Chaka v Republic (Criminal Appeal E033 of 2023)
[2025] KECA 2222 (KLR) (19 December 2025) (Judgment)

Neutral citation: [2025] KECA 2222 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MOMBASA

CRIMINAL APPEAL E033 OF 2023

AK MURGOR, KI LAIBUTA & GW NGENYE-MACHARIA, JJA

DECEMBER 19, 2025

BETWEEN

CHARLES NDORO CHAKA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Mombasa (M. Odero, J.) delivered on 13th June 2011 in HCCR Case No. 4 of 2007)

JUDGMENT

1. The appellant, Charles Ndoro Chaka, was charged in the High Court of Kenya at Mombasa in Criminal Case No. HCCR Case No. 4 of 2007 with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. The particulars of the offence were that, on the night of 16th and early morning of 17th December 2006 at Jorori village, Musulwa Location in Kwale District within Coast Province, he murdered Morris Ndoro Chaka (the deceased). He pleaded not guilty and stood trial at which the prosecution called 9 witnesses.

2. PW1, Rai Ndoro, a young brother to the appellant and the deceased, testified that, on the night of 16th December 2006 at about 7:30 pm, he and his younger brother, Jullo Ndoro (PW6), went to spend the night at the deceased's home; that they had left the deceased at their parents' home; that they went to sleep at the deceased's house and did not hear him return; that, at about 1:00 am, they heard the door, which was not bolted, being pushed in; that two people came in and demanded money from the deceased, who asked them to wait; that, as he went out, he pleaded with the two not to kill him; and that he heard the sound of something being cut.

3. In his further testimony, PW1 stated that one of the men came into the room where they were sleeping and ordered them to cover themselves; that, after a while, the other man came in and ordered them out of the house; that, as they went out, he saw the deceased's body in the sitting room covered with

burning clothes; that, from the fire light, he saw and recognized one of the intruders as the appellant, who is his elder brother; that the appellant was wearing a blue hat and a black long-sleeved shirt; that he saw but could not identify the second man; that, on their way to their parents' house, they fell into a hole where they remained until 6:00 am when they left for their parents' house and reported that the deceased had been attacked by thugs; that he told his father that one of their attackers was the appellant, who he had recognized by voice and sight; and that he returned to the deceased's house and found that he had died.

4. In his further testimony, PW1 stated that, three months prior to the incident, the appellant had quarreled with the deceased over the appellant's belongings, which the deceased had taken; and that the appellant had demanded Kshs. 40,000, but that they had discussed and settled for Kshs. 18,000.

5. PW2, Nyae Ndoro, also a brother to PW1, the appellant and the deceased, testified that, in 2006, he lived with the appellant and assisted him in his bicycle repair business; that, on 16th December 2006 at around 8:00 pm, he was at home with the appellant before he (the appellant) left without telling him to where he was headed; that he closed the door and slept and, at about 5:45 am, he answered to a knock on the door and, when he opened, he found that it was the appellant; that the appellant had the same clothes in which he was dressed when he left; that, the next morning, PW2 left for the well and, on return, found that the appellant had left; that, on enquiry from a neighbour, he was told that the appellant had been informed that their deceased brother had been attacked by thugs; and that he (PW2) got onto his bicycle and left for the deceased's house.

6. Rhoda Ndoro, the appellant's and deceased's mother, testified as PW3 and confirmed that, on the night of 16th December 2006, PW1 and PW6 had gone to sleep at the deceased's house; that, at 6:00 am the next morning, PW1 came rushing home and informed them that the deceased had been beaten by thugs; that he heard and saw the appellant, who lit a torch while the other man proceeded to kill the deceased; and that they rushed to the deceased's house and found him lying down on the floor dead.

7. PW3 further testified that the appellant had been charged and convicted for theft and jailed for six months; that, during his imprisonment, he entrusted his household goods to the deceased; and that, when he returned from prison, he demanded Kshs. 40,000 from the deceased in lieu of his household goods, but that the Chief settled the matter at Kshs. 18,000. According to her, the appellant was not satisfied with the Chief's decision, which allegedly prompted the appellant to kill the deceased. She also testified that the deceased's body had burns on the back and the head.

8. PW4, Ruth Morris, the deceased's wife, testified that she had left home for a funeral on 15th December 2006 and returned the next day to find that the deceased had been killed; and that she proceeded to Msambweni Hospital Mortuary where she identified the deceased's body. According to her, the body had burns on the back and the head.

9. Naomi Ndoro, a sister to the appellant and the deceased, testified as PW5 and essentially recapitulated PW3's testimony. So did PW6, who likewise retold what PW1 had stated in his testimony.

10. Next was PW7, Chief Inspector Charles Mutua, the investigating officer, who testified that he was the Acting OCS Kwale Police Station in December 2006; that, on 17th December 2006 at about 8:00 am, he received a report from Alfred Nzau, the Assistant Chief of Mazomalume sub-location, regarding the murder incident at Jorori Village; that he proceeded to the scene where he found the deceased's body inside his house; that the body had deep cuts on the head, and was partly burnt on the upper part around the shoulders and the head; that the face was recognisable, but had bloodstains ; that there were partly burnt clothes on the upper part of the body; that he secured the scene of crime and organised to have it photographed by Sergeant Oduor (PW9); that he interviewed PW1 and PW6, both of whom

claimed to have been in the house when the murder incident occurred; that PW1 and PW6 implicated the appellant for the murder; that he organised to have the body removed to Msambweni Hospital Mortuary for post-mortem; and that he met the appellant at the scene and proceeded to arrest him.

11. PW8, Constable Mwamweru Mbogo, then a crime investigation officer at Kwale Police Station, had accompanied PW7 to the scene of crime. PW8 essentially testified to the facts as told by PW7, but added that, when they booked the appellant into the cells, he was wearing a faded old blue/grey cap, which they retained as evidence in view of PW1's and PW6's statement in that regard.

12. Even though the pathologist who conducted the post-mortem did not testify and produce the post-mortem report, the learned Judge addressed this issue at length in the impugned judgment to which we will shortly return.

13. At the conclusion of the prosecution case, the appellant was found to have a case to answer and was put on his defence. He gave an unsworn statement and stated that, on the material night of 16th December 2006, he left work for home where he went to sleep; that the next day on 17th December 2006 he went to open his shop at 7:15 am; that, 15 minutes later, a neighbour to the deceased called and informed him that his brother had been killed by thugs at night; that he rushed to his brother's house and found his body, that he was taken to Kwale Police Station to record a statement, but was instead placed in the cells and later charged with murder; and that the deceased was killed by thugs, but that he knew nothing about it.

14. In her judgment dated 19th April 2011, M. Odero, J. convicted the appellant and sentenced him to 45 years imprisonment.

15. Aggrieved by the learned Judge's decision, the appellant moved to this Court on appeal on 2 grounds contained in his undated memorandum styled "Grounds of Appeal". Subsequently, the appellant filed an undated "Supplementary Grounds of Appeal" setting out 6 grounds (incorporating those contained in his initial Grounds), namely:

> " 1. That the learned trial judge erred in law by relying on the identification by the prosecution witnesses where the conditions surrounding the incident were not favourable for a positive identification.
>
> 2. That the learned trial court failed to consider that the prosecution case was riddled with massive contradictions and inconsistencies which was not safe to rely on for a safe conviction.
>
> 3. That the learned trial judge erred in law and fact by relying on the appellants arrest which had no link with the present matter.
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> 4. That the learned trial court failed to consider that the prosecution failed to prove its case beyond reasonable doubt.
>
> 5. That the learned trial judge erred in law by failing to consider the time spent in remand custody prior to conviction and sentence.
>
> 6. That the learned trial court failed to consider that the sentence imposed was harsh and excessive in the circumstances of the case.""

16. In support of the appeal, learned counsel for the appellant, M/s. Ngumbau Mutua & Associates, filed written submissions and a list of authorities dated 14th May 2025 citing 7 judicial authorities to which we will shortly return.

17. On his part, the Prosecution Counsel, Mr. Martin Kariuki, also filed written submissions dated 30th January 2025 citing 3 judicial authorities, which we have duly considered.

18. This being a first appeal, it is by way of a retrial and this Court, as the first appellate court, has a duty to re-evaluate, re-analyse and re-consider the evidence afresh and draw its own conclusions. However, when doing so, the Court should bear in mind that it did not see or hear the witnesses as they testified and give due allowance for that.

19. It must be borne in mind though, that scrutiny without more is not sufficient. The Court is mandated to undertake a fresh and exhaustive examination and reach its own decision on the evidence on record. In this regard, the Court in Okeno vs. Republic [1972] EA 32 set out the duty of a first appellate court in the following words:

> " 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 the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. 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 finding 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."

20. This cautious approach has deep roots in comparative common law jurisdictions as demonstrated in the decision of the Supreme Court of India in Ganpat vs. State of Haryana (2010) 12 SCC 59, where the court set out the principles to be borne in mind by a first appellate court while dealing with appeals and stated thus:

> " a. There is no limitation on the part of the appellate Court to review the evidence upon which the order appealed against is founded and to come to its own conclusion.
>
> b. The first appellate Court can also review the trial court's conclusion with respect to both facts and law.
>
> c. It is the duty of a first appellate Court to marshal the entire evidence on record and by giving cogent and adequate reasons may set aside the decision appealed against or the entire proceedings if they are flawed.
>
> d. When the trial Court has breached provisions of *the constitution* or ignored statutory provisions, or misconstrued the law, or breached rules of procedure, or ignored crucial evidence or misread the material evidence or has ignored material documents, or in any manner compromised the accused rights to a fair trial or prejudiced the accused etc. the appellate court is competent to reverse the decision of the trial court depending on the materials in question."

21. Having carefully considered the record of appeal, the grounds on which it is anchored, submissions and the law, we form the view that the appeal raises 3 main issues, namely:

(i) whether the prosecution proved its case against the appellant beyond reasonable doubt;

(ii) whether the sentence meted on the appellant was harsh and excessive in the circumstances; and

(iii) whether the learned Judge failed to consider the time spent in remand custody before conviction and sentence.

22. On the 1st issue, the prosecution was mandated to prove the offence of murder with which the appellant was charged and convicted. Challenging the evidence of identification/recognition, the appellant submitted that the prosecution failed to link him to the deceased's murder. According to him,

> "... the prosecution failed to discharge the burden of proof as to the required standard".

23. On his part, the learned prosecution counsel did not make any submissions on this broad issue of proof of the three ingredients of murder in order to sustain a safe conviction.

24. Turning to the 1st ingredient of intention to cause death, learned counsel for the appellant submitted thus:

> "... ... it is clear that as between the deceased and the appellant, there appears to have been bad blood as disclosed by PW3 in her evidence. We therefore submit that there is a strong possibility that the appellant was arrested, charged, convicted and sentenced purely on mere suspicion ... the narrative from PW3 concerning the motive for the offence and the allegation that the appellant had even served jail time ...."

25. On his part, learned prosecution counsel did not make any submissions thereon.

26. We hasten to observe that the prosecution was bound to prove its case against the appellant beyond any reasonable doubt. To do so, the prosecution was under duty to adduce evidence to establish the three ingredients of the offence of murder, to wit:

(a) the intention to cause death;

(b) the unlawful act that caused the death of the deceased; and

(c) proper identification of the appellant as the perpetrator of the offence.

27. In this regard, section 203 of the Penal Code sets out three elements, which the prosecution must prove beyond reasonable doubt to earn a conviction, namely:

(a) The death of the deceased, and cause of that death;

(b) that the accused committed the unlawful act which caused the deceased's death; and

(c) that the accused had malice aforethought. See Nyambura & others vs. Republic [2001] KLR 355.

28. Section 206 of the Penal Code defines "malice aforethought" as follows:

> 206. Malice aforethought
>
> Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances—
>
> 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. an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.

29. This Court in John Mutuma Gatobu vs. Republic [2015] eKLR lent further clarity to the conception of malice aforethought thus:

> " There is nothing in that definition that denotes the popular meaning of malice as ill will or wishing another harm and all the related negative feelings. Nor, for that matter, is it to be confused with motive as such. Our law does not require proof of motive, plan or desire to kill in order for the offence of Murder to stand proved, though the existence of these may go to the proof of malice aforethought."

30. We hasten to add that the predecessor to this Court in R v Tuper S/O Ocher [1945] 12 EACA 63 persuasively held that:

> " 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 …."

31. Of particularly decisive effect is the learned Judge's observation of the deceased's body:

> " …. PW8 SGT. Michael Oduor an officer attached to the scenes of crime section in Mombasa, told the court that he went to the scene at Jorori Village where he took six (6) photographs of the body of the deceased. The said photographs were duly produced in court Pexb4 and the court had an opportunity to view the scene. They were all graphic depictions of the gruesome death which the deceased met. There were what appeared to be deep cut wounds on the head with heavy loss of blood. There were burn marks on the top part of the body, the head, the shoulders, the back and the fingers of the right hand were also burnt."

32. As testified by PW7 and PW8, the deceased's body had deep cuts on the head, burns on the upper part (around the shoulders, burns on the hands, fingers and the head, and blood stains on the face). To our mind, the parts of the body on which deep cuts and burns were inflicted, and the nature of the weapons used to inflict the deep cuts and burns, lead to the inference of malice aforethought, or the intention to cause the deceased's death.

33. With regard to the cause of death, none of the two learned counsel made submissions thereon. Be that as it may, it would be remiss of us not to pronounce ourselves on this obvious cause of death. Even though the post-mortem report was not produced in evidence, we nonetheless affirm the learned Judge's finding that the cause of death was attributable to an unlawful act. As the learned Judge observed:

> " The doctor did not testify in this case and no post-mortem report was produced in court. However even in the absence of such medical evidence it is clear that the deceased did not die of natural causes. Indeed, his wife PW3 told the court that the deceased was alive and in good health on 16th December 2006 when she left home. The photographs clearly corroborate the evidence of the witnesses that the deceased was attacked and cut on the head

and thereafter set alight. It was these acts which led to his untimely death. The cause of death of the deceased cannot be in any dispute (sic). The acts of cutting him about the skull and setting him alight were the unlawful actions that caused his death."

34. The remaining question, which is directly related to the 3rd ingredient, is whose unlawful act caused the death of the deceased. Put differently, whether the appellant was identified as the perpetrator of the offence of murder with which he was charged and convicted. In this regard, counsel for the appellant submitted that:

> " ... the basis of the appellant's conviction was voice recognition by minors and the law as we understand it is that voice recognition is the weakest kind of evidence to sustain a conviction. The prevailing circumstances at the scene, did not in our humble view, at all favour positive and proper voice recognition or any identification at all ...."

35. According to PW1 and PW2, they recognised the appellant by voice and by reason of the fact that they also saw his face as illuminated by the flames emanating from the burning clothes with which the deceased's body was set ablaze by the appellant and his accomplice. It is noteworthy that the appellant was not a stranger to PW1 and PW2. The three were brothers living in the same community, leaving no doubt that they knew his face and voice well enough to recognise him as he quarreled with their elder brother (the deceased) and as they crossed the floor under the flames from the clothes with which the deceased's body was burnt.

36. In Mbelle v Republic [1984] KLR 626, this Court set out the conditions that must be satisfied when considering evidence of voice recognition as follows:

> " In relation to the identification by voice, care would obviously be necessary to ensure
>
> (a) that it was the accused person's voice
>
> b. that the witness was familiar with it and recognized it, and
>
> c. that the conditions obtaining at the time it was made were such that there was no mistake in testifying to which was said and who said it."

37. Further, this Court in Vura Mwachi Rumbi v Republic [2016] eKLR stated:

> " In the case of Choge v R [1985] KLR 1, this Court held that evidence of voice identification is receivable and admissible and it can, depending on the circumstances, carry as much weight as visual identification. In receiving such evidence, however, care and caution should be exercised to ensure that the witness was familiar with the appellant's voice and recognized it and that the conditions obtaining at the time the recognition made were such that there was no mistake in testifying to that which was said and who had said it "

38. In Karani vs. Republic [1985] KLR 290 this Court held that:

> " Identification by voice nearly always amounts to identification by recognition. Yet here as in any other cases care has to be taken to ensure that the voice was that of the appellant, that the complainant was familiar with the voice and that he recognized it and that there were conditions in existence favouring safe identification."

39. In Libambula v Republic [2003] KLR 683 this Court held that:

> " Normally, evidence of voice identification is receivable and admissible in evidence and it can, depending on the circumstances, carry as much weight as visual identification. In receiving such evidence, care would be necessary to ensure that it was the accused person's voice, the witness was familiar with it and recognized it and that the conditions obtaining at the time it was made were such that there was no mistake in testifying to that which was said and who had said it." (Our emphasis). See also Choge v Republic [1985] KLR 1.

40. Addressing itself to the evidence of recognition in the case of Reuben Taabu Anjononi & 2 Others v Republic [1980] eKLR, this Court held that:

> " ... recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other."

41. When the above cited authorities are placed alongside the evidence of PW1 and PW6, as was the learned Judge, we too are satisfied that the appellant was recognized by his voice that was well known to the minors.

42. The three ingredients of murder having been established; the 1st issue stands settled as to whether the prosecution proved its case against the appellant beyond reasonable doubt. In our considered view, it did, and nothing more remains to be said.

43. Turning to the 2nd issue as to whether the sentence meted on the appellant was harsh and excessive, it is noteworthy that the appellant has made no submissions thereon. On his part, the learned prosecution counsel submitted that the findings of the trial court upon consideration of the evidence adduced by the prosecution, the sentence of 45 years was within the law; and that we should not interfere with the sentence imposed by the trial court.

44. In Shadrack Kipkoech Kogo v Republic - Criminal Appeal No. 253 of 2003 (unreported), this Court sitting in Eldoret (Omollo, O'Kubasu & Onyango Otieno, JJ.A.) stated:

> " Sentence is essentially an exercise of discretion of the trial court and for this Court to interfere, it must be shown that in passing the sentence, the sentencing court took into account an irrelevant factor or failed to take into account a relevant factor or that a wrong principle was applied or short of those the sentence itself is so harsh and excessive that an error in principle must be inferred." (Emphasis added)

45. In Omuse v Republic (2009) KLR, 214, this Court by a bench differently constituted (O'Kubasu, Waki, & Onyango Otieno, JJ.A.), laid down the principles to be considered in sentencing thus:

> " In Macharia vs R. (2003) EA, 559, this Court stated: 'The principle upon which this Court will act in exercising its jurisdiction to review or alter the sentence imposed by the court have been firmly settled as far back as 1954 in the case of OGOLA S/O OWOUR (1954) EACA, 270 wherein the predecessor of this Court stated:
>
> > 'The Court does not alter a sentence on the mere ground that if the members of the Court had been trying the appellant they might have passed a somewhat different sentence and it would not ordinarily interfere with the discretion exercised by a trial Judge, unless as we said in JAMES VS R (1950)18 EACA,

147, it is evident that the Judge acted upon some wrong principles or overlooked some material factors. To this, we should also add a third criterion, namely that the sentence is manifestly excessive in view of the circumstances of the case (R VS SHERXHAWSKY (1912) CCA 28 TLR, 263. Further, the law is that sentence imposed on an accused person must be commensurate to the moral blameworthiness of the offender and it was thus not proper exercise of discretion in sentencing for the Court to have failed to look at the facts and circumstances of the case in their entirety before settling for any given sentence. See Ambani VS R (1990) KLR, 161.'" [Emphasis ours]

46. Apart from the appellant's blanket assertion in the 3rd ground that the sentence meted on him was harsh and excessive, counsel did not demonstrate that the trial court took into consideration matters it ought not to consider or failed to consider matters that it ought to have considered. Neither did counsel show that the sentence meted on the appellant was unlawful or excessive in the circumstances of the case, or that the trial court applied wrong principles in reaching the conclusion to pass the impugned sentence. Likewise, that ground of appeal fails, and that settles the 2nd issue, leaving us with the 3rd issue as to whether the sentence meted on the appellant considered the time spent in remand before conviction and sentence.

47. Section 333 (2) of the Criminal Procedure Code states as follows:

> 333. Warrant in case of sentence of imprisonment.
>
> (2) Subject to the provisions of section 38 of the Penal Code (Cap.63) every sentence shall be deemed to commence from, and to include the whole of the day of, the date on which it was pronounced, except where otherwise provided in this Code;
>
> Provided that where the person sentenced under subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody.

48. Having carefully considered the appeal, the grounds on which it is anchored, the rival submissions, the cited authorities and the law, we reach the conclusion that the appeal against conviction fails and is hereby dismissed, while the appeal against sentence partially succeeds, in that, if the period of imprisonment of 45 years imposed did not take account of the time spent in remand custody, that time shall be taken into account in reckoning the prison term.

DATED AND DELIVERED AT MOMBASA THIS 19TH DAY OF DECEMBER 2025.

A. K. MURGOR

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JUDGE OF APPEAL

DR. K. I. LAIBUTA CArb, FCIArb.

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JUDGE OF APPEAL

G. W. NGENYE-MACHARIA

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR