**Otieno & another v Republic (Criminal Appeal 254 of 2019)**
**[2025] KECA 1020 (KLR) (30 May 2025) (Judgment)**

Neutral citation: [2025] KECA 1020 (KLR)

**REPUBLIC OF KENYA**

**IN THE COURT OF APPEAL AT KISUMU**

**CRIMINAL APPEAL 254 OF 2019**

**MSA MAKHANDIA, LK KIMARU & AO MUCHELULE, JJA**

**MAY 30, 2025**

**BETWEEN**

**STEPHEN OKUKU OTIENO ..... 1ST APPELLANT**

**CHRISANTHUS ODERO NYANDURU ..... 2ND APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

***(Being an appeal from part of the judgment of the High Court at Homa Bay (J.R. Karanjah, J.) dated 10th October 2018 in Criminal Case No. 10 of 2016)***

## JUDGMENT

1. On 11th October 2018, Stephen Okuku Otieno (1st appellant) and Chrisanthus Odero Nyanduru (2nd appellant) were jointly convicted by the High Court of Kenya at Homa Bay for the murder of Joseph Otieno alias Nyayal under sections 203 and 204 of the *Penal Code*, and were each sentenced to serve 15 years in jail. Their co-accused, Rose Auma Odero, Judith Atieno Okuku, Elza Atieno Odhiambo and Grace Anyango Odero were found not guilty of the charge and were acquitted.

2. The appellants were aggrieved by the conviction and sentence and appealed to this Court. The 2nd appellant subsequently withdrew his appeal. That left the 1st appellant's appeal which is the subject of this judgment. His complaints in the memorandum of appeal were as follows:-

> " 1) That the trial judge of the High Court erred in law and fact by convicting the appellants for the offence of murder contrary to section 203 as read with section 204 of the *Penal Code* in as much as the prosecution failed to prove its case beyond reasonable doubt.

2. That the trial judge of the High Court erred in law and fact by convicting the appellants of murder contrary to section 203 as read with section 204 of the *Penal Code* in as much as there was no evidence pointing directly to the appellant as having killed the victim.

3. That the trial court erred in fact by convicting the appellant, as the prosecution failed to summon material witnesses.

4. That the trial court erred in law and fact by failing to consider the defense of alibi that the appellant clearly put forward."

3. The deceased was fatally wounded at about 10.00 am on 23rd April 2016 at Kotina Village in Kanyanjua sublocation of Gem West Location in Rangwe Division of Homa Bay County. When Dr. Odundo Nicodemus (PW 4) of Homabay County Referral Hospital conducted the post-mortem on the body on 5th May 2016, he found a bruise on the front lower leg with a complete tibia-fibula fracture, deep cut wound on the forehead, deep cut on the right parietal, a depressed skull fracture and an occipital cut wound. Components of the brain were coming out. There were bruises on right upper limb. There was massive cerebral hemorrhage. Most of the injuries were concentrated on the head. The injuries were caused by both blunt and sharp objects. The Doctor formed the opinion that the cause of death was massive cerebral hemorrhage secondary to assault.

4. The deceased was the husband of Joyce Anyango Otieno (PW 1) and father of Felix Odhiambo (PW 3). PW 3 was at the time of the incident in class seven and was aged 13. It does appear from the record that the deceased was suspected by the villagers to be a thief who had also been involved in the murder of a villager. His homestead had been burnt and he had escaped to Uganda for some time. The villagers were baying for his blood. On 23rd April 2016 at about 10.00 am, following his return, he was weeding in the company of PW 2 and PW 3. Armed villagers came while shouting "thief, thief" and attacked and beat him as he ran. He was overwhelmed and fatally injured. The evidence of PW 1 was that the appellant, a member of the clan and whom she knew well, was one of the attackers. He had a panga with which he chased the deceased and hit him on the upper back between the shoulders as the 2nd appellant cut him on the head using a panga. PW 1 had been following the chase, but ran away to her home when the attack intensified. She returned to the scene about 15 minutes later and found the deceased dead, on the ground. He had injuries on the head and body. Among those who came to the scene were area chief Joel Otieno Oguta (PW 2) who contacted the police who came and took the body to the mortuary.

5. PW 3 testified that, while weeding, the villagers came armed. The deceased took off as they chased him, and that he saw the appellant, who was among them, cut the deceased on the neck. He (PW 3) ran away. When he returned, the deceased's body had been taken to hospital.

6. The appellant gave sworn defence in which he denied assaulting the deceased or causing his death. His case was that he was not at all at the scene; that at the time in question he was in his shamba from where he returned to his home where he remained until he went to sleep. He learned of the incident on the following day. He did not call witnesses.

7. The trial Judge (J.R. Karanjah, J.) received the prosecution evidence and the defence evidence; believed the prosecution version and disbelieved the defence version. He found that the evidence by PW 1 and PW 3 placed the appellant, whom they knew at the scene at the time in question and found that he was one of the villagers who fatally wounded the deceased in the incident. The defence of alibi was therefore discounted.

8. Learned counsel Mr. Menezes for the appellant, in his submissions, urged the Court to consider that the trial court failed to appreciate that there was a grudge between the appellant's family and the deceased's family which would have led to PW 1 and PW 3 wrongly implicating the appellant. Secondly, that, even if PW 1 and PW 3 were to be believed, they

had run away from the scene leaving the deceased alive, and could not therefore tell who had killed him. Thirdly, that the prosecution had not proved malice aforethought, and, lastly, the defence of alibi had not been considered.

9. Regarding sentence, which learned counsel complained was excessive, reference was made to Francis Karioko Muruatetu & Another -vs- Republic [2017]eKLR and submitted that death sentence was not a mandatory penalty for a murder case; that the trial court still had unfettered discretion, in an appropriate case, to impose a lesser sentence. On the question of sentence, we immediately find the learned counsel's submission misplaced as the applicant was sentenced to serve 15 years imprisonment, and not the death penalty. We were not addressed on why it was thought that 15 years jail for the offence was excessive or illegal.

10. Learned Prosecution counsel, Mr. Okango, agreed with the decision of the learned Judge and asked us to dismiss the appeal. It was his submission that there was the direct evidence of PW 1 and PW 3 who saw the appellant, among others, who chased and struck the deceased; and that their evidence was that the deceased, although being beaten, had not died when the witnesses left the scene. When they returned, he had died with fatal injuries. The trial court, according to the learned counsel, had considered the alibi but discounted it as the evidence of PW 1 and PW 3 had placed the appellant at the scene of crime at the time. On the question of malice aforethought, it was the submission by learned counsel that, one, there was the accepted grudge between the families which was reason for the attack. Two, the intensity of the injuries which resulted into the death showed malice aforethought under section 206 of the *Penal Code*.

11. This is a first appeal and the principles guiding the exercise of jurisdiction of a first appellate court has been restated in several decisions of this Court, including Josephat Manoti Omwancha -vs- Republic [2021]eKLR in which this Court re- affirmed the decision of Okeno -vs- Republic [1972] EA 32 in which it was held as follows:-

> " An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya
>
> v. R., [1957] E. A. 336) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (Shantilal M. Ruwala v. R., [1957] E.A. 570). 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 findings and conclusions; 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, see Peters v. Sunday Post, [1958] E. A. 424."

12. According to the medical evidence, the deceased suffered severe cuts and blunt injuries to his head and limbs. Whoever injured him paid attention to his head which was cut severally and this caused massive cerebral hemorrhage. Components of the brain were coming out. Injuries associated with mens rea are those that result from actions of the assailant who caused the injuries intentionally or recklessly. Mens rea for murder is malice aforethought. To prove murder, the prosecution must show that the accused

had the intention to kill or cause grievous harm. Or he knew that his actions would likely cause death or grievous harm and was indifferent to the consequences, or had intention to commit a felony and the death occurred. This is what section 206 of the *Penal Code* provides.

13. If several people, some armed with pangas and others with rungus, attack a suspected thief whom they cut and clobber, on his head and body, until he dies, they will be guilty of murder. This Court in Bonaya Tutu Ipu & Another -vs- Republic [2015]eKLR reiterated that, in determining whether or not malice aforethought has been proved, the court will take into account factors such as the part of the body injured, the type of weapon used and the type of injuries inflicted upon the deceased. We have noted in the foregoing that pangas and rungus were among the weapons used, and that the injuries were concentrated on the deceased's head. We determine that there was malice aforethought on the part of the appellant therefor.

14. The appellant's case was that there was no direct evidence that pointed to him as having killed the deceased. However, the prosecution called PW 1 and PW 3 who saw him, along with others, and while armed, him with a panga, charged at and cut and injured the deceased. The deceased died from these injuries. It does not matter who had the fatal blow. There was common intention to injure and murder the deceased. See section 21 of the *Penal Code*.

15. The appellant admits that there was a grudge. If there was a grudge, this would have led to the appellant being framed. But it could have been the reason why the appellant and others set out to trace the deceased and kill him. The trial court acknowledged the grudge, but found it was not the excuse for the appellant to behave the way he did.

16. The trial court considered the appellant's plea that he was elsewhere at the time of the incident and that had not participated in it. The Court, nonetheless, believed PW 1 and PW 3 that the appellant was present and had participated in the attack. This is the court that saw and heard the witnesses and the appellant. We have no reason to believe otherwise.

17. Consequently, we find that the appeal lacks merits as the appellant was convicted on compelling and overwhelming evidence, and that his sentence was legal and deserved. We dismiss the appeal.

**DATED AND DELIVERED AT KISUMU THIS 30TH DAY OF MAY 2025**

**ASIKE-MAKHANDIA**

**JUDGE OF APPEAL**

**L. KIMARU**

**JUDGE OF APPEAL**

**A.O. MUCHELULE**

**JUDGE OF APPEAL**