



**Wayumba v Republic (Criminal Appeal E022 of 2024)  
[2025] KECA 1070 (KLR) (13 June 2025) (Judgment)**

Neutral citation: [2025] KECA 1070 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT KISUMU  
CRIMINAL APPEAL E022 OF 2024  
MSA MAKHANDIA, HA OMONDI & LK KIMARU, JJA  
JUNE 13, 2025**

**BETWEEN**

**COLLINS OWUOR HONGO WAYUMBA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal from the judgment of the High Court at Kisumu (Aburili, J) dated 22nd November, 2023 and Sentencing Ruling dated 23rd January, 2024 in HCCRC No. 18 of 2019)*

**JUDGMENT**

1. Collins Owuor Hongo Wayumba, hereinafter “the appellant”, has filed this appeal against the judgment rendered by the High Court at Kisumu (Aburili J) in Criminal Case No. 18 of 2019. He was in the said court arraigned, tried, convicted and sentenced on the information charging him with the offence of murder contrary to Section 203 as read with Section 204 of the [Penal Code](#). The allegations were that on March 31, 2019, at Nyahera sub-location, Kisumu West sub-county, he unlawfully caused the death of Enos Ogada Odongo, hereinafter “the deceased”. The appellant entered a plea of not guilty and soon thereafter, his trial ensued.
2. During the trial, the prosecution called a total of 8 witnesses namely, Paul Ochieng Nyadiare, PW 1, Lilian Auma, PW 2, Emmanuel Otieno Oyuge, PW 3, Peninah Awino Odondi, PW 4, Kennedy Ogada Ochola, PW 5, PC Richard Ripoo, PW 6, Cyndi Oyaya, PW 7 and PC Elijah Thotho, PW 8.
3. PW 1 testified that he and the deceased had been partaking a local brew-chang'aa at the home of Mama Christine. At about 4.30pm, the deceased requested him to escort him home as he was intoxicated. While on the way, they met the appellant who was riding a motor cycle who upon seeing them on the road, stopped and asked them to give way. PW1 asked the appellant to wait so that he could get the deceased off the road. At this point the appellant became irritated, reversed his motor cycle and immediately raced forward and hit the deceased as a result of which the deceased fell on the road whilst



PW 1 jumped out of the way. That the appellant then repeatedly hit the deceased with the motor cycle and finally ran over him multiple times. According to PW1, when he asked the appellant what he was doing, he attempted to run over him as well but PW1 managed to jump off the road. The appellant thereafter rode away. PW1 then called Emmanuel Otieno Oyuge (PW3), Omondi and Wambogo who assisted him take the deceased to his home. The following day he learnt of the death of the deceased at the hospital where he had been taken for treatment. He stated that he knew the appellant very well and even his home though he did not know his full name.

4. According to PW2, the deceased's daughter, at around 4:35pm on the material day, two men, PW1 and PW3, arrived home carrying the deceased, who was unconscious. She was instructed to fetch a mattress and place it under a mango tree, where they laid the deceased and began fanning him. After some time, the deceased regained consciousness, and the two men left. Later, she called her mother PW4, who was away, and informed her of the incident. Her mother returned home around 6:00pm with two relatives, and they moved the deceased into the house. After learning about what had happened, her mother decided to take the deceased to Jaramogi Oginga Odinga Teaching and Referral Hospital. Unfortunately, he did not make it. The next day, she received a call from her mother informing her that the deceased had passed on.
5. PW3 found the deceased lying on the road. Upon inquiry, he was informed by PW1 that the deceased had been knocked down by a motorbike ridden by one, Owuor. PW3 identified the appellant as Owuor. He and PW1 carried the deceased to his home, where they met PW2, who provided a mattress for the deceased to lie on under a mango tree. He removed the deceased's clothing to help him breathe and instructed PW2 to call her mother before leaving. The following day, he learned that the deceased had passed on.
6. PW4, the deceased's wife, testified that at around 6:30pm, while she was in church, she received a phone call from her daughter, PW2, informing her that "Kwach" her husband's nickname—had been knocked down by a motorbike. She rushed home and found the deceased lying on a mattress in pain. She immediately called the deceased's brother, Kennedy Ogada Ochola, PW5, who arrived with his wife, Gloria. Together, they took the deceased to Jaramogi Oginga Odinga Teaching and Referral Hospital, where he received treatment but did not recover. At around 6:00am the following day, he was informed that the deceased had passed on. Prior to this the deceased had told the witness in the presence of his brother PW5 and his wife that he had been knocked by motorcycle ridden by the appellant.
7. PW5, the deceased's brother, testified that at around 7:00pm on the material day, he was at home in Nyahera when he received a call from PW4 informing him that the deceased had been hit by a motorcycle. He and his wife, Gloria, who is a clinical officer, rushed to the deceased's home and found him lying outside under a tree, complaining of lower abdominal pain. He told them that the appellant had hit him with his motorcycle. They decided to take him to the hospital, where he was treated but did not recover. The next day, at around 10:00am, he received a call from PW4 informing him that the deceased had passed on whilst in theatre.
8. PW6, testified that on April 1, 2019, at around 5:00pm, he was called by the Base Commander, Chief Inspector Mawili, who informed him of a road traffic accident that had occurred the previous day. He was instructed to record statements from three men who had reported the incident and to investigate it further. After the deceased's burial, additional witnesses came forward to provide statements, including one who had been with the deceased at the time of the incident. He visited the scene, drew a sketch plan, and reported back to Mawili, concluding that the incident was no ordinary road traffic accident but a murder. Mawili then called the Directorate of Criminal Investigation DCIO" to take over the case.



9. PW7, Dr. Cyndi Oyaya, a pathologist from Jaramogi Oginga Odinga Teaching and Referral Hospital, testified that she conducted a postmortem examination on the deceased's body on 10<sup>th</sup> April, 2019. Externally, she observed bruises on the right knee and upper abdomen. Internally, she found that the left lung had collapsed, the spleen was ruptured, and there was clotted blood in the abdomen. Additionally, the deceased had multiple bowel perforations. She concluded that the cause of death was a ruptured spleen due to blunt abdominal trauma.
10. PW8, testified that he took over the investigations after the death of the previous investigating officer, PC Williamson Mwanyota. He stated that initial reports classified the incident as a road traffic accident, but further investigations revealed that the appellant had been knocked down and deliberately run over by the appellant. On May 10, 2019, the appellant was arrested and charged with the offence of murder.
11. In his defence, the appellant denied ever having knocked down or hit the deceased as alleged or at all. Instead, he alleged that indeed he met the deceased and PW I on the road. That the deceased who was so drunk, fell down on the road on seeing him approach on his motorbike. He stopped but did nothing. He thereafter just rode away.
12. The trial court, after considering the evidence before it, found that the prosecution had successfully proved all the elements for the offence of murder beyond reasonable doubt against the appellant. The trial court established that the deceased, had sustained fatal injuries resulting from blunt abdominal trauma, caused by the appellant repeatedly running over him with a motorcycle.
13. In reaching its decision, it relied on the testimonies of key witnesses, including PW1, who was present at the scene and identified the appellant as the motorcycle rider responsible for the incident. Additionally, the court took into account the dying declaration made by the deceased to PW4 and PW5, which was corroborated by the postmortem report which confirmed that the deceased had suffered severe internal injuries, including a ruptured spleen and a collapsed lung, consistent with the manner in which the incident is said to have occurred.
14. The trial court rejected the appellant's defence that the deceased had merely fallen in front of his motorcycle on seeing him approach, finding it inconsistent with the evidence presented. Furthermore, it determined that malice aforethought was evident, given the nature and severity of the injuries inflicted. As a result, the accused was found guilty of murder and convicted accordingly. He was thereafter sentenced to twenty (20) year imprisonment.
15. Dissatisfied with the conviction and sentence, the appellant has appealed to this Court on grounds that the trial court erred both in law and fact in relying on the evidence of a single witness who was drunk and intoxicated as at the time of the incident; failing to appreciate the findings captured in the Post Mortem report on the cause of death; finding and or concluding that all the ingredients of the offence of murder had been proved; failing to consider the defence proffered by the appellant; failing to appreciate that the incident in question that was reported as a road traffic accident could only support the charge of causing death by dangerous driving contrary to Section 46 of the *Traffic Act*; failing to take into account the fact that PW I, recorded his statement long after the incident and after the burial of the deceased which raised doubt as to his independence and recollection of the events at the scene of the accident; failing to call, without reason and excuse, the Base Commander, Chief Inspector Mawili who made the conclusion that the incident was a murder and not a road traffic accident; that the judgment was against the weight of the evidence and finally, that the sentence imposed was manifestly harsh and excessive in the circumstances.
16. When the appeal came up for hearing on 30<sup>th</sup> April, 2025, Mr. Richard Onsongo, learned counsel appeared for the appellant whereas Mr. Patrick Okango, learned Assistant Director of Public



Prosecutions represented the respondent. The appeal was prosecuted solely through written submissions.

17. Mr. Onsongo submitted that the trial court erred in convicting the appellant for murder, arguing that the evidence presented did not establish malice aforethought. He contended that the trial court relied on the testimony of a single witness, PW1, who had consumed lots of alcohol at the time of the incident, thereby raising concerns about reliability and credibility of his evidence. Counsel further argued that the medical evidence provided by PW7 contradicted PW1's account, as it did not indicate multiple injuries consistent with being repeatedly run over by a motorcycle. Additionally, he submitted that the trial court, did not personally observe PW1 testify and therefore could not assess his demeanor. Counsel also pointed out that the prosecution failed to call the Base Commander, Chief Inspector Mawili, who had initially classified the incident as a road traffic accident before later concluding it was murder. He maintained that the trial court should have considered the provisions of Section 179 of the [Criminal Procedure Code](#) and convicted the appellant for the traffic offence of causing death by dangerous driving contrary to Section 46 of the [Traffic Act](#) instead of murder.
18. In support of his arguments, counsel relied on the authorities of *Okeno v Republic* [1972] EA 32, for the proposition that a first appellate court must independently evaluate the evidence and draw its own conclusions rather than merely affirming the trial court's findings, *Joseph Ndungu Kimanyi v Republic* [1979] eKLR, for the proposition that a witness whose testimony raises doubts about their trustworthiness should not be relied upon to find a conviction, *Peter Karobia Ndegwa v Republic* [1985] eKLR, which emphasized the importance of a succeeding judge properly invoking Section 200 of the [Criminal Procedure Code](#) when taking over a case mid-stream, *Robert Mutungi Muumbi v Republic* [2015] eKLR, which clarified that a court may convict an accused person of a lesser cognate offence under Section 179 of the [Criminal Procedure Code](#) if the evidence supports it and lastly, he cited *Peters v Sunday Post* [1958] EA 424, which underscored the principle that an appellate court must make allowances for the fact that the trial court had the advantage of hearing and seeing the witnesses.
19. Finally, with regard to sentence, counsel complained that the that the trial court did not exercise its discretion appropriately resulting in the imposition of a sentence that was manifestly harsh and excessive in the circumstances.
20. Based on these arguments and authorities, counsel urged the court to find merit in the appeal, allow it, quash the conviction for murder, set aside the sentence imposed, and substitute it with a conviction for causing death by dangerous driving under Section 46 of the [Traffic Act](#).
21. The appeal was opposed by the respondent. Mr Okango argued that the conviction was proper and should be upheld. He submitted that the trial court correctly evaluated the evidence and found that the prosecution had proved all elements of murder beyond reasonable doubt. He contended that PW1's testimony was reliable despite claims that he had consumed lots of alcohol, emphasizing that there was no evidence to suggest that he was intoxicated to the extent of impairing his recollection of events. Counsel further argued that the delay in recording PW1's statement was justified, as the family had prioritized burial arrangements before engaging legal proceedings. Additionally, he maintained that the medical evidence presented by PW7 was consistent with the injuries described by PW1, reinforcing the conclusion that the deceased suffered blunt abdominal trauma due to the appellant's actions.
22. Counsel also refuted the appellant's assertion that the incident should have been treated as a road traffic accident rather than murder. He asserted that the appellant's deliberate actions—stopping, reversing, and accelerating toward the deceased before repeatedly running over him, demonstrated malice aforethought, as defined under Section 206 of the [Penal Code](#). Citing *Okeno v Republic* (supra) counsel emphasized that the appellate court must independently assess the evidence while



acknowledging that the trial court had the advantage of observing the witnesses firsthand. He further relied on *Josephat Manoti Omwancha v Republic* [2021] eKLR, which reaffirmed the principle that a first appellate court must conduct a fresh and exhaustive examination of the evidence presented before the trial court.

23. Regarding sentencing, counsel submitted that the trial court exercised its discretion appropriately, imposing a sentence lower than the statutory maximum. He argued that the appellant had not demonstrated any basis for interfering with the sentence, urging the court in the ultimate to dismiss the appeal in its entirety.
24. This is a first appeal and the duty of the first appellate court remains as set out in the Court of Appeal for Eastern Africa in the case of *Pandya v Republic* [1957] EA 336 as follows:-

“On a first appeal from a conviction by a Judge or magistrate sitting without a jury the appellant is entitled to have the appellate court’s own consideration and views of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the witnesses before the Judge or magistrate with such other material as it may have decided to admit. The appellate court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises which witness is to be believed rather than another and that question turns on manner and demeanor, the appellate court must be guided by the impression made on the Judge or magistrate who saw the witness but there may be other circumstances, quite apart from manner and demeanor which may show whether a statement is credible or not which may warrant a court differing from the Judge or magistrate even on a question of fact turning on the credibility of witnesses whom the appellate court has not seen.”

25. After considering the record, the submissions by respective counsel, and the cited authorities, the issues that arise for our determination are whether the trial court: correctly assessed the evidence and arrived at a proper finding on the appellant’s culpability; failed to consider the appellant’s defence and erroneously classified the incident as murder instead of a road traffic-related offence, and whether the sentence imposed was excessive and unjustified in the circumstances.
26. On first issue, the appellant challenges the trial court’s reliance on PW1’s testimony, arguing that his alcohol consumption at the time of the incident rendered his account of the events leading to the incident unreliable as he was momentarily impaired mentally. However, the trial court noted that while PW1 admitted to having consumed alcohol, there was no evidence to suggest that he was intoxicated to the extent that it affected his recollection or ability to comprehend and narrate the events in question. In fact, PW1’s actions before and following the incident, including assisting the deceased home whilst supporting him on his shoulder, pleading with the appellant to give him time to get the deceased off the road, jumping off the road when the appellant threatened to run over him as well, thereafter taking him home and asking for a mattress so that the deceased can be laid in the open under a mango tree, all demonstrate that he was throughout in charge of his faculties. Indeed, even the appellant himself acknowledged that it was the deceased who was intoxicated, not PW1. Additionally, medical evidence presented by PW7 confirmed that the injuries sustained by the deceased were consistent with the events as described by PW1, reinforcing the credibility of his testimony.
27. The delay in recording PW1’s statement does not in any way impugn the credibility and reliability of his evidence. In any case, PW6 explained that the family of the deceased had prioritized burial arrangements before pursuing legal proceedings, which accounted for the delay. The trial court determined that this factor did not necessarily render PW1’s testimony unreliable, as his account remained consistent throughout the trial. In *David Kinyua v Republic* [2014] KECA this Court held



- that minor inconsistencies or delays in witness statements do not necessarily invalidate their credibility, provided that the core narrative remains intact and is corroborated by other evidence. We are satisfied that though the evidence of identification was that of a single witness, it was nonetheless reliable and believable and the trial court was right in acting on it.
28. Based on the evidence presented in the trial court, we are satisfied too just like the trial court that indeed the offence of murder was proved to the required standard of beyond reasonable doubt as set out in the case of *Woolmington v DPP* [1935] AC 462, the leading authority on the subject. The prosecution established the key elements of murder, being the unlawful killing of the deceased and its cause, the appellant's direct involvement in the act, and the presence of malice aforethought as defined under Section 206 of the *Penal Code*.
  29. First, the evidence demonstrated that the deceased died as a result of injuries sustained in the incident involving the appellant as witnessed by PW1. The medical findings presented by PW7 confirmed that the cause of death was consistent with deliberate impact trauma, aligning it with the events as described by PW1 and other prosecution witnesses. Second, the appellant was well known to PW1 therefore ruling out the possibility of mistaken identification. The appellant did not dispute the fact that he was well known to PW1. Indeed, this was a case of recognition as opposed to identification of a stranger in difficult circumstances. Further, the appellant if anything placed himself at the scene of crime, save that he denied the acts he was being accused of. He said he only saw the deceased fall on the road before he rode away. Lastly there was the dying declaration made by the deceased to PW4 and PW5 claiming that he had been knocked by the appellant whilst he was riding his motorcycle which the trial court accepted and acted on it to find the conviction
  30. Secondly, the actions of the deceased of stopping, reversing, and accelerating the motorcycle toward the deceased before repeatedly running over him pointed to intentional harm, rather than an accidental event as claimed in the defence by the appellant. The intention of those acts was clear, to kill the deceased, maim him or at the very least cause grievous harm to the deceased; thus, malice aforethought was established. Everything considered, we are satisfied that the trial court correctly assessed the evidence and arrived at a proper finding regarding the appellant's culpability for murder.
  31. Should the appellant have been convicted for the offence of murder under the *Penal Code* or causing death by dangerous driving under the *Traffic Act*? The appellant argues that the trial court should have considered convicting him for a lesser offence under Section 179 of the *Criminal Procedure Code*, contending that the incident was initially reported as a traffic accident. However, the evidence clearly demonstrated malice aforethought under Section 206 of the *Penal Code*, given that the appellant deliberately stopped, reversed, accelerated toward the deceased, and ran over him repeatedly, manifesting an intent to kill or at least cause grievous harm, one of the elements of murder.
  32. The Supreme Court in *Muruatetu & Another v Republic* [2021] KESC 31 (KLR) clarified that courts must consider both aggravating and mitigating factors when determining culpability for serious offences such as murder. This Court in *Chai v Republic* [2022] KECA 495 (KLR) reaffirmed that an appellate court must independently assess whether the trial court correctly applied the law in classifying an offence. Given the overwhelming evidence pointing to intentional harm, this Court finds no fault with trial court's determination that this was a case of murder as opposed to an ordinary road traffic accident. This was not a one-off event so as to pass for an accident.
  33. The final issue for determination concerns the sentence imposed on the appellant. Sentencing is a judicial function that must be exercised within the confines of the law, taking into account the gravity of the offence, the circumstances under which it was committed, and any mitigating or aggravating factors. The appellant argues that the sentence was harsh and disproportionate, warranting appellate



court's intervention. However, this Court is satisfied that the trial court exercised its discretion appropriately, imposing a sentence within the statutory framework.

34. Section 204 of the *Penal Code* stipulates that any person convicted of murder shall be sentenced to death. However, following the Supreme Court's landmark ruling in *Francis Karioko Muruatetu & Another v Republic* [2021] KESC 31 (KLR), the mandatory nature of the death sentence was declared unconstitutional, granting courts discretion in sentencing in murder cases. The Supreme Court emphasized that sentencing must be individualized, taking into account factors such as the gravity of the offence, the manner in which it was committed, and the impact on the victim's family. In the present case, the appellant's actions were deliberate and calculated, demonstrating malice aforethought and warranting a significant custodial sentence.
35. Further, this Court in *Chai v Republic* [supra] reaffirmed that an appellate court may only interfere with a sentence if it is manifestly excessive or based on wrong principles. The appellant has not demonstrated that the trial court misapplied sentencing principles or imposed a sentence disproportionate to the offence committed. In this case, the trial court properly considered the appellant's deliberate actions and the severity of the offence, leading to a sentence that was well within the statutory framework.
36. Given the appellant's conduct and the circumstances of the offence, this Court does not find sufficient reason to interfere with the sentence imposed by the trial court. Consequently, the conviction and sentence are upheld, with the result that appeal is dismissed in its entirety.

**DATED AND DELIVERED AT KISUMU THIS 13<sup>TH</sup> DAY OF JUNE, 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.**

