IN THE COURT OF APPEAL AT KISUMU

(CORAM: ASIKE-MAKHANDIA, OMONDI & KIMARU, JJ.A)

CRIMINAL APPEAL NO. E100 OF 2021

BETWEEN

NICHOLAS SIMIYU WAFULA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Bungoma, (Riechi. J) dated 22nd September, 2021

in

HCCRC No. 41 of 2019)
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JUDGMENT OF THE COURT

[1] This is a first appeal from the conviction and sentence of the appellant, **Nicholas Simiyu Wafula** by the High Court of Kenya at Bungoma on the information charging him with murder contrary to **Section 203** as read with **Section 204** of the Penal Code. The particulars were that on 29th November 2019 at Buema village, Tuuti Sub-location within Bungoma County, the appellant unlawfully murdered **Joseph Wamalwa Wekesa, "the deceased."** The

appellant denied the information and his trial soon thereafter ensued.

[2] The prosecution's case was founded on the testimony of seven witnesses. PW1, Dr. Caleb Gwata, a Senior Medical Officer attached to Kimilili Sub-County Hospital, tendered in evidence the post-mortem report prepared by Dr. Ombongi which indicated that the deceased had sustained a penetrating chest injury, a wound on the right elbow joint, massive blood in the chest cavity, collapsed lungs, and penetrating injuries through the diaphragm and liver. The conclusion was that the cause of death was haemorrhage resulting from penetrating chest and abdominal injuries inflicted by a sharp object.

[3] PW2, Humphrey Mulati, a driver for Hon. Wafula Wamunyinyi, former member of Parliament for Kanduyi constituency in Bungoma County was on the night of 29th November 2019, at the home of the late Matayos Mulati Wamunyinyi attending an anniversary commemorating his death when at about 2.00a.m whilst standing near a vehicle, witnessed the appellant and the deceased have an altercation that led to a fight. Both appeared drunk. After they were separated, the appellant rushed home but soon returned armed with a knife. The deceased attempted to flee but the appellant pursued him and stabbed him on the right lower chest. He saw all these courtesy of the strong security lights that lit the compound.

He intervened and rushed the

deceased to Bungoma West Hospital, where the deceased succumbed to his injuries shortly thereafter.

[4] PW3, Meshack Wanjala Webala, a caretaker at the function also saw the appellant hit the deceased with a fist before leaving and coming back later armed with a knife. The deceased then ran towards him but was stabbed on the right side of the chest by the appellant in his full view. He observed the unfolding events courtesy of the strong security lights that lit the compound as well. He noticed that both men had consumed a lot of busaa (a local brew).

[5] PW4, Evans Khaemba Nyongesa, was the musician at the function.

While leaving the ceremony at about 2.00 a.m. saw the appellant emerge from his house armed with a knife. The deceased, upon seeing him, attempted to flee but was chased and stabbed on the right side of the chest by the appellant. He later learned that the deceased had passed on.

[6] PW5, Doris Nanjala Nabangi, the wife of the deceased, was at her nearby house when she heard screams emanating from the function. Immediately thereafter, the appellant came calling on a *tuk tuk (three- wheeler).* He called out for her husband, and declared that he wanted to kill him. In that irate state, he stabbed

their dog, broke the window

glass, and left. Shortly thereafter, she was informed that her husband

had been stabbed by the appellant and taken to hospital, where she later found him dead.

[7] PW6, Pius Wekesa Wafura, a cousin of the deceased, attended the post-mortem and identified the body to the pathologist, Dr. Ombongi for that purpose.

[8] PW7, Sgt Mary Okongo, the investigating officer visited the scene and recovered a blood-stained shirt said to belong to the appellant, though the murder weapon was not found. She later arrested the appellant at Dawamed Hospital, where he was receiving treatment for injuries on his head and hand. She also confirmed reports that the appellant had gone to the deceased's home, broken window panes, and stabbed his dog.

[9] When placed on his defence, the appellant, gave a sworn statement denying the information. He testified that the deceased was a cousin to his father. That he had attended his grandfather's death anniversary on the material night when he heard a commotion, on checking, he was suddenly struck on the head and immediately passed out, only to come round and find himself in hospital. He denied meeting or fighting the deceased that night, and insisted that he did not know who killed him. He also denied going to the deceased's home, injuring his dog or

breaking window panes of his house.

[10] After carefully analyzing the evidence tendered by the witnesses, the trial court found that the prosecution had proved its case against the appellant. It held that the evidence of the prosecution witnesses consistently placed the appellant at the scene, that he was seen armed with a knife, and that he stabbed the deceased on the right side of the chest causing him fatal injuries. The medical evidence confirmed that the cause of death was haemorrhage resulting from penetrating chest and abdominal injuries inflicted by a sharp object. The court rejected the appellant's defence as a mere denial and unconvincing in the light of the strong eyewitness testimony by the prosecution witnesses. Consequently, the appellant was convicted of the information and sentenced to thirty (30) years' imprisonment.

[11] The appellant, dissatisfied with the conviction and sentence aforesaid has sought to impugn it in this appeal on seven grounds to wit: that the trial court failed to properly evaluate the appellant's defence; relying on implausible identification evidence; failed to properly evaluate contradictory prosecution evidence; misapplying the law on malice aforethought; failure to conduct forensic analysis; and that the sentence imposed was harsh and excessive in the circumstances.

[12] When the appeal was called out for plenary hearing, the appellant was present from Kibos maximum prison being represented by **Mr. Menezes B.**, learned counsel, whilst **Mr. Minishi**, holding brief for **Ms. Nyambura**, learned Prosecution counsel appeared for the respondent.

[13] Mr. Menezes B. relied on his written submissions to argue the appeal. He collapsed his submissions into five thematic areas; defence, identification, inconsistencies, intoxication and or provocation and finally, sentence. Counsel submitted that the trial court erred in law and fact by failing to properly evaluate the appellant's defence. He emphasized that the appellant, gave sworn testimony stating that he was injured during a fracas at the anniversary, lost consciousness, and only regained it whilst at Dawamed Hospital where he was eventually arrested. Counsel argued that this defence was consistent and plausible, yet the trial court dismissed it without giving any reasons. He invoked **Wang'ombe v Republic [1980] KLR 149** and **Ssentale v Uganda EA 365, 368**, in which it was held that the burden of proof never shifts to the accused once a defence is raised, and that courts must evaluate such defences fairly. Counsel submitted that the trial court's failure to consider the appellant's defence constituted a

miscarriage of justice.

[14] On identification, learned counsel submitted that the trial court erred in relying on purported positive identification of the appellant by some of the witnesses without subjecting their evidence to the requisite legal scrutiny. He argued that the circumstances of the alleged identification were fraught with confusion, intoxication, and poor visibility, which diminished its reliability. He cited **R v Turnbull [1976] 3 ALL ER 549**, where cautionary principles requiring courts to assess identification evidence with utmost care were pronounced, being consideration of lighting, distance, duration of observation, any hindrance and prior acquaintance.

[15] He also referred to **Wamunga v Republic [1989] KLR 424**, where this Court warned that convictions resting solely on identification evidence are unsafe unless the circumstances are favourable and free from possibility of error. Counsel submitted that the appellant expressly denied knowing the key witnesses, yet the trial court presumed familiarity without evidentiary support, rendering the finding of positive identification unsafe.

[16] On contradictory evidence, counsel submitted that the prosecution's case was marred by material inconsistencies regarding the presence and use of a weapon. PW2 testified that he did not see the

accused with any weapon, while PW3 and PW4 claimed the appellant

returned armed with a knife. Counsel submitted that these contradictions went to the heart of the prosecution's narrative and were not reconciled by the trial court. He cited **Kimotho Kiarie v Republic [1984] KLR 739** and **Roria v R [1967] EA 583**, where the courts cautioned that even honest witnesses may be mistaken, and multiple witnesses can all be mistaken. He reiterated the principle in **Bhatt v R [1957] E.A. 332**, that worthless or contradictory evidence cannot sustain a conviction.

[17] On malice aforethought, counsel submitted that the trial court misapplied **Section 206** of the Penal Code by inferring intent solely from the weapon used and the injuries sustained. He argued that if PW3's account that the deceased returned armed with a knife is considered, then provocation or self-defence could arise, negating malice aforethought or reducing the offence to one of manslaughter. He further submitted that intoxication was a material factor that the trial court failed to address, noting contradictions between PW2, who said both men appeared drunk, and PW3, who said they had drunk but were not intoxicated. He cited **Elizabeth Waithiegeni Gatimu v Republic [2012] eKLR**, where it was held that a single circumstance creating reasonable doubt is sufficient to acquit, and that every

ambiguity must be resolved in favour of the accused. Counsel argued

that intoxication could negate the specific intent required for murder, and the trial court erred in failing to resolve these doubts in favour of the appellant.

[18] Finally, on sentence, counsel submitted that the thirty-year term imposed on the appellant was excessive and disproportionate given the appellant's status as a first offender, his remorse, and his personal circumstances. He relied on **Francis Karioko Muruatetu v Republic [2017] eKLR**, where the Supreme Court, stated that in sentencing, the trial court should consider mitigating factors such as age, first offender status, remorse, and potential for reform. Counsel also referred to the Judiciary Sentencing Policy Guidelines, emphasizing proportionality of the sentence and rehabilitation prospects. He asserted that the appellant had demonstrated reform through completion of biblical studies and positive conduct in prison, which was supported by a recommendation from the prison chaplain. He urged the court to reduce the sentence to time served or a much lesser custodial term.

[19] Counsel for the respondent in opposition to the appeal, submitted that the conviction and sentence of the appellant were proper and should be upheld. Counsel argued that the prosecution had proved all the essential ingredients of murder beyond

reasonable doubt. On the

issue of identification, counsel citing **Abdalla Bin Wendo v R [1953]**

20 EACA 166, stated that although a fact may be proved by the testimony of a single witness, identification evidence must be tested with the greatest care, and corroboration was required where conditions for correct identification were difficult. He further relied on **Wamunga v Republic (supra)**, where this Court emphasized that where identification is the only evidence against an accused, the trial court must examine such evidence carefully and be satisfied that the circumstances were favourable and free from possibility of error before basing a conviction upon it. However, in the circumstances of this case, the conditions of identification and recognition were perfect, as the compound was well lit with security lights, the appellant was not a stranger to the witnesses and the identification was not by a single witness.

[20] On malice aforethought, counsel referred to **Sango Mohamed Sango & Another v Republic [2015] KECA 178 (KLR)**, where this Court held that malice aforethought may be inferred from factors such as the part of the body targeted, the type of weapon used, and the nature of injuries inflicted, drawing from **Rex v Tubere s/o Ochen (1945) 12 EACA 63** and **Chesakit v Uganda, Cr. App. No. 95 of 2004**. Counsel submitted that the gory injuries inflicted on the deceased were

consistent with an assault intended to cause death.

[21] Turning to sentence, counsel acknowledged that **Section 204** of the Penal Code prescribes the death penalty for murder as the ultimate sentence but also relied on the Supreme Court decision in **Francis Karioko Muruatetu & Another v Republic (supra)**, where the Court held that the mandatory nature of the death sentence is unconstitutional as it deprives courts of discretion to consider mitigating circumstances, and outlined factors that should inform the sentencing such as age, first offender status, remorse, and possibility of reform.

[22] He also cited **John Bundi Koome v Republic, Nyeri Criminal Appeal No. 22 of 2017 (Court of Appeal, 7th October 2022)**, where the Court affirmed that sentences imposed for murder cases must reflect both the seriousness of the offence and the circumstances of the offender, and that life imprisonment was lawful where mitigation had been considered. Counsel therefore submitted that the thirty-year sentence imposed on the appellant was lawful, proportionate, and consistent with precedents, and urged this Court to dismiss the appeal in its entirety.

[23] This being a first appeal, we remind ourselves of our duty to subject the entire evidence tendered before the trial court to a fresh

and exhaustive re-evaluation and analysis, and draw our own

independent conclusions while appreciating that we neither saw nor heard the witnesses and give due allowance in matters of demeanor of witnesses. See **Okeno v Republic [1972] EA 32**.

[24] The issues for determination in this appeal are threefold in our view: first, whether the appellant was the perpetrator of crime; second, whether malice aforethought was proved beyond reasonable doubt; and third, whether the sentence imposed was lawful and proportionate in the circumstances.

[25] We start with whether the appellant was identified as the perpetrator of the crime. This is because the fact of death and the cause thereof is not in dispute**.**

[26] On identification, the law requires that where a conviction rests entirely or substantially on identification evidence, the court must exercise the greatest caution and restraint before founding a conviction. In **Wamunga v Republic (supra),** the Court stated that:

> ***"it is trite law that where the only evidence against a defendant is identification, 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 a basis for conviction."***

[27] Similarly, in **R v Turnbull (supra)** the Court laid down

guidelines requiring courts before they can convict based on identification

evidence to consider the lighting, distance, duration of observation, any obstruction and prior acquaintance of the person identifying and the person being identified. In the present appeal, the circumstances of observation were at night, with witnesses claiming reliance on security lights. The appellant denied knowing the witnesses, while they asserted prior familiarity. However, from the evidence on record, the appellant was no stranger in the village. He was a person well to the three identifying witnesses. Indeed the deceased was his uncle. There were bright security lights at the function which enabled the three witnesses, PW2, PW3 and PW4 to positively identify and or recognise the appellant. The observation was not at all hindered. Indeed, the observation was not sporadic but took a while. In fact this was a case recognition as opposed to identification of a stranger in difficult circumstances.

[28] As observed in **Anjononi vs Republic, [1980] eKLR**, recognition is more satisfactory and reliable than identification of a stranger in difficult circumstances because it is based on some knowledge of the accused. No reasons have been advanced by the appellant why the three witnesses would bear false testimony against him. Further, the appellant does not discount his presence at the scene of crime. He in

fact confirms the fact but his only point of departure is that he was

equally a victim of assault by unknown persons at the venue. Faced with the strong prosecution evidence of identification and or recognition aforesaid, we doubt just like the trial court that such defence could hold.

[29] On malice aforethought, **Section 206** of the Penal Code gives instances where the same may be inferred. They include, and what is relevant in this case, the intention to cause death or grievous harm, knowledge that the act will probably cause death and intent to commit a felony. Similarly, this Court in **Nzuki v Republic [1993] KLR 171** held that malice aforethought is a question of fact to be inferred from the circumstances, including the nature of the weapon used, the part of the body targeted, and the conduct of the accused before and after the attack.

[30] In this appeal, while the medical evidence confirmed fatal injuries caused by a sharp object, coupled with evidence of intoxication and a fracas, raise doubt as to whether the appellant formed the specific intent to kill the deceased. The presence of alcohol and the chaotic circumstances suggest that the act may have been spontaneous rather than premeditated. Guided by the principle that any doubt created in the prosecution's case must be resolved in favour of the accused, we

are satisfied that malice aforethought in the strict sense, was not

proved beyond reasonable doubt, and the offence disclosed, given the circumstances, is more consistent with manslaughter contrary to **Section 202** as read with **Section 205** of the Penal Code other than murder.

[31] We note that, the appellant was sentenced to thirty years' imprisonment, by the trial court after it considered his mitigation. However, given this Court's finding that the conviction for murder cannot stand and is substituted with manslaughter, the sentence must be revisited. Taking into account the appellant's status as a first offender, his remorse, his family responsibilities, and his demonstrated efforts at reform while in custody, we are satisfied that a custodial sentence is still warranted but should be tempered by these mitigating factors. A sentence of fifteen years' imprisonment is appropriate and proportionate in the circumstances.

[32] In conclusion, we are satisfied that conviction for murder was unsafe as malice aforethought was not proved beyond reasonable doubt. The conviction for murder is therefore quashed and substituted with a conviction for the offence of manslaughter contrary to **Section 202** as read with **Section 205** of the Penal Code. The sentence of thirty years' imprisonment is set aside and

substituted with a sentence of

fifteen years' imprisonment from the date of arraignment in court.

The appeal succeeds to that limited extent.

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

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

H.A. OMONDI

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JUDGE OF APPEAL

L. KIMARU

.....

JUDGE OF APPEAL

I certify that this is a
true copy of the original

DEPUTY REGISTRAR