

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MIGORI**  
**CRIMINAL APPEAL NO. E068 OF 2022**

**DANCAN MGIGE .....**  
**APPELLANT**

**VS**

**REPUBLIC.....**  
**RESPONDENT**

**(Being an appeal from the judgement of Hon. Mesa L. N. (PM) in Kehancha Criminal Case No. 941 of 2019 delivered on 28<sup>th</sup> April 2021)**

**JUDGMENT**

The Appellant Dancan Mgige was charged with the offence of manslaughter contrary to **Section 202 as read with Section 205 of the Penal Code.**

The particulars are that the Appellant on the night of 26<sup>th</sup> December 2019 at Ntatechi village, Taranganya Sub-Location in Kuria West Sub-County within Migori County unlawfully killed James Marwa Mwikwabe

Based on the evidence of five (5) prosecution witnesses and the Appellant's unsworn testimony the Trial Magistrate convicted and sentenced him to serve 10 years imprisonment after considering the pre-sentence report.

The Appellant was aggrieved by the conviction and sentence of the subordinate court and lodged his Petition of Appeal on 13<sup>th</sup> July 2022 on the following grounds:

- a) That the trial Magistrate faulted both in law and fact when he erroneously based the conviction on misapprehension and assumption merely demonstrated in court without circumspect that both the deceased and**

**the accused were totally intoxicated with drugs of changaa local brews none of the two was sober.**

- b) That the Trial Court erred in law and fact when miserably based the conviction on the purported evidence demonstrated in court by the prosecution and failed to observe that both the deceased and the Appellant were at the den of changaa when the deceased provoked the Appellant and they begun to fight each other.**
- c) That the Learned Trial Magistrate erred in law and fact when he seemingly overlooked to observe that the Appellant and the deceased were found at the den of changaa when the crime was committed**
- d) That the Learned Trial Magistrate erred in law and fact when he failed to consider the Appellant's defence without cogent reasons yet the same was remarkably comprehensive in casting considerable doubts in the mind of the court.**

**The Appellant urged the court to allow his appeal.**

Prosecution's case was that on 25<sup>th</sup> December 2020 at around mid-night there was music at the home of PW1 which was brought by her mother's boyfriend. That she danced with the deceased who gave her 200/= and after that she danced with Frank the Appellant herein. That when she started dancing with the Appellant the deceased whom she had just seen that day started arguing with the Appellant over her.

PW1 said that the deceased then took a knife and stabbed the Appellant. That the Appellant then took the knife and stabbed the deceased twice on the chest and abdomen and the deceased fell down. That the people who were present ran and left her with her mother. That she went to where her mother was sleeping and she

woke her up to go and see what had happened and they screamed raising alarm. That when they saw the family of the deceased they ran and hid in the cassava plantation. That when they returned in the morning, they found the body had been taken. That after 2 days they went to record their statements. She said there was a lamp in the house and the Appellant and the deceased fought about 3 meters from where she was. She said she did not have a grudge with the Appellant.

In cross examination PW1 said there were many people who were dancing. She said the Appellant snatched the knife the deceased had used to stab him and in turn stabbed the deceased twice.

PW2 the mother of PW1 said that her boyfriend Mosesti had brought music but since she was the only adult she decided to go and sleep. That at 1.00pm her daughter went to wake her up saying that somebody had been killed. That PW1 picked her baby and ran off. That when she went out, she found a man lying on the floor. That she found PW1 at a neighbor's home. That when they tried to go back home, they were chased and they only managed to return the following day. She said she learnt that Frank was responsible for the death. She said she knew Frank as a neighbour and she had no grudge with him

In cross examination she said that the music was to celebrate Christmas. She said that she heard the Appellant was also stabbed but she did not see.

PW3 CPL John Meli visited the scene of murder in company of CIP Majani the OCS Kehancha Police Station and CPL Ruto. That they found the home deserted and relatives of the deceased led them to the room where the alleged disco was. That at the door they found the body of a young man who was identified as James Marwa Mwikwabe. They took photographs and on examination of the body they saw 3 stab wounds

on thighs. The body was removed and taken to Pastor Machage Hospital Mortuary where PM was done on 30<sup>th</sup> December 2019.

That on the same day at 10.00am a relative of the deceased went and gave information that the Appellant was at Migori District Hospital undergoing treatment. That in company of the said relative together with P.C. Tanui and P.C. Dan they proceeded to Migori and found the Appellant had been admitted. That on interrogation he told them that the deceased had stabbed him and in retaliation he took the knife and he stabbed him. That the Appellant remained under police guard and on discharge he was charged.

PW4 PC. Tonui of DCI Kuria West investigated the murder herein. He said that he accompanied Rodgers Mwikwabe the relative of the deceased to Migori County Referral Hospital in company of PW3 and P.C. Dan where they found the suspect had been admitted and was undergoing treatment for a stab wound. That on 29<sup>th</sup> December 2019 the Appellant was discharged from hospital and arraigned in court with the offence herein. That on interrogation the Appellant told him that he was on his way home when he heard loud music and when he went to find out he found several youth dancing. That he was abit drunk and he sat next to the music player and he fell asleep. That he was woken up by fracas in the house. That he told PW4 that 2 youth were fighting in the house and one of them had a knife that he wanted to use to stab the other, That the one who was to be stabbed avoided the knife and he was the one stabbed. That he went out of the house and fell unconscious

When PW4 interrogated PW1 she said that she was dancing with deceased who gave her 200/= . That the accused wanted to dance with her but the deceased declined. That they then started insulting each other and the insults degenerated to physical confrontation. That when

the deceased tried to pull a knife from his waist, the Appellant saw and he also pulled out a knife and when the deceased stabbed the accused, the accused retaliated by stabbing the deceased 3 times on the right thigh and once in the abdomen.

That when PW4 visited the scene on 27<sup>th</sup> December 2019 PW1 took him round and showed him where the deceased lay after being stabbed. Post mortem was conducted on 30<sup>th</sup> December 2019 and on 31.12.2019 the Appellant was escorted for mental assessment. PW4 produced Discharge summary, mental assessment Report and PM report as exhibits.

PW5 Dr. David Keboi conducted PM on the body of the deceased and was of the opinion that death was caused by excessive bleeding secondary to stab wounds. He produced the PM Report as Ex P 3.

PW6 Rodgers Mwikwabe testified that he was asleep on the night of 26<sup>th</sup> December 2019 when his brother went to wake him up and informed him that their brother James had been killed. That when they went to the scene, they did not find any one in that home. That they found the body in the sitting room. They went to Kehancha Police Station and reported and returned with police to the scene and the body was removed to the mortuary. PW6 said that the body was identified by his brother Thomas Otaigo before PM was done. That later they learnt that the person who killed their brother was admitted at Migori County Hospital. He led police to Migori County Hospital and found the Appellant. He said he did not know the Appellant before.

In cross examination PW6 said he learnt his deceased brother and the Appellant were fighting over a girl.

PW7 testified that on 26<sup>th</sup> December 2019 he was asleep when Gisiri Philip, Oginga George and Mukami went to inform him that his brother

had been stabbed. That they wanted him to go and help. That he rushed to the house of Kimaru Kibuna and found the deceased lying on the floor in the house. That he returned home screaming and called his brother Rodgers Iresa and they returned to the scene as they raised alarm. That several people responded and called the police.

PW7 said that they learnt it was the Appellant who stabbed the deceased

When the Appellant was placed on defense he gave unsworn statement and said that all the witnesses who testified were told what happened. He said that on 24<sup>th</sup> December 2019 he was sick and that he was taken to hospital and informed that a case of manslaughter had been reported and he wanted him to record a statement. He said that on 29.12.2019 he was surprised when he was charged with the offence he did not commit.

Directions were taken for hearing of appeal by way of written submissions on 29<sup>th</sup> September 2025 but it appears none were filed and the charge sheet which copy the Appellant said he had in custody was also not availed. This court has therefore proceeded to determine this matter based on the grounds of appeal and records of the trial court.

### **ANALYSIS AND DETERMINATION**

This being the first appellate court, my duty is well spelt out namely; to re-evaluate the evidence tendered before the trial court and subject it to a fresh analysis so as to reach an independent conclusion as to whether or not to uphold the decision of the trial court. In the often cited case of **Okeno v Republic [1972] EA 32**, the East Africa Court of Appeal stated on the duty of the court on first appeal that:

**“An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination.”**

Likewise, in the case of **Mark Oiruri Mose vs R (2013) eKLR**, it was reiterated that:

**“... the first appellate court has the duty to revisit the evidence tendered before the trial court, afresh analyze it, evaluate it and come to its own independent conclusion on the matter but always bearing in mind that the trial court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and to give allowance for that.”**

Having considered the grounds of Appeal, and reviewed/revisited the evidence tendered before the trial court afresh as well as the submissions by the rival parties, the issues for determination are:

- 1. Whether the conviction for manslaughter was safe and supported by the evidence.**
- 2. Whether the sentence of ten (10) years was lawful and appropriate in the circumstances.**

On whether the conviction was safe, PW1 was the only eyewitness. She was in close proximity to both the deceased and the Appellant. Her account—that the deceased stabbed the Appellant first, and that the Appellant disarmed him and stabbed him multiple times—remained consistent and was not shaken on cross-examination. The testimony of PW1 was corroborated By the Appellant’s own admissions to PW3 and PW4; the Appellant’s stab wound, confirming an initial assault by the deceased and the medical evidence showing multiple stab injuries on the deceased. This Court finds no misapprehension of the evidence.

On the issue of intoxication and the “chang’aa den” argument, intoxication under sections 13(4) - (6) of the Penal Code does not constitute a defence unless involuntary. The fact that both parties had consumed alcohol does not negate liability for manslaughter.

On the issue of provocation and self-defence, the deceased was the initial aggressor, which is an important mitigating factor. However, after being disarmed, the Appellant stabbed the deceased multiple times, including a fatal abdominal wound. Self-defence does not permit disproportionate force, and the Appellant’s response exceeded what was reasonably necessary to avert danger. The trial court correctly concluded that his conduct amounted to unlawful killing, thereby satisfying the ingredients of manslaughter.

On whether the Appellant’s defence was ignored the unsworn denial was considered but reasonably rejected. It did not explain his injuries, nor did it displace the coherent and corroborated testimony of the prosecution witnesses.

Upon re-evaluation, the Court finds that the trial magistrate properly directed himself and the evidence overwhelmingly supports the conviction and the same is upheld.

On whether the sentence was excessive the offence of manslaughter under Section 205 of the Penal Code carries a maximum of life imprisonment. A sentence of 10 years is therefore lawful. However, sentencing must be proportionate and consider the offender’s degree of blameworthiness. In this case the deceased was the initial aggressor; the incident arose from a spontaneous, drunken altercation; the Appellant himself suffered stab injuries and he was admitted and

treated for the same; there was no evidence of premeditation and the witnesses had no grudge against the Appellant.

In the converse the Appellant inflicted multiple stab wounds; one abdominal wound was fatal; and he used a dangerous weapon. Considering these factors and comparable sentencing trends for manslaughter arising from fights (*Republic v Joseph Otieno*; *Republic v Daniel Kiplangat Cheruiyot*; *Republic v Joseph Olale*), terms between 5 and 7 years are common where provocation and excessive self-defence are evident.

This Court is satisfied that the trial court did not sufficiently factor the partial elements of self-defence and provocation, and the sentence is therefore manifestly harsh in the circumstances. The Court finds reason to interfere with the sentence.

The sentence of 10 years' imprisonment is hereby set aside and substituted with the term already served of 4 years and 8 months. The Appellant shall be released forthwith unless lawfully detained.

Right of appeal 14 days.

Orders accordingly.

**DATED, SIGNED AND DELIVERED AT MIGORI THIS 5<sup>TH</sup> DAY OF  
FEBRUARY, 2026.**

**ONG'INJO**

**HON. ANNE ADWERA-  
JUDGE**

**In the Presence of:**

Victor - Court Assistant

Mr. Oimbo - for the Respondent/ State

Appellant-