



**Njenga & another v Republic (Criminal Appeal 17 of 2018)  
[2024] KECA 1513 (KLR) (25 October 2024) (Judgment)**

Neutral citation: [2024] KECA 1513 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAKURU  
CRIMINAL APPEAL 17 OF 2018  
M NGUGI, FA OCHIENG & WK KORIR, JJA  
OCTOBER 25, 2024**

**BETWEEN**

**JOSEPH NDUNGU NJENGA ..... 1<sup>ST</sup> APPELLANT**

**JOHN KOIGI WANGARE ..... 2<sup>ND</sup> APPELLANT**

**AND**

**REPUBLIC ..... REPUBLIC**

*(An appeal from the Judgment of the High Court of Kenya at Nakuru  
(M. A. Odero, J.) dated 23rd March 2018 in HC.CR.C. No. 24 of 2015)*

**JUDGMENT**

1. The appellants herein were charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code.
2. The particulars in the information were that on 12<sup>th</sup> February 2014 at Githunguri village in Kipipiri District within Nyandarua County, the appellants jointly murdered Joseph Kinuthia Gathecha.
3. In a bid to prove the case against the appellants, the prosecution called nine witnesses. At the end of the trial, the appellants were found guilty, convicted, and each was sentenced to 30 years' imprisonment.
4. As this is a first appeal, we are mandated to re-evaluate and re-analyze the evidence before the trial court, bearing in mind that we did not have the occasion to see or hear the witnesses. In the case of Chiragu & Another v Republic [2021] KECA 342 (KLR), this Court stated that:

“However, before we grapple with grounds of appeal aforesaid, we must remind ourselves that this being a first appeal from the judgment of the High Court, by dint of section 379 of the CPC and guidance provided in the famous case of Okeno V. R. [1972] EA 32, we are expected to subject the entire evidence tendered in the trial court to fresh and exhaustive



examination so as to reach our own independent conclusions as to the guilt or otherwise of the appellants. In doing so, we must however give due allowance to the fact that we neither saw nor observed the witnesses as they testified. Accordingly, we must give way to the findings of facts and demeanor of witnesses by the trial court. See also *Erick Otieno Arun V. Republic* [2006] eKLR. In undertaking this exercise, we must of necessity go over the evidence presented before trial court albeit in summary.”

5. The brief facts of this case were that the appellants and the deceased were all relatives. The 1<sup>st</sup> appellant was a cousin to the deceased while the 2<sup>nd</sup> appellant was a nephew to the deceased.
6. According to PW1, the wife of the deceased, on the material day, the deceased, who was a plumber, went out to inspect a water pump. She sat outside her house facing the road. After a while, she saw the appellants approach the deceased while carrying pangas. They dared the deceased to kill them as he had threatened to do. The deceased told them he was not interested in a fight. He threw down the jembe which he was holding in his hands on the ground. Although the deceased was not interested in the fight, the appellants pounced on him and started to cut him with the pangas. She screamed and the neighbours came.
7. PW2 corroborated the evidence of PW1 when she told the court that on the material day, while she was collecting cattle feed, she heard noises from the road. She went to check what was happening when she heard the appellants dare the deceased to kill them. She also saw the appellants cut the deceased with pangas. She also screamed for help.
8. PW3, fondly referred to by the villagers as ‘Goodman’ was inspecting the water pipes with the deceased on the material day.  
  
When they finished their work, they took different paths home. As he was walking, he heard PW1 shouting and rushed in that direction to check what was happening. He found the appellants cutting the deceased with pangas. When he rushed to intervene, the appellants walked away. Together with others, PW3 rushed the deceased to a nearby clinic. The deceased was later transferred to Ol Kalou District Hospital where he died while undergoing treatment. The incident was reported to the police who then arrested the appellants.
9. PW4 informed the court that when he heard screams from the family home, he rushed to the scene where he found the deceased lying on the ground, badly injured, with severe cuts on his body.
10. PW5 and PW6 identified the body of the deceased and witnessed the autopsy.
11. PW7 produced the post-mortem report by Dr. Fazia Kamau which indicated that the body of the deceased had three deep cuts on the head, a deep cut to the left parietal region, a deep cut on the right upper arm, and a complete skull fracture with exposed brain tissue. The doctor had concluded that the cause of death was ‘severe head injury secondary to deep cuts on the head with a sharp object’.
12. According to PW8, the Government Analyst, when she received a blood sample of the deceased and the two pangas from the PW9, she examined them and found that the DNA profiles generated from both pangas matched the DNA profile generated from the deceased’s blood sample.
13. PW9, the investigating officer, told the court that the appellants surrendered themselves to the police after their houses had been burnt down by the villagers. The appellants then led PW9 to the place where they had hidden the two pangas, which he believed to be the murder weapons, and he recovered the same. He stated that the 1<sup>st</sup> appellant led him to Gathongo area where he had hidden a panga. He recovered the panga and the same was produced in court.



14. PW9 also told the court that the 2<sup>nd</sup> appellant led him to a maize plantation in Wanjohi area and pointed to where he had hidden the other panga. He informed the court that the pangas had bloodstains on them, and they were forwarded to the Government Chemist for analysis.
15. In their sworn statement of defence, the appellants denied any involvement in the murder of the deceased. They seemed to suggest that it was PW1 who killed the deceased because they had a feud over the deceased's plans to bring his first wife back to live in the homestead. The appellants stated that they never went to the scene on the material day and only became aware of the death of the deceased later on.
16. According to DW3, the 1<sup>st</sup> appellant's wife, when they heard the commotion, she and the appellants went to the scene. She told the court that while they were there, the mob started beating the appellants claiming that the two had killed the deceased.
17. DW4 was the sister to the 1<sup>st</sup> appellant and aunt to the 2<sup>nd</sup> appellant. She told the court that she did not witness the incident but only heard that the appellants had been involved in a fight. When she met the area Assistant Chief, she was informed that the appellants had hacked the deceased to death.
18. Upon analyzing the evidence tendered before the court, the learned Judge held that there was no doubt that the deceased died, as was confirmed by the post-mortem report produced by PW7; and that the cause of the death of the deceased was 'severe head injury secondary to deep cuts on the head with a sharp object'.
19. The learned Judge held that PW1, PW2, and PW3 gave a clear and consistent account of the day's events and positively identified the appellants as the men they had seen cut the deceased. Their evidence corroborated one another in all material aspects, and they each remained unshaken on cross-examination.
20. The learned Judge found that since the appellants led the police to where the murder weapons were hidden, the logical conclusion would be that they were the ones who used those weapons to hack the deceased to death.
21. The learned Judge found that the appellants' defences were a mere denial and the fact that the deceased's first wife did not live in the homestead did not mean that they were feuding, as this was common in polygamous families. The learned Judge further held that the evidence of DW3 contradicted the evidence of the appellants as she placed the appellants at the scene while the appellants denied being on the scene, while the evidence of DW4 was mainly hearsay and of little value to the defence.
22. As regards malice aforethought, the learned Judge held that it was the appellants who picked a quarrel with the deceased. Even when the deceased asked them to leave him alone, they viciously attacked him while he was unarmed. As a result of the attack, the deceased suffered deep cuts and a fractured skull. The learned Judge held that there was no doubt that the appellants, not only intended to kill the deceased, but they actually killed him.
23. Consequently, the appellants were found guilty of murder as charged, they were convicted, and sentenced to 30 years' imprisonment each.
24. Being aggrieved by their conviction and sentence, the appellants lodged this appeal in which they raised the following supplementary grounds of appeal to wit:
  - a. The sentence imposed was excessively harsh and excessive and contrary to paragraph 4:1 of the Sentencing Guidelines, 2015.



- b. The Court to consider his mitigation.
  - c. The Court to consider the provisions of Section 333(2) of the Criminal Procedure Code.
25. When the appeal came up for hearing on 19<sup>th</sup> March 2024, Ms. Mwira, learned counsel appeared for the appellants whereas Mr. Omutelema, Assistant Deputy Director of Public Prosecutions, represented the respondent. Counsel relied on their written submissions.
26. From their supplementary grounds of appeal and their written submissions, it was clear that the appellants had abandoned their appeal against conviction as they had only submitted that their sentences were harsh. They sought leniency because the circumstances that led to the death of the deceased were a result of a long-standing family feud originating from a land dispute.
27. However, their counsel filed written submissions dated 21<sup>st</sup> February 2024 in which the following issue was raised for determination;
- Whether the trial court erred in its assessment of evidence leading to the conviction of murder.
28. The appellants questioned the trial court’s assessment of evidence citing a potential misapplication of legal principles crucial to the administration of justice. They submitted that Section 203 of the Penal Code was not properly applied as malice aforethought was not proved.
29. They submitted that the circumstances leading to the fight between them and the deceased were unclear, the motive was uncertain, and there was an error of law in invoking circumstantial evidence when malice aforethought had not been established. They were of the view that they ought to have been convicted of manslaughter.
30. The appellants submitted that they were convicted on circumstantial evidence and the burden of proof rested on the prosecution.
31. They further submitted that the prosecution had failed to prove beyond reasonable doubt its case against the appellants as the evidence of PW1 was not corroborated.
32. Opposing the appeal, the respondent through its written submissions dated 18<sup>th</sup> March 2024, submitted that the prosecution case was proved beyond reasonable doubt as the case was based on the direct evidence of PW1, PW2 and PW3 who witnessed the incident. Their evidence was credible and believable, and their conduct did not leave any doubt about their credibility. Their evidence remained unshaken even on cross- examination.
33. The respondent submitted that malice aforethought on the part of the appellants could be inferred from the appellants’ act of assaulting the deceased using pangas. The fatal assault was premeditated as the appellants approached the deceased while armed leaving no doubt that they intended at the very least to inflict grievous harm upon the deceased.
34. The respondent urged us to uphold the sentence, mitigation notwithstanding as the assault leading to the death of the deceased was unwarranted.
35. We have carefully considered the record, submissions by counsel, the authorities cited, and the law. The issues for determination are; whether the prosecution case was proved beyond any reasonable doubt and whether or not this Court should interfere with the sentence meted out against the appellant.



36. The appellants were charged under Section 203 of the Penal Code. The section provides that:
- “Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.”
37. To sustain a charge under the said provision, the prosecution had to prove beyond reasonable doubt, the fact and cause of death of the deceased person; that the death of the deceased was a result of an unlawful act or omission on the part of the accused person; and that such an unlawful act or omission was committed with malice aforethought.
38. It is common ground that the deceased died. The prosecution witnesses testified they took the deceased to the hospital where he died while undergoing treatment. This evidence was corroborated by the post-mortem report which showed that indeed the deceased died as a result of ‘severe head injury secondary to deep cuts on the head with a sharp object’.
39. It follows, therefore, that the questions that beg to be answered are; did the death of the deceased occur as a result of the unlawful act or omission of the appellants, and was there malice aforethought?
40. According to the evidence of PW1, she saw the appellants approach the deceased while each was armed with a panga, confront him, and cut him with the pangas. This evidence was corroborated by the evidence of PW2 who witnessed the assault upon the deceased. Further corroboration was provided by PW3 who intervened, to stop the appellants from assaulting the deceased. The post-mortem report confirmed that the deceased died as a result of the injuries he sustained during the assault. Therefore, we find the death of the deceased occurred as a result of the unlawful act of the appellants.
41. As regards malice aforethought, Section 206 of the Penal Code provides the following definition:
- a) An intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not.
  - b. Knowledge that the act or omission causing death will probably cause death or grievous harm to some person, whether that person is the person killed or not, accompanied by indifference whether death or grievous injury occurs or not or by a wish that it may not be caused.
  - c. An intention to commit a felony.
  - d. An intention by an act to facilitate the flight or escape from custody of any person who attempted to commit a felony.”
42. In the case Republic v Tubere s/o Ochen [1945] 12 EACA 63, the court established the following elements on malice aforethought:
- “The nature of the weapon used; the manner in which it was used; the part of the body targeted; the nature of the injuries inflicted either a single stab wound or multiple injuries; the conduct of the accused before, during, and after the incident.”
43. From the evidence on record, the appellants approached the deceased claiming that the deceased had threatened to kill them. However, the deceased showed no interest in fighting the appellants. The deceased, who was holding a jembe, placed it down to show that he was not going to fight the appellants.



