Chepus v Republic (Criminal Appeal 135 of 2018)
[2023] KECA 129 (KLR) (10 February 2023) (Judgment)

Neutral citation: [2023] KECA 129 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT ELDORET

CRIMINAL APPEAL 135 OF 2018

FA OCHIENG, LA ACHODE & WK KORIR, JJA

FEBRUARY 10, 2023

BETWEEN

BONIFACE CHEREN CHEPUS ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an Appeal from Judgment of High Court at Kapenguria (S.M.Githinji, J.) delivered on 13th February, 2018 in HCCRA NO. 2 OF 2016(Formerly Kitale HCCRA No. 22 of 2014)

JUDGMENT

1. Boniface Cheren Chepus (the appellant) was charged with the offence of murder contrary to Section 203 as read with Section 204 of the *Penal Code*. The particulars were that on the night of 1st and 2nd April, 2014 at Amon village in Psigirio Sub-Location within West Pokot County, the appellant unlawfully murdered Thomas Lokipuna.

2. This is a first appeal and this Court is mandated to re-evaluate and conduct a fresh and exhaustive examination of the evidence adduced at the trial in order to arrive at its own independent conclusion. This is done bearing in mind the fact that unlike the trial court we did not have the advantage of seeing and hearing the witnesses as they testified in order to gauge their demeanour. These principles were well-captured in *Okeno vs. Republic* [1972] EA 32 and in *Shantilal M. Ruwala v R* [1957] EA 570 where it was held that the first appellate court must itself weigh conflicting evidence and draw its own conclusions. It is on the backdrop of these principles that we set to discharge our mandate in this appeal.

3. The prosecution case which was largely not disputed by the appellant was that on 1st April, 2014, C.K. (PW1) a 13-year-old girl was on her way home when she saw her father, Thomas Lokipuna (the deceased) at the gate. She then heard the appellant call the deceased to his home. C.K. testified that when the deceased arrived at the appellant's home, the appellant went into his house and emerged with

a metal bar which he used to hit the deceased on the head. She also stated that the deceased was not able to defend himself since he had a fracture on his hand at the time. Thereafter, she went to call her mother (PW2 Mary Chetoyo Thomas) who arrived in about five minutes alongside other neighbours. The deceased was then rushed to Kapenguria Hospital where he succumbed to the injury.

4. Another eye-witness to the incident was PW3 Losiwareng Longartepa who testified that on the fateful day, he was with the appellant at Kitelaposho where they were paid and the appellant bought maize. They then went to the appellant's house after which the deceased came and accused the appellant of having said that he was going to kill him. The appellant then stepped outside with a metal bar and hit the deceased on the head. The deceased fell down and PW3 screamed thereby attracting the attention of neighbours who streamed into the scene. PW3 further testified that while at the scene, the deceased was bleeding from the nostrils and the head. He also testified that the deceased seemed drunk at the time. On cross-examination, PW3 confirmed PW1's evidence that the incident took place around 7.00pm and that the deceased and the appellant did not quarrel. According to him the deceased just shouted at the appellant questioning why the appellant had intimated that he would kill him.

5. All the other witnesses arrived after the fact. Confronted with the prosecution case, the appellant gave unsworn testimony in which he denied committing the offence of murder. It was his evidence that on the said day, he went to his place of work alongside PW3 where they worked until 4.00pm when they were paid and they proceeded to a posho mill. They then bought maize after which they headed home. On his way home, he branched to a chang'aa den for a drink before heading home where he found that PW3 was not at home. While looking for a source of light, he heard someone coming into his homestead saying that he would know who he is. The person then came and knocked his door with a club. The person then snatched his maize flour and threw it over the gate. The person then struck him with a club on the shoulder. They engaged in a fight but when he attempted to run to his house, the deceased blocked him from locking the house even as he threatened to burn him inside the house. As he attempted to escape from the house, the deceased picked an iron bar from under the door wanting to hit him with it. They struggled over the iron bar and he managed to wrestle it from the deceased. He hit the deceased on the head with the metal bar after which the deceased fell down. He tried lifting the deceased from the ground before running to the home of his in-laws after being scared by PW2 who came with a crowd while running. The appellant stated that he was arrested the same night and escorted to Murkujwit AP Camp and later to Kapenguria Police Station.

