Mulwa v Republic (Criminal Appeal 205 of 2020)
[2025] KECA 1517 (KLR) (19 September 2025) (Judgment)

Neutral citation: [2025] KECA 1517 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT ELDORET

CRIMINAL APPEAL 205 OF 2020

JM MATIVO, PM GACHOKA & WK KORIR, JJA

SEPTEMBER 19, 2025

BETWEEN

WESLEY CHIRCHIR MULWA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal from the conviction of the High Court of Kenya at Eldoret (C.W. Githua, J.) dated 7th June 2018 and sentence (S.M. Githinji, J.) dated 22nd June 2018 in HCCRC No. 4 of 2017)

JUDGMENT

1. Wesley Chirchir Mulwo alias Chain alias Giant, the appellant herein, was charged 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 20th October 2006 at Talai Trading Centre in Baringo District within Rift Valley Province, the appellant murdered James Barkwany Cheboiwo.

2. The appellant was arraigned before the trial court. He pleaded not guilty to the offence that he was charged with. After a full trial, the appellant was convicted of the offence and sentenced to life imprisonment. It is those findings that have precipitated the present appeal.

3. The appellant filed his notice of appeal on 4th July 2018. He also filed undated grounds of appeal and a memorandum of appeal dated 13th September 2018 that raised 14 grounds disputing the findings of the trial court. We have taken the liberty to summarize those grounds as follows: the appellant was improperly convicted because the aspect of identification was not proved beyond reasonable doubt; the trial court ought to have concluded the trial process with the assessors who had initially participated in the hearing; section 200 (3) of the Criminal Procedure Code was not complied with rendering the trial unfavorable; and the evidence of the prosecution was marred with contradictions rendering the conviction unsafe.

4. The appellant continued that the sentence meted out was harsh and excessive; written submissions were improperly admitted; the trial court failed to consider that the torch was implanted on the appellant when he was arrested; the trial court failed to consider his request for the production of occurrence book of 9th November 2006; the trial court failed to attach probative value to the dying declaration of the deceased; and the trial court failed to consider his alibi cogent defence. In view of the foregoing, the appellant urged this court to allow the appeal, quash the conviction and set aside the sentence imposed on him.

5. This appeal was heard virtually on 6th May 2020. The appellant was present and represented by learned counsel Mr. Miyienda. Prosecution Counsel I Miss Kirenge represented the State. Parties relied on their respective written submissions to persuade this Court to find in their favor.

6. The appellant filed written submissions dated 17th January 2020. He abridged the testimonies of the prosecution witnesses to argue that the evidence of the eye witnesses, that is PW1 and PW7, were contradictory. Furthermore, it was dark when the offence was committed and that the moonlight was not sufficient to assist the witnesses in identifying and recognizing the assailant. In his view, PW1 was too far from the scene as to make out a case for identification of the offender. The appellant also complained that while PW1 testified that the perpetrator was wearing a black jacket, the same was never recovered from the crime scene.

7. Turning to the dying declaration, the appellant submitted that since the deceased died on the spot, it was incomprehensible that the deceased told PW1 and PW7 that it was the appellant who murdered him. In his view, based on these arguments, he was not properly identified as the offender. He added further that in any event, PW1 did not catch up with the suspect in his hot pursuit. He could therefore not have known who killed the deceased.

8. On the ground decrying the absence of assessors at the conclusion of the trial, the appellant observed that while the assessors initially participated in the trial, they were ultimately removed. He challenged that their absence rendered his right to be tried with the aid of assessors infracted. He opined that the repeal of section 262 of the Criminal Procedure Code ought not to have affected the proceedings at trial because it commenced before the repeal of that provision. Thus, he submitted, the removal of the assessors was an error and a misapplication of the law,rendering the trial a mistrial and offending Article 50 of *the Constitution*.

9. On section 200 (3) of the Criminal Procedure Code, the appellant submitted that it was not explained to him when the evidence of PW5 was taken. On this ground, he submitted that the trial violated his right to a fair trial and occasioned a miscarriage of justice. The appellant urged this Court to find that the sentence meted out was harsh and excessive in light of the decision of the apex Court in Francis Karioko Muruatetu & Others vs. Republic [2017] eKLR. The appellant maintained that he was not in possession of a torch at the time of his arrest. Further, the failure of the prosecution to accede to his request to furnish him with the occurrence book from Kabarnet Police Station dated 9th November 2006 was indicative that the prosecution was covering up lapses in its investigation.

10. Further challenging the circumstances leading up to his arrest, the appellant submitted that the fact of his arrest 21 days later questioned the manner and conduct of the investigations. PW4 testified that he was arrested for committing other offences. Based on that evidence, the appellant submitted that no nexus was created between the present offence and the offences he was suspected to have committed.

11. The appellant questioned the credibility of the evidence by stating that the knife that was used to stab the deceased was not submitted for forensic evaluation. Finally, on his alibi defence, he submitted that

it was improperly rejected, yet it was cogent. For those reasons, he prayed that his appeal be allowed urging this Court to consider that he had been incarcerated for 16 years.

12. The respondent opposed the appeal. It filed its written submissions dated 28th June 2021. It submitted that contrary to the appellant's findings, the appellant was properly and positively identified as the perpetrator by way of recognition. It relied on PW1's evidence to submit that the moonlight and the torch shone by the deceased on the appellant assisted him to recognize the appellant whom he knew very well.

13. The respondent continued that other than PW1, PW7 was present when the offence was committed and corroborated the evidence of PW1. Thus, it was affirmed that the appellant murdered the deceased person since they were in close proximity when the offence occurred. Additionally, the deceased told the witnesses that the appellant had stabbed him before succumbing to the injuries. The witnesses, the respondent continued, further testified that the appellant had worn a black jacket which he had worn on previous occasions. In its view, this was a case of recognition rather than identification.

14. Addressing the participation of the assessors, the respondent submitted that this case did not qualify from the presence of assessors to its tail end. This is because when the matter was poised to proceed on 7th June 2007, the assessors did not participate in the session as the trial was adjourned. That since the assessors did not participate from that onset thereof, it was not a requirement for them to participate up to the conclusion of the matter. About a year after sections 263 – 273 of the Criminal Procedure Code were repealed, the hearing of this matter took off but without the presence of assessors. In its view, thus, no prejudice or a miscarriage of justice had occurred from their absence.

15. Turning to the provisions of section 200 (3) of the Criminal Procedure Code and whether they were complied with, the respondent observed that Githua, J. at the hearing of the defence case, explained the provisions of section 200 (3) of the Criminal Procedure Code on 13th July 2015. It therefore submitted that the actions of the trial court were properly sanctioned in law. Submitting on contradictory evidence as alleged by the appellant, the respondent argued that on the contrary, PW1 and PW7's testimonies corroborated each other and there was no case for contradiction.

16. Speaking to the appellant's request for the production of the occurrence book, the respondent observed from the record that counsel for the appellant requested for the same in order to proceed with the defence hearing. That application was granted. Thereafter, the matter was adjourned at the instance of the appellant on six occasions in order for the appellant to procure the said document. Those applications were never objected by the respondent. Come 23rd July 2014, the appellant's counsel ceased to act on his behalf. The appellant then retained the services of his new counsel, who on 13th July 2015, failed to raise this issue when section 200 (3) of the Criminal Procedure Code was read out to the appellant.

    In its view, thus, the appellant abandoned the request and could not approbate and reprobate.

17. On sentencing, the respondent submitted that the trial court actually adopted the decision in Francis Karioko Muruatetu & Others vs. Republic (Supra) since he was sentenced to life imprisonment and not death. Lastly, on the appellant's alibi defence, the respondent submitted that the same was not cogent and was accordingly properly rejected. It urged this Court to dismiss the appeal, uphold the conviction and affirm the sentence.

18. We have considered the memorandum of appeal, grounds of appeal and the parties' written submissions, examined the record of appeal and analyzed the law. As a first appellate Court, the appellant is entitled to expect the evidence tendered in the superior court to be subjected to a fresh

and exhaustive examination and to have this Court's own decision on that evidence. [See Henry Katap Kipkeu vs. Republic [2009] KECA 294 (KLR)].

19. The facts captured in the record before us are as follows: PW1 Gideon Barkwang testified that the appellant was his neighbour. He ran a pool table business in the community.

His alias was Giant also expressed as Chain. The deceased James Barkwany Cheboiwo was his father. His testimony was that on 20th October 2006 at 7:00 p.m., he was at home. The deceased was unwell. He requested PW1 to take him to the hospital. PW1 was thus accompanied by the deceased to look for a vehicle to take them to hospital.

20. PW1 went to his cousin's house, PW7 Zephaniah Barkwany Kipng'etich, who owned a vehicle. He found him in his shop located in Talai center. All the three persons proceeded to PW7's house where the car had been parked. It was 9:30 p.m. There was moonlight. On their way, PW1 saw the appellant approach the deceased, who was approximately 30 metres ahead of him. He was wearing a black jacket. PW7 was ahead of them all as he had gone to the vehicle. All the while, PW1 was under the impression that the appellant was assisting the deceased to walk. After a few word exchanges, PW1 saw the appellant stab the deceased with a knife. PW1 then raised an alarm.

21. Together with PW7, PW1 approached the deceased to try and administer first aid. In the process, the deceased informed them that Giant, who is the appellant, had killed him. He then died while he was with them. He recalled that his father had a torch with him that he had used to light up the appellant. That was how the deceased recognized the appellant. The appellant then ran away and disappeared in the thicket of Katimok Forest. PW1 testified that he tried to pursue him together with PW7 but their efforts were an exercise in futility. He stated that the deceased had a tendency of marking his items and he had marked the torch with initials 'JBC' and that they did not trace it after the incident.

22. PW1 and PW7 then returned to the crime scene and later reported the incident to the chief. The matter was then reported to the police station and the body of the deceased transferred to the mortuary. PW1 testified that the appellant went into hiding. He was eventually arrested on 21st November 2006. He learned that the deceased's torch was found in the appellant's possession on his arrest. During the deceased's lifetime, PW1 testified that he never quarreled with the appellant. He further recalled that the appellant had committed robbery with others sometime in October 2006. He maintained that the appellant had not been framed.

23. PW2 Elium Kibet Chesire, the chief of Talai Division, knew the appellant as Chain. He recalled that on a previous occasion, the appellant had robbed a lady in the location. He had also committed several other offences. They had been pursuing him for these offences.

24. On 20th October 2006, PW2 testified that at around 9:00 p.m., he received reports from PW1 that his father had been murdered by the appellant. PW2 accompanied PW1 to the scene and found the deceased's body lying on the ground on his stomach. PW7 was manning it. He noticed that there was a big stab wound on the back that emerged at the frontal part of his chest. It was fresh. He also had a wound on his leg and hand. His trouser was torn. PW2 called the OCS who took the body. He confirmed that there was moonlight. Though the appellant was not traced that night, he learned that he was later arrested.

25. PW3 Johana Kipkulei Cheutoi was the deceased's first cousin.

He testified that on 27th October 2006 at 10:00 a.m., he went to Kabarnet District Hospital and identified the body of the deceased during the post mortem exercise. He recalled that the deceased sustained a cut on his arm and a deep cut on the left side of his back. He also had a deep cut above the waist.

26. PW4 Corporal Lawrence Njue testified that on 10th November 2006 at around 6:30 a.m., he had been deployed at Kiamunyi along the Marigat-Nakuru road. PW4, in the company of his colleagues, stopped motor vehicle registration number KAU 036K Toyota Hiace matatu. He had received intelligence reports that the vehicle was ferrying a suspect at large wanted at the Kabarnet Police Station. PW4 identified the suspect as the appellant, a passenger aboard the said vehicle. He was referred to as Wesley or Chain.

27. PW4 found that the appellant was in possession of an ID with the names 'Dickson Yator Chepkaitany'. The appellant explained that he was called Harun. On looking at his ID, PW4 discovered that the same did not belong to the appellant, as the face on the ID did not match that of the appellant. In his nylon bag, PW4 recovered cooking utensils, a dagger and a spot light torch bearing the marks 'JBC'. Upon further interrogation, the appellant admitted to PW4 that he was on the run. PW4 then took the appellant to Menengai Police Station. He was booked in the OB. Later on, the appellant was escorted to Kabarnet Police Station.

28. PW5 Dr. Ambrose Rotich testified on behalf of Dr. Gitaka who was away to pursue his education. Dr. Gitaka conducted the post mortem on the deceased on 27th October 2006. His observations were that the deceased had a deep cut wound about 4cm long on the left lumbar region backside. The twelfth left rib had been fractured. He had blood lesions along the stab wound in his vascular system. There was blood in the abdominal cavity. His opinion was that the deceased died as a result of hemorrhagic shock caused by a stab wound on his back. The stab wounds were inflicted by a sharp object. Dr. Gitaka signed the autopsy report that was produced in evidence.

29. PW6 Sergeant Joshua Aseto, the investigating officer, testified that on 20th October 2006 at 11:00 p.m., while on duty at Kabarnet Police Station, he received a call from PW2 that the appellant murdered the deceased person that night. PW6 proceeded to the scene where he found PW2 and a crowd that had gathered. He found that the deceased had a stab wound on his back-left side. The body was found facing upwards along the roadside of Balai/Katamock Forest. It was removed and transferred to Kabarnet District Hospital. A post mortem was done on 27th October 2006.

30. PW6's evidence was that the appellant went into hiding and could not be traced. He had been informed that he had disappeared into the Katimo forest. He commenced his investigations to recover the murder weapon and trace the suspect who was at large. He recalled that area residents were afraid of him because he was a threat to the society. That he was spotted on several occasions but would disappear into the valleys and mountains within the area. He testified that the appellant was spotted by a Good Samaritan on 10th November 2006 in a vehicle where he was arrested by PW4.

31. PW6 continued that the appellant had committed several other offences previously; that is two cases of robbery with violence and one case of impersonation. He produced the torch, bearing the initials 'JBC' and a dagger suspected to have been the murder weapon. They had been found in the possession of the appellant. He also produced a rough sketch map of the crime scene.

32. PW7 testified that the deceased was his relative while the appellant was his neighbour. He recalled that on 20th October 2006 at 8:00 p.m., he was at his shop when the deceased's son, PW1 came to his shop requesting him to take the indisposed deceased to hospital. PW7 closed his shop and retreated to his home at around 9:30 p.m. where his vehicle had been parked. He was accompanied by PW1 and the deceased. PW7 rushed ahead leaving PW1 at the junction. He also saw the appellant, clad in a black jacket, talking to the deceased person. He was 15 meters ahead and the moonlight was shining.

33. Suddenly, PW7 heard PW1 screaming. PW7 left his car and saw PW1 chasing after the appellant. The deceased told PW1 and PW7 that Chain, that is the appellant, had knifed him. PW7 also attempted to

chase after the appellant who had disappeared into Katmwock Forest. He was however unsuccessful. On return to the scene PW1 and PW7 tried to administer first aid but he had already succumbed to the stab wound inflicted on his back. PW2 later came to the scene. Thereafter, the body was taken to the mortuary by the police.

He recalled that during his lifetime, he had never heard the deceased quarrel with the appellant.

34. PW8 PC Musa Kiptum Koech was present when the deceased's autopsy was carried out on 27th October 2006. He observed that the deceased suffered a stab wound on the left side of his back.

35. At the close of the prosecution's case, the trial court established that the appellant had a case to answer. He was placed on his defence. He testified on his behalf and called two other witnesses to the stand. As DW1, the appellant gave an unsworn testimony maintaining his innocence. He accused the prosecution witnesses of lying. He confirmed that he ran a pool table business. He recalled that sometime in July 2006, PW7 approached him for his assistance in removing his vehicle that was stuck in the mud. Unable to do so, the appellant was paid Kshs. 50.00 together with other persons.

36. The following day, DW1 was visited by the chief accompanied by a few police officers. He had been accused of stealing items from PW7's car. Nothing was recovered. One week later, his pool business was closed down because he had not obtained a licence to operate. DW1 would later find employment at a Nakuru hotel. He thus decided to move with his family to the new town.

37. On his way, accompanied by his family on 10th October 2006, DW1 was arrested in the presence of his family. Police officers also took his household items. He was arrested after one of the passengers spoke to the police officers at a roadblock. Though his household items were returned, DW1 testified that police officers confiscated his kitchen knife. He complained that he called for the production of the occurrence book but that was never availed. He denied committing the offence.

38. DW2 Alice Mulwo recalled that the appellant had previously been employed at Keekorock Lodge. They were colleagues before she found employment elsewhere. She testified that in June 2006, the appellant returned home as his wife delivered a baby. Later on 5th November 2006, DW2 secured employment for DW1 at Naivasha Country Club. The appellant however did not report for duty. That was when she discovered that he had been charged with the offence of murder. DW2 maintained that the appellant was not running away since he was traveling to his new domicile.

39. DW3 Nancy Chebet Bowen testified that on 27th September 2006, the appellant came to her hotel establishment seeking employment. She retained his services as a cashier effective 1st October 2006. She would thereafter discharge him because he informed her that he found employment elsewhere on 4th November 2006. She confirmed that he was working on 20th October 2006.

40. In this appeal, the main issue for determination is whether the trial judge arrived at a correct finding in convicting the appellant and sentencing him to life imprisonment. In order for the prosecution to secure a conviction for the offence of murder, the prosecution must establish beyond reasonable doubt, the following conjunctive ingredients: the death of the deceased; the act or omission causing the death was unlawful; the act or omission was committed by the perpetrator and; malice aforethought.

41. PW5 produced Dr. Gitaka's post mortem report. His opinion was that the deceased died as a result of hemorrhagic shock caused by a stab wound on his back. Therefore, there is no doubt that the deceased died as a result of stab wounds that were inflicted by a sharp object and consequently, the question of death is not in doubt. Was the appellant the perpetrator? We shall revisit the evidence once again.

42. The prosecution relied on the evidence of PW1 and PW7 who were the eye witnesses to demonstrate that the appellant murdered the deceased. At the onset, we must point out that the evidence of PW1

and PW7 substantially corroborated one another. The setting of the crime scene as told by the two witnesses is that the offence occurred in the night hours of 20th October 2006 at around 9:30 p.m. within Talai Trading Centre. Both witnesses confirmed that there was moonlight sufficient to recognize the appellant.

43. It was testified that on their way to PW7's house, PW1 saw the deceased talking to the appellant. PW1 was about 30 metres away from him while PW7 was ahead of them by 15 meters. PW1 was under the impression that the appellant was assisting the ailing deceased person who was poised to go to hospital that night. Suddenly, PW1 saw the appellant stabbing the deceased person and screamed. This caught the attention of PW7, meters away, who came back to the scene.

    While trying to administer first aid, PW1 and PW7 were informed by the deceased that Chain, alias, the appellant, had stabbed him. They would later pursue the appellant but those efforts were met with futility since the appellant vanished in the forest.

44. Both witnesses were subjected to a rigorous cross examination exercise but their evidence remained unshaken. PW1 further testified that the deceased shone his torch on the appellant giving an even clearer view of his physical attributes. PW1 testified that the said torch had been marked by the deceased person with the initials 'JBC'. The torch, was later recovered by PW4 upon arresting the appellant.

45. The appellant opted to rely on the occurrence book to somewhat prove his innocence. He claimed that the torch was implanted to frame him. The appellant failed to follow up on the production of the relevant occurrence book and we note that the Court had granted his request. Further, we find that since he was found in possession of the torch, belonging to the deceased, without any rational explanation or otherwise, that was a show of a direct linkage between the commission of the offence and the appellant.

46. Indeed, this was a case of recognition rather than identification. There was moonlight. The appellant was recognized by PW1 and PW7 who were his neighbors. They were able to see him with the aid of the moonlight. He was the last person seen with the deceased before his death. He vanished and went off the grid until he was traced in a passenger vehicle by PW4.

47. It is also instructive to note that before his death, the deceased uttered that it was the appellant who had killed him. The place of a dying declaration has been discussed in our jurisdiction. This Court in the case of Philip Nzaka Watu vs. Republic [2016] KECA 696 (KLR) held as follows:

> "Decisions of this Court abound on admission and reliance on a dying declaration. Suffice to mention only two, Choge V. Republic [1985] Klr1, Kihara v. Republic [1986] KLR 473 and Nelson Julius Karanja Irungu V. Republic, CR. APP. No. 24 of 2008. 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.
>
> Clearly by reason of section 33 (a), there is no substance in the claim that a dying declaration constitutes inadmissible hearsay evidence.
>
> Notwithstanding section 33(a) of the *Evidence Act*, courts have consistently held the view that evidence of a dying declaration must be admitted with caution because firstly, the dying declaration is not subject to the test of cross- examination and secondly, circumstances

leading to the death of the deceased such as acts of violence, may have occasioned him confusion and surprise so as to render his perception questionable. While it is not a rule of law that a dying declaration must be corroborated to found a conviction, nevertheless the trial court must proceed with caution and to get the necessary assurance that a conviction founded on a death declaration is indeed safe. This Court expressed itself as follows in Choge V. Republic (supra):

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

48. We are alive to the above rudimentary principles and exercise caution in the dying declaration of the deceased. We find that the deceased indeed declared that he was murdered by the appellant in the presence of PW1 and PW7. In our view, not only did the deceased state those words immediately before his death, but also, we find that PW1 and PW7 were eye witnesses to the offence. We find that the appellant stabbed the deceased leading to his untimely death. We shall not interfere with the findings of the learned judge.

49. On malice aforethought, Section 206 of the Penal Code gives instances of the same in the following terms:

> " a. An intention to cause death or to do grievous harm to any person whether such person is the person actually killed or not;
>
> b. Knowledge that the act or omission causing death will cause the death of or grievous harm to some person, whether such 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 be caused;
>
> c. An intent to commit a felony;
>
> d. An intention to facilitate the escape from custody of a person who has committed a felony."

50. In this case, the deceased was stabbed with a sharp object leading to his death. Certainly so, the appellant was fully aware that stabbing the deceased with a sharp object would lead to his death. We find that the appellant had the intention of murdering or inflicting grievous bodily harm to the deceased person. Accordingly, we find that the ingredient of malice aforethought was proved beyond any shadow of a doubt.

51. The appellant raised several other grounds as to make a case to quash the conviction found against him. Firstly, he complained that assessors were never allowed to participate in the trial. In his view, regardless of the repeal of section 262 the Criminal Procedure Code, the assessors ought to have been retained. He argued that since the trial began with their presence, they ought to have participated until logical conclusion of the trial.

52. Indeed, before its repeal through amendment by Act No. 7 of 2007, sections 262 - 272 of the Criminal Procedure Code were clear and mandatory that all trials before the High Court shall be with the aid of assessors. Courts in such instances applied section 23 (3) (e) of the *Interpretation and General Provisions Act* Chapter 2, Laws of Kenya to ensure that the trial continued with the aid of assessors to the end.

53. According to the record before us, five assessors were present on 7th June 2007 when the hearing was poised to start. However, Bauni, J. (as he then was) was indisposed and had the matter adjourned. The matter was then mentioned on 14th June 2007 and listed for hearing on 26th November 2007, 27th February 2008 and 30th September 2008 but was adjourned. In all those dates, the assessors never participated. In the forthcoming dates, the assessors were not part of the proceedings. Was this proper?

54. It is not gainsaid that the trial proceeded from the beginning without assessors. We are therefore of the view that since the hearing was not heard in the presence of assessors, their absence did not vitiate the conduct, manner and import of the proceedings. We find that since they were not present ab initio, the proceedings were not affected by their absence and were therefore lawful. The appeal on this ground fails and is accordingly dismissed in totality.

55. Secondly, the appellant lamented that the trial judges failed to properly explain to him its import and meaning of section 200 (3) of the Criminal Procedure Code which provides as follows:

> "Where a succeeding magistrate commences the hearing of proceedings and part of the evidence has been recorded by his predecessor, the accused person may demand that any witness be resummoned and reheard and the succeeding magistrate shall inform the accused person of that right."

56. It is trite law that the purpose of section 200 (3) of the Criminal Procedure Code is to afford the appellant with a fair hearing giving life to the provision of Article 50 (2) of *the Constitution*. It is a sacrosanct right calling for the fact finder to inform the accused person of his right to recall or re-summon or re-hear a matter at the trial court. This was the holding of this Court in Malindi Criminal Appeal No. 57 of 2014, Joseph Kamora Maro vs. Republic that held as follows:

> "The position in law is that a trial magistrate taking over a case that is partly heard is mandatorily obligated to inform an accused person of his right to recall witnesses. After an accused person has been informed of his right, he/she may elect to have the witnesses recalled. What happens thereafter is for the court to decide depending on the availability of witnesses, the length the trial has taken, because if it has taken too long, chances are that some witnesses may have left jurisdiction of the court as was the case here or some may have even died. To this extent we are in agreement with the learned judges of the High Court that "this provision does not oblige the succeeding magistrate to start denovo" but what is mandatory is to inform an accused person of his right under section 200(3) of the Criminal Procedure Code."

57. According to the record before us, on 15th October 2009, when Osiemo, J. took over, the parties by consent agreed to proceed with the hearing from where it had reached. On 1st March 2011, the prosecution informed Karanja, J. that the matter was to proceed from where it had reached. The appellant's advocate raised no objection. On 21st May 2012, the appellant's counsel urged Mshila, J. to proceed with the hearing from where it had reached. Thereafter, the evidence of PW5 was taken.

58. Section 200 of the Criminal Procedure Code was invoked on 20th March 2013 and interpreted on 28th March 2013 when Ngenye, J. (as she then was) took over the matter. When Githua, J. took over the matter, it is recorded that sections 200 (3) and 201 (2) of the Criminal Procedure Code were read and explained to the appellant in a language that he understood to which he urged that the matter does proceed from where it had reached save requested that PW7 be recalled for cross examination. This is to be found in the proceedings of 13th July 2015.

59. The above record captured instances where several learned judges took over the proceedings with the appellant reserving his right to proceed with the case from where it had reached. Pertinently, the appellant's responses were properly captured on record, indicative that he was informed of this right set out in statute. We find that in all instances, the right espoused in section 200 (3) of the Criminal Procedure Code was informed to the appellant, with his response recorded in all instances.

60. Thirdly, on the claim that written submissions were unprocedurally considered, the appellant failed to set out with precision the aspect of failed procedure in admitting the submissions. In any event, he submitted that he was abandoning that ground in light of the effects of the COVID-19 pandemic. We shall therefore disregard that ground in totality.

61. The appellant also lamented that the trial court failed to give him an opportunity to have the occurrence book belonging to Kabarnet Police Station dated 9th November 2006 made available. The record shows that the appellant applied for its production for the first time on 17th December 2013 to enable him to prepare for his defence. That application was granted by the trial court.

62. Thereafter, the appellant complained that the police officers had plucked certain pages from the occurrence book. The appellant thus applied to have the OCS Kabarnet Police Station summoned to avail the occurrence book in question. Those summons were granted and subsequently extended on two occasions until the appellant's counsel ceased to act for the appellant.

63. Upon the appointment of a new counsel, the appellant indicated his intentions to proceed with the matter from where it had reached. However, there was no extension of the summons to the OCS or a follow up of the request for the production of the occurrence book. In our view, we find that the trial court granted the request by the appellant and even issued summons to the OCS. The trial court cannot be faulted for the appellant's procedural lapse in not being vigilant in his request for the occurrence book. The appeal on that ground accordingly fails.

64. Finally, the appellant complained that his alibi defence was not considered yet it was cogent. We have carefully analyzed the appellant's defence. Firstly, we find that the appellant and his witnesses failed to give a substantial account of what transpired on the night of 20th October 2006. In fact, the appellant did not testify at all about where he was on that night. The defence is our view was a sham and was rightly rejected by trial Judge.

65. Secondly, DW3, while stating that the appellant was working on 20th October 2006, failed to establish that she was a business owner and had employed the appellant. Furthermore, she failed to adduce employment logs to evince that indeed the appellant was on duty at the material time that the offence took place. We find that the trial court properly rejected his defence. It is our finding that the conviction against the appellant was safe. Accordingly, the appeal on the conviction lacks merit and it is hereby dismissed.

66. The appellant was sentenced to life imprisonment. In mitigation, the appellant stated that he was a 45-year-old married man with one wife and three children. The children were young and of school going

age. He was an orphan. He had been in custody for 12 years and was remorseful. He added that he was a first offender.

67. Taking into account the decision in Francis Karioko Muruatetu & Others vs. Republic (supra), we find that the appellant ought to benefit from the findings of our Apex Court.

We therefore interfere with the sentence meted out by setting aside the sentence of life imprisonment and substituting it with a sentence of 40 years imprisonment. The period of sentence shall be computed from the date he was charged in Court.

DATED AND DELIVERED AT NAKURU THIS 19TH DAY OF SEPTEMBER 2025.

J. MATIVO

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JUDGE OF APPEAL

M. GACHOKA C.Arb, FCIArb.

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JUDGE OF APPEAL

W. KORIR

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JUDGE OF APPEAL

I certify that this is a True copy of the original

Signed

DEPUTY REGISTRAR