

**IN THE COURT OF  
APPEAL AT KISUMU**

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

**CRIMINAL APPEAL NO. E071 OF 2021**

**BETWEEN**

**DISHON NANGALAMA KHAOYA.....APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

*(Being an appeal from the judgment of the High Court of Kenya at  
Bungoma ( Riech, J.) dated 3<sup>rd</sup> day of March 2021*

*in*

**HCCRC No. 23 of 2017)**

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**JUDGMENT OF THE**  
**COURT**

1. The appellant, Dishon Nangalama Khaoya was charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code, on allegations that on 21<sup>st</sup> July, 2017 at Makemo village, Ndivisi Location in Bungoma East Sub County within Bungoma County, he murdered Silivano Wafubwa Khaoya (the deceased).
2. The appellant pleaded not guilty to the charge and the case proceeded to full hearing. The prosecution called a total of

seven

(7) witnesses and closed its case. The appellant adduced evidence in his defence denying the charge. He gave an alibi defence that he was elsewhere when the deceased was fatally stabbed.

3. In its determination, the trial court was satisfied that the evidence placed the appellant at the scene and that all the circumstances, taken together, created a complete chain, making it clear that the appellant committed the felonious act; he was then found guilty of murder and sentenced to 25 years imprisonment.

4. Aggrieved, the appellant is now before this court challenging the outcome on grounds that:

- (i) the learned Judge erred in law and in fact by convicting the appellant for murder when the prosecution failed to prove the essential element of malice aforethought beyond reasonable doubt.**
- (ii) the learned Judge erred in law and in fact by erroneously relying on the Appellant's Statement of Inquiry without adequately addressing its voluntariness and resolving its fundamental contradictions with the Appellant's sworn defence.**
- (iii) the learned Trial Judge erred in law and in fact by imposing an excessive sentence of Twenty-Five (25) years imprisonment.**
- (iv) the trial court erred in law by shifting the burden of proof to the appellant and expecting him to explain what happened to the deceased.**

5. On 20<sup>th</sup> July, 2017, at 3.00 pm, the appellant who was drunk and bleeding from the nose, approached his mother, Mary

Musanga Khaoya, PW1, and informed her, that he had been assaulted by the deceased, who was his younger brother. The mother advised him to wait, so that she could talk to the deceased and arbitrate over a dispute. At 4.00pm, an equally drunk and angry sibling in the person of the deceased, arrived and as PW1 tried to calm the situation, the agitated appellant walked away, muttering that a younger person could not press him down. Apprehensive as to how matters were escalating, PW1 reported the situation to her ailing husband, who advised her to report to the police. After making the report, on the way back, accompanied by police officers, she got information that her son, Silvano, the deceased had died after being stabbed with a knife by the appellant.

6. Dominic Wanjala, PW2, another brother to the agitated duo, confirmed that the appellant arrived home angry and bleeding from the nose; he wanted to set the deceased's house on fire, but he restrained him; he then went into the deceased's house and took a torch and a radio, and went away. Shortly, an equally angry deceased arrived, took note of his missing items and followed the appellant. PW2 followed them, only to find the

deceased bleeding from the chest. According to PW2, the deceased did not say who had injured him, but sought help saying he was dying; and added that:

***“The accused was in the house where the deceased was coming from. Accused had a knife. This is the knife. I took the deceased to Lugulu hospital. I found the deceased coming out of the house by the door saying help me I am dying. Accused was in the house. He had a knife on his right hand. The knife was blood stained. On arrival at hospital, he was examined and the doctor pronounced him dead.”***

7. Faith Munyeleti Khaoya, PW3 a sister to the duo confirmed seeing the appellant angrily storm into the deceased's house and carry away a radio and torch; shortly the deceased arrived and discovered that the appellant had taken the items from the house; and she saw an angry deceased follow the appellant; 30 minutes later, she saw the deceased on a motorcycle and PW2 shouting that the deceased was injured.
8. P.C. Peter Mukono, PW5, who took over investigations from retired Senior Sergeant Kibet, confirmed to the trial court that Senior Sergeant Kibet had received a call from OCS, visited the scene; and recovered a blood-stained knife from the appellant's house. The recovered knife was handed over to the government chemist for analysis. A DNA profile carried

out by Polycarp Luta

Kweyu, PW4, confirmed that the blood on the knife was human blood, and matched that of the deceased.

9. Dr. Kennedy Wekesa Barasa, PW6, who produced the post mortem report, stated that the deceased had a stab wound penetrating between the 2<sup>nd</sup> and 3<sup>rd</sup> ribs on the left side and the cause of death was due cardio-pulmonary failure due to a stab wound.
10. In a charge and caution statement made by the appellant to Chief Inspector of Police Francis Milwa, PW7, the appellant explained that he had been angered by the deceased who had sold some iron sheet and in anger he went and caused mayhem in the deceased's house, when the deceased followed the appellant to the latter's house, the deceased;

***"...pushed the door and found me inside my house. We started fighting and he held me to my neck and we started struggling each other. He was telling me that he will kill me. I took a kitchen knife and stabbed him at the shoulder and he started making noise and he left me at the house and there were people outside the house who took him to Lugulu Mission Hospital."***

11. The appellant's defence was that he did not assault the deceased he was elsewhere and only got to learn from boda boda riders that his brother had been injured, and had been

taken to

hospital. He went to the hospital, only to learn that he had succumbed to the injuries. He maintained that he had no grudge with the deceased neither was he with the deceased nor did he have any knife on that day.

12. The learned trial judge in rejecting this defence noted that the appellant was in his house where the deceased entered and then came out while bleeding from the chest from a stab wound; that there was no evidence to suggest the presence of any other person in the house pointing out that the deceased entered the house to pursue the return of his radio and torch which the appellant had taken that is when he came out with the injuries. That in his statement under inquiry the appellant had explained in detail how the deceased had assaulted him earlier, triggering a chain reaction of unbridled anger, physical altercation, resulting in the ultimate stab, which snuffed out the brother's life.
13. The learned judge was thus satisfied that the evidence in its totality established the case against the appellant beyond reasonable doubt, leading to the conviction; and the 25 year sentence imposed. The appellant urged us to allow his appeal,

quash his conviction, and set aside the sentence that was meted upon him by the trial court.

At the plenary hearing of the appeal. Learned counsel Miss Lumallas appeared for the appellant who was held at Naivasha Maximum prison, whilst learned prosecution counsel, Miss Mwaniki appeared for the respondent.

Miss Lumallas informed us that after conversing with the appellant who managed to bring out some factors on the sentencing, she wished to abandon the appeal on conviction, and only pursue the appeal on sentence. In urging us to interfere with the sentence and reduce it to a shorter period, Miss Lumallas implored us to consider that the appellant; that the deceased were in an inebriated state, and also that the appellant had been in remand custody since his arrest in the year 2021, until conclusion of his trial and sentence in the year 2021. In conceding to the appeal, Miss Mwaniki pointed out the fact that the deceased and the appellant were brothers, who had never been given to quarrelling before, and it appeared that the incident in question was an isolated one; as several witnesses alluded to the fact that they were both drunk. Counsel urged us to allow

the appeal against sentence; and to review and significantly reduce the sentence of Twenty-Five (25) years imprisonment, in light of the compelling mitigating factors on record.

**14.** Regarding sentence, it is trite that the appellate court will not easily interfere with a sentence unless that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account some wrong material, or acted on a wrong principle. Even if the appellate Court feels that the sentence is heavy and that the appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless any one of the matters already stated is shown to exist. ***[See Bernard Kimani Gacheru vs. Republic [2002] KECA 94 (KLR).]***

15. In sentencing the appellant to 25 years' imprisonment, the trial court considered his mitigation. However, the learned judge ought to have considered and given weight to the circumstances in which the offence was committed. There is no doubt, and the prosecution conceded that this was an isolated incident and several witnesses alluded to the fact

that the appellant and the

deceased were both drunk when they were fighting and further that it is the deceased who triggered the fight. Although the appellant ought to have controlled himself, these are material factors that were overlooked by the trial judge. The sentence shall therefore be interfered with.

16. Accordingly, the sentence of 25 years' imprisonment be set aside and substituted with a sentence sentencing the appellant to the period already served. He is ordered set at liberty forthwith unless otherwise lawfully held. The appeal on sentence thus succeeds to that extent.

**Dated and delivered at Kisumu this 13<sup>th</sup> 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 the  
original.*

**DEPUTY REGISTRAR**