Nonetheless, the appellants maliciously attacked the deceased with their pangas and injured him, leading to his death.

44. It is trite that by assaulting the deceased with their pangas, the appellants ought to have known that the deceased would die or that their actions would cause him grievous harm. In the circumstances, we find that malice aforethought was established.

45. We are, therefore, satisfied that all the ingredients of murder in this case met the threshold prescribed by law and the prosecution case was proved beyond any reasonable doubt. The appellant's conviction was sound.

46. It is common ground that the legality of the sentence is not under challenge. The appeal before us, as stated in black and white, is against the severity of the sentence. The appellants prayed for leniency and attributed the incident to a long-standing family feud.

47. It is trite that sentencing is at the discretion of the trial court.

The principles upon which an appellate court will act in exercising its discretion to review or alter a sentence imposed by the trial court were settled in the case of *Ogolla s/o Owuor v Republic* [1954] EACA 270 wherein this Court stated as follows:

“The Court does not alter a sentence unless the trial Judge has acted upon wrong principles or overlooked some material factors”. To this, we would add a third criterion namely, “that the sentence is manifestly excessive in view of the circumstances of the case (*R -v- Shershowsky* (1912) CCA 28TLR 263).”

48. In the South African case of *Mokela v The State* (135/11) [2011] ZASCA 166, the Supreme Court held that:

“It is well-established that sentencing remains pre-eminently within the discretion of the sentencing court. This salutary principle implies that the appeal court does not enjoy *carte blanche* to interfere with sentences which have been properly imposed by a sentencing court. In my view, this includes the terms and conditions imposed by a sentencing court on how or when the sentence is to be served.”

49. Similarly, in *Shadrack Kipkoech Kogo v Republic*, Criminal Appeal No. 253 of 2003 this Court stated that:

“Sentence is essentially an exercise of the trial court and for this court to interfere, it must be shown that in passing the sentence, the court took into an account an irrelevant factor or that a wrong principle was applied or short of those the sentence was so harsh and excessive that an error in principle must be inferred.”

50. In the case of *Francis Nkunja Tharamba v Republic* [2012] eKLR this Court held as follows with regard to sentencing:

“... sentencing is a discretionary act of the trial court even though the limits such as the maximum sentences and in some cases the minimum sentences are prescribed by law, nonetheless, as to the exact sentence to be pronounced upon a convicted person, the trial court has in most criminal cases, the discretion to decide. That being the case, in law, the appellate court should not intervene in such an exercise of discretion by an inferior court unless, it is demonstrated to it that the trial court has not exercised that discretion properly



in that it has failed to consider matters it should have considered or that it has considered matters it should not have considered or that looking at the entire decision, it is plainly wrong. These are the situations in law where the appellate court can intervene in the trial court's exercise of discretionary power such as that of sentencing. The next principle that the appellate court should adhere to when considering an appeal on sentence is that when the sentence is lawful, the appellate court should not interfere.”

51. In this case, the learned Judge, in imposing the sentence, considered the appellants' mitigation that they were remorseful, first offenders, they had voluntarily surrendered to the police, and they had not absconded court despite being out on bond during the trial.
52. In the circumstances, we find that the trial court considered the correct principles in imposing the sentence of 30 years' imprisonment.
53. Accordingly, we will not interfere with the sentence meted out by the trial court. In the result, the appeal is dismissed in its entirety.

Orders accordingly.

**DATED AND DELIVERED AT NAIROBI THIS 25<sup>TH</sup> DAY OF OCTOBER, 2024.**

**MUMBI NGUGI**

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**JUDGE OF APPEAL**

**F. OCHIENG**

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**JUDGE OF APPEAL**

**W. KORIR**

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**JUDGE OF APPEAL**

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

Signed

**DEPUTY REGISTRAR**

