Owino v Republic (Criminal Appeal 197 of 2020)
[2025] KECA 979 (KLR) (30 May 2025) (Judgment)

Neutral citation: [2025] KECA 979 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 197 OF 2020

MSA MAKHANDIA, HA OMONDI & LK KIMARU, JJA

MAY 30, 2025

BETWEEN

CALEB ODOYO OWINO ALIAS TONNY ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an Appeal from the judgment of the High Court of Kenya at Kisumu, (Cherere, J.) dated 12th August 2020.) in HCCRA No. 28 of 2019)

JUDGMENT

1. The appellant faced an information charging him with murder contrary to section 203 as read with section 204 of the *Penal Code*. According to the information, on June 26, 2019, at Ngiti Village in North Kamswa Sub-Location, Muhoroni Sub-County, Kisumu County, the appellant, along with others who were not before court, murdered Jotham Garo ("the deceased"). The appellant denied the information, necessitating the prosecution to prove its case beyond reasonable doubt by presenting a total of nine witnesses. After the prosecution had rested its case, the trial court determined that a prima facie case had been established against the appellant and thus required him to present his defence. In response, the appellant gave sworn testimony and called one witness in support of his defence.

2. Upon a thorough evaluation of the evidence on record, the trial court, in a judgment dated and delivered on 12th August 2020, was satisfied that the State had proved its case against the appellant beyond a reasonable doubt and accordingly, convicted him of the offence. Upon considering the Probation Report and the Victim Impact Assessment report, along with the appellant's mitigation, the court sentenced him to serve twenty (20) years' imprisonment. It is against this judgment that the appellant, not being satisfied with has appealed to this Court. In the memorandum of appeal dated 25th November 2020, the appellant has raised three grounds of appeal. Firstly, that the case was not proved beyond reasonable doubt. Secondly, that his conviction was impugnable, and lastly, that his alibi defence was not given due consideration.

3. This is a first appeal, and the duty of the first appellate court is to conduct a thorough and independent review of the evidence presented in the trial court and reach its own conclusions. This duty was articulated in the often-cited case of Okeno vs. Republic [1972] EA 32, thus:

> " 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 vs. 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. 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 vs. Sunday Post, [1958] E. A. 424."

4. To comply with the aforesaid imperative, it is necessary that we revisit the evidence presented by the prosecution in the trial court.

5. Akoth Claris Obanda (PW1), a married woman, had been involved in an extramarital affair with Jotham Garo ("the deceased") for three years. On the night of 25th June 2019, at around 9:00 pm, the deceased, as usual, visited her at her house. Shortly after his arrival, the appellant and Jeconia Nyanga Owino, both brothers to PW1's husband, stormed into the house armed with clubs, dragged him outside, and set upon him, having locked her inside the house. Akoth peered through the window and saw the appellant and his brother assaulting the deceased. She stayed inside the house until around 2:00 am when Jeconia Nyanga Owino opened the door and assaulted her, but she managed to escape and hid in a maize plantation. The following morning, at about 6:00 am, she returned to her house to find the deceased, barely alive, outside. The deceased was taken to the hospital, but she later learned that he had passed on.

6. PW2, Hezbon Accra Ogul, the Head Teacher at Ngiti Primary School, where the deceased served as his Deputy, after receiving information about the deceased's injuries, hired a bodaboda rider, PW6 Pius Oduor, who ferried the deceased to the hospital. Later, he was informed that the deceased had passed on. On his part, PW3, Nick Ochieng Onyango, also a colleague of the deceased, saw his body in a police vehicle but did not know the circumstances of his death. PW4 Peter Arum, another colleague, along with PW5 Joseph Odero, the assistant chief of Kamswa North Sub-Location, and PW7 Peter Omollo, a village elder, arrived at PW1's house to find the deceased seriously injured and barely alive. PW8, Dorcas Angira Kiharangwa, wife of the deceased, was informed of her husband's death. She later identified his body to the doctor who conducted a postmortem at Ahero Sub-County Hospital. PW9, PC Charity Kagwiria, investigated the case and reviewed the witness statements, leading to the appellant being charged. With the consent of the appellant's counsel, the witness produced the deceased's postmortem report, which showed that he had suffered a right proximal 1/3 closed tibia-fibula fracture, hyper-pigmented lesions with haematoma in the muscles of the right and left arms, forearms, and back. The conclusion was that he had died of head injury with an intracranial hematoma secondary to blunt force trauma due to assault.

7. Put on his defence, the appellant elected to give a sworn statement of defence and called his wife as a witness. He denied committing the offence. He stated that on the evening of the material day, he had visited his neighbour and returned home at about 7:30 pm and never left the house until 5:00 am when he was attracted to his brother's house by loud noise. He proceeded to the house, where he found a large crowd with the deceased, who was seriously injured, lying outside the house. He later learnt that he had passed on. The appellant's wife, Neta Akoth Odayo (DW2), confirmed that the appellant did

not leave the house after 8:00 pm on the material day. That they slept at around 9:00 pm only to wake up at 5:00 am the following day, upon hearing noises from PW1's house.

8. The defence notwithstanding, the appellant, as already stated, was found guilty of the offence, convicted and sentenced, hence this appeal. The appeal was canvassed by way of written submissions with limited oral highlights. During the plenary hearing, Ms. Anyango, learned counsel, appeared for the appellant, whereas Mr. Okango, the learned Assistant Director of Public Prosecutions, represented the respondent.

9. The appellant's counsel submitted that the trial court erred in noting that the prosecution had proved its case beyond reasonable doubt. It was submitted that the prosecution's case heavily relied on the testimony of PW1, who claimed that the appellant and his brother came to her house, dragged out the deceased, and continuously assaulted him until 2.00 am. She witnessed all these through the window of her house. However, there was no evidence that the house had light of whatever kind, begging the question of how, then she was able to identify the appellant as one of the assailants.

10. Counsel submitted that several key witnesses (PW2, PW4, PW5, PW6, PW7, and PW8) did not see the incident and based their testimonies on information gathered later, which translated into hearsay, which was of no evidential value. Given that PW1's house had no electricity and the exact source of lighting was not mentioned, counsel questioned how long it took PW1 to identify the appellant when they entered and left the house immediately with the deceased. The lighting conditions outside her house, the distance between PW1 and where the deceased was being assaulted, and whether it was a clear or dark night were never interrogated. It was argued that the circumstances were not, therefore, favourable for positive identification, and the trial court should have proceeded carefully before relying on this evidence of identification. Counsel relied on the case of Wamunga vs. Republic [1989] KLR 424, for the proposition.

11. Additionally, counsel cited the case of Nzaro vs. Republic [1991] KAR 212 for the proposition that evidence of identification by recognition at night must be absolutely watertight to justify a conviction. Counsel also referred to the case of Daniel Kipyegon Ng'eno vs. Republic [2018] eKLR, where the court set out factors to consider when evaluating the accuracy of identification testimony, including lighting conditions, distance, unobstructed view, opportunity to observe facial features and clothing, period of observation, and the mental and emotional state of the witness. Counsel maintained that these factors were not considered in this case. She questioned why Martin Akongo and his wife were not called as witnesses to corroborate PW1's testimony, yet were seen at the scene at 2.00 am. According to counsel, PW1's account was fabricated and would have been quickly disproved if other witnesses had been called. On the alibi defence, counsel contended that the trial court erred by dismissing the appellant's alibi defence and the supporting evidence. That the appellant admitted to having limited interactions with the deceased and held no animosity towards him or PW1. That DW2 corroborated his account, stating that he had been with her all night after coming home drunk. She also mentioned that the appellant's alleged accomplice, Jeconia Nyanga Owino, was in Mombasa at the time.

12. That though the trial court rejected the appellant's alibi defence, terming it an afterthought, not credible and was not presented early enough to be tested by those responsible for investigating the crime, it was argued that the raising of the alibi defence after the prosecution had closed its case was not prejudicial to the prosecution as it still had the opportunity to salvage its case. The prosecution, however, did not exercise this right and did not rebut the appellant's alibi defence. Counsel referred to the case of Kiarie vs. Republic [1984] KLR for the proposition that an alibi raises a specific defence, and an accused person who puts forward an alibi as an answer to a charge does not, in law, assume any burden of proving that answer. It is sufficient if the alibi introduces doubt into the mind of the court.

It was submitted that the prosecution's failure to investigate or check out the alibi raised reasonable doubt and should have led to an acquittal of the appellant.

13. Counsel also relied on the case of Nguku vs. Republic [1985] eKLR, where the Court emphasized that when analyzing the facts and the opposing evidence in a trial, the individual facts and the assessment of the relative credibility of the witnesses come first. It is incumbent upon the trial magistrate or Judge to consider the evidence in its respective stages and then arrive at a general conclusion on the totality of the evidence. Counsel argued that the trial court had made up its mind about the culpability of the appellant even before considering the appellant's alibi defence. That the trial court did not even bother to consider who, among those assaulting the deceased, if at all, delivered the fatal blow.

14. In conclusion, the appellant urged us to allow the appeal in its entirety. However, in the event that we uphold the conviction, counsel prayed that we review the sentence downwards, contending that the sentence imposed was manifestly harsh and excessive.

15. In opposing the appeal, Mr. Okango submitted that the case was proved beyond reasonable doubt. He contended that PW1's testimony was reliable; and that she identified the appellant through recognition. Citing the case of Peter Musau Mwanzia vs. Republic [2008] eKLR, counsel reiterated that PW1 knew the appellant as her brother-in-law and had interacted with him, thus, recognizing him during the incident was easy. Addressing the alleged inconsistencies in PW1's testimony, counsel argued that there were no such inconsistencies or contradictions when the evidence is considered holistically. The doctrine of common intent holds each person in a criminal enterprise personally liable for the group's acts. It does not matter who delivers the final or fatal blow. That the evidence showed that the appellant actively participated in the assault, resulting in the deceased's fatal injuries.

16. Regarding the appellant's alibi, counsel acknowledged that the burden of disproving an alibi once raised lay with the prosecution. However, the alibi was raised late in the day, allowing no room to countercheck and disapprove it; that in any event, the trial court weighed it against the prosecution's evidence and dismissed it as an afterthought, and rightly so, according to counsel. Citing the case of Juma Mohamed Ganzi & 2 Others vs. Republic [2005] eKLR, counsel emphasized that an alibi advanced late must be weighed against the prosecution's evidence. In the ultimate, counsel submitted that the appeal lacked merit and ought to be dismissed in its entirety.

17. We have carefully gone through and considered the record before us, the respective submissions, and the cited authorities. The issues that we discern fall for our consideration are threefold whether the: prosecution proved its case against the appellant beyond reasonable doubt, trial court erred in relying on evidence of identification, and whether the trial court erred in disregarding the appellant's alibi defence.

18. On the first issue, the offence of murder is defined in section 203 of the *Penal Code* as follows: "Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder." From this definition, the three elements of murder which the prosecution must establish beyond reasonable doubt are: the fact of and cause of death; the cause of the death was a direct consequence of the accused's unlawful act or omission, and that the unlawful act or omission was perpetrated with malice aforethought.

19. The death of the deceased was confirmed by the evidence of all the witnesses who came to the scene. They either saw the body of the deceased at the scene, when being ferried to the hospital and or the morgue, or subsequently received information regarding his death. The appellant also conceded to this fact. The icing on the cake was, of course, the testimony of the deceased's wife, who identified the body of the deceased for purposes of the post-mortem and the post- mortem report itself. The report concluded that the deceased had succumbed to death due to head injuries, specifically an intracranial

hematoma, secondary to blunt force trauma inflicted through assault. Consequently, we cannot fault the trial court for holding that the death and its cause had been established by the prosecution beyond reasonable doubt.

20. As to the evidence indicating that the appellant committed the unlawful act that led to the death of the deceased, the prosecution's case was dependent on the veracity of PW 1's evidence, who placed the appellant at the scene of crime. PW1 was in the company of the deceased on the material night, when he was forcibly taken from her house by the appellant and his brother, Jeconia Nyanga Owino. Both individuals are brothers to her husband and, therefore, easily recognizable by PW1. They assaulted him continuously for hours with rungus, motivated by their belief that he was having an affair with her.

21. The trial court correctly found that the appellant was identified through recognition. In the case of Geoffrey Muchugia Gitonga & Another vs. Republic [2020] KECA 746 (KLR), this Court stated:

> " Like in many criminal trials, at the heart of this appeal is the question of identification. It is common in such trials for the defence and the prosecution to disagree about the fairness of identification of the suspect. This contest can be quite intense, as it is believed that eyewitness identification is accurate and, therefore is one of the most compelling types of evidence. Consequently, achieving the admissibility of evidence of visual identification of a suspect goes a long way towards obtaining a conviction. In admitting evidence of identification, courts must always bear in mind that a wrongful conviction is one of the worst errors that can be committed by a court of justice. It is because of this balance that courts in this country have emphasized that evidence of identification be treated with extra caution."

22. In R vs. Turnbull (supra), the court observed that:

> " Recognition may be more reliable than identification of a stranger but even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made."

(See also Anjononi vs. Republic [1980] KLR 57).

23. From the record, the appellant was well-known to PW1 before the incident, being a brother-in-law. They also lived in the same homestead, their two houses separated by a live fence. There was no evidence that there were other intruders who could have inflicted the violence on the deceased. PW1 could also hear them talk to the deceased and recognized their voices. She also interacted with them when they assaulted her. There was no evidence that all these happened in complete darkness. The encounters were very close. The appellant was not camouflaged at all to make it nearly impossible to be recognized. We are therefore satisfied, just like the trial court, that the identification of the appellant was without error, as it was by recognition.

24. Lastly, on this aspect, the fact that the appellant was with another person and one cannot ascertain who rendered the fatal blow does not absolve the appellant from culpability. The doctrine of common intent holds each person in the criminal enterprise personally liable for the acts of the group, even where the person who rendered the fatal blow is not ascertainable. This Court in Imbwaka & 3 Others vs. Republic [2025] KECA 92 (KLR), stated:

> " Criminal liability is individual, and even in cases of a mob or group, the doctrine of common intent holds each person in the criminal enterprise personally liable for the acts of the group,

even where the person who rendered the fatal blow is not ascertainable. It suffices that the individual accused person did nothing to disengage himself from the acts of the group."

25. In the premises, the appellant was personally liable for his acts and those of his brother, as evidence showed that he actively participated in assaulting the deceased. We are therefore satisfied with the finding of the trial court that indeed it was the appellant who caused the injuries that resulted in the death of the deceased.

26. We now turn to malice aforethought. What constitutes malice aforethought is found in section 206 of the *Penal Code*, which provides inter alia:

> "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."

27. In the case of Hyam vs. DPP [1974] AC, the Court held, inter alia, that:

> " 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."

Malice aforethought may also be inferred from the acts of the accused person as stated in Ernest Asami Bwire Abanga alias Onyango vs. R (CACRA No. 32 of 1990) where the Court held:

> " The question of intention can be inferred from the true consequences of the unlawful acts or omission of the
>
> brutal killing, which was well planned and calculated to kill or to do grievous harm upon the deceased."

28. In effect, it is the circumstances surrounding each case that provides guidance to the court on whether an accused person had the necessary malice aforethought at the time he or she killed the deceased person.

29. In the instant appeal, the appellant and his brother continuously assaulted the deceased for hours on end, and later, the deceased was found with serious and severe injuries, which resulted in his death. Having placed the appellant as the last person to be with the deceased, and causing injuries to the said deceased person, it follows that indeed the deceased had an intention either to cause death or grievous bodily harm as there was a risk that death or grievous bodily harm will ensue from his acts and he committed the same without any lawful excuse. The assault was further geared towards the head of the deceased, which is the most vulnerable part of the body. In Rex vs. Tubere s/o Ochen (1945) 12 EACA, the court observed that if repeated blows to the vulnerable part of the body inflicted injury, then malice aforethought could be presumed. This was the case here! We are, therefore, satisfied that the ingredient of malice aforethought was established.

30. The appellant lamented that his alibi defence was not considered. We have gone through the judgment of the trial court, and we are satisfied that the court did consider the same and rightly dismissed it. In Erick Otieno Meda vs. Republic [2019] eKLR, this Court observed that:

> "In considering an alibi, we observe that: 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 vs. S (AR 300/13) [2014] ZAKZPHC 27 (16 May 2014)."

31. When we place the above considerations against the appellants alleged defence, we note that the only witness that came to corroborate the appellants defence was his wife who simply regurgitated the appellant's version of the events, was introduced very late in the day and thus could not be tested by the prosecution carrying out investigations to counter it. Weighing the defence against the evidence tendered by the prosecution, it is clear that the respondent had made an overwhelming case against the appellant, which was not displaced by the alleged alibi defence.

32. On sentence, we note that the maximum punishment for murder was death. It is, however, no longer mandatory as was the case in the past. See Francis Karioko Muruatetu and Another vs. Republic [2017] eKLR.

33. In this case, the appellant was sentenced to 20 years' imprisonment. We find this sentence lawful, as there is no evidence to show that the trial court acted on wrong principles, overlooked material factors, took into account irrelevant factors, or that the sentence is illegal or excessively lenient, which would constitute an error of principle (see Shadrack Kipkoech Kogo vs. R. and Wilson Waitegei vs. Republic [2021] eKLR). The sentence imposed by the trial court was neither harsh nor excessive. To our mind, the sentence was even lenient.

34. Accordingly, the appeal is devoid of merit and is dismissed in its entirety.

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

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

H. A. OMONDI

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JUDGE OF APPEAL

L. KIMARU

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JUDGE OF APPEAL

I certify that this is a True copy of the original

DEPUTY REGISTRAR