6. The High Court in its judgment found that the appellant in hitting the deceased to an extent of causing damage to the deceased's head as revealed by the pathologist showed that he harboured the intention to kill him. The High Court consequently found the appellant guilty of murder stating that all the ingredients of the offence were proved by the prosecution. The appellant was sentenced to 30 years imprisonment.

7. The appellant being dissatisfied with the judgment and sentence of the trial Court lodged his memorandum of appeal raising the grounds that the learned judge erred in law and fact by failing to notice that the post-mortem report was not corroborative of the evidence of the prosecution witnesses; that the learned Judge erred in law and fact by failing to appreciate that the elements of the alleged offence were not proved beyond reasonable doubt; that no proper investigation was conducted in the matter; and, that the learned Judge never considered the period of time already spent by the appellant in remand when passing sentence.

8. Both parties filed written submissions which they sought to rely on.

   The appellant's submissions were filed on 14th April, 2021. Counsel for the appellant submitted on two main issues. Firstly, counsel submitted that the appellant's defence of provocation was not considered

by the trial Court. It is the appellant's case that the behavior of the deceased towards the appellant led to the appellant being provoked thereby forcing him to act in the heat of the moment. The appellant's counsel referred to Section 107 of *Penal Code* as providing for the defence of provocation. It was also submitted that the actions of the appellant in those circumstances met the conditions set by this Court for the defence of provocation to stand in the case of *Peter King'ori Mwangi & 2 others v Republic* [2014] eKLR.

Further, counsel relied on the case of *Stephen Kipkeror Cheboi v Republic* [2002] eKLR to submit that provocation in this instance was both instant and cumulative.

9. Secondly, counsel for the appellant urged that the appellant had established that he was acting in self-defence. Counsel submitted that from his testimony, the appellant was apprehensive of the imminent threat to both his life and property when the deceased threatened to lock him inside his own house and burn him. Counsel relied on this Court's decision in *Victor Nthiga Kiruthu & Another v Republic* [2017] eKLR as expounding the doctrine of self-defence and submitted that the circumstances surrounding the incident entitled the appellant to defend himself. In conclusion, counsel urged this Court to find that the trial court failed to appreciate the gaps in the prosecution's case and the defence available to the appellant thereby wrongly convicting him.

10. Counsel for the respondent filed submissions dated 28th April, 2021 and limited herself to the question as to whether the defences of provocation and self-defence were available to the appellant. On provocation, counsel invoked the definition of provocation in Section 208(1) of the *Penal Code* to submit that for the defence of provocation to stand, there must be a trigger that pushed the appellant to lose self-control and commit the offence. According to counsel, the evidence on record revealed no such trigger and the appellant could not therefore rely on the defence of provocation. Further, counsel relied on the case of *Peter Kingori Mwangi & 2 others v Republic* [2014] eKLR to submit that the defence of provocation is not a complete defence that can guarantee the appellant an acquittal.

11. Counsel for the respondent also submitted that the evidence of the appellant cannot be relied on to insinuate provocation yet he gave unsworn testimony hence denying the prosecution an opportunity to cross-examine him and test the veracity of his defence. To counsel, the defence of provocation is an afterthought as the appellant had time to cool off his temper and the offence could not be said to have been committed in the heat of the moment.

12. On the issue as to whether the appellant acted in self-defence, counsel submitted that Section 17 of the *Penal Code* requires the court to construe the defence in line with the principles of English Common Law. Counsel also urged us to adopt the principles set by this Court in the case of *Victor Nthiga Kiruthu & Another v Republic* [2017] eKLR. It is counsel's submission that the evidence on record reveals no imminent danger faced by the appellant and that the force he used to hit the deceased who was drunk at the time was disproportionate hence the defence of self-defence cannot hold.

13. On sentence counsel submitted that the trial Court in issuing a sentence other than the death sentence as provided in law was alive to the circumstances of the case as well as the mitigation by the appellant. In summary, counsel urged this Court to dismiss the appeal in its entirety.

