



REPUBLIC OF KENYA



**KENYA LAW**  
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**Nyamweya v Republic (Criminal Appeal 375 of 2019)  
[2025] KECA 1406 (KLR) (31 July 2025) (Judgment)**

Neutral citation: [2025] KECA 1406 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT KISUMU  
CRIMINAL APPEAL 375 OF 2019  
MSA MAKHANDIA, HA OMONDI & P NYAMWEYA, JJA  
JULY 31, 2025**

**BETWEEN**

**MATUNDURA NYAMWEYA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an Appeal from the Judgment of the High Court of Kenya at  
Kisii, (Ougo, J.) dated 11th November 2009 in HCCRC No.11 OF 2016)*

**JUDGMENT**

1. The appellant, Matundura Nyamweya, was charged with the offence of murder contrary to Section 203 as read with Section 204 of the *Penal Code*. The allegation was that on the night of 13<sup>th</sup> April, 2016, in Igare within Sameta Sub-County of Kisii County, he murdered Kashmir Onsari Mariera (“the deceased”).
2. He pleaded not guilty to the information and the prosecution presented evidence from a total of eight witnesses to substantiate their assertion that the appellant was responsible for the unlawful death of the deceased.
3. PW1, Kennedy Dagr Atina, stated that he knew both the deceased and the appellant. Indeed, the appellant was his employee at his hotel. On the evening of 13<sup>th</sup> April, 2016, at about 10:00 pm, he heard footsteps outside his premises. Soon thereafter, the appellant began calling out PW2, PW1’s wife, asking her for 200/= so that he could take his wife to the hospital. Before PW1 could open the gate so as to give him the money, the appellant asked him to pass the money through the spaces in the gate. PW1, nonetheless opened the gate and felt a sudden force pushing him backwards. At this point, he saw the appellant holding the deceased by the collar. He pulled the appellant away from the deceased and as soon as the appellant let go, the deceased fell to the ground. PW1 held the deceased’s



- head up and immediately noted that he had passed on. He recognised the deceased as a neighbour's security guard. He also noted that the deceased had an injury on his chest that was actively bleeding.
4. Upon realizing that the deceased was no longer alive, PW1 screamed and alerted his wife and children of the incident and quickly left to report the incident at Igare Administration Police Camp. He later returned to the scene with two police officers. He further testified that the appellant was wearing a white T-shirt that had visible bloodstains; he also saw a knife at the scene as the electric lights in the area provided adequate illumination.
  5. PW2, Verona Moraa Kennedy, PW1's wife, testified that between 9:00 pm and 10:00 pm on the material day, she heard the appellant calling her and requesting financial assistance, claiming that his wife was sick. However, since she had already paid him his wages earlier in the day, she found no reason to open the door and respond to his pleas. Subsequently, she heard the gate open, prompting her to go outside. There, she saw her husband, PW1 pulling the appellant away from the deceased, who was neither speaking nor moving. When the appellant learnt that the deceased was dead, he attempted to flee, but they prevented him from escaping.
  6. PW3, Alfred Cheriot Chewen, an Administration Police officer recounted that whilst on duty on 13<sup>th</sup> April, 2016, he received a report from PW1 at approximately 9:00 pm that a person had been murdered. That he together with other police officers proceeded to the scene and upon arriving, found the deceased lying on the ground, bleeding from the left side of his ribs. Meanwhile, the appellant was still at the scene of crime having been restrained from fleeing by being tied up with a rope. He also observed blood on the appellant's white T-shirt and a bloodstained kitchen knife at the scene.
  7. PW4 Dr. Dennis Oeri Ongere, a Senior Medical Officer at Moi Teaching and Referral Hospital, performed the post-mortem on the deceased on 15<sup>th</sup> April, 2016. His examination revealed a stab wound on the right lower side of the chest between the sixth and seventh ribs, measuring approximately 3 cm by 1 cm. The wound had been inflicted by a sharp object. He concluded that the cause of death was cardiopulmonary failure due to a sharp wound in the heart inflicted with a sharp object.
  8. PW5, Simon Waithaka, a police officer, testified that at around 11:30 pm on 13<sup>th</sup> April, 2016, he received information from the officer commanding police station ("OCS"), Itumbe Police Station, Chief Inspector of Police Wangombe regarding a watchman who had been fatally stabbed at Igare market. He proceeded to the scene accompanied by the OCS and other officers from the Station. When they arrived, they found the deceased's body lying face-up in a corridor between the hotel and a residential house. Blood was visible around the chest area, and a bloodstained knife was lying near the body. He learned that the deceased had been stabbed by the appellant, who had been confined at the scene, whom he later escorted to the police station. Sometimes later whilst at the police station he noticed that the appellant was no longer wearing a T-shirt. He inquired about the missing T-shirt and discovered that the appellant had attempted to dispose it off by throwing it into a latrine after digging a hole in the wall of the adjacent bathroom. The officers were however able retrieve the T-shirt from the latrine.
  9. PW6, Richard Kimutai Langat, a government analyst stated that he received several items for forensic analysis. The results conformed that the DNA profiles obtained from the knife and scarf matched those of the deceased, while the DNA profile from the T-shirt matched that of the accused.
  10. PW7 Kennedy Bahati Fortune, recalled that around 9:00 pm on the night in question, he overheard voices and the appellant shouting requesting for 200/= to take his wife to the hospital. He observed that the appellant was intoxicated and yelling. When he went outside, he saw PW1 pulling the appellant away from the deceased. PW1 instructed him and others to restrain the appellant from fleeing the scene and they tied him up with a rope.



11. PW8, George Musila, the investigating officer, testified that on the night of the incident, he proceeded to the crime scene accompanied by P.C. Kitur. Upon arrival, he observed blood stains at the location. At the AP camp, they later recovered a white T-shirt belonging to the appellant. He further stated that they went to Christamariane Hospital, where they examined the body of the deceased. They noted that the deceased had an open wound on the right side of his chest, and his clothes were stained with blood. He collected a cream-colored scarf from the body of the deceased, which had blood stains, and retained it as an exhibit. He recorded statements from witnesses and sent various exhibits to the government analyst for testing. Based on the gathered evidence, PW8 concluded that there was sufficient proof to charge the appellant with murder and he did so.
12. Placed on his defence, the appellant in his sworn testimony, stated that on the day of the incident, he had been working at the hotel and left at 7:00 pm. His employer, PW2, paid him Kshs.100/= and requested that he returns later to complete some unfinished work. He returned to the hotel at 9:00 pm. However, upon seeing him, the employer started screaming and accusing him of killing someone. He was soon tied up using a rope, taken behind the hotel, and assaulted. He claimed that he did not know what happened thereafter as he only regained consciousness at Itumbe Police Station the following day.
13. The trial court after reviewing the evidence found that the prosecution had proved its case against the appellant beyond reasonable doubt, convicted him and sentenced him to twenty years in jail.
14. Aggrieved by the judgment and sentence, the appellant proffered this appeal through the amended memorandum of appeal dated 15<sup>th</sup> November, 2024. He contends that the prosecution's evidence was insufficient to support the charge of murder and that the sentence imposed was excessively harsh, unconstitutional, and unlawful given the circumstances in which the offence was committed. Based on these grounds, the appellant seeks to have the appeal allowed.
15. When the appeal came up for hearing on 5<sup>th</sup> May, 2025, Ms. Awuor, learned counsel appeared for the appellant, whilst Mr. Kimanthi, learned Senior Assistant Director of Public Prosecutions was present for the respondent. Parties elected to rely solely on their written submissions.
16. Counsel for the appellant submitted that the trial court erred in convicting the appellant based on circumstantial evidence that did not meet the threshold. She contended that the prosecution failed to establish the appellant's culpability for the unlawful act that resulted in the deceased's death. In support of this argument, counsel cited the case of Republic v Andrew Omwenga [2009] eKLR, for the proposition that murder requires proof that the appellant caused the death with malice aforethought through an unlawful act or omission and that was the case here. Counsel further contended that the trial court disregarded the appellant's alibi defence and failed to consider the possibility that he was being framed. To reinforce this argument, she relied on the case of Republic v Chivatsi & Another [1989] eKLR, which reiterated that the burden of proof remains with the prosecution and does not shift to the accused save in a few circumstances which was not again the case here.
17. Additionally, counsel submitted that the prosecution failed to establish malice aforethought, a critical component for the offence of murder. He cited the case of Rex v Tubere s/o Ochen [1945] 12 EACA 63, which laid down guidelines for determining what amounts to malice aforethought. Counsel argued that the trial court did not properly scrutinize the elements and wrongfully concluded that malice aforethought had been established.
18. Further, counsel challenged the sentence imposed, arguing that it was excessive and unjust. She relied on the case of Saveka v Republic [1989] KLR 306, in which it was held that an appellate court has jurisdiction to interfere with the sentence imposed by the trial court if it is manifestly excessive or based



on wrong principles. Counsel contended that the sentence imposed fell into this category and therefore warranted review. In light of these arguments, counsel urged us to allow the appeal in its entirety.

19. The appeal was opposed by the respondent. Mr Kimanthi submitted that the conviction and sentence of the appellant were properly founded on the evidence presented during trial. That the respondent successfully proved all the elements of murder as required under Section 203 of the *Penal Code*, including the fact and cause of death, the identity of the perpetrator, and the presence of malice aforethought in executing the death. Counsel further contended that the appellant was placed at the scene of the crime by eyewitness, particularly PW1 and PW2, who saw him holding the deceased moments before he collapsed and died.
20. Although no witness saw the actual stabbing, counsel submitted that the circumstantial evidence irresistibly pointed to the appellant as the perpetrator of the offence. On malice aforethought, counsel relied on the case of *Nzuki v Republic* [1993] KLR 171, in which it was held that malice aforethought can be inferred from the nature of the weapon used, the manner of attack, and the conduct of the accused before and after the incident. Additionally, counsel cited the case of *Joseph Kimani Njau v Republic* [2014] eKLR, which reaffirmed that an intention to cause death or grievous harm can be deduced from the circumstances surrounding the act. That in the circumstances of this case, the act of the appellant stabbing the deceased in the chest with a sharp could only have meant that he intended to kill the deceased or at least cause grievous harm, hence malice aforethought.
21. Counsel also argued that the sentence of 20 years imprisonment was lenient given the gravity of the offence, asserting that the appellant had no basis to complain. In conclusion, the respondent urged the court to dismiss the appeal in its entirety, maintaining that the conviction and sentence were properly arrived at based on the evidence and applicable legal principles.
22. As the first appellate court, this Court is required to conduct a fresh analysis of the evidence tendered during the trial before arriving at its own independent conclusions, bearing in mind, however, that the trial court enjoyed the advantage of hearing and observing the witnesses firsthand and make due allowance for that. In the oft quoted case of *Okeno v Republic* [1972] EA 32 the principle was put thus:

“ An appellant on a first appeal is entitled to have the appellate court’s own consideration and views of the evidence as a whole and its own decision. The first appellate court has a duty to reconsider the evidence, evaluate it itself, and draw its own conclusions, though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect.”
23. Upon reviewing the grounds of appeal and submissions by both parties, three key issues arise for our determination in this appeal namely, whether: the prosecution proved the charge of murder against the appellant beyond reasonable doubt, the trial court properly evaluated the circumstantial evidence, and whether the sentence imposed was excessive and unlawful.
24. Regarding the first issue, Section 203 of the *Penal Code* defines murder as the unlawful killing of another person with malice aforethought. To return a conviction therefore the prosecution is required to prove the fact and cause of death, the appellant’s culpability, and the presence of malice aforethought in causing the death. The post-mortem examination conducted by PW4, Dr. Dennis Oeri Ongere, confirmed that the deceased suffered a fatal stab wound to the chest, leading to cardiopulmonary failure. Indeed, it is not even disputed that the deceased passed on at the scene. PW1 and PW2 witnessed as the deceased collapsed and died under their watch. Thus death of the deceased and the cause thereof is not in doubt. The trial court came to similar determination and we have no basis to think otherwise.



25. Eyewitnesses PW1 and PW2 placed the appellant at the scene of crime as they saw him struggling with the deceased just moments before his collapse and death. The appellant was well known to them as he was their employee. The scene was well illuminated thereby making his recognition easy. This being the case the possibility of mistaken identification and or recognition are extremely remote. Indeed, even the appellant placed himself at the scene.
26. This Court in *Nzuki v Republic* (supra) held that malice aforethought can be inferred from the nature of the nature of the weapon used, the manner of attack, and the accused's conduct before and after the incident. In this case, the use of a sharp knife by the appellant to stab the deceased in the chest where the vital body organs are ensconced demonstrated an intention to cause grievous harm or death of the deceased. No doubt therefore that malice aforethought was proved as correctly held by the trial court.
27. On the second issue, the appellant contended that the trial court relied solely on circumstantial evidence, which was insufficient to find a conviction. The principle governing circumstantial evidence was articulated in the case of *Republic v Kipkering Arap Koske & Another* [1949] 16 EACA 135, where the court held:
- "In order to justify a conviction based wholly on circumstantial evidence, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt. There must be no other co-existing circumstances which would weaken or destroy the inference."
28. This principle underscores the requirement that circumstantial evidence must form a complete chain leading to the guilt of the accused, without any other reasonable or alternative explanation. This principle was reaffirmed in the case of *Katana v Republic* [2020] eKLR, where it was emphasized that circumstantial evidence can serve as a basis for conviction if it excludes all other reasonable possibilities. The court further noted that circumstantial evidence must be cogent, compelling, and lead to only one logical conclusion—that the accused committed the crime. In the present case, the appellant's actions before and after the incident strengthen the inference of guilt. He placed himself at the scene, was found holding the deceased by the collar, there was a sharp knife nearby, had a blood-stained T-shirt, the Government analyst evidence and the appellant's attempt to dispose of the blood-stained T-shirt whilst in police custody all point to the culpability of the appellant to the exclusion of anybody else.
29. As was stated in the case of *Teper v R* (1952) AC 480, and reiterated by this Court in *Owuor v Republic (Criminal Appeal 120 of 2017)* [2023] KECA 364 (KLR), an accused person's attempt to conceal evidence can be considered an incriminating factor demonstrating a consciousness of guilt. The court observed:
- "The appellant's actions after the incident, including his attempt to dispose of the weapon and his blood-stained clothing, were indicative of a guilty mind. Such conduct, when viewed alongside the other circumstantial evidence, strengthens the inference that he was responsible for the unlawful act leading to the deceased's death"
30. The trial court, in our view correctly evaluated these facts and found that the circumstantial evidence met the required legal standard for conviction. We are therefore satisfied that the appellant's conviction was properly founded on circumstantial evidence that was strong and consistent. The trial court's reliance on this evidence was to our mind justified.
31. The final issue concerns whether the sentence imposed was excessive and unlawful. The appellant was sentenced to 20 years imprisonment. This Court in the case of *Joseph Kimani Njau v Republic* [2014] eKLR held that an appellate court may interfere with a sentence only if it is manifestly excessive or



based on wrong principles. In this case, the trial court took into account the appellant's intoxication, prior conviction for being drunk and disorderly, and lack of remorse. Given these considerations, the sentence imposed was proportionate to the offence, and there is no basis for our interference as it is neither harsh nor excessive.

32. Upon evaluating the appeal, the evidence, and applicable legal principles, we are satisfied that the conviction was properly founded on credible evidence and the sentence was lawful and appropriate. Consequently, the appeal is dismissed in its entirety.

**DATED AND DELIVERED AT KISUMU THIS 31<sup>ST</sup> DAY OF JULY, 2025.**

**ASIKE-MAKHANDIA**

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**JUDGE OF APPEAL**

**H.A. OMONDI**

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**JUDGE OF APPEAL**

**P. NYAMWEYA**

.....

**JUDGE OF APPEAL**

I certify that this is a true copy of the original

**DEPUTY REGISTRAR**

