Mwangi v Republic (Criminal Appeal 13 of 2012)
[2021] KECA 149 (KLR) (19 November 2021) (Judgment)

Neutral citation: [2021] KECA 149 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAKURU

CRIMINAL APPEAL 13 OF 2012

RN NAMBUYE, PO KIAGE & J MOHAMMED, JJA

NOVEMBER 19, 2021

BETWEEN

PETER MWANGI MWANGI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against the judgment of the High Court of Kenya (W. Ouko, J.) dated 21st February, 2012 in Nakuru Criminal Case No. 105 of 2009)

JUDGMENT

1. This is a first appeal arising from the judgment of the High Court of Kenya at Nakuru, W. Ouko, J. (as he then was) in Criminal Case No. 105 of 2009 dated 21st February, 2012.

2. The background to the appeal albeit in a summary form is that the appellant was charged with the offence of murder contrary to section 203 as read with section 204 both of the *Penal Code.* The particulars of the offence were that on 16th December, 2009 at Geta Village in Kipipiri District within the Central Province murdered Joseph Mwangi Nderitu. The appellant denied the charge prompting a trial in which the prosecution called eight (8) witnesses to prove the charge against him while he was the sole witness in support of his defence.

3. The prosecution case as gathered from the testimonies of PW1, Benjamin Wanjau Nderitu, (Benjamin), PW2 - Rahab Muthoni (Rahab), PW3 - John Kabiru Mungai (John), PW4 - Gabriel Nderitu Muthoni (Gabriel), PW5 - Milka Wanjiru Nderitu, (Milka), PW6 - APC Moses Busendich (APC Moses), PW7 - CPL John Rono (CPL John) and PW8 - Dr. Jackson Macharia (Dr. Jackson) is that the appellant and the deceased were neighbours. On 16th December, 2009 between 10.00am – 11.00am, the appellant's cow strayed into Milka's farm and destroyed crops. The deceased who was a son to Milka drove it out onto the road. The appellant and his wife are alleged to have protested and stormed the deceased's home over the issue. Loud exchange of words between them, drew the

attention of Rahab, John and Milka to deceased's home. Milka intervened. The appellant is alleged to have uttered threats against the life of the deceased before leaving the deceased home.

4. At 7.00 – 8.00pm on the same date, Benjamin phoned the deceased and inquired of his whereabouts. The deceased is alleged to have replied that he was on his way home from the market where he had gone to buy unga only for Benjamin to hear him screaming mentioning the appellant's name and asking why the appellant was killing him for no good reason. Benjamin rushed to the direction of the deceased's screams. Before reaching the deceased, he saw a person approaching from the direction of the screams. He flashed the person with a torch he had on him and recognized the person as the appellant, who jumped over the fence and disappeared into his compound which Benjamin knew very well as they were neighbours.

5. Gabriel also heard the deceased screaming that he had been killed by appellant for nothing. Gabriel also heard the appellant ask the deceased for how long he (the deceased) was going to disturb him. Gabriel left for the scene. On the way, he met a person coming from the direction of the deceased's screams. The person flashed Gabriel with a torch. Gabriel recognized the person as the appellant with the help of both bright moonlight and light from the appellant's own torch. The appellant started chasing him while holding a knife but stopped the chase when he (appellant) sensed the presence of other persons also headed in the direction of the deceased's screams and disappeared into his compound nearby.

6. On arrival, Benjamin, Gabriel and Rahab found the deceased lying on the ground, holding his stomach. He told them that he had been killed by the appellant. They observed injuries on the deceased's stomach which was bleeding; and another on his head. Benjamin made arrangements and rushed the deceased to hospital but he died before arrival at the hospital. The body was taken to the mortuary, and a report made to police at 9.45p.m. on the same date.

7. In response to the above report, CPL John in the company of P.C Jemei and P.C Driver Soita left for the scene where on arrival noticed a sign of struggle and blood stains. They were given the name of the appellant as the assailant. They went to his home but found it deserted. The following day Benjamin went back to the scene and recovered unga (flour) believed to be what the deceased informed Benjamin, he had gone to buy and a cap Benjamin identified as belonging to the appellant who he had seen wearing it on numerous occasion. These were handed to police as exhibits.

8. On 18th December, 2009 at 10.00pm, the appellant reported to APC Moses that he had fought with the deceased. APC Moses detained him and handed him over to police on the next day.

9. Dr. Jackson Macharia, carried out post mortem on the body of the deceased. He observed a deep sharp penetrating stab wound on the right lower chest between the 10th and 11th ribs, 5cm long, 6cm on the lower abdomen. Internally the wound penetrated the gall bladder, and the stomach resulting in massive collection of blood within the abdominal cavity. Cause of death was given as cardio pulmonary arrest, secondary to severe haemorrhage secondary to abdominal stab wound.

10. In his defence, the appellant admitted having been aware of the incident that had occurred between him and the deceased earlier in the day but denied confronting the deceased over the issue. It was his testimony that it was the deceased while in the company of Milka, John and Rahab who stormed his homestead over the same issue and demanded compensation for destroyed crops to the tune of Kshs. 3,500.00 which he promised to pay. He also recalled that, on the evening of that same day while headed home from Riverside Shopping Centre in the company of the deceased, they met Benjamin and his party who immediately demanded the compensation money. When he told them that he only had Kshs. 700.00 on him, they set upon him and started assaulting him. He struggled with them and they fell down. In the process the Kshs. 700.00 he had on him also fell down. He managed to escape from

them and fled to his home nearby. He denied reporting to APC Moses on 18th December, 2009 that he had fought with the deceased.

11. At the conclusion of the trial, the learned Judge analyzed the record and concluded that there was no eye witness to the incident. The prosecution case therefore rested entirely on circumstantial evidence.

12. On the threshold for finding conviction based on circumstantial evidence, the learned Judge reviewed the case of *Republic vs. Kipkering Arap Koske & Another* [1949] 16 EACA 135 and *Simon Musoke vs. Republic* [1958] EA 715 and considering the principles enunciatedtherein in light of the rival positions before the Court expressed himself on this issue as follows:

> " The prosecution relied on the following circumstantial evidence. There was a disagreement between the deceased and accused person in the morning of the incident; that on that occasion, the accused was armed with a knife and a club; that he uttered threatening words; that the deceased gave the name of the accused person as the one who had inflicted his injuries; that Nderitu and Gabriel saw him fleeing from the scene of the stabbing; that Gabriel heard his voice; that the accused person's marvin hat was recovered at the scene; that on 18th December, 2009 he reported to APC Moses Busendik that he had fought with a someone.
>
> The disagreement that was witnessed by several people was in the morning at about 10a.m. Rahab, Kaburu and Milka, all witnesses to the morning incident confirmed that the accused was armed with a knife. They also said that he issued threats directed at the deceased. That very evening, the accused and the deceased person were together walking from Riverside. Gabriel heard and recognized the voice of the accused, who was a neighbour, asking the deceased for how long the deceased was going to disturb him. The deceased was exclaiming that the accused was going to kill him. The deceased then screamed that Peter "had killed him for nothing". When Gabriel got to the scene, which was only 15 meters from his house, he saw the accused holding a torch. Gabriel was categorical that, with the aid of the torch light as well as moon-light, he was able to see the accused person. He also recognized him from his voice."

13. On voice recognition, the learned Judge reviewed the record and applied thereon principles/ propositions enunciated in the case of *Mbelle vs. Republic [1984] KLR* 625, that before acting on evidence of voice recognition as a basis for finding a conviction against an accused person, the Court must ensure that there is evidence to demonstrate that the voice was that of the accused; the witness was familiar with the voice and recognized it; and, lastly, that the conditions obtaining at the time it was made were such that there was no mistake in testifying to what was said and who had said it, and expressed himself thereon as follows:

> " I am persuaded that being neighbours and with the aid of torch light Gabriel recognized the accused person both from his appearance and voice.
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> On recognition by Nderitu, the witness was categorical that he flashed his torch on the accused person who was coming towards him. That the accused person was only 30 meters from the witness."

14. On visual identification, the learned Judge reviewed and considered the principles/propositions in the case of *Cleophas Otieno Wamunga vs. Republic [1989] eKLR* and *Pius Jasunga s/o Akumu vs. Reginam (1954) 21 EACA 331*, in light of the record on this issue and expressed himself thereon as follows:

> " As Gabriel was making his way to the scene, he heard the deceased screaming that "he had been killed" by Peter. When Gabriel got to where the deceased lay down, it was his evidence that the deceased stated repeatedly that "he had been killed" by Peter for nothing.
>
> The description of Peter taken, with what Nderitu heard, more or less at the same time, to the effect that the deceased was crying that Peter Mwangi had stabbed him, together with the evidence of Rahab, the only person fitting the description in the circumstances was the accused person.
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> Although it was after 7p.m., there was unanimous evidence that the deceased was with the accused person hence the former could not have mistaken the person who attacked him. An independent witness and a neighbour to both the accused and the deceased person, Milka also confirmed that the deceased told her that he had been stabbed by Peter.
>
> From all the foregoing, I find that the accused was positively recognized as the person who inflicted the single fatal wound on the deceased."

15. Turning to appellant's defence, the learned Judge expressed himself thereon as follows:

> " The accused, in his defence, contended that he had been attacked by the deceased, Nderitu and Gabriel. But according to P3 form produced in the evidence, he told the examining doctor that he had been attacked by two persons, known to him. Indeed, he had reddened eye, scratch marks on the forehead and general tenderness on the trunk and right thumb.
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> It is my view in the circumstances of this case that these injuries must have been sustained in the process of the accused stabbing the deceased and a struggle between them. The circumstantial evidence points irresistibly to the guilt of the accused person and I find no co-existing factors that would weaken that inference."

16. On proof of elements for the offence of murder the learned Judge stated as follows:

> " Although there was a single stab wound, the fact that from the morning incident the accused had all through been armed with the knife and made threatening statements, I have no doubt that he intended to cause grievous harm to the deceased.
>
> For the reasons stated, I find the accused guilty of murder contrary to Section 203 as read with Section 204 of the Penal Code."

17. The appellant was convicted and sentenced to thirty (30) years imprisonment. He filed this appeal against the above decision raising eight (8) grounds of appeal subsequently condensed into thematic issues in his written submissions, which may be summarized into the following:

    i. Evidence tendered by the prosecution did not prove the charge against appellant beyond reasonable doubt;

    ii. Appellant's defence was plausible and should not have been rejected by the trial court;

iii. Trial Judge's failure to call for a pre-sentencing probation officer's report on mitigating factors was highly prejudicial to the appellant as it resulted in the trial court handing down a harsh and excessive sentence against appellant and which should be interfered with and set aside.

18. Addressing the Court globally on the above condensed grounds of appeal, counsel submitted that in the absence of evidence of an eye witness the prosecution evidence rested entirely on circumstantial evidence which they submit fell short of meeting the required threshold of proof of a criminal charge against the appellant beyond reasonable doubt.

19. In support of the above proposition, counsel faults the trial Judge for failure to appreciate that the appellant was the one who was assaulted by the deceased and his relatives as was corroborated by the P3 form he tendered in support of his defence which indicated clearly that he had suffered injuries; allegation that the appellant had threatened the deceased earlier on the day of the incident was not proved as no report of the alleged incident was made either to the police, area chief or any other person in authority, there was no basis for holding that appellant was armed with a sword throughout the day as only two incidences were alluded to by witnesses, Benjamin who allegedly saw the appellant with help of moonlight and torch light did not mention seeing him armed with a sword, while Rahab who was allegedly in the company of Benjamin and Gabriel did not mention seeing the appellant. Lastly, that the trial court's failure to call for a probation officers pre-sentencing report resulted in the trial court handing down a harsh and excessive sentence which should be interfered with.

20. In rebuttal, Ms. Chelangat submitted that the appellant was placed at the scene of the murder of the deceased by the circumstantial evidence adduced by the prosecution against him, mistaken identity of the appellant did not arise as he named key prosecution witnesses to have been among the persons who attacked him on that very material night and at the very same spot where the deceased was found injured, shortly before he succumbed to injuries inflicted against him, evidence on the deceased's dying declaration was properly appreciated, considered and the law applied thereon before finding it credible and safe to be acted upon as basis for finding a conviction against him, allegation of self defence was rightly rejected by the trial Judge who found it displaced by credible prosecution evidence, there was no basis for the appellant's assertion of alleged bias against him by key prosecution witness as evidence on record indicated clearly that the scene of the murder was near where both the appellant and key prosecution witnesses lived. They therefore knew each other very well. These witnesses therefore testified to court of events they themselves had witnessed especially when it was never put to them in cross examination that they were biased against the appellant. Lastly, that failure to call for a pre-sentencing probation officer's report was not fatal to the sentence handed down against the appellant as it was not a mandatory requirement.

21. In reply, Mr. Maragia added that the appellant never admitted that he killed the deceased in self defence.

22. This is a first appeal. Our mandate is as was aptly set out in the case of *Okeno vs. Republic [1972] EA 32*, namely:

> " 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."

23. We have considered the record in light of the above mandate, and the rival submissions set out above. Issues that fall for our determination are, whether:

    1. Ingredients for the offence of murder were established;
    2. Circumstantial evidence relied upon by the trial court as basis for convicting appellant satisfied the threshold of proof beyond reasonable doubt;
    3. Evidence of deceased's dying declaration was properly appreciated, before basing appellant's conviction thereon;
    4. Failure of the trial court to call for a pre-sentencing probation officer's report on mitigating factors rendered the sentence handed down against appellant by the trial court null and void.

24. Starting with issue number 1, the court in *Republic vs. Nyambura & 4 Others [2001] KLR* 355 reiterated that there are three key elements for proof of the offence of murder namely, proof that:

    i. Death of the deceased occurred;
    ii. That the death of the deceased was caused by an unlawful act or omission by the accused person.
    iii. The accused in committing the unlawful act or omission possessed malice aforethought.

25. The threshold for proof of malice aforethought and which we fully adopt is that set out in section 206 of the Penal Code, namely proof of:

    i. 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.
    ii. 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 even if that knowledge is accompanied by indifference whether death or grievous harm is caused or not, or even by a wish that it may not be caused; and lastly
    iii. An intent to commit a felony.

26. In *Milton Kabulit & 4 Others vs. Republic [2015] eKLR*, the Court expressed itself on this issue as follows:

    " 49. In *Bonaya Tutut Ipu and another vs. Republic* [2015] eKLR this Court stated that "Malice aforethought" is the mens rea for the offence of murder and it is the presence or absence of malice aforethought which is decisive in determining whether an unlawful killing amounts to murder or manslaughter. Whether or not malice aforethought is proved in any prosecution for murder depends on the peculiar facts of each case. (see *Moris Aluoch vs. Republic* Cr. App. No.47 of 1996) where the court went further and drew inspiration from

a persuasive authority in the case of *Chesakit vs. Uganda* CR App. No.95 of 2004 wherein the Court of Appeal of Uganda held thus:-

"In determining 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."

The court also drew inspiration from a decision of the predecessor of this Court in *Rex versus Tuper S/O Ocher* [1945] 12 EACA 63 wherein, it was ruled thus;-

" 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..."

27. Considering the above threshold in light of the key prosecution witnesses' evidence as corroborated by medical evidence tendered through Dr. Macharia, we are satisfied as did the trial court that indeed death of the deceased occurred. Second, that the only plausible inference to be drawn from the prosecution evidence on the effect on the life of the deceased of the deep penetrating injury from which the deceased succumbed as correctly found by the trial judge is that the person who inflicted that fatal injury on the deceased either intended the same to result in the death of the deceased or did not care whether it resulted in the death of the deceased or not. We therefore entertain no doubt in our minds as did the trial Judge that the element of malice aforethought was established.

28. On the identification of the perpetrator of the death of the deceased, the prosecution case rested entirely on circumstantial evidence. The approach we take in determining whether the threshold for finding a conviction based on circumstantial evidence was satisfied is that taken by the court in Milton Kabulit & 4 Others vs. Republic [supra] as follows:

66. In *Rex vs. Kipkerring Arap Koske & 2 others* [1949] EACA 135 the principle laid was this;

" In order to justify a conviction on circumstantial evidence the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt and the burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any reasonable hypothesis of innocence is always on the prosecution and never shifts to the accused."

29. The incriminating factors the learned trial Judge took into consideration and which we are also obligated to take into consideration in determining whether the circumstantial evidence tendered by the prosecution placed the appellant at the scene of the murder of the deceased is that which related to evidence tendered through key prosecution witnesses found credible by the trial court that they recognized the appellant in connection with the murder of the deceased by both voice and visual recognition.

30. Starting with voice identification the record is explicit that only two voices were heard on the evening of the murder of the deceased, namely, that of the deceased and the appellant. The voices were familiar to both witnesses and the appellant. That is why the appellant recognized the voice of Benjamin when he talked to the deceased on phone while in the company of the deceased on their way from Riverside

Shopping Centre. This was confirmed by Benjamin who said that he indeed phoned and talked to the deceased on that fateful evening shortly before he heard him screaming saying that the appellant had killed him for nothing. We are therefore, satisfied as did the trial Judge, that the appellant was placed at the scene of the murder by reason of recognition of his voice which was familiar to both Benjamin and Gabriel who not only heard it but also acted on it by rushing to the scene and met the appellant emerging from the direction they found the deceased lying injured, mentioning to them the appellant as his assailant.

31. On visual recognition, the learned Judge applied the threshold in the case of Cleophas Otieno Wamunga vs. Republic [supra] to Benjamin's evidence that he flashed a torch he had on a person approaching him from the direction of the deceased's screams and recognized him from a distance of only 30metres away as the appellant. Likewise, Gabriel identified the appellant with the help of moonlight which he said was very bright and torch light of a torch the appellant had on him and which he (appellant) used to flash Gabriel, who also gave an estimate of 30metres away. It is our view that in the circumstances demonstrated above, the learned Judge cannot be faulted for reaching the only reasonable and plausible conclusion that both the lighting and distance were conducive to both Benjamin and Gabriel recognizing a familiar face of the appellant in connection with the murder of the deceased as he was not a stranger to both of them but a familiar person from the neighbourhood.

32. Turning to the dying declaration, in the case of *Choge vs. Republic [1985] KLR* the court held, inter alia, that:

> " 5. The general principle on which a dying declaration is admitted in evidence is that it is a declaration made in extremity when the maker is at the point of death and the mind is induced by the most powerful considerations to tell the truth. In Kenya, however, the admissibility of a dying declaration does not depend upon the declarant being, at the time of making it, in a hopeless expectation of imminent death.
>
> 6. There need not be corroboration in order for a dying declaration to support a conviction but the exercise of caution is necessary in the reception into evidence of such declaration as it is generally unsafe to base a conviction solely on the dying declaration of a deceased person."

In *Peter Kimathi Kanga vs. Republic [2015] eKLR* the Court expressed itself as follows on this issue:

> " Dying declarations are a legally accepted exception to the rule against hearsay. Their statutory basis is in Section 33 of the *Evidence Act* which provides that a statement of a person who is dead whether written or oral is admissible when it relates to the cause of his death. It is instructive that the statement (referred to as a dying declaration) is admissible under the Act whether or not the deceased was at the time of making it under expectation of death.
>
> Courts have on their part formulated rules to guide the reception and weight to be attached to dying declarations and
>
> it is sensible that one made when death is imminent will be accorded a high degree of credit since in the extremity of life's ebbing away, it is expected that one has a strong motive to be truthful. In the interests of fairness to an accused person, a rule has also developed that a court should approach a dying declaration with caution and act on it only if satisfied as to its veracity and if there is corroboration, but only as a cautionary rule of practice, not a legal

requirement. See *CHOGE –VS- REPUBLIC* (*Supra*); *PIUS JASUNGA s/o AKUMU –VS- REPUBLIC* [1954] EACA 331and *MUSILA –VS- REPUBLIC* [1991] KLR 322."

In *Philip Kariuki Ambao vs. Republic [2016] eKLR* the court had this to say:

> " Dying declarations are underpinned by Section 33 (a) of the *Evidence Act*-Cap 80 in the following terms:-
>
> "Statements, written or oral, or electronically recorded of admissible facts made by a person who is dead .... are themselves admissible in the following cases-
>
> When the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question and such statements are admissible whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question;"
>
> This Court has considered the said provision in several cases including *Pius Jasunga s/o Akumu vs. R* (1954) 21 EACA 333 where the predecessor to this Court stated:-
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> > " The question of the caution to be exercised in the reception of dying declarations and the necessity for their corroboration has been considered by this court in numerous cases and a passage from the 7th Edition of Field on Evidence has repeatedly been cited with approval.... It is not a rule of law that in order to support a conviction there must be corroboration of a dying declaration (*R vs. Eligu s/o Odel & Another* (1943) 10 EACA 9) and circumstances which go to show that the deceased could not have been mistaken in his identification of the accused.... But it is generally speaking, very unsafe to base a conviction solely on the dying declaration of a deceased person made in the absence of the accused and not subject to cross-examination unless there is satisfactory corroboration".

33. We have considered the above threshold in light of the record. We reiterate our finding reached above that key prosecution witnesses on the deceased's dying declaration namely, Benjamin and Gabriel were related and well known to the deceased. They heard him scream and asked the appellant why he was killing him for nothing. We are therefore satisfied as did the learned Judge that they were familiar with the deceased's voice and correctly attributed the scream to him especially when it is not disputed that they found him injured shortly thereafter but able to talk and mentioned to them the appellant as the person who had inflicted the fatal injuries on him before he shortly thereafter succumbed to those injuries.

34. Likewise, the appellant was also a local resident very well known to the witnesses. He had interacted severally with the witnesses being neighbours separated only by a fence. They were therefore bound to be familiar with his voice. Their assertion that they also heard his voice asking the deceased for how long he (the deceased) was going to disturb him (the appellant), cannot therefore, be ruled out especially when he himself confirms that he had a confrontation with them on that very night.

35. In light of the above assessment and reasoning, we entertain no doubt in our minds that the learned Judge properly appreciated the prosecution's evidence on the deceased's dying declaration, applied the law correctly thereon and arrived at the correct conclusion that the evidence of Benjamin and Gabriel on this aspect of the prosecution case was credible and therefore admissible as it left no doubt in the mind of the trial Judge and now this Court on appeal that the appellant was placed at the scene of the murder of the deceased through the deceased's dying declaration as well.

36. As for alleged bias of key prosecution witnesses against him, it is our observation that his attack on the credibility or otherwise of the testimonies of key prosecution witnesses, is simply based on the fact that these were variously related both to each other and also to the deceased and the tendency to be biased against him could not therefore be ruled out. It is true that indeed key prosecution witnesses were variously related to each other and the deceased. Our take on this complaint is that it is without basis for the appellant's failure to point out any aspects of these witnesses' evidence that tended to demonstrate bias against him. His complaint therefore remains a mere unsubstantiated allegation not sufficient in law to form a basis for vitiating the said evidence and it is accordingly rejected.

37. On sentence, it is explicit from the record that indeed the trial court did not call for a pre-sentence probation officer's report on mitigating circumstances if any before handing down the sentence against the appellant. Besides this complaint, there is no complaint that the sentence was not lawful, nor that it was not commensurate to the gravity of the offences committed. We find no injustice was occasioned to the appellant by the trial court's failure to follow that procedure. This complaint is also rejected.

38. The upshot of the totality of the above assessment and reasoning is that we find no merit in the appeal. It is accordingly dismissed. Both the conviction and sentence be and are hereby affirmed.

DATED AND DELIVERED AT NAIROBI THIS 19TH DAY OF NOVEMBER, 2021.

R. N. NAMBUYE

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR