IN THE COURT OF APPEAL AT KISUMU

(CORAM: MUSINGA (P), KIAGE & ODUNGA, JJ.A.)

CRIMINAL APPEAL NO. 165 OF 2020 BETWEEN

JOEL WANJALA MAIKUMA.......................................APPELLANT

AND

REPUBLIC...RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Bungoma (A. Aroni, J.) dated 10th June, 2019

in

HCCRC No. 25 of 2016)

****

JUDGMENT OF THE COURT

On the night of 31st July, 2016 at the height of the circumcision season while a crowd of revellers, sang, smoked, drank, denied and made merry; young men argued and lovers whispered and embraced in the half-light of the pale moon, a man was stabbed to death at Ngososia village, Nabuyole sub location of Webuye East within Bungoma County. The slain man was one Moses Musundi, a re-known singer at such ceremonies and the person charged, tried and convicted for that murder by the High Court at Bungoma (Ali-Aroni, J., as she then was) is **Joel Wanjala Maikuma**, the appellant herein. He was upon conviction sentenced to 25 years' imprisonment.

The evidence led by the prosecution, and which the learned judge believed, is that **Julius Silungi Kwanusu (PW1)** was asleep

when he

received a call at 11.15pm from one Peter Mgonjilo who told him that the deceased, who was **PW1's** 5th child and used to sing had been stabbed to death. He rushed to Nabuyole and found that his son had indeed been stabbed on the chest and lay dead at the door of one Wafuli Mbuni.

17-year-old **Macheso Silungi (PW2)** was the deceased's younger brother. He attended the circumcision ceremony at Thomas Iningilo's home. He testified thus: "I did not want to reach my brother. I was with a girl so I stepped back. I was busy talking to the girl." His quiet moment with the girl was cut short at about 10.30pm as he heard people quarrelling and he saw the accused stab his brother (though he did not see the knife) and then leave. In cross-examination he stated that "There were many people. Some were standing and others sited (sic!) I saw the back of the person who stabbed as he entered the house

…. I had not seen the accused before the incident… I did no see his face." He told his brother, **Amos Wanjala Silungi (PW3)**, about the stabbing. PW3 himself did not witness the stabbing and was seeing the appellant for the first time when testifying at the trial.

The testimony of **Jane Wekesa (PW4)**, likewise a resident of Nabuyole, was that on the day before the stabbing incident, at about 7 pm, she was at home when came two people, namely, her neighbour Peter Mukhongo, who was next to testify as **PW5**, and one

Godfrey. The

duo had come to her home looking for the deceased, who was her

husband, but he was not home. **PW5** then gave her an ominous message to pass to her husband: he (**PW5**) "would remove his intestines" and that there was a circumcision ceremony in the village the next day "where he would do something". Next day she received word that her husband had been stabbed at that ceremony.

When **PW5** testified, he confirmed attending the ceremony at Thomas Mulati's home whose son and the son of one Nathan, were being circumcised. People were singing outside but suddenly stopped when someone, who turned out to be his neighbour's son, the deceased, had been stabbed. He claimed to have called the deceased's father. He did not see the stabbing and did not know who stabbed the deceased, who he said was his friend. He did not know the accused.

PW6 was **Police Corporal Vincent Mokoit** attached to Webuye Police Station. He was instructed by his commanding officer to go to the home of Thomas Mulati where a person had been stabbed at a circumcision ceremony. His enquiries yielded information that the culprit was the appellant who was arrested on 3rd August, 2016 in Webuye town. A few days later, he receive a call from Thomas Mulati that the killer knife had been found in a maize plantation. He went and took custody of the knife, which he produced in evidence. In cross- examination, he said there were many people at the ceremony and there was 'some' moonlight.

Chief Inspector John Nyongesa (PW7) was the Commanding Officer, Webuye Police Station. He recorded the appellant's statement under enquiry in which he admitted to stabbing the deceased. The production of that statement was objected to by the appellant's then counsel, whereupon the learned judge ruled thus; "I overrule the objection. My reasons are reserved to be given in the judgment."

Police Constable Charles Atte of Webuye Police Station testified as **PW8**. He went with PW6 to the home of Thomas Mulati where the stabbing occurred. They learnt that the appellant stabbed the deceased and escaped for fear of being killed. Later, the knife was found by children who were harvesting maize. At the home on the material night they found several people at the ceremony. In one house they found some girls. The place was not well-lit as there was no electricity.

