Khwatenge v Republic (Criminal Appeal 169 of 2020)
[2026] KECA 177 (KLR) (30 January 2026) (Judgment)

Neutral citation: [2026] KECA 177 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 169 OF 2020

DK MUSINGA, PO KIAGE & GV ODUNGA, JJA

JANUARY 30, 2026

BETWEEN

BEN SIMIYU KHWATENGE ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal from the judgment of the High Court of Kenya at Bungoma (S. N. Riechi, J.) dated 7th May 2020 in HCCRC No. 6 of 2017)

JUDGMENT

1. Ben Simiyu Khwatenge, 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 being that on the 21st day of December 2014 at Musembe Village in Bungoma North District within Bungoma County, he murdered John Wanjala Nato. After the hearing, the appellant was found guilty and was sentenced to 25 years' imprisonment by the High Court, Bungoma (Riechi, J.).

2. The prosecution's case was that on 21st December 2014, PW1, Rose Mulongo, went to the house of Ann Waswa (PW2) to have her hair plaited and while there, her boyfriend, the appellant, came to the house. A disagreement arose between PW1 and the appellant during which PW1 informed the appellant that she wanted to end the relationship. Annoyed, the appellant threatened to kill her should PW1 leave him. He grabbed her and tore her clothes and when PW2 came to her rescue, she sought refuge in PW2's kitchen. In the meantime, the appellant hit PW2 before going after PW1 inside the kitchen, where he continued kicking her and beating her using his fists. PW1's screams attracted neighbours, among them the deceased, John Wanjala Nato, who went to separate them. However, the appellant turned against the deceased, similarly kicking him with is boots and beating him with fists. When the deceased fell down, the appellant, stepped him. At that point PW1 managed to escape leaving the two still struggling. She later learnt that deceased died while being taken to hospital.

3. PW2, Ann Naliaka Waswa, confirmed PW1's evidence and added that as people started gathering, the appellant ran away. The deceased, who was injured, also walked away.

4. PW3, Joel Katenge Nato, the deceased's brother, received information of the assault from PW6, Justus Sirengo, who was on his way to church and saw the deceased lying in a trench, unresponsive. PW3 proceeded to the scene, where he found the deceased lying in a trench, unable to talk. Together with PW6, they removed the deceased and took him home where they found the deceased's wife, Caroline Nanjala, PW7. PW6 then left. According to PW7, that day when at 3.00pm the deceased, who was not sick, left to go to the market. She confirmed that when brought home, the deceased was not talking and had injuries in the abdomen.

5. The information about the assault on the deceased was also received by another brother, Jacob Toili Nato (PW4), who rushed to the scene and found that the deceased had been removed. At home, he found the deceased lying down and together with PW3, they took the deceased to Soteni Hospital, but on arrival they were informed that the deceased was already dead. They then took the body back home and reported the matter to the police. The next day the body was taken to Webuye District Hospital where the post mortem was conducted, witnessed by PW4 and PW5, Joseph Namasaka Nato.

6. PW8, Chief Inspector Francis Mweu, attached to Albikula police station, received information of the deceased's death and, on proceeding to the scene, found the deceased having been taken home. He was shown the scene, whose sketch plan he drew. When he examined the deceased, he saw injuries on the chest which appeared swollen. He recorded statements from the witnesses and caused the appellant to be arrested.

7. PW9, Dr. David Mukabi, who performed a post mortem examination on body of the deceased, found that the deceased had bruises above left eye, on abdomen, left shoulder and knee. On opening the body, he found a ruptured spleen with bleeding in abdominal cavity and a minor cut on the liver. He formed an opinion that the death was as a result of internal bleeding due to rupture of spleen, caused by a blunt object. He produced the post mortem report.

8. When placed on his defence, the appellant testified that he knew the deceased as he was married to his aunt. He denied having seen the deceased on 21st December 2014 as he was at Endebes where he went to in early October 2014, came back on 11th December 2014, went back on 13th December 2014 and returned in February 2014. He said that he last saw the deceased in November 2014.

9. In his judgement, the learned trial Judge relied on the case of Republic v Andrew Omwenga (2003) eKLR on the elements of the offence of murder and found, on the basis of PW9's evidence, that the prosecution had established, not only the fact of death, but also the cause thereof. On the strength of the evidence of PW1, PW2, PW7 and PW8, the learned Judge found that the kicks, fists, felling down and stepping on the deceased were pieces of unlawful acts by the perpetrators on the deceased. He found, based on the case of R v Tumbere S/o Ochian (1945) 12 EACA 63, that from the injuries inflicted on the deceased, there was an intention to kill or do grievous harm to him and, therefore, malice aforethought was established. Appreciating that the appellant raised an alibi defence for which he did not assume the responsibly of proving (see Ssentale v Uganda (1968) EA 36), the burden of proving his guilt always on the prosecution (see Wangombe v Republic (1976-80) 1 KLR) the learned Judge however was alive to the need for that defence to be raised at the earliest opportunity either by intimating it to the prosecution or though cross-examination of witnesses for the prosecution as was held in the case of R v Sulcha Singh S/o Wazir Singh & Others (1939) EACA 145. In this case the learned Judge found that the appellant did not do so and on the authority of the cases of Festo Androa Asenua & Another v Uganda, Criminal Application No. 1 of 1998 and Benard Shikuku Wamalwa v Republic (2019) eKLR, and on the basis of the evidence of PW1 and PW2 who were well known to

the appellant, found that the prosecution witnesses' evidence firmly placed the appellant at the scene of the offence.

Being mindful of the need to weigh the defence alibi against the prosecution evidence as recommended in Ganzi & 2 Others v Republic (2005) I KLR 52, the learned Judge found that the prosecution's evidence displaced the alibi defence advanced by the accused. In the end, the learned Judge found the appellant guilty and, as stated above, sentenced him to 25 years' imprisonment after considering the mitigation.

10. Dissatisfied with the decision, the appellant challenged the decision on the grounds that the learned Judge erred in points of law and fact: by failing to properly analyse the evidence before court hence arriving at a wrong determination; by failing to consider the appellant's alibi defence which warranted an acquittal; and by failing to factor in the time spent by the appellant in custody hence arriving at a wrong decision on the sentence.

11. We heard this appeal on 3rd September 2025 when learned counsel, Ms. Ida Anyango, appeared for the appellant while learned Assistant Director of Public Prosecutions, , Ms Mwaniki, appeared for the respondent. Both counsel relied on their written submissions which they briefly highlighted.

12. On behalf of the appellant, it was submitted: that the learned Judge erred in law by failing to properly analyse the medical evidence, hence coming to a wrong conclusion that approximately three hours lapsed between the assault and the time the deceased was found lying in a ditch; that there was no explanation as to what occasioned his fall in the ditch; that there was no link between the rapture of the spleen and the assault; that the possibility of the rapture having been due to the fall into the ditch cannot be ruled out; that this Court should be guided by the decision in the case of Kihara v R [1986] eKLR, where the Court found that the rapture of the spleen was insufficiently explained.

13. It was further submitted: that based on the decision in the case of Victor Mwendwa Mulinge v R [2014] eKLR, the prosecution had the opportunity to rebut the alibi defence notwithstanding that it was raised late; that the defence was never dislodged; that from the evidence, the appellant was presented to court for plea on 28th February 2017 and his surety was rejected on grounds of age, thus he remained in custody throughout the trial; that upon being convicted, the appellant's sentence to 25 years' imprisonment did not factor in the time spent in custody contrary to section 333(2) of the Criminal Procedure Code as applied in the decision in Ahamad Abolfathi Mohammed & Another v R [2018] eKLR.

14. Based on the foregoing, we were urged to allow the appeal.

15. In opposition to the appeal, the respondent submitted: that the appellant received a fair trial and the burden of proof was discharged by the prosecution; that the trial court properly evaluated the evidence, gave detailed reasons for its findings and made no error; that the sentence to 25 years' imprisonment was warranted, considering the aggravating circumstances, the absence of remorse and the principles of deterrence, retribution and protection of the public; and that it was within the discretion of the court, taking into account the guidance in the Supreme Court decision in Francis Karioko Muruatetu & Another v R [2017] eKLR.

16. We were urged to dismiss the appeal for lack of merit.

17. We have considered the grounds of appeal and the evidence on record, the respective submissions filed by and on behalf of the appellant, and by the respondent. Our mandate, sitting as a first appellate Court, is provided for under rule 31(1)(a) of the Rules of this Court, under which we are enjoined to undertake a fresh and exhaustive examination and reach our own decision on the evidence on record. See Okeno v Republic (1972) EA 32.

18. In a charge of the offence of murder, it is required of the prosecution to prove certain ingredients in section 203 of the Penal Code, if the charge is to be upheld by the court. These ingredients, as explained in the case of Chiragu & Another v Republic [2021] KECA 342 (KLR) are: that the death of the deceased occurred; that the death was caused by an unlawful act of commission or omission by the appellant; and that the appellant had malice aforethought as he committed the said act.

19. That the deceased died is not in doubt. The evidence of PW3 and PW4 confirmed that when the deceased was being taken from home to the Hospital, he was pronounced dead on arrival. The deceased's wife, PW7 confirmed the deceased's death, whose cause was explained by the evidence of PW9. The post mortem was attended by PW4 and PW5 who identified the body. Accordingly, there is no doubt that the deceased died.

20. As to the cause of his death, PW9's evidence was that the deceased sustained bruises above his left eye, abdomen, left shoulder and knee. The cause of death, according to him, was internal bleeding due to rupture of spleen, caused by a blunt object. The deceased's wife, PW7, testified that the deceased was not sick when he left the house that afternoon. Accordingly, his death was caused by an unlawful act.

21. On whether the death of the deceased was caused by the appellant, there was evidence of severe assault on the deceased by the appellant. This was confirmed by the evidence of PW1 and PW2. In cross-examination, it was not put to the two witnesses that the appellant was not there. The evidence of the two witnesses, as regards the presence of the appellant, was not seriously challenged. On whether the injuries sustained from the assault are the ones that led to the death of the deceased, from the evidence of PW1 and PW2, the deceased, by the time he was leaving, was seriously injured and he was shortly thereafter found lying in a ditch unable to speak. There was no evidence of any intervening factor between the time of the assault and the time he was found in the ditch. In our view, PW9's opinion was in accord with the injuries inflicted on the deceased by the appellant.

22. Section 215 of the Penal Code provides that:

> A person is not deemed to have killed another if the death of that person does not take place within a year and a day of the cause of death.

23. On malice aforethought, the decision in Tubere s/o Ochen v Republic [1945] 12 EACA 63, is to the affect that:

> "The weapon in possession of the accused while carrying out the intention, the manner in which it was used to strike the human being whether one off blow or violent multiple blows, the conduct of the accused in fleeing from the scene afterwards, the permanency or dangerous severity of the bodily harm and that cumulatively the death of the deceased must ensue from the bodily harm intentionally inflicted."

24. In this case, the appellant wore boots. He struck the helpless deceased whose only "crime" was to go to the rescue of the deceased, with fists and stepped on him even after he had fallen down. After realising that the deceased was injured, he fled from the scene instead of assisting him. In those circumstances, the learned Judge correctly concluded that either the appellant intended to kill the deceased or cause him grievous harm, hence malice aforethought was proved.

25. It was contended that the appellant's alibi defence was never considered by the learned Judge. In his judgement, the learned Judge stated, after setting out the appellant's

evidence, and noting that the appellant did not call any witness, that:

> "PW 1 and PW 2 are people well known to the accused. The accused admits that they are known to him. The incident occurred at around 3 p.m. during the day. It occurred at the home of PW 2 Ann in broad daylight. The accused engaged and spoke to the witnesses. Indeed, he was assaulting PW 1 Rose when the deceased came to separate them. All these show that the conditions for positive identification or recognition with no possibility of error existed. Those prosecution witnesses' evidence in my view, firmly placed the accused at the scene of the offence... The prosecution evidence in this case has placed the accused at Musembe Village Bungoma North District where the deceased was murdered. The prosecution has, therefore, be evidence displaced the alibi defence advanced by the accused."

26. We do not see what else was required of the learned Judge apart from what he said. The learned Judge clearly weighed the alibi defence with the prosecution's evidence and found it unmerited. We have, on our own considered the said defence and find that, in light of the clear and uncontroverted evidence by PW1 and PW2, which placed the appellant on the scene, and in light of lack of any evidence in support of the appellant's alibi, the said defence was clearly dislodged.

27. Regarding the sentence, we agree that the learned Judge erred in not expressly factoring in the period that the appellant spent in custody, in meting out the 25-year sentence. The proviso to section 333(2) of the Criminal Procedure Code clearly states that where the person sentenced under subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody. This is a legal imperative and the trial courts must comply with it. Therefore, in meting out a sentence, the court ought to indicate not only whether it has taken into account the period spent in custody but must go further and state what and how it has been taken into account. This is important because, sentencing being an exercise of discretion, the material taken into account must be set out so as to avoid the impression that the sentence was arbitrarily imposed. This is our understanding of the case of decision in Ahamad Abolfathi Mohammed & Another v Republic (supra) where this Court of held that:

> "The second is the failure by the court to take into account in a meaningful way, the period that the appellants had spent in custody as required by section 333(2) of the Criminal Procedure Code. By dint of section 333(2) of the Criminal Procedure Code, the court was obliged to take into account the period that they had spent in custody before they were sentenced. Although the learned judge stated that he had taken into account the period the appellants had been in custody, he ordered that their sentence shall take effect from the date of their conviction by the trial court. With respect, there is no evidence that the court took into account the period already spent by the appellants in custody. "Taking into account" the period spent in custody must mean considering that period so that the imposed sentence is reduced proportionately by the period already spent in custody. It is not enough for the court to merely state that it has taken into account the period already spent in custody and still order the sentence to run from the date of the conviction because that amounts to ignoring altogether the period already spent in custody. It must be remembered that the proviso to section 333(2) of the Criminal Procedure Code was introduced in 2007 to give the court power to include the period already spent in custody in the sentence that it metes out to the accused person. We find that the first appellate court misdirected itself in that respect and should have directed the appellants' sentence of imprisonment to run from the date of their arrest on 19th June 2012."

28. Unless the above imperative is complied with, it will be presumed that the period spent in custody was, in error, not factored in. In the premises, we direct the sentence to 25 years' imprisonment meted on the appellant to run from 28th February 2017.

29. Save for that clarification, we dismiss the appeal.

30. We so order.

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

Ksm Crim Appeal No. 169 of 2021