



REPUBLIC OF KENYA



**KENYA LAW**  
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**Adhoch v Republic (Criminal Appeal 19 of 2020)  
[2022] KECA 819 (KLR) (29 July 2022) (Judgment)**

Neutral citation: [2022] KECA 819 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT MALINDI  
CRIMINAL APPEAL 19 OF 2020  
SG KAIRU, P NYAMWEYA & JW LESSIT, JJA  
JULY 29, 2022**

**BETWEEN**

**GEORGE OWINO ADHOCH ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(An appeal from the conviction and sentence of High Court at Malindi,  
(Nyakundi, J) delivered on 14th May, 2020 (H.C. Case No. 18 of 2018))*

**JUDGMENT**

1. The appellant, George Owino Adhoch, was convicted of murder contrary to section 203 as read with 204 of the Penal Code. The particulars of the offence were that on October 10, 2018 at Mnarani sub-location the appellant murdered Juma Boi Jundwa. He pleaded not guilty and the matter proceeded to trial with 5 witnesses in support of the prosecution's case.
2. In brief the prosecution case was that on the material day, PW1 sold a bottle of alcoholic drink each to the deceased and the appellant, at Signature Pub, and closed for the day, leaving the two at the club. PW3, the watch man of the Signature Pub stated that he could see the deceased and the appellant inside the club. He testified that before long, he saw the deceased go to where the appellant was seated and forcefully take his alcoholic drink. That his action triggered a fight between them which continued outside the club. That when he saw the appellant attack the deceased with a club on the chest and stomach he called PW2, a boda boda rider to go assist take the two to hospital. He said that the deceased died before PW2 reached the scene. PW2 on his part said he saw the deceased lying on the ground at the club but did not bother with him.
3. The appellant gave an unsworn statement. The appellant in his defence admitted being at the bar and that he was in the presence of Jackson (PW3), Kanzo and Noah (PW2). He testified that the deceased who was in a drunken stupor, entered the bar and caused fracas resulting in a fight between him and



- the deceased. He testified that the deceased threw a stone at him and he pushed the deceased who fell on some trees; that he sustained injuries as a result. He told court that he informed Noah to bring a motorcycle that was used to transport him (the appellant) to hospital. He denied killing the deceased.
4. The learned trial Judge found the appellant culpable of murder. The learned judge found that the death of the deceased was proved through the post mortem report Pexh5; that the cause of death was indicated as severe head injury. He found that the evidence of PW1, PW2 and PW3 identified the appellant as the assailant; that the cause of death was as a result of an unlawful act and that malice aforethought could be inferred from the head injury. The court rejected the defence of self-defence because there was no evidence that the appellant was under any reasonable belief of attack or danger from the deceased. He also rejected the defence of provocation because there was no evidence of any wrongful act by the deceased so as to deprive him of the power of self-control; that the appellant was able to cool off when he stepped out of the fighting scene. It was concluded that the prosecution satisfied its burden of proof. The appellant was found guilty of the offence of murder and convicted. After considering mitigation, the appellant was on May 14, 2020 sentenced to serve 28 years imprisonment.
  5. Being aggrieved by the decision of the High Court, the appellant filed this appeal raising six grounds as follows:
    - a. That, the post mortem report and medical documentary report produced as exhibits were admitted in violation of Section 77 of the *Evidence Act*.
    - b. That, the elements of provocation provided under section 207 as read with section 208 of the *Penal Code* was never taken into account
    - c. That, the element of intoxication under section 13 of the Penal Code was never established.
    - d. That, the investigating officer did not visit the scene of the crime since the charge was based merely on recorded witness statements.
    - e. That, there was no link as to how the exhibits were recovered from the scene.
    - f. That, the appellant's mitigation and defence were not considered in violation of section 216 and 329 of the *Criminal Procedure Code*.
  6. When the appeal was called out for virtual hearing, Mr. Ngumbao Mutua learned counsel for the appellant, and Ms. Vivian Kambaga learned Prosecution counsel were present and ready to proceed.
  7. Mr Ngumbau relied on his written submission dated March 28, 2021. He urged that he was condensing the six grounds of appeal raised in this appeal into two grounds. Counsel urged that the learned trial Judge erred for convicting the appellant based on insufficient evidence for reason; PW1 and PW2 did not witness the incident, that PW2's evidence shows he ferried the appellant to hospital pursuant to a fight; that PW3 who was present during the fight being the watchman gave scanty evidence, not mentioning the murder weapon, and shedding no light on how the body of the deceased was recovered. Counsel raised issue whether the exhibits were properly admitted urging that the proceedings shows they were adduced in evidence without mention of Sections 33 and 77 of the *Evidence Act*; that in the judgment it was mentioned that the parties admitted them by consent, in which case, counsel urged, the *Evidence Act* was not complied with. Finally, learned counsel for the appellant urged that the three ingredients for the offence of murder were not proved, that the prosecution case was weak and shaky, and that the appeal should be allowed.
  8. Ms. Kambaga learned Counsel for the State opposed the appeal relied on the written submissions filed on the March 20, 2022 in response to the appellant's written submissions. On the production



of exhibits, counsel urged that the post mortem report was produced by PW5 a police officer present during the post mortem, and that no objections were raised by the defence. In regard to the issue of provocation raised in the appellant's written submissions, counsel urged that they were relying on the evidence of PW3 who stated that the deceased forcefully took the appellant's drink which gave rise to the fight.

9. The State conceded that the defence of intoxication and provocation applied and should have been given due consideration as the appellant was intoxicated and was also provoked. That even in his conduct the appellant did not behave as one with a guilty mind as he did not try to flee. Ms. Kambaga urged that in the circumstances the offence of murder was not proved, and urged that the offence be reduced to manslaughter. That in considering sentence the Court do consider the period the appellant has been in custody since 2018.
10. This being a first appeal, it behooves this Court to re-evaluate, re-assess and reanalyze the evidence on record and then determine whether the conclusions reached by the learned trial Judge should hold. In *Okeno v Republic* [1972] EA 32, the Court of Appeal for East Africa expressed this principle thus:

“ An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination ... and to the appellate court's own decision on the whole evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions...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 conclusion; 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...”
11. We have considered this appeal, the memorandum of appeal and grounds raised therein, the submissions of counsel from both sides and the list of authorities relied upon.
12. Mr. Ngumbao for the appellant raised two issues, while Ms. Kambaga conceded the appeal in part. Taking these into consideration we find that the issues for determination are twofold; one, whether the prosecution adduced sufficient evidence to sustain a conviction; and two, whether the documentary exhibits were properly admitted in evidence.
13. In regard to the sufficiency of the prosecution evidence, the appellant's counsel posited that the evidence of PW3 was scanty, while PW1 and PW2 did not witness the incident. We have considered the evidence that was adduced and found several gaps. PW1 was the person that sold alcohol to both the appellant and the deceased before leaving for the day. She left PW3 as the watchman. From the evidence of PW3, he was watchman but also the owner of the Pub where the incident in question took place, and was present when he saw the deceased and the appellant start fighting. He said that what triggered the fight was the deceased's level of intoxication, and secondly, his aggressive conduct. PW3 described seeing the deceased forcefully take the appellant's drink from him. A fight ensued inside the Pub, which continued outside the Pub.
14. That when he saw the appellant hitting the deceased on the chest and stomach with a club, he called PW2 to return with his motor bike to take them to hospital. PW3 initially stated that PW2 took both the deceased and the appellant to the hospital. He then changed and said that the deceased was left at the scene. PW2 contradicted PW3 because he said that when the latter called him he told him that someone had been killed at the Pub. He said that he was asked to go back to the Pub to take PW3 and the appellant to hospital. According to PW2, both the appellant and PW3 were injured and he took both to hospital. As for the deceased, PW2 said he saw him lying on the ground.



15. The gaps in the prosecution case is lack of clarity about the number of people involved in the fight that night. From PW2, they were at least three, the deceased, the appellant and PW3. The evidence of PW2 in that regard corroborates the appellant's defence that the deceased also fought with PW3.
16. That brings us to the other point that given the poor quality of lighting, it is not clear how PW3 could have been able to make out the weapon used by the appellant, and the part of the deceased body the appellant targeted. This is important as the prosecution had the burden to create a nexus between the injury the deceased suffered and the appellant.
17. And finally, we noted that the deceased was left at the scene when PW2, PW3 and the appellant left for the hospital. There is no clear evidence of the deceased condition. More importantly, given the post mortem findings on the cause of death, there was no nexus between the cause of the death of the deceased and the beating he received from the appellant. PW4, the deceased kin who identified his body for post mortem testified that he saw a fractured skull and a nail which had penetrated the skull. There was no evidence of a nail cracking the skull from the evidence of PW3. Not to mention that the alleged murder weapon adduced in evidence by PW5 was not identified by any witness, not even PW3.
18. One more important fact is in the evidence of PW5, the sole police officer who testified in this case. He said that the deceased was found dead the following day. He does not say where the body was found. He also introduced new evidence which was not mentioned by any other witness, which was that there were two people fighting over the bar maid, PW1. He did not disclose who these two people were, and there can be no speculation about who they could have been, as the evidence shows both PW3 and the appellant were present.
19. We find that the credibility of PW3, the sole witness who was present at the scene when the fight between the deceased and the appellant allegedly took place was doubtful. He was part of the fight, according to injuries PW2 saw on him, and secondly, he gave economical evidence to exonerate himself.
20. In the Court of Appeal case of *Ndungu Kimanyi V. Republic* [1979] Klr 283, Madan, Miller and Potter JJA held:

“The witness in a criminal case upon whose evidence it is proposed to rely should not create an impression in the mind of the court that he is not a straightforward person, or raise a suspicion about his trustworthiness, or do (or say) something which indicates that he is a person of doubtful integrity, and therefore an unreliable witness which makes it unsafe to accept his evidence.”
21. In regard to the documentary exhibits adduced in this case, Mr. Ngumbao, learned counsel for the appellant raised issue whether the exhibits were properly admitted. We have analyzed the evidence of PW5, the sole police officer who testified. In his evidence, he stated, “I participated in the post mortem on 12.10.2018. I have the post mortem as exhibit 2.” There was no interrogation why the maker could not be called as a witness, as Sections 33 and 77 of the *Evidence Act* require. That said, we note that the appellant was represented by counsel who was present at the time of production, but raised no objection.
22. We have considered this appeal and find that the evidence adduced by the prosecution was not credible, that it did not create a nexus between the injuries suffered by the deceased and the action of the appellant and that there was a long period of time that was unaccounted for, between the time the appellant and PW3 left the scene and the next day when the deceased body was found. In the circumstances, we find that the prosecution did not prove the case against the appellant on the required standard of proof, beyond any reasonable doubt.



23. In the result, the appeal succeeds, the conviction is quashed and the sentence set aside.

24. The appellant should be set free unless he is otherwise lawfully held.

**DELIVERED AND DATED AT MOMBASA THIS 29<sup>TH</sup> DAY OF JULY, 2022.**

**S. GATEMBU KAIRU, FCIArb**

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**JUDGE OF APPEAL**

**P. NYAMWEYA**

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**JUDGE OF APPEAL**

**J. LESIIT**

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**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**

