



**Tindi v Republic (Criminal Appeal E046 of 2021)
[2025] KECA 2272 (KLR) (19 December 2025) (Judgment)**

Neutral citation: [2025] KECA 2272 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CRIMINAL APPEAL E046 OF 2021
MS ASIKE-MAKHANDIA, HA OMONDI & LK KIMARU, JJA
DECEMBER 19, 2025**

BETWEEN

DISMAS MUSUDI TINDI APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal from the Judgment of the High Court of Kenya at
Busia (W. Kiarie, J.) dated 6th May, 2019 in HCCRA. No. 21 of 2016)*

JUDGMENT

1. The appellant, Dismas Musudi Tindi, was charged and convicted of 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 15th May, 2014, at Mauko Village of Butula District within Busia County, the appellant, jointly with others not before court murdered Patrick Opanga Makokha. (the deceased).
2. The facts of the case, in brief, were that the deceased's wife, Evaline Opanga (PW1), and his mother, Justina Ngashi Makokha (PW3), witnessed the appellant, together with a group of about nine people, attack the deceased, thereby causing his death. It was PW1's evidence that on 15th May, 2014, at about 6. 00 p.m., she was seated with the deceased outside their home, when they heard a group of people approaching, shouting the deceased's name. The group of people entered their homestead, armed with pangas and rungas. She testified that she was able to recognize the people as some of them were neighbours, while others were relatives, and specifically the deceased's step mother and step siblings. She mentioned them by name.
3. PW1 stated that one Justus, Bernard and the appellant were the first to attack the deceased. It was her testimony that the appellant, who was armed with a panga and a stick, cut the deceased on his back, near his neck. She tried raising alarm by screaming for help but the assailants attacked her. She sustained a cut on her right hand. PW2, whose house was in the same homestead came to their rescue. She was



also attacked and injured. PW2's evidence corroborated what PW1 told the court. They reported the matter at Bumala Police Station, and sought treatment at a hospital in Bumala, where the deceased was declared dead upon arrival. PW2 told the court that there was animosity between the two families due to a land dispute. According to the post mortem report produced by PW5, Dr. Hillary Kiplagat, the deceased suffered extensive penetrating injuries on his head, a large haematoma on the posterior part of his neck, extensive blood clots on his nostrils and ears, and a penetrating injury on his left forearm and back. He died due to severe head injuries.

4. PW3, Sgt. Amos Alekana, was the arresting officer. He testified that on 26th July, 2016, he received a call from one Polycarp Otieno, the appellant's brother, who informed him that the appellant, who had gone into hiding after the incident, had returned home. PW3 arrested the appellant at their home and took him to Bumala Police Station. The investigating officer, IP Edward Ndaru (PW4), stated that he was on night patrol on 15th May, 2014, when he received a report of the attack. He visited the victims at Bumala "B" Health Centre, where he found the deceased's lifeless body, with several cut wounds on his head. He was informed that the deceased had been attacked by his step-mother and her children, and that the appellant, who was also involved in the attack on the deceased, had fled from the scene and had gone to Mombasa. The appellant was later arrested on 26th July, 2016, and charged with the offence for which he was convicted.
5. The appellant, in his unsworn statement in defence, denied participating in the attack on the deceased. It was his evidence that on the material date of 15th May, 2014, he went to Butula town at about 1.00 p.m., for the purpose of finalizing his bursary application. At about 4.00 p.m., he started his journey back home. He met one Erick Oduori on the way. They walked home together. On the way, at about 8.00 p.m., they heard screams and wailing coming from a nearby junction. The appellant recalled that he saw PW1 wailing, as she held on to the deceased who was a pillion passenger on a bicycle. The bicycle was being ridden by one Andrew Juma. Andrew informed them that the second family of Mzee Makokha Opanga, had attacked the first family, and injured the deceased. They left the scene. The appellant stated that he went home and slept. He testified that he remained at his home until 2nd June, 2014, when he went back to the University. On 22nd July, 2016, he was at home when he had a disagreement with his elder brother. On 25th July, 2016, his elder brother called PW3 and informed him that the appellant was involved in the death of the deceased. He was arrested the following day and later charged with murder.
6. After full trial, the appellant was found guilty as charged. Upon his conviction, the appellant was sentenced to serve twenty-five (25) years imprisonment.
7. The appellant, aggrieved by this decision, lodged this first appeal to this Court. The appeal was heard by way of written submissions. The appellant appeared in person after requesting for discharge of his state appointed counsel. He informed the Court that he wished to represent himself in person. The appellant did not list down his amended grounds of appeal, after abandoning his earlier grounds contained in the memorandum of appeal dated 7th April, 2021. Instead, he intimated that his amended grounds of appeal were expounded in his written submissions.
8. It was his submission that when the deceased's death occurred, he was a student at the Technical University of Mombasa. He submitted that members of the deceased's family accused of being involved in the deceased's murder were arrested and charged in 2014 (High Court Criminal Case No.14 of 2014). No police officer visited his home during that time. He submitted that he was arrested in 2016, after a disagreement with his brother, and charged in Criminal Case No. 1972 of 2016, with the offence of malicious damage to property. He asserted that by that time, HCCR No.14 of 2014 was pending judgment. It was his submission that he was unable to get the proceedings of the court in HCCR



No.14 of 2014 during his trial, and that he accessed the same after his conviction and sentence from one of the convicted persons in the said case. He was aggrieved that the trial court failed to consider the proceedings in HCCR No.14 of 2014, before delivering its judgment, since both cases were in respect of the murder of the same deceased person. He asserted that the testimony of PW1, PW2 and PW4 before the trial court, differed from their account of events in HCCR No.14 of 2014, regarding his involvement in the deceased's murder. He asserted that the said witnesses did not testify that he was involved in the said murder of the deceased before the court in HCCR No.14 of 2014.

9. It was the appellant's further submission that his right to a fair trial was violated by the fact that he was not consulted when a state appointed counsel was assigned to represent him. He submitted that the trial court colluded with the prosecution to allocate him a biased advocate. He maintained that the charge sheet was defective as the particulars of the offence read "jointly with others not before court", yet the "others" referred to in this case meant the accused persons charged in HCCR No. 14 of 2014. He urged that the evidence by PW1 and PW2 that he cut the deceased on the neck was not supported by the post mortem report findings. It was his further submission that he did not have any bad blood with the deceased to want him dead. He reiterated that the prosecution did not avail any evidence to establish that PW1 and PW2 named him as one of the assailants in their first report made to the police.
10. In the premises therefore, the appellant prayed that this Court issue an order calling for the trial court's records in Busia HCCR No.14 of 2014 and Criminal Case No.1972 of 2016, and compare the evidence tendered in those cases, to that tendered before the trial court in this case; he urged this Court to allow his appeal, quash his conviction, and set aside the sentence that was imposed on him; and that in the alternative, this Court issues orders for a re-trial.
11. No written submissions were filed on behalf of the respondent.
12. We have carefully considered the record of appeal, the submissions by appellant 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)".
13. 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 murder, beyond any reasonable doubt; and,
 - ii. Whether the appellant's constitutional right to a fair trial was violated.
14. To establish the charge of murder, the prosecution was required to prove the death of the deceased and the cause thereof, that the death of the deceased was caused by the appellant, and that the appellant had malice aforethought in committing the act causing the death of the deceased. The death of the deceased was not contested. The post mortem report produced in evidence established that the deceased cause of death was severe head injury caused by assault. However, the appellant denied the allegation that he was involved in causing the death of the deceased.



15. The prosecution relied on the evidence of two eye witnesses to establish its case against the appellant. PW1 and PW2 placed the appellant at the scene of crime on the material day of 15th May, 2014, at about 6.00 p.m. It was their evidence that the appellant accompanied the deceased's step-siblings to the deceased's homestead and participated in the attack on the deceased. They stated that the appellant was armed with a panga and a rungu, and that they saw him cut the deceased at the back of his neck. It is not contested that the appellant was well known to PW1 and PW2. The evidence of identification was that of recognition. The attack took place during daytime. The investigating officer, PW4, told the court that the appellant fled to Mombasa after the incident. They managed to charge him in 2016, after he was arrested for another offence, that of malicious damage to property.
16. The appellant, on his part, raised an alibi defence in his unsworn defence statement. The law on a defence of alibi was explained by this Court in *Kimotho Kiarie v Republic* [1984] eKLR as follows:
- “An alibi raises a specific defence and an accused person who puts forward an alibi as an answer to a charge preferred against him does not in law thereby assume any burden of proving that answer and it is sufficient if an alibi introduces into the mind of a court a doubt that is not unreasonable.”
17. It was the appellant's testimony that on the material day he went to Butula town, where he left at about 4.00 p.m., and started his journey back home. That at about 8.00 p.m., he came to a junction where he met a group of people who were screaming. He stated that he saw the deceased being transported on a bicycle, while being supported by PW1. He was informed that the deceased had been attacked by members of his father's second family. He then proceeded to his house. The appellant stated that he stayed home from 15th May, 2014, to 2nd June, 2014, when he went back to the university at the Mombasa. He was later arrested on 26th July, 2016, while at home for the school holidays, after a disagreement with his brother who had called the police.
18. After re-evaluation of the evidence in light of the submission made, we are satisfied that the evidence adduced by the prosecution placed the appellant at the scene of crime. This evidence was credible and cogent and dislodged the appellant's alibi defence. PW1 and PW2 placed the appellant at the scene of crime on the material day. The appellant was well known to them. They identified him by name. They also described the weapons he was carrying, as well as his role in the attack. They stated that he was carrying a panga and a club, and that he hit the deceased on his back, near his neck. The appellant's identification was that of recognition. We are satisfied that there was no possibility of mistaken identity. The learned Judge properly considered and rejected the appellant's alibi defence, having weighed the same against the prosecution's evidence. The appellant was positively identified as one of the assailants who attacked the deceased, and inflicted the fatal injuries.
19. The other element required to be established by the prosecution was that of mens rea. Malice aforethought is defined by Section 206 of the Penal Code as follows:
- “Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances:
- a. an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;
 - b. knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference



whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;

- c. an intent to commit a felony;
- d. an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.”

20. This Court in *Bonaya Tutu Ipu & another v Republic* [2015] eKLR held that:

“It is in rare circumstances that the intention to cause death is proved by direct evidence. More frequently, that intention is established by or inferred from the surrounding circumstances. In the persuasive decision of *CHESAKIT V. UGANDA*, CR. APP. NO. 95 OF 2004, the Court of Appeal of Uganda stated that in determining a charge of murder whether malice aforethought has been proved, the court must take into account factors such as the part of the body injured, the type of weapon used, if any, the type of injuries inflicted upon the deceased and the subsequent conduct of the accused person.”

21. In this case, the appellant, accompanied by others, went to the deceased’s house while armed. The deceased was outside his house with his wife. The group immediately attacked the deceased with pangas and rungas, inflicting severe injuries. According to the post mortem report, the deceased suffered extensive penetrating injuries on his head, a large haematoma on the posterior part of his neck, and penetrating injuries on his left arm and back. His cause of death was determined to be severe head injuries. We are satisfied that the fact that the appellant went in search of the deceased while armed with dangerous weapons, which he used to inflict injuries on the deceased, is an indication that his actions were not only pre- meditated, but intended to cause death or do grievous harm. He had the requisite motive which was to assist his co-convicts in Busia High Court Criminal Case No 14 of 2014 to ‘settle’ a land dispute that existed between them and the family of the deceased.
22. The appellant main thrust in this appeal was that the trial court failed to consider the proceedings in Busia High Court Criminal Case No.14 of 2014, where his accomplices were charged with the murder of the deceased, and eventually acquitted. It was his submission that PW1 and PW2 did not mention his involvement in the murder of the deceased in their testimonies before the trial court in Busia HCCR No.14 of 2014. We note that the appellant did not request for the said proceedings to be availed before the trial court for perusal, and neither did the appellant cross-examine PW1 and PW2 on this issue. The court record in HCCR No.14 of 2014 was available during the appellant’s trial, and it does not therefore constitute new or fresh evidence. It is our view that the appellant is seeking to make a fresh case on appeal, and that he has failed to show that the additional new evidence he seeks to be admitted, could not have been obtained with reasonable diligence, for use at the trial. In any event, the appellant did not make an application to this Court to allow him to adduce additional evidence. We hold that the appellant is raising this issue for the first time during the hearing of this appeal. This Court has no jurisdiction to consider evidence which was never placed before the trial Court. That ground of appeal must fail.
23. It was the appellant’s contention that his constitutional right to a fair trial was compromised by the trial court. He argued that he was not consulted when a State appointed advocate was assigned to represent him in his case before the trial court. Legal representation is a constitutional right guaranteed under Article 50(2)(b) of *the Constitution*. A state-funded advocate is assigned in cases where substantial injustice would otherwise result. In this case, the appellant was charged with a capital offence which attracted a death penalty upon conviction, thereby necessitating the need for a State-appointed counsel. If the appellant was uncomfortable with the State-appointed advocate, he had the option of formally



requesting for a change of counsel, citing reasons why he deemed his advocate unsuitable, or request the Court to appoint another advocate. Again, this is an issue that the appellant did not raise before the trial Court. He is raising for the first time on this appeal. This ground of appeal must therefore fail.

24. After a re-evaluation of the evidence tendered before the trial court, we are satisfied that the appellant was properly convicted by the trial court. The twenty-five (25) years custodial sentence imposed on him by the trial court was sound in law. We decline the invitation to interfere with it.

25. The upshot of the above reasons is that the appeal lacks merit.

It is dismissed in its entirety.

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

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JUDGE OF APPEAL

I certify that this is a true copy of original.

DEPUTY REGISTRAR

