



**Kigen alias Killing & another v Republic (Criminal Appeal
41 of 2019) [2025] KECA 1143 (KLR) (20 June 2025) (Judgment)**

Neutral citation: [2025] KECA 1143 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAKURU
CRIMINAL APPEAL 41 OF 2019
JM MATIVO, PM GACHOKA & WK KORIR, JJA
JUNE 20, 2025**

BETWEEN

DENNIS KIPKURUI KIGEN ALIAS KILLING 1ST APPELLANT

DAVID KIPLAGAT CHELULE 2ND APPELLANT

AND

REPUBLIC RESPONDENT

*(An appeal from the judgment of the High Court of Kenya at Kericho
(M. Ngugi, J.) dated 7th February 2019 in HCCRC No. 8 of 2016)*

JUDGMENT

1. Dennis Kipkurui Kigen alias Killing and David Kiplagat Chelule were jointly charged with the offence of murder contrary to section 203 as read with section 204 of the *Penal Code*. The particulars of the offence were that on 27th February 2016 at Tingoro village Kipkelion West Sub County within Kericho County, the appellants jointly murdered Stanley Kibet Kosgei.
2. When the appellants were arraigned before the trial court, they pleaded not guilty to the offence. After a full trial, M. Ngugi, J. (as she then was), convicted both appellants of the offence on 7th February 2016. They were sentenced to each serve 20 years imprisonment.
3. It is those findings that precipitated the present appeal. The appellants filed separate notices of appeal dated 27th June 2019. They however filed a joint memorandum of appeal dated 5th July 2024 that raised seven grounds disputing the findings of the trial court. We have taken the liberty to summarize them as follows: the prosecution failed to discharge its burden of proof to the required standard; the age of the 1st appellant was not established during the commission of offence; the 1st appellant was erroneously sentenced as an adult when the evidence tilted towards his age, at the time of the offence, as a minor; and the sentence failed to consider the dictates of section 333 (2) of the *Criminal Procedure Code*.



4. In view of the foregoing, the appellants urged this Court to allow the appeal by quashing the conviction and setting aside the sentence. In the alternative, the appellants prayed that the finding of murder be substituted with a finding of manslaughter attracting a 10-year sentence from the date of arrest. They also prayed for a finding that the 1st appellant was a 16-year-old minor and his sentence be deemed as already served. They furthermore proposed that the sentence be reckoned from the date of the appellants' arrest, should the appeal on conviction and sentence fail.
5. When the appeal was heard on 17th March 2025, learned Counsel Mr. Matoke was present for the appellant, while learned Counsel Mr. Omutelema appeared for the respondent. Parties relied on their written submissions that were orally highlighted.
6. The appellants filed their joint written submissions and list of authorities dated 5th July 2024. They framed the following issues for determination: Whether the age of the 1st appellant was established? When the sentences meted out ought to run? What sentences were suitable in the circumstances? Whether the prosecution discharged its burden of proof to the required standard?
7. Arguing the 1st appellant's age, the appellants submitted that the 1st appellant was remanded in a children's home. However, the trial court failed to take this into consideration and instead, deemed the 1st appellant as an adult because there was no age assessment report. They argued that from the evidence of the 1st appellant, it was apparent that he was a minor aged 14 years at the time of commission of the offence; an issue that was neither denied nor countermanded.
8. Turning to the sentence meted out, they submitted that since the 1st appellant was a minor at the time of the offence, he ought not to have been sentenced to 20 years imprisonment as an adult. This, they continued, was in line with section 191 of the *Children Act* Cap. 141. They submitted that since he had been incarcerated for 8 years, the court does deem that he had fully served his sentence and be released from prison as was held by this Court in Nakuru Criminal Appeal No. 55A of 2017; Aaron Langat v Republic.
9. Speaking to the 2nd appellant's sentence, it was argued that he was remorseful. He therefore ought to be given a lenient sentence of 10 years imprisonment from the date of arrest. That submission was fortified by the case of Bonaya Tutu Ipu & another v Republic [2015] eKLR and section 333 (2) of the *Criminal Procedure Code*.
10. On the conviction, the appellants submitted that though the death of the deceased and its cause were proved, the eye witness accounts of PW1, PW3 and PW4 did not attest to the fact that the appellants inflicted injuries upon the deceased's chest. There was also no testimony speaking to a sharp object that was used by the appellants to ultimately rapture the deceased's liver. Therefore, the cause of the rapture of the deceased's liver was not linked to the appellants.
11. They formed the opinion that since the deceased was found lying in the cow shed, he must have been pierced by one of the cow's horns. They argued that the use of a rungu and a stick to occasion injuries on the deceased was not per se an unlawful act. In any event, that was not the cause of death. Withal, the weapons were not adduced in evidence.
12. On malice aforethought, they submitted that the appellants only beat the deceased to punish him and not cause death. When they were asked to stop hitting the deceased, they acceded to that request. They contended that the deceased must have been a thief. It is for that reason that he was begging for forgiveness; an indication that he had done something wrong and was being punished by the appellants.



13. They submitted that PW1 affirmed that they were good people and did not want to murder the deceased. Furthermore, though DW9 (sic) testified as to the existence of a grudge arising from a land dispute, there was no nexus between that grudge and the cause of death. Finally, the appellants did not attempt to flee the scene. For those reasons, they submitted that malice aforethought was not proved beyond reasonable doubt. In light of the above submissions, the appellants prayed that their appeal be allowed.
14. The respondent opposed the appeal. It filed written submissions, a list of authorities and case digest all dated 2nd September 2024 to submit that all the ingredients to a charge of murder had been proved beyond any shadow of a doubt. Relying on the testimonies of the prosecution witnesses, and in particular PW1, PW2, PW3 and PW4, coupled with the appellants' defence, it submitted that the appellants murdered the deceased person. It continued that the evidence tendered was credible and reliable leaving no iota of doubt. Citing *Joseph Kariuki Ndung'u & another v Republic* [2010] eKLR, it urged this Court to appreciate the fact that the trial court's decision was arrived at on the premise that it had the advantage of seeing and hearing the witnesses when testifying in court.
15. The respondent continued that the medical evidence was consistent with the eye witness accounts. This is because PW1, PW2, PW3 and PW4 all saw the appellants exact injuries on the deceased person. Regarding malice aforethought, the respondent submitted that the same emerged from the appellants' actions of viciously assaulting the deceased using a club and a stick. It explained that the assault was premeditated because instead of arresting the deceased, whom they knew very well, they assaulted him for a long time in a fit of rage. They went on to chase away PW1 and anyone else who tried to intervene.
16. Speaking to their defences, the respondent observed that though they were unsworn, they were ably considered and the trial court rightfully rejected them. Finally, since the learned judge considered the circumstances of the offence, the appellant's mitigation and the social inquiry report, the sentence meted out was proper. It prayed that the appeal be dismissed.
17. The duty of this Court as a first appellate court was enumerated in *Gabriel Kamau Njoroge v Republic* [1987] eKLR as follows:

“As this court has constantly explained, it is the duty of the first appellate court to remember that the parties to the court are entitled, as well as on demand a decision of the court of first appeal, and of drawing its own inferences and conclusions, though it should in this respect. (see *Ruwala v R* [1957] EA 570).”
18. The prosecution marshalled 12 witnesses whose evidence is encapsulated as follows from the record before us: PW1 Betty Bet, testified that on the night of 26th/27th (sic) February 2016 at 1:00 a.m., she was called by the 2nd appellant's sister called Veronicah from her house where she was sleeping. Veronicah told her that there was a stranger in the 2nd appellant's house.
19. PW1 immediately retreated to the 2nd appellant's home, approximately 5 meters away from her house. On reaching, she found both appellants standing outside. She also saw Stanley Kibeygon Sigei, PW4, who was also a neighbour. When asked who the stranger was, the 2nd appellant stated that it was Stanley Kosgei. The 2nd appellant turned on his flashlight that directly landed on Stanley Kosgei. PW1 recognized him as a neighbour.
20. PW1 described that Stanley Kosgei (the deceased) was seated alone inside the house. He was seated drunk on a stack of maize. He appeared sleepy. The 2nd appellant inquired what he wanted to which the deceased responded that he wanted alcohol and change. PW1 confirmed that the 2nd appellant was not



a brewer, did not sell liquor and did not drink. However, his sister, the 1st appellant's mother, did brew liquor. When the 2nd appellant flashed his light, the deceased desired to come out. The 2nd appellant cautioned that he would beat him.

21. Using a small opening in the back of the house, the deceased managed to escape from the house. She described the house as grass thatched with mud walls. Upon his exit, the 2nd appellant chased the deceased with a rungu and hit him on the forehead using the thick side of it. That impact led the deceased to fall down. he started beating the deceased together with the 1st appellant, who used a thick white stick to beat him. Shortly, two people from Kaisugu Company, namely Daniel Bii and Bernard Kipkirui, joined the appellants in beating up the deceased with a nyahunyu (read whip). The deceased was repeatedly hit until he fainted. Thereafter, they tied his hands with a rope.
22. PW1's evidence was that they tried to stop them but the 2nd appellant chased them away. PW1 retreated to her home at around 5:00 a.m. and informed the deceased's sister Nancy Kirui PW2 about what had transpired. PW2 came back to the scene with PW1 carrying the deceased's apparel. They found him lying outside the 2nd appellant's home, unable to speak.
23. On observing his private parts, PW1 testified that he must have been beaten there because they were swollen. PW1 and PW2 took the deceased to PW2's house. They assisted him to take a cup of tea. When the area chief arrived, it was ordered that the deceased be taken to hospital. On that afternoon at 2:00 p.m., she learned that the deceased had passed on. She recalled that the appellants were good people and could not therefore establish whether they planned to execute the murder.
24. PW2's evidence was that at around 5:00 a.m. on 26th November 2016, PW1 came to her home and informed her that her brother, the deceased, had been badly injured. On arrival at the scene, she found the deceased at the 2nd appellant's home unable to speak. She also found the chief, the 2nd appellant and his sister Rose. She observed that the deceased's clothes had been removed and placed aside. She also saw an axe and a torn sack. The deceased was escorted to the hospital by the 2nd appellant and his sister but he died before receiving treatment.
25. PW2 recalled that Rose used to sell alcohol from her house. Her brother was an avid customer. That they were all neighbours. She stated that they were not on good terms with the appellants as there existed a land dispute. She was emphatic that the deceased was not at the appellants' home looking for food.
26. PW3 Ezekiel Kibet Ngetich testified that on 26/27th November 2016, he was asleep at his home. He was then visited by the 1st appellant, sent by his uncle the 2nd appellant. He was informed that there was a man in their house. PW3 ignored the 1st appellant who returned to his home ten minutes later. This time, PW3 woke up and went to the 2nd appellant's house that was about 300 meters away from his home. It was at the midnight hour.
27. On arrival, PW3 heard someone saying: "He was trying to get out." He found PW1 and PW4. PW3 then saw the 2nd appellant hit the deceased with a club from the side of the cow shed where there were cows with horns. The impact led the deceased to fall. He was able to recognize everyone because of the full moon that shone. He was then hit by the 2nd appellant on the head and right knee. This led the deceased to start bleeding from the forehead. The 1st appellant, using a stick, joined the 2nd appellant in beating the deceased.
28. PW3 tried to intervene to stop them from battering the deceased.
He wanted to call the assistant chief but did not have his mobile phone. All the while, the deceased, who was in a state of inebriation, was asking for forgiveness. PW3 asked the appellants to stop beating



- the deceased to which they acceded to that request. The 2nd appellant then tied the deceased with a rope. At this juncture, PW3 left and went home.
29. In the morning hours at around 7:00 a.m., PW3 saw the deceased being carried by Bernard, a neighbour's son. There was also a crowd of people. He was informed that the chief had visited the scene. PW3 followed them. He observed that the deceased was injured on the head, knees and arms. He was moaning. He was clad in trousers. He had blood on his head. The chief called a bodaboda that ferried him to the hospital. However, the deceased died before he arrived at the hospital. He recalled that the deceased used to drink during his lifetime.
30. PW4's evidence was that on the midnight of 26th November 2016, he was at home asleep when he was awoken by the 1st appellant. He was informed that someone was inside his grandfather's house. He proceeded to the home that was about 50 metres away. The moonlight stood high. On arrival, PW4 found the 2nd appellant standing outside the house. The 2nd appellant then used his torch to flash inside the house. That was when PW4 saw the deceased. He was seated on a sack of maize asking for money. It was however, unclear who he sought the money from.
31. Shortly thereafter, the deceased emerged from the house through the window. The 2nd appellant hit him with a rungu on his head and he fell down. The appellants then continued to beat him. The 1st appellant used a stick. PW4 asked them to stop beating him and instead, tie the deceased up while awaiting administration.
- They tied the deceased and stopped beating him. PW4 left and retreated to his home.
32. The next morning, as PW4 was leaving for school, he found the deceased lying down next to a store in the 2nd appellant's compound. He would later be informed at noon that the deceased had passed on. He clarified that he was not there when the guards from Kaisugu came to the scene. He recalled that the deceased was a reformed thief.
33. PW5 Richard Kiprono Kemei testified that on 4th March 2016, he identified the body of the deceased, who was his brother, at Kericho District Mortuary. He observed that the deceased had injuries on his head and one rib was broken. He also noticed that there were blood clots on his lower limbs. He witnessed the doctor fill the post mortem report. He identified the body together with his father Joseph Cheruiyot.
34. PW6 Geoffrey Kiplangat Chirchir, the area chief, testified that on 27th February 2016 at around 6:30 a.m., he had a look on his phone and noticed that the assistant chief tried calling him at 2:00 a.m. On returning the call, he was informed that a man, whose alias was Ndili, was caught trying to steal from Ngososei's place; the appellants' home. Resultantly, Ndili was attacked.
35. PW6 deployed his assistant, Mr. Joseph, to the scene. Unable to make it, PW6 instead went to the scene at 8:00 a.m. It was here that he was informed that the deceased, alias Ndili, was called Stanley Kosgei. PW6 saw visible injuries on the deceased. He was in a bad condition and his hands were swollen. He was unable to sit up. He instructed people at the scene to untie him and take him to the hospital.
36. PW6 reported the matter at the police station. He sought for a vehicle at AP Kipkelion. He eventually managed to get a vehicle from area residents. The deceased was taken to Kipkelion District Hospital but was pronounced dead on arrival. Though there were antecedent bad incidences about the appellants, he confirmed that there were not bad reports about them.
37. PW7 PC Titus Muriuki Rugungu, officer working at the Directorate of Criminal Investigations Kericho Crime Scene Support Services, testified that on 2nd May 2016 he received unexposed photographic material from the DCIO Kipkelion. He supervised the processing and printing of the



photographs that had been taken by the investigating officer. He also prepared the certificate dated 16th May 2016. The photographs and certificate were produced in evidence.

38. PW8 CI Chitibwa Mwadzombo Said the DCIO Kipkelion received a phone call from the OCS Kipkelion on 29th February 2016 concerning an incident of an assault leading to death that occurred on the night of 26/27th February 2016. He was the investigating officer assigned to this case. He perused OB No. 13/2/2016 and an entry by the area chief in OB 14 on 27th February 2016. He was informed by the OCS that they had visited the crime scene. That the deceased had been rushed to Kipkelion District Hospital but was pronounced dead. The body was then preserved at Kericho District Hospital.
39. PW8 then visited the crime scene together with Corporal Maina on 1st March 2016. He was in contact with the lady reportee who was to lead them to the scene. He was later called by the 2nd appellant who escorted them to the scene. They found several people at the scene. They wanted to lynch the 2nd appellant. They intervened and commenced investigations. They were led to the crime scene and given witness accounts essentially from PW1, PW3 and PW4.
40. After interrogating the witnesses, PW8 took photographs of the scene. They were taken to the scenes of crimes officer for processing. He then recorded witness statements.
41. Aside from the testimonies of the prosecution witnesses, PW8 stated that he was informed by the first lady reportee called Rose that she was the 2nd appellant's sister and the 1st appellant's aunt. As a seller of illicit brew, on the night of 26/27th February 2016, she served the deceased with illicit brew at her den. The deceased paid Kshs. 200.00 but only drank worth Kshs. 150.00 of brew. It was that change of Kshs. 50.00 that the deceased returned to the crime scene to demand for. Before being attacked, the deceased had a conversation with the appellants for approximately 15 minutes. The appellants attacked the deceased together with two other suspects namely David and Rono, who were still at large.
42. On 10th March 2016, he received a call from a sergeant at Equator Police Post at Timboroa that the appellants were seen in the area. He found them and had them arrested. In his investigations, PW8 unearthed that the deceased was framed as a thief when all he wanted was his change. For those reasons, he charged the appellants with the offence of murder.
43. DW9 (sic) John Cheruiyot Samoei testified that he received a call on 26th February 2016 from his sister Nancy Chepkoech that their brother had been badly beaten by the 1st appellant and fell unconscious. He asked her to report the matter. He traveled three days later from his Uasin Gishu home.
44. On arrival, he found an uproar. He proceeded to Kipkelion and met the DCIO. He recalled that the deceased had a dispute with the 2nd appellant during his lifetime. This happened when his mother sold land in Kaula to the 2nd appellant in the deceased's absence. He was also present when the deceased's body was identified in the post mortem exercise. While being informed that the deceased died as a result of internal bleeding, he observed that the deceased had copious amount of blood in the chest near the ribs. He also had bruises on his forehead, both arms and legs and three broken ribs.
45. DW10 (sic) Janet Chepngetich, the deceased's widow testified that she had traveled to Londiani. She had been away to give birth to their last born. On 28th February 2016, she received a phone call that her husband had been killed. She was informed that he had been murdered by the 2nd appellant.
46. PW11 PC Dennis Nyaoko Mogeni testified that he was present at the autopsy exercise that took place on 4th March 2016. He was accompanied by the deceased's uncle and brother. He observed that the deceased had several scars from head to toe, swollen limbs, a cut on the forehead, a broken right rib and plenty of blood around his lungs. The death, they were informed, was caused by internal bleedings.



47. PW12 Dr. Fabian Kosgey testified that he conducted the post mortem on 4th March 2016. He noted that the deceased had a penetrating head wound on the left frontal region, multiple bruises and swelling on both upper limbs, lacerations on the right anterior superior spine, chest and left knee and a blister on the left leg. Internally, he had blood in the right chest cavity with a lacerated lobe of the liver. He formed the opinion that the deceased died as a result of trauma to the chest cavity which led to liver rupture and massive hemorrhage. He signed the post mortem report dated 4th March 2016 that was produced in evidence.
48. PW12 continued that the autopsy conducted was a pre-autopsy and not a full autopsy. He observed that the deceased died due to hypoxia (lack of oxygen), hypovolemia and cardiac arrest. Though there were injuries to the head, they could not have led to the deceased's death as the brain tissue and cavity were not bleeding. The lacerations on the liver were caused by a sharp object, sharp as a panga or cow horn.
49. After considering the evidence of the prosecution, the trial judge formed the opinion that a prima facie case had been established as to place the appellants on their defence. They gave unsworn testimonies. The 2nd appellant, who testified first, stated that he was with the 1st appellant on 26th February 2016 at home. They were living together. His sister Veronica Chebet woke them up at midnight telling them that there was a stranger inside her house. He woke up, took his torch and proceeded to the house. He found a suspicious person crawling in the maize store. He was hiding his face.
50. Shortly after, the 1st appellant arrived at the scene. The 2nd appellant sent Veronica Chebet to call PW1 while the 1st appellant was tasked with calling PW3 and PW4. On arrival, PW1 and Veronica alarmed area residents that someone was inside their house. People started streaming into the home. PW5 was among them. When PW3 arrived, the 2nd appellant explained that they were strategizing on how to get the stranger out of the house. In the process, he escaped through the window and into a cattle shed where there were cows.
51. On seeing this, the 2nd appellant searched for a rope that he would use to tie the stranger (identified as the deceased), who was found lying on the ground. According to the 2nd appellant, the deceased was pleading with the crowd not to have him beaten. He observed that the had a wound on the left side of his forehead and was bleeding. Since he was bleeding, they did not bother to punish him. He was in pain. They then moved him into another area in the compound together with PW4 and PW5.
52. The 2nd appellant continued that he went back to his house to change his clothes. On return, he found Bernard Bii, a watchman employed to guard Tinga farm, caning the deceased, together with another man called Bernard. They were beating him up inquiring whom he had sold the donkey to. He was then given the chief's number by PW3 all the while asking the assailants not to beat the deceased since he had already been accosted.
53. At around 2:00 a.m., the 2nd appellant's sister, Rose Chemutai, arrived at the scene. Using her phone, the 2nd appellant called the chief. He also called several other persons asking for a motor bike but to no avail. The area chief PW6 arrived at the scene at 6:00 a.m. when he was preparing to go to the police station. Though the deceased's condition was unstable, they gave him two cups of tea and ugali. He was then assisted by area residents to carry the deceased and take him to Kipkelion Hospital using the chief's motor bike.
54. On the way, they were met with several challenges that hindered their smooth ride to the hospital. They also met an angry crowd of people instilling apprehension on the 2nd appellant. As such, he fled the scene and went to the police station. He found the chief and his sister Rose who believed that he had



- bolted. He went back home eventually. He explained that over the next couple of days, he was unable to secure witnesses to accompany him and defend him.
55. On 1st March 2016, he received a call from a police officer who lured him to Barsiele shopping center. The 2nd appellant was apprehended and placed in police custody. He was later charged with the offence. He added that the cows in the shed were hostile and had sharp horns. He maintained that no alcohol was being sold at their homestead.
 56. When called to the stand, the 1st appellant testified that he was sixteen years old at that time. He initially expressed willingness to associate himself with the evidence of his uncle, the 2nd appellant's statement. Uncomfortable with that proposition, the trial was adjourned to enable the 1st appellant's advocate to counsel him.
 57. When he took the stand again, he testified that on the night of 26/27th February 2016, he heard a lot of screaming. He located them coming from PW1 and Veronica. This also caught the attention of his uncle, the 2nd appellant, and other area residents. He heard that someone was in the house.
 58. At the behest of his uncle, the 1st appellant dashed to call PW4 who came with his wife. He also called PW3 who had a conversation with his uncle. Since he was going to school, the 1st appellant went back to sleep. He was later informed that the stranger, who was the deceased, was taken to hospital and died thereafter. Come 16th March 2016, the 1st appellant's mother sent him to collect fees at Equator at his uncle's place. He was arrested by the police while he was there. He was then brought to court to answer to the charges preferred against him.
 59. In this appeal, we are tasked to reevaluate the evidence on record to establish whether the learned judge arrived at a correct or incorrect finding in convicting the appellants and sentencing them accordingly. In order for the prosecution to secure a conviction on a charge of murder, the following crucial ingredients must all be established: the death of the deceased; the act or omission causing the death was unlawful; the act or omission was committed by the perpetrator and; malice aforethought.
 60. On the question of the death of the deceased, PW12 testified that the deceased died as a result of trauma to the chest cavity which led to liver rupture and massive hemorrhage. He noted that the deceased had a penetrating head wound on the left frontal region, multiple bruises and swelling on both upper limbs, lacerations on the right anterior superior spine, chest and left knee and a blister on the left leg. Internally, he had blood in the right chest cavity with a lacerated lobe of the liver. The deceased's body was identified by his brothers PW5 and DW9 as well as police officer PW11. We therefore find that the deceased's death was proved to the required standard.
 61. Was the deceased's death caused by an unlawful act or omission committed by the appellants? The evidence that was led by the prosecution in establishing this ingredient was exigently adduced by PW1, PW2, PW3 and PW4. In particular, the eye witness accounts of PW1, PW3 and PW4 all corroborated one another regarding the circumstances leading up to the deceased's death.
 62. It was testified that on the night between 26th February and 27th February 2016, an alarm had been raised that a stranger had been spotted inside the 2nd appellant's sister's house. She was living in the same homestead with the appellants. This caught the attention of PW1, PW3 and PW4 who affirmatively saw each other at the crime scene.
 63. On their arrival, the appellants were seen standing outside while the stranger, who was identified as the deceased person, was found seated inside a house over a stack of maize. They all managed to recognize him when the 2nd appellant lit a torch in his direction. They were all neighbours. When PW3 arrived, he heard someone saying: "He was trying to get out."



64. The state of the deceased was described as that of a person who was drunk and appeared sleepy. When asked by the 2nd appellant what had brought him there, he said that he wanted money. PW1 on her part recalled that he wanted alcohol and change. The deceased then tried to escape by jumping out of the house through a small opening in the back of the house. This triggered the 2nd appellant to strike the deceased with a rungu that landed on his forehead.
65. Following that hit, the deceased fell down. The 2nd appellant began to beat the deceased and was joined by the 1st appellant who hit the deceased with a stick. They would later be joined by two persons from Kaisugu Company namely Daniel Bii and Bernard Kipkirui using a nyahunyu (whip). During the ordeal, the deceased pleaded with them seeking exoneration but those cries went unanswered.
66. When PW1 tried to stop them, she was chased away by the 2nd appellant. The appellants however listened to PW4 and stopped. The deceased was beaten until he was left with some level of consciousness. He was seen by PW3 bleeding from his forehead. Thereafter, the appellants tied the deceased with a rope.
67. All witnesses left the scene and retreated to their homes save for PW1 who rushed to inform the deceased's sister, PW2. The two ladies would return to the scene finding the deceased lying on the ground outside the 2nd appellant's home silent. His clothes had been removed. On observing his private parts, PW1 testified that they were swollen. He was taken to PW2's home before he was taken to hospital. Unfortunately, he was pronounced dead on arrival.
68. The transpirations above created a chain of events leading up to the death of the deceased. There was no activity interrupting those events as to cast doubt that the act of beating the deceased led to his unfortunate death. Though the deceased was suspected to be a thief, the assault injuries inflicted on him were so grave and did not justify the reasons why he was beaten. In fact, it is not clear whether he was a thief as firstly he was not found with a stolen item. Secondly, the narrative of the prosecution's witnesses point to a drunk man who was simply asking for money. It was however not clear who he sought the money from.
69. The autopsy report revealed that the deceased died as a result of trauma to the chest cavity. It is that trauma that led to liver rupture and massive hemorrhage. We therefore find that indeed the appellants caused the deceased's death when they repeatedly assaulted him grievously. Though the appellants tried to dislodge the prosecution's evidence by stating that the deceased must have been pierced by the cows in the shed, that evidence is not persuasive. In any event, PW2 and PW1 who were in close proximity to the deceased after his assault, did not see any visible injury as to suggest that a sharp object had pierced the deceased. Be that as it may, the post mortem did state that it was the chest trauma that led to the liver rupture. We are satisfied, just like the trial judge that the death was caused by the unlawful actions of the appellants.
70. The last ingredient is that of malice aforethought. Was mens rea established beyond reasonable doubt? Section 206 of the [Penal Code](#) defines malice aforethought as follows:
- “(a) An intention to cause death or to do grievous harm to any person whether such person is the person actually killed or not;
 - b. Knowledge that the act or omission causing death will cause the death of or grievous harm to some person, whether such person is the person 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 be caused;



- c. An intent to commit a felony;
- b. An intention to facilitate the escape from custody of a person who has committed a felony.”

71. In this case, the appellants pointed out that the deceased had no rational explanation for his presence in the homestead. However, they took the law into their own hands. They landed on him, beat him repeatedly and ignore the cries of the witnesses to stop the vicious assault. After they were done with him, they left him to lie outside the homestead and didn't bother to take him to hospital. The incident occurred between midnight and 1:00 a.m. However, the deceased was only taken to hospital in the morning hours of 8:00 a.m. and only after the intervention of the area chief.
72. In our view, the appellants knew the consequences of their actions would lead to serious injuries inflicted upon the deceased. That alone amounted to malice aforethought. The trial court considered their defences and rightfully rejected them. We agree with those findings. Ultimately, we find that the appellants were properly convicted of the offence of murder. Accordingly, the appeal on conviction lacks merit and it is hereby dismissed.
73. On sentence, starting with the 2nd appellant, the trial court considered his mitigation and the pre-sentencing report. Indeed, the deceased was beaten viciously and mercilessly amidst his intoxication. It is this grievous assault that led to his death. In our view, that cannot be taken away. We therefore find that the sentence of 20 years was lenient given the circumstances of the case. We shall therefore not disturb that finding. However, the computation of the sentence should run from the date of his arrest.
74. Turning to the 1st appellant, the trial court stated that no evidence was tendered before it to establish that he was a minor. It added that though he appeared to be young, the fact that he was a secondary school child did not prove that he was a minor aged below eighteen years.
75. Those findings were impugned by the appellants. They submitted that his age was in fact established at trial when he was remanded in a children's home. Gathered from that foregoing, it was apparent that he was a minor aged 14 years at the time of commission of the offence; an issue that was neither denied nor countermanded.
76. From the record, it can be confirmed that the 1st appellant was remanded at the children's remand home after taking plea on 17th March 2016. On 30th May 2018, he testified that he was 16 years old. Additionally, the judgment of the court at paragraph 2 confirmed that the 1st appellant was a minor. These facts were not rebutted by the prosecution. The probation officer's report compiled in 2019, confirmed that the 1st respondent at that time was eighteen years old. We think that those circumstances tilted towards a finding that the 1st appellant was a minor at the time of the offence.
77. The appellants urged us to consider the decision of this Court in *AL v Republic* [2024] KECA 462 (KLR) which also dealt with a minor that stood charged with the offence of murder. The Court aptly ruminated itself as follows when it was considering the sentence meted out against the appellant:

“That said, however, we think that the age of the appellant, being in late teenage at the time of the offence, is a relevant consideration when determining the appropriate sentence. We note that the appellant raised his youthfulness as a mitigating factor alongside his remorsefulness and his being a breadwinner for a large family of ten siblings. He also blamed the alcohol he had taken and stated that the probation report was favourable. However, even though the learned judge noted the mitigation, including the fact that the appellant immediately reported the stabbing, all he stated is that he was sentencing the appellant “to suffer death



as per law provided.” It is not evident that the learned judge well and fully exercised his discretion as he ought to have since the Supreme Court ruled the mandatory death sentence for murder to be unconstitutional in Francis Karioko Muruatetu & Anor v Republic [2017]eKLR. Nor is there the weighting of all aggravating and mitigating factors in the case as expected of a sentencing court in the Sentencing Guidelines.

We think that whereas the offence committed by the appellant led to a senseless loss of another young life, the toxic combination of youthful exuberance competing for the attentions of the strange woman at Sweet Waters Bar, emboldened by the alcohol imbibed for the better part of the evening, played a significant part in the appellant’s fatal stabbing of the deceased. The record is clear that there was no bad blood between the two, who were, in fact, close friends who worked amicably together and socialized well out of work. The appellant was in shock after the dastardly act and made no effort to escape, deny the deed or even to conceal the knife. He had it, bloody and all, in his hands as he reported the stabbing and asked his brother and other witnesses to go attend to the deceased and take him to hospital.

All in all, the appellant does not present as a criminal who did not care for human life, and it would hardly be in keeping with the legitimate aims of punishment to impose upon him the ultimate sentence of death, which we hereby set aside. We substitute therefor an order that the appellant is sentenced to the term already served.”

78. While indeed the Court addressed its mind on a child in conflict with the law, the facts and circumstances were vividly different. In that case, the appellant was found to have been drinking and had other aggravating factors leading to the stabbing of the deceased. He also realized that what he did was wrong when he immediately sought assistance to take the deceased to hospital.
79. In this case, the 1st appellant stabbed the deceased together with his uncle. From the facts established by the prosecution, the 1st appellant understood that what he did was wrong but went on any way. He took no further steps to mitigate the situation; rather let the deceased stay in agony. Perhaps, he took the direction of his uncle to steer clear of doing anything contrary to inflicting the deceased with bodily harm. Though the 1st appellant was a minor at the time of the commission of the offence, he was already of majority age at the time of sentencing. Taking into account the conduct of the 1st appellant on that fateful night and his participation in the murder of the deceased we are satisfied that the custodial sentence that was meted out was appropriate in the circumstances.
80. In the end, we are satisfied just like the trial Judge that the appellants are guilty and that the grounds of appeal have no merit. Accordingly, we dismiss the appeal, save on the question of sentence, which should run from the date that the appellants were arraigned in court, 11th March 2016, as the record shows that the case proceeded when the appellants were in remand. Orders accordingly.

DATED AND DELIVERED AT NAKURU THIS 20TH DAY OF JUNE, 2025.

J. MATIVO

JUDGE OF APPEAL

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M. GACHOKA C.Arb, FCI Arb.

JUDGE OF APPEAL

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W. KORIR
JUDGE OF APPEAL

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I certify that this is a True copy of the original

Signed

DEPUTY REGISTRAR

