



**Ogutu alias Opiga v Republic (Criminal Appeal E316 of 2022)
[2026] KECA 738 (KLR) (24 April 2026) (Judgment)**

Neutral citation: [2026] KECA 738 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CRIMINAL APPEAL E316 OF 2022
MS ASIKE-MAKHANDIA, HA OMONDI & LK KIMARU, JJA
APRIL 24, 2026**

BETWEEN

SILVESTER ODHIAMBO OGUTU ALIAS OPIGA APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from the conviction and sentence of the High Court of Kenya at Siaya (Aburili, J.) dated 7th November, 2022, in Criminal Case No. E010 of 2022)

JUDGMENT

1. The appellant, Silvester Odhiambo Ogutu alias Opiga, was arraigned before the High Court of Kenya at Kisumu on the information charging him with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. He was alleged to have murdered one David Omondi Otieno, on 16th April, 2021, at Township Location in Siaya Sub-county within Siaya County. He denied the information.
2. Briefly, the prosecution's case was as follows: PW3, Elvis Omondi Olunga, testified that on 16th April, 2021, he was seated outside his hotel when the deceased, a regular customer, approached him and requested a loan of Kshs. 50 to repair his motorcycle. PW3 stated that he gave the deceased the money, after which the deceased left. Shortly thereafter, he observed the deceased engaged in a scuffle with another individual. PW3 then went back into his hotel to attend to customers. A few minutes later, outside his premises, he found the deceased bending on his motorcycle, appearing weak, while the person he had been struggling with was fleeing towards a nearby garage. Members of the public informed him that the individual had stabbed the deceased. The deceased was subsequently rushed to Siaya Referral Hospital. PW3 identified the assailant as the appellant.
3. PW4, Eric Odhiambo Otieno, the deceased's cousin, testified that he received a phone call on the material date at about 1.00 p.m., informing him that the deceased was at Siaya Referral Hospital.



Upon arriving at the hospital, the deceased informed him that he had been stabbed by a person known as “Opija.” He explained that he had loaned Opija Kshs. 400, of which Kshs. 200 had been repaid. When he demanded the balance, a scuffle ensued, during which Opija stabbed him with a knife in the abdomen. PW4 further testified that the doctor handed over to him the knife that had been removed from the deceased’s abdomen upon his arrival at the hospital. PW4 then took the knife to the police station, where he reported the incident and surrendered the said knife.

4. PW1, Kennedy Opiyo, a clinical officer at Siaya Referral Hospital, testified that the deceased was admitted at the said hospital on 16th April, 2021, after being stabbed. He stated that the deceased sustained a linear surgical cut wound on his abdomen, with lacerations on his liver and colon, due to the penetrating injury. He stated that the deceased was treated and discharged from the hospital.
5. PW5, Joseph Achola, testified that he was the Chairman of the bodaboda operators in Siaya, Alego and Usonga sub-counties. He stated that on the material date, he was informed by one Mwalimu that one of the bodaboda operators, known as Opija (appellant), had stabbed another rider. Together with other operators, they went in search of the appellant. They were able to locate him the following day, the 17th April, 2021, at a supermarket. The appellant informed PW5 that he had a scuffle with the deceased over Kshs.200 that the deceased was claiming from him. He escorted the appellant to Siaya Police Station where he was detained.
6. PW2, Corporal Alfred Kiprop, from Siaya Police Station, stated that the appellant was initially charged with the offence of assault causing grievous harm. It was his testimony that on 17th April, 2021, he visited the deceased at Siaya County Referral Hospital and recorded his statement. He also recorded the statements of other witnesses at the police station. He stated that PW4 surrendered a knife that was used to stab the deceased, which he said he had been given by hospital personnel. PW2 testified that the appellant was brought to the station by bodaboda operators, who accused him of stabbing one of their own. He stated that the deceased, after being discharged from the hospital, succumbed to his injuries. Consequently, he handed over the file to the Directorate of Criminal Investigations, as the matter had escalated into a murder investigation.
7. PW2 produced the deceased’s statement dated 17th April, 2021.

In the statement, the deceased stated that he was stabbed by the appellant, due to a disagreement over Kshs.200 owed to him. The deceased stated that when he approached the appellant and asked him to pay back the money, the appellant became angry and wanted to leave. The deceased held him by his shirt and then let him go. The appellant left, only to return back shortly after, armed with a knife, which he used to stab him. The deceased stated that he removed the knife that was embedded in his body and was rushed to hospital. He underwent surgery, and was admitted at the hospital. The next day, police officers visited him at the hospital and recorded his statement.
8. A post mortem examination of the deceased’s body was conducted on 24th February, 2022 at Siaya County Referral Hospital, by one Dr. Juma Wekesa (PW6). PW6 told the court that the deceased had a stab wound that was healed on the right abdominal wall. Internally, he had a healed stab scar on the right abdomen and an operation midline scar following his surgery. He had multiple intestinal adhesions between the intestinal loops and the abdominal wall. PW6 determined that the cause of death was intestinal obstruction resulting from multiple abdominal adhesions following an exploratory laparotomy performed after an abdominal stab wound. He explained that the adhesions were caused by the internal stab injury, which extended and led to multiple adhesion-related injuries affecting other parts of the intestines.
9. PW7, Polycarp Lutta, a Government Analyst, testified that on 1st March, 2022, he received two exhibits from the Directorate of Criminal Investigations in Siaya: a military knife and nail samples from the



- deceased. He determined that the stains on the said knife contained human blood, which matched the DNA from the nail samples collected from the deceased.
10. PW8, Sergeant John Nzive, attached to Directorate of Criminal Investigations (DCI) in Siaya was the investigating officer. He testified that he was assigned the case on 22nd February, 2022. The appellant had at the time been charged with the offence of causing grievous harm contrary to Section 234 of the Penal Code. He stated that the deceased died after undergoing treatment at Siaya County Referral Hospital. It was his testimony that a post mortem examination was carried out and established the cause of death. He thereafter re-arrested the appellant and charged him with the offence of murder. He also forwarded samples of exhibits to Kisumu Government Chemist for DNA analysis. He received witness statements from PW2.
 11. The appellant, in his defence, denied causing the death of the deceased. He told the court that the deceased was his friend. It was his testimony that on 16th April 2021, his wife had been taken to hospital as she was about to give birth. He proceeded to wash his motorcycle when the deceased approached him and demanded payment of some money owed. He informed him that he would repay the money later, but the deceased began assaulting him and tore his cloths. He further testified that he then heard a group of people calling out to him and, upon looking back, saw the deceased approaching while concealing something in his jacket. He managed to fend him off. They thereafter parted ways. The next day, he went to pick up a client at Walia Supermarket when bodaboda operators arrested him. They beat him and took him to the police station. He denied having any connection with the knife alleged to have been used to stab the deceased. He stated that his family raised Kshs. 170,000/= towards the deceased's medical bill as he was his friend. He admitted that the scuffle between him and the deceased was due to an unpaid loan of Kshs. 200 that he owed the deceased.
 12. At the conclusion of trial, the court (Aburili, J.), found that the prosecution had established its case against the appellant to the required standard of proof beyond reasonable doubt. The appellant was consequently convicted and sentenced to serve a custodial sentence of thirty-five (35) years.
 13. Aggrieved by this decision, the appellant lodged an appeal before this Court. In his memorandum of appeal dated 25th June, 2025, the appellant challenged his conviction and sentence on four grounds. He contended that the circumstantial evidence on record was insufficient to sustain a conviction. He was of the view that the prosecution failed to discharge its burden of proof. He faulted the trial court for convicting him in the absence of proof of mens rea. Lastly, he urged that the sentence imposed upon him was manifestly excessive in the circumstances.
 14. The appeal was heard by way of written submissions. Mr. Ooro learned counsel appeared for the appellant. It was the appellant's submission that no one witnessed him stab the appellant. There was no direct evidence linking him to the knife that was alleged to have been used to stab the deceased. He pointed out that PW3 did not witness the deceased being stabbed, and that there was a chance that the deceased was stabbed after the scuffle. He argued that the appellant had no motive to kill the deceased who was his friend. The appellant submitted that the deceased identified his assailant as one 'Opija', which nickname was not linked to him. He maintained that the dying declaration was not supported by any eye witness account. It was his submission that the observation by the trial court that the appellant was the last person seen with the deceased was not supported by evidence on record. He argued that the sentence imposed by the trial court was manifestly excessive in the circumstances of the case and should therefore be reconsidered.
 15. The appeal was opposed. Ms. Munyolo, learned prosecution counsel, appeared for the respondent. It was her submission that the trial court correctly relied on circumstantial evidence to convict the appellant. She stated that PW3 witnessed the appellant and the deceased get into a scuffle, and minutes



later, he saw the deceased bending over his motorcycle, appearing weak. The appellant was seen running away from the scene. She explained that the deceased's statement recorded by PW2 established that the appellant had stabbed the deceased over a Kshs.200 debt. The deceased relayed the same information to PW4.

16. It was Ms. Munyolo's further submission that the circumstances of the case pointed to no one else but the appellant, as the person who stabbed the deceased. She argued that going by the injuries sustained by the deceased, as well as the type of weapon used, the appellant intended to kill or cause grievous harm to the deceased.
17. On whether the sentence imposed on the appellant was manifestly excessive, counsel submitted that the custodial sentence was in no way excessive, as the maximum penalty provided by the law on conviction for the offence of murder is death. She asserted that the appellant had failed to establish that the learned Judge applied her sentencing discretion wrongly, to warrant interference by this Court.
18. We have carefully considered the record of appeal, the 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, *Ruwalla v R* [1957] EA 570)”.

19. In the present appeal, we have been called upon to determine whether the case against the appellant was sufficiently established; and whether the sentence imposed upon him was manifestly excessive.
20. At the heart of the appeal is the issue of whether the prosecution proved that the appellant stabbed the deceased. The evidence on record established that the deceased and the appellant were acquaintances, and had a financial dispute over Kshs.200/=. On the material day, the deceased approached the appellant demanding repayment of the amount owed to him. A scuffle ensued, witnessed by PW3, who after the scuffle, observed the deceased leaning on his motorcycle, appearing weak, while the appellant was fleeing from the scene. Though PW3 did not witness the appellant stab the deceased, his testimony established that the appellant was present and engaged with the deceased immediately before the injury occurred, after which the deceased was rushed to the hospital, having sustained a stab injury.
21. The deceased made statements to PW4, his cousin, and PW2, the investigating officer, at Siaya County Referral Hospital, which the trial court treated as a dying declaration. The deceased explained that he had loaned the appellant Kshs.400, of which Kshs.200 had been repaid. When he demanded the balance, the appellant initially became angry and attempted to leave. The deceased held the appellant by his shirt, but let him go, but the appellant returned shortly thereafter armed with a knife. The appellant used it to stab him in the abdomen. This statement was recorded by PW2 and signed by the deceased.
22. This Court has severally held that dying declarations are admissible in evidence as an exception to the rule against admission of hearsay evidence. Their statutory basis is in Section 33 of the *Evidence Act* which provides that “...when the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question such statements are admissible whether the person who made



them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question.”

23. Further, this Court in *Watu v Republic* [2016] KECA 696 (KLR) observed as follows:

“Notwithstanding section 33(a) of the *Evidence Act*, courts have consistently held the view that evidence of a dying declaration must be admitted with caution because firstly, the dying declaration is not subject to the test of cross-examination and secondly, circumstances leading to the death of the deceased such as acts of violence, may have occasioned him confusion and surprise so as to render his perception questionable. While it is not a rule of law that a dying declaration must be corroborated to found a conviction, nevertheless the trial court must proceed with caution and to get the necessary assurance that a conviction founded on a death declaration is indeed safe. This Court expressed itself as follows in *CHOGE V. REPUBLIC* (supra):

“The general principle on which a dying declaration is admitted in evidence is that it is a declaration made in extremity when the maker is at a point of death and the mind is induced by the most powerful considerations to tell the truth. In Kenya, however the admissibility of dying declaration need not depend upon the declarant being, at the time of making it, in a hopeless expectation of eminent death. There need not be corroboration in order for a dying declaration to support a conviction but the exercise of caution is necessary in reception into evidence of such declaration as it is generally unsafe to base a conviction solely on the dying declaration of a deceased person.”

24. In this appeal, we are satisfied that the consistency between the evidence contained in the deceased’s dying declaration and PW3’s observation of the scuffle between the appellant and the deceased reinforced its credibility. The medical evidence further corroborated the fact of the stabbing. PW1 confirmed that the deceased sustained a penetrating abdominal wound with liver and colon lacerations. The injuries were consistent with a knife attack and required surgical intervention.
25. PW7, the government analyst, confirmed that the recovered knife contained the deceased’s blood, linking it to the fatal injury. PW5, the bodaboda chairman, testified that he apprehended the appellant, also known as “Opija”, at Walia Supermarket the day after the incident. Upon being apprehended, the appellant admitted to PW5 that he had been involved in a scuffle with the deceased over a KShs.200 debt. The appellant in his submissions sought to dispute that the nickname “Opija” referred to him. However, he did not challenge this identification during cross-examination, particularly of PW5, who apprehended him. We are therefore not inclined to believe the assertion made by the appellant in that regard.
26. The cumulative effect of these facts, leaves no doubt that it was the appellant who inflicted the stab wound on the deceased.
27. While the act of stabbing was clearly proved, we find that the prosecution did not establish that the appellant had the necessary intention to kill the deceased. The altercation arose from a minor financial dispute between friends, and the stabbing occurred during a sudden scuffle. There is no evidence of planning, prior threats, or any act indicating a resolve to kill. The deceased was stabbed only once in the abdomen. The deceased death to a large extent resulted from post-surgical complications rather than from a deliberate attempt to take life. The proper characterization of the offence, in our view, is manslaughter, arising from an unlawful act that caused the death of the deceased without intention to kill.



- 28. We therefore find 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 will therefore set aside the conviction for murder and substitute it with a conviction of manslaughter contrary to section 202 as read with section 205 of the Penal Code.
- 29. Given the reduction of the conviction from murder to manslaughter, the sentence must of necessity be reviewed. The circumstances of the case established that the appellant acted impulsively in a brief altercation over a minor debt. His contribution towards the deceased’s medical bills thereafter demonstrated a level of contrition and remorse. We further note that the appellant is a first offender. However, despite these considerations, a life was lost as a result of his impulsive and reckless action. Taking both the mitigating factors and the seriousness of the offence into account, we find that a custodial sentence of fifteen (15) years’ imprisonment is appropriate in the circumstances.
- 30. The appeal is allowed. The conviction on the charge of murder entered by the trial court is hereby set aside and substituted with a conviction of the lesser charge of manslaughter contrary to section 202 as read with section 205 of the Penal Code. The sentence of thirty-five (35) years’ imprisonment imposed by the trial court is reduced to fifteen (15) years’ imprisonment with effect from the date of his arraignment in Court taking into account he was in remand custody during trial.

DATED AND DELIVERED AT KISUMU THIS 24TH DAY OF APRIL,2026.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

H. A. OMONDI

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JUDGE OF APPEAL

L. KIMARU

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JUDGE OF APPEAL

I certify that this is a true copy of original.

DEPUTY REGISTRAR.

