Akello v Republic (Criminal Appeal E014 of 2020)
[2026] KECA 178 (KLR) (30 January 2026) (Judgment)

Neutral citation: [2026] KECA 178 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL E014 OF 2020

DK MUSINGA, PO KIAGE & GV ODUNGA, JJA

JANUARY 30, 2026

BETWEEN

DENNIS OKINYO AKELLO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against the Judgment of the High Court of Kenya at Kisumu (Cherere, J.) delivered on 12th August 2020 in Criminal Case No. 9 of 2018)

JUDGMENT

1. The appellant was charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. The particulars were that on 20th March 2018 at 2.00pm at Nyakoko Village, Muhoroni Sub-County within Kisumu County, he unlawfully murdered Zainabu Mohammed (the deceased).

2. The prosecution presented seven witnesses. PW1, John Oluoch Oguya, a 52-year-old Artisan and preacher from Masogo in Muhoroni Sub-County, testified that on 20th March 2018 at about 2 pm, he came across a crowd near Magare Primary School. Moments earlier he had met the appellant, whom he greeted though the appellant walked past him without responding. When PW1 joined the crowd, he found the appellant's wife among them and the group proceeded toward the couple's home. Inside the house, in the presence of the appellant's brother identified as Ouma (PW4) and another woman, PW1 stated that he saw the appellant holding a stick and striking his wife twice on the thighs. He intervened and told the appellant to stop. PW1 further testified that the deceased openly confessed she had travelled to Kisumu, met her man friend, gone with him to a lodging, and fought with another woman over the same man. According to PW1, the deceased asked him to pray for her so she could stop engaging in adultery and requested that he speak to the appellant not to continue beating her. After advising them, PW1 left, but later heard screams around 7 pm and returned to the appellant's home where he found the deceased lying dead in one of the rooms with no visible injuries or bleeding.

3. PW2, Rose Atieno Otieno, a neighbour, testified that on the date of the incident at around 2 pm, the deceased came to her house and told her that the appellant wanted to beat her. PW2 advised her to resolve the issue at home. She saw the appellant standing outside unarmed. The deceased left for her house and the next morning, PW2 learnt she had died. She however stated that she did not witness the appellant assaulting the deceased.

4. PW3, Bava Zeinab, the couple's nine-year-old daughter, gave an unsworn statement after a voir dire examination. She stated that on the material day she returned home with her sister around 1 pm and found the appellant beating their mother with a stick all over the body. Several neighbours tried to restrain him but he continued, saying the deceased had done something very bad. She stated that the appellant forced the deceased to call the man she had visited, breaking her phone in the process. PW3 was then sent to buy meat and returned to find the beating still ongoing. Later, the deceased sat with her face lowered, unresponsive, and PW3 locked the appellant out when he threatened to continue beating her. The appellant later entered with Ouma (PW4), attempted to resuscitate the deceased and said he was going to call an ambulance. PW3 stated that the appellant ran away when police came and that she later learnt her mother had died. She also said that she learnt from her sister that her father attempted suicide by stabbing himself in the neck.

5. PW4, Nicholas Ouma, the appellant's brother, testified that he saw the appellant and his wife arrive home around 1 pm and found the wife crying. Inside the house, the appellant told him that he had found her with another man while the deceased claimed she had been assaulted by a woman. PW4 said he stayed in the house for about five minutes and saw the appellant hit the deceased twice with a stick before PW1 took it away. Later in the evening, PW4 returned home and found the deceased unconscious and she never came- round.

6. PW5, Dr. Nixon Mchana, the Pathologist who conducted the autopsy on the deceased's body, testified that he found bluish discoloration of fingertips, lips and tongue, indicating difficulty in breathing before death; a large bruise on the forehead;

> widespread whip-like bruises on the arms, forearms, back, shoulders and neck; and extensive internal soft-tissue bleeding. The skull was intact but the brain was swollen. He concluded that death resulted from extensive soft tissue injuries caused by blunt force trauma from assault. According to PW5, the injuries were fresh and consistent with death occurring during the assault.

7. PW6, William Osimba, a relative of the deceased, testified that he went to the appellant's home after receiving news of the death at about 9.30 am and found the body of the deceased in the children's bedroom covered with clothes. He did not observe the injuries as the body was covered with clothes. He later identified the body to PW5 during the postmortem.

8. PW7, CPL Susan Chebet, the investigating officer, stated that she visited the scene at 8 pm and found the deceased's body lying on a bed in the kitchen with multiple bruises. The appellant was absent, but neighbours later traced him after he attempted suicide by stabbing himself in the neck, after which he was rushed to the Jaramogi Oginga Odinga Teaching & Referral Hospital (JOOTRH) and treated as an inpatient. She produced the appellant's discharge summary and gate pass issued by JOOTRH. She also testified that she recorded statements from witnesses who uniformly said the appellant had beaten the deceased. She confirmed that she witnessed the postmortem and that the deceased died from extensive soft tissue injuries due to assault.

9. The appellant gave a sworn defence, stating that he found his wife's shop closed around noon and later learnt that she had gone to Kisumu to see a fridge repairer. He stated that the deceased eventually

admitted going to a lodging with the fridge repairer and being assaulted by a woman. He also stated that he only whipped the deceased once or twice on the thighs to reprimand her. It was his further testimony that the deceased later asked for water, said she was tired, and eventually became unresponsive. He stated that the children were not present during the whipping. He added that he went to seek help and was attacked by three people who stabbed him in the neck after which he was taken to the hospital. He maintained that he never beat his wife severely and was unaware she had died until days later.

10. The trial court in its judgment delivered on 12th August 2020 held that the prosecution had proved the charge of murder beyond reasonable doubt. The court found that the postmortem results clearly established that the deceased suffered extensive soft tissue injuries, widespread whip-like bruises, internal bleeding and a swollen brain, all consistent with a prolonged and forceful assault. These injuries did not match the appellant's claim that he had merely whipped his wife twice on the thighs. The court also held that PW3, the couple's nine-year- old daughter, gave a detailed, credible and reliable account of seeing the appellant beat her mother with a stick all over the body, even after neighbours, including PW4 tried to restrain him. Her testimony was corroborated by the medical evidence.

11. The trial court rejected the version of events given by the appellant as well as the suggestion by PW1 and PW4 that the deceased had earlier been assaulted by another woman. The learned judge noted that the appellant himself admitted that the deceased was in good health when she returned home and thus concluded that the claim of an earlier assault was a fabrication intended to conceal the severe beating inflicted by the appellant. The court emphasized that the scale and distribution of the injuries could not be explained by two light blows or by a prior altercation elsewhere.

12. On malice aforethought, the court held that the prolonged beating and the severity of the injuries demonstrated an intention to cause death or grievous harm within the meaning of section 206 of the Penal Code. Consequently, the court concluded that the appellant unlawfully caused the death of his wife, with malice aforethought, and convicted him of murder. The appellant was subsequently sentenced to 20 years' imprisonment.

13. Being dissatisfied with the conviction and sentence, the appellant filed the instant appeal. The appellant contends that the learned trial judge erred in fact and in law by failing to inquire into or establish his mental state before taking plea, thereby undermining the fairness of the proceedings from the outset. He further argues that the court did not properly evaluate the evidence as a whole, and failed to recognize that the prosecution fell short of proving the case beyond reasonable doubt. The appellant also challenges the conviction on the basis that the trial court relied heavily on circumstantial and hearsay evidence without adequate, credible or reliable supporting proof, thereby resulting in an unsafe conviction.

14. At the hearing of this appeal, the appellant was represented by learned counsel Mr. Mirembe, while the respondent was represented by learned counsel Ms. Kagali. Both counsel made brief oral highlights of their respective client's written submissions.

15. Mr. Mirembe indicated to court that his client would be abandoning ground no. 3 in the Memorandum of Appeal dated 16th June 2025. Highlighting his client's written submissions, counsel contended that the trial court erred by taking plea without first confirming his mental state despite an earlier direction by the Deputy Registrar that he undergoes a mental assessment at Jaramogi Oginga Odinga Teaching and Referral Hospital. He argued that no such assessment was ever conducted and no report was placed before the judge, yet mental evaluation is a longstanding judicial practice intended to ascertain an accused person's state of mind before plea. To support this position, he relied on Republic v Lewis (Criminal Case E077 of 2021) [2021] KEHC 272, where the court emphasized that mental

assessment helps the court determine an accused's state of mind and is essential because it is based on both clinical examination and the accused's history.

16. Responding to a question from the Court, counsel acknowledged that there had been no allegation from the appellant's family, or anyone else, suggesting that the appellant's mental state was unstable at the time of plea. He maintained, however, that a mental assessment should still have been conducted because, in his view, it is a standard practice and consistent with section 48 of the *Evidence Act*. When the bench reminded him that the law presumes sanity under sections 11 of the Penal Code and that the assessment is meant only to confirm fitness to take plea rather than mental status at the time of the offence, counsel conceded the presumption but argued that an assessment at plea stage would still have clarified whether the appellant was in a proper state of mind to proceed to take a plea. Counsel further conceded that the appellant was represented by counsel at the time of taking plea, who did not raise any concern regarding the appellant's fitness to plead.

17. On the issue whether the appellant was provoked by the deceased's infidelity and extra-marital affairs, it was submitted that the trial court failed to consider that he acted under provocation arising from the deceased's admitted infidelity. Counsel specifically pointed to the testimony from PW1, PW2, PW4 and PW7, all of whom confirmed that the deceased stated she had gone to Kisumu and met another man and that she had been involved in a confrontation with another woman while there. It was contended that these revelations triggered a sudden loss of self-control of the appellant, thus satisfying the elements of provocation under section 207 of the Penal Code. To contextualize the defence, he relied on VMK v Republic (2015) eKLR, where the High Court adopted the classic definition of provocation from Duffy (1949) 1 All ER 932, describing it as conduct capable of causing a reasonable person to lose self-control and rendering the accused momentarily not master of his mind. The appellant therefore submitted that both the subjective and objective limbs of the provocation test were met: he was actually provoked by the deceased's confession of adultery, and a reasonable person in similar circumstances would have been provoked.

18. Responding to a question from the Court, counsel conceded that although he addressed provocation in his submissions, it was not specifically pleaded as a ground of appeal. He stated that he raised it within ground one rather than presenting it as a standalone ground.

19. In the end, the appellant urged this Court to quash the conviction for murder, contending that the trial was vitiated by the failure to establish his mental state before plea and that the deceased's infidelity provoked a sudden loss of self-control inconsistent with malice aforethought.

20. In response, the respondent contended that although the court had directed on 29th March 2018 that the appellant undergoes a mental assessment at Jaramogi Oginga Odinga Teaching and Referral Hospital, neither the State nor the defence counsel ever raised the absence of that report during plea on 10th April 2018 or at any point thereafter. In the circumstances, and since the plea was taken in Kiswahili, the appellant responded appropriately, and his advocate did not object or indicate any concern about his mental condition, it was contended that both parties clearly proceeded on the understanding that there was no issue regarding the appellant's sanity.

21. In addition, it was contended that subsequent conduct, particularly defence counsel's participation in the hearing which commenced on 23rd October 2018 without raising the issue, confirmed that the omission did not prejudice the appellant. Counsel maintained that there is no express legal requirement mandating mental assessment before plea. In this regard, counsel cited the High court decision in Republic v Kamotho [2025] KEHC 577 (KLR), wherein it was held that the practice stems from common law rather than statutory obligation and that failure to conduct such assessment does not constitute a miscarriage of justice. Counsel further submitted that insanity was never raised as a defence

at the trial, thereby reinforcing the presumption that the appellant remained sane throughout the proceedings.

22. On provocation, counsel posited that the defence was unavailable on the facts as the record showed the appellant acted with full presence of mind. In this regard, it was contended that the appellant waited for the deceased outside PW2's house, sent PW3 to buy meat, instructed the deceased to prepare food, and generally displayed deliberate intent, rather than a sudden loss of self-control. She submitted that the evidence demonstrated no provocation at all and that the prosecution proved every ingredient of murder beyond reasonable doubt, consistent with the trial judge's reasoning in the impugned judgment. Lastly, it was contended that the nature and extent of the injuries inflicted left no doubt that the appellant intended to cause grievous harm on the deceased.

    This Court was therefore urged uphold the appellant's conviction.

23. We have considered the record, the rival submissions and the law. This being a first appeal, the duty of this Court is to re- analyze the entire evidence and reach its own conclusions, while bearing in mind that it did not see or hear the witnesses testify. See Okeno v Republic [1972] EA 32 and David Njuguna Wairimu v Republic [2010] eKLR.

24. The issues that present themselves for determination in this appeal are whether the learned judge erred in fact and in law by failing to inquire into or establish the appellant's mental state before taking plea, thereby undermining the fairness of the proceedings from the outset; and whether the trial court erred in failing to consider and hold that the appellant acted under provocation arising from the deceased's alleged infidelity, and that such provocation was capable of displacing malice aforethought.

25. As regards the first issue, the record shows that on 29th March 2018 the trial court directed that the appellant undergoes a mental assessment at JOOTRH. However, during plea taking on 10th April 2018, there was no indication that the assessment had been undertaken. The appellant, who was then represented by counsel, proceeded to take plea. The Information dated 29th March 2018 was read to him and each element explained in Swahili, a language he said he understood and to which he responded, "Si kweli" (not true). The question that arises is whether in those circumstances the appellant suffered any prejudice that curtailed his right to a fair hearing. In our view, he did not.

26. In saying so, we make reference to the provisions of section 11 of the Penal Code which provides that every person is presumed to be of sound mind at all material times unless the contrary is proved. This presumption is rebuttable and underpins the defence of insanity. Section 12 of the Penal Code sets out the legal test, shielding from criminal responsibility a person who, through disease affecting the mind, is rendered incapable of understanding what he is doing or of knowing what he ought not to do. The presumption of sanity under sections 11 and 12 is a substantive provision of law, and the burden of displacing it rests squarely on the party alleging incapacity. Indeed, this Court in Richard Kaitany Chemagong v Republic [1984] KECA 64 (KLR) held thus:

> "As the learned judge correctly stated, the burden of proving an averment of insanity, once raised, lies upon the accused person to show on the balance of probabilities:
>
> "that at the time of the killing the deceased was-
>
> a. suffering from disease affecting his mind;
>
> b. through such disease incapable –
>
> i. of understanding what he was doing, or

ii. of knowing that he ought not to kill the deceased."

27. This Court in Titus Ngamau Musila Katitu v Republic [2020] KECA 705 (KLR) had this to say on the practice of mental assessment before plea taking:

> " Before we embark on the determination of the single issue which we have identified earlier in this judgment, the appellant has complained that he was never subjected to a mental examination to prove that he was fit to stand trial. Our answer is drawn from the decision of the Court in F U M V. Republic, Criminal Appeal No. 139 of 2010 where it was explained that:
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> > 'On whether or not the appellant should first have been taken for a psychiatric examination, we are unable to find a legal basis for that requirement. It little matters that some practice exists whereby murder suspects are first taken for such assessment. The law is quite clear that all persons are presumed to be compos mentis: Section 11 of the Penal Code states as much. If it is an accused person's defence that he was not of good mind at the time of the commission of the offence, the onus is on him to raise and prove it on a balance of probability. See section 107, 109 and 111 of the *Evidence Act*.'
> >
> > The appellant did not raise a defence of insanity and there were no doubts raised as to his mental capacity. As the Court said in the above case mental examination of suspects accused of murder has been done as a matter of practice rather than law. No prejudice was occasioned to the appellant by the failure to subject him to a psychiatric evaluation. Therefore, nothing turns on this issue."

28. In the circumstances herein, neither the appellant, his counsel nor his family raised any allegation suggesting mental instability. At the hearing of this appeal, counsel candidly conceded that nothing in the record pointed to any defect in the appellant's mental state. The appellant was represented throughout by counsel, who took instructions, cross-examined witnesses and conducted the defence case without raising any concern regarding the appellant's fitness to plead or stand trial. Nothing in the record suggests that the appellant was unable to comprehend the charge, communicate with counsel or participate in his defence. We agree with the reasoning in Republic v Kamotho (supra) that mental assessment prior to plea is a prudential common-law practice rather than a statutory requirement. In our view, the appellant has not demonstrated any prejudice or miscarriage of justice he suffered as a result of the trial court's failure to address itself on the issue of his mental assessment. On the contrary, the record shows that the appellant was sane at the time of the offence and during trial, and, in any case, the burden lay on him to displace the presumption of sanity under section 11 of the Penal Code, which he did not.

29. On the second issue, we are equally unpersuaded that the argument on provocation is tenable. Section 208 (1) of the Penal Code defines the term provocation as:

> " The term "provocation" means and includes, except as hereinafter stated, any wrongful act or insult of such a nature as to be likely, when done to an ordinary person or in the presence of an ordinary person to another person who is under his immediate care, or to whom he stands in a conjugal, parental, filial or fraternal relation, or in the relation of master or servant, to deprive him of the power of self- control and to induce him to commit an assault

of the kind which the person charged committed upon the person by whom the act or insult is done or offered."

30. Provocation is an affirmative defence and a question of fact that must be expressly raised and supported by evidence at trial; it cannot be introduced for the first time on appeal through submissions. See Julius Lopeyok Wero v Republic [1983] KECA 21 (KLR). The record confirms that the defence of provocation was never raised before the trial court. The attempt to introduce it is therefore misplaced and legally untenable. Indeed, in Peter King'ori Mwangi & 2 Others v Republic [2014] KECA 270 (KLR), this Court rejected the appellant's attempt to plead provocation on appeal. It held thus:

> "No evidence with regard to provocation having been led, we are not able to determine whether the subjective and objective conditions were met. Secondly, to raise the defence now deprives the prosecution the chance to rebut the same."

31. However, and even assuming, for argument sake that it had been competently raised, the surrounding circumstances negate the possibility of sudden provocation. As accurately recounted by the respondent, the appellant waited for the deceased outside PW2's home, sent PW3 to buy meat, instructed the deceased to prepare food, and otherwise interacted with his children and brother calmly and deliberately. There is no evidence of a sudden and temporary loss of self-control. Moreover, the sustained assault on the deceased, coupled with the extensive whip-like bruises, internal bleeding, soft-tissue trauma and cerebral swelling, is wholly incompatible with a momentary outburst. These injuries instead point to a prolonged and forceful attack. The trial court was therefore correct in concluding that malice aforethought had been proved in terms of section 206 (a) and (b) of the Penal Code.

32. In light of the foregoing, we are not persuaded that the appellant was unfit to stand trial, or that the absence of mental assessment, if at all, prejudiced him in any way. In addition, the ground of appeal of provocation was never raised before the trial court as an affirmative defence and cannot be raised on appeal. The long and short of it is that the trial court's conviction was grounded on credible, consistent and corroborated evidence and the legal principles governing proof of murder were correctly applied.

33. In the end, we are satisfied that the appellant's conviction was safe and the sentence passed was lawful. This appeal is therefore devoid of any merit and is accordingly dismissed in its entirety.

DATED AND DELIVERED AT KISUMU THIS 30TH DAY OF JANUARY, 2026.

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