before the trial court demonstrated that the deceased sustained a severe head injury, which presented as the clear and proximate cause of death. The deceased died on the same day he was attacked by the appellant. PW1 stated that he found the

appellant lying on the ground bleeding from an injury on his head. He stated that they tried to tie his head with a bedsheet to stop the bleeding. The deceased was rushed to Amukura Health Centre, and was referred to Bungoma West Hospital, where he died on the same day. In the absence of any contrary evidence, we are satisfied that the lack of a post-mortem report does not constraint the drawing of a clear causal connection between the serious head injury and the deceased's demise.

25. Regarding the appellant's alibi defence, we find that the same was dislodged by the overwhelming circumstantial evidence adduced by the prosecution. The appellant conceded that PW1, who identified him fleeing the scene was indeed his neighbour, and that there existed no bad blood between them. There was therefore no reason for PW1 to implicate the appellant in his brother's death. After a re-evaluation of the evidence, we are satisfied to the required stand of proof that the prosecution's evidence was cogent and dislodged the appellant's alibi defence.

26. The appellant complained that the custodial sentence of fifteen (15) years imposed by the trial court was excessive in the circumstances. Upon reassessment, we find no basis to interfere with the sentence, as the offence in question is of a grave and serious nature, involving aggravating circumstances, and resulting in the death of the victim. Section 205 of the Penal Code prescribes a maximum sentence of life imprisonment. In that context, the sentence of fifteen years imposed by the trial court is neither manifestly harsh nor disproportionate. We cannot fault the trial Court for imposing the sentence that it did. The appellant failed to persuade us that the trial Court failed to properly exercise its sentencing discretion to the extent that it requires this Court's intervention.

27. The upshot of the above reasons is that we are satisfied that the appellant was properly convicted and sentenced by the trial court. The appeal on both conviction and sentence is hereby dismissed.

DATED AND DELIVERED AT KISUMU THIS 19TH DAY OF DECEMBER, 2025.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

H.A. OMONDI

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JUDGE OF APPEAL

L. KIMARU

.....

JUDGE OF APPEAL

I certify that this is a true copy of original.

DEPUTY REGISTRAR.