Kiragu v Republic (Criminal Appeal E018 of 2023)
[2025] KECA 852 (KLR) (7 March 2025) (Judgment)

Neutral citation: [2025] KECA 852 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MALINDI

CRIMINAL APPEAL E018 OF 2023

AK MURGOR, GWN MACHARIA & KI LAIBUTA, JJA

MARCH 7, 2025

BETWEEN

SAMUEL KAMANGARA KIRAGU ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Garsen (R. Nyakundi, J.) delivered on 30th September 2021 in HCCR No. 5 of 2019)

JUDGMENT

1. This is an appeal from the judgment of the High Court of Kenya at Garsen (R. Nyakundi, J.) dated 20th May 2021 in Criminal Case No. 5 of 2019 in which the appellant, Samuel Kamangara K, was charged with the offence of murder contrary to section 203 as read with section 204 of the *Penal Code*. The particulars were that, on 26th January 2019 at Mukondoni area, Hindi Location in Lamu West Sub-County within Lamu County, the appellant murdered his wife, Margaret Wanjiku Njoroge (the deceased).

2. The appellant pleaded not guilty to the charge whereupon the trial proceeded with the prosecution calling 9 witnesses in support of its case. It is noteworthy from the record of the witness testimonies and the list of witnesses provided by the prosecution, it appears that the testimonies of PW1 and that of PW3 were inadvertently interchanged in the record, which explains the minor discrepancy in the record that by no means prejudices the prosecution or the defence case.

3. PW1 is unnamed in both the typed and handwritten court proceedings but is erroneously indicated in the list of prosecution witnesses as being JK, who actually testified through an intermediary as PW3. PW1 is in fact MW, the deceased's 17 year-old daughter and the appellant's step-daughter, who was erroneously listed as PW3 in the list of prosecution witnesses.

4. According to PW1, she was at home with her younger siblings K (erroneously referred to as PW1 instead of PW3) and the infant P when the deceased returned from the neighbouring Sinambio village with oil and flour, which she put on the ground and went outside; that the deceased said "Baba K, don't hide, I have seen you"; and that the deceased later prepared a meal, which they took, after which the deceased took the small child (P) and went out. Soon thereafter, PW1 heard the deceased screaming; that PW1 took a towel and went outside; that she saw the appellant slap the deceased, who ran into the house and fell down; that the appellant cut the deceased with a panga on the head and neck, and that he also cut her with a jembe; that PW1 could see the appellant as there was light coming from a phone's torch on the table; that the appellant turned to PW1 and said that he would kill her; and that PW1 and her siblings ran out and slept at their aunt's home.

5. PW1 further testified that the appellant and the deceased would often quarrel, but that she did not know what they quarrelled about.

6. MMW, a minor aged 11 years, and a daughter to the deceased and the appellant, testified as PW2 after a voir dire examination was conducted whereupon she was found to be fit to testify. PW2's testimony was that, on the material day, she was at her aunt's place when she was called by a neighbour called Erick, who told her that something had happened at home, but would not say what; that PW2 took a bodaboda ride home and found the police and many people at the scene; and that she was told that her mother (the deceased) had been cut.

7. PW2 further testified that the appellant had a history of violence; that, at one time, the appellant cut the deceased on the fingers and would threaten them; and that the appellant had even been arrested, but that the deceased went to the police to have the appellant released.

8. JK, a minor aged 4 years, and a son to the deceased and the appellant, testified through an intermediary as PW3. According to him, the deceased was at home during the night when the appellant cut the deceased; and that, thereafter, he went to stay with his aunt.

9. On the material day, PW5, Fredrick Mwangi Njoroge, had visited his friend Joseph Maweu (PW6), a neighbour to the deceased. According to PW5, at about 8:30 pm while they were relaxing, they heard screams from the deceased's house; that they did not react immediately because it was normal for the couple to fight and quarrel; that, when they heard more loud screams, they stood near the house and listened keenly; that they heard one of the children saying that "Baba K has beaten mum"; that they moved closer and called out the deceased's name; that the children came out and M (PW2) told PW5 that the appellant had cut the deceased, and that he had gone away; that PW5 approached the house and saw the deceased's body using the torch on his phone; that PW6 also saw the body and noted that there was blood on the floor; and that they then called PW4, the village elder. According to PW5 and PW6, the appellant and the deceased were living separately when the incident occurred.

10. PW4, Hassan Chonde Abdullah, a village elder, recalled being at home on the material day at 9:00 pm when he received a call from one Mwangi (PW5), who told him that there was a murder incident in the village; that the incident involved the deceased and her husband, the appellant; that PW4 rushed to the scene and saw the deceased's body; that the children were there, but that the appellant was not at the scene at the time; that PW4 proceeded to call the chief and the police; and that the police came from Mukome Police station, examined the body and took it away.

11. In his testimony, PW4 recalled receiving a complaint from the deceased that the husband had threatened to kill her, and that the last report was about a week before the murder; that PW4 handled the case and advised the couple to live separately; that he advised the deceased to report the matter to the police; and that the deceased told him that she had reported several times. PW4 further stated that

the deceased was the one who owned the house and the land and, therefore, the appellant was the one who moved out after the case; and that he had not heard that the appellant had returned.

12. PW7, Caleb Gitari Mwaniki, likewise received a call from PW5 requesting him to go to the deceased's house; that he went to the scene and found PW5 and PW6 together with 3 children of the deceased; and that one of the children said that the father had cut up the mother.

13. PW8, John Mungai Mwangi, was at home when a motorcycle rider came and informed him that the village elder wanted to see him; that he proceeded to the scene of the incident and saw the deceased's body full of injuries and soaked in blood; and that he saw the deceased's children, and had a brief conversation with M (PW2), who told him that their father came armed with a jembe, which he used to inflict harm on the deceased. PW8 further stated that the appellant and deceased were husband and wife, but that they had separated at the time of the incident.

14. PW9, Cpl. Abdalla Tacho, a police officer attached to DCIO – Lamu West, testified that the murder incident was reported by Joseph Maweu (PW6); that PW8 went to the scene, took photographs and recorded statements from witnesses; that his investigations revealed that the appellant and the deceased had separated due to domestic issues; that, on the material day, the appellant went to the market and gave the deceased Kshs. 150; that the deceased returned home at around 9:00pm and prepared a meal; that the deceased met the appellant outside the house and went back into the house; that the appellant opened the door and hacked the deceased on the head and neck, and also used a jembe on the deceased; and that the appellant threatened the minors.

15. PW9 further testified that the body of the deceased was moved to the mortuary for post-mortem examination; that the jembe was recovered and produced in court as an exhibit, but that the panga was never recovered; and that the appellant was arrested at Karafu Village where he was subjected to mob justice. PW9 produced the post-mortem form prepared by one Dr. Fawazi, who observed a deep cut wound on the left part of the head penetrating into the skull; 3 deep cut wounds on the left side of the neck; and a small cut wound on the right forearm. Although the second last page of the report is missing from the record, the impugned judgment indicates that Dr. Fawazi was of the opinion that the cause of the deceased's death was severe head injury and haemorrhage secondary to deep cut wounds on the skull and neck.

16. Having considered the prosecution evidence, the trial court found that the appellant had a case to answer and put him on his defence. In his defence, the appellant gave sworn evidence, stating that he was taking alcohol at Sinapiu in the company of the deceased until 7:30 pm when the two proceeded to their separate houses; that he arrived at his house at Maweni; that he later heard screams at the market; and that he did not get to the scene as he was attacked by unknown members of the public and fell unconscious. The appellant denied being at the scene during the incident, denied being armed, and contended that the prosecution witnesses' testimony was a fabrication.

17. In its judgment, the High Court (R. Nyakundi, J.) held that the cause of the deceased's death happened to be the fatal injuries inflicted on the head and neck; that there was no evidence that the injuries were naturally or accidentally caused; that PW1 and PW2's evidence indicated that the appellant had attacked the deceased with a panga as he set out to inflict physical bodily harm; that the intention to kill could be inferred from the brutality of the killing carried out by the accused and the appellant's failure to call for assistance to take the deceased to hospital; that PW1 and PW2 recognized the appellant at the scene as he inflicted serious harm on the deceased; that more supporting evidence came from the appellant's admission that he had parted ways with the deceased immediately before the alleged assault took place; that there was no doubt that the appellant single-handedly designed the plan, which he

executed with precision to murder the deceased; and that the appellant had no alibi evidence to disprove the prosecution's case.

18. In view of the foregoing, the court found the appellant guilty of the offence as charged and proceeded to sentence him to 30 years' imprisonment.

19. Aggrieved by the conviction and sentence, the appellant moved to this Court on the instant appeal on three (3) grounds set out in his Memorandum and Grounds of Appeal filed on 28th July 2023, namely:

> "1. That the learned Judge erred in law by not considering that there was no common intention in the killing of the deceased person.
>
> 2. That the learned High Court Judge erred in law by not considering there were massive contradictions and invariances.
>
> 3. That the learned High Court Judge erred by not considering my defense."

1. In support of the appeal, learned counsel for the appellant, M/s. Bennette Nzamba & Co., filed written submissions and a list of authorities dated 22nd September 2024. Counsel cited the cases of Boniface Muteti Kioko & another vs Republic (1982-88) 1 KAR 157 for the proposition that it is the duty of the Judge to deal with alternate defense such as intoxication that emerged from the evidence which might reduce the charge to manslaughter; Rex v Retief [1940-1943] EA 71 for the proposition that insanity, whether induced by drunkenness or otherwise, is a defense to the crime charged; that it is immaterial whether the insanity so induced was permanent or temporary; and that if a man's intoxication were such as to induce insanity so that he did not know the nature of his act or that his act was wrongful, his act would be excusable on the ground of insanity, and that the verdict should be as laid down in section 159 of the *Criminal Procedure Code* 'guilty of the act charged but insane when he did the act.'; Roba Galina Wario v. Republic [2015] eKLR for the proposition that, for the conviction of murder to be sustained, it is imperative to prove that the death of the deceased was caused by the appellant; and that he had the required malice aforethought and that, without malice aforethought, the appellant would be guilty of manslaughter; and the cases of Shadrack Kipchoge Kogo vs.Republic, Ogolla s/o Owuor vs. Republic [1954] EACA 270; and Bernard Kimani Gacheru vs. Republic [2002] eKLR for the proposition that the appellate court would be entitled to interfere with the sentence imposed by the trial court if it is demonstrated that the sentence imposed is not legal, or that it is so harsh and excessive to amount to a miscarriage of justice, and/or that the court acted upon wrong principles, or if the court exercised its discretion capriciously.

21. Learned counsel for the respondent, Wangari Mwaura (Principal Prosecution Counsel) filed written submissions dated 16th July 2024. Counsel cited the cases of Okeno vs. R (1977) EALR 32; and Mark Oiruri Mose vs. Republic [2013] eKLR, which set out the duty of this Court in a first appeal; Anthony Ndegwa Ngari vs. Republic [2014] eKLR, which set out the elements to be satisfied in order to prove the offence of murder, that is, the death of the deceased, that the accused committed the unlawful act which caused the death of the deceased, and that the accused had malice aforethought; Erick Onyango Ondeng' vs. Republic [2014] eKLR for the proposition that grave contradictions, unless satisfactorily explained, will usually, but not necessarily, lead to the evidence of a witness being rejected, and that the court will ignore minor contradictions, unless the court thinks that they point to deliberate untruthfulness, or if they do not affect the main substance of the prosecution's case; and the cases of R v Sukha Singh S/o Wazer Singh & Others (1939) 6 EACA 145; and R v Mahoney (1979), 50 C.C.C. (2d) 380 for the proposition that, if an accused person's evidence is an alibi, he should bring forward that alibi as soon as he can to avoid a doubt as to whether he has not been preparing it in the internal,

and to give the prosecution an opportunity of inquiring into that alibi and, if they are satisfied as to its genuineness, proceedings will be stopped.

22. We have considered the record of appeal, the rival submissions and the applicable law. Our mandate on a first appeal as set out in rule 31(1) (a) of the Rules of this Court is to reappraise the evidence and draw our own conclusions. In principle, a first appeal takes the form of a rehearing (see Ogaro vs. Republic [1981] eKLR).

23. This being a first appeal, it is by way of a retrial and this Court, as the first appellate court, has a duty to re-evaluate, re-analyse and re-consider the evidence afresh and draw its own conclusions on it. However, when doing so, the Court should bear in mind that it did not see the witnesses as they testified and give due allowance for that.

24. It must be borne in mind, though, that scrutiny without more is not sufficient. The Court is mandated to undertake a fresh and exhaustive examination and reach its own decision on the evidence on record. In this regard, the Court in Okeno vs. Republic [1972] EA 32 set out the duty of a first appellate court in the following words:

> "An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses."

25. This cautious approach has deep roots in comparative common law jurisdictions as demonstrated in the decision of the Supreme Court of India in Ganpat vs. State of Haryana (2010) 12 SCC 59, where the court set out the principles to be borne in mind by a first appellate court while dealing with appeals and stated thus:

> " a. There is no limitation on the part of the appellate Court to review the evidence upon which the order appealed against is founded and to come to its own conclusion.
>
> b. The first appellate Court can also review the trial court's conclusion with respect to both facts and law.
>
> c. It is the duty of a first appellate Court to marshal the entire evidence on record and by giving cogent and adequate reasons may set aside the decision appealed against or the entire proceedings if they are flawed.
>
> d. When the trial Court has breached provisions of *the constitution* or ignored statutory provisions, or misconstrued the law, or breached rules of procedure, or ignored crucial evidence or misread the material evidence or has ignored material documents, or in any manner compromised the accused rights to a fair trial or prejudiced the accused etc. the appellate court is competent to reverse the decision of the trial court depending on the materials in question."

26. Learned counsel for the appellant urged us to consider two main issues, namely whether the prosecution established malice aforethought; and whether the sentence meted on the appellant ought

to be reduced. On her part, learned prosecution counsel for the respondent anchored her submissions on the three grounds of appeal advanced by the appellant.

27. In our considered view, the appeal raises four main issues, namely: whether the prosecution established malice aforethought; whether there were massive contradictions and invariances in the prosecution's case; whether the learned Judge failed to consider the appellant's defence; and whether the sentence meted on the appellant ought to be reduced.

28. We take to mind the fact that the deceased's death and the cause thereof as disclosed in the post-mortem report are not in contention and that, therefore, we need not say more, save to take note of "the severe head injury and haemorrhage secondary to deep cut wounds on the skull and neck" to which her death was attributed. Neither does the appellant deny inflicting those injuries on the deceased subject, however, to the defence of intoxication in which he takes refuge, and on which learned counsel have submitted substantively, urging us to find that the appellant had no malice aforethought.

29. On the 1st issue as to whether the prosecution established malice aforethought, learned counsel for the appellant submitted that the appellant was drunk together with his deceased wife when an incident occurred that led to the offence of murder; that the appellant does not recall what happened between him and the deceased, which could have led him to commit the offence of murder; that he was very intoxicated that night; that intoxication can be pleaded as a defence by an accused person to show that, as a result thereof, he did not understand the nature of his actions or know that what he was doing was wrong, or form the necessary intent to commit the crime; that, in as much as the appellant was voluntarily intoxicated, he indicated that he was not able to form the necessary intention to commit the unlawful act of murder because he did not even recall what really happened on that day; and that, in the circumstances, the prosecution did not prove mens rea in accordance with section 206 of the *Penal Code* as they did not prove beyond reasonable doubt that the appellant had the intention to cause the deceased's death.

30. On her part, learned prosecution counsel for the respondent submitted that the appellant went to the deceased's house and was hiding so as not to be seen; that the prosecution witness testified that when the deceased went outside, he heard the deceased say "Baba K usijifiche, nimekuona"; that this was a clear indication that the appellant was hiding to lay ambush on the deceased; and that, on realising that the appellant intended to attack her, the deceased tried to find refuge inside the house, but that the appellant followed her armed with crude weapons ready to attack her, a clear indication that he had malice aforethought.

31. In the impugned judgment, the learned Judge held as follows:

> " The next ingredient is that of malice aforethought as defined in section 206 of the penal code...
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> In the present case, K and M referred to the attack by the accused while armed with a panga as he set out to inflict physical bodily harm. Thereafter, a postmortem examination report revealed that
>
> ... the cause of death as already observed elsewhere in this judgement was severe head injury and hemorrhage due to the deep cut wounds on the skull and neck.
>
> The prosecution witnesses both in their direct and circumstantial evidence pointed to the fact of injuries to the head and neck. The body also lay in a pool of blood at the scene. The intention to kill can be inferred from the brutality of the killing carried out by the accused and the manipulated deadly weapon, a panga which was used to repeatedly hit the head and neck. Further, the accused on inflicting the fatal injures did nothing to mitigate the loss by

making any attempts to call for assistance for the deceased to be escorted to the hospital. There was therefore clear elements of malice aforethought that the execution of the deceased was in cold blood with no justification or excuse.

This killing went on in the presence of the children of the deceased who had to call out the neighbours for psycho-social support. The acts of assaulting the deceased with a panga targeting the vulnerable parts of the body was inhumane and the consequences foreseeable by the accused. The resultant outcome was to kill the deceased. The intention having been proved to excuse for this offence therefore discharges the burden which rests with the prosecution beyond reasonable doubt."

32. Section 206 of the *Penal Code* provides:

> 206. Malice aforethought
>
> Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances—
>
> a. an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;
>
> b. knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;
>
> c. an intent to commit a felony;
>
> d. an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.

33. Faced with a similar issue in Bonaya Tutu Ipu & another v Republic [2015] eKLR, this Court held that:

> " Malice aforethought" is the mens rea for the offence of murder and it is the presence or absence of malice aforethought, which is decisive in determining whether an unlawful killing amount to murder or manslaughter. Whether or not malice aforethought is proved in any prosecution for murder depends on the peculiar facts of each case ....
>
> It is in rare circumstances that the intention to cause death is proved by direct evidence. More frequently, that intention is established by or inferred from the surrounding circumstances. In the persuasive decision of CHESAKIT V. Uganda, Cr. App. No. 95 of 2004, the Court of Appeal of Uganda stated that in determining in a charge of murder whether malice aforethought has been proved, the court must take into account factors such as the part of the body injured, the type of weapon used, if any, the type of injuries inflicted upon the deceased and the subsequent conduct of the accused person. Earlier in Rex V. Tubere S/

O Ochen (1945) 12 EACA 63, the former Court of Appeal for Eastern Africa stated thus on the issue:

> 'It (the court) has a duty to perform in considering the weapon used and the part of the body injured, in arriving at a conclusion as to whether malice aforethought has been established, and it will be obvious that ordinarily an inference of malice will flow more readily from the case, say, of a spear or knife than from the use of a stick...'"

34. Counsel for the appellant submits that the appellant pleaded insanity due to intoxication as his defence; and that, due to intoxication, the appellant was not able to form the necessary intention to commit the unlawful act of murder. However, going by the record, all that the appellant appears to plead is an alibi defence, and this is what he had to say:

> " Following the offence of murder, I do not know why I was charged with the offence .... I was accused but I never committed the offence. I was at home in the December of 26.1.2019. I was consuming alcohol at Sinaupiu. There was incidence that happened. We proceeded with the deceased. I stay at Maweni at 7.30 pm.
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> Each of us had a house. I arrived at my house. I heard screams on the market. I did not arrive at the scene. I was attacked by members of the public.
>
> I was unconscious. I did not know the people it was at night. They started stabbing me with a knife. The deceased was my wife. I was not armed."

35. When cross-examined by Mr. Mwangi for the DPP, the appellant stated thus:

> " I was not there during the incident. I tried to separate myself but no one could hear of it. It was at night.
>
> I sustained injuries. I heard witnesses testify that it was a fabrication."

36. Contrary to the appellant's statement, PW1 and PW3 recognised the appellant and placed him at the scene. They saw him viciously attack and cut the deceased with a panga and struck her with a Jembe on the head and on the neck. To our mind, the weapons used by the appellant; the parts of the deceased's body that he targeted to injure; the appellant's wilful neglect to seek medical attention to save the deceased's life; and the threat to PW1 that he would kill her, all leave no doubt that malice aforethought had been proved.

37. In view of the foregoing, the suggestion by counsel for the appellant that the appellant had pleaded intoxication is far- fetched and misplaced. The record as put to us attests to the alibi defence, which would invariably dispel the intoxication alluded to as a defence. In any event, no evidence of intoxication was adduced to support counsel's argument that the appellant did not know what he was doing. It defeats reason to assert on the one hand that he was not placed at the scene of crime and, on the other hand, state that he was too intoxicated to know what he was doing. The fact that the alibi raised by the appellant is incompatible with the defence of intoxication, such a defence cannot stand.

38. With regard to the offence of murder and proof of malice aforethought, the Eastern Court of Appeal observed as follows in Rex vs. Tubere s/o Ochen (1945) 1Z EACA 63:

> " In determining the existence or nonexistence of malice one has to look at the facts proving the weapon used, the manner in which it is used and the part of the body injured." [Emphasis added]

39. In the same vein, the court in Hyam vs. DPP (1975) AC 55 held, inter alia, that the intent to do grievous bodily harm was sufficient to convict for murder. In the court's view:

> " Malice aforethought in the crime of murder is established by proof beyond reasonable doubt when during the act which led to the death of another the accused knew that it was highly probable that, that act would result in death or serious bodily harm."

40. In view of the foregoing, we find nothing to fault the learned Judge's conviction that the appellant was guilty of the offence of murder and that malice aforethought had been established. Accordingly, the 1st ground of appeal fails.

41. Turning to the 2nd issue as to whether there were massive contradictions and invariances in the prosecution evidence, learned counsel for the appellant submitted that the prosecution evidence was fundamentally flawed in light of the *Evidence Act* and the rules of natural justice, and that it was not sufficient to sustain the conviction and sentence.

42. On their part, learned counsel for the respondent submitted that the prosecution witnesses did not in any way contradict themselves; that they remained consistent even on cross- examination; and that the witnesses corroborated each other. Counsel further submitted that it is not possible for all witnesses to say the exact same thing, and that there is bound to be minor inconsistencies.

43. In the impugned judgment, the learned Judge had this to say on the issue:

> " The infliction of the grievous harm was witnessed by Joshua K and Magdalene Muthoni [who] alluded to the fact on the commencement of the conflict. It was their evidence that the deceased came home with oil and flour. It was at that moment the accused also came to the homestead. It was emphasized in their evidence that when the deceased stepped out she was violently attacked by the accused who armed himself with a panga. The screams which came from the home attracted the attention of neighbours whose homes were just within the vicinity.
>
> In their recollection of evidence to wit Pw5, Pw6, Pw7 and Pw8 the deceased was killed at her house and she was physically injured to the head and neck. Their evidence was consistent and unshaken."

44. We find nothing to establish the so-called "massive contradictions" in the prosecution evidence which, to our mind, was consistent throughout. PW1 and PW3 both recognised and positively identified the appellant as the one who inflicted the fatal injuries on the deceased. The testimonies of PW4 to PW8 corroborated the children's evidence as they consistently reported to those witnesses that the appellant had cut their mother. The evidence of PW4 to PW6 also established the appellant's history of violence towards the deceased and the subsequent separation of the couple without any rebuttal or challenge by the appellant. Moreover, the appellant has not pointed out any particular contradictions or invariances in the prosecution evidence for the court to consider in his favour. Likewise, this ground of appeal fails.

45. On the 3rd issue as to whether the learned Judge failed to consider the appellant's defence, learned counsel for the appellant did not make any submissions on this issue, which we consider as having been abandoned. Be that as it may, it would be remiss of us not to pronounce ourselves on the matter as we see it.

46. We agree with learned counsel for the respondent that the appellant attempted to raise the defence of alibi to which the trial Judge addressed himself substantively and in no uncertain terms. In his defence, the appellant denied committing the offence and testified that, although he heard screams, he did not get to where they came from because he lost consciousness after he was attacked by a mob. The record is clear that the trial court considered this defence and found that it did not hold any water, the same having been raised as an afterthought, and not having been raised early enough to enable the prosecution to investigate it. In any event, that defence was easily displaced by the prosecution evidence as shown in the impugned judgment where the learned Judge observed:

> "The implication of the prosecution evidence is that K and M personally recognized the accused at the scene as he went about inflicting serious harm against the deceased. The test to be applied in determining whether or not there was sufficient evidence to plainly place the accused at the scene has been fully answered for over purposes in the unchallenged testimonies of K and M. Prior knowledge of the accused as their father foreclosed any irregularity mistake or error that may be associated with a failed identification...
>
> ...The more supporting evidence came from the accused admitted fact that he had parted ways with the deceased in close proximity when the alleged assault took effect. There is therefore no doubt that the accused person single handedly designed the plan, which he executed with precision to murder the deceased who also happened to be his wife.
>
> The essence of all that is non-proof of alibi defence to mischaracterize and label the prosecution case as dispensable in proving the charge of murder against the accused beyond reasonable doubt....
>
> ...In this respect, the alibi defence is dismissed for lack of merit."

47. To say that his defence was not considered is to stretch his right of appeal too far from reason. Neither was it founded on any factual evidence. In Erick Otieno Meda vs. Republic [2019] eKLR, this Court set out the principles to guide the Court when considering an alibi defence as follows:

> "(a) An alibi needs to be corroborated by the other witnesses, and not just a mere regurgitation of the events from the accused's point of view.
>
> b. An alibi defence needs to be introduced at an early stage so as to allow it to be tested, especially during cross-examination of the trial.
>
> c. The alibi defence or evidence may often rest on the credibility of the accused and the reliability of the evidence that he or she has presented in court.
>
> d. The accused does not need to prove the alibi, but the prosecution must have presented its case that the accused is guilty beyond a reasonable doubt so as to allow the alibi to fail. (See Mhlungu - v - S (AR 300/13) [2014] ZAKZPHC 27 (16 May 2014)"

48. In the same vein, in R. vs. Sukha Singh s/o Wazir Singh & Others [1939] 6 EACA 145, the predecessor to this Court held that:

> " If a person is accused of anything and his defence is an alibi, he should bring forward that alibi as soon as he can because, firstly, if he does not bring it forward until months afterwards there is naturally a doubt as to whether he has not been preparing it in the interval, and secondly, if he brings it forward at the earliest possible moment it will give prosecution an opportunity of inquiring into that alibi and if they are satisfied as to its genuineness, proceedings will be stopped."

49. Having scrutinised the record as put to us, we find that the appellant's alibi was not corroborated by any witness, and was not brought forward at an early stage of the trial, but only in the appellant's statement in his defence. Perhaps, that would explain counsel's silence on the matter. In the face of the unshaken prosecution evidence that proved his presence at the scene, and that he was the one who committed the offence, the learned Judge correctly found, as we likewise do, that the alibi defence must fail.

50. On the 4th and last issue as to whether the appellant's sentence ought to be reduced, we hasten to observe that this issue does not feature in the grounds on which the appeal was preferred, but is raised for the first time in the submissions by his counsel. For this reason, learned counsel for the respondent made no submissions on sentence.

51. Be that as it may, learned counsel for the appellant submitted that, when sentencing, the court must take into account all relevant factors and eschew all extraneous or irrelevant factors; that, while exercising its discretion in sentencing, the court should bear in mind the principles of proportionality, deterrence and rehabilitation and, as part of the proportionality analysis, mitigating and aggravating factor should also be considered; that the sentence imposed on the appellant was excessive in light of the minimum sentence prescribed in statute law; that the appellant had no intention of committing the offense of murder; and that he was very remorseful for committing such a crime in the first place. Counsel urged us to reduce the sentence so that the appellant can re-join his family because his absence has caused them great suffering.

52. Though not advanced as a ground of appeal, we nonetheless take the liberty to pronounce ourselves thereon and set the law straight on this indisputable issue of judicial discretion as an obiter dicta. We begin by recalling the words of the learned Judge, who had this to say:

> " ... Samuel K has been convicted of murder contrary to section 203 as punishable under 204 of the penal code. The evidence showed that he intended to kill the deceased. That is apparent from the prosecution evidence adduced against him at the trial.
>
> In K's case, there are mitigating factors that may be applied to influence the decision on the type of sentence to be implored. The obvious factors that stated out are in respect of the intention to cause death of the deceased. The provisions of section 204 provide for the death penalty as the maximum sentence but, in K's case, I consider that the appropriate minimum term is one of 30 years imprisonment with effect from 1st February, 2019."

53. Recognising the discretionary powers of the trial court in Francis Nkunja Tharamba v Republic [2012] KECA 29 (KLR), this Court held that:

> "...sentencing is a discretionary act of the trial court even though the limits such as the maximum sentences and in some cases the minimum sentences are prescribed by law, nonetheless, as to the exact sentence to be pronounced upon a convicted person, the trial

court has in most criminal cases, the discretion to decide. That being the case, in law, the appellate court should not intervene in such an exercise of discretion by an inferior court unless, it is demonstrated to it that the trial court has not exercised that discretion properly in that it has failed to consider matters it should have considered or that it has considered matters it should not have considered or that looking at the entire decision, it is plainly wrong. These are the situations in law where the appellate court can intervene in the trial court's exercise of discretionary power such as that of sentencing. The next principle that the appellate court should adhere to when considering an appeal on sentence is that when the sentence is lawful, the appellate court should not interfere."

54. We find nothing on record to suggest that the sentence of 30 years imprisonment meted on the appellant was plainly wrong; or that the learned trial Judge considered matters he ought not to have considered, or that he failed to consider matters he ought to have considered in imposing the sentence belatedly complained of in closing submissions of counsel as an afterthought, a practice that should not be encouraged.

55. Having considered the record of appeal, the grounds on which it is anchored, the rival submissions of learned counsel, the cited authorities and the law, we reach the inescapable conclusion that the appeal fails and is hereby dismissed in its entirety. Consequently, the judgment of the High Court of Kenya at Garsen (R. Nyakundi, J.) delivered on 30th September 2021 is hereby upheld, and it is so ordered.

DATED AND DELIVERED AT MOMBASA THIS 7TH DAY OF MARCH, 2025.

A. K. MURGOR

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JUDGE OF APPEAL

DR. K. I. LAIBUTA CArb, FCIArb.

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JUDGE OF APPEAL

G. W. NGENYE-MACHARIA

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JUDGE OF APPEAL

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

Signed Deputy Registrar