**Onyeri & 3 others v Republic (Criminal Appeal 313 of 2019)**
**[2025] KECA 241 (KLR) (13 February 2025) (Judgment)**

Neutral citation: [2025] KECA 241 (KLR)

**REPUBLIC OF KENYA**

**IN THE COURT OF APPEAL AT KISUMU**

**CRIMINAL APPEAL 313 OF 2019**

**HM OKWENGU, HA OMONDI & JM NGUGI, JJA**

**FEBRUARY 13, 2025**

**BETWEEN**

**DENNIS ARUBA ONYERI ..... 1ST APPELLANT**

**CHARLES ONDIBA ..... 2ND APPELLANT**

**BENARD OYUGI ..... 3RD APPELLANT**

**BONFACE NYABERI ..... 4TH APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

***(Being an appeal from the Judgment of the High Court of Kenya at Kisii, (R.E. Ougo, J.) dated 17th July 2019 in HCCRC No. 109 of 2012)***

## JUDGMENT

1. Dennis Aruba Onyieri (the 1st appellant); Charles Ondiba (2nd appellant); Benard Oyugi (3rd appellant); and Bonface Nyaberi (the 4th appellant) were charged with the offence of murder contrary to Section 203 as read with Section 204 of the *Penal Code*. The particulars of the offence were that on the night of 8/9th August 2012 at Sosera Village, Sosera sub-location of the South Masaba District within Kisii County jointly murdered Bernard Nyarimbasi (deceased).

2. The appellants were tried and convicted of the offence and sentenced to serve 25 years imprisonment each. Being dissatisfied and aggrieved with both the conviction and sentence, the appellants have now appealed to this Court.

3. We have carefully considered the record of appeal, submissions by counsel, the authorities cited and the law. This being a first appeal, this Court is mindful of its duty as 1st appellate court. This duty was well articulated by this Court in *Erick Otieno Arum v Republic* [2006] eKLR as follows:

> "It is now well settled, that a trial court has the duty to carefully examine and analyse the evidence adduced in a case before it and come to a conclusion only based on the evidence adduced and as analysed. 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 analyse 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 as follows: Erick Monene Oyugi, PW1, testified that he was at home for school holiday on 8th August 2012, when at around 6 pm he went to visit his cousin, the deceased, at his home which doubled up as a kiosk. The deceased sent PW1 to pick up his jacket. When he returned, the 1st appellant knocked on the door asking for 85 pieces of jaggery but declined to pay. He asked for 64 more pieces and refused to pay for those too. The 1st appellant then took a panga and hit the deceased on the head and also cut PW1 on his head. The 1st appellant then opened the door for the other appellants who came in and attacked them and left them for the dead. PW1 recalled that the 2nd and 4th appellants were armed with pangas and the 3rd appellant had a knife. PW1 testified that he knew the appellants very well as they were his cousins, and they did not have a good relationship with the deceased. When PW1 regained consciousness the following morning at 7 am, he was taken to Hema Hospital. He testified that the deceased had been severely injured, with his tongue, eyes and fingers removed. On cross examination, PW1 stated that it was a little dark but since the kiosk was small and the appellants had torches, he was able to see them. He stated: "I witnessed when we were attacked and Bernard killed". He recalled that the 1st appellant wore a jacket, shirt and black trousers, the 2nd appellant wore a sweater and the 4th appellant wore a shirt.

5. Samwel Abeba, the father of the deceased, testifying as PW2, told the trial court that on the morning of 9th August 2012, he received information that his son, PW1 was badly injured and had been taken to hospital. He testified that his son had severe injuries and was in hospital for a long time. PW2 was declared a hostile witness by the prosecution for recanting his statement that PW1 told him who the assailants were, but after cross and re-examination by the court, PW2 stated that PW1 had given him the names of those who attacked him.

6. Monica Nyaboke Nyarimbasio, the deceased's mother, testifying as PW3, narrated how on the day in question, the deceased went to his place of work where he used to sell sugar. At around 6 pm, she asked PW1 to tell the deceased to come back home quickly when PW1 went to pick up the deceased's jacket. She further testified that the deceased did not come home that night; that the following morning at around 7 am she heard a lady scream; and on going to the place where the scream came from, she found the deceased with his head and hands decapitated, while PW1 lay on the ground unconscious with injuries.

7. Francis Gekonge Omindi, PW4, the Chief of Ekorongero location confirmed to the trial court that all the appellants hailed from Ekorongo; and that on 9th August 2012 he received a call at around 7 am, informing him about the death which had occurred in Sosera location. He proceeded to the scene and found the deceased lying on a sack of jaggery with his neck completely severed off. He informed the police who took the body to the morgue.

8. PC Samuel Marwa, who testified as PW5, was the Investigating Officer. He told the trial court that on 9th August 2012 at 7.00 a.m., he received a report from the area chief that two bodies were lying in a kiosk that was used to sell jaggery. At the scene, they found the body of the deceased on top of the jaggery with deep cut wounds on his head. PW1 was taken to hospital, and he mentioned the name of the 4 appellants as the assailants.

9. PW6, Dr. Peter Ratemo Merebu, testified on behalf of Dr. Boreme who had gone to do his further studies at the time. He presented the postmortem report prepared on 16th August 2012. The doctor observed that external appearance showed multiple cut wounds on the right hand a cut on the anterior neck measuring 15cm extending to the posterior part of the neck. He also observed multiple cut wounds on the frontal region of the face with complete cuts of the neck veins both right and left. Internal exam revealed that the trachea was completely cut off and the neck severed off. He also noted a fracture on the frontal bone on the spine column, the cervical bones were fractured, and a complete cut of the spine at C3. The doctor concluded that the deceased died as a result of hemorrhage shock secondary to a penetrating injury on the neck.

10. The 1st appellant, in his defence, testified that on 8th August 2012, he was arrested by a customer he was ferrying. The customer asked him to take him to Ramasha Police Station and told him that he was a police officer and arrested him for not having a reflector and helmet. He was later charged with the murder of the deceased. He denied seeing the deceased on that night and that his place was 142km from the deceased's place.

11. The 2nd appellant testified that he was at home on 8th August 2012 planting potatoes with his father. The following day his father was called to the scene and when he came back he informed the 2nd appellant that the deceased had been murdered. The 2nd appellant was then summoned to write a statement and he was taken to Ramasha Police Station and put in the cells where he stayed for two weeks and was arraigned in court to face the charges. He testified that he knew nothing about the deceased's death and that he had no grudge against the deceased who was his stepbrother.

12. The 3rd appellant denied involvement in the death and testified that on the material day, he went to the shamba and that on the following day at 9.00 a.m., he heard people crying at Sosera location and found out about the deceased's death. He was arrested by the chief and handed over to the police. Investigations were carried out and he was charged with murder.

13. The 4th appellant testified that he was home on the night of 8th August 2012, and while harvesting he was summoned by the chief who asked him if he had killed the deceased. He denied but was arrested and taken to the police station.

14. The appellants' counsel in submissions contended that it was at night when the incident occurred and that PW1 had not testified that there was light at the time or that he knew the appellants prior. Counsel submitted that an identification parade ought to have been conducted to identify the attackers, that the jaggery sold at the kiosk was not produced as an exhibit, that PW2 was never called back to the witness box after he was stood down and urged the court to dismiss the case.

15. The trial court, having considered the prosecution case, was satisfied that the ingredients of the offence of murder had been satisfactorily met. On the death of the deceased, the court noted that PW6 adduced medical evidence that ascertained the deceased's death and the cause of death as hemorrhage shock secondary to penetrating injury of the neck. The fact of the deceased's death was also corroborated by PW1, 3 & 4.

16. The trial court noted that the prosecution relied only on the direct evidence of PW1, the only witness at the scene. The learned judge warned herself about the dangers of convicting based on the evidence of a single witness relying on the case of *Abdallah bin Wendo & Sheh bin Mwambere v Regina* 20 EACA166 & *Kiilu & Another v Republic* [2005] eKLR. The learned judge noted PW1's detailed description of the appellants' encounter with the deceased and his testimony that the incident occurred at 7.00 p.m. when it was a little dark. Upon cross examination, PW1 stated that the appellants had a torch, he was in close proximity with the appellants, as such he could tell what they were wearing and he knew the appellants as they were his cousins.

17. On the issue raised that an identification parade ought to have been conducted, the learned judge pointed out that the parade would not have served any useful purpose as PW1 recognized the appellants and even mentioned their names to the police. On the issue of PW2's evidence and on being declared a hostile witness after recanting his original statement then going back to it, the court was of the opinion that PW2's statement was of no value, and in the court's view, PW1's evidence was in itself sufficient to prove the identities of the attackers as PW2 did not witness the attack.

18. As regards the issue of whether the injuries were inflicted with malice aforethought, the learned trial Judge was satisfied that the appellants having been properly placed at the scene inflicted the injuries that led to the death of the deceased; and these injuries were inflicted with an intention to cause grievous harm and/or death within the meaning of section 206(a) of the *Penal Code*; that the appellants ought to have known that the act of attacking the deceased with pangas and knives severing of the neck the deceased would cause death; as such the appellants knew what they was doing.

19. The court noted that although there was no evidence as to which of the appellants inflicted the fatal blow, there was a common intention amongst the appellants to commit the offence. Having considered all the evidence in its totality, the trial court found the prosecution evidence was overwhelming and effectively dislodged the appellants' alibi raised in their respective defenses and found the appellants guilty of the offence as charged and sentenced them each to serve 25 years imprisonment.

20. Aggrieved by the outcome, both on conviction and sentence, the appellants jointly raised 7 grounds in the memorandum of appeal as follows:

    i. That the learned trial judge erred in points of law and fact by failing to evaluate the evidence as a whole and observe that the prosecution never proved the case beyond reasonable doubt.

    ii. That the learned trial Judge misdirected herself by convicting the appellants from the inconsistent and contradictory testimony of prosecution's witnesses in particular the evidence of PW1.

    iii. That the learned Judge misdirected herself by convicting the appellants on the offence of murder relying on single witness testimony, which witness was a minor at the time of the incident and testimony contrary to the provisions of Section 124 of the *Evidence Act*.

    iv. That the learned Judge misapplied the law by convicting the 3rd appellant for having common intention with the rest of the appellants despite the evidence of PW1 stating that he did not participate in the assault of the deceased.

    v. That the learned Judge erred in convicting the appellants by holding that the Prosecution had proven the information of murder beyond reasonable doubt despite the prosecution not bringing conclusive evidence by omitting to produce the treatment notes & related exhibits, important witnesses who allegedly found the deceased at the Kiosk also failed to testify.

vi. That the learned judge erred in both law and fact by failing to subject the entire tender evidence in the course of the hearing to an exhaustive scrutiny therefore arriving at a verdict thereby occasioning miscarriage of justice;

vii. That having exercised its discretion capriciously when sentencing the appellant, the learned trial Judge's decision was unsafe and therefore warranting the intervention of this Honorable Court.

The appellant prays that the appeal herein be allowed, and the Judgment and/or decision of the trial court be set aside, varied and/or quashed.

21. Essentially, the appellants' grounds of appeal can be condensed to the following; that the prosecution did not prove the offence beyond reasonable doubt; that the court failed in convicting on the evidence of PW1 only; and that the court erred in finding comment intent between the appellants.

22. This Court is satisfied and agrees with the trial judge's finding that the appellants were placed at the scene by PW1, and from the evidence on record there is no other plausible version of how the deceased was killed or by whom.

23. The appellants submit that the trial court erred in convicting on the evidence of a single witness who was a minor whose testimony was not corroborated; that his testimony was inconsistent and contradictory; and that it was not clear who inflicted the fatal blow, as to warrant convicting all the appellants. To fortify the argument regarding lack of corroboration, the appellants draw from the provisions of section 124 of the *Evidence Act* which requires corroboration of children's evidence, save in sexual offences. The appellants also lament that the prosecution did not call all the witnesses.

24. The respondent, in opposing the appeal on this limb, acknowledges that it is trite law that the court, before convicting on the evidence of identification by a single witness, should warn itself of the possibility of mistaken identity on the part of the witness; that the trial court should carefully evaluate such evidence with utmost diligence including any other independent evidence on the matter. The respondent insists that the learned trial judge cautioned herself before considering the evidence of the single witness and determined that the evidence was consistent, vivid, and clear. In support of this proposition, the respondent refers to citing the decision in *Chila v Republic* (1967) EA 722 quoted by the court in *Mohamed Boru Guyo v Republic* [2022] eKLR which held that:

> "...The judge should warn ... himself of the danger of acting on uncorroboroted testimony of the complainant, but having done so he may convict in the absence of corroboration if he is satisfied that her evidence is truthful. lf no such warning is given, then the conviction will normally be set aside unless court is satisfied that there has been no failure of justice"

25. The provision in section 124 of the *Evidence Act* states as follows:

> 124. Corroboration required in criminal cases Notwithstanding the provisions of section 19 of the *Oaths and Statutory Declarations Act* (Cap. 15), where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him:
>
> > Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be

recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.

26. In response to the issue relating to who inflicted the fatal blow, the respondent submits that the appellants committed the offence together and at the same time all of them participated in kicking and cutting the deceased with their pangas and rungus. In this regard, we are invited to consider the statutory definition of common intention as found in section 21 of the *Penal Code*. From the record, PW1 testified that he was at the deceased's kiosk when the 1st appellant came and asked for jaggery which he refused to pay for and instead attacked PW1 and the deceased with a panga, and let in the other appellants who were armed with pangas and knives. We acknowledge that before convicting on the evidence of identification by a single witness, a court should warn itself of the possibility of mistaken identity on the part of the witness. The trial court should carefully evaluate such evidence with utmost thoroughness in order for it to be satisfied that it is safe to convict. It should, therefore, consider any other independent evidence on the matter. See *Abdala Bin Wendo v R* [1989] KLR 424, and *R v Turnbull* (1976) 3 All ER 549. It is competent for a court to convict on evidence of a single witness if that evidence is clear and satisfactory in every respect.

27. The law is also clear that there is no particular number of witnesses required for proof of any fact. Further, it has not been shown that the evidence tendered had gaps which required to be filled. See *AHM v Republic* (Criminal Appeal E043 of 2021) [2022] KEHC 12773(KLR)(31 August 2022) (Judgment). This Court is of the view that being the only eyewitness, PW1'S testimony was unshaken. This court also notes that the evidence of PW6 and the postmortem report also buttresses PW1's testimony and is satisfied that the conviction was proper.

28. Did the appellants have a common intention? Was it crucial to establish who administered the final fatal blow or chop? Section 21 of the *Penal Code* which defines common intention as follows:

> When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purposes, an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence.

29. This Court in *Stephen Ariga & Another v Republic* [2018] eKLR while quoting with authority the decision of *Wanjiru d/o Wamerio v Republic* 22 EACA 521 expounded on the doctrine of common intention as follows:

> "Common intention generally implies premeditated plan, but does not rule out the possibility of a common intention developing in the course of events, though it might not have been present to start with"

30. It is abundantly clear to us that the appellants were all placed at the scene; and it did not matter who did what, as their end goal was clear- to eliminate the deceased and as such acted in concert to commit the offence. We are in agreement with the trial court that the appellants must have known the outcome of their actions, repeated multiple chopping of the neck and hands of any human being, to the point of decapitation can only mean that the actors intended maximum grievous harm or even death. This Court also agrees with the trial court that the identification parade with regard to the appellants was of no consequence as they were known to PW1 and an identification parade would have been superfluous. We are, thus, satisfied that the appellants were properly identified and the prosecution witness placed the appellants at the scene.

31. The appellants also fault the trial court for convicting them without the production of the weapons used in the attack. This Court has held severally that it is not fatal to the prosecution case if the murder weapon is not produced. In *Ekai v Republic* (1981) KLR 569 this Court rejected the argument that failure to produce the murder weapon is in itself fatal to a conviction. In that case the Court found that even though the murder weapon had not been produced, the post mortem examination had established beyond all reasonable doubt that the fatal injury had been caused by a sharp weapon. Also see *Karani v Republic* (2010)1 KLR 73 at page 79 & *Ramadhan Kombe v Republic* CRA No. 168 of 2002-MSA).

32. With regard to sentencing, the appellants submit that their mitigation was not considered and that the imposed sentence is unduly harsh and excessive. The respondent on the other hand argues that the circumstances of the case deserved an even more punitive sentence and should this Court interfere, the sentence should be enhanced to life.

33. 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. In *Francis Muruatetu & Another v Republic*, the Supreme Court of Kenya Petition No. 15 & 16 of 2016, the court 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.

34. 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 that censure or in the converse impose the death penalty."'

35. This Court in *Chai v 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. To justify a death, sentence the ruling should have spoken to it, showing in black and white what the court considered. In the absence of any demonstration of factors that could have led to such a sentence we find the same to be excessive.

36. It is our finding that the trial court followed the guidelines set out by the Supreme Court with regards to mitigation and in doing so used its discretion in making an informed decision with regard to sentencing noting the circumstances of the case. We note from the record that there is a ruling on sentence which shows what the trial court took into account in sentencing. This Court agrees with the sentencing of the trial court. The deceased suffered a brutal, gruesome and most painful death, his neck having been severed off. One could even say that the trial court was very lenient with the appellants.

37. To that end this Court finds that this appeal lacks merit and upholds the judgment of the High Court and affirms the sentence imposed by trial court.

It is so ordered.

**DATED AND DELIVERED AT KISUMU THIS 13TH 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**