

**IN THE COURT OF
APPEAL AT KISUMU**

(CORAM: ASIKE-MAKHANDIA, OMONDI & KIMARU, JJ.A)
CRIMINAL APPEAL NO. E054 OF 2024

BETWEEN
FRANCIS AMULEI ISAYA.....APPELLANT
AND
REPUBLIC.....RESPONDENT

*(Being an appeal from the Judgment of the High Court of
Kenya at Bungoma (Kemei, J.) dated 19th April, 2024*

in
HCCRA No. 53 of 2020)

JUDGMENT OF THE COURT

1. **Francis Amulei Isaya**, the appellant herein, was charged alongside three others with the offence of **murder** contrary to **Section 203** as read with **Section 204** of the **Penal Code**. The particulars of the offence were that on 26th December, 2018, at Nambusi 'B' Village, Butonge Sub-location, Malakisi Location, in Bungoma West Sub-County, within Bungoma County, the appellant and his co-accused jointly murdered **George Namalwa Wekesa**. The appellant entered a plea of not guilty and his trial soon thereafter ensued.
2. During trial, the prosecution called seventeen (17) witnesses.

PW1, **Xavier Wamalwa**, told the court that on 26th

December, 2018, at about 4.00 p.m., he was in the company
of his uncle

(the deceased) when they saw the Area Assistant Chief approaching, accompanied by six police officers. Upon seeing the officers, the deceased took flight. The police officers gave chase, and in the course of the pursuit, one officer fired his firearm into the air. PW1 testified that when the officers caught up with the deceased, one officer started kicking him on the chest, while another, who he identified as the appellant, hit the deceased using a rifle. The deceased started rolling on the ground while begging for water. Villagers who heard the gunshots gathered at the scene. He recalled that the deceased was eventually placed in a vehicle and taken away by the officers. Later that evening, he was informed that the deceased had died. PW1 stated that three days later, he was invited to participate in an identification parade at the police station where he identified the appellant as the officer who hit the deceased with his rifle.

3. PW2, **Michael Tukai**, PW3, **Moses Wamukota**, PW4, **Wilson Matisi**, and PW15, **Jemimah Wekesa**, were among the villagers who heard the gunshot and rushed to the scene of crime. PW15 told the court that she was at home on 26th

December, 2018, at

about 2.30 p.m., when she heard a gunshot. She went outside

and saw four police officers in hot pursuit of the deceased. She stated that the deceased slowed down and raised his hands up. One of the police officers, who she identified as the appellant, hit the deceased on his head with a rifle. She stated that the other three officers (2nd, 3rd and 4th accused) joined in and started kicking the deceased. It was her evidence that the deceased was on the ground screaming, while pleading to be given water.

4. PW2, PW3 and PW4 did not witness the deceased being assaulted by police officers. It was their evidence that by the time they got to the scene, they saw police officers with the deceased who was rolling on the ground, and asking for water. The deceased was at the time being arrested for allegedly selling illicit brew. They testified that they did not see any injuries on the deceased's body. They reiterated that the appellant was carrying a rifle.
5. PW5, **John Wekesa**, is the deceased's father. He testified that he received a phone call on 26th December, 2018, and was informed that his son had been badly beaten by police officers and had been taken into custody. He was directed to go to

Malakisi Health Centre where the deceased had been

pronounced dead. He testified that when a post mortem examination was carried out, it determined that the deceased died due to head injuries caused by a blunt object.

6. PW9, **Francis Waswa**, was the then Butonge area Assistant Chief. It was his evidence that due to the rampant sale of illicit brew in his area, he sought the assistance of the OCS Malakisi Police Station, CIP **Samuel Kipngeno** (PW6), in organizing an operation to arrest the culprits. The officers who were involved in the raid aimed at apprehending illicit brewers at Butonge Sub-Location were ten in number, among them the appellant, his three co-accused, PW7, PC **Purity Thiongo**, PW8, PC **Vicky Munyi**, PW10, CPL **William Konya**, and PW14, CPC **Cornelius Kipkosgei**.
7. The team was divided into two groups: one group went to patrol Matunda Village, while a team of six officers, including the appellant, accompanied the assistant chief (PW9). PW9 recalled that he directed the officers to an area in Nambusi Village that was notorious for selling *chang'aa*. After sometime, he heard gunshots. He rushed to the scene and found the officers with the deceased. He was lying on the ground. PW9 recalled that he

was informed that the deceased had had too much to drink,
and

was requesting for water. They declined to give him water, fearing that he may die. The police rushed him to hospital instead. He was later informed that the deceased died while at the hospital. Upon cross-examination, PW9 stated that he did not witness the officers assault the deceased. He testified that the deceased informed him that he had been drinking alcohol.

8. PW10 and PW14 were among the officers who accompanied PW9, together with the appellant and the three co-accused. They testified that on arrival, they found a group of people drinking alcohol inside a thicket. When the people spotted them, they started running away. PW10 and PW14 stated that the appellant, who was armed with a G3 rifle, fired a gunshot in the air. The deceased then emerged into the open field carrying a bag slung over his shoulder. They testified that the appellant and the three co-accused persons pursued him. According to PW10, the deceased fell to the ground and abandoned the bag, after which he resumed running. He fell again a few meters thereafter, and did not get up. When PW10 and PW14 got to the scene, they found the appellant and his co-accused, as well as the area

assistant chief with the deceased.

The deceased was begging for water. PW10 stated that he called

for the police vehicle which ferried the deceased to Malakasi Health Centre, where he died shortly thereafter. It was their evidence that they did not see the appellant or his co-accused assault the deceased, and that the deceased did not complain of having been assaulted.

9. PW7 and PW8 were part of the team that went to Matunda Village. They were not present at the scene when the deceased was apprehended. However, when the commotion began, they were alerted to proceed to the scene of crime. It was their evidence that they found the deceased lying on the ground. He was thereafter placed in their vehicle and taken to Malakasi Health Centre. They stated that within the group that arrested the deceased, the appellant had a G3 rifle while PC Otieno (3rd co-accused) had a hand gun. The rest of the officers were armed with canes.

10. PW11, IP **Salinah Aiyabei**, conducted identification parades on 19th January, 2019, in respect of five, out of the six police officers who were alleged to have been at the scene when the deceased was apprehended. The identifying witnesses were two in number, PW1, **Xavier Wamalwa**, and PW15, **Jemimah**

Wekesa. It was her evidence that Emmanuel Otieno (3rd co-

accused) was identified by both witnesses, while **Eutyclus Wambugu** (4th co-accused) and **Paul Kilonzo** (2nd co-accused) were identified by PW15 only. PW12, retired CIP **Francis Wafula**, oversaw the identification parade in respect of the appellant, which was conducted on 21st January, 2019. It was his testimony that the appellant was identified by both PW1 and PW15. He recalled that the appellant was apprehensive that the identifying witnesses recognized him as he had already been arraigned before the trial court.

11. The pathologist who conducted the post mortem examination of the deceased's body was PW16, **Dr. Dickson Mchana**. It was his evidence that the deceased had small bruises on both elbows and right knee; bruises on the left side of his forehead under the skin; bleeding in his left chewing muscle; bruise on the left back side of his scalp; and bleeding on the brain, with moderate swelling of the general brain. He stated that the contents of his stomach suggested that he had ingested alcohol. After examination, PW16 formed the opinion that the deceased died due to the head injury caused by blunt force trauma. He stated that there

was nothing to suggest that the deceased had any underlying problem. Upon cross-examination, PW16 was

categorical that the deceased did not die due to alcohol ingestion or epilepsy, but due to the head injuries.

12. PW17, Isaac Kirwa, from Independent Policing Oversight Authority (IPOA), investigated this case. The deceased was alleged to have been fatally assaulted by police officers. He stated that he interviewed witnesses, visited the scene of crime and obtained documentary evidence including a list of the police officers involved in the operation, OB extracts, post mortem report, arms movement register and crime scene photographs. He testified that according to the post mortem report, the deceased died due to a closed head injury caused by blunt force trauma. He also attended identification parades where the appellant and three co-accused were picked out by two witnesses as the officers who assaulted the deceased. He recalled that the appellant was identified as the one who hit the deceased on the head using a rifle. After concluding his investigations, he recommended that the appellant and his co-accused be charged with the murder of the deceased.

13. The appellant was placed on his defence. He gave sworn evidence. He conceded that he was part of the team of

officers that conducted the operation at Butonge area on
26th

December, 2018, aimed at nabbing illicit brewers. It was his evidence that when they got to Nambusi 'B' village, they saw a group of people consuming illicit brew inside a thicket. Upon seeing the officers, the group scattered in all directions. He stated that the deceased, who was among the group, ran towards an open field, while carrying a black bag. He testified that the deceased fell down, dropped the bag, started running again and fell down for the second. He stated that, together with three co-accused, he pursued the deceased and eventually caught up with him. They found him lying on his back, complaining of sharp abdominal pain. The deceased asked them for water. He said that he had consumed alcohol on an empty stomach.

14. The appellant recalled that at this time, members of the public had gathered at the scene, and that one of them exchanged words with the area assistant chief, which prompted the appellant to fire a shot in the air with his rifle to contain the situation. He stated that some of the villagers claimed the deceased was epileptic. It was his testimony that a fellow officer called for their vehicle which was used to ferry the deceased to Malakisi Health Centre. The appellant testified that he joined the team that escorted other suspects who had been arrested to the police station. They

were later informed that the deceased

had died. It was his evidence that the medical officer who examined the deceased at the health Centre did not note any visible injuries on his body.

15. It was the appellant's evidence that he was arrested on 10th January, 2019, and arraigned before court the following day. He was later subjected to an identification parade on 20th January, 2019. It was his testimony that the two identifying witnesses, PW1 and PW15, had already seen him in court before they picked him out in the parade. The appellant denied ever assaulting the deceased.
16. After full trial, the appellant was found guilty as charged. The three co-accused were however acquitted. Upon his conviction, the appellant was sentenced to serve twenty (20) years imprisonment.
17. The appellant, aggrieved by this decision, lodged this first appeal. He proffered five (5) grounds of appeal. In a nutshell, the appellant was aggrieved by his conviction and sentence, contending that: the prosecution failed to establish its case beyond reasonable doubt; the trial court failed to properly analyze the evidence thereby arriving at a wrong conclusion; malice aforethought was not established by the prosecution; the trial court failed to appreciate his defence which displaced the prosecution's culpatory evidence; and that his

sentence, if all,

ought to run from the date of his arrest and not the date of his conviction.

18. The appeal was heard by way of written submissions. Mr.

Omondi learned counsel appeared for the appellant. It was the appellant's submission that the prosecution witnesses gave conflicting evidence regarding the cause of the deceased's death. He contended that the evidence on record showed that the deceased had consumed alcohol on the material date, and that the pathologist acknowledged that alcohol can cause death. The appellant further argued that, apart from PW1 and PW15, none of the other prosecution witnesses testified to having seen the appellant strike the deceased with the butt of a rifle. He maintained that none of the witnesses observed any visible injuries on the deceased's body. He asserted that there was a possibility that the body may have been tampered with during transportation or storage. Additionally, he argued that the deceased did not say that he had been assaulted, but only mentioned that he had consumed alcohol and requested for water.

19. The appellant further submitted that the evidence of

the

pathologist on deceased's cause of death was not binding on
the

court, and that the deceased's dying declaration absolved the appellant of any wrong doing. He was of the view that PW15's evidence, to the effect that she saw the appellant strike the deceased with a rifle, was unreliable. He argued that other witnesses who arrived at the scene before her, namely PW4 and PW14, testified that they did not witness any such assault on the deceased. He urged us to find that there was co-existing evidence that the deceased might have hurt his head while he was rolling on the ground after being apprehended. He contended that the parade identification had no evidential value as the witnesses had already seen the appellant when he was arraigned in court.

20. On the issue of *mens rea*, it was the appellant's submission that no evidence was adduced to demonstrate that he had any premeditated intention to kill the deceased. He contended that he was at the scene of crime in the course of his official duties and that he had not known the deceased prior to the material date. He further asserted that there was no evidence of any prior grudge or ill will between him and the deceased. The appellant urged that his defence that he never assaulted the deceased was

support by the evidence of PW10 and PW14. On sentence, it was

the appellant's contention that the time he spent in remand custody was not considered in computing his sentence. In the end, he urged us to allow his appeal as prayed.

21. The appeal was not opposed. **Ms. Mwaniki** learned Assistant Director of Public Prosecutions appeared for the State. It was her submission that the evidence on identification was not sufficient to sustain a conviction, and that the eye witness accounts were inconsistent. She maintained that PW1 failed to specify which part of the body the appellant hit the deceased with the rifle. It was her submission that PW15's evidence that the appellant was the person who inflicted the fatal blow on the deceased was challenged during cross-examination. There was material contradiction on what was recorded in her statement vis-a-vis her testimony in Court. She contended that the third eye witness, PW10, stated that he did not see any officer assault the deceased. Learned prosecution counsel asserted that the contradictions in the statements of the three witness was material to the extent of raising doubt as to the credibility of the evidence, and therefore the appellant's conviction was unsafe.

22. We have carefully considered the record of appeal, the submissions by both parties, and the law. Much as counsel for

the respondent conceded the appeal, that concession is not binding on this Court. We still have to carry our duty as the first appellate Court as set out in **Gabriel Kamau Njoroge v Republic [1987] eKLR** as follows:

“As this court has constantly explained, it is the duty of the first appellate court to remember that the parties to the court are entitled, as well as on the questions of facts as on questions of law, to demand a decision of the court of first appeal, and that court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions, though it should always bear in mind that it has neither seen or heard the witnesses and to make due allowance in this respect. (see Pandya v R [1957] EA 336, Ruwala v R [1957] EA 570)”.

23. The issues falling for determination by this Court can be summed up as follows:

- i. Whether the prosecution established the ingredients of the offence of murder, to the required standard of proof beyond any reasonable doubt; and,***
- ii. Whether the time spent by the appellant in remand custody was computed in his sentence.***

24. To establish the charge of murder, the prosecution was required to prove the death of the deceased and its cause thereof, that the death of the deceased was caused by the

appellant, and that

the appellant had malice aforethought in committing the

murder. The death of the deceased was not contested. However, the appellant contended that the cause of death was not sufficiently established by the prosecution. He also denied the allegation that he was involved in the killing the deceased.

25. The prosecution's case substantially relied on the evidence of two eyewitnesses, PW1 and PW15, both of whom testified to having witnessed the assault upon the deceased on 26th December, 2018. PW1 testified that at about 4.00 p.m., he was in the company of the deceased when they saw the Area Assistant Chief approach them in the company of several police officers. Upon seeing them, the deceased ran off and the officers gave chase. During the pursuit, a gunshot was fired in the air. According to PW1, when the officers caught up with the deceased, he was assaulted. He stated that one officer kicked the deceased on the chest while another officer, whom he identified as the appellant, struck the deceased with the butt of the rifle. The deceased fell to the ground, rolled, and pleaded to be given water. PW1 further testified that villagers began gathering at the scene of crime after hearing the gunshot. The deceased was eventually

placed in a vehicle and taken away by
the officers. He later learnt that the deceased had died.

26. PW15 similarly testified that upon hearing the gunshot that afternoon, she rushed outside and observed police officers pursuing the deceased. She recalled that when the deceased slowed down and raised his hands in apparent surrender, one officer, whom she identified as the appellant, struck him on the head with the butt of a rifle. She further stated that other officers joined in and kicked the deceased as he lay on the ground while pleading for water. It was her evidence that she was two meters away from the scene when she observed all these events.

27. The medical evidence on record established that the deceased suffered small bruises on both elbows and right knee, injury on the left side of his forehead under the skin, bleeding in his left chewing muscle, bruise on the left back side of his scalp, and bleeding on the brain, with moderate swelling of the general brain. The pathologist, PW16, formed the opinion that the deceased died due to a head injury caused by blunt force trauma.

28. The appellant challenged his conviction on the basis that the evidence of identification was unreliable and that the

prosecution failed to prove that he was the person who
inflicted

the fatal injury. It is common ground that the two civilian eyewitnesses (PW1 and PW15) participated in an identification parade after they had already seen the appellant during his arraignment in court. That procedural irregularity undoubtedly weakened the probative value of the parade evidence. Once a witness has seen a suspect in custody or in court, the evidential value of a subsequent parade is diminished. However, the question remains whether, even discounting the police parade, the remaining evidence was sufficient to link the appellant to the assault that caused the deceased's death.

29. PW1 and PW15 testified that they saw the deceased get struck on the head with a rifle butt during the course of his apprehension. They were independent civilian witnesses with no demonstrated motive to falsely implicate the appellant. PW1, upon cross-examination went further to detail that the appellant was wearing a yellow shirt, was armed with a rifle, and that he fired a shot in the air. Their accounts were materially consistent on the fact that a blow was delivered to the deceased's head with a rifle butt. The appellant argued that their testimony was unreliable because other police

officers

present at the scene stated that no such assault took place.
The

trial court, having had the advantage of observing the demeanour of the witnesses, was inclined to prefer the testimony of the independent witnesses, particularly given the collegial relationship between the appellant and the officers who denied that the assault ever occurred. The mere fact that police officers did not corroborate the assault does not render the evidence of PW1 and PW15 inherently unreliable or incredible.

30. We find it crucial to point out that the evidence on record was consistent that the appellant was the only officer at the scene of crime armed with a G3 rifle. This fact was conceded to by the appellant. The eyewitnesses described how the deceased was struck with a rifle butt. No evidence was led that any other officer among those who apprehended the deceased carried such a weapon. The logical inference arising from the totality of the evidence is that the person who struck the deceased with a rifle butt was the officer in possession of that rifle, namely, the appellant. Thus, even if the identification parade evidence were to be excluded entirely from consideration, the circumstantial evidence placing the G3 rifle exclusively in the appellant's possession

provided a cogent link between him and the assault
occasioned upon the deceased.

31. The pathologist was categorical that the cause of death was head injury caused by blunt force trauma. This medical finding materially corroborated the eyewitness accounts that the deceased was struck on the head with a rifle butt. There was no credible medical evidence suggesting that alcohol consumption caused or materially contributed to the deceased's death. While it was acknowledged that alcohol can, in some circumstances, cause death, the post-mortem findings in this case identified head trauma as the cause of death. The suggestion that the death may have resulted solely from alcohol consumption was therefore inconsistent with the objective medical evidence. Similarly, the speculative suggestion that the body may have been tampered with during transportation or storage was not supported by any evidence. Courts cannot make a finding of fact on conjecture.

32. After a re-evaluation of the evidence, we are of the view that the prosecution's evidence was cogent, credible and consistent and dislodged the appellant's defence.

33. Having found that it was the appellant who inflicted the fatal blow that caused the deceased's death, the remaining question is whether the prosecution proved malice

aforethought. Malice

aforethought is defined by **Section 206** of the Penal Code as follows:

“Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances:

- a. 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;***
- b. 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;***
- c. an intent to commit a felony;***
- d. 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.”***

34. In this case, the trial court, having found that the appellant struck the deceased with a butt of a rifle, proceeded to infer malice aforethought from the nature of the weapon used and the injuries sustained by the deceased. With respect, we must re-evaluate whether the evidence on record supports that conclusion to the required standard of proof beyond reasonable doubt.
35. It is not in dispute that the appellant was on official duty at the

material time, and was participating in the apprehension of a

suspect who was fleeing a scene of crime upon seeing law enforcement officers. There was no evidence of prior interaction, grudge, or premeditated plan directed at the deceased by the appellant. The incident arose spontaneously in the course of pursuit and arrest of a suspect. The appellant was acting in the course of his official duties, albeit unlawfully used excessive force. The evidence, viewed as a whole, points more to the use of excessive and unlawful force in effecting an arrest rather than to a calculated or conscious design to kill. The appellant lacked the requisite *mens rea* to cause the death of the deceased.

36. It is our holding that the prosecution did not discharge the burden of proving malice aforethought beyond reasonable doubt. The conviction for **murder** under **section 203** of the **Penal Code** is therefore unsafe. We substitute the conviction for **murder** with a conviction for **manslaughter** contrary to section **202** as read with **section 205** of the **Penal Code**, the death having resulted from the appellant's unlawful and excessive use of force in the course of arrest, absent proof of malice aforethought.

37. On sentence, upon conviction by the trial court, the

appellant

was sentenced to serve a custodial sentence of twenty (20)

years. The appellant challenges his sentence on the sole ground that the period he spent in remand custody was not taken into account by the trial court. A perusal of the trial court record shows that the appellant was out on bond during the pendency of his trial.

38. However, having found the appellant guilty of the lesser but cognate offence of Manslaughter, his custodial sentence will of necessity be reduced downward. The custodial sentence of twenty years imprisonment imposed by the trial Court is set aside and substituted by a sentence of this Court. The appellant shall serve **ten (10) years imprisonment** from the date of his conviction. It is so ordered.

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

ASIKE-MAKHANDIA

.....

... JUDGE OF APPEAL

H.A. OMONDI

.....

... JUDGE OF APPEAL

L. KIMARU

.....

... JUDGE OF APPEAL

I certify that this is a true copy of original.

DEPUTY REGISTRAR.