

**IN THE COURT OF
APPEAL AT KISUMU**

(CORAM: MUSINGA (P), KIAGE, & ODUNGA,

JJ.A.) CRIMINAL APPEAL NO. 182 OF 2020

BETWEEN

TITUS WAMBOMBA MUKWEA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

*(Being an appeal against the Judgment of the High Court of Kenya at Bungoma (**Ali Aroni, J.**) delivered on 5th February 2019*

in

Criminal Case No. 12 of 2014)

*

JUDGMENT OF THE COURT

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 31st March 2014 at Kabula Sub- Location in Bumula District within Bungoma County, he murdered one Robert Masai (hereinafter referred to as **“the deceased”**).

2. At the trial, the prosecution called seven witnesses, all of whom were police officers. Save for PW7, the rest were said to have been with the deceased at the time of the incident. PW1, **Anne Akoth Omino**, an Administration Police officer stationed at Bumula at the time of the incident, testified that on 31st March 2014 she led an eight-member patrol team towards Kabula area. When they reached Mukumake, they heard noise from a homestead and moved in to check. They found several people drinking chang'aa and began making arrests. However, during the struggle, one man attempted to grab her firearm. As she dealt with the said man, she heard the deceased officer, APC Robert Masai, shout "gun". She rushed to him and found the appellant on top of Masai, with APC Eric Osoro Omache, PW2, struggling to pull him off. She further stated that the appellant tried to remove his trousers as if planning to escape but other officers restrained him. As at that time, the deceased was unconscious. They placed the deceased on a mattress and drove to St. Domiano Hospital where he was pronounced dead shortly thereafter. PW1 stated that she was able to identify the appellant because

the torch that PW2 held had bright light. She

did not initially notice external injuries on the deceased but later learnt that the deceased had suffered injuries to his genital area and neck.

3. PW2 stated that he first assisted PW1 when someone wrestled her for her gun. Soon after, he heard the deceased cry out. When he flashed his torch, he saw the appellant lying on top of the deceased. He saw the appellant hit the deceased on the stomach while holding his (the deceased's) private parts. When he tried to intervene, the appellant jumped on him, but with the help of PC Mwangi (PW3), they subdued and handcuffed him. By then, the deceased was unconscious. They rushed the deceased to St. Domiano Hospital where he was later pronounced dead, but the doctor did not tell them the cause of the death.
4. PW3, **PC David Mwangi**, a police officer attached to Bumula Police Post, who was also in the same patrol, testified that at the chang'aa den he helped arrest people who were fleeing to escape arrest. He stated that PW2 called him and told him the appellant had injured an officer. PW3 assisted in restraining the appellant, and then found the deceased

lying unconscious on

the ground. They attempted first aid before calling for the police vehicle. The deceased was placed in the vehicle together with the suspects and taken to St. Domiano Hospital. He later received a call informing him that the deceased had died. He identified the appellant as the individual he arrested. PW3 was able to identify the appellant through a torchlight.

5. PW4, **APC Luka Chelimo**, testified that he arrested three people inside the house while others arrested suspects outside. Shortly afterward, PW3 brought the appellant to him and told him that the appellant had injured an officer. He stated that he helped take the deceased to St. Domiano Hospital and remained there with another officer as the rest took the suspects to the station. He later learnt of the deceased's death from a doctor at the hospital but the doctor did not tell them about cause of the death. He also testified that he did not witness the assault itself.
6. PW5, **APC Michael Kiptoo Sannet**, was one of the two officers who remained guarding the patrol vehicle. He testified that a short while after his colleagues had gone into

the chang'aa den, he received a call from PW1 that an officer had been injured. Together with PW6 they drove to the scene and found the

deceased lying down while officers attempted first aid on him. The deceased together with six suspects (including the appellant), were loaded into the patrol vehicle. They took the deceased to St. Domiano Hospital and then left to take the suspects to Bungoma Police Station. Shortly thereafter, he received a call from PW1 informing him that the deceased had died. He neither saw the deceased's death certificate nor did he know the cause of the death.

7. PW6, **APC Caleb Chirchir**, was driver of the patrol vehicle. He testified that after he parked the vehicle and remained behind with PW5, he received a call from PW1, who informed him that an officer had been injured. He drove to the scene, assisted in placing the deceased in the vehicle, took him to St. Domiano Hospital, and then took the suspects to Bungoma Police Station. He later received word that the deceased had died. He was not told the cause of the death.
8. PW7, **CPL Geoffrey Ngeno**, was the officer who handled the matter after the incident. He testified that he received a report shortly after midnight that an officer had been injured while arresting people drinking chang'aa. When he reached

the scene,

the officers had already left and so he went to St. Domiano Hospital, where the deceased had been pronounced dead. He later escorted the body to the mortuary and attended the post-mortem conducted by Dr. Mbiru Were.

9. The trial court found that the appellant had a case to answer.

In his sworn defence, the appellant stated that on 31st March 2014 he arrived home at around 7.00pm and later went to drink chang'aa at Judith Nanjala's homestead. At around 8.30pm police arrived. Three patrons tried to run away, and he also tried to flee but slipped in the rain and was arrested. He denied struggling with or assaulting any officer. He was then handcuffed, taken to the police vehicle and only then did he notice someone lying inside it, whom he could not identify. He further testified that at St. Domiano Hospital the unconscious person was taken inside and a crowd began shouting that he had killed the man, which he denied. He stated that he was later charged with murder, while the others were charged with drinking alcohol. He insisted he had no involvement in the deceased's death.

10. The learned trial judge considered the evidence and held that the prosecution had proved all the elements of murder beyond reasonable doubt. She held that the fact of death had been established through the testimony of the officers who witnessed the deceased lose consciousness at the scene and later be pronounced dead at St. Domiano Hospital; that although no post-mortem report was produced, the said omission was not fatal to the prosecution's case because there was clear and direct eye witness evidence of a violent assault that immediately rendered the deceased unconscious and led to his death shortly thereafter.
11. The court accepted the evidence of PW1 and PW2 who testified that they found the appellant on top of the deceased hitting him. The court found that the appellant was positively identified at the scene because of the bright torchlight carried by PW2 and was arrested instantly, thereby eliminating any possibility of mistaken identity. It rejected the claim by the appellant that he only slipped and was arrested without assaulting anyone.

12. The court therefore concluded that the deceased was attacked while performing his lawful duties, collapsed, and died shortly

thereafter, and that all fingers pointed at the appellant as the one who fatally injured him. It thus found the appellant guilty and convicted him accordingly. The appellant was sentenced to 25 years' imprisonment.

13. Being dissatisfied by both the conviction and sentence, the appellant filed this instant appeal. The appellant contends that the learned judge erred in law and in fact by misdirecting herself on the insufficiency of the prosecution's case and proceeding to convict and sentence him; by finding that the ingredients of murder had been established despite the lack of proof required by law; by holding that the offence had been proved beyond reasonable doubt even though the cause of death was not proved; by failing to consider and evaluate the appellant's defence including his intoxication; by imposing a harsh and excessive sentence; by failing to consider mitigating factors; and by entering a conviction and sentence against the weight of the evidence on record.
14. At the hearing of the appeal the appellant was represented by learned counsel **Ms. Omondi**, while the respondent was represented by **Ms. Mwaniki**, learned Deputy Director of

Public

Prosecutions. Ms. Omondi made brief oral highlights of her client's written submissions, while Ms. Mwaniki elected to rely entirely on her client's written submissions without making oral highlights.

15. Highlighting the appellant's written submissions filed in person and those filed by counsel and dated 11th April 2025, counsel contended that the offence of murder was not proved to the required standard. Citing section 203 of the Penal Code, it was submitted that the prosecution failed to prove the essential element of malice aforethought since the evidence adduced before the trial court did not show an intention to cause death or grievous harm. Reliance was placed on the decision of this Court in **Roba Galma Wario vs Republic [2015] KECA 521 (KLR)** wherein this Court held that for malice aforethought to be inferred, the prosecution must show that the accused's acts were intentional and of such a nature that death or grievous harm was a natural consequence. Counsel posited that the evidence on record was that the events said to have led to the deceased's death occurred during a disorderly drinking-

den arrest, and nothing in the evidence

shows a premeditated or intentional assault aimed at fatally injuring the deceased. For that reason, it was contended that the trial court erred in finding malice aforethought was proved, without which the trial court could not lawfully convict the appellant of murder.

16. As regards the deceased's cause of death, it was contended that the prosecution did not produce a post-mortem report or any medical evidence to establish the cause of death or link the death to any alleged assault by the appellant. According to the appellant, this was a fatal omission in a murder trial; and the absence of medical evidence left open the possibility that the deceased died from causes unrelated to any alleged assault by the appellant. Counsel reiterated that the failure to tender a post-mortem report undermined the prosecution's case because the trial court was left without objective proof of the cause of death.
17. As regards the defence of intoxication, it was contended that trial court erred by failing to consider the said defence contrary to **section 13** of the Penal Code which allows intoxication to negate *mens rea* where the accused was so

impaired as to be

incapable of forming the necessary intent. Citing the decision of this Court in **Sang vs Republic (Criminal Appeal E069 of 2022) [2024] KECA 807 (KLR) (12 July 2024) (Judgment)**, it

was contended that intoxication can reduce a murder charge to manslaughter if it is shown that the accused's mental state was substantially impaired. In this regard, it was submitted that the evidence showed the appellant had been drinking chang'aa for about an hour and could not recall how he was arrested. According to counsel, the appellant's state of intoxication at the time of the incident clearly meant that he did not have any malice aforethought for the commission of the offence he was charged with.

18. On sentence, it was submitted that the sentence to 25 years' imprisonment was excessive. It was contended that the appellant's mitigation should have been given fuller weight, particularly because he was a first-time offender with no criminal record, and because the circumstances in which the offence was said to have occurred were not clear. The appellant, therefore, urged this Court to impose a more

lenient term or substitute the sentence with a lesser penalty,
particularly in

view of the mitigating factors and the absence of clear evidence establishing malice aforethought.

19. For the respondent, although Ms. Mwaniki indicated that she would entirely rely on the written submissions on record, we have reviewed the submissions dated 6th February 2024, signed by Winny Bati, Principal Prosecution Counsel, but the submissions bear no relevance to the present appeal. Although the appeal number and the parties are correct, the rest of the contents of the submissions refer to a totally different appeal. They relate to the murder of one Isaac Wafula Soita on 14th October 2016 at Matunda village, Butonge sub-location, Malakisi location in Bungoma West Sub-County, Bungoma County, whereas this appeal relates to the murder of Robert Masai on 31st March 2014 at Kabula Sub-location in Bumula District in Bungoma County. The submissions are of no value to us and we hereby strike them out.
20. That notwithstanding, Ms. Mwaniki, while responding to a question by the Court, acknowledged that the post-mortem report was never produced, but contended that the fact of

death was undisputed and that the deceased died immediately after

the altercation with the appellant, making the cause of death equally clear from the circumstances. When pressed by the Court on what precisely caused the death, counsel maintained that PW2 saw the appellant on top of the deceased and struggling with him and that the violent nature of the encounter, followed by the deceased's immediate collapse, supported an inference that the assault caused the death.

21. The Court also pointed out material contradictions in the prosecution evidence, particularly the cross-examination of PW4, whose earlier written statement suggested that the deceased officer was ailing, despite his oral testimony asserting that the deceased had been in good health that evening. In addition, reference was made to the AP OB No. 2 of 1st April 2014 which recorded the deceased's death with the remark "no cause of death." When pressed to explain these inconsistencies, Ms. Mwaniki stated that PW4 clarified during cross-examination that he meant that the deceased was hurt, not ailing, and further stated that the OB entry reflected the position at the time before a post-mortem

examination was conducted.

22. We have considered the record, the appellant's submissions and the law. This being a first appeal, our duty is to re-analyze the entire evidence and arrive at our own conclusions, while bearing in mind that we did not see or hear the witnesses testify. See **Okeno vs Republic [1972] EA 32** and **David Njuguna Wairimu vs Republic [2010] eKLR**.
23. The appeal, in our view, turns on two broad issues, namely, whether the trial court erred by finding that the ingredients of murder had been established to the required standard; and whether the trial court erred by failing to consider and evaluate the appellant's defence of intoxication.
24. The offence of murder is provided for under section 203 of the Penal Code which is to the effect that **“any person who of malice aforethought causes the death of another person by an unlawful act or omission is guilty of murder.”** For the prosecution to secure a conviction for the offence of murder, it must establish the death of a person and the cause thereof; that the accused committed the unlawful act which caused the death of the deceased; and

that the accused had malice aforethought. Throughout the trial, an accused who has denied

the charge remains innocent until proved guilty and is under no obligation to prove his or her innocence.

25. The fact of the deceased's death is not disputed. The gravamen of this appeal is the cause of the deceased's death and the involvement of the appellant, if at all. The record reflects that the cause of the deceased's death was never medically established. Although PW7 stated he attended the deceased's post mortem on 1st April 2014, which was performed by Dr. Mbiri Were, the said doctor did not testify at the hearing nor was the post mortem report produced in court. The trial court held that the omission was not fatal because eye-witnesses were present and the deceased died immediately after the struggle.
26. It is trite law that the cause of death is a central element in a murder trial and the prosecution bears the duty to prove not only that the deceased died, but what caused the death, and that the cause is attributable to the accused. Therefore, expert medical evidence is ordinarily indispensable to establish cause of death, unless the cause is obvious or admitted. This Court in **Ndungu vs Republic [1985] KECA**

93 (KLR) expressly held thus:

“Where the body is available and the body has been examined, a post-mortem report must be produced, the trial court having informed the prosecution that the normal and straightforward means of seeking to prove the cause of death is by regularly producing the post-mortem examination report as a result of which the Medical Officer who performs the post-mortem examination is cross-examined...”

27. Similarly, in **Chengo Nickson Kalama vs Republic** [2015] KECA 196 (KLR), this Court emphasized that medical evidence is crucial to connect the accused to the death unless the injuries are manifest and severe. It held thus:

“The position then appears to be that save in very exceptional cases stated above, it is absolutely necessary that death and the cause thereof be proved beyond reasonable doubt and that can only be achieved by production of medical evidence and in particular, a post-mortem examination report of the deceased. To the extent that the same was not done in this case, though available, death and its cause was therefore not proved beyond reasonable doubt”

28. This case, in our view, falls squarely within the principles in both **Ndungu vs Republic** and **Chengo Nickson Kalama vs Republic**. In stating so, we are alive to the fact that save for PW2 who stated that he witnessed the appellant hit the deceased on the stomach and that the appellant held the

private parts of the deceased, none of the remaining six witnesses, five

of whom were at the scene, witnessed the alleged assault on the deceased or the infliction of any fatal blow on the deceased. PW1 stated that **“Later, I learnt that he (the deceased) received injuries to his male parts and the neck.”**

29. In addition, none of the witnesses testified that they saw any visible injuries on the deceased at the time of the incident or that the deceased was bleeding. In fact, PW4 who was assisted in retrieving the deceased from the scene to the hospital stated during examination in-chief as follows:

“We took APC Masai to hospital. He was the one lying down. I did not see who hurt him. I was not informed by the doctor of his cause of death. Masai did not bleed.”

30. As noted hereinabove, save for PW2 who testified that he saw the appellant hit the deceased in the stomach and that he held the deceased’s private parts, no other witness saw the appellant assault the deceased. None of the witnesses testified as to the deceased’s cause of death. In fact, the witnesses were consistent in their testimony that the doctor did not inform them of the deceased’s cause of death. This is a fact that required to be established by way of

production of the post

mortem report. In the circumstances, it would be unfair and indeed speculative to conclude that the cause of the deceased's death was from the events recounted by PW2.

31. In **Ndungu vs Republic (supra)**, this Court went on to hold that:

“The prosecution, relying on the decisions in Republic v Cheya and Another [1973] E A 500, argued that death and the cause of it could be established otherwise than by medical evidence and that the evidence of PW 1 about the sickness of the deceased proved that the deceased's death was as a result of the accused's attack on him on January 18, 1983... The judgment in Cheya gives no report of what injuries were sustained although there is a reference to vicious assault, bleeding in several places and that the deceased was assaulted by a group of people. That decision does not illustrate the proper application of the principle that in some cases death can be established without medical evidence. Of course there are cases, for example where the deceased person was stabbed through the heart or where the head is crushed, where the cause of death would be so obvious that the absence of a post-mortem report would not necessarily be fatal. But even in such cases, medical evidence of the effect of such obvious and grave injuries should be adduced as opinion expert evidence and as supporting evidence of the case of the death in the circumstances relied on by the prosecution.” [Emphasis added]

32. In our view, the absence of a post-mortem report left the trial court without a factual or scientific basis for the cause of

the deceased's death. Taking the totality of the foregoing in mind,

we are of the view that the trial court fell into serious error when it held that the absence of the post mortem report did not weaken the prosecution's case.

33. The trial court, in our view, also ought to have warned itself as to whether the failure to produce the post-mortem report was adverse to the prosecution's case. PW7 testified that he attended the post mortem which was conducted by Dr. Mbiri Were. The prosecution did not call the said doctor to produce the post mortem report. In **Bukenya vs Uganda [1972] EA 549**, (Lutta Ag. Vice President) held:

“The prosecution must make available all witnesses necessary to establish the truth even if their evidence may be inconsistent. Where the evidence called is barely adequate, the Court may infer that the evidence of uncalled witnesses would have tended to be adverse to the prosecution.”

34. We reiterate the fact that the incident in question occurred at night, in a chaotic environment, and the witness accounts differed as to what they saw. PW2 said the appellant hit the deceased on the stomach and held his private parts but PW1 and PW3 did not corroborate any specific assault. In the ensuing circumstances, it was necessary for the Dr. Mbiri

Were

to testify and produce the post mortem report in court so that the cause of the deceased's death could be settled with certainty.

35. According to the appellant, the absence of medical evidence left open the real possibility that the deceased may have died from causes wholly unrelated to any alleged assault. This concern was amplified by the appellant's own account that it was only when he was escorted to the police vehicle after being arrested that he noticed someone already lying inside the vehicle, unconscious, and whom he could not identify. In his view, this raised doubt as to whether the deceased had already sustained injuries before any interaction with him. It appears from the impugned judgment that the trial court did not address this issue nor did it reconcile it with the absence of a post-mortem report which would have objectively established what, if anything, caused the deceased's death. Without medical evidence, the chain of causation remained speculative and the possibility of an alternative cause of death could not be excluded.

36. The above findings lead us to the issue of whether there was direct evidence establishing that the appellant killed the deceased. While PW1, PW2 and PW3 placed the appellant on top of the deceased during the struggle, none described an action capable of causing death. None witnessed strangulation, blunt force trauma, or any form of fatal violence. We reiterate that the trial court did not establish the cause of the deceased's death. The law requires not only presence of the accused but a causal act. This Court in **Mary Wanjiku Gichira vs Republic**, **Criminal Appeal No 17 of 1998** held that suspicion, however strong, cannot provide a basis for inferring guilt which must be proved by evidence. Before a court of law can convict an accused person of an offence, it ought to be satisfied that the evidence against him is overwhelming and points to his guilt. This is because a conviction has the effect of taking away the accused's freedom and at times life. In the circumstances herein, we take the view that presence at the scene or involvement in a struggle does not amount to proof of homicide unless the acts leading to death are

distinctly established. The prosecution, in our view,

failed to satisfy the evidentiary threshold that the appellant killed the deceased.

37. As regards the ingredient of malice aforethought, section 206 of the Penal Code provides that it may be inferred from the nature of the weapon used, the part of the body targeted, and the severity of the injuries. In **Republic vs Tubere s/o Ochen [1945] 12 EACA 63**, the Court identified relevant factors in the establishment of malice aforethought such as the type of weapon used, the manner of its use, the part of the body targeted, and the conduct of the accused before and after the attack. In this case there was no evidence of intention to kill or cause grievous harm. There was no weapon, no motive, and no description of a lethal assault. The incident alleged to have led to the deceased's death arose spontaneously during an arrest situation and the appellant was described as drunk. We are of the view that without establishing with certainty the cause of deceased's death, it is impossible to infer malice aforethought on the appellant.

38. In addition, under **section 206** of the Penal Code, there has

to be intent to cause harm or death or knowledge that an act
can

cause death or injury on the part of the accused person for the presence of malice aforethought to be inferred. The appellant in his defence before the trial court stated that he had been drinking chang'aa for about an hour before the police came to the chang'aa den. He acknowledged having been drunk but maintained that he did not kill the deceased. Section 13 of the Penal Code provides that intoxication may negate malice aforethought where it impairs the ability to form intent. We have perused the impugned judgment and the trial court does not seem to have addressed itself at all on this defence. This Court in **Said Karisa Kimunzu vs Republic [2007] KECA 481 (KLR)** held as follows as far as **section 13 (4)** of the Penal Code is concerned:

“But under subsection (4) the court is required to take into account the issue of whether the drunkenness or intoxication deprived the person charged of the ability to form the specific intention required for the commission of a particular crime. In a charge of murder such as the one under consideration, the specific intention required to prove such an offence is malice aforethought as defined in section 206 of the Penal Code. If there be evidence of drunkenness or intoxication then under section 13(4) of the Penal Code, a trial court is required to take that into account for the purpose of determining whether the person charged was

capable of forming any

intention, specific or otherwise, in the absence of which he would not be guilty of the offence. In the circumstance of this appeal, the learned trial Judge was required to take into account the appellant's drinking spree of the previous night and even that morning in determining the issue of whether the appellant was capable of forming and had formed the intention to kill his son."

39. Similarly, in **Julius Obare Angasa vs Republic** [2010] KECA 458 (KLR), this Court held thus:

"As this Court pointed out in DAVID MUNGA MAINA VS. REPUBLIC [2007] eKLR, a party who says he had taken some liquor is not necessarily raising the defence of insanity. Such a person may only be asking the court to take into account the fact of his having consumed liquor and whether that state had deprived him of the ability to form the specific intent to kill. The court is under a duty to consider such a defence where it is raised."

40. It is evident from the above authorities that a trial court must consider whether the accused's level of intoxication affected his capacity to form the necessary intent because without such intent, criminal liability for the offence cannot stand. In our view, the trial court's failure to evaluate the defence of intoxication amounted to an error of law.

41. We think we have said enough to show that this appeal is for allowing. Accordingly, the appeal is allowed, the conviction

quashed and the sentence imposed is hereby set aside. The appellant is set at liberty unless otherwise lawfully held.

Dated and delivered at Kisumu this 13th day of February, 2026.

D. K. MUSINGA, (PRESIDENT)

.....
JUDGE OF APPEAL

P. O. KIAGE

.....
JUDGE OF APPEAL

G. V. ODUNGA

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JUDGE OF APPEAL

I certify that this is a true copy of original.

DEPUTY REGISTRAR.