John Masinde Luka (PW8), a 22-year old cart-pusher, went with the deceased to the circumcision ceremony and danced with him twice before losing him in the crowd "as there were many people." There was also no electricity. He found the deceased who, after dancing, disappeared again only for PW8 to hear screams that someone had been stabbed. It was the deceased. He did not get to know the assailant.

The testimony of **Joseph Nyongesa Sambula (PW9)** spoke of a quarrel erupting between some 6 people at the circumcision

ceremony. Among them was the deceased who was “high” (intoxicated) and was

saying that a stranger could not threaten them at their home. That

stranger had a sharp object and pushed PW 9 as he tried to separate them. He is then recorded to have told the court that;

"I wanted to call people but on checking on the other person was down (sic!). It was at night. I saw his face. I knew he was stranger (sic!). The person was short, dark from the one I saw." He reiterated, in further examination, that there were many people, including strangers and it was at night and dark.

The host of the ceremony, **Thomas Mulati Wafula**, testified as **PW11**. He said his homestead was full of merrymakers on the eve of the circumcision of children. He was in the house fetching sodas when he heard people running. One was the appellant, Joel, whom he had known for 10 years. He was running to **PW11's** house for safety as people, including one Wanjala, wanted to beat him for stabbing the deceased. People started pelting the house with stones so he told the deceased to get out, which he did, running into the maize plantation. A fortnight later, his children found a knife it the plantation which the police came and collected. He confirmed that whereas there was solar lighting inside his house, "outside there was darkness."

At the end of the prosecution case the appellant was placed on his defence and he gave sworn testimony denying the offence. He also raised an alibi to the effect that on the material day he was in Mount Elgon doing electricity installation at Makunga Primary School from 3rd

July, 2016 and only returned to Webuye on 3rd August, 2016. He was

with **DW2**, whom he called as a witness. He denied recording a statement with the police and was only made to sign a document when being taken to court in Kakamega. He denied meeting **PW11** and also stated that he was not Joel Buke.

DW2, **Alfred Wanjala Siundu**, supported the appellant's testimony about spending a month in Mt. Elgon installing electricity, and was with him there on 31st July, 2016, the material day.

Following the conviction and sentence, the appellant preferred this appeal against both, through a memorandum of appeal filed on his behalf on 20th August, 2025 by the firm of Otieno, Yogo, Ojuro & Co. Advocates, in which he complained on points of law, that the learned judge erred:

> ***"1. … by failing to uphold that the offence of murder and the ingredients of the aforementioned offense had not been proved.***
>
> ***2. … by failing to properly analyze the evidence and exhibits presented before court hence coming at a wrong determination which was not backed by evidence on record.***
>
> ***3. … by relying on evidence of identification without observing that the conditions prevailing at the scene of crime were absolutely difficult for a witness to make any significant identification.***
>
> ***4. … by failing to uphold that the appellant's alibi defence was not considered and/or broken thus warranting an acquittal."***

At the hearing of the appeal, learned counsel **Ms. Ida Anyango** appealed for the appellant and highlighted her written submissions

dated 20th August, 2025. She first urged that as the prosecution did not produce a death certificate, the fact and cause of the deceased's death were not established, in support of which she cited this Court's decision in ***NDUNGU Vs. REPUBLIC* [1985] KLR 487.**

Ms. Anyango next argued that the statement under enquiry was wrongly admitted and relied on by the learned judge contrary to **section**

25 of the **Evidence Act**. No person of the appellant's choice was present as admitted by **PW7**, and the same should have been ruled inadmissible. What is more, it was never properly produced as an exhibit and the learned judge was, therefore, wrong to place any reliance on it instead of disregarding it.

It was counsel's next submission that the conditions prevailing at the scene were unfavourable for the positive identification of the deceased's assailant. Citing ***WAMUNGA Vs. REPUBLIC* [1989]**; ***NZARO***

Vs. REPUBLIC* [1991] KAR 212** and ***DANIEL KIPYEGON NGENO Vs.

***REPUBLIC* [2018] eKLR**, she argued that the learned judge ought to

have proceeded carefully as evidence of identification at night must be absolutely watertight to justify conviction, bearing in mind various factors including distance, distraction, period, lighting, and the like. Counsel urged that in the present case the area was not well lit, **PW2**

was distracted with “his attention centred on some girl he was talking to,” and so the the prevailing circumstances were not adequate for
positive identification, which rendered the conviction unsafe.

Finally, **Ms. Anyango** faulted the learned judge for failing to consider the appellant's alibi evidence that he was not at the scene on the day of the incident as he was in Mount Elgon for work from 3rd July, 2016 all the way to 3rd August, 2016 which was corroborated by DW2 and not at all disproved by the prosecution. She referred to ***VICTOR MWENDWA MULINGE Vs. REPUBLIC* [2014] eKLR**. She urged us to quash the conviction and set aside the judgment.

Ms. Mwaniki, the learned Assistant Director of Public Prosecutions, was of a contrary view. Highlighting submissions filed by her colleague, **Winny Bati**, Principal Prosecution Counsel in opposing the appeal, she stated that the statement under enquiry was properly admitted and asserted that the learned judge did consider the appellant's alibi defence and added that the said evidence "was not independently corroborated as no work permits or other documents were produced by the appellant." This prompted us to ask her where in the record the learned judge considered the alibi defence and whether, in law, an accused person who raises such defence is under any obligation to corroborate or otherwise prove it.

We also asked her why the police did not investigate the statement of **PW4** to the effect that Peter Mukhongo had threatened "to remove the appellant's intestines" just the evening before the incident but, instead, called him as **PW5**. Unable to answer those

questions, Ms.

Mwaniki conceded the appeal, but sought to persuade us to order a retrial.

We think, with respect, that Ms. Mwaniki did the honourable thing to concede this appeal as the appellant's conviction was as untenable as it was indefensible. We have already set out the evidence that was placed before the learned judge, consistent with our burden duty as a first appellate court to proceed by way of rehearing and subjecting the entire evidence to a fresh and exhaustive scrutiny and appraisal before arriving at our own inferences of fact and independent conclusions on the guilt or otherwise of the appellant. We do so cognizant that we are denied the opportunity the trial judge had of hearing and observing the witnesses in live testimony, for which handicap we make due allowance.

Regarding the appellant's first complaint on the non-production of the death certificate to prove the cause of death, we think that the omission is one example of the cavalier or shoddy manner in which the investigation into the deceased's death was conducted. Whereas the nature of the injuries suffered here – a stab wound to the left of the chest – probably fit into the category of grave and obvious injuries that could well be taken to be the cause of death, the prosecution should nonetheless have produced the death certificate. We reiterate what was held some 40 years ago in ***NDUNGU Vs. REPUBLIC***

(supra) at P488 and

which remains good law;

"4. Though there are cases in which death can be established without medical evidence relating to its cause as where there are obvious and grave injuries, medical evidence should still be adduced in such cases of the effect of such injuries as opinion expert evidence and as evidence supporting the cause of death alleged by the prosecution."

As to the statement under inquiry, we have already pointed out that its production was objected to but the learned judge admitted it in evidence, stating that she would give her reasons for doing so in the judgment. In the judgment, which is remarkably brief, at four and half pages, 12 paragraphs and double-spaced, all she said, by way of the promised explanation, was a single sentence at the end of paragraph 10: *"The inquiry was proper and the accused gave his statement voluntary (sic!)."*

With much respect, this cannot pass for a reasoned justification for admission following objection – which is not even referred to. We think the complaint by Ms. Anyango that the statement was admitted in violation of **section 25(1)** of the **Evidence Act** is not idle. That sub- section provides that for a confession to be admissible, it needs to have been made, if before a police officer of the proper rank, *in the presence of a third party of the suspect's choice*. It is common ground that no such third party was present and the same was, therefore, not properly admitted.

As to the appellant's identification, it is beyond dispute that the conditions were far from ideal for identification; several witnesses

indicated that it was dark as there was no electric light at the scene. The only reliable light emanating from some solar lighting was inside the house, but there was none outside, according to the owner of the homestead, **PW6**. There was mention of a single kerosene lamp and a witness also spoke of moonlight but there was no telling the intensity of such lights. Moreover, the crowd of merry makers was large, with lots of movement, singing, dancing and drinking. So fluid was the situation, and so crowded the place, that **PW8** spoke to having danced with the deceased but twice lost him. At one point he found him in a different house some 50 metres away but, after another dance, the deceased disappeared again in the large crowd. The deceased's own brother, **PW2**, spoke of how he was busy talking to a girl and did not get to witness the actual stabbing of the deceased. The circumstances were a potential mix of darkness, drunkenness, distraction and obstruction that made any safe identification of the assailant practically impossible, especially when such a person was said to be a stranger.

In ***DANIEL KIPYEGON YEGO Vs. REPUBLIC*** (supra) the Court

listed some near-dozen factors that a court should consider when evaluating identification evidence as including the following;

> ***"a. What were the lighting conditions under which the witness made his/her observation?***
>
> ***b. What was the distance between the witness and the perpetrator?***

c. Did the witness have an unobstructed view of the perpetrator?

d. Did the witness have an opportunity to see and remember the facial features body size, hair, skin, colour and clothing of the perpetrator?

e. For what period of time did the witness actually observe the perpetrator?

f. During that time, in what direction were the witness and the perpetrator facing, and where was the witness's attention directed?

g. Did the witness have a particular reason to look at and remember the perpetrator?

h. Did the perpetrator have distinctive features that a witness would be likely to notice and remember?

i. Did the witness have an opportunity to give a description of the perpetrator? If so, to what extent did it match or not match the accused, as the court finds the accused's appearance to have been on the day in question!

j. What was the mental, physical, and emotional state of the witness before, during, and after the observation?

k. To what extent, if any, did that condition affect the witness's ability to observe and accurately remember the perpetrator?"

We are of the respectful view that had the learned judge subjected the identification evidence to the above considerations so as to be sure that the circumstances were free for the possibility of error (per ***WAMUNGA Vs. REPUBLIC,*** supra), it is highly doubtful that she would

have considered it safe to found the appellant's conviction. On our own assessment, the evidence of identification was not watertight to firmly give the assurance that it was free from the possibility of error.

We opine that the conviction, based on identification evidence,

which we have indicated was weak, was dealt is fatal blow upon consideration of the manner in which the learned judge wholly ignored

the appellant’s defence. A trial court is under obligation to give the accused person’s evidence due consideration, which should be patent on the record. In this case, the appellant was categorical that he was in Mount Elgon on the material day and had been there for a month or so, working. He even called a witness, his co-worker, who confirmed that testimony. We think it most baffling that the learned judge made no mention of, and did not consider, this affirmative defence as was her duty to consider it, and we think this was an omission and non- direction, fatal to the appellant’s conviction. Once an accused person raises the defence of alibi, it is upon the prosecution to challenge it, including by tendering evidence in rebuttal. No attempt was made to do so in the instant case. The alibi evidence, which the appellant had no duty to prove (See ***VICTOR MWENDWA MULINGE Vs. REPUBLIC,***

supra), introduced a reasonable doubt to the prosecution case and, unchallenged, entitled the appellant to an acquittal.

We have said enough, we think, to show that the appeal is for allowing, as rightly conceded by Ms. Mwaniki, Assistant Director of Public Prosecutions. We need only add that we found it most peculiar that even with the clear statement of the deceased’s wife **(PW4)**, that **Peter Mukhongo (PW5)** had threatened to do harm to the deceased by “spilling his intestines,” on the eve of the deceased’s murder, the police made absolutely no effort to investigate the issue

of the threat. Instead,

and in the most cynical fashion, that person was called to testify against the appellant – and immediately after the wife.

As we have come to the conclusion that the evidence tendered was not sufficient to justify the conviction, the respondent's plea, on conceding the appeal, that we should remit the matter to the High Court for retrial is misplaced as the consequence of our conclusions is his outright acquittal.

In the result, we quash the conviction and set aside the sentence. The appellant shall forthwith be set at liberty unless he is otherwise lawfully held.

Order accordingly.

Dated and delivered at Kisumu this 19th day of December, 2025.

D. K. MUSINGA, (PRESIDENT)

....
JUDGE OF APPEAL

P. O. KIAGE

....
JUDGE OF APPEAL

G. V. ODUNGA

....
JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR