Mandaa v Republic (Criminal Appeal E007 of 2023) [2025] KECA 674 (KLR) (11 April 2025) (Judgment)

Neutral citation: [2025] KECA 674 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MOMBASA

CRIMINAL APPEAL E007 OF 2023

KI LAIBUTA, WK KORIR & GWN MACHARIA, JJA

APRIL 11, 2025

BETWEEN

SAMUEL MWACHOFI MANDAA .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Voi (Farah S. M. Amin, J.) delivered on 16th December 2019 in HCCR No. 3 of 2016)

JUDGMENT

1. The appeal before us arose from the judgment of the High Court of Kenya at Voi (Farah S. M. Amin, J.) dated 16th December 2019 in Criminal Case No. 3 of 2016 in which the appellant, Samuel Mwachofi Mandaa, was charged with murder contrary to section 203 as read with section 204 of the *Penal Code*.

2. The particulars of the charge were that, on 24th July 2016 at Sagala Village within Taita Taveta County, the appellant murdered Paul Mwashambo (the deceased). The appellant pleaded not guilty and stood trial.

3. The prosecution called five (5) witnesses. PW1 – PM, a 17-year-old minor, and a student at [Particulars withheld] Secondary School, was sworn in after a voire dire examination. He testified that, on 11th June 2016 at about 4:00pm, he was chatting with the deceased and a boy named J while seated on a culvert by the road near Sagala Health Centre when the appellant, who was known to PW1, charged towards them while demanding that they move away from that spot; that they did not know why he wanted them to move since they had not provoked him; that PW1 observed that the appellant was drunk as he spoke to them loudly; and that, when the appellant got to where they were, PW1 and J ran about 15 to 20 metres away, but that the deceased remained where he was seated.

4. The appellant lifted and threw the deceased down several times; that, all this while, the deceased was telling the appellant that he was hurting him, but the appellant would not stop; that coincidentally, a doctor emerged from Sagala Health Centre and requested the appellant to stop beating the deceased; and that the appellant eventually stopped and walked away.

5. PW1 went on to testify that, after the ordeal, the deceased was conscious but had bruises on his hands and legs; that he was bleeding from his hands, legs and left side of his forehead, which was also bruised; that the deceased could not walk properly; that the deceased told PW1 and one J that he was in pain and felt like "his back was being pulled"; that the deceased requested them to retrieve his phone which he misplaced during the beating, but that they could not find it; that they initially set out to take the deceased home, but were advised by passersby to take him to hospital; that one Jeniffer Makaji saw them and called the deceased's mother, Eunice Paul (PW2); that they took the appellant to Sagala Health Centre where they met PW2 and left shortly thereafter.

6. PW2 testified that, upon arrival at Sagala Health Centre, she found the deceased with injuries on the face and hand; that the deceased narrated his ordeal with the appellant, recounting that he was on the phone when the appellant confronted him; and that the appellant threw him off the culvert and stepped on him about 8 times before leaving; that the appellant made away with his phone after the assault. PW2 testified that, upon examination at the Centre, the Doctor referred them to Moi Hospital in Voi for further examination.

7. It was PW2's further testimony that, the following day, the appellant came in the company of his two brothers to return the deceased's phone and gave it to PW2 ; that the appellant knelt down and begged forgiveness from the deceased and PW2, but that PW2 could not find it in her heart to forgive him; that PW2 took the deceased to Moi Hospital in Voi where an X-ray was done on 27th June 2016; that the doctor told her that her son's neck had a problem and advised them to purchase a neck collar for support; that the deceased never improved, and was transferred to Coast General Hospital, but died on 24th July 2016; and that, prior to the incident, the deceased was healthy.

8. The arresting officer, Corporal Anthony Ngala attached to the Chief's Office at Sagala, was the prosecutions' third witness. He testified that, on 24th July 2016, he received information from the area Chief regarding the deceased's assault by the appellant and subsequent demise at Coast General Hospital in Mombasa; that he was referred to a village elder, one Mwadimo, to assist in tracing and arresting the appellant; and that he proceeded to the appellant's house, arrested him and, thereafter, handed him over to police officers attached to Voi Police Station.

9. The investigating officer, PC Stanley Kirui (PW4) of Voi Police Station, told the trial court that, on 21st July 2016, PW2 reported the incident between the appellant and the deceased as an assault; that, upon the deceased demise, he was instructed to take over the investigation; that he recorded PW1's and PW2's statements; that, during his investigations, he established that the deceased was sixteen years old; that the appellant was drunk during the confrontation; that the incident occurred at 4:00 pm; that no grudge existed between the deceased and the appellant; and that the appellant informed him that he had paid for the deceased's treatment at Sagala Health Centre and at Moi Hospital in Voi.

10. The Prosecution's fifth and last witness, Dr. Uba Hemed of Coast General Hospital, Mombasa, performed autopsy on the body of the deceased and prepared the post-mortem report dated 29th July 2016. She took the trial court through the report, testifying that she performed her examination in the presence of the deceased's uncle, one Mathias MacKenzie, and one Doro Wakio; that the deceased was of good nutrition; that he had no external injuries; that he had internal injuries, blood under the scalp and in the skull, and that he had a normal spinal cord column. PW5 determined the cause of death

as “increased intra-cranial pressure secondary to the sub-dural haemotoma as a result of an assault.” According to her, intra- cranial pressure is caused by “rupture of vessels beneath the scalp which can cause collection of fluids in the scalp” when an individual is struck. Dr. Uba went on to explain that “the skull does not expand. There are respiratory centres that are responsible for our breathing in the brain.... If there was a collection of blood in the skull or fluids or anything that increases the volume of what is in the skull, this interferes with the breathing which can cause death.” PW5 concluded her testimony after producing the post mortem report in evidence.

11. When the prosecution’s case closed on 22nd February 2018, the trial Judge (Kamau, J.) directed the parties to file and exchange written submissions on whether or not the appellant had a case to answer. However, on 29th May 2018, the Hon. Justice F. Amin took over the proceedings and found the appellant to have a case to answer vide her ruling dated 5th February 2019 whereupon the appellant gave a sworn statement in his defence, but did not call any witness.

12. The appellant stated that, on 11th June 2016 at about 3:30 pm, he went to have a drink at a nearby club; that, on his way home, he saw three people seated on a culvert; that they were all looking down at “their” phone; that among them was the deceased and PW1 whom he knew; that the appellant was interested in knowing what they were all looking at so intently because they were school children, and that he was concerned by the fact that they were not in school that day; that one of them who he did not know jumped up and startled his friends whereupon the deceased fell down; that the deceased complained of having injured his foot from the fall; that the appellant attempted to pick the deceased off the ground, but that they both fell in the process; that the appellant got up and requested the deceased’s friends to help him; and that the deceased’s friends managed to lift him up and took him away.

13. The appellant further testified that he did not have any grudge with the deceased or his friends; that he did not have a stick with him; that he was not too drunk; that, after the deceased, PW1 and the other boy left, he retrieved a phone from the scene; that he handed over the phone to PW2 and the deceased the very next day; and that he did not pay for the deceased’s medical expenses at any facility or offer to do so.

14. In her judgment dated 16th December 2019, Farah Amin, J. found that PW1’s evidence was categorical that the appellant assaulted the deceased; and that PW1’s testimony was corroborated by the evidence of what the deceased told his mother, and the serious nature of the injuries observed by PW2 and PW5. The learned Judge observed that the appellant admitted having confronted the deceased and his friends; that the appellant stated that he approached the boys out of parental concern, and yet he did not ensure that the injured child was taken to hospital; that the appellant’s evidence was inconsistent and implausible; that the appellant’s unprovoked attack caused the injuries suffered by the deceased; and that the appellant’s conduct was so frightening that it prompted PW1 and one J to run away.

15. Having considered the prosecution evidence and the appellant’s defence, the learned Judge found the appellant guilty as charged, convicted him of murder and sentenced him to serve a term of twenty (20) years in prison.

16. In addition to the conviction and sentence, the learned Judge awarded and directed the appellant to pay the deceased’s mother a sum of Kshs. 500,000 for pain and suffering and Kshs. 100,000 for loss of expectation of life in line with the *Fatal Accidents Act* and the *Law Reform Act*.

17. Aggrieved by the trial court’s decision, the appellant moved to this Court on appeal on the grounds set out in his undated memorandum of appeal, namely that the learned Judge erred in law in: directing the parties to file submissions [to determine whether the appellant had a case to answer or not] in breach of sections 213 and 310 of the CPC; failing to find that malice aforethought was not established; failing

to consider the circumstances of the occurrence of the offence; failing to find that the doctor's evidence was in contrast with the key prosecution witnesses; and dismissing the appellant's plausible defence.

18. In addition to the grounds aforesaid, the appellants filed "Supplementary Grounds of Appeal" dated 30th October 2024 containing three grounds, faulting the trial court for: failing to find that the offence was not proved beyond reasonable doubt; reading out the sentence in the absence of Defence Counsel; and meting out a sentence that was manifestly excessive, extremely punitive and harsh while disregarding the Judiciary Sentencing Guidelines and section 333(3) of the *Criminal Procedure Code* (CPC).

19. In support of the appeal, learned counsel for the appellant, Miss Aoko Otieno, filed written submissions dated 31st October 2024 citing the cases of Anthony Ndegwa Ngari v Republic[2014] eKLR highlighting the three ingredients that needed to be proven by the prosecution to secure a murder conviction; Julius Kitsao Manyeso v Republic [2020] eKLR, submitting that the offence disclosed by the evidence as presented by the prosecution is one of manslaughter and not murder and that the appellant ought not to have been given more than 5 years imprisonment for the unlawful death of the deceased; Bernard Kimani Gacheru v Republic [2002] eKLR where this Court set out the principles to be considered during sentencing; Abdalla Mwanza v Republic [2018] eKLR where this Court considered data from the World Health Organisation on life expectancy during sentencing; Thoya & 3 others v Republic [2023] KECA 925 (KLR) where this Court pronounced itself on the importance of a sentence hearing, the expectation of the trial court to state what aspects of the mitigation were considered and how this impacted the sentence one way or the other; Ephas Fwamba Toili v Republic [2009] eKLR and Mathew Kiplalam Chepkieng v Republic [2019] where this Court considered 10 years imprisonment sufficient for murder.

20. In his response, learned Senior State Counsel, Mr. Mwangi Kamanu, filed written submissions and a list of three authorities dated 31st October 2024 citing the cases of Okeno v Republic (1972) EA 32 on this Court's mandate on a first appeal; Roba Galma Wario v Republic [2015] eKLR and Republic v Lawrence Mukaria & Another [2014] eKLR where both courts attempted to define what constitutes malice aforethought.

21. 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).

22. 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-analyze and re-consider the evidence afresh and draw its own conclusions thereon. The Court should however bear in mind that it did not see the witnesses as they testified and give due allowance for that.

23. 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."

24. 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. 4. 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.
>
> b. 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."

25. Having considered the record of appeal, the grounds on which it is anchored, the rival submissions of learned counsel and the law, we form the view that the appeal raises 5 main issues, namely: (i) whether the learned Judge was at fault or in breach of sections 213 and 310 of the *Criminal Procedure Code* (Cap. 75) (the CPC) by directing the parties to file submissions on the issue as to whether the appellant had a case to answer;

(ii) whether there were material contradictions in the doctor's evidence and that of other key prosecution witnesses; (iii) whether the prosecution proved the ingredients of murder (to wit, actus reus and mens rea) beyond reasonable doubt; (iv) whether the learned Judge failed to consider the appellant's defence; and (v) whether the sentence meted on the appellant was harsh and excessive or, otherwise, whether it was unconstitutional or contrary to statute law.

26. On the 1st issue as to whether the learned Judge erred in law and in breach of sections 213 and 310 of the CPC by requiring the appellant to submit on the question as to whether he had a case to answer, we hasten to observe that section 213 relates to proceedings in the subordinate courts. To our mind, the applicable section pursuant to which the trial court is obligated to give the kind of directions complained of is section 306 of the CPC. However, counsel for the appellant made no submissions in that regard. Consequently, nothing turns thereon since that ground remained unsubstantiated and, therefore, deemed as having been abandoned.

27. The same fate befalls section 310 to which the 1st issue also relates, and which refers to the prosecutor's right to adduce evidence in reply where the accused adduces new evidence in his defence introducing a new matter which the prosecution could not by the exercise of reasonable diligence have foreseen.

To our mind, section 310 is apparently misplaced and has no bearing on the issue complained of. Likewise, that ground fails.

28. Turning to the 2nd issue as to whether the prosecution evidence was plagued with material contradictions as between the doctor's evidence and that of other key prosecution witnesses, counsel for the appellant made no attempt to substantiate that ground, which appears to have been likewise abandoned. It is also noteworthy that the learned Senior State Counsel made no submissions in that regard. Accordingly, nothing turns thereon and the same fails.

29. On the decisive 3rd issue as to whether the prosecution proved the ingredients of murder to sustain the appellant's conviction therefor, counsel for the appellant submitted that the prosecution's evidence did not prove the ingredients of murder but, instead, proved manslaughter for which the appellant should have been convicted and sentenced to a lesser term not exceeding 5 years. On the authority of Anthony Ndegwa Ngari v Republic (supra), counsel highlighted the three ingredients to be proved by the prosecution to secure a conviction for murder. Arguing that the offence as proved amounted to manslaughter, counsel relied on the case of Julius Kitsao Manyeso v Republic (supra).

30. On his part, the Senior State Counsel drew our attention to what constitutes malice aforethought as defined in Roba Galma Wario v Republic [2015] eKLR and Republic v Lawrence Mukaria & Another [2014] eKLR. According to counsel, the prosecution proved the offence of murder and the conviction therefor was safe.

31. We take to mind the fact that the deceased's death and the cause thereof, to wit, severe injuries are not contested. The only questions that call for our determination are whether the injuries leading to his death were caused by the appellant and, if the answer is in the affirmative, whether the appellant had malice aforethought.

32. Section 203 of the *Penal Code* sets out three elements, which the prosecution must prove beyond reasonable doubt to earn a conviction for murder, namely: (a) The death of the deceased and the cause thereof; (b) that the accused committed the unlawful act which caused the deceased's death; and (c) that the accused had malice aforethought. See Nyambura & others vs. Republic [2001] KLR 355.

33. On the first question, PW1 (PM) narrated how, on the material day, the appellant approached them (PW1, the deceased and one J) while they sat on a culvert on the roadside chatting. PW1 testified that, though unprovoked, the appellant charged at them, menacingly ordering them to leave; that PW1 and J ran and stood at a distance while the deceased remained where he was seated; that the appellant grabbed the deceased and started beating him; that, when the deceased fell to the ground, the appellant repeatedly lifted and threw him down; and that the appellant did not stop despite the deceased's pleading telling the appellant that he was hurting him.

34. PW1 testified further that the deceased sustained bruises on his hands and legs; that he was bleeding from his hands, legs and left side of his forehead and could not walk properly; that he told PW1 and J that he was in pain and felt as if "his back was being pulled".

35. Likewise, PW2 testified to what the deceased had told her concerning his ordeal with the appellant. According to her, the deceased recounted how he was on the phone when the appellant confronted him; that he threw him off the culvert and stepped on him about 8 times before walking away; and that, the following day, the appellant went to her home, returned the deceased's phone, and begged forgiveness for what he had done; but that PW2 could not find it in herself to forgive him.

36. Dr. Uba Hemed (PW5) prepared and produced the post-mortem report dated 29th July 2016 in evidence to prove that the deceased succumbed to internal injuries, blood under the scalp and in the

skull. According to her, the deceased died of "increased intra- cranial pressure secondary to the sub-dural haemotoma as a result of an assault," and which was caused by "rupture of vessels beneath the scalp which can cause collection of fluids in the scalp". She went on to explain that, "... if there was collection of blood in the skull or fluids or anything that increases the volume of what is in the skull, this interferes with the breathing which can cause death."

37. The appellant's defence that the deceased fell while trying to escape, and that he sustained the fatal injuries in consequence of the fall was not credible. PW1's eyewitness account of the vicious assault on the deceased by the appellant could not be displaced by a casual assertion that he fell down, and that the appellant was only trying to help him up. In view of the foregoing, we find no fault in the learned Judge's finding that the deceased's death was as a result of serious internal injuries inflicted by the appellant, who admitted confronting the three youths. The only question is whether the appellant acted with malice aforethought

38. Section 206 of the *Penal Code* defines "malice aforethought" as follows:

    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.

39. This Court in John Mutuma Gatobu vs. Republic [2015] eKLR lent further clarity to the conception of malice aforethought thus:

    > "There is nothing in that definition that denotes the popular meaning of malice as ill will or wishing another harm and all the related negative feelings. Nor, for that matter, is it to be confused with motive as such. Our law does not require proof of motive, plan or desire to kill in order for the offence of Murder to stand proved, though the existence of these may go to the proof of malice aforethought." [Emphasis added]

40. To our mind, the appellant's vicious assault on the deceased denotes malice aforethought – the intention to do grievous harm. The appellant knew or ought to have known that the repeated acts that caused the deceased's death could probably have caused his death or grievous harm. It matters not that he did not harbour ill will or wished the deceased harm or any of the related negative feelings associated with the word "malice" (see John Mutuma Gatobu vs. Republic (ibid)).

41. In Morris Aluoch v Republic [1997] eKLR), the Court of Appeal cited with approval the case of Rex v Tubere S/O OCHEN (1945) 12 EACA 63 where it was stated that "if repeated blows inflicted the injury then malice aforethought could well be presumed ...." Having carefully considered the evidence on record, the rival submissions, the cited authorities and the law, we can only conclude that the learned

Judge was correct in holding, as we do, that the prosecution had proved the three ingredients of murder against the appellant beyond reasonable doubt.

42. Turning to the 4th issue as to whether the learned Judge failed to consider the appellant's defence, we hasten to observe that, far from it, the trial court went to lengths to analyse the appellant's defence, but rejected it in the face of the eyewitness evidence of PW1 as to what transpired. Accordingly, that ground does not hold.

43. On the 5th issue as to whether the sentence meted on the appellant was harsh and excessive or, otherwise, whether it was unconstitutional or contrary to law, counsel for the appellant submitted that the appellant ought to have been convicted for manslaughter and sentenced to a term not exceeding five (5) years.

44. On his part, the State Counsel submitted that the sentence of 20 years meted on the appellant was lawful and by no means unconstitutional.

45. Taking to mind the gravity of the offence proved as charged and the law, we find nothing to fault the learned Judge on that score. Having convicted the appellant for murder, the trial court properly exercised its discretion to impose such sentence as befitted the circumstances of his case having regard to the mitigating factors.

46. Section 204 of the *Penal Code* prescribes a maximum death penalty for murder, which is still applicable as a discretionary maximum punishment, subject however to the Sentencing Policy Guidelines, 2023 that require mitigating factors to be considered in a sentencing hearing for a conviction for murder. We find nothing to suggest that the learned Judge departed from those guidelines or that she was at fault in exercising her discretion to sentence the appellant to a prison term of twenty (2) years, save to add that the proviso to section 333(2) of the *Criminal Procedure Code* shall apply to the effect that the period during which the appellant was held in custody before conviction and sentence shall be taken into account.

47. Finally, the only discretionary decision for which we find the learned Judge at fault is the award to the deceased's mother as against the appellant the sum of Kshs. 500,000 for pain and suffering, and Kshs. 100,000 for loss of expectation of life in line with the *Fatal Accidents Act* and the *Law Reform Act*. Whereas section 31 of the *Penal Code* (Cap. 63) provides for compensation to any person injured by the offence of a person who has been convicted, the learned Judge did not invite submissions thereon before pronouncing the award which, to our mind, is tantamount to condemning the appellant unheard in that regard.

48. Having considered the record of appeal, the grounds on which it is anchored, the written and oral submissions of learned counsel, the cited authorities and the law, we find that:

    a. the appeal on conviction and sentence fails and is hereby dismissed, save that the period during which the appellant was held in custody before conviction and sentence shall be taken into account;

    b. the awards to the deceased's mother in the total sum of Kshs. 600,000 under the *Fatal Accidents Act* and the *Law Reform Act* are hereby set aside; and

    c. subject to (b) above, the judgment of the High Court of Kenya at Voi (Farah S. M. Amin, J.) delivered on 16th December 2019 be and is hereby upheld.

Orders accordingly.

DATED AND DELIVERED AT MOMBASA THIS 11TH DAY OF APRIL, 2025

DR. K. I. LAIBUTA CArb, FCIArb.

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JUDGE OF APPEAL

G. W. NGENYE-MACHARIA

..

JUDGE OF APPEAL

W. KORIR

....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR