Bundi v Republic (Criminal Appeal 149 of 2018)
[2025] KECA 1231 (KLR) (4 July 2025) (Judgment)

Neutral citation: [2025] KECA 1231 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NYERI

CRIMINAL APPEAL 149 OF 2018

JW LESSIT, A ALI-ARONI & GV ODUNGA, JJA

JULY 4, 2025

BETWEEN

JACOB BUNDI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal from the conviction and sentence of the High Court of Kenya at Meru (Ong'injo, J.) dated 8th November 2018 in HCCRA No. 17 of 2014)

JUDGMENT

1. The appellant, Jacob Bundi, was charged with the offence of murder contrary to Section 203 as read with Section 204 of the *Penal Code*. The particulars are that, on 30th June 2012, at Kinyanka Village, Kiegoi Sub-Location, Igembe North in Meru County, he murdered Stephen Kirimi.

2. As this is the first appeal, the court is under a duty to reconsider the evidence afresh, analyse and evaluate it, bearing in mind that the trial court had the benefit of seeing and hearing the witnesses, making allowance of this fact and proceeding to arrive at its independent opinion on the matter. This principle was well expounded in the often-cited case of Okeno vs. R [1972] E.A., where this Court's predecessor stated:

> "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."

3. Bearing in mind our duty and to put the case into perspective, we shall examine the evidence tendered before the trial court. The prosecution called six (6) witnesses. Salome Karimi Kirimi (PW1), the deceased's wife, testified that on 30th June 2012, at approximately 1:00 am, she was woken up by one Abraham Kendi, who informed her that her husband, Stephen Kirimi, had been cut by the appellant. She woke up other people, including Nchooro Miriti, Mercy and Dorcas, and they all proceeded to the Eastleigh area where the incident took place. On arriving at the scene, she found her husband bleeding profusely from a neck wound and lying dead. Jackson Kaunga and Miriti reported the incident to the police, who later collected the body and took it to Maua Hospital.

4. She further testified that she was aware that on 1st July 2012, the police went to the appellant's house and retrieved his clothes. On 5th July 2012, PW1 went to Maua Police Station and recorded her statement. She identified the appellant as the deceased's stepbrother, whom they had lived with, and that before the incident, the two had minor quarrels over the appellant's mother's miraa. She also testified that after the incident, the appellant went into hiding and was not arrested until December 2013, when he resurfaced in the area.

5. Christopher Mwiti, testifying as PW2, recalled that on 30th June 2012, he was in a hotel in the Eastleigh area when he saw the appellant arguing with the deceased. The appellant then left, returned with a panga, and attacked his brother. He was about 5 to 7 meters away and witnessed the incident, which occurred at midnight under bright light from the nearby hotel and bar. The appellant had come from the bar and the deceased from the hotel, and they met on the road next to the bar/hotel. The distance from the hotel to the scene of the crime was 7 to 10 meters, with visibility extending up to 50 meters.

6. PW2 further testified that he witnessed the appellant attack the deceased on the hotel verandah, first cutting his neck, causing him to fall, and then striking him again. PW2 and others could not approach the scene as the appellant was armed. After the appellant left, PW2 went to the scene of crime and confirmed that the deceased had been murdered. The following day, when the police arrived to collect the body, PW1 accompanied PW2 to the police station to record his statement.

7. Dorcas Kanario, PW3, testified that on 30th June 2012, at around 1:00 am, her sister-in-law (PW1) woke her up to inform her that her (PW1's) husband had been cut. They walked to the Eastleigh area; using torchlight, she saw her brother lying by the road, bleeding profusely from a neck wound. A report was made at Maua Police Station, and the body was taken to Methodist Hospital. On 1st July 2012, the police visited PW3's home, interrogated her and asked her to show them the appellant's house. They broke down the door and took three photographs from the appellant's photo album.

8. Dr. Charles Njeru (PW4) testified that a postmortem was conducted on 3rd July 2012 at Maua Methodist Mortuary by Dr. Kang'ethe. He produced the report, without objection, on behalf of his colleague. He informed the court that the head was almost cut off from the rest of the body and was barely held by some muscles. The cut was on the right side of the neck. It appeared there were repeated cuts to separate the head from the body using a sharp object. All neck structures were cut. Further, the spinal cord and column of the neck were fractured. Other systems were okay. He further informed the court that on examination, Dr. Kang'ethe formed the opinion that the death caused by massive blood loss after decapitation. He produced the death certificate as an exhibit.

9. Elizabeth Waithera (PW5), a government analyst, testified that on 4thJuly 2012, and 24th February 2014, at the government laboratory, she received items for analysis from P.C. Joshua Kiambati of DCI Maua Police Station. The items included blood samples from both the deceased, Stephen Kirimi and

the appellant, and clothing items (a yellow jacket, a sky-blue t-shirt, and green trousers) indicated as belonging to the appellant. The analysis showed that these items were moderately stained with human blood. The DNA test revealed that the blood on the appellant's clothing matched the DNA profile of the deceased.

10. Joshua Kiambati (PW6), who was the investigating officer, stated that on 30th June 2012, at about 1:00 am, he was on duty with Cpl. Kaitan when they received a phone call informing them that someone had been killed at the Eastleigh Trading Centre. They rushed to the scene, and on arrival, they found the body of the deceased, whose neck had been cut halfway. And there was a lot of blood. A crowd had formed. Family members of the deceased were present at the scene, and PW1 identified the appellant, who is the deceased's brother, as the person who inflicted the fatal wound. PW6 transported the body to Maua Methodist Mortuary. Later, at around 8:00 am, PW6 and P.C. Juma returned to the scene and visited the deceased's home, where they found the appellant's mother and sister, who directed them to both the deceased's and the appellant's residence.

11. Further, he stated that they found the appellant's house was locked from the outside, prompting him to break the padlock and enter. Inside, he discovered a yellow jacket, a sky-blue t-shirt, and green trousers with bloodstains, which the appellant's mother and sister identified as the clothing the appellant wore on the day of the incident. After recording statements from them, he took the clothes and resumed the investigation, noting that the appellant had escaped by then. A postmortem was conducted, and blood samples were collected from the deceased for comparison with the blood stains on the appellant's clothes.

12. Approximately one and a half years later, PW6 learned that the appellant was hiding in Buuri, Timau. On 3rd February 2014, the appellant was traced and arrested in Timau and taken to Maua Police Station. The Deputy Officer in Charge of the Station obtained the appellant’s consent for a blood sample to be analysed by the government chemist. He then prepared a file and charged the appellant with the offence of murder. He also informed the court that family members had reported a land dispute between the appellant and the deceased, who occupied land that the appellant claimed which contained miraa and tea leaves.

13. At the close of the prosecution’s case, the appellant was placed on his defence. He elected to give a sworn statement. He informed the court that on 29th June 2012, he was in Maua town from 8:00 a.m. He met with the deceased at a bar where they had drinks together from around 11:00 am until 6:30 pm. They left for the Eastleigh area and, on the way, passed by Kanthiari, where the deceased picked up a jacket and a panga. The deceased wore the coat and tucked the panga inside it. Both were intoxicated. They passed through a miraa farm before going to Eastleigh bar, where they continued drinking until about midnight. After leaving the bar, they stopped to buy cigarettes when a young man known as Morris went to where they were, and the deceased accused him of stealing miraa. They wanted to fight, and the appellant intervened to separate them. The deceased wanted to produce the panga from his jacket, but the appellant held him, and they crossed the road and started walking home. While approaching a shop, the deceased insisted on going to see Morris, but the appellant restrained him, and a struggle between them ensued. They fell to the ground while holding the panga. The deceased held the appellant down, the appellant pulled the panga and in the process injured the deceased. On realising he had cut the deceased he threw the panga away and raised an alarm, attracting James Mugambi and Faulu who went to the scene. He was shocked and feared when a crowd surged. He went home, changed his clothes, and went to Nyayo Tea Zone. Since he was drunk, he slept and woke up three hours later; on returning home, he found people mourning, which saddened him. He then travelled to Meru and later to Nanyuki, where he stayed for 1½ years while seeking help from a pastor. He returned home on 7th December 2013 and began working by transporting miraa. On 3rd February 2014, after parking

his vehicle in Maua to watch football, he was arrested by police. He was later charged with murder on 24th March 2014. He had a cordial relationship with the deceased and had never had any disagreements before this.

14. James Mugambi (DW2) testified that on 29th June 2012, the appellant and the deceased visited his bar at 11:00 pm while already intoxicated. They ordered beer, which DW2 sold to them only once, and refused to sell more as they were too drunk. After about 10 minutes, DW2 heard screams and went outside to investigate. It was dark, so he returned for a torch and found the appellant screaming while holding his brother, with Faula present. Many people gathered, and the appellant later left the scene. Mberia, the appellant's brother, arrived and confirmed that Kirimi had died. He observed the deceased had a cut on the neck and called the Assistant Chief, who then contacted the Maua Police Station. The police arrived the next morning to collect the body. DW2 did not see the appellant until after 2 months. The deceased worked as a guard at a miraa farm and also owned his own. The standard weapon mentioned was a C-line panga. He added that they arrived in a celebratory mood.

15. Ibraham Mberia, (DW3), the appellant's brother, testified that on 30th June 2012, he arrived in Eastleigh at 11:45 pm after coming from Kanthiari, where he found a gathering of people and discovered his other brother, the deceased, lying dead on the ground. DW3 asked Faula, who was already present at the scene, and she informed him that the appellant and the deceased had woken her up to purchase cigarettes; she then heard them arguing, followed by the appellant screaming after they left. Following the incident, DW3 did not see the appellant, who vanished for two years. It was only after a year of his disappearance that DW3 began to communicate with the appellant.

16. While returning the verdict of guilty on the appellant, the High Court (Ong'injo, J.) found that the prosecution's six (6) witnesses had proven beyond all reasonable doubt that the appellant committed the heinous act of murdering his brother ruthlessly and inhumanly and convicted the appellant, as charged.

17. On sentence, the learned judge found that the appellant committed the offence without a justifiable cause and deserved the maximum possible punishment. He was sentenced to suffer the death penalty.

18. Dissatisfied with the decision, the appellant filed the instant appeal on grounds, inter alia, that the learned judge erred in law in failing to consider that no documentary evidence was provided to prove the case, failing to consider that no identification was made; failing to consider that the prosecution's evidence was insufficient to sustain a conviction; failing to consider that none of the mentioned exhibits were produced before the court; failing to consider that there existed a grudge between the appellant and PW2; by rejecting the appellant's defence on weak reasons contrary to Section 169 of the CPC.

19. The appeal was heard by way of written submissions. Learned counsel for the appellant filed submissions and a list of authorities, both dated 13th December 2024. He summarised the issues for determination as follows: whether the prosecution proved its case against the appellant beyond any reasonable doubt, whether there was malice afterthought in the appellant's actions, and whether the mandatory death sentence meted out to the appellant was justified in the circumstances.

20. On whether the prosecution proved its case against the appellant beyond any reasonable doubt, learned counsel submitted that the prosecution did not prove its case beyond any reasonable doubt. He contended that the evidence of PW2 who was the main witness for the prosecution was full of contradictions and inconsistencies. For instance, PW2 testified that he did not meet the deceased and the appellant when he got to the hotel however he later contradicted himself by saying that he saw the appellant in the bar and the deceased heading to the hotel; he claimed there was electricity in the bar, but the DW2 contradicted this, stating that there was no electricity and that he had to use a torch; PW2 asserted that the appellant was not drunk, while DW2, testified that both the appellant and the

deceased were too drunk to be served more beer. PW2's statement during cross-examination that the appellant was in the bar and the deceased was in the hotel seemed false, as both had arrived together and were served at DW2's bar. Further, DW2, in his evidence, stated that he saw DW3 and Faula but did not mention seeing PW2.

21. In support of the argument that the prosecution must prove its case beyond any reasonable doubt, learned counsel for the appellant relied on the case of Anthony Ndegwa Ngari vs. Republic [2014] KECA 424 (KLR), where this Court held that there must be intent to cause harm or death, or knowledge that an act can cause death or injury, on the part of the accused person. He also relies on the case of Siele vs.*Republic (Criminal Appeal 4 of 2015*) [2023] KECA 165 (KLR), in which this Court held that the State bears the burden of proof at all times.

22. Learned counsel further submitted that prosecution evidence must be proven beyond any reasonable doubt, and any substantial contradictions or inconsistencies should favour the accused as held in the case of Chiphoro vs. Republic (Criminal Appeal E010 of 2023) [2024] KECA 227 (KLR).

23. On the issue of whether there was malice afterthought in the actions of the appellant, learned counsel submitted that there was no intention to kill or cause grievous harm as both the deceased and the appellant were too intoxicated to make a fair judgment and the fatal consequences of their struggle could not have been foreseen. In support of this argument, learned counsel relied on the case of Siele vs. Republic [2024] KEHC 7096 (KLR), where the court quoted the case of Nzuki vs. Republic [1993] KLR 171, where the court held that in the absence of malice aforethought, the appellant's conviction for the offence of murder was unsustainable - the killing of the deceased amounts only to manslaughter. Learned counsel added that the fact that these "drinking buddies" could not be allowed to buy another drink from the bar indicated that, indeed, they were too drunk.

24. On whether the sentence meted on the appellant was lawful, reliance was placed in the Supreme Court case of Muruatetu & Another vs. Republic; Katiba Institute & 5 Others (Amicus Curiae) (Petition 15 & 16 of 2015 (Consolidated)) [2017] KESC 2 (KLR), urging that the death sentence ought not to have fallen on the appellant.

25. Learned counsel for the appellant contended that the trial judge should have considered the mitigating factors. Furthermore, it was the appellant who raised the alarm after noticing that the deceased had been injured, which prompted DW2 and Faula to go to the scene.

26. The respondent's learned counsel filed submissions dated 16th December 2024. He summarised the issues for determination as follows: whether the prosecution proved the offence of murder against the appellant beyond any reasonable doubt; whether malice afterthought was proved; whether there was the need to conduct an identification parade; whether failure to produce exhibits was fatal to the prosecution's case and whether the appellant's defence was rejected without cogent reasons.

27. The learned counsel argued that the prosecution successfully proved the offence of murder against the appellant beyond any reasonable doubt. He relied on the case of Anthony Ndegwa Ngari vs. Republic [2014] KECA 424 (KLR), where the court held that to sustain a conviction for the charge of murder, the prosecution has to prove the ingredients of the offence.

28. The respondent submitted that the death of the deceased was not disputed. All witnesses who testified confirmed that the deceased had died. Additionally, the postmortem report produced by PW4 confirmed that the cause of death was massive blood loss resulting from decapitation. Further, the prosecution presented evidence to show that, indeed, the appellant unlawfully killed the deceased. PW2 was an eyewitness. Furthermore, PW5, the government analyst, confirmed that the DNA analysis revealed a match between the blood stains found on the appellant's yellow jacket, sky-blue t-shirt, and

green trousers and the blood sample from the deceased. The appellant himself admitted to being with the deceased on the day in question.

29. On whether malice afterthought was proved, the respondent relied on the evidence of PW2, which indicated that the deceased was unarmed when the appellant cut him twice. Additionally, the postmortem examination showed that the deceased had sustained multiple deep cuts. Therefore, it was submitted that there was an intention on the part of the appellant to kill or to cause grievous bodily harm, thus proving malice on the part of the appellant. In support of this proposition, the respondent relied on the case of Nzuki vs. Republic [1993] KECA 83 (KLR) & Daniel Muthee vs. Republic (Criminal Appeal 218 of 2005) [2007] KECA 419 (KLR).

30. The State argued further that the cuts inflicted upon the deceased were not accidental, contrary to the appellant's claims before the court. By repeatedly striking the deceased with a panga, the appellant should have reasonably foreseen that such action would result in death or grievous harm.

31. Regarding the need for an identification parade, the respondent contended that the appellant incorrectly faulted the trial judge for failing to take note that none was conducted. It is submitted that this argument lacks merit, as the appellant's identification was not disputed. The appellant clearly stated in court that the deceased was his brother and admitted to being with him on the day of the incident, as well as inflicting the injuries that resulted in his death.

32. On whether failure to produce exhibits was fatal to the prosecution's case, the respondent submitted that the blood- stained clothes recovered from the appellant's house, as well as the alleged murder weapon, were not presented before the trial court. However, this omission was not fatal to the prosecution's case. Furthermore, the appellant admitted that he had changed his clothes after the incident because they were stained with blood. It is also undisputed that the police found these clothes in the appellant's house. It was also established that the murder weapon was a panga. The appellant confirmed this, and the postmortem report conclusively indicated that a sharp object caused the injuries leading to the deceased's death.

33. On whether the appellant's defence was rejected without any cogent reasons, the respondent submitted that the trial court considered the appellant's defence and provided valid reasons for disregarding the same.

34. On the issue of sentencing, it is the respondent's submission that the mandatory death sentence is prescribed under Section 204 of the *Penal Code* and that before passing the sentence, the court had considered the appellant's mitigation, and was of the view that he deserved the maximum possible sentence. In supporting the punishment meted out to the appellant, the respondent cited the case of Francis Karioko Muruatetu & Another vs. Republic, SC Petition No. 16 of 2015, submitting that the case did not outlaw the death sentence but gave parameters to be considered by courts when considering the death sentence and that in this instance these were considered by the trial court when passing sentence.

35. We have carefully considered the evidence, counsel's submissions, the cited authorities, and the applicable law, and we appreciate our role as a first appellate court. From the material placed before us, we distil the issues falling for our determination to be whether the prosecution proved the ingredients of the offence of murder beyond reasonable doubt against the appellant and whether the sentence was lawful.

36. It is old hat that the prosecution in the case of murder has the singular task of proving three ingredients to secure a conviction: the occurrence of death, that the death was caused by the unlawful act of

commission or omission by the appellant; and that the appellant had malice aforethought as he committed the said offence. See Joseph Githua Njuguna vs. Republic [2016] eKLR.

37. As submitted by the respondent, the fact of death of the deceased is acknowledged by both the respondent's witnesses and the appellant. The appellant confirmed that he spent the material evening with the deceased; PW2 testified that he witnessed the altercation between the deceased and the appellant, which led to the death of the deceased. It was his testimony that he saw the appellant cut the deceased twice. The family of the deceased and the appellant confirmed the death, including the wife, who went to the scene of the crime immediately after the deceased met his death, and if there was any doubt, the postmortem report affirmed the death. The appellant confirmed that he cut the deceased. However, he urges that it was a mistake as he struggled to get the panga from the deceased, who wanted to attack a third party (Morris) when the panga accidentally cut the deceased.

38. The trial court did not believe the evidence of the appellant on how the death occurred. This is what the trial court said:

> "Was the unlawful act of decapitating the deceased person's head actuated with malice aforethought? The accused explained that he was trying to restrain the deceased from following and fighting with one Moris, as the deceased had even drawn a C-line panga from the jacket but the issue of Moris only came up in his defence. Even his witnesses don't say they heard the deceased quarrel with anyone."

However, the trial court believed the testimony of the respondent's witnesses. The trial judge stated of the respondent's witnesses:

> "PW2 said the deceased was in the hotel while accused was in the bar when accused found the deceased had left the hotel to go home he picked a quarrel with him. The accused went home which is less than 1 km away and which PW3 said is 5 minutes' walk from Eastleigh and cane back armed with a panga and without saying anything cut the deceased neck. That when the deceased fell he cut the deceased again on the neck. The doctor's observation in the postmortem report indicate there were signs of repeated use of a sharp instrument to decapitate the head. That means it was not accidental but intentional cut kill (sic)..."

39. We align ourselves with the trial judge's findings. The conduct of the appellant at the material time seems to have been calculated. He left the hotel and went for the panga. Secondly, if he indeed cut the deceased accidentally, why was there a repeat of the gruesome assault upon the deceased, as testified by PW2 and corroborated by the postmortem report? In a case with similar circumstances Daniel Muthee vs. Republic (Criminal Appeal 218 of 2005) [2007] KECA 419 (KLR), this Court stated:

> "When the appellant set upon the deceased and cut her with a panga several times and then proceeded to cut the young Allan in similar manner, he must have known that the act of cutting the deceased persons on the head with a sharp instrument would cause death or grievous harm to the victims. We are therefore satisfied that malice aforethought was established in terms of section 206(b) of the *Penal Code*."

40. Our thoughts align with those of the trial court and the referenced authority. The manner in which the appellant butchered the deceased, coupled with the fact that the appellant disappeared for 1½ years after he committed the heinous act, leaves no room for any other inference to be drawn, but that malice aforethought was proven. We, therefore, do not fault the trial court.

41. Regarding the sentence meted out, we find that the action of the appellant in killing his brother, whatever their differences, was heinous. However, we are inclined in the aftermath of the emerging jurisprudence concerning murder offences vis a vis the death sentence, and having taken into account the circumstances surrounding the case, including that the two spent time drinking together, were not known to have had any serious grudge between them, and the mere fact that the appellant though with an excuse admitted having cut the deceased, we find that the sentence that commends itself in these circumstances would be a determinate sentence.

42. Ultimately we affirm the conviction. The appeal succeeds only to the extent that we set aside the death sentence and substitute the same with a sentence of thirty (30) years to run from the date of the appellant's arrest.

DATED AND DELIVERED AT NYERI THIS 4TH DAY OF JULY, 2025.

J. LESIIT

.....

JUDGE OF APPEAL

ALI-ARONI

.....

JUDGE OF APPEAL

G.V. ODUNGA

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR