



REPUBLIC OF KENYA



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**Mandila v Republic (Criminal Appeal 95 of 2019)
[2025] KECA 332 (KLR) (21 February 2025) (Judgment)**

Neutral citation: [2025] KECA 332 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CRIMINAL APPEAL 95 OF 2019
HM OKWENGU, HA OMONDI & JM NGUGI, JJA
FEBRUARY 21, 2025**

BETWEEN

DUNCAN MANDILA APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal from the Judgment of the High Court of Kenya at Kisii
(R. N. Sitati, J.) dated 4th October 2012) in HCCRC No. 78 of 2009)*

JUDGMENT

1. Duncan Mandila, the appellant herein, was charged with the offence of murder contrary to Section 203 as read with Section 204 of the *Penal Code*. It is alleged that on 29th November 2009 at Poroko village in Transmara District within Rift Valley province, he murdered Anderson Talengo Kirwa (the deceased).
2. The appellant was tried and convicted of the offence and sentenced to life imprisonment in Kisii HCCRC No. 78 of 2009 (Sitati, J.). Being dissatisfied and aggrieved with both the conviction and sentence, the appellant has now appealed to this court.
3. This being a first appeal, this Court is mindful of its duty well- articulated in Erick Otieno Arum vs. Republic [2006] eKLR as follows:

“It is now well settled, that a trial court has the duty to carefully examine and analyze the evidence adduced in a case before it and come to a conclusion only based on the evidence adduced and as analyzed. This is a duty no court should run away from or play down. In the same way, a court hearing a first appeal (i.e.) a first appellate court) also has a duty imposed on it by law to carefully examine and analyze afresh the evidence on record and come to its own conclusion on the same but always observing that the trial court had the advantage of



seeing the witnesses and observing their demeanour and so the first appellate court would give allowance for the same.”

4. The evidence before the trial court was that on 29th November 2009, the deceased was among the many of the local people who attended a circumcision ceremony at the home of Dominic Ole Tito. The appellant was also present. For no apparent reason, the appellant attacked the deceased with a walking stick, upon which a scuffle ensued. The appellant, then, removed a knife and stabbed the deceased in the stomach. The deceased was rushed to Transmara District Hospital and later transferred to Kisii District Hospital where he succumbed to his injuries.
5. PW1, Wycliffe Leman testified that on the material day he was at the home of Dominic Ole Tito attending an initiation ceremony. There was moonlight though it was not bright. He heard shouts from outside and rushed out only to find the deceased lying down saying: “he has stabbed me”. The appellant ran away from the scene into a house but was overpowered by the people at the ceremony who flushed him out and tied him up with rope. The deceased and the appellant were put in a vehicle and taken to the hospital and police station respectively. A double-edged sword was recovered from the place PW1 saw the deceased lying down; and was taken to the station, and later on produced as PEX 1. On cross-examination, PW1 stated that the knife was found a few meters from where the deceased lay; and that although there were many people at the ceremony only the deceased and the appellant fought, and that he saw the appellant run away from where the deceased lay.
6. Emmanuel Kirwa, the deceased’s brother who testified as PW2, informed the trial court that by the time he went out to see what was happening, the deceased was already lying down bleeding from his side and mouth. PW2 also identified the deceased’s body for postmortem examination. On cross-examination, PW2 testified that it was normal for Maasai men to carry knives but could not say who stabbed the deceased.
7. Danford Lemeso Kitembe, PW3, was also at the ceremony when he heard the sound of sticks clashing. From a distance of about 10 meters, he saw the appellant and the deceased fighting. As the deceased fell down the appellant ran into one of the houses within Dominic Ole Tito’s compound. PW3 testified that he heard the deceased say he had been stabbed. On cross-examination, PW3 stated that many Maasai young men carry knives with them and that evening, there were over 200 young men in the compound.
8. David Konoile Tele, the deceased’s nephew who testified as PW5, was at the ceremony but seated with the elders in one of the houses in the compound. At around 9.30pm he went out and saw the appellant running towards the elders’ house, and he restrained some five people from pursuing the appellant further. It was at this time he got to learn that the appellant had stabbed the deceased. PW5 later saw the deceased lying down with a stab wound in the abdomen, and that he died on the following day from the wounds. On cross-examination, PW5 stated that all the attendees at the ceremony carried knives but he could not tell who stabbed the deceased.
9. PW, PC Mutua testified that on the date in question, he received the appellant from members of the public assisted by Administration Police. He arrested the appellant, interrogated those who had bought in the appellant, and also received the weapon which was said to have been used by the appellant in stabbing the deceased. At the time the knife had blood stains with fresh human tissue on it. This witness could not say if the said exhibit was taken to the government chemist for analysis.
10. PW7, Alfred Kisasi, a friend to the deceased was in the company of the deceased at the ceremony; and narrated to the trial court that at around 10 pm, the appellant went where they were; and stabbed the deceased on the right-hand side of the stomach before taking off towards the elder’s house. PW7



testified that although the appellant did not speak, it was not so dark as there was moonlight which enabled him to identify the appellant. On cross-examination PW7 was categorical that neither he nor the deceased carried knives that night. He also stated that after being stabbed, he heard the deceased cry, “umenidunga”, in Maa language without naming names but stated that he saw the appellant remove the knife from the deceased’s stomach and run off with it towards the elders’ house.

11. The prosecution closed its case without the evidence of the doctor who performed the postmortem and the Investigating Officer.
12. The appellant gave an unsworn statement. He told the court that on the day in question, he was arrested from his house at around 10 pm on 30th November 2009, by a village elder with the help of two neighbours; was put in a vehicle to Kilgoris police station and that at the station he was informed that he was arrested in connection with a charge of assault; and was taken to court on 31st November(sic) and charged with the said offence. On 30th December 2009, he was arraigned before the High Court on a murder charge. He denied knowledge of the allegations against him and the knife which was produced as an exhibit at the trial.
13. The trial Judge identified the issue arising for determination as: whether the deceased was murdered, whether the appellant the perpetrator; and whether malice aforethought had been established.
14. The trial court determined that although no medical evidence was placed before the court, it was not in doubt that the deceased died as all the prosecution’s witnesses testified to that effect and that there was evidence that the deceased was stabbed by someone at the ceremony. PW7 testified that the appellant was the one who inflicted the fatal stab wound on the deceased. It was PW7’s testimony that he was standing with the deceased when the appellant emerged and approached them, and without uttering a word stabbed the deceased in the stomach. PW7 testified that with the aid of moonlight, which was not as bright, he clearly saw the appellant come forth and stab the deceased. The court noted that PW1 and PW3 both confirmed that there was moonlight though not as bright. The court also noted that PW1, PW3, PW5 and PW 7 testified to the fact that after the deceased fell, the appellant ran away towards the elders’ house.
15. On the issue of identification/recognition of the appellant with the intensity of the moonlight, the trial court was satisfied especially by the evidence of PW7, that there was no mistaken identity of the person who stabbed the deceased as that of the appellant. The court questioned why the appellant would run and hide in the elders’ house, and this act persuaded the learned judge that such conduct of running away was not consistent with that of an innocent person.
16. As regards the appellant’s defence, the trial court found the same unsustainable as it was only raised at the stage of the appellant giving his unsworn testimony and as such the same was considered an afterthought.
17. On malice aforethought, from the evidence, the court found that the appellant knew or ought to have known that a stab in the stomach would probably cause the death of the deceased. The appellant’s action showed only one intention of the appellant, to cause grievous harm to the victim, and as such malice afterthought was established.
18. On the final issue regarding whether the prosecution’s failure to call the doctor who performed the postmortem was fatal to its case, the learned judge pointed out that the testimony of PW1, PW3, PW5, and PW7 was sufficient to point to the fact on the cause of the deceased’s death.
19. Having considered all the evidence in its totality, the trial court found the appellant guilty of the offence as charged and sentenced him to life imprisonment.



20. Aggrieved by the outcome, the appellant filed this appeal against conviction and sentence, raising 9 grounds in the memorandum of appeal dated 20th May 2024, we reproduce verbatim albeit with grammatical corrections as follows:

- a. The learned trial judge erred in law and fact in convicting the appellant for the offence of murder notwithstanding that there was lack of expert evidence, in that there was no post mortem report produced before court nor death certificate adduced to prove death thus occasioning a miscarriage of justice,
- b. the learned trial judge erred in law and in fact by failing to observe that there was no proof that the knife was the murder weapon, as the alleged blood stain on the weapon was not analyzed by an expert; and that no DNA profiling was conducted regarding the blood stain; and no forensic report was filed as to the fingerprints that held the weapon,
- c. the learned trial judge erred in law and in fact by failing to scrutinize the evidence of identification of the appellant which had been flawed and had no guarantee of any degree of accuracy hence prejudicial to the appellant as identification was not positive,
- d. the learned trial judge erred in law and in fact by failing to consider and evaluate and or otherwise take a deeper analysis of the numerous contradictions in the evidence of the prosecution witnesses thus failing to come to the conclusion that the prosecution did not prove their case beyond reasonable doubt,
- e. the learned trial judge erred in law and in fact by failing to observe that the deceased never gave the name of the attacker, hence the appellant was irregularly charged with the offence of murder without concrete investigations hence miscarriage of justice,
- f. the learned trial judge erred in law and in fact by failing to observe that the prosecution failed to bring the doctor who was a vital expert witness to prove the cause of death hence irregularly arriving at a conclusion that the appellant was guilty,
- g. the learned trial judge erred in law by failing to consider the appellant's alibi hence occasioning a miscarriage of justice,
- h. the trial court erred in law and in fact on its analysis of the evidence tendered in court which was not beyond reasonable doubt and went ahead to convict the accused/appellants,
- i. the trial court erred in law and in fact on analysing the evidence on identification and recognition of the appellants by the witnesses.

The appellant thus prays that

- a) the appeal be allowed;
- b) the conviction be quashed and sentence set aside; and he be set at liberty

21. The crux of the appellant's argument as contained in his written submissions is that without the production of the post-mortem report and analysis of the exhibit, then his conviction was erroneous, secondly there was no proper identification; and finally, the court ignored the appellant's defence.

22. The appellant submits that he was not properly identified as the perpetrator as the nature and the intensity of light available was doubtful as the learned judge failed to make inquiries regarding the intensity of the alleged moonlight to establish whether the moon was full, half or crescent, and the nature of the weather conditions, to specify whether it was rainy, cloudy with black nimbus clouds. In this regard, he points out to Pw7's testimony that: "The time was 10.00pm. it was dark. There was



moonlight. It was dark, though it was enough light- I could see half but sufficient to enable me identify somebody." And that on cross-examination he stated "It was dark so I could not tell the clothes the accused was wearing."

23. According to the appellant, the alleged identification was a momentary glimpse, and given the available lighting, then could not be relied on to sustain a conviction and that the prosecution failed to establish malice aforethought as no evidence emerged to prove that the appellant had malice aforethought at all.
24. In opposing the appeal, the respondent argues that although the Doctor who performed the post-mortem never testified at the trial nor was the post-mortem report produced as an exhibit, there was independent evidence as to the death of deceased. That PW1 testified that he heard some shouts outside, there was moonlight, although not bright; and when he went outside, he found the deceased lying down, and heard him say " he has stabbed me" even as the appellant ran away and got into a house.
25. It is pointed out that PW2 also testified to the fact of the deceased's death thus: "When I went outside, I found many people surrounding him. He was bleeding from his side. Blood and foam were also coming from the mouth. The deceased was taken to Kilgoris Hospital. He was transferred to Kisii Hospital. He died after 3 days. I identified the deceased's body for postmortem."
26. The respondent emphasizes that PW3 who was 10 metres away, was able to see the deceased and the appellant fighting as there was moonlight; he saw the deceased falling and the appellant ran away. That PW3 did not speak of any other person who was engaging in a fight with the deceased but the appellant only and the sequence of events which followed immediately according to PW3 was taking to the hospital of the deceased. That all these were fortified by PW7 who was an eye witness and sealed by the investigations carried out by PW6 which established that the deceased fought with the appellant and in the process the appellant stabbed him(deceased) on the head and stomach, and PW6 recovered a knife which was blood stained and had fresh human waste.
27. The respondent points out that the issue of failure to produce a post-mortem report by the prosecution was discussed in Criminal Appeal No. 171 of 1984, Court of Appeal Nairobi Ndungu vs. Republic (1985) eKLR where the court in quoting the case of Cheya and Another vs. R [1973] EA 500 observed:•

Page 4: " ... Of course, there are cases for example where the cause of death would be so obvious that the absence of a postmortem report would not be fatal..."

It is submitted that in the instant case, the cause of death was obvious and firmly established, and the person who caused it was properly identified by witnesses who knew him.

28. In urging us not to interfere with the sentence, the respondent submits that although the learned Judge when delivering the Judgment, expressed herself that, the offence of murder carried a mandatory death sentence, yet after considering the appellant's mitigation and the provisions of *the Constitution* of Kenya 2010, she sentenced him to life imprisonment and the respondent contends that this sentence is neither excessive nor harsh.
29. In a charge of murder, the prosecution has the singular task of proving the following 3 ingredients to secure a conviction; that the death of the deceased has occurred; that the death was caused by an unlawful act of commission or omission by the person accused of the offence; and that the accused had malice aforethought as he committed the said act. See Chiragu & Another vs. Republic (Criminal Appeal 104 of 2018) [2021]KECA 342 (KLR).

The fact that a death occurred is not disputed, the persons who were at the home of Ole Tito each confirmed seeing an injured victim, who later succumbed to his injuries.



30. The twin concern is who caused the death, and whether malice aforethought was proved. Section 206 of the [Penal Code](#) Laws of Kenya defines malice aforethought in the following words:•
206. Malice aforethought shall be deemed to be established by evidence proving any 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.

In Omar vs. Republic (2010) 2KLR 19 at page 29, this Court (differently constituted) stated: ‘So by the appellant hitting the deceased on the neck with a bottle, he must have intended to cause her at least grievous harm. Indeed, the blow using a bottle caused a fatal wound on the deceased. The evidence clearly shows the appellant had the necessary malice aforethought.’

31. This Court will adopt the same train of thought. The appellant for no reason accosted the deceased and from the prosecution witnesses of PW1, PW3, PW5, and PW7 confirmed that the deceased had a stab wound in the stomach using a knife. Clearly, the targeted body part, and the weapon used, leaves no other reasonable conclusion, other than that the intention was to grievously harm the deceased or snuff the life off him. We are in agreement with the trial court that there is no other version of how the deceased was killed or by whom.
32. On the issue of whether failure to call the doctor who performed the post-mortem. Firstly, this Court notes that the death is not disputed by the appellant. In Muriithi vs. [Republic \(Criminal Appeal 35 of 2019\)](#) 2024KECA1528(KLR) (25th October 2024) (Judgment) the appellant contended that the prosecution’s failure to produce a post-mortem left the cause of death unproven. This Court in the aforementioned case, acknowledged that while the post-mortem report is significant, its absence is not necessarily fatal. The court emphasized that other evidence such as eyewitness testimony or circumstantial evidence can sufficiently establish the cause of death. We draw from the case of Muriithi (supra) quoting Ndungu vs. Republic [1985] eKLR, the Court held as follows:

“Where the body is available and the body has been examined, a post-mortem report must be produced, the trial court having informed the prosecution that the normal and straightforward means of seeking to prove the cause of death is by regularly producing the post-mortem examination report as a result of which the Medical Officer who performs the post-mortem examination is cross-examined. Here, no post-mortem examination report was produced. Very poor reasons were given for not producing it. The original report must have been lying in some hospital or police file. No adjournment was applied for to obtain the original report. The haste to produce the unsatisfactory copy is in the circumstances inexplicable and was unhelpful to the prosecution and to the judge.”

The Court considered the holding in the Tanzanian High Court case of Republic vs. Cheya & Another [1973] E.A. 500 that the cause of death can be proved by evidence other than the medical evidence, ... of course, there are cases, for example where the deceased person was stabbed through the heart or where the head is crushed, where the cause of death would be so obvious that the absence of a post-mortem report would not necessarily be fatal. But even in such cases, medical evidence of the effect of such obvious and grave injuries should be adduced as opinion expert evidence and as supporting evidence of the case of the death in the circumstances relied on by the prosecution. Where a post-mortem examination is performed and a report is prepared, signed and kept in safe custody, but the doctor is not available some other medical expert could give general evidence as an expert, on the basis



of the report as to whether the findings of the report are consistent with the case for the prosecution.”

33. From the cited decisions, what emerges is that where the body of the deceased is available, and a post-mortem has been conducted, the prosecution ought to produce the report for consideration by the court. We echo the emphasis made in the Muriithi case (supra) that a post-mortem report is important in assisting the court to reach the conclusion that it is the injury inflicted by the accused person that led to the demise of the deceased, but also recognize the acknowledgment that:

The failure by the prosecution to call a witness to produce the postmortem report is inexcusable and courts should not condone such carelessness. Be that as it may, such failure should not be an escape route for criminals. As can be discerned from the cited authorities, the court can still convict without expert evidence where there is overwhelming evidence that the deceased died as a result of the actions or omissions of the accused person. However, where the cause of death cannot be discerned through the layman’s eye, the prosecution will suffer loss where expert evidence has not been adduced to confirm the cause of death.

46. In respect to the appeal before us, PW4 identified photographs of the body of the deceased before the trial court. He talked of injuries on the chest, arm and face. He also saw stab wounds on the chin and forehead. PW5 testified about loose teeth and burns on the torso. Indeed, the postmortem report though not eventually produced was identified by PW7 who was present during the autopsy. The same was marked for identification as a prosecution exhibit. Other witnesses including PW1 and PW2 all saw injuries on the body of the deceased. The evidence on record is that the deceased was hale and healthy when she was last seen. The nature of the injuries as observed by the witnesses were caused by a human hand. In her judgment, the learned Judge concluded that:

“The court must determine whether the Accused, with malice aforethought caused the deceased’s death. The fact of her death is not disputed, and even though the autopsy report marked MFI 3 was not produced as exhibit, it is clear from the evidence by PW2, PW3, PW4, PW5, PW8 as well as the photographs of the deceased’s body at recovery (Exhibit 1a-c) that the deceased died a violent death. The body bore stab wounds on the head/neck region and the torso what appeared to be extensive scaling from burns and corrosive substances. The body was half naked as only some fragments of her body clothing remained on the body. Whoever inflicted these injuries had clearly intended to cause her death.” ...

34. In our considered view, this is as close as it can get in the present appeal. We, therefore, agree with the trial court that the oral testimony of PW 1, PW5, PW7 and the circumstantial evidence, amount to sufficient ‘other’ evidence that leads to a compelling conclusion that there was a stabbing by the appellant, which resulted in death. We hold that the failure to produce the post- mortem report was not fatal to the prosecution case.
35. With regard to the severity of sentence, Section 379 (1)(a) &(b) of the *Criminal Procedure Code* provides for this court’s jurisdiction to entertain an appeal against sentence from the High Court. This court notes that the State concedes the setting aside of the death sentence.



36. In Francis Muruatetu & Another vs. Republic [2017] eKLR, the Supreme Court of Kenya gave sentencing guidelines with regard to mitigation before sentencing in murder cases at paragraph 71 as;
- a. Age of the offender,
 - b. Being a first offender,
 - c. Whether the offender pleaded guilty,
 - d. Character and record of the offender,
 - e. Commission of the offence in response to gender- based violence,
 - f. Remorsefulness of the offender,
 - g. Any other relevant factor.
37. In the same case the court in regard to the application of mitigation by the accused before sentencing held as follows, ‘it is during mitigation, after conviction and before sentencing, that the offender’s version of events may be heavy with pathos necessitating the court to consider an aspect that may have been unclear during the trial process calling for pity more than censure or in the converse impose the death penalty.’
38. This court in Chai vs. *Republic (Criminal Appeal 30 of 2020)* [2022] KECA 495 (KLR) (1 APRIL 2022) held that the two holdings of the Supreme Court in the Muruatetu case make it very clear and underscores the importance of receiving and considering mitigating circumstances, and also of applying applicable sentencing guidelines, even though the latter are a guide.
39. To justify a sentence, the ruling should have spoken to it, showing in black and white what the court considered. In mitigation, the appellant through his then advocate informed the trial judge that he was a child offender aged 17 years, and had been remanded in custody for three years while awaiting trial. The learned trial judge ordered an age assessment, which was carried out at Kisii Level 5 hospital, and the record shows the learned Judge’s observation that the appellant was aged 23 years, which meant that even at the time of being arraigned in court for plea on 30th December 2009, he had already attained the age of maturity.
40. This Court consequently finds that the appellant’s conviction for the offence of murder was safe and upholds the said conviction. The learned judge took into account the mandatory nature of the penalty, but also the progressive approach of the 2010 Constitution of Kenya; and meted out a life sentence. We cannot fault the approach adopted by the learned judge. In allowing the appeal on sentence, we echo the very sentiments in the Muruatetu case (supra), taking into consideration that the trial court was informed that the appellant was a first offender the social inquiry report presented to the trial did not portray him as a troublesome social misfit and we also consider that he was a young adult at the time aged 23 years, and set aside the life imprisonment and substitute the same with a sentence of 30 years imprisonment. The record shows that the appellant was in custody since he was arraigned in court on December 30, 2009; and by dint of Section 333(2) of the *Criminal Procedure Code*, the imprisonment term shall be computed to begin running from that date.

It is so ordered.

DATED AND DELIVERED AT KISUMU THIS 21ST DAY OF FEBRUARY, 2025.

HANNAH OKWENGU

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JUDGE OF APPEAL

H. A. OMONDI

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JUDGE OF APPEAL

JOEL NGUGI

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR

