

**IN THE COURT OF
APPEAL AT KISUMU**

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

CRIMINAL APPEAL NO. E064 OF 2021

BETWEEN

BENARD OKUMU OLALO.....APPELLANT

AND

REPUBLIC.....RESPONDENT

*(Being an appeal from the Judgment of the High Court of
Kenya at Busia, (Waweru, J) dated 8th October, 2020*

in

HCCRC No. 23 of 2017)

JUDGMENT OF THE

COURT

[1]This is a first appeal against the judgment of the High Court of Kenya at Busia in Criminal Case No. 23 of 2017, where the appellant, **Benard Okumu Olalo**, was tried, convicted and sentenced to death on the information charging him with murder contrary to **Section 203** as read with **Section 204** of the Penal Code. The particulars of the information were that on 2nd September 2017, at Namunyuenda village in Samia sub-county, Busia County, the appellant unlawfully murdered **Whitney Sirale**, “**the deceased**”, a child aged

approximately three years.

[2] The appellant pleaded not guilty to the information and his trial thereafter ensued. The prosecution's case was built on the testimonies of several witnesses, including family members, police officers, and a medical expert. This is how it panned out!

PW1, Ibrahim John Ringo, a hotelier and grandfather to the deceased was informed by Maglick Abdurahaman of a violent altercation between his daughter, Zuhura Higten Ringo, (PW5) and the appellant. He sent his wife to the scene, only to find that the deceased had been killed as a result. Upon visiting the scene, he found the deceased's body on the floor and observed that PW5 was bleeding from her head and legs. He called the police, who came and removed the body to Port Victoria Sub-County Hospital mortuary. He subsequently attended the post mortem of the deceased and identified the body of the deceased to the pathologist, Dr. Angira Stephen (PW3) for purposes of post mortem.

[3] PC Kiplagat Willy Kipkemoi, (PW2) received a report from the Deputy Officer Commanding Port Victoria Police Station about the incident. Upon visiting the scene, he found the deceased's body with multiple head injuries. PW5 informed him that she had quarreled with the appellant and during the altercation, the appellant had turned his aggression on her and the deceased assaulting them with a stick

embedded with nails.

He did so continuously between the hours of 9am and 2pm when the deceased collapsed and passed on.

[4] PW3, a medical officer based at Port Victoria Sub-County Hospital, conducted the post-mortem on the body of the deceased, which was identified to him by PW1. He concluded that the cause of death was blunt force trauma resulting in subdural hematoma.

[5] CIP Simon Mutugi Mpaku (PW4), then based at Port Victoria Police Station received a report from a village elder, one Meshack Ringo that the deceased had been killed by her father, the appellant. Upon arrival at the scene, he found the deceased's body with injuries to the head, thighs, and ribs. He interviewed PW5, who stated that the deceased had been called by the appellant's mother to take porridge. When she complied, the appellant slapped her and questioned her why she was going to eat again. When she protested, the appellant turned on her and the deceased with a wooden stick embedded with nails. The assault continued until the deceased collapsed and passed on. That PW5 then called her mother for assistance and when the appellant saw her in the company of police officers, he fled the scene and went to hide in Magunga Sub-County of Homa Bay County. Acting on a tip-off the police officers were able to trace the appellant at his said hideout, arrested and subsequently

charged him with the information.

[6] PW5, the mother of the deceased and wife to the appellant, gave a detailed and graphic account of the events preceding the death of the deceased. She stated that the appellant began assaulting them at around 9:00 a.m. after the deceased was called by the appellant's mother to take porridge which he did not agree with. He assaulted them continuously until 2:00 p.m. when the deceased collapsed whereupon he stepped on her before picking her up taking her to his mother. She contacted her mother regarding the incident and when he saw her mother accompanied by police officers approach the home, the appellant fled to Magunga Sub-County in Homa Bay County where he was later arrested and charged with the information.

[7] The last witness PW6, APC Vincent Aira of Magunga Sub-County headquarters is the one who flushed out the appellant from his hideout aforesaid and handed him over to the police officers from Port Victoria Police Station for processing.

[8] In his defence, the appellant denied the information and claimed that on the material day he had spent the night at Busende beach and returned home the following morning. Upon arrival, he found PW5 assaulting the deceased for allegedly going to eat at his mother's house. He intervened and took the deceased inside the

house. PW5 in disgust poured dirty water she was using to clean utensils on him and ran into

the house. When he followed her, he found the deceased lying on the floor and she told him that she had been hit by the house door. They then took the deceased to the nearby clinic where she later pronounced dead.

[9] The trial court after evaluating the evidence tendered by both sides, came to the conclusion that the appellant's version of events simply did not add up and was therefore an afterthought, noting that it had not even been put to PW5 during cross-examination. The medical evidence did not support the claim that the deceased was injured by a door. It found that the injuries sustained were consistent with prolonged and brutal assault, and that the appellant was the perpetrator. It held that malice aforethought was established, given the nature of injuries and duration of the assault. The trial court accordingly found the appellant guilty of the information, convicted him and sentenced him to death.

[10] Dissatisfied with both the conviction and sentence aforesaid, the appellant filed this appeal on grounds that the trial court erred both in law and fact by not: impugning the credibility and reliability of the evidence adduced by PW1 through to PW5; cautioning itself against the dangers of relying on uncorroborated or biased testimony; questioning the recovery and handling of the alleged murder

weapon; and not faulting the investigations which were shoddy. The appellant also raised

his concerns regarding procedural fairness of the trial, alleging that the trial court demonstrated open bias, failed to consider his alibi defence, and improperly shifted the burden of proof to him. He asserted that the conviction and sentence were arrived at without his submissions being considered, thereby violating his right to a fair trial under **Article 50(2)** of the Constitution. Additionally, he challenged the legality of the sentence imposed on him claiming that the mandatory nature of murder sentences were invalidated by the Supreme Court of Kenya in **Francis Karioko Muruatetu vs Republic [2017] eKLR**. He concluded by praying that the appeal be allowed in its entirety.

[11] When the appeal was called out for hearing, the appellant was represented by **Ms. Nduhukire**, learned counsel whereas **Ms. Mutellah**, learned Prosecution counsel, appeared for the respondent. Both elected to rely entirely on their written submissions that they had filed and exchanged.

[12] Counsel for the appellant submitted that the prosecution failed to prove the information against the appellant beyond reasonable doubt. She argued that the evidence presented was riddled with contradictions, inconsistencies, and was at most hearsay. Key witnesses, including PW1, PW2, PW4, and PW5, did not directly

witness the fatal assault, and their testimonies were either second-hand or internally inconsistent.

Indeed PW4, the investigating officer admitted to conducting minimal inquiries and even failed to recover any murder weapon.

[13] Counsel further contended that the trial court erred in dismissing the appellant's alibi defence, which placed him far away from the scene of crime at the material time. She asserted that the burden of disproving the alibi was improperly shifted to the appellant, contrary to established legal norms.

[14] She challenged the credibility of the evidence of PW5, whose testimony was central to the prosecution's case. She submitted that her account was uncorroborated, emotionally charged, and possibly influenced by a family grudge. She questioned why no alarm was raised during the alleged prolonged assault and why no neighbour or relative intervened.

[15] On forensics, Counsel highlighted the absence of scientific testing of the alleged murder weapon. No dusting for fingerprints or blood analysis was undertaken, and no forensic expert testified to confirm the weapon that caused the fatal injuries. She argued that this evidentiary gap undermined the entire prosecution's case.

[16] On malice aforethought, it was counsel's submission that it was not proved. She contended that the incident was not premeditated and that

the prosecution failed to prove intent to kill or cause grievous harm to the deceased.

[17] Finally, counsel challenged the legality and proportionality of the sentence imposed. She invoked the Supreme Court decision in **Francis Karioko Muruatetu & Another v Republic (supra)**, which declared the mandatory nature of the death sentences in murder cases unconstitutional. She submitted that the trial court failed to consider mitigating factors prior to sentencing. She pleaded with this Court to either allow the appeal, quash the conviction and set aside the sentence, or in the alternative, substitute the death sentence with a term not exceeding fifteen years in the event we uphold the conviction.

[18] Opposing the appeal, counsel for the respondent maintained that the conviction of the appellant and the sentence imposed thereof were proper.

[19] Counsel emphasized that the evidence of PW5, who was present throughout the incident gave a detailed and consistent account of what transpired. PW5's testimony was corroborated by PW2 and PW4, who visited the scene promptly and recovered the weapon next to the deceased's body. PW3, the medical officer, confirmed that the cause of death was subdural hematoma due to blunt force trauma,

consistent with the injuries described by PW5.

[20] The appellant's claim that the deceased was injured by a door was not put to PW5 during cross-examination and was therefore deemed an afterthought.

[21] On malice aforethought, counsel submitted that the prolonged and brutal nature of the assault, the use of a dangerous weapon, and the deliberate targeting of a vulnerable body parts of the deceased's body satisfied the requirements of malice aforethought. Counsel cited **Nyambura & Others v Republic [2001] KLR 355**, in which it was held that malice aforethought may be inferred from the nature of injuries and the manner of attack on the deceased.

[22] Regarding the alibi defence, counsel noted that the appellant's own testimony placed him at the scene shortly before the deceased's death, contradicting his claim of absence. The trial court found the alibi unconvincing and unsupported by any corroborative evidence, and rightly rejected it. In support thereof, the respondent cited **Chai v Republic [2022] KECA 495 (KLR)**, in which it was held that an alibi must be weighed against the totality of the prosecution's case and cannot stand where direct evidence places the accused at the scene of crime.

[23] Turning to sentence, counsel acknowledged the Supreme Court's decision in **Francis Karioko Muruatetu & Another v Republic**

(supra).

However, counsel submitted that the trial court still retained the discretion to impose the ultimate death penalty where circumstances justify. Given the gravity of the offence and the brutality inflicted on a defenceless three-year-old deceased, the sentence of death imposed was proportionate, lawful and justified in the circumstances.

[24] Counsel in the ultimate prayed that the appeal be dismissed in its entirety.

[25] This is a first appeal and as such, we are duty-bound to re-evaluate and re-analyze the entire evidence tendered during the trial and draw our own independent conclusions, while bearing in mind that the trial court had the distinct advantage of seeing and hearing the witnesses as they testified and assessed their demeanor which we must therefore give due allowance to that advantage. These seminal statements of principle are found in **Okeno v Republic [1972] EA 32, Kiilu & Another v Republic [2005] 1 KLR 174, EMS v Republic [2020] KECA** and more recently **Odhiambo alias Ben & Another v Republic [2025] KECA**.

[26] The appeal, in our view, turns on two issues: first, whether the conviction of the appellant on the information of murder was safe in the light of the evidence which has been impugned by the appellant; and second, whether the sentence imposed was lawful and

proportionate.

[27] Interrogating the conviction of the appellant, we begin with the evidentiary matrix. PW5, gave a detailed, compelling and time-stamped account of a prolonged assault on the deceased and herself by the appellant within the appellant's house from around 9:00 a.m. to 2:00 p.m., with a stick embedded with nails. PW2 and PW4, police officers who promptly visited the scene of crime upon receipt of the report, found the deceased with injuries to the head, thighs, and ribs; recovered the wooden stick embedded with nails next to the body; and recorded the account from PW5 and other relatives consistent with the assault narrative. PW3, the medical officer, observed cut wounds on the forehead and thigh, a bruise on the parietal scalp, and internally a large subdural hematoma compressing the brain, concluding death resulted from blunt force trauma. PW1's testimony was consistent with what was found at the scene and with the post-mortem he witnessed.

[28] Upon our own re-evaluation, these strands cohere: PW5 was an eye-witness to events within a small domestic space, the account was internally consistent and externally corroborated by immediate police observations and medical findings, and the physical exhibit matched the described assault mechanism. Recognition and identification of an accused within a domestic setting by a close

relation in broad daylight is considered more reliable, satisfactory and assuring than visual

identification of a stranger in difficult circumstances. (See **Anjononi & Others v Republic [1980] KLR 59**).

[29]The foregoing satisfies the first two ingredients of murder, which the prosecution must prove being; the death of and cause thereof of the deceased and secondly, the architect of the murder. On *mens rea*, or malice aforethought, which is the third ingredient, **Section 206** of the Penal Code sets out circumstances from which malice aforethought may be inferred, including and which is relevant in this case, intent to cause grievous harm or knowledge that the act will probably cause death or grievous harm to the victim. Our courts also infer malice from the nature of the weapon used, the manner of its use, the part of the body targeted, the severity and multiplicity of injuries, and the conduct of the assailant before, during, and after the attack (see **Nzuki v Republic [1993] KLR 171**; and **Nyambura & Others v Republic (supra)**). The record shows that a vulnerable three-year-old deceased was subjected to hours of assault, with a dangerous weapon and the stepping on her chest by the appellant, resulting in fatal head trauma. The viciousness, duration, and targeting of vital parts of the deceased's body permit a clear inference of malice aforethought within **Section 206(b)** of the Penal Code.

[30]The appellant did not deny or counter the prosecution evidence that soon after the incident, he disappeared from the homestead and went

into hiding in Magunga Sub-County, Homa Bay County where he was eventually flashed out and subsequently charged. This not only manifests further malice aforethought but is also further evidence of his participation in the crime.

[31] The appellant's defence, initially placed him far away from the scene, but ultimately brought him at the scene of crime, then morphosised into the deceased being injured by the door. The trial court noted that this purported door-injury narrative was not put to PW5 in cross-examination and emerged as an afterthought, a proper basis to discount its probative value thereof. The medical evidence refuted a single accidental "door-hit" mechanism; the multiplicity and distribution of injuries, together with the subdural hematoma, were consistent with repeated blunt force and not with a trivial household mishap. On the whole therefore, the appellant's defence was a hyperbole. It could not pass for an alibi. Of course, we are aware that the law on alibi is settled. Such a defence does not impose a burden on the accused to prove it but must be weighed against the totality of the prosecution evidence. Where credible direct evidence places the accused at the scene of crime and as the assailant, the alibi fails to raise reasonable doubt. **See Kiarie v Republic [1984] KLR 739; and Chai v Republic (supra).**

[32] We have considered the appellant's complaints regarding contradictions, hearsay evidence, investigative gaps and absence of forensics. The law does not demand perfection; it only demands proof beyond reasonable doubt. Minor inconsistencies that do not go to the heart of the prosecution case are immaterial as was the case here. The absence of forensic testing is not fatal where there is reliable eye-witness testimony corroborated by medical evidence and prompt police observations as again was the case here! See **Kiilu & Another v Republic (supra)**, and **section 143 of the Evidence Act**). PW5 gave direct evidence as to what transpired and, on that basis, alone, the appellant's complaint about hearsay evidence cannot hold.

[33] The complaint that the trial court shifted the burden of proof or ignored appellant's submissions implicates **Article 50(2)** of the Constitution. We have carefully reviewed the trial court's judgment and reasoning. We are satisfied that it assessed the defence case, explained why the door-injury claim was untenable, and anchored its findings on the medical and testimonial evidence. We discern no improper burden-shifting; rather, the court applied the settled test. No material misdirection emerges that would vitiate the conviction. In sum, the conviction was safe.

[34] As to the sentence, **Section 204** of the Penal Code prescribes the death sentence for murder, but following the Supreme Court decision in **Francis Karioko Muruatetu & Another v Republic (supra)**, the mandatory nature of the death sentence was declared unconstitutional and or waived, and sentencing discretion, with individualized consideration of mitigating and aggravating factors, restored. A first appellate Court's power to interfere with a trial court's sentence is circumscribed, as sentencing is primarily within the trial court's discretion. The appellate court will not easily interfere unless specific grounds are established, focusing on errors of principle or instances where the sentence is shockingly inappropriate or exceedingly excessive. For instance, where the court took into account an irrelevant factor, ignored a relevant one, applied a wrong principle. See **Sichei v Republic [2025] KECA 152 (KLR)**.

[35] The record depicts an exceptionally brutal assault on a defenseless three-year-old child over several hours, employing a dangerous weapon and targeting vital parts of the body, culminating in fatal cranial injury. These are profound aggravating features. However, balancing the aggravating and mitigating circumstances, we find that while the death penalty was lawful, it was not the only

proportionate sentence available. The brutality of the offence justifies a long custodial term, but the

conflicting accounts of events, and absence of premeditation warrant moderation.

[36] Accordingly, we interfere with the sentence and substitute it with a custodial term of twenty-five (25) years imprisonment. In computing the sentence, the period between 15th July 2017 and 10th April 2018 before the appellant was released on bond shall be factored in. Similarly, the period between 17th December 2019 when his bond was cancelled to the date of sentence shall also be subtracted from the total sentence. To that limited extent the appeal on sentence succeeds.

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

ASIK-MAKHANDIA

.....
JUDGE OF APPEAL

H.A. OMONDI

.....
JUDGE OF APPEAL

L. KIMARU

.....
JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR