Wakora v Republic (Criminal Appeal E055 of 2021)
[2025] KECA 2305 (KLR) (19 December 2025) (Judgment)

Neutral citation: [2025] KECA 2305 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL E055 OF 2021

DK MUSINGA, PO KIAGE & GV ODUNGA, JJA

DECEMBER 19, 2025

BETWEEN

BEATRICE NANYAMA WAKORA .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(Appeal against the judgment of the High Court of Kenya at Bungoma (Ali Aroni, J.) delivered on 1st December 2016 in Bungoma High Court Criminal Case No. 2 of 2012)

JUDGMENT

1. The appellant, Beatrice Nanyama Wakora and her son, Peter Wakundu Wakora, were charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code, the particulars of the offence being that on 12th January 2012 at Kimilili Rural within Bungoma County, they murdered Millicent Nasipondi Wakora.

2. The prosecution evidence was that on 12th January 2012, PW1, Eunice Nanjala, left her 4-year-old daughter (the deceased) in the custody of her co-wife, the appellant, while she went to her casual work in the neighbourhood. Those left at home, apart from the appellant, were her husband, Morris Wakora, and her 1st born son, Simon. When she came back at mid-day, she found a crowd at home and was informed that her daughter had died. She saw the deceased's body in a standing position in a pit partially covered with soil up to the chest. The pit, according to her had been dug to plant bananas, although she did not know who dug it. She was informed by her grandchild, Ezekiel Saachi Mangeni (PW7), whom she found at the scene, that the appellant and the 2nd accused were involved in the death of the deceased. The 2nd accused was not at home at the time she was leaving but was present when she returned.

3. In his unsworn evidence, following a voire dire examination, Ezekiel Saachi Mangeni, PW7, aged 15 years, stated that on 12th January 2012, while standing under a mango tree next to the house, he saw his uncle, the 2nd accused, hit the deceased, whom he accused of stealing a potato, with a hoe- handle

on the head just outside the house of his grandmother, the appellant. The appellant then slapped the deceased before the 2nd accused, using a gunny bag given by the appellant, carried the deceased behind the toilet, leaving the appellant. When he followed the 2nd accused, he saw him removing the deceased from the bag and placed her in the pit for of planting bananas, half covered with soil. PW7 then ran to the posho mill where he found his aunt Jacqueline, PW8. It his further evidence that the 2nd accused warned him not to speak and even told the village elder to beat him for disclosing what happened. He recognised the weapon which was used by the 2nd accused to beat the deceased. Although the deceased collapsed after being hit, he stated that her eyes were open.

4. PW8, Jacquline Wamalwa Wakora, confirmed that on 12th January 2012 she had gone to grind maize when, on her way back, she found the appellant at the gate seated by the roadside. The appellant informed her that the deceased had died and her body was in the maize plantation. Accompanied with PW7, she went to the farm where she saw the deceased buried in a pit dug for planting bananas. The body was covered by the soil up to the waist. In the farm was an avocado tree and banana plantation. She stated that the 2nd accused had been in the home selling molasses.

5. PW2, Joseph Kundu Khaoya, was the village elder who received information about the death of the deceased. When he proceeded to the scene which was 70 metres from the home, he saw a body of a child inside a small pit about 2 feet deep. The body lay flat in the hole and from the feet to the waist, it was covered with soil. He did not notice any injuries. He was informed that the pit had been dug to plant bananas. By then the villagers were holding the accused as suspects in the death of the deceased.

6. The body of the deceased was identified by PW3, Rajab Simiyu Mukangi, for the purposes of post mortem which was conducted by PW5, Dr. Achinza Shikuza, a medical officer at Kimilili Sub County Hospital on 14th January, 2012. According to PW5, the body had bruises on central part of forehead measuring 5 x 5 cm and on the right hand measuring 1 x 1 cm. Internally, there were soil particles in the nostril, the lungs, the heart, liver, stomach and spleen. Although the head was bruised and there was haemorrhage on the temporal area of the skull, there was no blood inside the head or any physical brain injury. In his opinion, the death was caused by cardio pulmonary arrest due to asphyxia resulting from suffocation.

7. PW6, Cpl Job Ntabo, PW6, on 12th January 2012 at around 4. 45 pm accompanied OCS to the scene where they found a crowd holding some villagers as suspects. The village elder took them to the shamba where they found a minor aged 4 years who had been partially buried in a shallow pit. The hole was 2 feet deep and the head was facing downwards while the legs were out. They recorded statements from children who had been playing with the deceased and from the scene, they recovered a jembe handle suspected to have been used to kill the deceased.

8. On being placed on her defence, the appellant's sworn evidence was that on 12th January 2012 she went to the millers, leaving the children, playing. On return, she found many people gathered at home and she was informed by the children that the deceased had fallen near the banana plantation and had died in a ditch. She screamed and ran to her daughter who had gone to the posho mill. It was her evidence that the deceased was epileptic. In her view, she was arrested because she was the one living with the deceased as her mother did not stay with them. Both her and the 2nd accused were apprehended and were handed over to the police. She denied seeing the 2nd accused beating the deceased. She insisted that the deceased had fallen into the ditch with her head down inside the hole and was not breathing. She explained that she did not remove the deceased from the ditch since she suspected that she was dead as she was not breathing.

9. The 2nd accused stated that at 1.00pm, he had passed by the home when he saw many people at the gate. When he proceeded to the pit, he saw the deceased's body. He then left to look for his father and, on

failing to find him, returned home only to be held as suspects together with his mother, the appellant. He denied giving instructions for PW7 to be beaten, although he admitted seeing PW2 beat PW7. In his view, he was suspected in the death because PW7 named him when PW7 was being beaten. Since he was residing elsewhere, he had no knowledge about the potatoes mentioned by PW7 and he did not see Ambrose, DW3.

10. DW3, Ambrose Muganda Wakora, a 9 year-old son to PW1, gave unsworn evidence in which he stated that the deceased was her sister but he didn't know how she died since he was at school. He returned home at 1.00pm and found her dead in the pit half covered with the soil up to the chest.

11. In her judgment, the learned Judge found that the death of deceased was not disputed. As to whether the evidence on record linked the two accused persons to the death, the learned Judge held that both the appellant and respondent agreed that PW7 who was the only person who witnessed the two accused injuring and burying the deceased on the material day. The learned Judge held that whereas PW8 did not seem to be a trustworthy witness, as she appeared to cover up the truth, PW7 was truthful as he gave a graphic account of what his uncle and grandmother did because the child had eaten a sweet potato belonging to the 2nd accused. According to the learned Judge, his evidence, as regards the injuries sustained by the deceased, was corroborated by that of PW5 and his evidence placed the two accused persons at the scene of crime and accounted for each of their actions. The conduct of the appellant, the learned Judge found, was not consistent with that of an innocent person and concluded that the appellant and 2nd accused jointly beat the deceased and buried her in a 2 feet hole leading to her suffocation and death. Both of them were convicted and sentenced to death.

12. This appeal came before us for virtual plenary hearing on 4th September 2021 when learned counsel, Ms Lunani, appeared for the appellant, herself joining from Kisumu Women Prison, while learned counsel, Ms Matere, appeared for the respondent.

13. The appellant's grounds of appeal were summarised into 5.

It was submitted that section 200(3) of the Criminal Procedure Code was not complied with when the hearing was taken over by Aroni, J. (as she then was) from Omondi, J. (as she then was), hence the appellant's rights to fair trial were violated. The case of Kailutha Nkaricha & Another v R [2015] eKLR, was cited to highlight the fact that failure to comply with the said provision renders the trial a nullity. It was further submitted that the learned Judge erred in convicting the appellant when, from the evidence, the appellant neither hit nor placed the deceased in the pit, which was the cause of the suffocation and that from the evidence on record, there was no motive or reason for causing harm to the deceased by the appellant. In absence of malice aforethought, it was submitted, the charge ought to have been reduced from murder to manslaughter. According to the appellant, the evidence of PW7 to the effect that the appellant slapped the deceased, if true, would not have been calculated to kill or cause grievous bodily harm to the deceased and that the injuries that were found on the body of the deceased could not have been inflicted by a slap.

14. It was contended that there were contradictions in the evidence of PW7 and PW8 as regards who relayed the information of the death to PW8. However, the learned Judge chose to believe the unsworn evidence of PW7 as opposed to the sworn evidence of PW8 on the basis only that PW7 appeared to be truthful. Citing Amber May v R (1979) KLR 38, it was submitted that unsworn evidence has no probative value and that its potential value is merely persuasive rather than evidential. In this case, it was contended that since PW7 did not seem to appreciate the importance of giving evidence on oath, the trial court erred in convicting the appellant on his unsworn and uncorroborated evidence.

15. On sentence, it was submitted that the death sentence imposed on the appellant was contrary to the decision in Francis Karioko Muruatetu & Another v R [2015] KLR.

We were urged to set aside that sentence, taking into account the number of years already served by the appellant and her advanced age coupled with her mitigation.

16. On behalf of the respondent, it was submitted: that although the appellant raised an alibi defence, of her going to the posho mill, she did not call any witness in support of her testimony; that, on the authority of R v Turnbull and Others (1976) 3 All ER 549, since most of the witnesses were relatives the appellant's relatives, there was no possibility of an error in identification; that the act of burying the body of the deceased without reporting to the local authorities pointed to mens rea to conceal their acts; that the post mortem report confirmed that the deceased died of cardiopulmonary arrest due to asphyxia due to suffocation and other injuries were noted and documented in the report; that section 200(3) of the Criminal Procedure Code was complied with by the trial court since the appellant stated that the matter should proceed from where it had reached; and that malice was established by the act of the appellant aiding in the beating and burying of the deceased.

17. It was further submitted: that there was no contradiction between the evidence of PW8 and PW7 since PW8 did not witness the incident and when she went to the scene she found deceased had been buried; that, if there were inconsistencies and/or discrepancies, they were of a minor nature and did not go to the root of the prosecution case as to be prejudicial to the appellant; that on the authority of the case of Richard Munene v Republic (2018) eKLR, it is not every trifling contradiction or inconsistency in the evidence of the prosecution witness that will be fatal to its case; that all the witnesses saw the deceased half buried which evidence was corroborated by the post mortem and the appellant was squarely placed at the scene by her confirmation conversation with PW8; and that the sentence was commensurate to the offence.

18. The respondent urged us to dismiss the appeal and uphold the trial court's verdict.

19. We have considered the grounds of appeal and the evidence on record, the respective submissions filed by and on behalf of the appellant and by the respondent. As a first appellate Court, we are under a duty, pursuant to rule 31(1)(a) of this Court's Rules, to undertake a fresh and exhaustive examination and reach our own decision on the evidence on record. See Okeno v Republic (1972) EA 32.

20. It was submitted that the provisions of section 200(3) of the Criminal Procedure Code were not complied with during the taking over of the trial by one Judge from another Judge. We agree that under the said provision the court is enjoined to direct the manner of proceeding in those circumstances and that the failure to give appropriate directions is fatal to the hearing. What is important in that provision is, however, that an accused person be afforded an opportunity to have a say in whether the trial starts afresh or proceeds from where it had reached. Having a say, however, does not mean that the court must yield to the position taken by the accused, since the ultimate decision rests on the court. We must however insist that the opportunity must be availed to the accused to put forward his or her position for consideration by the court.

21. In this case the proceedings for 18th May 2015 are indicated as follows:

    Coram

    Before Hon Ali Aroni – Judge Court Assistant: Wayongo State: Mr Kamau Accused: Mr Tsimonjero for M/S Mumalasi

    Mr Tsimonjero: This is a part heard matter with only one witness

    Court: Matter to proceed for hearing on 29th of September, 2015.

22. While we appreciate that the proceedings could have been conducted with more clarity as regards compliance with section 200(3) aforesaid, in this case, from the submissions of the defence counsel, he was not averse to the matter proceeding from where it had reached. The learned Judge could have made it clearer that the matter was proceedings from where it had reached. However, in light of the defence counsel's position and the directions that followed, we are of the view that section 200(3) aforesaid was complied with.

23. The ingredients of a charge of murder under section 203 as read with section 204 of the Penal Code, are: that the death of the deceased occurred; that the death was caused by an unlawful act of commission or omission by the appellant; and that the appellant had malice aforethought as he committed the said act. See Chiragu & Another v Republic [2021] KECA 342 (KLR).

24. Regarding the death of the deceased, both the appellant and the respondent agree that the deceased died. On whether the death was caused by an unlawful act or omission, the appellant advanced the view that the death might have been naturally caused since the deceased was known to be epileptic and fell in the pit, though no evidence was adduced to show that the deceased was indeed epileptic as alleged. The respondent is however of a different view. In this case, the undisputed evidence on record was that the deceased was found in a pit half covered with soil. If the deceased had suffered an epileptic fit and as a result fell into the hole, it is not clear how her body ended up being covered partly with the soil with legs outside and the head facing downwards. A third party must have played a role in covering the deceased after the deceased's body was placed in the pit. Clearly, therefore the death of the deceased was not occasioned by natural causes, hence was unlawful.

25. As to who caused her death, the learned Judge had the benefit of observing the demeanour of witnesses and having done so stated that:

> " PW7 gave the impression that he was truthful. His evidence stands out he is the only one who saw and explained every detail of what transpired and reasons for the action. He gave an account of who was present, and where other members of the family were at the time. His evidence is corroborated by that of PW5, the doctor as related to injuries sustained. Indeed, DW3 also corroborates his evidence as to who was present at the time the child met her death. PW7 placed the two accused persons at the scene of crime and accounts for each of their action."

26. The learned Judge, in determining whose evidence to believe relied on the impression that PW7, although a child, created in her mind. Credibility of witnesses is a matter which is largely left to the trial court as this Court appreciated in Nelson Julius Karanja Irungu v Republic [2010] eKLR where it was held that:

> " ...when it comes to credibility of witnesses an allowance must be given that the trial court was in a better position to make that
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> judgment as it saw and heard the witnesses."

27. In such matters, as this Court pronounced in Republic v Francis Otieno Oyier [1985] KECA 55 (KLR), unless it is shown that the trial court erred in arriving at such a finding or that in arriving at it, the court acted on wrong principles, the impression must be respected. We have no reason for differing with the learned Judge's impression. To the contrary we agree that the evidence of PW7 was detailed and was unshaken in cross examination. It could not have been evidence that was made up by PW7 to nail the accused persons.

28. The mere fact that PW7 gave unsworn evidence did not render that evidence worthless as submitted by the appellant. Such evidence, if believable, may be a basis for finding a conviction as long as there is corroboration. In this case, the evidence of PW7 was corroborated by that of PW5.

29. On whether it was the appellant and the 2nd accused who caused the death of the deceased, we reiterate that PW7's evidence was cogent. Unlike the appellant whose evidence that she left DW3 at home, which was contradicted by DW3, PW7's evidence was consistent as to who was at home at the time of the incident. His evidence not only explained the death of the deceased but demarcated the roles played by the appellant and the 2nd accused in the death of the deceased. His detailed evidence that the deceased was placed in a sack before being buried in the pit was consistent with the findings by PW5. The alleged inconsistency between the evidence of PW7 and PW8 as to who relayed the information of the deceased's death to PW8 was not material to the case.

30. Was there malice aforethought? The appellant submitted that since there was no known previous animosity between the appellant and the deceased, in the absence of the motive for the killing, malice aforethought was not proved. This Court in Odhiambo v Republic [2024] KECA 571 (KLR) cited the decision in Dida Ali Mohammed v R, Nakuru Court of Appeal Criminal Appeal No. 178 of 2000 (UR) where this Court disabused the notion that motive is a necessary ingredient of the offence of murder by clarifying that":

> "Mr Amingá for the appellant submitted before us that the learned trial Judge did not consider an important ingredient of motive for the killing. With due respect to him, and this he conceded when we pointed it out to him, motive is not a material element in establishing guilt. [See section 9(3) of the Penal Code]...But perhaps what Mr Amingá had in mind is the element of mens rea. Assuming that is so, we say this. The learned trial judge did not specifically advert to the issue. That indeed was an error. However, the evidence which he accepted clearly shows that the appellant killed the deceased with the necessary malice aforethought. Medical evidence shows that pressure was applied to the deceased's neck which suffocated her. From that evidence, it is quite clear that by pressing against the deceased's neck the appellant intended to cause the deceased grievous harm or death."

31. It is true that the only evidence of the assault on the deceased by the appellant is that she slapped the deceased after she had been hit by the 2nd accused. That act, though may not necessarily have led to the death of the deceased, was taken in pursuance of a common intention of inflicting grievous harm to the deceased, if not to kill her. The deceased was a mere child aged 4 years, and having been beaten by the 2nd accused using the handle of a jembe, there would have been no reason to inflict further injuries on her. In R v Tabula Yenka S/o Kirya and 3 Others [1943] 10 EACA 51, the predecessor of this Court held that:

> " To constitute a common intention to prosecute an unlawful purpose...it is not necessary that there should have been any concerted agreement between the accused prior to the attack on the so called thief. Their common intention may be inferred from their presence, their action and the omission of any of them to disassociate himself from the assault."

32. The same court in R v Mikaeri Kyeyune and 4 others 8.E.CA 84 observed that:

> " Any person identified as having taken part in the beating must be regarded as linked by a common intention."

33. There was no evidence as to what action the appellant did when the 2nd accused struck the deceased. Instead, she slapped the deceased. After finding the deceased in the hole, she similarly took no action that might have been geared towards saving the deceased's life. The natural reaction, where a person in the position of a mother finds a child in danger, is to instinctively save the life without first ascertaining whether the child is dead or alive. Here, we see a mother who finds a child in a pit and instead of removing her therefrom, suspects that the child must be dead and, on that basis, does absolutely nothing apart from going to sit by the roadside outside the home. The only plausible explanation was that she only raised alarm after confirming that the deceased was dead.

34. On the sentence meted, we agree that since the decision in Francis Karioko Muruatetu & Another v R (supra) death sentence is not mandatory in all cases where an accused is convicted of murder. The learned Judge did not consider the mitigating circumstances on the premise that the sentence of death was the only prescribed punishment. It was brought to our attention that the 2nd accused, in resentencing proceedings filed in Bungoma Constitutional Petition 34 of 2019 – Peter Kundu Wakora v R, had his sentence reduced to 30 years. That a court, in meting out the sentence, has discretion to consider the roles played by the perpetrators to an offence was appreciated in Marando v The Republic [1980] KLR 114, where the holding in R v Ball (1951) 35 Cr App Rep 164, 165 was referred to, for the proposition that:

> " The differentiation in treatment is justified if the court, in considering the public interest, has regard to the differences in the characters and antecedents of the two convicted men and discriminates between them because of those differences."

35. Considering the major role played by the appellant in the death of the deceased and the fact that the sentence of the 2nd appellant was reduced to 30 years, we likewise quash the death sentence imposed on the appellant and reduce the sentence to 15 years, given that the appellant is now 83 years old. Although there was an order that the appellant could be released on bond of Kshs 500,000 with a surety, her release on bond was not secured. In the premises, the 15 years will run from 23rd January 2012 when she was first arraigned in court.

36. Save for the sentence, we uphold the appellant's conviction.

37. We so order.

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

D. K. MUSINGA, (PRESIDENT)

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

G. V. ODUNGA

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR