Okinda v Republic (Criminal Appeal E010 of 2020)
[2025] KECA 1405 (KLR) (31 July 2025) (Judgment)

Neutral citation: [2025] KECA 1405 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL E010 OF 2020

MSA MAKHANDIA, HA OMONDI & LK KIMARU, JJA

JULY 31, 2025

BETWEEN

JOASH FRANCIS ASIENGA OKINDA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Kisumu (D.S. Majanja, J.) dated 11th May, 2017 in HCCRA No. 18 of 2011)

JUDGMENT

1. Joash Francis Asienga Okinda, the appellant herein, 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 13th March 2011 at Marenyo Sub-Location of Siaya County, the appellant murdered John Oketch Odhiambo [deceased]. He pleaded not guilty to the charge and was subjected to a full hearing, with the prosecution calling six witnesses to prove their case. Upon conviction of the offence of murder, he was sentenced to suffer death. He is dissatisfied with both the conviction sentence, which is the basis of this first appeal.

2. Briefly, the facts of the prosecution case are that on the material date at about 5.00 pm, James Ombedo Odhiambo [James] was at the home of Joyce Asiko Odhiambo [Joyce] drinking chang'aa. He was with Dick Opany [Dick] and the appellant. James recalled that when the deceased arrived, he asked the appellant for bhang'. The appellant was annoyed by the request and when he wanted to beat the deceased with a bottle, James intervened. Another fight erupted between the appellant and the deceased and, once again, James separated them and both of them left the house. However, the fighting did not stop and once again James separated them.

3. Thereafter, the deceased started walking away while the appellant returned to Joyce's house. Immediately thereafter, James heard the appellant say that the deceased had thrown some soil at him.

The appellant went back to Joyce's house and came back with a piece of firewood and assaulted the deceased on his back. The deceased started running away as the appellant chased him. On his way home, James met the appellant going back to Joyce's place.

4. In her evidence, Joyce told the court that when the deceased arrived, he started arguing with the appellant over bhang. She testified that it was the deceased who started the arguments while the others were telling them to stop. They all left the house but the appellant and the deceased continued fighting.

5. Joyce testified further that after the group left her house, she did not hear any commotion but the appellant returned to her house after about 5 minutes, and took a piece of wood which he said he was going to use as a walking stick. After about 10 minutes, the appellant came back and returned the piece of wood on the pile of firewood.

6. After the appellant had passed by, Dick informed James that he had seen someone in the nearby shamba. When they both went to the shamba, they found the deceased in great pain and immediately went to the deceased's home to report the incident.

7. Martha Adhiambo Ochieng [Martha], the deceased's wife testified that upon being called by Dick and told to go to the shamba where the deceased had been injured, she noticed that the deceased had a deep cut on his head and eye brow. The deceased also appeared to have whip marks on his back. She called a motorcycle rider who came and took the deceased to Yala Sub-District Hospital where he died while undergoing treatment.

8. Francis Odhiambo Oketch [Francis], the deceased's father told the court that after learning about the incident, he proceeded to the hospital where the deceased was undergoing treatment. He found the deceased bleeding profusely from the head. After the deceased succumbed to the injuries, he went to report the matter to the police station.

9. Chief Inspector Michael [Michael] Were from Yala Police Station investigated the incident and, in his evidence, told the court that upon a report being made at the station, together with other officers, they proceeded to the scene of the incident, where the deceased's father directed them. Michael testified that at the scene there was a lot of blood in the shamba and he recovered a piece of wood, about 6 inches long, which he produced in evidence. They went to Joyce's house where they found three pieces of wood in heap which had blood stains on them. He arrested Joyce. On the next day, 14th March 2011, the accused was arrested by members of the public at Ebuyangu market and taken to Ebuyangu Patrol Base. A postmortem conducted by Dr. Bob Otieno Amimo [PW1] at Yala sub-district hospital revealed a deep stab wound on the left forehead, a deep cut in the occipital region with haemorrhage, a lower fracture on the same side of the head, a haematoma, leading to the conclusion that the cause of death was haemmorrhage due to the skull fracture. Thereafter, he was taken Yala Police Station and charged.

10. Placed on his defence, the appellant elected to give an unsworn statement and stated that on 13th March 2011, he went to the home of Joyce where he found many people drinking chang'aa. As they were drinking, a young man, who was drunk, came in and started demanding a cigarette and bhang from him. The appellant responded in the negative but the man came towards him intending to assault him. As the appellant stood up, he was told to get out of the house as he was from Western Province and not Nyanza where Joyce's home was situated. As he got out of the house, the deceased removed a chain from his waist and struck him on the head. In self- defence, the appellant stated that he took a piece of wood which was nearby, hit the man once and left. He was arrested the next day while he was at his place of work. The appellant told the court that he did not intend to kill the deceased but merely intended to defend himself.

11. At he hearing of the appeal, learned counsel Ms. Awuor S, appeared for the appellant whilst learned counsel Mr. Okango appeared for the respondent. The appellant challenged the conviction and sentence through supplementary grounds dated 17th February 2025, that the evidence presented did not support the charge, his defence was not considered, and the sentence was harsh, excessive and unconstitutional.

12. In support of the appeal, the appellant submits that malice aforethought against the appellant was not established as according to the prosecution witness and the appellant, it was a fight between the deceased and the appellant in a den where they were taking alcohol and bhang. The fight was between intoxicated persons without any intention to kill each other.

13. Relying on the case of Republic v Moloney 1986 3 Aller, the appellant submits that the prosecution must not only prove that the appellant killed the deceased but at the time of committing such offence, the appellant had the intention to cause death or grievous harm against the deceased.

14. Regarding the appellant's defence, it is submitted that in his evidence, the appellant testified that the deceased had hit him after provoking him many times as a result of which he decided to defend himself but did not have any intentions to kill the deceased. Relying on section 17 of the *Penal Code*, it is submitted that self defence is a good defence.

15. As to whether the sentence was excessive, the appellant submits that having been charged and found guilty of murder, he was sentenced to death. The mandatory death sentence is unconstitutional as it violates the appellant's rights under articles 25[a][c], 28 and 29[f] of *the Constitution*.

16. Relying on the case of Francis Karioko Muruatetu & Another v Republic [2017] eKLR, the appellant submits that the sentence meted out is thus illegal and unconstitutional. That in sentencing the appellant, the learned judge did not have regard to the appellant's mitigation.

17. In rebuttal, the respondent submits that malice aforethought was proved by a look at the injuries that were inflicted on the deceased as described by the doctor who produced the postmortem report. Secondly, was the conduct of the appellant who upon the deceased running away from the fight towards his home, the appellant went back to Joyce's house, got a piece of wood and ran after the deceased and hit him occasioning him the injuries which conduct goes further to prove malice aforethought.

18. Regarding the self defence, it is submitted that it is a defence when well raised and can lead to an acquittal. However, the plea of self defence is well cushioned by the principle of proportionality. When raising the said defence, the force used to retaliate or counter the danger should be proportionate.

19. The respondent submits that during the fight, the deceased was not armed, and the fight as brought out by the evidence, was by use of bare hands, but the force the appellant used, and the gravity with which he carried it out, do not fall within the confines of the plea of self defence.

20. On sentence, the respondent conceded to the setting aside of the death sentence and it being reduced to 25 years imprisonment, pointing out that the sentence was meted out pre-Muruatetu decision.

21. This being a first appeal, it is settled that on a first appeal, the Court has a duty to scrutinize the evidence as stated in Okeno v Republic [1972] EA 32 that:

> " An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination [Pandya v. R., [1957] E. A. 336] and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. [Shantilal M. Ruwala v. R., [1957] E.A. 570]. 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 findings and conclusions; 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, see Peters v. Sunday Post, [1958] E. A. 424."

22. Having considered the record, the contending oral and written submissions made before the Court and the law, it is clear that the appellant was charged with murder under Section 203 of the *Penal Code* which provides that:

> " Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder."

23. To sustain a charge under the said provision, the prosecution has to prove three things. First, the death of the deceased, and cause thereof; second, that the death of the deceased was a result of an unlawful act or omission on the part of the accused person; and third, that the unlawful act or omission was committed with malice aforethought. [See also Roba Galma Wario v Republic [2015] eKLR].

24. It is common ground that the deceased died, as this fact is not substantially in dispute as several prosecution witnesses testified that the deceased died in the hospital. Similarly, there is no dispute as to its cause if the evidence of pathologist is anything to go by. The real legal issue is whether the defence of self defence was available to the appellant. From the narrative given by James, a fight was going on between the appellant and the deceased, they were separated and the deceased left. As the deceased walked away, the appellant went back to Joyce's house, picked a piece of firewood which he claimed he was going to use as a walking stick and followed the deceased and assaulted him. In his defence, the appellant contended that he did not intend to kill the deceased but was acting in self defence.

25. The defence of self defence is provided for under section 17 of the *Penal Code* which states:

> " Subject to any provisions in this Code or any other law in operation in Kenya, criminal responsibility for the use of force in the defence of person or property shall be determined according to the principles of English Common Law."

26. In the case of Abraham Kibet Chebukwa v Republic [2020] eKLR this Court cited with approval the decision in Mokwa v Republic, [1976-80]1KLR 1337, where the Court had this to say as regards the defence of self defence:

> " Self defence is an absolute defence even on a charge of murder unless in the circumstances of the case the accused applied excessive force."

27. Similarly, in the case of Victor Nthiga Kiruthu & Another v Republic [2017] eKLR, this Court held that:

> " The principles that have emerged from these and other authorities are as follows:
>
> i. Self defence, as the term suggests, is defence of self. It is the use of force or threat to use force to defend oneself, one' family or one's property from a real or threatened attack. Self defence is therefore a justification in the application of force recognized by the common law:

ii. The law generally abhors the use of force or violence, but there are instances when a person is justified in using a reasonable amount of force in self defence if he or she believes that the danger of bodily harm is eminent and that force is necessary to repel it, meaning that the force must be necessary and that it must be reasonable.

iii. It is not necessary, however, for there to be an actual attack in progress before the accused may use force in self defence. It is sufficient if he apprehends an attack and uses force to prevent it.

iv. The danger the accused apprehends however must be sufficiently specific or eminent to justify the action he takes and must be of a nature which could not reasonably be met by mere pacific means.

v. What amounts to reasonable force is a matter of fact to be determined from evidence and the circumstances of each case.

28. What is clear is that the defence of self defence is only available to an accused person who is able to demonstrate that he used reasonable force either on provocation or on being threatened by actual danger. However, this case does not present a scenario where the appellant was in imminent threat or danger from the deceased. This is because after the appellant and the deceased were separated, the deceased was asked to walk away which he did, while the appellant walked back to the house, picked a piece of firewood, followed the deceased and assaulted him causing fatal injuries. It is clear that the injuries were a result of deliberate act aimed at disabling the deceased, and the defence of self defence could not hold as the deceased was not armed. The appellant's conviction was thus safe. The appeal against conviction therefore lacks merit and is dismissed.

29. With regard to the severity of sentence, Section 379 [1][a] &[b] of the *Criminal Procedure Code* provides for this Court's jurisdiction to entertain an appeal against sentence from the High Court exercising original jurisdiction. The principles guiding this Court on appeal in deciding whether or not to interfere with the sentencing discretion of the trial court was addressed by this Court in the case of Benard Kimani Gacheru v Republic [2000] eKLR thus:

> "It is now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate Court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account, some wrong materials, or acted on the wrong principle."

30. Similarly, in Ahamad Abolfathi Mohammed & Another v Republic [2018] eKLR it was stated that:

> " sentence is essentially the exercise of discretion as a principle this Court will normally not interfere with exercise of discretion by the court appealed from unless it is demonstrated that the court acted on wrong principle; ignored material factors; took into account irrelevant considerations; or on the whole that the sentence is manifestly excessive."

31. The appellant raises issue with the mandatory nature of the death sentence imposed upon him. That in imposing the said sentence, the trial court failed to consider the appellant's mitigating factors. The State has conceded to the setting aside of the death sentence, and proposes that the appellant be sentenced to 25 years imprisonment.

32. We recognize that the deceased was the initiator of acts that led to the confrontation, but the appellant became wired to destruction, despite repeated interventions to calm the situation. Indeed, as submitted by the respondent, the manner in which the appellant set upon the deceased and occasioned injuries sustained by the deceased clearly showed that the attack was violent and brutal and meant to cause the death of the deceased, an appropriate custodial sentence in the circumstances is called for to meet the ends of justice.

33. We have taken into consideration that the appellant is remorseful, has undergone character reform, and the circumstances leading to the unfortunate outcome; and despite his plea in mitigation, the learned judge in meting out the death sentence pointed out that it was the only sentence then available in law. In our considered view, a death sentence is not proportionate to the circumstances of this case; and the decision in Muruatetu [supra] offers him some reprieve. We thus find it appropriate to interfere with the sentence and set it aside; and substitute it with a sentence of fifteen [15] years imprisonment. We also take note that the appellant remained in custody from the date he was first arraigned in court on 15th March 2011, to the end of his trial and sentence on 17th May 2017. By dint of Section 333[2] of the *Criminal Procedure Code*, the sentence period shall run from 15th March, 2011 when the appellant was first arraigned in the trial court. The appeal thus partially succeeds on sentence to that limited extent only.

34. Orders accordingly.

DATED AND DELIVERED AT KISUMU THIS 31ST DAY OF JULY, 2025.

ASIKE-MAKHANDIA

JUDGE OF APPEAL

H. A. OMONDI

JUDGE OF APPEAL

L. KIMARU

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Deputy Registrar