Kitsao v Republic (Criminal Appeal 64 of 2020)
[2025] KECA 1137 (KLR) (20 June 2025) (Judgment)

Neutral citation: [2025] KECA 1137 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MALINDI

CRIMINAL APPEAL 64 OF 2020

AK MURGOR, KI LAIBUTA & GWN MACHARIA, JJA

JUNE 20, 2025

BETWEEN

FONDO KALAMA KITSAO .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Malindi (R. Nyakundi, J.) delivered on 23rd September 2020 in HCCR No. 3 of 2015)

JUDGMENT

1. This is a first appeal from the judgment of the High Court of Kenya at Malindi (R. Nyakundi, J.) dated 23rd September 2020 in High Court Criminal Case No. 3 of 2015 in which the appellant Fondo Kalama Kitsao was 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 the night of 30th January 2015 in Midodoni Village in Ganze sub-County within Kilifi County, jointly with another, the appellant murdered Ngowa Mwaringa Mume (the deceased).

2. The appellant pleaded not guilty to the charge whereupon the prosecution called 7 witnesses in support of its case.

3. The first prosecution witness was the deceased's wife, Taabu Ngowa (PW1), who testified that, on 30th January 2015 at about midnight, the deceased arrived home with some meat and requested her to prepare it for him; that, with the assistance of her daughter, Raheli Nyevu Ngowa (PW2), they prepared the meal for him; that, while the deceased was washing his hands outside their house in preparation for his supper, the appellant appeared in their compound in the company of a masked man; that the appellant approached the deceased and shone a light from his mobile phone on his (the deceased's) face; that the masked man menacingly brandished a sharp object used to cut down coconut trees, and which he instantly used to fatally strike the deceased's head twice; that the appellant slapped

PW2 when she tried to intervene; and that the masked attacker fled immediately after assaulting the deceased.

4. PW1 further testified that she was able to identify the appellant under the moonlight; that she knew the appellant since he tapped palm wine at their home, and that the appellant had hitherto been stopped from tapping palm wine from their coconut trees following a dispute over an outstanding debt on account of the palm wine harvested by him.

5. In her testimony, PW2 recounted the incident as testified by PW1, only adding that the appellant shone his phone's light on the deceased to enable the masked assailant to attack the deceased; and that she did not know the masked assailant, but that she knew the appellant, who occasionally tapped palm wine at their home.

6. PW3, Katana Mwaringa Mume, the deceased's brother, testified that he was notified of the deceased's death on 31st January 2015; that he immediately travelled to Ganze from Mombasa; that PW1 informed him that she knew one of the attackers; that, armed with this information and in the company of PW1 and PW2, they reported the matter at Ganze Police Station; that the appellant was eventually arrested whereupon he claimed that he was with one Hamisi during the attack; that the appellant had worked for their father, Karisa Mumbe Ngulu (PW5), for more than three years; and that the appellant had stopped making payments to PW5 for palm wine harvested from his coconut trees.

7. PW5 testified that, on the material night, he heard screams coming from the deceased's compound; that he instinctively picked a panga and rushed to the scene; that he unexpectedly met the appellant running away from the scene; and that he also saw another person running ahead of the appellant.

8. It was PW5's testimony that, on arrival at the scene, he found the deceased's body lying on the ground; and that, with the assistance of PW1 and PW2, he managed to take the deceased to seek urgent medical attention. PW5 testified that the appellant was his palm wine tapper for a long time, but that he (the appellant) had defaulted in payment to him for the palm wine harvested from his trees; and that the deceased intervened and demanded that the appellant pays PW5, but that the appellant rebuffed this demand.

9. David Kazungu (PW4) attached to Ganze Administration Police Camp testified that, on the night of the murder on 31st January 2015, he received information from one Inspector Raymond Karisa regarding the incident; that he proceeded to the scene and escorted the deceased to Ganze Dispensary before being referred to Kilifi District Hospital where he succumbed to his injuries; and that, on receiving information from PW1, PW2 and PW3, he, along with one APC Olunya and APC James Mulei, arrested the appellant.

10. Inspector Solomon Salu (PW5), the investigating officer, testified that, during his investigation, he was informed that the appellant and one Hamisi had killed the deceased; that there was a disagreement between the appellant and the deceased relating to money from tapped palm wine; that the deceased had threated to have the appellant dismissed from work on account of the debt; that the appellant dared him to try; and that PW1 and PW2 had seen the appellant during the day in the same clothes that he wore the night of the murder; and that, upon concluding his investigations, the appellant was charged with the offence.

11. Dr. Ali Mohamed Nassir of Kilifi County Hospital was the last prosecution witness. He took the trial court through the deceased's post mortem report prepared by one Dr. Khadija and testified that the deceased's body had multiple injuries extending 12cm deep, multiple cut wounds on the frontal part of the brain, which led to internal bleeding, and which was the cause of his death.

12. At the conclusion of the prosecution case, the trial court found that the appellant had a case to answer and put him on his defense.

13. In his defense, the appellant gave a sworn testimony and stated that, on 30th January 2015 at about 12am, he received a call from a boda boda rider, whose name he could not recall, asking him to skip work that day because he was being sought for the deceased's murder; that he was arrested the following day; that he had a grudge with PW1, who was "always drunk" and occasionally grabbed palm wine from him; that this issue had been escalated to the local chief for resolution; that PW1 coached PW2 to falsely implicate him; that he did not kill the deceased; that he had no grudge with the deceased; and that he did not know one Hamisi.

14. In its considered judgment, the trial court held that the crime of murder against the deceased was committed within the context and meaning of section 21 of the *Penal Code* on common intention; that the killing of the deceased was done by the appellant and another accomplice not before the trial court; that PW1 and PW2 were credible witnesses and saw the appellant at the scene; and that the deceased was brutally killed without any justification or excuse. The court was satisfied that the prosecution had proved its case against the appellant beyond reasonable doubt and, accordingly, convicted him and sentenced him to 35 years imprisonment.

15. Aggrieved by the conviction and sentence, the appellant moved to this Court on appeal on 3 substantive grounds set out in his undated Memorandum of Appeal. According to him, the learned trial Judge was at fault: (i) in failing to consider that the prosecution did not prove its case beyond reasonable doubt; (ii) in failing to adequately consider his defense; and (iii) that the sentence meted on him was harsh and excessive.

16. In support of his appeal, learned counsel for the appellant, M/s. Wanjiku Gituire & Company, filed written submissions dated 22nd October 2024 citing 2 judicial authorities, namely: Miller v Minister of Pension (1947) 2 ALL ER 372, submitting on what constitutes the burden of proof beyond reasonable doubt; and Namayengo alias Nakhafanyaje and 4 Others v Republic [2024] KECA 1203 (KLR), submitting that the appellant did not satisfy the ingredients or circumstances to prove malice aforethought, and that care must be taken with regard to identification evidence. It is noteworthy that the cited authorities only touch on the 1st ground of appeal. On the basis of her submissions, counsel urged us to allow the appeal.

17. We hasten to point out that the appellant appears to have abandoned the 2nd and 3rd grounds of appeal, having only submitted on the 1st ground in relation to which learned counsel raised five (5) "self-styled" issues for determination, namely: whether the identification evidence was safe to form the basis of a conviction; whether there was any other basis for conviction beyond the identification evidence; whether the appellant was armed with any dangerous or offensive weapon or instrument; whether the prosecution proved mens rea; and whether this appeal should be allowed, conviction quashed and the sentence set aside.

18. To our mind, the 5 issues raised by counsel relate to the standard of proof of the offence charged; the ingredients of the offence; the issue as to whether the appellant was properly identified; and whether the prosecution proved its case to the required standard to warrant conviction and sentence.

19. On these five issues, learned counsel submitted, inter alia: that the attack took place at night, and that, therefore, care must be taken with regard to identification; that PW1, PW22, PW5 and PW6 gave different versions of evidence as to what the appellant was wearing on the day of the murder; that the murder weapon and the clothes allegedly worn by the appellant during the murder were not produced

by the prosecution; that malice aforethought was not proved; and that no evidence was adduced linking the appellant to the offence.

20. Opposing the appeal, the Senior Principal Prosecution Counsel, Ms. Evah Kanyuira, filed written submissions and a list of authorities dated 11th November 2024 citing 5 judicial authorities, namely: Muruatetu & Another v Republic [2017] KESC 2 (KLR), submitting that the trial court considered the mitigating as well as the aggravating factors, and that the sentence meted on the appellant was appropriate and should not be interfered with; Barisa v Republic [2024] KECA 219 (KLR), highlighting the elements of the offence of murder; Gusambizi Wesonga v Republic [1948] 15 EACA 65, submitting that every homicide is presumed to be unlawful except where circumstances make it excusable, or where it has been authorised by law; Republic v Kipkemei [2024] KEHC 2388 (KLR), submitting on the elements of unlawful acts in homicide cases; and David Mwangi Monica v Republic [2020] eKLR on what constitutes malice aforethought and the manner in which it is established.

21. In addition to the submissions aforesaid, we have considered the record of appeal, the rival submissions of counsel and the applicable law. We take to mind our mandate on a first appeal as set out in rule 31(1)(a) of the Rules of this Court, namely to reappraise the evidence and draw our own conclusions.

22. In principle, a first appeal takes the form of a rehearing (see Ogaro vs. Republic [1981] eKLR). This being a first appeal, it

is by way of a retrial. As the first appellate court, the Court has a duty to re-evaluate, re-analyze and re-consider the evidence afresh and draw its own conclusions on it. However, the Court should bear in mind that it did not see the witnesses as they testified and give due allowance for that."

23. In the same vein, the predecessor of this Court, the Court of Appeal for Eastern Africa pronounced itself on the cautious approach to be employed in discharge of its mandate on a first appeal and stated thus in Peters vs. Sunday Post Limited [1958] EA 424:

> " Whilst an appellate court has jurisdiction to review the evidence to determine whether the conclusions of the trial judge should stand, this jurisdiction is exercised with caution; if there is no evidence to support a particular conclusion, or if it is shown that the trial judge has failed to appreciate the weight or bearing of circumstances admitted or proved, or has plainly gone wrong, the appellate court will not hesitate so to decide."

24. It must be borne in mind, though, that scrutiny without more is not sufficient. The Court is mandated to undertake a fresh and exhaustive examination and reach its own decision on the evidence on record. In this regard, the Court in Okeno vs. Republic [1972] EA 32 set out the duty of a first appellate court 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 and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses."

25. This cautious approach has deep roots in comparative common law jurisdictions as demonstrated in the decision of the Supreme Court of India in Ganpat vs. State of Haryana (2010) 12 SCC 59.4. 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.
>
> d. When the trial Court has breached provisions of *the constitution* or ignored statutory provisions, or misconstrued the law, or breached rules of procedure, or ignored crucial evidence or misread the material evidence or has ignored material documents, or in any manner compromised the accused rights to a fair trial or prejudiced the accused etc. the appellate court is competent to reverse the decision of the trial court depending on the materials in question.”

26. Having carefully considered the record of appeal, the grounds on which it is anchored, the respective written and oral submissions and the law, we form the view that the appellant’s appeal stands or falls on our finding on the following three main issues, namely: (i) whether the prosecution evidence was sufficient to prove the charge against the appellant beyond reasonable doubt; (ii) whether the appellant’s defence was adequately considered; and (iii) whether the sentence meted on him was harsh and excessive in the circumstances.

27. On the 1st issue as to whether the prosecution proved its case against the appellant beyond reasonable doubt, the learned Judge concluded thus:

> “.... I am satisfied that the killing of the deceased was done by the accused and another accomplice not before the Court.
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> ... .
>
> .... The witnesses alleged that the accused’s description, knowledge and visual identification was made possible because he had been an employee of PW5 as a wine tapper for a long period of time.
>
> ... .
>
> According to PW1, PW2 and PW5 there were sources of moonlight which assisted them to positively identify the accused .... In all the circumstances, I am satisfied that PW1 and Pw2 saw the accused at the scene”

28. Arguing that the prosecution did not prove its case beyond reasonable doubt, counsel for the appellant took issue with the appellant’s identification, the question as to whether he was armed with any dangerous weapon, and whether the prosecution proved malice aforethought. According to counsel, the attack took place at night and, therefore, care must be taken with regard to the evidence of identification. She contended that there were inconsistencies, contradictions and weaknesses in the evidence of the appellant’s identification with regard to the time the deceased arrived home; the clothes

worn by the attackers; whether the deceased died at the scene, or whether he died in hospital; and whether the attackers said anything to the deceased before the attack.

29. On the issue of identification or recognition, counsel cited the case of Namayengo alias Nakhafanyaje & 4 Others v Republic (supra) where this Court observed that:

> " .... It is true that recognition may be more reliable than identification of a stranger, but, even when the witness is purporting to recognise someone whom he knows, the Court should remind itself
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> that mistakes in recognition of close relatives and friends are sometimes made."

30. On the question as to whether the appellant and/or his accomplice were armed with a dangerous weapon or weapons, counsel submitted that there was need for the prosecution to produce the weapon which was used during the attack to link the appellant therewith. Counsel went on to submit that it is the other attacker who was armed with a sharp object and proceeds to draw the Court's attention to the trial court's observation that, "... in the hands of the co-accomplice was 'a wooden stool'". .

31. On her part, the Senior Principal Prosecution Counsel dealt with the 1st issue as framed from the appellant's 1st ground of appeal. Learned counsel submitted on the four elements that the prosecution is required to establish to prove murder, namely: that the deceased died, and the cause of death; that the death was unlawful; that the accused caused the death; and that the death was caused with malice aforethought. Counsel cited the case of Barisa v Republic (supra), submitting that there was clear evidence that the deceased died; that, according to the post-mortem report, he suffered from multiple cut wounds, which led to internal bleeding; that every homicide is presumed to be unlawful, except where circumstances make it excusable or has been authorized by law; and that the appellant used a light to assist the assailant in attacking the deceased, which is an indication that the appellant had the intention of causing harm to the decease.

32. Citing the cases of Republic v Kipkemei (supra); and David Mwangi Monica v Republic (supra), counsel concluded by submitting that it is the part of the body struck and the object used that shows that the appellant had malice aforethought and intended to cause the death of the deceased.

33. Having considered the relevant part of the impugned judgment on the first main issue, the respective submissions of counsel, we begin with elucidation of what constitutes murder with which the appellant was charged.

34. This Court enunciated what constitutes murder in Joseph Kimani Njau v Republic (2014) eKLR thus:

> "Before an act can be murder, it must be aimed at someone and in addition, it must be an act committed with one of the following intentions, the test of which is always subjective to the actual subject:
>
> i. The intention to cause death;
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> ii. The intention to cause grievous bodily harm;
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> iii. Where the accused knows that there is a serious risk that death or grievous bodily harm will ensue from his acts, and commits those acts deliberately and without lawful excuse with the intention to expose a potential victim to that risk as the result of those acts.

It does not matter in such circumstances whether the accused desires those consequences to ensue or not…"

35. In this case, the appellant and his co-assailant intentionally assaulted the deceased as one of them struck him on the head with a sharp object under a light shone by the other (the appellant) with intent to cause death or grievous bodily harm. No lawful excuse would avail for such an unlawful act, which the two knew or ought to have known was likely to cause death or grievous bodily harm. On the authority of Joseph Kimani Njau v Republic (ibid), it matters not whether their intention was to kill or merely inflict an injury on the deceased.

36. On the question as to whether or not malice aforethought was proved, we take to mind the learned Judge's following observation:

> " In the instant case in the presence of the co-accomplice a weapon used as a murder weapon was willfully and voluntarily discharged against the deceased substantially with an intention to cause death. The conclusion that follows therefore is that the killing of the deceased was actuated with malice aforethought under Section 206 (a), (b), (c) of the *Penal Code*."

37. Malice aforethought is defined in section 206 of the *Penal Code* in the following terms:

    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.

    d. An intention to facilitate the escape from custody of a person who has committed a felony.

38. We hasten to add that the predecessor to this Court in R v Tuper S/O Ocher[1945] 12 EACA 63, held that:

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

39. It must be borne in mind, though, that failure to recover or produce a murder weapon in evidence at the trial does not necessarily mean that an accused person should be acquitted. In effect, a court can convict an accused person if they believe a weapon existed at the time of the crime, even if the weapon is not produced as was the case here. In Katana v Republic ([2024] KECA 463 (KLR), this Court differently constituted held that:

    "44. In our opinion, malice aforethought may well be inferred from the force applied and the weapon used by the assailant. In this case, the post mortem report revealed that the death of the deceased was due to severe head injury resulting from assault. In fact, the injury exposed the crushed brain matter of the deceased, a clear indication of the extent of the force or the nature of the weapon used. The only inference that can be made in those circumstances is that the assailant intended to cause death or at least grievous harm to the deceased and, either way,

that proves the existence of malice aforethought. We are also satisfied that the documentary evidence in the form of the post mortem report, which was produced without objection clearly revealed the cause of death, and the submission that the cause of death was not established does not hold.

45. In light of the same documentary evidence, nothing turns on failure by the prosecution to produce the weapon. In Ekai v R [1981] KLR 569, this Court held that failure to produce the murder weapon was not of itself fatal to a conviction and that, as long as the post mortem report had established beyond reasonable doubt the injury from which the deceased died, a conviction could still stand. If there is sufficient evidence on record that prove that the homicide was committed, the court may well convict the accused person.

45. This Court appreciated this position in the case of Karani v R [2010] 1 KLR 73 in which this Court pronounced itselfas follows:"The offence as charged could have been proved even if the dangerous weapon was not produced as exhibit as indeed happens in several cases where the weapon is not recovered. So long as the court believes, on evidence before it, that such a weapon existed at the time of the offence, the court may still enter and has been entering conviction without the weapon being produced as exhibit."

40. On the authority of Katana v Republic(ibid), we reach the conclusion that nothing turns on the submission by counsel for the appellant that the offence of murder with which the appellant was charged was not proved beyond reasonable doubt merely because the murder weapon was not produced as an exhibit at the trial. Accordingly, that element of the appellant's 1st ground of appeal fails.

41. Turning to the impugned judgment, it is noteworthy that, in convicting the appellant for the offence as charged, the learned Judge relied on the doctrine of common intention which, under section 21 of the *Penal Code*, is defined thus:

> When two or more persons from a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence.

42. The elements on the principle of common intention were defined in the cases of Njoroge vs Republic [1983] KLR 197 and Solomon Munga vs Republic [1965] EA 363 thus:

> " If several persons combine for an unlawful purpose and one of them kills a man, it is murder in all who are present whether they actually aided or abated or not, provided that the death was caused by act of someone of the party in the course of the endeavors to effect the common object of the assembly."

43. This Court also considered the doctrine of common intention in the case of Dickson Mwangi Munene & another vs Republic [2014] eKLR and had this to say:

> " This provision has been interpreted and the doctrine of common intention dealt with by our courts in several cases. In Solomon Mungai v. Republic [1965] E.A. 363, the predecessor of this Court held that in order for this section to apply, it must be shown that the accused had shared with the other perpetrators of the crime a common intention to pursue a specific unlawful purpose which led to the commission of the offence charged."

44. The elements for application of the doctrine of common intention were also adopted by this Court in the case of Stephen Ariga & another vs Republic [2018] eKLR, as established in Eunice Musenya Ndui vs Republic [2011] eKLR thus:

> "(1) There must be two or more persons;
>
> 2. The persons must form a common intention;
> 3. The common intention must be towards prosecuting an unlawful purpose in conjunction with one another;
> 4. An offence must be committed in the process;
> 5. The offence must be of such a nature that its commission was a probable consequence of the prosecution of the unlawful purpose".

45. The pertinent question is whether the prosecution proved its case beyond reasonable doubt. Put differently, whether the appellant and his accomplice murdered the deceased. From the evidence on record, the only reasonable conclusion that can be drawn is that their common intention was undoubtedly to kill or inflict grievous harm on the deceased, and that their intentional assault on him led to his death. Indeed, the assault carried out with such common intent comprised an unlawful purpose that finds no excuse in law. In short, the evidence established the appellant's guilt beyond reasonable doubt regardless of whether the murder weapon was not produced in evidence at the trial.

46. In drawing this conclusion, we take to mind the decision of the High Court of South Africa in S vs. Sithole and Others 1999

(1) SACR 585 (W) at 590 where the court had this to say on the standard of proof in criminal cases:

> " There is only one test in a criminal case, and that is whether the evidence establishes the guilt of the accused beyond reasonable doubt. The corollary is that an accused is entitled to be acquitted if there is a reasonable possibility that an innocent explanation which he has proffered might be true. These are not two independent tests, but rather the statement of one test, viewed from two perspectives. In order to convict, there must be no reasonable doubt that the evidence implicating the accused is true, which can only be so if there is at the same time no reasonable possibility that the evidence exculpating him is not true. The two conclusions go hand in hand, each one being the corollary of the other. Thus in order for there to be a reasonable possibility that an innocent explanation which has been proffered by the accused might be true, there must at the same time be a reasonable possibility that the evidence which implicates him might be false or mistaken."

47. In the same vein, Lord Denning in Miller vs. Ministry of Pensions (supra) had this to say:

> "That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence of course it is possible, but not in the least probable, the case is proved beyond reasonable doubt, but nothing short of that will suffice."

48. On the 2nd issue as to whether the appellant's defence was considered, the learned Judge had this to say:

> "As the accomplice pulled [out] the murder weapon and aimed it at the deceased, it's clear that the accused did nothing to restrain him or as of necessity take preventive measures to avoid the deceased being hit by his accomplice. The facts themselves negate any defence that during the assault [the] accused person was an innocent bystander that he will not have known of the intention of his co-accomplice.
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> … ….
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> …. In the circumstances of the case the unlawful act which caused the death of the deceased was actually corroborated by the medical evidence given on the contents of the post-mortem report by PW7. That in my view, constitutes proof of unlawful death beyond reasonable doubt."

49. Challenging the impugned judgment with regard to the appellant's defence, learned counsel for the appellant submitted that, due to COVID19 pandemic, the appellant was not given a chance to avail his witnesses.

50. In rebuttal, the State counsel submitted that the appellant's defence was to the effect that the suspicion as to the murder was because of a grudge the wife to the deceased had against him. According to counsel, the deceased's wife (PW1) testified, but the appellant never brought up the issue of a grudge between them in cross-examination, and that this defence was an afterthought.

51. A cursory look at the record of appeal shows that counsel for the appellant had expressly indicated to the trial court that the appellant did not intend to call any witnesses in his defence. The relevant part of the record of the proceedings in the trial court at the hearing of the appellant's defence on 12th June 2020 reads:

> "Chepkwony: - My client will give a sworn statement with no witness. Due to Covid 19 cannot avail the witness."

52. Be that as it may, we find nothing to suggest that the appellant applied for adjournment or sought the court's assistance to facilitate the attendance of his 'witness' whether in person or virtually. Moreover, the statement made by his learned counsel clearly indicated the intention not to call his 'witness' (if any).

53. On the 3rd issue as to the severity of sentence, counsel for the appellant makes no submission thereon and, in the circumstances, it may be presumed as having been abandoned. Consequently, nothing turns thereon.

54. Be that as it may, it would be remiss of us not to express our view on the submissions of the State counsel on the issue of sentence. According to learned counsel, the trial court considered the mitigating as well as the aggravating factors. Citing the case of Muruatetu & Another v Republic (supra), counsel submitted that the sentence meted on the appellant was appropriate and should not be interfered with.

55. In Shadrack Kipkoech Kogo v Republic - Criminal Appeal No. 253 of 2003 (unreported), this Court sitting in Eldoret (Omollo, O'Kubasu & Onyango Otieno, JJ.A.) stated:

> "Sentence is essentially an exercise of discretion of the trial court and for this Court to interfere, it must be shown that in passing the sentence, the sentencing court took into account an irrelevant factor or failed to take into account a relevant factor or that a wrong

principle was applied or short of those the sentence itself is so harsh and excessive that an error in principle must be inferred." (Emphasis added)

56. In Omuse v Republic (2009) KLR, 214, this Court by a bench differently constituted (O'Kubasu, Waki, & Onyango Otieno, JJ.A.), laid down the principles to be considered in sentencing thus:

> " In Macharia vs R. (2003) EA, 559, this Court stated: 'The principle upon which this Court will act in exercising its jurisdiction to review or alter the sentence imposed by the court have been firmly settled as far back as 1954 in the case of OGOLA S/O OWOUR (1954) EACA, 270 wherein the predecessor of this Court stated:
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> > 'The Court does not alter a sentence on the mere ground that if the members of the Court had been trying the appellant they might have passed a somewhat different sentence and it would not ordinarily interfere with the discretion exercised by a trial Judge, unless as we said in JAMES VS R (1950)18 EACA, 147, it is evident that the Judge acted upon some wrong principles or overlooked some material factors. To this, we should also add a third criterion, namely that the sentence is manifestly excessive in view of the circumstances of the case (R VS SHERXHAWSKY (1912) CCA 28 TLR, 263. Further, the law is that sentence imposed on an accused person must be commensurate to the moral blameworthiness of the offender and it was thus not proper exercise of discretion in sentencing for the Court to have failed to look at the facts and circumstances of the case in their entirety before settling for any given sentence. See AMBANI VS R (1990) KLR, 161.'"
> >
> > [Emphasis ours]

57. Apart from the appellant's blanketing assertion in ground No. 3 that the sentence meted on him was harsh and excessive, counsel did not demonstrate that the trial court took into consideration matters it ought not to consider or failed to consider matters that it ought to have considered. Neither did counsel show that the sentence meted on the appellant was unlawful or excessive in the circumstances of the case, or that the trial court applied wrong principles in reaching the conclusion to pass the impugned sentence. Likewise, that ground of appeal fails.

58. In conclusion, the record of appeal, our scrutiny of the impugned judgment and the grounds on which it is anchored, viewed in the light of the rival submissions, the cited authorities and the law, do not turn in any reason for us to interfere with the appellant's conviction and sentence. Accordingly, the appeal fails and is hereby dismissed and, consequently, the judgment of the High Court of Kenya at Mombasa (R. Nyakundi, J.) delivered on 23rd September 2020 is hereby upheld.

Orders accordingly.

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

A. K. MURGOR

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JUDGE OF APPEAL

DR. K. I. LAIBUTA CArb, FCIArb.

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JUDGE OF APPEAL

G. W. NGENYE-MACHARIA

...

JUDGE OF APPEAL

I certify that this is a True copy of the original

Signed

DEPUTY REGISTRAR