14. The admission by the appellant in his evidence that he took away the life of the deceased reduces our task to determining whether the ingredients of the offence of murder were proved by the prosecution. This duty will entail determining whether both or any of the defences raised by the appellant were available to him.

15. Even though the appellant in his submissions abandoned the ground relating to inconsistencies and contradictions in the prosecution's case, we are inclined to briefly address the issue. On the effect of

inconsistences and contradictions on the prosecution case, this Court stated in *Philip Nzaka Watu v Republic* [2016] eKLR that:

> " However, it must be remembered that when it comes to human recollection, no two witnesses recall exactly the same thing to the minutest detail. Some discrepancies must be expected because human recollection is not infallible and no two people perceive the same phenomena exactly the same way. Indeed as has been recognised in many decisions of this Court, some inconsistency in evidence may signify veracity and honesty, just as unusual uniformity may signal fabrication and coaching of witnesses. Ultimately, whether discrepancies in evidence render it believable or otherwise must turn on the circumstances of each case and the nature and extent of the discrepancies and inconsistencies in question.
>
> In Dickson Elia Nsamba Shapwata & Another v The Republic, Cr. App. No. 92 of 2007the Court of Appeal of Tanzania addressed the issue of discrepancies in evidence and concluded as follows, a view we respectfully adopt:
>
> "In evaluating discrepancies, contradictions and omissions, it is undesirable for a court to pick out sentences and consider them in isolation from the rest of the statements. The Court has to decide whether inconsistencies and contradictions are minor, or whether they go to the root of the matter.""

16. In our view, we have not encountered from the record contradictions or discrepancies that go to the root of the case that was laid by the prosecution against the appellant. We have carefully considered the evidence adduced at the hearing and we do not find discrepancies that are so grave as to vitiate the crux of the charge. The evidence laid before the Court will be considered as a whole in order to determine whether it is the prosecution case or the defence case that is to be believed.

17. The appellant was charged with the offence of murder. It suffices to restate the various elements of the charge that the prosecution ought to prove beyond reasonable doubt so as to attain conviction for the offence. Section 203 of the *Penal Code* provides for the ingredients of the charge of murder to include the fact and cause of death of the deceased person; that the death of the deceased was as a result of an unlawful act or omission on the part of the accused person; and that such unlawful act or omission was committed with malice aforethought. Those ingredients were aptly stated by this Court in *Roba Galma Wario v Republic* [2015] eKLR thus:

> " For the conviction of murder to be sustained, it is imperative to prove that the death of the deceased was caused by the appellant; and that he had the required malice aforethought. Without malice aforethought, the appellant would be guilty of manslaughter, as it would mean the death of the deceased during the brawl was not intentional."

18. In this case, there is no doubt that the deceased died. This fact was proved by Dr Wilfred Mungare Munyalo (PW9) who conducted post- mortem on the body of the deceased and produced a post-mortem report establishing the cause of death as increased intracranial pressure and cardiopulmonary failure due to blunt head trauma as a result of assault. Indeed, the appellant concedes that his encounter with the deceased on the material day dispatched the deceased to the hereafter.

19. Having established the fact and cause of death of deceased, the next issue is answering the question as to who caused the death of the deceased. The appellant himself provided the answer when he admitted that he inflicted the fatal blow on the head of the deceased. This evidence confirmed that of PW1 and PW3 who saw the appellant hit the deceased on the head with an iron bar. This set of evidence when

considered alongside the evidence of the pathologist leaves no doubt that it is the appellant's actions that led to the demise of the deceased.

20. For the record, we note that there is no evidence that intervening factors might have caused the death of the deceased other than the fact that the deceased was hit using a metal bar. This is confirmed by the evidence of PW3 who stated that the deceased fell down immediately he was hit with blood oozing from his nostrils and the head. In the circumstances, we find that even the identity of the appellant is not in doubt as the appellant himself corroborates the evidence of the prosecution witnesses that he is indeed the one who hit the deceased on the head.

21. The question of the day is whether in hitting the deceased, the appellant had the intention to kill him or cause him grievous harm or whether the appellant had the requisite malice aforethought. Section 206 of the *Penal Code* provides the circumstances from which malice aforethought can be inferred as follows:

> "(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 the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;
>
> (c) an intent to commit a felony;
>
> (d) escape from custody of any person who has committed or attempted to commit a felony."

22. As to whether the appellant had malice aforethought when he hit the deceased with the metal bar on the head, we are required to take into consideration all the circumstances surrounding the event. In that regard, this Court in *Bonaya Tutu Ipu & another v Republic* [2015] eKLR held that:

> "It is in rare circumstances that the intention to cause death is proved by direct evidence. More frequently, that intention is established by or inferred from the surrounding circumstances. In the persuasive decision of Chesakitv Uganda, CR. App. No.95 of2004, the Court of Appeal of Uganda stated that in determining in a charge of murder whether malice aforethought has been proved, the court must take into account factors such as the part of the body injured, the type of weapon used, if any, the type of injuries inflicted upon the deceased and the subsequent conduct of the accused person. Earlier in REX v Tubere s/ oOchen (1945) 12 EACA 63, the former Court of Appeal for Eastern Africa stated thus on the issue:
>
> > "It (the court) has a duty to perform in considering the weapon used and the part of the body injured, in arriving at a conclusion as to whether malice aforethought has been established, and it will be obvious that ordinarily an inference of malice will flow more readily from the case, say, of a spear or knife than from the use of a stick..."""

23. It is also from the circumstances surrounding the commission of the offence that the court can determine whether any defence proffered by an accused person is plausible. In this case, the trial Court in finding that the appellant had malice aforethought considered the nature and extent of the injuries

suffered by the deceased. However, before us, the appellant has pleaded the defences of provocation and that of self- defence. This being a first appeal, the appellant is as a matter of right entitled to our opinion on this issue.

24. With regard to the defence of provocation, the appellant submitted that it is the deceased who went to his home, initiated the quarrel with him, accused him of wanting to kill him, snatched his flour, and eventually hit him first. The appellant submits that these actions of the deceased amounted to provocation and that he acted on impulse without reflecting on the consequences of his actions. The respondent on the other hand urged that the defence of provocation was an afterthought as the same was never raised during cross-examination of any prosecution witness therefore denying the prosecution an opportunity to rebut the evidence. The respondent also submitted that such a defence as raised by the appellant in his unsworn testimony denied the prosecution an opportunity to cross-examine him to test the veracity of such claims.

25. This Court has ruled in the past that even if a defence is not raised but there exist circumstances as to lead to scrutiny of such a defence, the court ought to address itself to the defence and test whether it is available for the accused in the circumstances of that particular case. Our statement is backed by the decision of this Court in *Katana Karisa & 4 others v Republic* [2008] eKLR where it was stated that:

> " However, the fact that the appellants did not raise the defence of provocation at the trial did not preclude the trial court from considering such alternative defence if it emerged from the evidence, for the prosecution had not only to dispose of the defence set up by the appellant herein that they did not kill the deceased but had also to prove that evidence adduced by the prosecution was only consistent with murder. In R v Sharmpal Singh s/o Pritam Singh [1962] EA 13, the Privy Council (in an appeal arising from the decision of the predecessor of this Court) said at page 15 paragraph H:
>
> "It is now well established by a series of authorities, in which Mancini v D.P.P. [1942] AC 1, is the first and still the best known, that it is the duty of the Judge to deal with such alternatives if they emerge from the evidence as fit for consideration notwithstanding that they are not put forward by defence ....."."

26. As the first appellate Court, we are therefore enjoined to address ourselves to this defence in our independent consideration of the evidence on record. Section 207 of the *Penal Code* provides for the defence of provocation in the following terms:

> " When a person who unlawfully kills another under circumstances which, but for the provisions of this section, would constitute murder, does the act which causes death in the heat of passion caused by sudden provocation as hereinafter defined, and before there is time for his passion to cool, is guilty of manslaughter only."

27. Section 208(1) of the *Penal Code* then proceeds to define provocation as follows:

> " The term "provocation" means and includes, except as hereinafter stated, any wrongful act or insult of such a nature as to be likely, when done to an ordinary person or in the presence of an ordinary person to another person who is under his immediate care, or to whom he stands in a conjugal, parental, filial or fraternal relation, or in the relation of master or servant, to deprive him of the power of self- control and to induce him to commit an assault of the kind which the person charged committed upon the person by whom the act or insult is done or offered."

28. It therefore follows that in the event of an unlawful killing which would ordinarily amount to murder, the incident will be reduced to manslaughter if the act which causes death is done in the heat of passion caused by provocation. It is therefore incumbent upon us to consider whether in the circumstances of this case, the appellant acted in the heat of passion caused by grave and sudden provocation of the deceased. We are also cognizant of the subjective and objective tests of the defence of provocation as has been submitted by the appellant while relying in the case of *Peter King'ori Mwangi & 2 others v Republic* [2014] eKLR.

29. The evidence of PW1 and PW3 is important in the circumstances because it creates the picture of what transpired at the scene. PW1 testified that it is the appellant who invited the deceased to his home. She also testified that the deceased was drunk at that time. The evidence of PW3 is that the deceased seemed drunk and that the deceased asked the appellant why he had said he would kill him. The appellant then got out of his house with a metal bar and hit the deceased. PW3 also testified that the appellant did not appear drunk which contradicted the appellant's evidence that he had taken chang'aa worth 50 shillings. Both PW1 and PW3 confirmed that the appellant and the deceased had a brief quarrel between themselves before the appellant went for the metal bar and hit the deceased on the head. None of these two witnesses saw the deceased hit the appellant with a stick as alleged by the appellant in his testimony. Additionally, it is the evidence of PW3 that upon hitting the deceased, the appellant took off from the scene. The evidence of PW3 who identified himself as a brother of the appellant corroborated that of PW1 who was a child of tender years. We find no reason why PW3 would give false testimony against his brother.

30. The degree of provocation is a factor in assessing whether the appellant's actions were guided by the heat of passion thereby depriving him the reasoning standard of an ordinary man or whether the provocation would still be operating on his mind so as to deprive him of the power of self-control. From the evidence recounted above, we do find the appellant's argument that the he was provoked to an extent that he lost his cool and acted in the heat of the moment is unsustainable. The appellant ought to have duly noted that the deceased was drunk. Further, the appellant took off from the scene after hitting the deceased and hid himself in another house in an attempt to evade arrest. He therefore was of a stable state of mind. In the circumstances, the appellant's defence of provocation is therefore not available to him.

31. On self-defence, Section 17 of the *Penal Code*, which provides for it, is couched in the following words:

> " Subject to any express 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."

32. In *Ahmed Mohammed Omar & 5 others v Republic* [2014] eKLR, this Court addressed itself to the common law principles of self- defence as follows:

> " The classic pronouncement on this issue and which has been severally cited by this Court is that of the Privy Council inPalmerv R [1971] A.C. 814. The decision was approved and followed by the Court of Appeal in R v McINNES, 55 Cr. App. R. 551. Lord Morris, delivering the judgment of the Board, said:
>
> "It is both good law and good sense that a man who is attacked may defend himself. It is both good law and common sense that he may do, but may only do, what is reasonably necessary. But everything will depend upon the particular facts and circumstances.

.....Some attacks may be serious and dangerous. Others may not be. If there is some relatively minor attack, it would not be common sense to permit some act of retaliation which was wholly out of proportion to the necessities of the situation. If an attack is serious so that it puts someone in immediate peril, then immediate defensive action may be necessary. If the moment is one of crisis for someone in immediate danger, he may have to avert the danger by some instant reaction. If the attack is over and no sort of peril remains, then the employment of force may be way of revenge or punishment or by way of paying off an old score or may be pure aggression. There may be no longer any link with a necessity of defence. .....

The defence of self-defence either succeeds so as to result in an acquittal or it is disproved, in which case as a defence it is rejected. In a homicide case the circumstances may be such that it will become an issue as to whether there was provocation so that the verdict might be one of manslaughter. Any other possible issues will remain. If in any case the view is possible that the intent necessary to constitute the crime of murder was lacking, then the matter would be left to the jury."

According to Archbold– Criminal Pleading, Evidence and Practice 2002, paragraph 19-42, the test of whether force used in self defence was reasonable is not purely objective.

"There is no rule of law that a man must wait until he is struck before striking in self defence." R v Deana,2 Cr. APP. R. 75, CCA."

33. In the present case, the appellant testified that his life was in danger when the appellant threatened to torch him if he locked himself inside his house. He also pleaded that he resorted to defending himself when the deceased first attacked him with a walking stick. Further, that he even had to wrestle the murder weapon being the iron bar from the deceased. This evidence was against the evidence of the PW1 and PW3 who were eye-witnesses at the scene. In fact, according to Maureen Titika (PW7), she was the one who traced the appellant and locked him inside a house where he had taken refuge. This was further corroborated by the evidence of PW6 Edwin Mutai Elly and PW8 Philip Limareng who testified that they arrested the appellant from a house he was hiding in. The evidence of PW6, PW7 and PW8 discredited the appellant's claim that he had gone into hiding because he feared for his life. His hideout was well-known even before the arrival of those who arrested him. If the members of the public were interested in attacking him they would have easily located him. Nobody can therefore be faulted for holding that the appellant had gone underground after appreciating the magnitude of his unlawful acts.

We find the evidence of the prosecution witnesses credible as compared to that of appellant.

34. Considering what we have just stated, and in view of our finding that there was no provocation, we find that in the circumstances the appellant's claim that he was acting in self-defence unbelievable. Our position is fortified by nature of injuries sustained by the deceased and the type of weapon used by the appellant to inflict such injuries. As a reasonable member of society, the appellant ought to have known that his actions would result in the death of the deceased.

35. Our determination that the defences raised by the appellant were not available to him lead us to the conclusion that the trial Court correctly found that the appellant's actions were driven by malice aforethought. The nature of the injuries suffered by the appellant as recounted by PW9 reveals an act that was committed with one main objective, to grievously impair, injure or end the life of the deceased. Brutal force was applied to the head of the deceased which is a sensitive part of the body. If the appellant wanted a different result, he could have employed other means of resolving his argument with the deceased who was visibly drunk at the time. We therefore find and agree with the trial Court that the appellant acted with malice aforethought.

36. We are therefore satisfied that the prosecution proved their case against the appellant beyond reasonable doubt. In the circumstances, we find that the learned Judge correctly directed himself as to the evidence on record and the law in finding the appellant guilty of murder. The appeal against conviction is therefore without merit and is dismissed.

37. The next issue for our determination is in respect of the sentence imposed on the appellant. This matter was determined post the decision of the Supreme Court in *Francis Karioko Muruatetu & Another v Republic* [2017] eKLR which gave courts the leeway to impose other sentences in murder cases other than the mandatory death sentence provided by Section 204 of the Penal Code. The trial Judge was therefore within his discretionary sentencing powers in locking away the appellant for 30 years. The appellant contends that the sentence is harsh and that is what we need to examine.

38. The sentencing mandate of an appellate court was explained by this Court in *Ahamad Abolfathi Mohammed & another v Republic* [2018] eKLR as follows:

> " As what is challenged in this appeal regarding 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. In Bernard Kimani Gacheru v. Republic, Cr App No. 188 of 2000 this Court stated 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 material, or acted on a wrong principle. Even if, the Appellate Court feels that the sentence is heavy and that the Appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exist."

39. It therefore follows that before an appellate court interferes with the sentence of a trial court, it must be satisfied that the trial court acted on wrong principles; ignored material factors; took into account irrelevant considerations; or on the whole that the sentence is manifestly excessive. The appellant has not established any of these grounds to merit our interference with the sentence imposed on him. We therefore find no merit in his appeal against the sentence.

40. The upshot of it all is that the appellant's appeal has no merit whatsoever. We dismiss it in its entirety.

DATED AND DELIVERED AT ELDORET THIS 10TH DAY OF FEBRUARY, 2023

F. OCHIENG

.....

JUDGE OF APPEAL

L. ACHODE

.....

JUDGE OF APPEAL

W. KORIR

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR