



**Kiratu alias Mwita & 2 others v Republic (Criminal Appeal  
186 of 2020) [2026] KECA 771 (KLR) (24 April 2026) (Judgment)**

Neutral citation: [2026] KECA 771 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT KISUMU  
CRIMINAL APPEAL 186 OF 2020  
P NYAMWEYA, LA ACHODE & JM MATIVO, JJA  
APRIL 24, 2026**

**BETWEEN**

**JONES WAMBURA KIRATU ALIAS MWITA ..... 1<sup>ST</sup> APPELLANT  
MWITA SANDWE ALIAS MTANZANIA ..... 2<sup>ND</sup> APPELLANT  
STEPHEN MAHIGARA KIRATU ALIAS MAHINGA WAMBARA ... 3<sup>RD</sup>  
APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal against the judgment of the High Court of Kenya (Ougo J.) delivered on 20th May 2020 in Kisii HCCR. Case Number 38 of 2018)*

**JUDGMENT**

1. This is the first appeal of Jones Wambura Kiratu alias Mwita, Tagane Mwita Sandwe alias Mtanzania and Stephen Mahigara Kiratu alias Mahinga Wambara (the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> appellants respectively). The appeal is against the judgment by R.E. Ougo J. delivered on 20<sup>th</sup> May 2020, in which they were convicted for the murder of Samuel Magige Kirato, (Magige) and Samuel Nyamuroni Marwa, (Nyamuroni) and sentenced to serve thirty years in jail on each count. The sentences were ordered to run concurrently.
2. The chronicle of the appeal began with the charging of the appellants in the High Court at Kisii with two counts of murder contrary to section 203 as read with section 204 of the Penal Code. The particulars of the offences were that on 1<sup>st</sup> April 2018 at Kenyamangari village, Mashangwa location in Transmara sub-county within Narok County, the appellants jointly with others not before court, murdered Samuel Magige Kirato in count 1, and Samuel Nyamuroni Marwa count 2.



3. The prosecution's case in a nutshell, was that the deaths of Magige and Nyamuroni arose from a violent confrontation between the deceased persons and the appellants, in a disputed land ownership. According to the prosecution, tension existed between Nyamuroni and the appellants over the disputed parcel of land prior to the events of the ill-fated day.
4. On 31<sup>st</sup> March 2018, Paul Mwita Nyamuhanga, (PW1) accompanied Nyamuroni to inspect his demolished house at Nyankongo. While travelling to the site on a motorcycle, they encountered the appellants in the company of others. PW1 testified that the group emerged armed with machetes, a sword, and sticks, prompting Nyamuroni to flee on foot for safety. The assailants deflated the tyres of their motorcycle and chased PW1 away preventing him from retrieving it.
5. On 1<sup>st</sup> April 2018, the following day, Nyamuroni requested PW1 to accompany him to recover the abandoned motorcycle and Magige transported them to the location. Upon arrival at the gate of one Obogo Wambura, where the motorcycle had been left, they encountered the appellants. PW1 testified that without much ado, the 1<sup>st</sup> appellant immediately set upon and assaulted Nyamuroni, kicking him on the head and leg. He was momentarily restrained by Obogo but shortly thereafter the 2<sup>nd</sup> and 3<sup>rd</sup> appellants joined the confrontation, and a violent altercation ensued.
6. During the ensuing struggle, Magige attempted to flee from the scene but the 1<sup>st</sup> appellant pursued and restrained him, assuring him that the dispute was not directed at him but at PW1 and Nyamuroni. The confrontation nevertheless escalated and the 1<sup>st</sup> appellant hurled a machete at Magige, striking him on the leg and causing him to fall, and the 2<sup>nd</sup> appellant cut him on the face with a machete killing him on the spot.
7. Realizing the gravity of the situation, PW1 attempted to escape but one of the assailants threw a sword at him injuring his leg. He managed to run into Mr. Obogo's house to seek refuge with the appellants in hot pursuit. They broke the door and entered the house but they retreated when they found that he had also armed himself with a panga. They threatened to burn the house but luckily for PW1, police officers arrived at the scene.
8. Nyamuroni was not so lucky. According to PW1, he was still alive when the police arrived. They asked him to rise up and leave but in that instance, the 3<sup>rd</sup> appellant cut him on the right leg with a machete causing him to collapse.
9. The testimony of Samuel Wambura Manga (PW2), corroborated parts of this account. PW2 stated that when he arrived at the scene, Magige was already dead, but Nyamuroni was alive and seated, being questioned by police officers. PW2 witnessed the further attacks inflicted upon Nyamuroni by the 3<sup>rd</sup> appellant who cut him on the head with a sword and the 2<sup>nd</sup> appellant who stabbed him with an arrow at the back of the head and Nyamuroni fell down dead on the spot.
10. Police officers Robert Osman (PW3) and Corporal Daniel Mwitani Ndeti (PW4) responded to reports that there were armed individuals in the area on 1<sup>st</sup> April 2018. They went to the scene and found that two persons had been fatally injured, one with severe head injuries and the other with injuries to the leg. They rescued PW1 from a nearby house where he had taken refuge with injuries to his leg.
11. The Investigating Officer, Solomon Samu (PW5), the OCS of Angate Barikoi in Kilgoris during the material time, received reports of the land dispute and the earlier confrontation on 31<sup>st</sup> March 2018. He visited the scene the following day and confirmed that the bodies of the two deceased persons bore multiple deep cut wounds to the head, hands, and legs, consistent with an attack by sharp weapons. He documented the scene and arranged for the bodies to be transported to Migori Sub-District Hospital Mortuary, while PW1 was taken for medical treatment.



12. Medical evidence was provided by Dr. Morebu Peter Momanyi (PW6), a senior medical officer attached at Kisii Referral Hospital. He produced post-mortem reports prepared by Dr. Victor Awinda. The post-mortem examination revealed that Magige sustained multiple stab and cut wounds, including a deep cut wound severing the femoral vein and artery, severe neck injuries cutting major blood vessels, and a comminuted fracture of the skull. The cause of death was determined to be severe open head injuries with distorted brain tissue resulting from assault.
13. The post-mortem examination of Nyamuroni disclosed multiple deep cut wounds on the head, arm, abdomen and face, including puncture wounds and skull fractures. The cause of death was likewise determined to be severe open head injury with brain tissue damage resulting from assault.
14. When placed on their defence, each appellant elected to testify without oath and to call no witnesses. Each of the defences consisted primarily of a denial of any involvement in the incident that led to the deaths of the two hapless men.
15. The 1<sup>st</sup> appellant stated that he had no knowledge whatsoever, of the incident that occurred on 1<sup>st</sup> April 2018 at Kenyamangari Village. He denied participating in any attack or confrontation resulting in the deaths of the deceased persons. He disassociated himself entirely from the allegations leveled against him.
16. The 2<sup>nd</sup> appellant similarly denied any involvement in the offence. He stated that he did not know the 3<sup>rd</sup> appellant and was never in his company at any time relevant to the alleged incident. Further, that Nyamuroni was not known to him. He denied the allegation that he participated in the attack that resulted in the deaths of the deceased persons.
17. The 3<sup>rd</sup> appellant likewise denied committing the offence. He asserted that he did not know the other two appellants and was not involved in the events that culminated in the deaths of the deceased persons.
18. Upon considering the matter before her, the learned Judge found that the respondent had established their case beyond reasonable doubt. She convicted the appellants on each of the two counts, and sentenced them to serve thirty years' imprisonment on each count. The sentences were to run concurrently.
19. Aggrieved by the judgment, the appellants filed this appeal. In the memorandum of appeal dated 25<sup>th</sup> August 2025, they raised three grounds which we set out verbatim as follows:
  1. The judge erred in law and in fact in conducting a trial convicting and sentencing the appellants without the charges first being read to them to formally take plea thus breaching the rules of natural justice and constitutional principle of fair hearing.
  2. The judge erred in law in failing to properly analyze the evidence and the law as required and thereby arrived at an erroneous conclusion and finding of guilt as against the appellant on both counts.
3. That the manner the trial was conducted resulted in the denial of and infringement upon the appellants rights under articles 25 (c) and 50 A (2) and 159 (2) of *the Constitution*.
20. In their submissions date 25<sup>th</sup> August 2025 filed through the firm of M/S Omondi, Abande & Co. Advocates, the appellant collapsed the three grounds and urged them as one. That is: "whether the learned judge erred in law and in fact in conducting a trial and convicting the accused person without taking plea."



