Oberi & another v Republic (Criminal Appeal 334 of 2019)
[2026] KECA 195 (KLR) (30 January 2026) (Judgment)

Neutral citation: [2026] KECA 195 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 334 OF 2019

MS ASIKE-MAKHANDIA, HA OMONDI & LA ACHODE, JJA

JANUARY 30, 2026

BETWEEN

EDWIN GIKIRA OBERI ..... 1ST APPELLANT

JOSEPHINE NYAERA OBERI ..... 2ND APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the judgment of the High Court at Nyamira, (Maina J .) dated 25th July 2016 in HCCRC No. 4 of 2017)

JUDGMENT

1. Isaac Onyige Machora thought the 26th of January 2017 was a day like any other when he left his home in the evening at about 6:00 p.m.to go to work. He never made it to his place of work because a short while later, his lifeless body lay besides a heap stones by the roadside. The following investigations led to the arrest and arraignment of Edwin Gikira Oberi the 1st appellant and Josephine Nyaera Oberi the 2nd appellant for his murder, contrary to Section 203 as read with Section 204 of the Penal Code in the High Court at Nyamira.

2. The particulars of the offence were that on 26th January 2017, at Bonyeigoba Village, Bonyaigoba Sub-County, within Nyamira County, the appellants, jointly with others not before court, murdered Isaac Onyige Machora.

3. According to the prosecution it all began with a dispute over the ownership of building stones that were being loaded onto a lorry. The deceased stopped by the scene and laying claim to the stones, he ordered the loaders who included the appellants, to stop loading the stones on to the lorry. This led to a confrontation in the course of which the appellants, together with other loaders, stoned the deceased

inflicting severe injuries. The assailants fled the scene when members of the public intervened and the deceased later succumbed to those injuries.

4. We present the prosecution's case as seen through the eyes of four witnesses to bring the appeal into perspective.

5. PW1, Dennis Okweri Machora, a brother to the deceased placed both appellants at the scene of the crime on 26th January, 2017 at around 6:00 p.m. He testified that the deceased confronted the loaders whereupon the 1st appellant hit him on the head with a stone and the 2nd appellant struck him in the back also with a stone. Other loaders joined in stoning the deceased. PW1 helped to administer first aid to the deceased and rush him to hospital, where he was pronounced dead on arrival. He added that he had met the deceased, earlier that day and he was in perfect health.

6. PW2, Josephine Machora, the deceased's mother testified that she rushed to the scene attracted by the commotion and found her son, the deceased lying on the ground. He had severe head injuries with brain matter oozing through the mouth. Although she did not witness the actual assault, she placed the 1st appellant at the scene and stated that there was pre-existing tension between her family and that of the appellants. She accompanied the deceased to Bosongo Nursing Home, where he was pronounced dead on arrival.

7. PW3, Mary Nyaboke, the deceased's widow, testified that she witnessed the stoning of the deceased by the appellants and other persons not before the court. Her pleas to them not to kill him fell on deaf ears. She placed both appellants at the scene of crime and stated that the appellants and their companions were angered when the deceased laid claim to the stones and told them to stop loading them onto the lorry. They pounced on him and stoned him until she saw a milky substance coming out of the deceased's mouth. He was pronounced dead on arrival at the hospital.

8. PW4, No. 77356 Sergeant Rebeca Makori, was on duty at Nyamira Police Station, on 26th January, 2017 when a group of people brought in a dead body identified as that of Isaac Onyige Machora. The group informed her that he had been killed by four people in a dispute over stones. The same group later arrested the 1st appellant and brought him to the station, while the 2nd appellant was arrested by the Assistant Chief. The other two suspects escaped without trace.

9. PW4 produced the post mortem report in evidence due to the unavailability of the doctor who compiled it. There was no objection from the two learned counsel on record, Mr Bwonwonga for the 1st appellant and Mr Okenye for the 2nd appellant respectively, who were present in court.

10. At the close of the prosecution case the appellants were placed on their defence. Both testified without oath and called no witnesses. The 1st appellant admitted that he was at the scene loading stones onto a lorry when a dispute arose over the ownership of the stones. However, it was the deceased's uncle who got involved in a fight and that he, the appellant, was not present when the altercation occurred. He was later arrested for an offence he did not commit and the evidence presented by the prosecution witnesses was untrue.

11. The 2nd appellant testified that she was at home cooking the evening meal when she heard people shouting as they approached her home. They were alleging that her family, that is, the family of Oberi had killed someone. Out of fear, she fled and spent the night in the bush before she was later arrested. She stated that her husband and the deceased were both chang'aa brewers, and that the deceased had accused her husband of reporting him to the police. This created bad blood between the two families.

12. Upon evaluating the evidence before her, E.N. Maina J, rendered a judgment on 25th July 2019 and made a finding that the prosecution had proved all the essential elements of the offence of murder

under Section 203 of the Penal Code against both appellants. She convicted them and sentenced each to serve thirty (30) years in prison.

13. Aggrieved by the judgment and sentence, the appellants filed this appeal, raising two grounds in the memorandum of appeal dated 24th April 2021. They alleged that the learned Judge erred in law by holding that the prosecution had proved the ingredients of the charge and also, by dismissing the appellants' defences which were cogent and credible.

14. The 1st appellant subsequently abandoned the appeal on conviction and filed another memorandum of appeal dated 22nd November 2024, containing his mitigation seeking to move this Court to review his sentence. He urged the Court to consider: the principles in Articles 22, 23 and 50 (2) (p); that he was a first offender, was reformed, rehabilitated and remorseful; and, that the mandatory minimum sentence was discriminatory.

15. The 1st appellant filed written submissions dated 22nd November 2024 and contended that the sentence imposed upon him was harsh and excessive, and failed to take into account his mitigation and personal circumstances. He pleaded for leniency, emphasizing that he was a first offender, and was remorseful, reformed, and rehabilitated and urged the Court to exercise its appellate discretion and reduce the sentence.

16. The 1st appellant cited Articles 27, 28, and 50 of *the Constitution* and urged the Court to consider his right to dignity and the principles of proportionality in sentencing. He also invoked Section 329 of the Criminal Procedure Code and the Sentencing Policy Guidelines, arguing that punishment should aim to serve justice and rehabilitation, rather than mere retribution.

17. The firm of M/s D.O.E. Anyul & Company Advocates filed written submissions dated 18th March, 2025 on behalf of both appellants, challenging both conviction and sentence for 2nd appellant and on sentence for 1st appellant. Counsel cited the case of R v Andrew Omwenga [2009] eKLR and urged [argued] that the ingredients to be proved for the offence of murder under section 203 include the death of the deceased and the cause; that the accused caused the death of the deceased; and, that the perpetrator had malice aforethought.

18. Counsel also referred to the case of R v Juma Mwarabu Chai alias, Juma Kazungu & Another [2022] eKLR and submitted that the prosecution evidence that the deceased was stoned to death was not corroborated by the postmortem report which indicated that the cause of death was due to cardiopulmonary arrest secondary to depressed skull fracture and intracranial and subdural hemorrhage due to blunt force trauma to the head. Counsel submitted that PW1 and PW3 testified that one Joshua Obiri hit the deceased on the head with a stone. That PW1 testified that the 1st appellant hit the deceased on the side of the body and the 2nd appellant hit him in the chest, while PW3 testified that the 2nd appellant hit him on the back. This means that the deceased died from the actions of Joshua Obiri and not the appellants.

19. Counsel submitted that the prosecution case was riddled with contradictions and referred to the cases of Joseph Maina Mwangi v Republic, CR Appeal Case No 73 of 1993, Erick Onyango Odeng' v Republic [2014] eKLR and Twehangane Alfred v Uganda CR Appeal No. 139 of 2001, [2003] UGCA 6 for the test on how to asses contradictory evidence. He contended that the evidence of the eyewitnesses was contradictory on the number of the loaders at the scene and who struck the deceased.

20. Counsel also argued that the prosecution's failure to call crucial witnesses such as the driver of the lorry who was at the scene, and the person who contracted the loaders to transport the stones and who would have confirmed the testimony of PW1 and PW3 concerning the dispute in the family weakened their case.

21. Lastly, counsel urged us to find that the sentence imposed upon the 1st appellant was harsh and excessive as it failed to take into account her personal circumstances, including that she was a mother, a first-time offender, and was remorseful.

22. The Senior Principal Public Prosecutor (name undisclosed), filed submissions dated 15th May 2025 on behalf of the

respondent in opposition to the appeal. He urged the Court to uphold both the conviction and sentence. With regard to the 2nd appellant, counsel submitted that the evidence of PW1 and PW3 consistently placed her at the scene and identified her as one of the aggressors. He invoked the provisions of Section 21 of the Penal Code to urge that the 2nd appellant acted with a common intention with her co- accused and that the prosecution had proved its case beyond reasonable doubt.

23. On sentence, counsel contended that thirty (30) years' imprisonment was lawful, fair, and proportionate, considering the gravity of the offence. Further that the learned trial Judge considered the appellant's mitigation, nature of the offence, and the aggravating circumstances before imposing the sentence.

24. The appeal came up for plenary hearing on 20th May 2025. Mr. Lore learned counsel appeared for both appellants, while Mr. Mwangi learned State counsel was present for the respondent. Both counsel relied entirely on their filed submissions and opted not to highlight. Both appellants were present electronically. The 1st appellant confirmed that he had abandoned the appeal on conviction and wished to pursue only the review of sentence. The second appellant maintained her appeal on both conviction and sentence. We therefore, re-evaluated the evidence on both conviction and sentence with regard to both appellants.

25. Under Section 379 (1) of the Criminal Procedure Code in which our mandate on first appeal reposes, we are obligated to reconsider the facts and the legal principles relevant to the conviction and sentence. We are expected to conduct a fresh examination of the evidence and carefully weigh conflicting testimonies, to arrive at our own independent conclusions. In so doing, we are cognizant that we did not have the opportunity of hearing and observing the witnesses as they testified in order to gauge their demeanor and we must give allowance therefor. (See Mark Oiruri Mose vs. Republic [2013] eKLR).

26. We have considered the record and grounds of appeal, together with the rival submissions and the law. The issues that arise for determination are whether all the elements of the offence of murder were proved beyond reasonable doubt; whether the appellants' defence was considered; and whether the sentence imposed was harsh and excessive.

27. The appellants were convicted for murder contrary to section 203 as read with section 204 of the Penal Code which stipulates that:

> " Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.
>
> Any person convicted of murder shall be sentenced to death."

28. In a murder trial the prosecution must prove three essential elements beyond reasonable doubt in order to secure a conviction:

(a) the death of the deceased and the cause thereof;

(b) that the accused committed the unlawful act which caused the death of the deceased; and,

(c) that the accused had malice aforethought. (See- Anthony Ndegwa Ngari v Republic [2014] eKLR.)

29. Regarding the death of the deceased and its cause, it lies beyond dispute that the deceased met an untimely and unnatural demise on 26th January 2017. The post-mortem report revealed that the deceased suffered cardiopulmonary arrest, secondary to a depressed skull fracture and intracranial/sub-dural haemorrhage, ensuing from blunt-force trauma to the head. It also revealed a deep cut on the right temporal region and bruising to the left supra orbital area.

30. These findings align with the testimony of PW1 and PW3, who described the deceased as having been struck with stones, especially on the head, during the altercation. The medical evidence and the eyewitness accounts compel the conclusion that the fact of death and the cause of death have been satisfied.

31. The next element that must be established is the identity of the perpetrator/s. The trial record shows that PW1 placed both appellants at the scene of the crime. He testified that the appellants hail from his village. He saw the 1st appellant hit the deceased in the chest with a stone and the 2nd appellant also hit him with a stone in the back, before the other two loaders joined the assault. PW2 did not witness the assault but she found the 2nd appellant at the scene. She confirmed that the appellants hail from her village and she had known them for a long time. PW3 placed both appellants at the scene and said she saw them in the act of stoning the deceased for asserting his claim of ownership over the stones. The 1st appellant admitted that he was one of the loaders at the scene at the time of the conflict.

32. This was therefore, a case of recognition, and not identification as the two eye witnesses knew the appellants very well. In Reuben Taabu Anjononi & 2 Others v Republic [1980] eKLR this Court held that recognition is much better, much more satisfactory, more reassuring, more believable and reliable than identification of a stranger, because it involves personal knowledge of the assailant in one way or another. Further, the circumstances favoring recognition were enhanced by the fact that the incident occurred during daylight, and PW1 spoke to the appellants pleading with them to stop the assault.

33. In Wamunga vs Republic (1989) KLR 424, this Court spoke to the evidence of identification generally, in the following terms:

> " It is trite law that where the only evidence against a defendant is evidence on identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of a conviction."

34. In the appeal before us, the attack occurred at 6 p.m. This means that the identification was aided by natural light and further, these were people who were well known to each other. From the foregoing analysis we are satisfied that the learned trial Judge was not in error in concluding that the appellants, and no one else, killed the deceased.

35. The next element for consideration is whether the appellants had malice aforethought when they committed the offence. In Section 206 of the Penal Code malice aforethought is defined as follows:

> Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances:
>
> 1. 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;

2. 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;

3. an intent to commit a felony;

4. 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."

36. The nature of the injuries sustained by the deceased included cardiopulmonary arrest, secondary to depressed skull fracture and intracranial and subdural haemorrhage as shown in the post-mortem report. The repeated stoning directed at the deceased's head, supports a finding beyond mere accident or unintended tragedy. The injuries were described as grave, amounting to maim, and thus demonstrated intent, or knowledge that death or serious harm would likely result. These facts evince an intent either to inflict grievous harm, or knowledge that grievous harm or death was a probable outcome of the acts. Accordingly, the requirement of malice aforethought is satisfied.

37. The defence of each appellant amounted to little more than mere denial of involvement in the attack. Each denied being at the scene at the time of the attack, despite being placed there by witnesses to whom they were well known. The court considered and rejected their defences as untruthful and insufficient to dislodge the consistent and credible prosecution evidence.

38. In light of the foregoing, we find that the prosecution discharged its burden to prove each of the three essential elements of murder beyond reasonable doubt.

39. Turning to the sentence, the appellants were each sentenced to thirty (30) years' imprisonment. An appellate court will only interfere with a sentence where it is shown

that the trial court acted upon wrong principles, ignored material factors, or imposed a sentence that is manifestly excessive in the circumstances. This principle was reiterated in the case of Bernard Kimani Gacheru v Republic [2002] eKLR, where the Court held that:

> "It is now settled law that an appellate court can only interfere with the sentence imposed by the trial court if it is evident that the trial court acted on wrong principles or overlooked material factors or the sentence is manifestly excessive in the circumstances of the case."

40. Similarly, in Wanjema v Republic [1971] EA 493, the Court had earlier observed that an appellate court should not alter a sentence unless it is manifestly excessive, or so low as to amount to a miscarriage of justice.

41. The Supreme Court in Francis Karioko Muruatetu & Another v Republic [2017] eKLR emphasized that sentencing must reflect both the individual culpability of the offender and the collective criminal conduct of joint offenders. In this case, the appellants actively participated in a violent assault that resulted in the death of the deceased, satisfying the principle of collective responsibility.

42. The High Court took into account the mitigation, including that the appellants were first offenders, their personal circumstances and the nature of the offence. The sentence imposed falls within the discretionary range recognized in Muruatetu (supra) and William Okungu Kittiny v Republic [2018] eKLR, and is thus lawful, proportionate, and reflective of both the seriousness of the offence and the need for deterrence.

43. Applying the principles in the foregoing case law to the present appeal, we note that the High court properly considered the nature of the offence, the appellants' personal circumstances, and their mitigation. The thirty (30) years' imprisonment imposed is therefore within the proper exercise of judicial discretion and there is no basis to interfere with it on appeal.

In the end we find that the appeal of each appellant is dismissed on both conviction and sentence. The conviction is upheld and the sentence of thirty (30) years' imprisonment imposed by the High court is hereby affirmed.

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

ASIKE-MAKHANDIA

..... JUDGE OF APPEAL

H. A. OMONDI

..... JUDGE OF APPEAL

L. ACHODE

..... JUDGE OF APPEAL

I certify that this is a

true copy of the original

Signed

DEPUTY REGISTRAR