

**REPUBLIC OF
KENYA IN THE COURT
OF APPEAL**

AT KISUMU

[CORAM: ASIKE-MAKHANDIA, OMONDI & NYAMWEYA JJ.A]

**CRIMINAL APPEAL NO. E136
OF 2023 BETWEEN**

**PATRICK ONG’AU OKIOMA.....APPELLANT
AND**

REPUBLIC

.....
RESPONDENT

*(An appeal from the Judgment of the High Court of Kenya at Kisii
(A. Ndung’u J.) delivered on 23rd September 2021 and sentence on
2nd November 2021*

*in
Kisii High Court Criminal Case No. 18 of 2020)*

JUDGMENT OF THE COURT

1. Patrick Ong’au Okioma (“the appellant”), has challenged his conviction for murder and sentence of 20 years imprisonment imposed by the High Court of Kenya at Kisii **(A.K. Ndungu J.)** in **High Court Criminal Case No. 18 of 2020**. The particulars of the offence were that on 5th June 2020 at Nyabiosi Village, in Bomariba sub location, Kisii South Sub County within Kisii County the appellant murdered Peter Sure Babu. The key witness for the prosecution in the murder trial was Lydia Kerubo Sure (PW1), who claimed to have been with the appellant at the time of the murder. In

summary, her testimony was that the appellant had complained that the deceased was disturbing him and threatening his life, and that he coerced

PW1 to participate in his plan to kill the deceased, who was PW1's father. PW1 described how on the material night on 5th June 2020, the appellant gave her a black sweater to wear, while he too, wore a black sweater and picked up an axe. At around 7:00 p.m. PW1 together with the appellant went to the deceased's house, and when the deceased entered his house, the appellant asked PW1 to untie a bull to attract his attention, which PW1 did twice. When the deceased came out for the second time to return the bull to its tether, the appellant, who was hiding in some flowers, came out and hit the deceased on the head, and when the deceased fell down, hit him again four times on the back of the head with the axe.

2. When the deceased fell down, Prisca Sure (PW2), the deceased's wife and PW1's mother, came out and saw two people who she was unable to identify because it was at night, running away in different directions. As she was returning the bull, PW2 saw the deceased on the ground, bleeding from the back of the head. She screamed and people came to the scene including Nyamira Babu (PW3) (the deceased's brother), and later Dominic Orina (PW4), the deceased's son, who, upon seeing his father lying on the ground dead, became emotional and held the deceased's body. PW2, PW3 and PW4 all testified that they were aware that PW1 had a relationship with the appellant, with PW3 testifying that the deceased had complained to him about

the relationship.

3. Two days after the deceased's death on 7th June 2020, PW1 disclosed to her mother (PW2) that she had witnessed the appellant killing the deceased,

and PW2 thereupon called the assistant chief of Omariba sub-location, Benjamin Ayuma Opanga (PW5). PW1 reiterated to PW5 that she had witnessed the appellant killing her father, and thereafter accompanied PW5 to the police station where she explained what had happened. PW1, PW5 and police officers then went to the appellant's home, where PW1 identified the clothes the appellant wore during the killing which were then taken by the police.

4. P.C. Gisiri Samuel (PW6) was the investigating officer. He produced photos and a report taken by scenes of crime personnel and after interrogating the first people to arrive at the scene, decided to arrest PW 4 as the first suspect. He explained that when the police came to take the deceased's body, they arrested PW4 because of the blood on his clothes, arising from PW4's contact with the deceased's body. On 7th June 2020 they received information that PW1 had confessed to her mother that she knew who had murdered the deceased and after PW1 narrated how the appellant had planned the murder of the deceased, he arrested PW1 and the appellant and released PW4 from custody. A CI Washington Mwiti took PW1's confession and they decided to use her as their key witness in the matter, because they learnt that the appellant had threatened to kill her if she did not co-operate. PW6 also produced the report of the post mortem conducted on the deceased at Nyangena private hospital by Dr. Morebu, which indicated that the cause of

death was a severe head injury secondary to sharp trauma to the head.

5. On his part, the appellant's defence was that on 5th June 2020 he woke up at 6.00 am, and while in the company of his younger brothers and father, they made a chicken cage until about 1.00 p.m., had lunch, and he went to his kiosk where he sold tomatoes and fuel. He closed his kiosk at 6.00

p.m. went back home, prepared supper, and at about 7.00 p.m. he decided to study with his younger brothers. They then heard screams from outside, and his father went to check what was happening and left them in the house. According to the appellant they went to sleep and their father only told them the following day that the screams were over the killing of the deceased.

6. Joseph Nyaede Okioma (DW2) the appellant's father gave a similar account to that of the appellant of the events of 5th June 2020, and added that the police arrested the son of the deceased who had blood on his hands and a yellow T-shirt which had blood. According to DW2, there had been a dispute between the deceased and the son. They were then told by PW1 that the appellant killed the deceased, and he insisted that he was with the appellant and his other children when the screams were heard and he was the only one who left the house and that the appellant did not kill the deceased.

7. After hearing the witnesses, the High Court (**A. Ndung'u J.**) held that the evidence of PW1 was that of an accomplice,

and while noting the dangers inherent in relying on such evidence and that the court must take caution not to base a conviction on the uncorroborated evidence of an accomplice,

found that that PW 1 spoke the truth when she testified that it is the appellant who attacked the deceased leading to his (deceased's) death. Further, that she also spoke the truth when she confirmed she had a relationship with the appellant which was disapproved of by, the deceased, and the existence of this relationship was corroborated and confirmed by PW2, PW3 and PW4. Therefore, that based on the evidence it was clear that PW1 participated in the unfortunate incident leading to the death of her father, and that she was later pricked by her conscience to reveal the truth. In addition , that there was nothing to show that she stood to gain anything from framing the appellant and neither was there any evidence that she had a motive to hurt the appellant by framing him with the offence. With these findings the appellant was convicted for the offence of murder and sentenced to 20 years' imprisonment.

8. Aggrieved, the appellant filed an appeal in this Court and raised fourteen (14) grounds of appeal which challenge the High Court's findings on the corroboration of the accomplice evidence of PW1, the appellant's and PW1's motive to kill the deceased, and the admission and reliance on the scene of crime photographs and post mortem report whose contents were not adequately proved as required by law .We heard the appeal on this Court's virtual platform on 6th May 2025, and the appellant, was present in person appearing virtually from

Kisii main prison, learned counsel **Mr. Odhiambo**, appeared for the appellant, while learned counsel **Mr.**

Kimanthi, appeared for the respondent. Both counsel relied on their respective submissions dated 27th January 2025 and 10th April 2025.

9. This being a first appeal, the duties of this Court are set out in the case of **Okeno vs. Republic [1972] EA 32** as follows:

“An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya vs. Republic (1957) EA. (336) and the appellate court’s own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala vs. R. (1957) EA. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court’s finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate’s findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters vs. Sunday Post [1958] E.A 424.”

10. In this respect, the elements which the prosecution must prove beyond reasonable doubt to secure a conviction for the offence of murder were set out by this Court in **Joseph Githua Njuguna vs R [2016] eKLR**, as being the death of the deceased; cause of the death; the death was caused by an unlawful act committed by the accused; and the accused harboured malice aforethought. In the present appeal the

death of the deceased was established by PW1 who witnessed the deceased being killed, PW2, PW3 and PW4, who testified as to seeing the deceased's body after he had died.

11. The appellant appears to dispute the evidence on the deceased's death to the extent that the photographs of the scene of crime were produced by PW6, who was not the author thereof and that no admissibility certificate was produced by PW6. According to the appellant, a proper view of the scene of the crime, as depicted in the photographs, would have been instrumental in evaluating the coherence and credibility of PW1's testimony in relation to the conditions surrounding the offence. The production of scene of crime photographs and reports is governed by section 78 of the Evidence Act which allows for the admissibility of photographic evidence via a certificate signed by an authorized officer. The certificate and accompanying photographs are considered evidence of the facts stated therein and their goal is to provide a true and accurate representation of the scene of crime.
12. It is notable that PW6 produced both the photographs and the report of the officer who took the photographs as required under section 78(1) of the Evidence Act, and under section 78(2) and (3) of the Evidence Act, it is not necessary for the maker of the report to produce it in court, as the court presumes that the signature to any such certificate is genuine, and if it thinks it fit, summon and examine the person who gave it and the appellant did not seek that the author be summoned to produce it. The appellant's contestation as regards the production of the photographs of

the scene of crime and report by PW6 therefore does not create any doubt that the deceased died, and in any event, photographs being static evidence

cannot be evidence as regards the circumstances in which a death took place.

13. The appellant also disputes the cause of death to the extent that he challenges the production of the post mortem report by PW6. While relying on various judicial decisions, the appellant submitted that when the original document is unavailable, a proper basis must be laid to allow the production of secondary evidence; it was apparent that PW6, as a witness, was not acquainted with either the handwriting or the signature of the doctor who authored the report; and that the document was not a public document under Section 79(1)(a) of the Evidence Act, as it was prepared at a private hospital by a private medical practitioner and on the importance of having expert evidence produced by the maker of the report or another technically qualified individual. In response, the respondent submitted that the report was properly tendered and admitted as evidence under section 77 (1)(2) and (3) of the Evidence Act, and when the postmortem report was produced as an exhibit, the appellant was represented by a counsel and no objection was raised as to its production or contents and is therefore estopped from raising the issue before this court.
14. Section 77 of the Evidence Act in this regard provides for production of documents made by any medical practitioners by persons other than their maker therefore section 79 of the Evidence Act is inapplicable, and presumes the

signature thereon to be genuine under section 77(2). It is

noteworthy that the appellant did not object to the production of the post mortem report by PW6, nor seek to have the maker of the report summoned for cross-examination, and it is too late in the day to object to the production of the said report . The post mortem report in this respect indicated that the cause of death to be severe head injury secondary to sharp trauma to the head.

15. As regards the element of the appellant causing the death, PW1's evidence to this effect is challenged by the appellant as not being credible and corroborated. While citing section 141 of the Evidence Act and the decisions of this Court in **Waringa vs Republic [1984] KLR 617** and **TMK vs Republic [2024] KECA 686 (KLR)** on admissibility and credibility of accomplice evidence, the appellant submitted that the Trial Court found the evidence of a single eyewitness (PW1) who the trial Court described as an accomplice to the crime to be credible and sufficient to establish that it was indeed the appellant who fatally attacked the deceased, when the said evidence was uncorroborated by other independent evidence, and several inconsistencies and gaps in the evidence were overlooked.
16. According to the appellant, PW1's credibility was highly questionable, as her testimony was not demonstrated to align with the evidence on record. In particular, that the alleged relationship between her and the appellant and the evidence of her being seen with the appellant was fabricated

and unsupported by substantive evidence, there was no evidence indicating that the alleged relationship had any other element beyond casual

association arising from the fact that their homes were in close proximity; the testimony of PW3—who, like PW2 and PW4, was a close relative of the deceased was insufficient to corroborate the existence of the alleged relationship due to their evident interest in the case; the Assistant Chief contradicted the relatives' testimony on the alleged relationship, asserting that he had never been involved in any case pitting the appellant against the deceased; the two members of the community policing group, who allegedly accompanied the deceased to the appellant's home on the material day, and who were better placed to provide independent accounts of this visit and of the existence of the relationship did not testify; and the evidence of the clothing allegedly worn by the appellant during the commission of the alleged act presented before the trial Court were identified as ladies' clothes, did not fit the appellant, and Furthermore, PW1s' admission of having access to the appellant's house and washing his clothes underscores the opportunity she had to frame him.

17. The respondent's submissions were that PW1 clearly saw the appellant hit the deceased on the back of the head, the appellant was a person who was well known to PW1 and they were together at the scene and she saw him inflict the fatal injuries to the deceased. Further, that the trial Judge in accepting and admitting the evidence of PW1 under section 141 of the Evidence Act warned himself of the dangers

inherent on relying on such evidence to convict.

18. This Court laid down the following three principles in considering accomplice evidence in **Waringa vs Republic [1984] KLR 617**:

(a) When considering the evidence of an accomplice, the first duty of the court is to decide whether the accomplice is a credible witness.

(b) .If the accomplice evidence is credible, the court should consider if there is corroborating evidence.

(c) The corroboration must be independent evidence which connects the accused person with the crime.

19. The first step therefore, is for the trial Court to make a determination as regards the credibility of an accomplice, and this the Court does by considering the demeanour of the witness and assesses the trustworthiness, reliability and integrity of the witness. This Court held in **Joseph Ndungu Kimanyi vs Republic [1979] KECA 5 (KLR)** that "*the witness upon whose evidence it is proposed to rely should not create an impression in the mind of the Court that he is not a straightforward person, or raise a suspicion about his trustworthiness, or do (or say) something which indicates that he is a person of doubtful integrity, and therefore an unreliable witness which makes it unsafe to accept his evidence..*" and this position was reiterated by this Court in **Kiilu vs Republic (2005) KECA 335 (KLR)**. In this regard the trial Court considered PW1's evidence and stated that she was truthful and it believed her, and that her

evidence was *“so exceptionally cogent, devoid of malice against the accused and based on no gain on the part of*

the accomplice". The trial Court had the opportunity to observe PW1's demeanour, and having had no such advantage, we cannot dispute the findings as regards her credibility, particularly in the absence of any evidence on record challenging PW1 truthfulness, as held in **TMK v Republic [supra]**.

20. As regards the corroboration of PW1's evidence, what is required to be demonstrated is some additional independent evidence on the material aspects of the offence, which renders it probable that the story of the accomplice is true and that it is reasonably safe to act upon it. In the present appeal, the material aspects that needed to be corroborated was that PW1 was with the appellant on the material night when she witnessed him hit the deceased. Apart from the evidence of PW1's relationship with the appellant, which PW2, PW3 and PW4 testified about, PW2 in this respect testified that she saw two people run away when she went out to check on the cow, and the post mortem report produced by PW6 was independent evidence of PW1's evidence that the appellant hit the deceased on the head with an axe. We are satisfied that there was sufficient corroboration of the account given by PW1 as regards the appellant's participation in the death of the deceased.
21. On the proof of malice aforethought, the appellant submitted that the existence of the alleged relationship was crucial, since the Trial Court found that the appellant's motive for

the offence was the deceased's disapproval of the alleged relationship between the appellant and PW1.

Furthermore, the inference by the trial Court that PW1 lacked a motive to kill her father and had nothing to gain by framing the appellant was erroneous, since PW1's evidence of her attempted suicide suggests she was distressed by her father's disapproval of her association with the appellant; and might have fuelled resentment toward her father. In addition, by her own admission, PW1 appeared deeply attached to the alleged relationship, as evidenced by her evidence that even after allegedly being sought out by her father on the day of the incident, she still returned to the appellant's residence. Lastly her lack of any audible reaction during the alleged attack on her father raises significant doubt and was more consistent with someone directly involved in the act rather than a mere witness.

22. The respondent on its part submitted that PW1 testified that the appellant had planned to kill the deceased earlier in the day where he conveyed the arrangement to her and requested for her help. Further, that according to PW1 who witnessed the incident, the appellant hit the deceased with axe and after the deceased fell down the appellant hit him on the back of the head 4 times. In our view, whatever other inconsistencies there may have been with PW1's evidence and her motives, we find that the act of hitting the deceased at the back of the head four times with an axe was enough evidence that the appellant intended to kill the deceased, and sufficient proof of his malice aforethought. The upshot of

our findings is that the conviction of the appellant for the offence of murder was safe, and there is no basis to disturb it.

23. As regards the sentence which the appellant seeks that we set aside, we note that the trial Judge considered the nature of the offence, the mitigation put forth by the appellant, the aggravating factors and the principles on sentencing, in meting out the sentence of twenty (20) years imprisonment. This sentence is in our view not only lawful, but also lenient in the circumstances, especially considering that the offence of murder attracts a maximum sentence of the death penalty. However, as there was no notice of enhancement of sentence given by the respondent, we shall not disturb the said sentence. Consequently, the appeal against sentence fails as well.
24. We accordingly find that the appeal herein is without merit and dismiss it in its entirety.

**Dated and Delivered at Kisumu this 13th day
of February, 2026 ASIKE-
MAKHANDIA**

.....
**JUDGE OF APPEAL
H. A. OMONDI**

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**JUDGE OF APPEAL
P. NYAMWEYA**

.....
JUDGE OF APPEAL

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

DEPUTY REGISTRAR