



REPUBLIC OF KENYA



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**Odhiambo alias Ben & another v Republic (Criminal Appeal
E001 of 2022) [2025] KECA 1407 (KLR) (31 July 2025) (Judgment)**

Neutral citation: [2025] KECA 1407 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CRIMINAL APPEAL E001 OF 2022
MSA MAKHANDIA, HA OMONDI & P NYAMWEYA, JJA
JULY 31, 2025**

BETWEEN

BENJAMIN ELI ODHIAMBO ALIAS BEN 1ST APPELLANT

VINCENT OWUOR OPONDO ALIAS RASTA/DADDY 2ND APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from the Judgment of the High Court at Siaya (Aburili, J) dated 17th November, 2021 and Sentencing Ruling dated 15th of December 2021 in HCCRC No. 27 of 2018)

JUDGMENT

1. The appellants, Benjamin Eli Odhiambo alias Ben and Vincent Owuor Opondo alias Rasta and or Daddy, were jointly charged with the offence of murder contrary to Section 203 as read with Section 204 of the *Penal Code*. The prosecution alleged in the information that on the night of 30th November, 2018, at Sigomere Trading Centre along Sigomere-Ugunja road in Ugunja Sub-County of Siaya County, they, together with others not before the court, caused the unlawful death of one Ronald Odhiambo Otieno (“the deceased”).
2. The appellants entered a plea of not guilty to the information and their trial thereafter ensued. The prosecution’s case was anchored on the testimonies of multiple witnesses who reconstructed the sequence of events leading up to the deceased’s death. This is how it flowed.

On the evening of 29th November, 2018, the deceased and his younger brother, Rodgers Ochieng Otieno (PW3), left their home on the deceased’s a motorcycle intending to pick up two ladies, Mercy (PW9) and Pauline (PW8) so that they could attend a disco at Bungasi area within Ugunja Sub-County. With the two ladies in tow, they proceeded to the venue and upon arrival, the deceased could not be admitted into the disco hall for want of entry fee. Instead PW3, paid for himself, PW8, PW9 and were allowed in while the deceased remained outside.



3. Meanwhile a motor vehicle, a white Toyota Hilux double cabin, registration number KCG 209M pulled up with the two appellants and parked outside the venue. They entered the disco hall and in no time, sweet talked PW8 and PW9 to go along with them. Soon thereafter the appellants and the duo boarded their vehicle, leaving the deceased and PW3 behind. Not amused by the turn of events, the deceased and PW3 took to their motorcycle and pursued the appellants' vehicle towards Ugunja.
4. As they approached the appellants' vehicle near Sigomere area while riding alongside it, PW3 overhead a remark from the occupants in the motor vehicle, exclaim, "Here they are, passing." Moments later, the motor vehicle swerved into their way and knocked the motorcycle, causing both the deceased and PW3 to fall, PW3 landing in a ditch on the side of the road while the deceased lay in the middle of the road. PW3, despite sustaining injuries, recalled hearing the vehicle driven by the appellants stop. He further heard someone therefrom say, "This one is already dead, but Odhis is not yet dead." The 2nd appellant then exited the vehicle and dragged the deceased closer to the vehicle's rear tyre. He then signaled the 1st appellant, to engage the reverse gear and run over the deceased multiple times.
5. PW8, and PW9, who were in the vehicle, corroborated this account.
PW8, in particular stated that when the deceased and PW3 attempted to overtake them, she heard the 1st appellant utter, "Shit," and Jacinta, another occupant, remarked, "Kill." She further described that after the impact, the 2nd appellant exited the vehicle and kicked the deceased, seemingly to confirm whether he was still alive. Subsequently, the 2nd appellant stepped out, pulled the deceased's body towards the vehicle, and signaled the 1st appellant to run over him. The 1st appellant did so by reversing and crushing him multiple times. The appellants later drove away, leaving the deceased lying motionless in a pool of blood in the middle of the road.
6. At dawn, members of the public discovered the deceased's body at the scene and alerted the authorities. PW10, Javan Tom Ndege, a police officer stationed at Sigomere Police Station, arrived at the scene and noted signs suggesting that the deceased's body had been deliberately run over multiple times. The crime scene investigator, PW11, CPL Derricks Kiprono, later inspected the vehicle and confirmed the presence of bloodstains and suspected brain matter underneath the body of the vehicle. A forensic pathologist, PW12, Dr. Thadeus Jude Massawa conducted a post-mortem examination on the deceased's body and confirmed multiple crush injuries to the head, with tyre marks present on the thorax and abdominal region. He attributed the cause of death to severe blunt force trauma. The appellants were subsequently traced, arrested and charged with the offence.
7. Put on their defence, the appellants elected to give unsworn statements of defence. The 1st appellant claimed that the incident was merely an accident and that he had panicked, leading him to flee the scene without reporting. The 2nd appellant, similarly denied involvement in the deliberate killing of the deceased and maintained that it was purely an accident. They contended that the circumstances of the accident were exaggerated by the witnesses and insisted that the motorcycle had veered recklessly in front of the vehicle, leading to the unfortunate incident.
8. After considering the evidence as well as the respective defences, the trial court concluded that the appellants had unlawfully caused the deceased's death with malice aforethought. The evidence demonstrated a coordinated effort to eliminate the deceased, and the injuries sustained confirmed the intention behind the act. The appellants were accordingly found guilty of murder, convicted and sentenced to life imprisonment.
9. Dissatisfied with the conviction and sentence aforesaid, the appellants have now approached this Court by way of appeal through Mr. Menezes B., learned counsel. Though counsel had raised several grounds of appeal, at the plenary hearing of the appeal, however, he condensed them into four broad thematic



areas, being insufficient and inconsistent evidence; want of malice aforethought; lack of consideration of the appellants' defences and finally, the sentence imposed.

10. On the first issue, counsel submitted that the conviction was based on insufficient and inconsistent evidence, highlighting contradictions in the testimonies of PW3, PW8, and PW9 as to what transpired at the scene of crime and inside the motor vehicle. He argued that the alleged actions of the appellants were inconsistently narrated by witnesses, raising doubts about the reliability of their accounts. Moreover, he contended that PW8 and PW9 had consumed lots of alcohol and were therefore unreliable witnesses whose testimony should not have formed the basis of the conviction.
11. Secondly, counsel submitted that the trial court misapplied the law on malice aforethought, leading to a wrongful conviction. He argued that the trial court failed to correctly interpret Section 206 of the *Penal Code*, which requires clear proof of intent to cause death or grievous harm. Counsel maintained that the incident was an unfortunate accident rather than an intentional act of killing. Counsel referred to the case of *Republic v Tubere S/O Ochen* [1945] 12 EACA 63, to posit that malice aforethought must be established through the nature of injuries inflicted and the accused's conduct. He urged this Court to find that there was no evidence of premeditation, coordinated action, or common intent to kill the deceased.
12. Thirdly, counsel argued that the trial court failed to consider the appellants' defence adequately, asserting that the appellants remained inside the vehicle throughout the incident and had no role in the alleged murder. He submitted that the trial court violated the appellant's constitutional right to a fair trial under Article 50, by failing to weigh their defences against the prosecution's evidence impartially. In support of the proposition, counsel relied on the case of *Peter Ngure Mwangi v Republic* [2014] eKLR, which underscored the duty of courts to fairly evaluate an accused person's defence before reaching a guilty verdict.
13. Finally, counsel submitted that the life sentence imposed on the appellants was excessive, urging that the trial court failed to consider mitigating factors, including the appellants' status as first-time offenders, their potential for rehabilitation, and their family responsibilities. He relied on the Supreme Court's landmark decision in *Francis Karioko Muruatetu & Another V Republic* [2017] eKLR, to emphasize that sentencing should be individualized and proportionate to the specific circumstances of the offender rather than uniformly applied. He further cited the case of *Evans Nyamari Ayako v Republic* [2023] KECA 1563 (KLR), which examined international human rights concerns related to indefinite life imprisonment, particularly cases from jurisdictions such as Norway, Germany, and South Africa, where life sentences are periodically reviewed.
14. In light of these arguments, Mr. Menezes urged us to allow the appeal, quash the conviction, and set aside the sentence imposed by the trial court. In the alternative, he submitted that in the event that we dismissed the appeal on conviction, we should at least tamper with the sentence by substituting the life sentence with a fixed-term sentence, ensuring that the time spent by the appellants in remand custody while undergoing trial is duly taken into account.
15. The appeal was opposed by the respondent. Mr. Okango, learned Assistant Director of Public Prosecutions submitted that the trial court correctly convicted the appellants based on credible and corroborated evidence, and that the sentence imposed was appropriate given the gruesome and calculated nature of the murder. He argued that the 13 prosecution witnesses consistently demonstrated that the appellants had acted with malice aforethought, a critical element of murder under Section 206 of the *Penal Code*.
16. Counsel submitted that the trial court correctly invoked the case of *Republic v Tubere S/O Ochen* (supra), whilst considering whether or not malice aforethought had been proved by the prosecution.



The prosecution's evidence, he argued, clearly demonstrated that the appellants had deliberately run over the deceased multiple times, which eliminated any possibility of accidental death.

17. Regarding the appellant's challenge on sentence, counsel submitted that the trial court exercised its discretion appropriately in sentencing the appellants to life imprisonment. Citing the case of Francis Karioko Muruatetu (supra), counsel underscored the importance of individualized sentencing that reflects the gravity of the offence. He also referred to the case of Evans Nyamari Ayako v Republic (supra), for the proposition that severe sentences are warranted for heinous crimes and this was one such case.
18. In conclusion, counsel urged the Court to dismiss the appeal, uphold the conviction and affirm the sentence imposed by the trial court.
19. This is a first appeal and this Court has the duty to re-evaluate, re-analyze, and re-consider the evidence presented before the trial court and arrive at its own independent conclusions. Apart from the case of Okeno v Republic (supra), this duty was further reiterated in the case of Gabriel Kamau Njoroge v Republic [1982] eKLR, thus:

“As this court has constantly emphasized, it is the duty of a first appellate court to reconsider the evidence, evaluate it itself, and draw its own conclusions, while making allowance for the fact that the trial court had the advantage of hearing and seeing the witnesses.”
20. Equally, this Court in Ngui v Republic [1984] KLR 729 reiterated that:

“A first appellate court is not bound to follow the trial court's findings of fact if it appears either that the trial court failed to take into account particular circumstances or probabilities materially affecting the case.”
21. Upon careful consideration of the grounds of appeal, the key issues that emerge for our determination are whether the convictions were well founded and whether the sentence imposed was excessive in the circumstances,
22. On the first issue, the appellants contend that the conviction was based on contradictory and unreliable evidence, particularly the testimonies of PW3, PW8, and PW9, whose accounts varied regarding the alleged actions of the appellants at the scene of crime and inside the vehicle. From the record, while there were minor contradictions in the testimonies of PW3, PW8, and PW9, in that regard, the trial court found that the inconsistencies did not materially puncture the prosecution's case. This Court in the case of Kamau v Republic (Criminal Appeal E048 of 2021) [2022] KEHC 11884 (KLR) held that a conviction cannot stand where the prosecution's case is riddled with inconsistencies that cast doubt on the reliability of the evidence; and further that not all contradictions warrant an acquittal, and only those that go to the root of the prosecution case such as contradictions on whether the accused was present or whether the act was committed can undermine the reliability of the evidence.
23. However, in the present case, the trial court carefully analyzed the testimonies and found that the core elements of the prosecution's case remained consistent, particularly the evidence of PW8 and PW9, who witnessed firsthand the appellants deliberately run over the deceased multiple times. The forensic evidence further corroborated this account, confirming that the injuries sustained were consistent with intentional crushing rather than an accident. Indeed, tyre marks were evident on the body of the deceased. Accordingly, we are satisfied that whereas some contradictions were noted, they were not material, and did not affect the credibility of the prosecution's case or undermine the conviction, as the material facts remained consistent and were corroborated by forensic evidence. The conviction was therefore properly founded on credible and sufficient evidence.



24. The appellants also argued that the trial court misapplied the law on malice aforethought, asserting that the incident was an accident rather than a deliberate act of murder. Section 206 of the [Penal Code](#) defines malice aforethought and gives various scenarios. One such scenario is where the accused's action is calculated to cause death or at least cause grievous harm to the deceased. In the circumstances of this case, the answer appears pretty obvious. The act of the appellants hitting the deceased's motor cycle, with PW3 aboard, knocking them off balance, thereafter dragging the deceased to the rear tyre of their vehicle and thereafter running over him repeatedly, can only have meant one consequence; death of the deceased or at the very least cause grievous harm to him. It matters not who ordered that the deceased be run over. Section 21 of the [Penal Code](#) takes care of that.
25. In *Naman v Republic* (Criminal Appeal 176 of 2019) [2025] KECA 476 (KLR), this Court held that
- “Malice aforethought may be inferred from the nature of injuries inflicted, the weapon used, and the conduct of the accused before and after the act.
- Where the attack is brutal, sustained, and directed at vital organs, the presumption of intent to cause death or grievous harm is strengthened.”
- See also *Republic v Tubere S/O Ochen* (supra),
26. Obviously the actions of the appellants were laced with malice aforethought therefor. In our view the appellants were properly charged with murder rather than the traffic offence of causing death by dangerous driving, because their actions demonstrated malice aforethought, which is a key element of murder under Section 203 of the [Penal Code](#). We say so for the reason that unlike causing death by dangerous driving under Section 46 of the [Traffic Act](#), which applies to negligent or reckless driving, murder requires proof of intent to kill or cause grievous harm and this was proved.
27. We agree with the persuasive decision of the High Court in the case of [Muchai v Republic \(Criminal Appeal 26 of 2020\)](#) [2023] KEHC 2863 (KLR), which distinguished between reckless driving resulting in death and intentional acts leading to death, holding that where an accused deliberately uses a vehicle as a weapon to kill, the charge must be murder rather than a traffic offence. Similarly, in *Kimathi v Republic* (Criminal Appeal E069 of 2022) [2023] KEHC 25179 (KLR), this Court held that causing death by dangerous driving applies only where the death results from negligent driving, not where the accused intentionally runs over a victim multiple-times.
28. In the present case, the appellants knocked down the deceased, dragged him towards the vehicle, and repeatedly ran over him, demonstrating a clear intention to kill rather than mere recklessness. Therefore, the charge of murder was appropriate, as the appellants' actions went beyond dangerous driving and constituted a deliberate act of killing.
29. The appellants also contended that the life sentence imposed on them was excessive, as it failed to consider mitigating factors such as their status as first-time offenders, their potential for rehabilitation, and their family responsibilities. The Supreme Court in *Muruatetu* case (supra), held that sentencing should be individualized and proportionate to the circumstances of the offender, rather than being applied rigidly. Similarly, in *Chai v Republic, (Criminal Appeal 30 of 2020)* [2022] KECA 495 (KLR), this Court differently constituted set aside a life sentence and substituted it with a fixed-term sentence, considering the appellants' personal circumstances.
30. The appellants sought to rely on this Court's decision in *Evans Nyamari Ayako V Republic* [2023] KECA 1563 (KLR), to support the argument that the sentence should be reduced to thirty years as held in that case. The Supreme Court has recently clarified its stance on substituting life sentences with fixed-term sentences. In a judgment in the case of *Evans Nyamari Ayako*, (supra), the Court overturned



the Court of Appeal's decision that had substituted a life sentence with a 30-year term. The Supreme Court held that life imprisonment should not automatically be converted into a fixed-term sentence, emphasizing that such determinations must be made within the framework of existing laws and judicial discretion.

31. Additionally, the Court reaffirmed that Parliament has the responsibility to define the parameters of life imprisonment, as previously recommended in the Muruatetu case. The judgment suggests that courts lack the jurisdiction to arbitrarily set a fixed term for life sentences, unless there is legislative guidance or constitutional interpretation allowing such adjustments.
32. Therefore, the precedent set in *Chai v Republic* (supra) regarding the substitution of life sentences with a fixed term may no longer be applicable following that Supreme Court's decision. The Court has effectively reinstated the position that life imprisonment remains indeterminate unless Parliament legislates otherwise.
33. Having found as much, we hasten to add that in the circumstances of this case, as the offence was heinous and premeditated, we are satisfied that the trial court properly considered the gravity of the crime and the need for deterrence. Accordingly, the sentence imposed was appropriate in the circumstances.
34. In the end, we find no merit in the appeal and dismiss it in its entirety.

DATED AND DELIVERED AT KISUMU THIS 31ST 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

