

**IN THE COURT OF
APPEAL AT KISUMU**

(CORAM: ASIKE-MAKHANDIA, OMONDI & KIMARU, JJ.A.)

CRIMINAL APPEAL NO. E073 OF 2021

BETWEEN

OLIVER NYONGESA WANJALA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Bungoma, (Riechi, J.) dated 20th January, 2021)

in

HCCRC No. 42 of 2018)

JUDGMENT OF THE

COURT

[1] This is a first appeal against the judgment of the High Court of Kenya at Bungoma delivered on 20th January 2021. By that judgment, Riechi, J., convicted **Oliver Nyongesa Wanjala, “the appellant”**, on the information charging him with murder contrary to **Section 203** as read with **Section 204** of the Penal Code. The information alleged that on 8th December 2018, at Ndengelwa village in Bungoma County, the appellant, jointly with others not before the court, murdered **Moses Lubano Musabasi “the**

deceased “. The appellant entered a plea of not guilty and his trial soon thereafter ensued.

[2]The prosecution's case was that on the material day, the deceased and his brother, PW3 Robert Musabasi, were at the home of Mercy Nanjala Wanyonyi, PW5 partaking of traditional liquor (*busaa*), when the appellant arrived in the company of Ronald, Emmanuel and Robert, who were all armed with *pangas* and wooden clubs. Without any provocation, they set upon the deceased. PW3 then fled the scene and reported the incident at Ndengelwa police Post and to his father who was also the father of the deceased, Pascal Mukabasi, PW2.

[3]PW4, PC Pius Korir, attached to Ndengelwa Police Post, received the report and in the company of his colleagues, PC Ibrahim Adan, PW 6 and PC Joseph Wekesa PW7 rushed to the scene, where they found a crowd gathered and the victim lying with multiple cut wounds. The deceased's father arrived shortly thereafter and evacuated him to Bungoma County Referral Hospital. They then arrested PW5, and later received information that the deceased had died. The appellant later presented himself at the police station Post and filed a report of assault but acting on the information in their possession regarding his alleged participation in the assault of the deceased, they arrested and placed him behind bars.

[4] PW5 confirmed that she was selling *busaa* at her home when the

appellant, Ronald, Emmanuel and Robert arrived. She observed that

they were all armed with *pangas* and immediately set upon the deceased cutting him all over the body. Fearing for her safety, she fled the scene only to return fifteen minutes later to find the deceased being taken to hospital. She confirmed that the assault occurred inside her house and that she clearly saw the appellant and his companions attack the deceased.

[5]PW1, Dr. Harun Ombongi, conducted the post-mortem examination on the body of the deceased and noted eight deep cut wounds on the head, additional wounds on the back, left ear, and nose, a ruptured spleen, a fractured lumbar spine, and multiple skull fractures. He concluded that the cause of death was shock due to severe head injuries.

[6] Put on his defence, the appellant testified on oath and called no witnesses. He admitted being present at the *busaa* den on the material day. He claimed however, that the deceased approached him and demanded that he buys him liquor. Upon his refusal, the deceased allegedly drew a concealed *panga* and attempted to cut him. He blocked the blow with his left hand, sustaining an injury, and that he then grabbed the *panga* and he fell. The deceased allegedly stepped on him before others intervened. He was taken to hospital and later reported

the incident to the police post, where he was arrested and subsequently charged.

[7] In its judgment, the trial court found that the appellant was positively identified at the scene of crime by both PW3 and PW5, and that even in his own defence, he admitted to being present at the scene of crime and was involved in an altercation with the deceased. The court held that the injuries sustained by the deceased, particularly the eight deep cuts to the head were consistent with the use of a lethal weapon and indicative of a deliberate and vicious attack. The court further relied on **Section 206** of the Penal Code and the principles set out in **Republic v. Tebere s/o Ochan [1945] 12 EACA 63** to buttress malice aforethought. It found that the nature of the weapon used, the vulnerable parts of the body targeted, the repeated blows, and the conduct of the appellant all pointed to an intention to cause grievous harm or death of the deceased. It rejected the appellant's claim that he did not know who inflicted the injuries, finding it to be a fabrication aimed at deflecting his culpability. Ultimately, the trial court was satisfied that the prosecution had proved all the elements of the offence beyond reasonable doubt, convicted him on the information and sentenced him to the 20 years imprisonment.

[8] Aggrieved by the conviction and sentence the appellant lodged the instant appeal on grounds that the trial court erred in law and fact by: failing to appreciate that the prosecution had not proved its case beyond reasonable doubt; misapprehending the facts and evidence; processing the trial in an unconstitutional and flawed manner; convicting and sentencing him without properly considering his defence; and relying exclusively on the prosecution's testimony, thereby drawing an erroneous and prejudicial conclusions. The appellant therefore sought to have the conviction and sentence imposed by the trial court set aside or varied by this Court.

[9] The appeal was canvassed by way of written submissions with limited oral highlights. When called out the appellant appeared through **Mr. Menezes B**, learned counsel, whereas. **Ms. Mwaniki**, learned Assistant Director of Public Prosecutions appeared for the respondent.

[10] Counsel for the appellant argued that the trial court erred in law and fact by failing to uphold the constitutional guarantees of a fair hearing, particularly under **Article 50** of the Constitution. He contended that the trial court did not impartially evaluate the appellant's defence. This, he argued, violated the principles of

impartial adjudication as articulated in **George Ngodhe Juma & 2 Others v Attorney General [2003] eKLR**, where the court emphasized that a

fair trial must be free from prejudice, favouritism, and self-interest, and must reflect judicial honesty, balance, and detachment. All these elements were lacking in the circumstances of the case according to counsel.

[11] Counsel further submitted that the prosecution failed to prove its case against the appellant beyond reasonable doubt. He pointed out material contradictions in the testimonies of PW3 and PW5 regarding the number of assailants, the weapons used, and the sequence of events. Counsel submitted that these inconsistencies undermined the reliability of the prosecution's case and that the trial court failed to subject this evidence to proper scrutiny. He also challenged the finding on malice aforethought, asserting that the prosecution did not establish any intent to kill or cause grievous harm as required under **Section 206** of the Penal Code. He maintained that the incident was spontaneous and lacked premeditation. That in his defence, the appellant had stated that he was attacked by the deceased after refusing to buy him local brew, sustained injuries while defending himself, and was later taken to hospital before reporting the incident to the police.

[12] Counsel therefore invoked self-defence, arguing that the appellant acted in response to an imminent threat posed by the

deceased, who

drew a *panga* and attempted to attack him. He submitted that his reaction was proportionate and justified under the circumstances. He relied on **Victor Nthiga Kiruthu & Another v Republic [2017] eKLR**, which defined self-defence as the use of force to protect oneself from real or threatened harm, and **Ahmed Mohammed Omar & 5 Others v Republic [2014] eKLR**, where this Court affirmed that self-defence must be judged from the accused's subjective perspective, even if based on a mistaken belief. He also cited **Republic v Ann Karimi [2020] eKLR**, which reiterated that the reasonableness of the belief is relevant to credibility but not to culpability.

[13] Additionally counsel submitted that the trial court failed to consider the defence of provocation. He argued that the deceased's persistent demands and aggression towards the appellant triggered a sudden and temporary loss of self-control. He relied on **Duffy v R [1949] 1 All ER 932**, which defined provocation as acts by the deceased that cause the accused to lose self-control, and **Peter King'ori Mwangi & 2 Others v Republic [2014] eKLR**, which held that provocation requires both a subjective loss of control and an objective standard that a reasonable person would have been similarly provoked.

[14] On sentence, counsel challenged the 20-year custodial sentence imposed as excessive and disproportionate. He submitted that the trial court failed to consider mitigating factors, including the fact that the appellant was a first offender, remorseful, and the sole breadwinner for his family. He relied on **Peter Kipngeno Cheruiyot v Republic [2017] eKLR**, where the appellate court varied the sentence due to errors in sentencing, and **Gedion Kenga Maita v Republic, Criminal Appeal No. 35 of 1997**, where the sentence of life imprisonment was reduced to five years. He also cited **Benard Seneyo Letikirich v Republic, Criminal Appeal No. 2 of 2005**, which reiterated the need to consider the offender's personal circumstances and potential for rehabilitation in sentencing. Finally, the counsel invoked the Supreme Court's decision in **Francis Karioko Muruatetu & Another v Republic [2017] eKLR** and its clarification in **Francis Karioko Muruatetu & Another v Republic; Katiba Institute & 5 Others (Amicus Curiae) [2021] eKLR**, which emphasized that courts must consider both aggravating and mitigating factors before passing sentence. Counsel submitted that the trial court failed to apply these principles and urged this Court therefore, to allow the appeal, set aside the conviction and sentence, or alternatively, vary the

sentence to reflect the mitigating circumstances proffered by the appellant.

[15] In opposing the appeal, counsel for the respondent maintained that the conviction and sentence imposed on the appellant were lawful and supported by credible evidence.

[16] Counsel maintained that the trial was conducted fairly that the appellant was represented by counsel throughout the proceedings. The trial court considered his defence and correctly rejected it based on the weight of the prosecution evidence. Counsel argued that the appellant was placed at the scene of the crime and actively participated in the assault that led to the deceased's death.

[17] On malice aforethought, counsel submitted that the nature and extent of the injuries particularly the repeated deep cuts to the head, demonstrated an intention to cause grievous harm or death of the deceased. Counsel submitted that this satisfied the *mens rea* element of murder. Regarding sentencing, counsel relied on **Francis Karioko Muruatetu & Another v Republic (supra)**, where the Supreme Court held that mandatory death sentences are unconstitutional and that courts must consider mitigating factors before passing sentence. It was submitted that the trial court considered the appellant's mitigation and imposed a lawful and proportionate sentence of 20 years' imprisonment, which should not be disturbed. In conclusion, counsel urged the Court to find that the

appellant was properly convicted and

that the sentence imposed was fair and just and dismiss the appeal in its entirety.

[18] This is a first appeal and the duty of this Court on such an appeal is well settled. In **Kamau v Mungai [2006] 1 KLR 150**, it was held that on a first appeal, the appellate court is duty-bound to re-evaluate and assess the evidence afresh and reach its own independent conclusions, but always bearing in mind that it did not see or hear the witnesses as they testified and make due allowance thereof. See also **Okeno v Republic [1972] EA 32**.

[19] Having considered the record, the judgment of the trial court, the submissions of both parties and the law, two issues arise for determination: first, whether the prosecution proved the offence of murder beyond reasonable doubt; and second, whether the sentence imposed was lawful and proportionate.

[20] On the first issue, PW1, Dr. Harun Ombongi, conducted the post-mortem and confirmed that the deceased sustained eight deep cut wounds to the head, additional wounds to the back, ear, and nose, a ruptured spleen, and multiple fractures. He concluded that the cause of death was severe head injury with hypovolemic shock due to assault with sharp and blunt objects. PW2, the deceased's father, took him to hospital where he died upon arrival.

PW4, PW6 and PW7 also got to

know of the death. Indeed, PW4 even attended the post mortem. The appellant did not dispute this fact. So that the first ingredient of murder which is the death of the deceased and the cause thereof was proved.

[21] PW3, the deceased's brother, testified that the appellant and four others attacked the deceased while armed, prompting him to flee and report the incident at Ndengelwa Police Post. PW5, the traditional liquor seller, saw the appellant and his companions, who were her customers and whom she knew very well assaulting the deceased before she fled through a window. This evidence places the appellant at the scene of crime. Of course, the appellant admitted being present at the scene but claimed that the deceased attacked him first with a *panga*, which he blocked, sustaining an injury. He was therefore in one way or another involved in the events culminating in the death of the deceased. This evidence therefore satisfies the second ingredient of murder which is whether it was the appellant committed the offence.

[22] As to malice aforethought, which is the final ingredient of murder that requires proof, the injuries inflicted on the deceased, particularly the repeated deep cuts to the head were excessive and indicative of intent to cause grievous harm. Under **Section 206** of

the Penal Code, one of the manifestations of malice aforethought is
the intent to cause

death or grievous harm. The trial court correctly applied the principles in **Republic v Tebere s/o Ochan (supra)**, in which it was held that malice aforethought may be inferred from the nature of the weapon used, the part of the body targeted, the manner in which the weapon was used, and the conduct of the accused before, during, and after the attack. We are satisfied that the prosecution proved all elements of murder beyond reasonable doubt.

[23] Of course we are aware that the appellant advanced an alibi defence. This Court in **Charles Anjare Mwamusi v Republic, Criminal Appeal No. 226 of 2002**, held that an accused who raises an alibi does not bear the burden of proving it, and it is sufficient if the defence introduces reasonable doubt in the prosecution's case. The trial court found the alibi unconvincing, noting that the appellant admitted being at the scene and was involved in a confrontation. We entirely agree with this summation. Though the appellant has now raised the issue of self- defence as well as provocation in his written submission, we note that the same were not advanced during the trial. They have simply popped up now. They cannot therefore fall for our determination.

[24] On claims of violation of the appellant's constitutional rights,

again this is an issue that was not interrogated during the trial. We therefore have no material upon which we can consider the validity or otherwise

of the claims. In any event, it is on record that the appellant was represented by able counsel throughout the trial and such violations would not have escaped his attention.

[25] On the second issue, the appellant was sentenced to 20 years' imprisonment. He contended that the sentence was excessive and that the trial court failed to consider mitigating factors. In **Francis Karioko Muruatetu & Another v Republic (supra)**, the Supreme Court held that sentencing must be individualized. The Court emphasized that mitigating factors must be considered, including age of the offender, being a first offender, remorsefulness, potential for rehabilitation, and impact on the victims.

[26] While the sentence was within the lawful range, we note that the trial court did not expressly evaluate the mitigating factors in detail and the circumstances of the offence. The appellant was a first offender, expressed remorse, and had dependents. The offence was committed in a traditional liquor den and appears not have been premeditated at all. In **Benard Seneyo Letikirich v Republic, Criminal Appeal No. 2 of 2005**, the Court reduced a sentence of ten years to seven years, emphasizing the need to consider the offender's personal circumstances. In **Peter Kipngeno Cheruiyot v Republic [2017] eKLR**, the Court held that where

there is an error in sentencing,

the appellate court may vary or quash the sentence. We find that the trial court erred in failing to sufficiently weigh the mitigating factors.

[27] Having re-evaluated the evidence and considered the applicable law and relevant authorities, we find no merit in the appeal against conviction which is upheld. However, on sentence, we are satisfied that the trial court did not adequately consider the mitigating circumstances. Accordingly, we set aside the sentence of 20 years' imprisonment and substitute thereof with a sentence of 15 years' imprisonment, to run from the date of first arraignment in court.

Dated and delivered at Kisumu this 19th day of December, 2025.

ASIKE-MAKHANDIA

.....
JUDGE OF APPEAL

H.A. OMONDI

.....
JUDGE OF APPEAL

L. KIMARU

.....
JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR