

**IN THE COURT OF
APPEAL AT KISUMU**

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

CRIMINAL APPEAL NO. E076 OF 2021

BETWEEN

JOSHUA ONGINJO ODUOR.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Migori (R. Wendoh, J.) dated 16th June, 2021)

in

HCCRA No. 1 of 2020)

JUDGMENT OF THE COURT

1. The appellant, **Joshua Onginjo Oduor**, was charged with two counts of **murder** contrary to **Section 203** as read with **Section 204** of the **Penal Code**. The particulars of the offence were that on 12th August, 2019, at Pith Nyadundo Village, South Sakwa Location, in Awendo Sub-County, within Migori County, in the Republic of Kenya, the appellant, jointly with others not before court, murdered **Charles Opondo Ombunde** (count I) and **Antony Oduor Ombunde** (count II). He pleaded not guilty to both counts and his trial thereafter ensued.
2. The two deceased persons were brothers. **Kelvin Onyango**

Otieno, PW1, told the court that the appellant was well known

to him as he was married to his step-mother, while the deceased persons were his neighbours. It was his evidence that on 12th August, 2019, at about 6.00 p.m., he was at home when he heard his step-mother shout that her child had been taken away by the appellant. He immediately rushed to where his step-mother was. She informed him that the appellant had taken their child, **Venessa Blessing**, and disappeared with her in a sugar plantation. Together with other villagers, PW1 mounted a search for the appellant in the sugar plantations. While at the sugar plantation, he heard an exchange of words between the first deceased person, **Charles Opondo**, and the appellant. **Opondo** was asking the appellant what he wanted to do with the child. When PW1 got to where the appellant was, he saw him hold the second deceased, **Antony Oduor**, pushed him to the ground, and stabbed him with a knife on his eyes and back. PW1 struck the appellant's leg with a stick he was holding in an attempt to prevent the appellant from inflicting further harm on the second deceased. The appellant turned and brandished the blood-stained knife at PW1, thereby causing him to flee for fear of being injured. Outside the plantation,

he

met with the rest of the villagers who informed him that the first

deceased was dead. The second deceased was nonetheless rushed to hospital.

3. PW3, **Everest Omondi**, was among the members of the public who went in search of the appellant in the sugar plantations. He stated that the two deceased persons were also part of that search party. It was his evidence that he heard a commotion within the sugar plantation which sounded like there was a fight. He then heard **Venessa** calling out for her father. He proceeded to where the child was and rescued her. He saw the first deceased's injured body lying on the ground. He took the child out of the plantation and alerted the other villagers to rescue the first deceased.
4. PW4, **Janet Opondo**, widow of the first deceased, told the court that on the material date at about 6.30 p.m., she was informed that her husband had been stabbed at a sugar plantation by the appellant. She went to the scene and found her husband's body which had a stab wound on the chest. PW2, **Peter Otieno**, a brother to the two deceased persons identified their bodies at Rapcom Mortuary for purpose of postmortem and was also present when post mortem

examination was conducted.

5. PW6, **Dr. John Wesonga**, conducted the post mortem examination of the two deceased persons on 22nd August, 2019, at Rapcom Mortuary, in Awendo. It was his evidence that the first deceased, suffered a penetrating chest injury to the right lung. His cause of death was cardio- respiratory arrest due to severe blood loss. The 2nd deceased person, suffered penetrating injuries to his left back, spine and loins, as well as cut injuries on his face, with a severed right eyeball. He died due to cardio- respiratory arrest caused by severe blood loss from the injuries on his face and abdomen. PW6 stated that the injuries were caused by a sharp object. He observed that there was use of severe force at close range.
6. PW5, Inspector **Wycliffe Marwa**, was the investigating officer. It was his testimony that the appellant was married to one **Eunice Atieno** through wife inheritance, and that he sired a child by the name **Venessa Blessing** with her. The appellant was subsequently chased away from the home. On the material day, he returned to the home, abducted the child, and disappeared with the child into a sugar plantation. **Eunice** raised an alarm and members of the public went in

search of the appellant and

the child. The first deceased person had a scuffle with the

appellant inside the sugar plantation. He was stabbed by the appellant. The second deceased person went to rescue the first deceased and was also attacked by the appellant. PW5 stated that he recovered a blood-stained knife and *panga* from the scene of crime. The knife, which was the murder weapon, belonged to the appellant, while the *panga* belonged to the second deceased. The appellant, who fled the scene, was later arrested on 28th December, 2019 at Homa Bay.

7. The appellant was placed on his defence. He gave unsworn evidence. He told the trial court that **Eunice Atieno** was his wife, and that they lived together at the time. He stated that sometime in August 2018, he was involved in an accident that incapacitated him from riding his motorcycle and, as a result, was compelled to seek another job. He testified that he got another job as a house caretaker in Homabay. On the material day of 12th August, 2019, **Eunice** called him and requested that he pick up their child as she had to travel. He however informed her that he did not have money to travel back home. He was later arrested and charged with the offence subject to these proceedings which he had no

knowledge of.

8. After full trial, the appellant was convicted as charged. The trial court sentenced the appellant to serve thirty (30) years' imprisonment in respect of Count I, and thirty-five (35) years' imprisonment in respect of Count II. The sentences were ordered to run concurrently.
9. The appellant, aggrieved by this conviction and sentence, preferred this first appeal. He advanced five (5) grounds of appeal, together with a further five (5) grounds in his supplementary grounds of appeal. In summary, the appellant urged: that the prosecution failed to prove the charge of murder to the required standard of beyond reasonable doubt, given the absence of direct evidence implicating the appellant; that the conviction for the murder of the two brothers was entered without proof of the appellant's motive, with witness testimony indicating contradictory accounts of a fight in the sugar plantation; that the prosecution did not discharge its burden of proof, particularly by failing to call key witnesses, including the mother of the child who was allegedly abducted; that the evidence presented at trial was not subjected to comprehensive scrutiny, resulting in a flawed verdict and a miscarriage

of

justice; that the appellant was not positively identified as
the

perpetrator of the offence; that the alleged murder weapon (knife) was neither linked to the appellant nor subjected to fingerprint or other forensic examination; that the prosecution's case contained inconsistencies which rendered it incapable of sustaining a conviction; and finally, that the sentence awarded was harsh and excessive.

10. The appeal was heard by way of written submissions. Learned Counsel for the appellant, **Mr. Ogenga**, submitted that the appellant's conviction was founded on the testimony of a single witness, and that the circumstances that could have a positive identification to be made were absent, as it was dark, and further that the scene of crime was in a sugar plantation. He faulted the trial court for failing to consider that the sugar plantations were also hiding spots for cattle rustlers, and that the deceased persons may have fallen victim to the said unlawful groups. He explained that the prosecution failed to sufficiently establish that the element of malice aforethought existed in the circumstances of the case, or that the appellant had any motive to kill the deceased persons.
11. It was his further submission that the appellant was attacked

by the two deceased persons in a mob like manner. This forced

him to react in self defence. Counsel for the appellant urged that the prosecution failed to conduct forensic examination of the recovered exhibits to conclusively establish that the same were linked to the appellant. He observed that failure by the prosecution to avail material witnesses such as the child who was allegedly abducted, as well as her mother, was fatal to the prosecution's case. The appellant contended that, given that the two scenes of crime were only ten meters apart, the accounts of PW1 and PW3 were contradictory and failed to corroborate each other in material respects, as they ought to have observed the same events and circumstances. On sentence, the appellant submitted that the same was harsh and excessive. He was not given an opportunity to mitigate before the sentences were passed.

12. The appeal was opposed. **Ms. Ikol**, learned prosecution counsel, appeared for the State. It was her submission that the appellant was positively identified by an eye witness, PW1, as the conditions for a positive identification to be made were present. She explained that the incident occurred in the early hours of the evening before it got dark. She

asserted that PW1, who was
in the sugar plantation heard an exchange between the

appellant and the first deceased, two people who were well known to him at the time. She submitted that other than voice recognition, PW1 witnessed the appellant stab the 2nd deceased to death, and actually tried to intervene, but the appellant brandished a knife, causing PW1 to run to safety. Counsel maintained that the evidence of PW3 corroborated that of PW1. She submitted that PW3 heard a commotion within the plantation, before he rescued the child that had been abducted by the appellant. He also discovered the first deceased's body.

13. **Ms. Ikol**, further submitted that the alleged contradictions were minor, and did not go to the root of the case. On malice aforethought, counsel was of the view that the nature of the injuries inflicted on the deceased persons by the appellant were clearly meant to cause grievous harm and to end their lives. On failure to call the appellant's wife as a witness, **Ms. Ikol** argued that the prosecution is not required to call a particular number of witnesses for proof of any fact, and that in this case, the prosecution availed all the necessary witnesses required to establish its case against the appellant. It was her submission that failure to subject the

recovered knife and panga to forensic

examination did not prejudice the prosecution's case, as the

appellant was seen by PW1 stabbing the second deceased with the particular knife. He also brandished the same knife at PW1.

14. On sentence, learned prosecution counsel, urged that the appellant's mitigation was properly considered by the trial court, and that the sentences awarded by the trial court were lawful, just and proportionate. She urged us to uphold the conviction and sentences meted by the trial court.

15. We have carefully considered the record of appeal, submissions by both parties, and the law. The duty of the first appellate court was stated by this Court 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)”.

16. The issues falling for determination by this Court can be

summed up as follows:

- i. Whether the evidence on record met the legal threshold required to sustain a conviction for the offence of murder against the appellant;***
- ii. Whether the sentence meted by the trial court was harsh and excessive.***

17. The conviction of the appellant rested on the evidence of an eyewitness, together with corroborative circumstantial evidence. Was the evidence on record sufficient to sustain a conviction? This Court in the case of **Anthony Ndegwa Ngari v Republic [2014] KECA 424 (KLR)** described the ingredients forming the offence of murder as follows:

“For the offence of murder, there are three elements which the prosecution must prove beyond reasonable doubt in order to secure a conviction. They are: (a) the death of the deceased and the cause of that death; (b) that the accused committed the unlawful act which caused the death of the deceased and (c) that the Accused had the malice aforethought. (See Nyambura & Others v Republic, [2001] KLR 355).”

18. The death of the two deceased brothers, and the causes thereof were not points of contention in this appeal. It's the appellant's case however, that the prosecution failed to conclusively prove that he committed the unlawful acts that caused the death of the two deceased persons, and that malice aforethought was not established. The appellant

further challenged his conviction on

the ground that he was not positively identified, contending that the incident occurred at night in a sugar plantation.

19. It is our view that the record does not support this assertion by the appellant. PW1 testified that the incident occurred at about

6.30 p.m., at a time when darkness had not yet set in. It was his evidence that the sugarcane plantation was not fully grown. He could therefore see properly through the plantation. When he entered the sugarcane plantation, PW1 testified that although he did not initially see the appellant and the first deceased, he heard them arguing and recognized their voices. He also stated that he heard the first deceased ask the appellant what he wanted to do with the child that he had abducted. He stated that both voices were familiar to him, the first deceased being his neighbour, and the appellant a person well known to him, by virtue of being married to his step-mother. He stated that he had known the appellant for about three years prior to the incident.

20. The identification at this stage was therefore by voice recognition rather than visual identification. This Court has previously held that voice identification is admissible and

can

be relied upon where the witness is familiar with the voice
and

the conditions then prevailing permit such correct recognition. (See **Samuel Awiti Karani v Republic [1985] KECA 44 (KLR)**). In the present case, PW1's familiarity with the voices of both the appellant and the first deceased eliminated any likelihood of mistaken identity.

21. It was PW1's further testimony that he heard the second deceased raise an alarm while stating that he was holding the appellant. When he finally got to where the appellant was, he saw the appellant stab the second deceased with a knife. He asserted that the appellant first stabbed the second deceased on his face, causing the deceased to fall down. He then proceeded to stab him on his back. The second deceased had come to the rescue of his brother, the first deceased. PW1 further testified that he was in close proximity to the appellant during the incident. He struck him with a stick in an attempt to stop him from further harming the second deceased. The appellant brandished his knife at PW1, causing him to run away in fear for his life. This proximity significantly enhanced the quality of the identification. Further, the level of detail with which PW1 described the sequence of events was consistent,

credible and remained unshaken. Such specificity

demonstrates that PW1 had a clear and direct view of the incident, thereby rendering the identification cogent and reliable.

22. We find it crucial to add that the identification of the appellant by PW1 was one of recognition rather than of a stranger. In these circumstances, the possibility of mistaken identity was not within the realm of imagination. Accordingly, the evidence on record demonstrates that the appellant was positively identified by PW1, and the conditions prevailing at the scene of crime at the time were conducive for a positive recognition to be made.

23. The evidence of PW1 was corroborated by other circumstantial evidence. PW3, who was among those searching for the appellant in the sugarcane plantation, testified that he heard a commotion and a fight. He further heard the child, who had allegedly been abducted by the appellant, **Venessa Blessing**, call out the name of her father. It is highly improbable that **Venessa** would call out for her father if the appellant was not present at the scene of crime, thus linking the appellant to the assault of the deceased persons in the plantation. Upon

reaching the location of **Venessa**, PW3 saw the body of the first

deceased lying on the ground. The first deceased had been stabbed but was still alive at this point. He immediately removed **Venessa** from the sugarcane plantation and raised an alarm, summoning the other villagers to assist the first deceased.

24. Although PW3 did not witness the stabbing itself, his evidence corroborates PW1's account, confirming that a violent confrontation took place involving the appellant and the first deceased. PW3 further stated that it was not yet dark in the sugar plantation and that he could see clearly, corroborating PW1's testimony that the events occurred while there was sufficient daylight for clear observation to be made. The sequence of events described by PW3 supports the presence and actions of the appellant at the scene of crime, lending credibility and weight to PW1's direct evidence in form of eyewitness identification and voice recognition.

25. The evidence of identification was further corroborated by the post-mortem reports of the two deceased. The report for the first deceased indicated that he suffered a penetrating chest injury to the right lung, with the cause of death being

cardio-

respiratory arrest due to severe blood loss. The second
deceased

sustained multiple penetrating injuries, including to the face, lumbar spine, and spinal cord, with the cause of death recorded as cardio-respiratory arrest due to blood loss from the injuries on the face and abdomen. These injuries are consistent with PW1's detailed description of the attack, in which he observed the appellant stab the second deceased on the face and back. The post-mortem findings, when considered together with the eyewitness and circumstantial evidence, confirm that the deceased persons died as a result of violent acts inflicted upon them by the appellant.

26. It was the appellant's submission that the knife recovered from the scene was not connected to him as it was not subjected to forensic examination, including fingerprint analysis. We disagree with this argument. PW1 testified that he saw the appellant holding the knife and brandishing it at him during the attack. The visual observation of the appellant in possession of the weapon at the material time of the attack directly links him to the knife, rendering the lack of forensic examination otiose to establish the prosecution's case.

27. It is well established in law that where a witness

positively

identifies the accused using a weapon during the commission

of the offence, the failure to subject the weapon to forensic testing does not invalidate the identification or the weight of the evidence. This Court in the case of **Kimani v Republic (Criminal Appeal E096 of 2023) 2024 KECA 615 (KLR)** considered the effect of failure to subject a knife and jacket recovered with bloodstains to forensic examination and held that this omission, on its own, was not fatal to the prosecution's case where the evidence as a whole met the standard required to prove the charge.

28. The appellant contended that the prosecution failed to call material witnesses, namely Venessa Blessing and Eunice, her mother, who were alleged to have knowledge of key events that occurred on the material day. **Section 143** of the **Evidence Act** provides that no particular number of witnesses is required to prove any fact. Where the evidence on record is sufficient to establish the offence beyond reasonable doubt, the absence of certain witnesses does not vitiate the case.

29. In the present appeal, the eyewitness testimony of PW1, corroborated by PW3, along with the post-mortem findings, sufficiently establishes the appellant's presence and actions

at

the scene of crime. Consequently, the non-production of

Venessa and the appellant's wife as prosecution witnesses does not diminish the credibility of the evidence adduced against him.

30. The appellant's alibi defence, asserting that he was in Homa Bay at the material time the crime was committed, does not undermine the prosecution's case, which is supported by overwhelming evidence of his presence and actions at the scene of crime. The appellant's submission that he was attacked mob-style by villagers and the assertion that he acted in self-defense is not supported by evidence. The evidence establishes the opposite; that he was the aggressor and was at the time armed with a knife.
31. Having established that the appellant caused the death of the deceased, the remaining issue for determination is whether the prosecution proved the element of malice aforethought, which is essential to sustain a conviction for murder. 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.”**

32. This Court in **Bonaya Tutu Ipu & another v Republic**

[2015] eKLR held that:

“It is in rare circumstances that the intention to cause death is proved by direct evidence. More frequently, that intention is established by or inferred from the surrounding circumstances. In the persuasive decision of CHESAKIT V. UGANDA, CR. APP. NO. 95 OF 2004, the Court of

Appeal of Uganda stated that in determining in a charge of murder whether malice aforethought has been proved, the court must take into account factors such as the part of the body injured, the type of

weapon used, if any, the type of injuries inflicted upon the deceased and the subsequent conduct of the accused person.”

33. In this case, the prosecution established that the appellant had the requisite *mens rea* for murder. Evidence of the appellant's use of a knife and the deliberate infliction of fatal stab wounds on the vulnerable parts of the deceased bodies demonstrated an intention to cause serious harm or death. The nature and severity of the injuries, combined with the circumstances of the attack, clearly showed that the appellant acted with a conscious awareness of the likely fatal consequences, satisfying the mental element necessary for a conviction for murder. We cannot in the circumstances disagree with the finding on conviction made by the trial Court. The appeal against conviction lacks merit and is hereby dismissed.

34. The final issue relates to the appellant's sentence. Upon conviction, the appellant was sentenced to serve concurrent sentences of thirty (30) years' imprisonment in Count I, and thirty-five (35) years' imprisonment in respect of Count II. The appellant challenged this sentence, claiming that his mitigation was not adequately considered. Is this claim supported by facts? The trial court's record shows that it expressly took into account the fact that the appellant was

a first offender, the
circumstances of the case, and his personal mitigation,

including the fact that he has a family, was the sole breadwinner, and deserved a second chance. We are satisfied that, considering the gravity of the offence, and the lives lost, the penalty meted out on the appellant was commensurate with the crime committed, and neither harsh nor excessive. We see no reason to interfere with the trial court's exercise of sentencing discretion.

35. The appellant's appeal on both conviction and sentence is hereby dismissed.

36. Orders accordingly.

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

DEPUTY REGISTRAR