Bondo v Republic (Criminal Appeal E085 of 2022)
[2025] KECA 2295 (KLR) (19 December 2025) (Judgment)

Neutral citation: [2025] KECA 2295 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL E085 OF 2022

MS ASIKE-MAKHANDIA, HA OMONDI & AO MUCHELULE, JJA

DECEMBER 19, 2025

BETWEEN

GEORGE KEYO BONDO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the High Court of Kenya at Homabay (Kiarie Waweru Kiarie, J.) dated 15{{^th}} December 2021 in HCCRC No. E025 of 2021)

JUDGMENT

1. George Keyo Bondo (the appellant) was charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. The information stated that on the night of 27th and 28th April, 2021, at Andigo Korwa Village of Kamenya Location in Ndhiwa Sub-County within Homabay County, jointly with another not before court he murdered Hezron Ochieng Onyango. He pleaded not guilty and a trial ensued pitting the prosecution's four witnesses against the appellant's own testimony. At the conclusion of the trial, the appellant was convicted of the offence and sentenced to death.

2. The appellant is now before this Court challenging the said decision. In his grounds of appeal dated 23rd May 2025, he faults the learned Judge contending that:

    a. the offence was not proved to the required standards;

    b. the identification was not proper;

    c. the prosecution case was contradictory;

    d. his alibi defence was not considered;

    e. and the sentence was harsh and excessive in the circumstances.

The appellant prayed that his appeal be allowed, the impugned judgment be set aside and the sentence quashed.

3. Briefly, the facts of the prosecution's case were that on the fateful night while asleep in his house, Moses Owino Omune (Moses), PW2 was awakened by a bang on his door. Upon enquiring who it was, a voice asked him to go out and eat his dog he had brought to him. Moses recognised the voice as that of Jossy, the appellant herein. When he went out, he saw Jossy carrying a club. Upon seeing Moses, Jossy ran away leaving the deceased lying naked and unable to speak. When he saw the appellant, he was at a distance of 30 meters, and was able to identify him with the help of the spotlight when he faced him, and there was also bright moonlight. Upon raising an alarm, people did not respond, prompting Moses to go to the home of a village elder who advised him to inform the chief. The chief advised him to go and inform the deceased's parents. Moses stated that he had known the appellant for between 20 and 22 years.

4. Pamela Awino Ongele (PW1) the mother of the deceased testified that on the said date at around 2:00 am, Moses came to her house and informed her that the deceased had been killed and placed at his door. Moses told her that it was the appellant who killed the deceased. When she went to Moses' house, she found the deceased lying naked at the door with bruises on the right flank and on the knees. The deceased was not talking, and when he gained consciousness, he implicated the appellant.

5. Kenneth Omondi Otieno [Kenneth], PW3 on his part told the court that upon being informed by Moses about the death, he went to Moses' house, where he found the deceased naked with bruises on his body. At about 2:00 am, the deceased briefly regained consciousness and talked to Kenneth and his mother, naming the appellant as the assailant. At about 3:00 am, the deceased succumbed to his injuries.

6. On his part, Corporal Samson Cheruiyot, PW4, the Investigating Officer told the court that upon receiving the report of murder, he proceeded to the scene where they found the body of the deceased, which had multiple injuries all over the body. He was informed by Moses that the deceased was beaten in the appellant's house, who pulled the deceased to Moses' door and abandoned him there. CPL Cheruiyot took the body to the Kobodo mortuary, where an autopsy was conducted on 30th April 2021. The post mortem report presented to the trial court indicated that the cause of death was hypovolemic shock. He produced the post-mortem report as P. exhibit 1.

7. Placed on his defence, the appellant gave sworn evidence and stated that on 24th April 2021 he left for fishing at 2 p.m. and remained in the lake until the following day at 10 a.m. He was with Fredrick Ochieng Gwaro (DW2), who was the coxswain. Their boat was Jaber Pok Nokwamo. The owner of the boat was Felix Ochieng. He said that when they landed, he was the one who was selling the fish while Gwaro (DW2) received the cash.

8. On his part, Fredrick Ochieng Gwaro (DW2) testified that on the said date, they went fishing with the appellant and Philip Ochieng. They left on 29th April 2012 at about 10 am. On being cross-examined, he stated that their boat was called Owuor Oula; he was the one weighing the fish while the appellant received the cash. He maintained that he had nothing to do with the death.

9. The trial court, after reviewing the evidence found that the prosecution had proved its case against the appellant beyond a reasonable doubt, convicted him and sentenced him to death

10. In support of the appeal, the appellant contended that the offence was not proved to the required standard as the ingredients of murder were not established; that it was evident on the record that the deceased died as a result of injuries sustained at an unknown place; that the identity of the attacker

and whether he had malice aforethought was not established; and the doctor who conducted the post mortem was not called as a witness.

11. Regarding his identification, the appellant contended that the trial court based the same on voice recognition and the dying declaration. However, the learned judge failed to interrogate the same bearing in mind that PW2 was a single identifying witness and that the dying declaration was made in the absence of the appellant. Relying on the case of Kihara v Republic [1986] eKLR 473, the appellant contended that the declaration was not corroborated and was not subjected to cross-examination.

12. It is contended that the prosecution's case was marred with inconsistencies and contradictions. That PW1 stated that at 2:00 am the deceased gained consciousness and implicated the appellant, while PW3 told the court that they took the deceased to his home at around 4:30 am and further stated that the deceased died at 3:00 am. On his part, the Investigating Officer told the court that on the said date, at about 4:30 am, a report of murder was made at Ndhiwa Police Station, and when they visited the scene, they found the body of the deceased with multiple injuries.

13. The appellant contended that the prosecution's case was based on shoddy investigations and that crucial witnesses were never called. In his determination, the learned judge relied on the evidence of a single identifying witness whose evidence was not corroborated and the murder weapon was not produced in court.

14. In opposing the appeal, the respondent submitted that the offence was proved to the required standards; that the death of the deceased was not contested as this was alluded to by PW4 the Investigating Officer who collected the body of the deceased and took it to Kobodo mortuary; and produced his autopsy report which indicated the cause of death to be hypovolemic shock.

15. As to whether the appellant caused the death of the deceased, the respondent contended that the prosecution's case was pegged on the dying declaration and the corroborative evidence of PWI, PW2, PW3 and PW4; that in their evidence, PW1 and PW2 told the court that the deceased told them that he had recognized the appellant, also known as Jossy as the person who assaulted him.

16. It was further submitted that the dying declaration consistently repeated to PW1 and PW3 clearly identified the appellant as the assailant. Additionally, PW2 positively recognized the appellant as the person who left the deceased naked and unconscious at his doorstep, telling him to “eat his dog.” On identification, PW2 confirmed that he recognized the appellant’s voice, having known him for 20–22 years, and also saw him clearly under full moonlight and by spotlight, even engaging in a brief conversation with him.

17. Relying on the case of Peter Mwariri Mwangi v Republic, Criminal Appeal No.1 of 2015 KLR, it was submitted that a dying declaration has to be of probative value and corroborated by way of evidence. That the deceased told his mother, PW1 and PW3 that Jossy had assaulted him. PW3 testified that he heard this statement in the presence of the deceased’s mother, and the deceased later died at 4 a.m. This dying declaration was supported by PW2, who was the first to see the deceased after the assault. PW2 stated that the appellant came to his house at midnight, kicked the door, and mentioned leaving his dog there. Upon opening, PW2 saw the appellant and spoke with him before discovering the deceased naked, bruised, and unconscious nearby.

18. Regarding the alibi defence, the respondent acknowledged that the accused has no duty to prove it; the burden rests on the prosecution to disprove it. However, if the alibi is raised late and the prosecution cannot challenge it, it does not automatically succeed. In such cases, the trial court must assess the alibi against the entirety of the prosecution’s evidence. Reliance was laid in the case of Juma Mohamed Ganzi & 2 others v Republic [2005] eKLR.

19. It was submitted that in the instant appeal, the appellant raised the alibi during the defence hearing, but the trial court properly weighed it against the prosecution's unrebutted evidence linking him to the murder. Finding the alibi inconsistent and baseless, the court dismissed it, and the respondent urged that this ground also be rejected for lack of merit.

20. Lastly on sentence, guided by the holding in the Supreme Court decision in Francis Karioko Muruatetu & another vs Republic, the respondent conceded to the setting aside of the mandatory death sentence and instead, the appellant be sentenced to a term of sentence or in the alternative, the matter be remitted back to the High Court for resentencing.

21. This is a first appeal, and the duty of the first appellate court is to conduct a thorough and independent review of the evidence presented in the trial court and reach its own conclusions. This duty was articulated in the often-cited case of Okeno v Republic [1972] EA 32, 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 (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. 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."

22. Having considered the record, the submissions and the authorities cited by counsel the issues that arise for determination are:

    a. whether the offence of murder was proved to the required standard;

    b. whether there were contradictions in the prosecution evidence and if so, whether they went to the root of the prosecution's case;

    c. whether the prosecution failed to avail a crucial witness; and,

    d. whether this Court can interfere with the sentence.

23. The appellant was charged under Section 203 of the Penal Code.

    The section provides that:

> " Any person who of malice aforethought, causes the death of another person by an unlawful act or omission is guilty of murder."

24. To succeed in proving a charge of murder, the prosecution must prove the following ingredients:

    a. the death of the deceased and its cause.

    b. that the death was caused by an unlawful act or omission on the part of the accused.

    c. that in causing the death of the deceased, the accused had malice aforethought.

25. To start with, the fact and cause of the death of the deceased is not disputed. The post-mortem report produced by PW4 indicated that the cause of death was due to hypovolemic shock.

26. Was the deceased's death caused by an unlawful act or omission on the part of the appellant? Relevant to this issue is the evidence of PW2, which was corroborated by PW1, PW3 and PW4. The totality of this evidence is that appellant attacked the deceased using a club, dragged him to PW2's house, called PW2 out and told him he had brought his dog to eat and fled. PW2's testimony was that she saw the appellant fleeing the scene while armed with a club. PW2 was able to recognise the appellant's voice as he had known him for close to 20-22 years, had a brief talk and that there was moonlight. He also flashed his torch and recognised him. Further, when the deceased gained consciousness, he implicated the appellant to PW1, PW2 and PW3 as the person who assaulted him.

27. Flowing from the foregoing analysis, the appellant was not only placed at the scene of the crime but was identified as the person who fatally wounded the deceased and even went on to drag the deceased to the house of PW2 and called him to "pick his dog and eat it".

28. The appellant attacked the veracity of his identification of evidence contending that the incident took place at night, and the evidence that there was moonlight was not corroborated. Also, that his identification was based on voice recognition.

29. We take note that the appellant was known to PW2. When the appellant called PW2 out, they had a brief conversation, and further, PW2 was able to identify the appellant with the help of the moonlight and a torch which he flashed at the appellant before he escaped.

30. It is also not in dispute that the incident happened at night and the conditions therefore, might not have been favourable for a positive identification/recognition. Be that as it may, this was a case of both voice and visual recognition. In Karani v Republic [1985] KLR 290 this Court rendered itself thus:

> " 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."

31. Similarly, in Choge v R [1985] KLR 1 it was stated thus:

> " .....There can be no doubt that the evidence of voice identification is receivable and admissible in evidence and that it can, depending on the circumstances carry as much weight as visual identification, since it would be identification by recognition rather than at first sight. In Rosemary Njeri v Republic [1977] Criminal App. No. 27, a victim of the offence of grievous harm testified she heard the appellant say 'break her legs'. The reception of this evidence was upheld in the High Court on the first appeal and also on the second appeal in which this Court said: Evidence of voice identification is receivable and admissible in evidence and can carry as much weight as visual identification, provided certain conditions are met. Care must be taken to ensure that it was the accused person's voice, that the witness was familiar with it and recognized it, and that conditions obtaining at the time were such that there was no mistake in the identification. Recognition may be more reliable than identification of a stranger, but even with recognition, the court must warn itself of the possibility of error.

32. In the instant case, the identification of the appellant was 3- pronged namely, by visual identification, voice recognition and the deceased's dying declaration; as such the appellant was properly identified as

the person who attacked the deceased on the night of 27th and 28th April, 2021. From the evaluation of the evidence of voice recognition, the calling out of PW2 by the appellant coupled with the visual identification rules out the possibility of mistaken identity.

33. Turning to the issue of the dying declaration, the court was faulted for relying on the dying declaration that was wanting in detail. It was submitted by the appellant that in the declaration, it was not shown that death was imminent.

34. PW1, PW2, and PW3 all testified that the deceased had told them before he died that the appellant had assaulted him. The evidence of these particular witnesses remained largely unchallenged even under cross-examination. There is no doubt that the statement by the deceased to these witnesses that the appellant who attacked him was a dying declaration within the meaning of Section 33 (a) of the *Evidence Act*.

35. In the case of Philip Nzaka Watu v Republic [2016] eKLR, this Court set out the principle of admissibility of a dying declaration as follows:

> "Under section 33(a) of the *Evidence Act*, a dying declaration is admissible in evidence as an exception to the rule against admissibility of hearsay evidence. Under that provision, statements of admissible facts, oral or written, made by a person who is dead are admissible where the cause of his death is in question and those statements were made by him as to the cause of his death, or as to any of the circumstances of the transaction leading to his death. Such statements are admissible whether the person who made them was or was not expecting death when he made the statements. ..... While it is not the rule of law that a dying declaration must be corroborated to found a conviction, nevertheless, the trial court must proceed with caution and (sic) to get the necessary assurance that a conviction founded on a death declaration is indeed safe."

36. A perusal of the impugned judgment does not indicate that the learned judge relied solely on the dying declaration to convict the appellant, as other factors such as opportunity for identification were also considered. This ground therefore has no leg to stand on, and it fails.

37. Regarding malice aforethought, Section 206 of the Penal Code defines malice aforethought in the following terms:

> "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 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."

38. For malice aforethought to be established, the predecessor of this Court, the East African Court of Appeal observed in the case of Rex v Tubere s/o Ochen (1945) 1Z EACA 63, that:

> " In determining the existence or nonexistence of malice one has to look at the facts proving the weapon used, the manner in which it is used and the part of the body injured."

39. Did the evidence establish the requisite malice aforethought and or mens rea on the part of the appellant? By attacking the deceased with a club and inflicting such severe injuries, the appellant ought to have known that he would cause grievous bodily harm or death. From the autopsy report, the injuries inflicted on the deceased's body were a manifestation of a motive to fatally kill or maim, that is, the presence of mens rea. Accordingly, malice aforethought was sufficiently proved to the required standard.

40. The appellant described the prosecution's evidence as contradictory. The appellant maintained that the witnesses contradicted the time within which the deceased succumbed to the injuries. In Twehangane Alfred v Uganda [2003] UGCA 6, the court held that it is not every contradiction that warrants rejection of evidence. Inconsistencies unless satisfactorily explained would usually but not necessarily result in the evidence of a witness being rejected. The question is whether the prosecution's evidence is contradictory on the occurrence of the event(s) and whether the contradictions (if any) are grave and point to deliberate untruthfulness of the witnesses or whether they affect the substance of the charge.

41. In the instant appeal, the contradictions alluded to are with regard to the time the deceased died. Contradictions in a witness's testimony are considered fatal only when they pertain to material facts and are substantial in nature. Minor or insignificant inconsistencies do not undermine a witness's credibility or invalidate the trial. An accused can benefit from such discrepancies only when they are major and go to the core issues before the Court, thereby creating reasonable doubt in the trial court's mind. In the instant appeal, as much as there may be a discrepancy on the time of death, the fact of the death is not disputed, and the contradictions concerning time are minor and immaterial.

42. Regarding the failure to call crucial witness, the appellant argued that the doctor who performed the autopsy on the deceased's body ought to have been called to testify as a prosecution witness and produce the post-mortem report. However, Section 143 of the *Evidence Act* provides that no particular number of witnesses shall in the absence of any provision of the law to the contrary be required for proof of any fact. This Court in Julius Kalewa Mutunga v Republic [2006] eKLR stated that as a general principle of law, whether a witness should be called by the prosecution is a matter within their discretion and an appeal court will not interfere with the exercise of that discretion unless, for example, it is shown that the prosecution was influenced by some oblique motive. The appellant did not establish any ill motive, nor did he state how he was prejudiced.

43. The appellant lamented that his alibi defence was not considered.

However, a perusal of the judgment of the trial court indicates that the court did consider the same and rightly dismissed it. In Erick Otieno Meda v Republic [2019] eKLR, this Court observed that:

> " In considering an alibi, we observe that:
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> a. an alibi needs to be corroborated by the other witnesses, and not just a mere regurgitation of the events from the accused's point of view.
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> b. An alibi defence needs to be introduced at an early stage so as to allow it to be tested, especially during cross-examination at the trial.

c. The alibi defence or evidence may often rest on the credibility of the accused and the reliability of the evidence that he or she has presented in court.

d. The accused does not need to prove the alibi, but the prosecution must have presented its case that the accused is guilty beyond a reasonable doubt so as to allow the alibi to fail. (See Mhlungu v S (AR 300/13) [2014] ZAKZPHC 27 (16 May 2014)."

44. In his determination, the learned judge stated as follows regarding the alibi raised:

> " George Okeyo Bondo, the accused contended that on 24th April 2021 he left for fishing at 2 p.m. and remained in the lake until the following day at 10 a.m. He was with Fredrick Ochieng Gwaro (DW2) who was the coxswain. Their boat was Jaber Pok Nokwamo. The owner of the boat was Felix Ochieng. He said that when they landed, he was the one who was selling the fish while Gwaro (DW2) received the cash. The evidence of Fredrick Ochieng Gwaro (DW2) on the other hand was that their boat was called Owuor Oula. He said he was the one weighing the fish while the accused was the one receiving cash. It is evidently clear that the alibi cannot possibly be true; there are far too many contradictions. I therefore dismiss it."

45. From the above, it is clear that the appellant and his witnesses contradicted themselves in their evidence as such there was no corroboration. Weighing the defence against the evidence tendered by the prosecution, it is clear that the respondent had made an overwhelming case against the appellant, which was not displaced by the alleged alibi defence.

46. On sentence, the appellant was sentenced to the mandatory death sentence. In meting out the sentence, the judge pointed out that it was the only sentence provided by the law. The respondent concedes to the reduction of the same owing to the Supreme Court decision in Francis Muruatetu & Another v Republic, the Supreme Court of Kenya Petition No. 15 & 16 of 2016, [2017] eKLR which affirmed the importance of judicial discretion in sentencing.

47. The Supreme Court decision in the Francis Karioko Muruatetu case (supra) did not outlaw it, rather, it declared the mandatory nature of the death sentence unconstitutional as it impedes judicial discretion in the determination of sentences. However, it does not prohibit, deter or limit the imposition of the sentence in deserving cases. The Supreme Court took the view, further, that the trial court should take into account the circumstances of the offender and the offence in meting out the sentence.

48. In the present case, the appellant assaulted the deceased and dragged him while unconscious to the house of PW2, before scornfully calling out to PW2 to come and get his "dog and eat it". The appellant employed physical violence, accompanied by verbal expressions calculated to demean and humiliate the deceased.

49. As regards sentence, the respondent conceded to the setting aside of the mandatory death sentence and the appellant be sentenced to a term of sentence or in the alternative, the matter be remitted back to the High Court for resentencing. A perusal of the trial court's record shows that the appellant presented his plea in mitigation saying: "I have no parents. None of my kins (sic) come to see me. I pray for a non custodial sentence" The learned judge indicated that he had considered the mitigation, but pointed out that the only appropriate sentence was the one prescribed by law, thus sentenced the appellant to death.

50. It is not lost to us that sentencing is a matter that falls within the discretion of the trial court; and an appellate court can only intervene in circumscribed circumstances. This was clearly stated by this

Court (Chunga, CJ, AB Shah & Bosire, JJA) in Bernard Kimani Gacheru v Republic [2002] KECA 94 (KLR), as follows:

> " 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."

51. The learned judge already took into consideration the mitigation, but pointed out that there was the sentence provided by law, which we acknowledge at the time, was mandatory in nature. Having considered the recent jurisprudence created by the Muruatetu I decision; although the death sentence is now not the only legal sentence for one convicted of murder, but even as we review the sentence, we consider the aggravating circumstances in this case bearing in mind the circumstances under which the offence was committed, the malice and brutality exhibited by the appellant, we consider a sentence of forty (40) years imprisonment to be appropriate. We therefore set aside the death sentence that was imposed on the appellant, and substitute thereto a sentence of forty (40) years imprisonment. The sentence shall be computed from 31st May, 2021, which is the date that the appellant was first arraigned in court, as we are unable to establish from the record whether he was able to satisfy the bond terms that were granted or whether the appellant remained in custody throughout his trial. We hold the view that this lacuna should and must be resolved in favour of the appellant – the assumption being he was unable to meet the bail terms.

Those shall be the orders of the Court.

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

ASIKE-MAKHANDIA

JUDGE OF APPEAL

.....

H. A. OMONDI

JUDGE OF APPEAL

.....

A. O. MUCHELULE

JUDGE OF APPEAL

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

DEPUTY REGISTRAR