Langat alias Kichokio v Republic (Criminal Appeal E004 of 2022)
[2025] KECA 1531 (KLR) (3 October 2025) (Judgment)

Neutral citation: [2025] KECA 1531 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAKURU

CRIMINAL APPEAL E004 OF 2022

JM MATIVO, PM GACHOKA & GV ODUNGA, JJA

OCTOBER 3, 2025

BETWEEN

RICHARD KIPYEGON LANGAT ALIAS KICHOKIO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal against the judgment of the High Court of Kenya at Kericho (A. N. Ongeri, J.) dated 9th July, 2021 in Criminal Case No. 38 of 2018)

JUDGMENT

1. Richard Kipyegon Langat (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 24th November 2018 at Tabain Village, Ainamoi Sub-County within Kericho County, he murdered Benard Kipkoech Tonui. He pleaded not guilty and a trial ensued pitting the prosecution's six 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 30th April 2025, he faults the learned Judge contending that: (a) the identification evidence was not free from error; (b) the cause of death was not sufficiently proved; (c) a higher burden of proof was placed on him even though the prosecution case was not sufficiently proved; (d) his defence was not considered; (e) the trial court determined the respondent's case in isolation from his case; and (f) the trial court relied on erroneous principles of law and imposed the death penalty. The appellant prays that his appeal be allowed, the impugned judgment be set aside and he be released forthwith.

3. A summary of the prosecution evidence is necessary. Daniel Ng'eno (PW1), the deceased's friend testified that on 24th November 2018 at night while walking with Benard Kipkoech Tonui (the deceased) after they had come from a ceremony, the appellant appeared and cut the deceased using

a matchet and ran away. PW1 stated that he did not know the motive of the attack but he was able to identify the appellant because there was light from the moon and he also heard his voice and he was therefore able to recognize him because he had known the appellant for years. It was also PW1's testimony that the deceased while being rushed to the hospital lamented that it was "Kichokio" who cut him on the head, arm and leg. The deceased later succumbed to the injuries.

4. Beatrice Martim (PW2), testified that on 24th November 2018, she heard the deceased scream and she ran towards the screams only to find the deceased had been cut on his head, arm and leg. Upon enquiry, the deceased informed her that the appellant who was known to him had cut him and run away. PW2 further stated that they rushed the deceased to hospital where he was treated but died. On cross-examination, PW2 confirmed that on her way to the scene she met the appellant running away from the scene.

5. Elkana Kimutai Tanui (PW3), a brother to the deceased testified that on 24th November 2018 at night while at his home at Tabain, he heard screams and ran to the scene where he saw the deceased had been cut on the head, right arm and leg. Upon enquiry, the deceased told him that the appellant had cut him. He pursued the appellant and upon catching up with him the appellant threatened to cut him like he had cut the deceased. He therefore, opted to retreat. It was also PW3's testimony that the appellant had a relationship with their mother and the deceased did not like it. Therefore, the appellant threatened to kill the deceased because he was opposed to the relationship with their mother.

6. Viola Chepngetich (PW4), the deceased's sister testified that on 24th November, 2018 at night while at her grandmother's house, she heard the deceased screaming and upon running towards the scene, she found the deceased had cuts to his head, right arm and right leg. It was also her testimony that the appellant used to threaten to kill the deceased because he was opposed to his love affair with their mother and that the appellant was always armed with a slasher or a machete.

7. PC Gilbert Kipchumba (PW5), the Investigating Officer testified that on 24th November 2018 at 12 p.m while on duty he was called by the area sub-chief one Jackson Koskei who informed him that a man had been cut with a panga and had been rushed to Kericho Hospital, and on the same day at 5.00 p.m, he was informed that the appellant had been arrested. PW5 also testified that he went to the hospital and recorded a statement on what happened and the deceased informed him that the appellant had attacked him with a panga and he shouted and when his uncle responded to his screams he informed him that the appellant had attacked him. The appellant fled to Fort Tenan while the deceased was taken for medical treatment and subsequently succumbed to his injuries.

8. Dr. Kiprono Koech (PW6), a Medical Officer, produced the post mortem report signed by Dr. Kelvin Rotich on 13th December 2018. Dr. Rotich performed the autopsy on 13th December 2018 at Kericho Referral Hospital. It was his evidence that the deceased had a large clot on the left pulmonary trunk, cut wound (6 cm) on the head, (6 cm) cut to the right upper arm with pus, (5 cm) cut to the right Elbow with pus, (15 cm) cut on the right mid thigh and all the wounds were almost healed. He concluded that the cause of death was pulmonary embolism causing cardio respiratory failure.

9. In his sworn defence, the appellant maintained that on 24th November 2018 at 1.00 a.m., he was attacked by people who broke into his house accusing him of reporting to the chief that they were selling bhang. His wife was away attending a ceremony at her home, leaving behind their two children. At around 10 a.m., he received a call from the deceased's brother telling him there was a crowd ready to attack him. He went to report the matter to Fort Tenan police, but the police detained him. However, he explained to the Officer Commanding Station (OCS) that he had been attacked at night but he was informed that he had killed somebody.

10. We heard this appeal virtually on 12th May 2025. The appellant appeared virtually from Kericho Main Prison. Learned counsel Ms. Kemunto appeared for the appellant, while learned Senior Assistant Director of Public Prosecutions Mr. Omutelema represented the respondent. Both counsel relied on their respective written submissions.

11. Ms. Kemunto submitted that the prosecution evidence was insufficient. She cited Republic vs. Gedion Wambua Koko & 2 Others [2019] eKLR which highlighted the elements of the offence of murder, and argued that the appellant was not positively identified as the offender. She maintained that the incident happened at 1.00 a.m. and recalled that, PW1 confirmed that he could only recognize the appellant through his voice since he knew him for years. However, the only voice heard that night was that of the deceased. Counsel also argued that whereas PW1 stated that there was light from the moon, his evidence was never corroborated. Therefore, it is only the deceased who mentioned the appellant and according to the deceased, PW1 fled the scene after the attack, therefore the said evidence contradicts the evidence of PW1 and if at all the deceased's statement is to be relied upon, then PW1's testimony stands discredited.

12. Ms. Kemunto also argued that PW3 & PW4's evidence was unreliable. She contended that the two siblings never liked the appellant's relationship with their mother, therefore, the accusation against the appellant could have been a good reason to get rid of the appellant. Furthermore, the deceased's mother was never called as a witness to confirm the allegation that the appellant threatened to kill the deceased and also confirm the deceased's statement produced by PW5 alleging that the deceased had an argument with the appellant five months before the incident. Therefore, it is wrong to infer that the relationship was the issue. Counsel maintained that the deceased's mother was a crucial prosecution witness and cited Bukenya & Others vs. Uganda [1972] E.A. 549 in support of the proposition that the prosecution must avail all the witnesses necessary to establish the truth, and where such witnesses are not called, the court may infer that their testimony would have been adverse to the prosecution case.

13. Counsel also submitted that the evidence of PW3 was that she found no one at the scene but later during cross-examination she said that she saw the appellant flee nor did she mention whether the alleged matchet had blood stains. Counsel argued that PW4 confirmed that when he arrived at the scene, he found the deceased alone and he knew it was the appellant who committed the offence since PW3 followed him. Therefore, PW3 and PW4's evidence was circumstantial and as the Supreme Court held in Republic vs. Ahmad Abdolfadhi Mohammed & Ano. 2019 eKLR, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt. Counsel also cited Musili vs. Republic Criminal Appeal No. 30 of 2013 in support of the proposition that to convict on the basis of circumstantial evidence, the chain of events must be so complete such that it establishes the accused persons culpability.

14. On whether the cause of death was sufficiently proved, Ms. Kemunto submitted that according to the post mortem report, the deceased died from pulmonary embolism causing cardio respiratory failure and that the cut wounds on the deceased were almost healed. On cross examination, PW6 confirmed that some people do recover from pulmonary embolism and in re-examination, PW6 confirmed that immobility can cause blood clots.

15. Regarding the sentence, the appellant's counsel maintained that the death penalty has faced criticism over the years and this Court in Godfrey Ngotho Mutiso vs. Republic [2010] eKLR held that it was inhuman to impose a sentence of death without considering circumstances surrounding the commission of the offence and the accused persons' mitigation. Ms. Kemunto argued that the trial Judge failed to take into account the time the appellant spent in custody and the appellant's mitigation.

16. The respondent's counsel Mr. Omutelema opposed the appeal.

In his submissions dated 7th May 2025, he maintained that the appeal lacks merit because the offence was proved to the required threshold. He submitted that the prosecution proved each and every element of the offence, therefore the learned Judge properly analyzed the evidence and correctly concluded that the prosecution evidence was well corroborated since PW1 saw the appellant wounding the deceased with a matchet and he fled from the scene and subsequently, the deceased succumbed from the injuries he sustained.

17. Regarding the appellant's identification, counsel submitted that there was cogent evidence of the appellant's recognition as the perpetrator. He recalled that PW1 stated that the appellant emerged and cut the deceased, he saw the appellant as there was moonlight and he could also recognize his voice since the appellant was his neighbour. PW2 confirmed that when she responded to the deceased's screams, she met the appellant running away and she was able to identify him since he was her neighbour. Furthermore, the deceased told PW2 that it was the appellant who attacked him and upon pursuing the appellant, the appellant threatened her.

18. Counsel also submitted that PW3 chased the appellant and when he caught up with him, the appellant also threatened to stab him like he had stabbed the deceased. Therefore, the conditions favoured correct identification of the appellant. Accordingly, the learned Judge correctly found that the appellant had been properly identified.

19. Regarding malice aforethought, counsel cited section 206 of the Penal Code and maintained that considering the continuous quarrelling between the appellant and the deceased and the fatal assault and the fact that the appellant was armed with a machete which he used to assault the deceased, it leaves no doubt that the appellant intended at the very least to inflict grievous harm upon the deceased. Therefore, malice aforethought was proved.

20. Counsel also submitted that there was evidence before the fatal incident that the appellant was always armed with a slasher and that the vicious attack on the deceased at night was a clear indication of malice aforethought. Further, the conduct of fleeing from the scene after committing the offence also pointed towards malice aforethought.

21. Mr. Omutelema contended that the learned Judge analyzed the appellant's defence that he was attacked and considered it together with the rest of the evidence and rightly rejected his defence which was displaced by overwhelming prosecution evidence.

22. Lastly, regarding the sentence, Mr. Omutelema maintained that the death sentence was not illegal nor excessive since there were aggravating circumstances which called for a severe sentence. Counsel stated that the appellant was a neighbour to the deceased and someone in a position of trust, that he was armed with a lethal weapon which he used to inflict injuries on the deceased, the assault was severe leaving the deceased with deep cut wounds to the head, right upper arm and a wound on the right mid thigh and that the appellant is not remorseful as he lied about the incident.

23. In this appeal, the appellant challenges both the conviction and sentence imposed by the High Court. Our mandate in a first appeal under section 379 (1) of the Criminal Procedure Code is akin to a retrial because it involves a reconsideration of the facts and the legal principles relevant to the conviction and sentence. It is the appellant's expectation that this Court will conduct a thorough and fresh examination of the evidence, carefully weigh conflicting testimonies before arriving at its own independent conclusions. In doing so, we must remain alive to the fact that we did not have the opportunity of hearing and observing the witnesses as they testified in order to gauge their demeanour, consequently, we must give room to that fact. (See Mark Oiruri Mose vs. Republic [2013] eKLR). Alive to the stated mandate, we have reviewed the record, the submissions and the authorities cited by

counsel. In our view, the issues that arise for determination are: (a) whether the appellant was positively identified; (b) whether the offence of murder was proved to the required standard; (c) whether there were contradictions in the prosecution evidence and if so, whether they went to the root of the prosecution's case; (d) whether the prosecution failed to avail a crucial witness; and, (e) whether this Court can interfere with the sentence.

24. The appellant's counsel attacked the veracity of the identification evidence contending that the incident took place at night and the evidence that there was moonlight was not corroborated. We note that, the appellant who was represented by an advocate did not raise the issue of his identification either during cross-examination of the prosecution witnesses or in his unsworn defence. Further, his advocate informed the Court that she did not wish to submit. Accordingly, the said issue is being raised before this Court for the first time. Nevertheless, this being a first appeal, it is a retrial. Therefore, we shall re-examine the evidence and make our own independent findings.

25. Undeniably, positive identification of a suspect is crucial in criminal cases because it can be the key factor in determining the accused's guilt or innocence. If the identification is accurate, it can strongly suggest the suspect's involvement in the offense because it provides a direct link between the crime and the accused, but this evidence must be treated with caution to avoid wrongful convictions. As decided cases suggest, courts scrutinize identification evidence carefully, especially when it's the only evidence against the accused, to ensure its reliability and accuracy. It is extremely important in criminal proceedings that a witness positively identifies the person he claims was the perpetrator.

26. The question here is whether the appellant was positively identified as the individual responsible for killing. The fundamental principle of our law that cannot be overstated is the presumption of innocence for the accused until proven guilty beyond reasonable doubt. If there remains any reasonable doubt about the accused's guilt after considering the evidence, the accused must be acquitted. Reasonable doubt is based on reason, logic and a common sense evaluation of the evidence presented not on prejudices or emotions. In our view, what is needed is a degree of certainty that falls between absolute certainty and probable guilt. The potential risks of mistaken identification require a thorough assessment of the reliability and credibility of such evidence before placing significant weight on it. Factors that impact the reliability of the identification evidence are, amongst others, the lighting, visibility, mobility of the scene, proximity of the witness and their opportunity for observation and importantly, the witnesses' prior knowledge or familiarity (if any) with the accused.