21. The appellants argue that the trial was fatally defective as it proceeded without the appellants' plea being formally taken. That although the appellants were presented before the court and the charges were explained to them, plea taking was deferred to allow for mental assessment to be done. However, when the matter resumed, the trial proceeded without the plea being taken, and there is no record showing that the appellants were ever called upon to plead to the charges.
22. It is the appellants' submission that plea taking is a fundamental stage in criminal proceedings, as it informs the accused persons of the charge and affords them an opportunity to respond before the commencement of the trial. They rely on the authority of *Adan v Republic* [1973] EA 445, which outlined the mandatory procedure to be followed in recording a plea in a criminal trial. The appellants argue that failure to comply with this procedure rendered the entire trial a nullity.
23. The appellants assert that the omission of plea taking strikes at the core of their constitutional right to a fair trial, guaranteed under Articles 25(c) and 50 of *the Constitution* which is non-derogable, so that any proceedings conducted in violation of this right cannot stand.
24. Consequently, they pray that the appeal be allowed, the conviction be quashed, the sentences imposed be set aside and the appellants be acquitted of the charges against them.
25. The respondent filed submissions dated 18<sup>th</sup> August 2025 filed by learned Senior Assistant Director of Public Prosecution, (SADPP) Mr. Joseph Kimanthi, in opposing the appeal. Counsel contends that the prosecution proved all the essential ingredients of the offence of murder and the appellants were properly convicted.
26. Counsel submits first, that the fact and cause of death were established through the post-mortem evidence produced by the medical witness, which showed that the deceased persons died from severe head injuries inflicted during the assault. Second, that the appellants were positively identified by prosecution witnesses who knew them prior to the incident and who witnessed the attack in broad daylight. The evidence demonstrated that the appellants inflicted fatal injuries on the deceased persons using weapons such as machetes and a sword.
27. Regarding sentence, counsel contends that the sentence of thirty (30) years' imprisonment imposed by the trial court was neither excessive nor harsh, but rather lenient. This is considering that two lives were lost and that the offence of murder attracts a maximum penalty of death.
28. Counsel asserts that the prosecution proved its case beyond reasonable doubt and therefore, this appeal lacks merit and should be dismissed and both the conviction and sentence upheld.
29. The appeal came before Court for plenary hearing on 4<sup>th</sup> September 2025. The appellants were present and joined the proceedings from Naivasha Maximum prison and learned counsel Mr. Munuango was also present appearing on their behalf. Mr. Njeru, learned counsel was present for the respondent. They both relied on their written submissions, and Mr. Munuango added that the import of plea having not been taken was that it resulted in a mistrial.
30. This being a first appeal, our duty, as has been repeatedly restated by this Court, is to scrutinize the evidence to see if it supports the findings of the High court and to draw our own conclusion on the matter, bearing in mind that we have neither seen nor heard witnesses and make due allowance for that. (See *Okeno vs Republic* [1972] EA 32).
31. This appeal stands or falls on the appellants' singular complaint that the trial was defective on account of failure to formally take their plea before its commencement. They contend that this omission rendered the entire proceedings a nullity. The respondent, on the other hand, maintains that the



prosecution proved the charge of murder beyond reasonable doubt and both the conviction and sentence were proper.

32. We have examined the record and it indicates that the appellants were arraigned in court on 29<sup>th</sup> September 2018 and were informed that they had been charged with murder. The court then deferred the plea taking to 1<sup>st</sup> October 2018, to allow the appellants undergo a mental assessment and for the Deputy Registrar to assign counsel for them. From what we surmise to be an inadvertent lapse on the part of the trial court, the record reveals that when the matter came before court on 1<sup>st</sup> October 2018 as scheduled, the court proceeded with the trial and subsequently concluded. There is no evidence on the record that the court took plea from the appellants for the offence they were tried.
33. In their submissions the appellants posit that plea taking is fundamental as it informs the accused persons of the charge and affords them an opportunity to respond before the commencement of the trial.
34. Article 50 guarantees every accused person the right to a fair trial and outlines seventeen distinct, minimum procedural rights. Failure to take plea violates Article 50 (2) (b) which provides for the right to be informed of the charge, with sufficient detail to answer it. The law therefore, obligates the court of first instance to take a plea from the accused person.
35. We therefore examine the record to determine whether the omission or irregularity herein, is such that it compromised the appellants' rights to fair hearing as provided in Article 50 (2) (b), or is one that was curable by section 382 of the Criminal Procedure Code.
36. Section 382 provides that:

“Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice:

Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings.”

37. This Court has pronounced itself on the consequences of procedural lapses such as the instant one in numerous decisions. In *Dominic Maina Wanjiru vs Republic* [2007] [2007] KECA 463 (KLR), while grappling with an issue similar to the one presently before us, the Court stated as follows:

“The trial properly started on 16<sup>th</sup> July, 2002. No plea was taken but the assessors were chosen and evidence was taken from four witnesses and the case was then adjourned severally until Mitey J retired and Okwengu J resumed trial on 18<sup>th</sup> December, 2003, also without taking plea. It is indisputable therefore that no plea was taken before any of the two trial judges. That such elementary axiom or omission escaped the notice of two judges and two experienced advocates somewhat surprises us. However, we have no hesitation whatsoever in holding that the omission not having occasioned the appellant a miscarriage of justice the error is curable by the application of Section 382 of the Criminal Procedure Code and we so affirm that the trial did not amount to a mistrial so as to justify a retrial. We reject the submissions of Mr. Orinda.”



38. In a subsequent decision in *Moses Mbaya vs Republic* [2016] KECA 459 (KLR) this Court had this to say:

“With regard to ground one, (1) there is no dispute that the appellant faced a criminal charge. The law obligated the court of the first instance to take a plea from the appellant. Both sides are in agreement that the record does not bear any evidence that plea was ever taken from the appellant with regard to the offence he then faced. In *Baya vs. Republic* (supra) the court was categorical that:

“The charge and all its essential ingredients must be explained to the accused in his vernacular or some other language that he understands and the accused’s own words in reply should be correctly translated into English and then carefully recorded. If the words are an admission of (sic) a plea of guilty should be recorded.”

In the same *Baya* case (supra) the court went further to add that where the trial was unsatisfactory and full of irregularities occasioning injustice which are not curable under section 382 of the Criminal Procedure Code, the proper order for the court to make in such circumstances is to order a retrial.

The court, when confronted with a similar scenario in the case of *Murage and Another versus Republic* [2006] KLR 63, held thus:-

“The irregularities and omissions arising from lack of opportunity to plead did not occasion a failure of justice and whatever irregularities were committed were curable under section 382 of the Criminal Procedure Code.”

We fully adopt that holding as applicable to the appellant’s complaint herein. This is because as submitted by the respondent, the appellant

participated fully in the trial, cross examined witnesses and when he took the witness stand to defend himself, he was categorical that he understood the charge then facing him.”

39. In the present case, we have anxiously considered the record and observed that the appellants were represented during the trial by Mr. Nyangwencha, learned counsel. The charges were read to them on their first day in court although they were not required to answer to them on that day. They therefore, understood the charges they faced and actively participated in the proceedings. Counsel cross-examined the prosecution witnesses and later the appellants defended themselves.

40. The appellants have not demonstrated how they were prejudiced, or in what manner their right to fair trial was compromised by the omission to take their plea. We fully adopt the holding in *Dominic Maina Wanjiru v Republic* (supra) and in *Moses Mbaya vs Republic* (supra), as applicable to the appellants’ complaint herein. We hold the view that the omission complained of did not occasion a failure of justice and is curable by section 382 of the CPC.

41. We also add that, although not a ground of appeal herein, we have re-evaluated the evidence adduced before the trial court and find that the court was not in error in its holding that the essential ingredients of the offence of murder had been established. Namely, the fact and cause of death; the unlawful acts linking the appellants to the deaths of the deceased persons; and, the presence of malice aforethought evinced by the level of depravity in the injuries inflicted. The conviction was therefore, supported by cogent evidence.

42. For the foregoing reasons, we find that this appeal is bereft of merit and dismiss it in its entirety. Both the conviction and sentence imposed by the trial court are accordingly upheld.



DATED AND DELIVERED AT KISUMU THIS 24<sup>TH</sup> DAY OF APRIL, 2026.

P. NYAMWEYA

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JUDGE OF APPEAL

L. ACHODE

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JUDGE OF APPEAL

J. MATIVO

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR

