

**IN THE COURT OF
APPEAL AT
NAKURU**

**(CORAM: WARSAME, MATIVO & GACHOKA,
JJ.A.) CRIMINAL APPEAL NO. E004 OF
2024**

BETWEEN
PETER LENANGETEI.....APPELLANT
AND **REPUBLIC**
.....

RESPONDENT
(An appeal from the conviction and sentence by the High Court)

**28th September 2023 and
respectively**

in

HCCRC No. 8 of 2020)

JUDGMENT OF THE COURT

1. The appellant, Peter Lenangetei, 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 were that on 23rd March 2020 within Loruko-Baragoi highway in Samburu North sub-county within Samburu County, the appellant murdered Livingstone Nyota.
2. When the appellant was arraigned before the trial court, he pleaded not guilty to the offence in Nyahururu HCCRC No. 8 of 2020. After a full trial, Kariuki, J. convicted him as

charged on 28th September 2023. He was sentenced to serve 20 years' imprisonment on 21st December 2023.

3. The appellant is dissatisfied with those findings. He filed his notice of appeal dated 3rd January 2024. He also filed his memorandum of appeal dated 14th January 2025 that raised fifteen grounds disputing the findings of the trial court. We have taken the liberty to summarize those grounds as follows: that the evidence was too scanty, unreliable and weak as to meet the required threshold; that the evidence of **PW3** was unreliable in identifying the murder suspect; the appellant was dissatisfied that none of the identifying witnesses gave prior description before the identification exercise as well as the circumstances surrounding; that no doctor testified but the trial court found otherwise; the trial court improperly shifted the burden of proof to the appellant in violation of his constitutional rights; and the prosecution failed to discharge its burden of proof to the required standard thereby rendering the conviction and sentence unsafe. For those reasons, the appellant prayed that the appeal be allowed, his conviction quashed and the sentence set aside.

4. The appeal was heard on 8th December 2025 through the zoom link virtual platform. The appellant was present. He was represented by learned counsel Mr. Wandugi. On the

part of

the respondent, Senior Assistant Director of Public Prosecutions Mr. Omutelema was present.

5. The appellant filed written submissions and a list of authorities both dated 9th June 2025. Learned counsel for the appellant submitted that the evidence was scanty. Additionally, **PW2** and **PW3** were unable to identify the attacker of the deceased by failing to give descriptive evidence of the assailant's attributes when recording their statements with the police. In addition, he argued that the evidence of a single identifying witness of the assailant was unfathomable, unreliable rendering the conviction unsafe.
6. It was further submitted that since the murder weapon was neither recovered nor a ballistic report submitted in evidence, the cause of death was not proved beyond reasonable doubt. He questioned the credibility of the post mortem report as it was not produced in evidence by the pathologist. In his view, this occasioned a miscarriage of justice as the appellant was denied the opportunity to cross examine the author of the report.
7. Turning to the circumstances of the appellant's arrest, learned counsel complained that the appellant was arrested two

months after the offence was committed questioning the intentions of the police. Furthermore, while the prosecution testified that the appellant was arrested aboard motorcycle registration number KMEZ 916X that was blue in colour, the evidence regarding his involvement in the crime was that he was riding a black motorcycle.

8. The appellant faulted the trial court for rejecting his defence without reasonable basis yet it was cogent. He argued that the hearing was not conducted in a fair manner as his evidence was dismissed in a single paragraph. Accordingly, this violated his inalienable rights enshrined in Article 50 of the Constitution. For those reasons, the appellant prayed that his appeal be allowed.
9. The respondent opposed the appeal. It filed written submissions, a list of authorities and a case digest all dated 3rd July 2025. Learned counsel for the state submitted that the prosecution discharged its burden of proof to establish that the appellant committed the offence that he was charged with. He observed that from the evidence of **PW2** and **PW3**, it was credibly established that the appellant was the perpetrator of the offence.

10. On the cause of death and adduction of the post mortem report in evidence, state counsel submitted that the post mortem report was properly admitted in evidence by dint of section 77 of the Evidence Act by **PW5**, the investigating officer. In any event, the manner of its adduction in evidence was not challenged by the appellant at trial. Furthermore, from the testimonies of **PW2**, **PW3** and **PW4**, the deceased died as a result of gunshot wounds, consistent with the cause of death as recorded by the doctor in the post mortem report.
11. On malice aforethought, the prosecution submitted that it was proved beyond any reasonable doubt and therefore ought to be upheld. On whether the trial court shifted the burden of proof to the appellant, Mr. Omutelema refuted those claims stating that the burden of proof always remained with the prosecution. He observed the evidence of the appellant finding that it did not prick holes in the prosecution's evidence as to cast doubt. It was therefore properly rejected.
12. Lastly, on sentence, learned counsel submitted that the sentence meted out was extremely lenient given the aggravating circumstances leading to the deceased's

death. It was therefore proposed that the sentence be enhanced in line

with the dictates of section 204 of the Penal Code to death. For those reasons, the respondent prayed that the appeal be dismissed in its entirety.

13. We have considered the parties' submissions, examined the record of appeal and analyzed the law. Our duty as a first appellate court is to re-evaluate, re-analyze and re-examine the evidence tendered afresh and arrive at our own independent findings while making due allowance to the fact that we did not have the advantage of hearing the witnesses and observing their demeanor. [See ***Mark Oiruri Mose vs. Republic*** [2013] KECA 67 (KLR)]. The prosecution marshalled five witnesses in a quest to prove that the appellant committed the offence for which he was charged. We shall revisit that evidence for our own evaluation when analyzing the grounds of appeal.

14. The main issue for determination in this appeal is whether the trial court arrived at a correct finding in convicting the appellant as charged. To sustain a conviction for the offence of murder, the following conjunctive elements must be proved beyond any reasonable doubt: the death of the deceased, the cause of death, the death of the deceased

was caused by an

unlawful act or omission; the said unlawful act or omission was caused by the appellant and with malice aforethought.

15. On the death of the deceased, **PW2**, **PW3**, **PW4** and **PW5** all confirmed that the deceased had passed on. However, as to the cause of death, as rightly pointed out by the appellant, it was **PW5**, the investigating officer, and not the doctor, who produced the post-mortem report. The trial court determined the cause of death from that post mortem report authored by Dr. Kuria.

16. Section 33 of the Evidence Act provides that written statements made by a person who cannot be found, is incapable of giving or whose attendance cannot be procured without an amount of delay or expense and which in the circumstances of the case appears unreasonable to the court would be admissible. It would have been prudent for the trial court to lay a basis for the reliance of **PW5**'s evidence in producing the post mortem report. Nonetheless, the same proved the cause of the deceased's death.

17. The next crucial element that must be established to secure a conviction is whether the deceased died as a result of an unlawful act or omission committed by the

appellant. The

prosecution relied on the direct evidence of three witnesses namely **PW1**, **PW2** and **PW3** to persuade the trial court that the appellant participated in killing the deceased. From the record, **PW1** was stood down and did not conclude his evidence. In fact, the testimony he had given was not subjected to cross examination. His evidence is therefore unreliable.

18. According to the evidence of **PW2** and **PW3**, they were occupants of a lorry registration number KCH 236B on a business trail with the deceased and **PW1** in selling goods between South Horr and Loonjorin centre on 23rd March 2020. **PW2** and **PW3** were seated at the back while **PW1** and the deceased occupied the front seat. They made several stops selling goods in the following areas: Loruko, Sumumai, Kirungu, Anderi, Ntalenirani village/manyatta and Loojolin. Once they were done, they retreated on their journey back to South Horr.

19. During the entire journey, **PW2** and **PW3** suspiciously noticed two motorcycles following them. One was red and the other was black in color. They each had a rider and a passenger. In several stops they made, they noticed the said motorcycles stopping on a number of those similar

stops. They recalled

that during that time, the area experienced high insecurity. In one of the stops, **PW2** was able to see one of the riders very well, a person he later identified in the identification parade as the appellant on 13th May 2020. Similarly, **PW3**, identified the person riding the black motorcycle as the appellant.

20. It was on their way back to South Horr, on passing Loruko, in the evening hours of around 8:30 p.m. or 9:00 p.m. that their vehicle was indiscriminately sprayed with bullets. This forced the vehicle, whose headlights were on, to stop, reverse and hit an embarkment. **PW2** was not able to get sight of the attackers and escaped.

21. However, **PW3** was unlucky, as he was caught by the attackers and frog marched to the lorry. The attackers forced him to switch off the lorry's headlights. The evidence of **PW3** was that he received orders from one of the assailants, whom he was able to see very well. He recognized him as a person he used to see in the centre for eight years. That person was the appellant; referring to him as LENANGETEI, whom he positively identified from the identification parade. We shall revisit that evidence later in the judgment.

22. **PW5**, Police Constable John Ngunyi, testified that on 23rd March 2020, he received information from the DCIO that a shooting incident had occurred on the Bargo Social Hall Highway. Accompanied by other security agencies he went to the scene of crime. They found a lorry motor vehicle registration number KCH 236 B that had been sprayed with bullets. They searched for the body of the deceased and found it in a bush. They later recorded statements. It was revealed that the two motor cycles that had been following the lorry were identified as black and red in colour. The registration number of the black one as identified as KMER 951N.

23. It was his further evidence that two months later, on 25th March 2020 he received information from informers that one of the suspects, who was the appellant, had been spotted at the market. On their way they met the appellant riding a blue motor cycle registration number KMEZ 916 X. He arrested the appellant and the pillion passenger. Later the appellant was positively identified in an identification parade. In cross- examination, he stated that the appellant was not satisfied with the identification parade and that he refused to sign the form. He was then charged with murder.

24. In his sworn evidence, the appellant denied that he committed the offence. He stated that he is a Samburu descendant and that the members of the identification parade were of the Turkana tribe. He further stated that Samburus are generally lighter than the Turkana and it was therefore easy to differentiate between a Samburu and a Turkana who have long-standing differences. He denied being involved in the shooting as he did not even know how to operate a firearm.

25. We have carefully considered this appeal. It is crystal clear that the prosecution case was founded entirely on the identification evidence. Put differently, this appeal will succeed or fail on the question whether the evidence on the identification was cogent and reliable to sustain a conviction.

26. It is trite that courts must be cautious and must scrutinize the evidence on identification, especially when the evidence is that of a single identifying witness. In this appeal, it is common ground that only one witness addressed the question of identification. We say so because though **PW1** is said to have participated in the identification parade, he was stood down to identify the

murder weapon and never came back to testify. As for **PW2**, though he positively identified the appellant as the

perpetrator, it is clear from his evidence that he did not see the appellant at the crime scene. Indeed, the witness clearly stated that he did not see the attackers when the lorry was sprayed with bullets. This leaves us with the evidence of **PW3**. Was that evidence safe? We shall first briefly set out the law on this issue, which has been addressed in a number of authorities.

27. The Court in the case of **Abdalla bin Wendo vs. Shah**

Bin Mwambere [1953] 20 EACA 166 had this to say:

“Subject to certain well-known exceptions a fact may be proved by the testimony of a single witness this does not lessen the need for testing with the greatest care the evidence of such witness respecting identification, especially where it is known that the conditions favouring a correct identification are difficult. In such circumstances, other evidence, circumstantial or direct, pointing to guilt, is needed from which a judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness,

28. Similarly, the Court in **Maitanyi vs. R** [1986] KLR 198 restated the issue of identification by a single witness and held as follows:

“(i) Although it is trite law that a fact may be proved by the testimony of a single witness, this does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially

when it is known that the conditions favouring a correct identification were difficult.

(ii) When testing the evidence of a single witness a careful inquiry ought to be made into the nature of the light, available conditions and whether the witness was able to make a true impression and description.

(iii) The court must warn itself of the danger of relying on the evidence of a single identifying witness. It is not enough for the court to warn itself after making the decisions, it must do so when the evidence is being considered and before the decision is made.

(iv) Failure to undertake an inquiry of careful testing is an error of law and such evidence cannot safely support a conviction."

29. In his analysis of the evidence before the trial court on the identification of the appellant, the court had this to say:

"76. The court is mandated to proceed with caution or circumspection before convicting an Accused person solely or mainly on the evidence of a single or multiple identification, the same has been the subject of numerous court decisions. The caution proceeds from a realization that the spectre and possibility of mistaken identity with its potential for great injustice always looms large. {See Roria -vs- Republic {1967} EA 583.}

77. In Maitanyi Vs Republic {1986} KLR 198 it was held:

.....

78. Moreover, it is widely held that reliance should be placed on identification evidence only when such evidence, viewed as a whole, is free from the possibility errors. See Abdala bin Wendo

***& Another versus Republic (1953), 20
EACA 166.***

***79. I am tasked with establishing whether the
identification of the Accused by the
witnesses***

particularly PW3 can be relied on in convicting the Accused, given the fact that the prosecution's case is centrally based on his alleged identification of the Accused.

80. I find that based on the fact that PW3 stated that he recognized the Accused firstly, as a boda rider in Baragoi town who he had seen for about 8 years or so and secondly, as one of the people who was trailing them on the material date using the black motor cycle (as was further corroborated by PW2); his evidence that he was able to properly see and identify the Accused as one of the attackers using the lorry's headlight was credible and consistent. I find that although it was at night, the conditions for identification i.e. the light from the lorry's headlights provided sufficient light which was favourable for positive identification especially as the Accused was ordering him. Furthermore, PW3 had special reasons to remember the Accused because he knew him and could easily recognize him thus, he could identify him. In R vs Turnbull & Others (1976) 3 ALL ER 549 the court held that...

81. I find that PW3 was a credible witness and I am confident in his evidence on positive identification of the Accused as one of the attackers.

.....

83. Further, I concur with the prosecution that although the Accused stated that he was unsatisfied with conduct of the parade, he did not give reasons why and it only during his defence that he stated that he may have been framed since he was a Samburu and was kept together with people from the Turkana community. However, as per the ID parade report he did not object to the arrangement of the members of the parade. Moreover, PW5

testified that the members of the parade were from different tribes and young men of different body psyches and he could not tell

whether the witnesses and the members of the parade knew each other and I find the same to be credible.

84. It is my opinion that the identification parade appears to have been conducted in compliance with the law.”

30. Though the trial court properly exercised caution in convicting the appellant on the basis of the identification of a single witness, it is our finding that the learned judge arrived at an incorrect finding for the reasons demystified hereunder.

31. We shall begin by reproducing the salient features of PW3's evidence captured as follows:

“Upon reaching Loruko and passing it we were sprayed with bullets guns firing. PW2 jumped out of the lorry and I remained in the lorry. I also jumped and sell (sic) and I was held by leg by the attackers. They told me to board the front side of motor vehicle. I switched off the motor vehicle. The others who were with us and Adan fled. Nyota died there at the scene. I switched off the lights all I saw one who was ordering me around knew him before as he was abode bod a ridder in Baragoi. I had seen him for 8 years and so (sic). I used to see him in town. He was a boda ridder and I used to see him. I knew him as Lenangetei. He talked Samburu Language. I understand Samburu language. I am a Turkana.

I saw him that day ridding motor cycle along the way. He rode black motor cycle (sic). I did not know its number plate. He would use various motorcycle (sic). He wilt (sic) other people ran away.

... I went back to scene when I saw police and I joined them... The accused Lanageti was

***arrested. I saw him that right (sic) I picked
accused in parade at Baragoi Police station.”***

32. **PW3** confirmed that he joined the police officers at the scene when they came to the crime scene. However, it is not recorded anywhere that **PW3** gave a description of the assailant as he did during the trial. If indeed he had known the appellant for 8 years, as Lenangetei, nothing would have been easier than for **PW3** to inform the police the moment he was in touch with them. In our view, the evidence of **PW3** alluded to recognition rather than identification. The identification parade was therefore gratuitous. Whatever the case, we reiterate that he was duty bound to give explicit descriptive details of the suspects immediately.

33. Recalling the investigations and the circumstances of the appellant's arrest, **PW5** testified as follows:

“On 25/3/2020 I received information that the suspect had been spotted in Illaldt Market with colleague we headed (sic) to the area. On our way we saw motor cycle driven by Leakona. KMEZ 916X blue in colour. We arrested the ridder and took they to Baragoi police station. We arrested them on account of the informer's information.

Discerptions given we that one was brown and another medium size. Informer said they were using motor cycle blue in colour that were coming from Illeut market. No. information on connection of 2 suspects. 2 were arrested and taken to Baragoi police station.

On 7 /15/2020 the 2 suspects were taken

**before Maralal Law courts on Misc.
Application for them to help investigation.
They were detained for 21 days vide Misc.
2/2020. This was to enable Id**

Parade to be done and record statement and post mortem to be done.

13/5/2020, I witnesses DCO conduct ID parade see forms.

Accused had relative as witness. The suspect participated in identification parade witnesses positively identified accused then suspect witnesses 3 warders (sic). Identified him. Accused was placed between No. 3 and 5 when witnesses No. 1 and 2 identified him.

**.....
They (PW 1, 2 and 3 identified him in ID parade.”**

34. What emerges from **PW5**'s evidence was that firstly, the appellant was arrested aboard a blue and not a black motorcycle. No evidence was adduced that this motorcycle was seen at the crime scene. In fact, no blue motorcycle was reported on that day. Secondly, **PW5** arrested the appellant without any descriptive basis. In addition, **PW5** stated that two witnesses identified the appellant positively but three witnesses participated in the identification parade. We do not know which of these two witnesses identified the appellant positively. As stated earlier, it was incumbent on **PW3** to describe the assailant in detail in order to lay a basis for the arresting officer. The question we then ask is how did **PW5** arrive at the inescapable conclusion that the appellant was the murder suspect? In his evidence he stated that he received information from an informer that the appellant had been seen

in the town and that is how they were able to arrest him. It is noteworthy that he did not state that PW3 had given the police the name or description of the appellant at any time.

35. It is also significant that the appellant raised serious objections to the identification parade. Indeed, PW5 in his evidence confirmed that the appellant indicated that he was not satisfied with the manner in which the identification parade was conducted and he refused to sign the report. When put on his defence, the appellant had this to say:

“My name is Peter Ienengetei. I do not know the deceased. I was taken to an identification parade after arrest. We were four in number. I am Samburu and members of parade were Turkana. It is easy to differentiate Turkana and Samburu. I am lighter than them... Identification parade was conducting. raised objection to (sic) same but return source it was recorded.”

36. The fact that the appellant raised issues with the process was sufficient reason for this court to question the credibility of the process. Thus, taking into account that the appellant expounded further on the reasons for his reservations and taking the scanty evidence of how PW5 conducted the identification parade, the learned judge therefore improperly

rejected the appellant's evidence on this issue. We don't know why and reasons for the same.

37. We also observe from **PW5's** evidence regarding the identification parade that it was not disclosed whether the members of the identification parade were as far as possible of similar age, height, general appearance and class of life as the appellant in line with the requirements of the chapter 42 of the National Police Service Standing Orders. Another important issue is the circumstances surrounding identification of the appellant and whether it was ideal for positive and reliable identification. There is no dispute the offence took place at night.

38. Looking at the totality of the evidence adduced, we find that the learned judge arrived at an incorrect finding in upholding that the identification parade failed to conform to the parameters set out in law. The identification of **PW3**, as the only single identifying witness, was not safe in light of the reasons set forth. We also find that the manner in which the post mortem report was produced raised credibility issues. In our view, it was not properly adduced in evidence and ought to have been rejected. It is for these reasons that we find

reason to interfere with the findings of the trial, as we are not satisfied that the conviction was safe.

39. Accordingly, we interfere with the findings of the learned judge by quashing the appellant's conviction and setting aside his sentence. We therefore direct the appellant to be forthwith be released from custody unless otherwise lawfully held. It is so ordered.

Dated and delivered at Nakuru this 30th day of January 2026.

M. WARSAME

.....
JUDGE OF APPEAL

J. MATIVO

.....
JUDGE OF APPEAL

M. GACHOKA C.Arb, FCIArb.

.....
JUDGE OF APPEAL

*I certify that this is
a True copy of the
original*

Signed

DEPUTY REGISTRAR