27. It cannot be gainsaid that positive identification provides strong evidence that the accused was involved in the crime. This is because when a witness can confidently and accurately identify the perpetuator, it significantly strengthens the prosecution case. However, the Court must be satisfied that the identification is reliable, especially if it is the only evidence linking the accused to the crime. We have earnestly re- examined the evidence on record. We note that PW1, PW2, PW3 and PW4, all confirmed that the appellant was their neighbour. Importantly, this crucial evidence was not controverted. In fact, it was PW3 & PW4's evidence that the appellant had a love affair with their mother and as a result of the relationship between the appellant and the deceased was acrimonious. Again, this evidence was not contested. The only argument raised by the appellant's counsel in her submissions before this Court, though not supported by the defence evidence, was that the strained relationship may have been used as a ground to get rid of the appellant. This issue, attractive as it is, cannot be raised from the bar as has happened in this case. When he took to the witness stand to offer his defence, the appellant never raised this issue. During cross-examination, the appellant's counsel never put the said question to the prosecution witnesses. What emerges from the evidence is that appellant was too familiar with PW1, PW2, PW3 and PW4. To eliminate any doubts since the offence took place at night, there is

uncontroverted evidence by PW1 that there was moonlight which enabled him to see the appellant attack the deceased, and also, he was able to identify the appellant by his voice.

28. The probative value of voice identification by an acquaintance is generally considered strong, however, courts scrutinize such evidence carefully and with caution. Courts consider factors like the length and clarity of the interaction where the voice was heard, the familiarity between the witness and the accused, and whether there were any other corroborating factors. In Mbelle vs. Republic [1984] KLR 626, this Court set out the conditions that must be satisfied when considering evidence of voice recognition as follows:

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

29. Considering the undisputed evidence that the appellant was a neighbour to PW1, PW2 and PW3, it cannot be said that PW1 was hearing the appellant's voice for the first time.

30. Talking about any other corroborating factors, on record is the evidence of PW2 who met the appellant running away from the scene while armed with a matchet. Further corroboration was provided by the evidence of PW3 who pursued the appellant and upon catching up with him, the appellant threatened to attack him with his machete like he had attacked the deceased. Upon considering the above compelling and largely uncontested evidence in totality, we are satisfied that the appellant's identification by way of recognition was free from error. As was held by this Court in Muchugia Gitonga & Ano. vs. Republic [2020] KECA 746 (KLR), eyewitness identification is one of the most compelling types of evidence. Further, evidence of recognition is more reliable than identification of a stranger. (See R vs. Turnbull & Others [1973] 3 All ER 549).

31. Next, we will address the question whether the offence of murder was proved to the required standard. Section 203 of the Penal Code defines the offence of murder as follows:

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

32. A reading of the above section shows that to succeed in a murder case, the prosecution must prove the following ingredients: (a) the death of the deceased. (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. It is within the bounds of these three elements that we shall determine whether the offence of murder was proved to the required standard. To start with, the fact and cause of the death of Benard Kipkoech Tonui is not disputed. The post mortem report produced by Dr. Dr. Kiprono Koech (PW6) clearly shows that the deceased had a (6 cm) a cut wound on the head, (6 cm) cut to the right upper arm with pus, (5 cm) cut to the right Elbow with pus, (15 cm) cut on the right mid thigh and that all the wounds were almost healed. He concluded that the cause of death was pulmonary embolism causing cardiorespiratory failure.

33. The question before us narrows to whether the deceased's death was caused by an unlawful act or omission on the part of the appellant. Relevant to this issue is the evidence of PW1 which was corroborated by PW2, PW3 and PW4. The totality of this evidence is that appellant attacked the deceased using a matchet and fled. PW2's testimony was that she saw the appellant fleeing the scene while armed with a matchet/slasher, while PW3 confirmed that upon catching up with the appellant after the attack, the appellant threatened to cut him like he had cut the deceased.

34. It was also the evidence of PW4 that there had been an acrimonious relationship between the appellant and the deceased because of the affair the appellant was having with the deceased's mother and that the appellant used to scream while saying he would kill the deceased.

35. In his defence, the appellant maintained he was home alone with his two little children since his wife had gone for a ceremony and that on the night of the incident he was attacked by a crowd who wanted to demolish his house claiming he is the one who was reporting them to the chief that they were selling bhang and at around 10 a.m. he received a call from the deceased's brother telling him there was a crowd ready to attack him. He went to report the matter at Fort Tenan Police Station, however, the police detained him.

36. We have carefully considered both the prosecution and the defence evidence. Notably, the evidence stating that the appellant had threatened to kill the deceased was not controverted. PW 1 saw the appellant attacking the deceased with a machete inflicting cuts to the deceased's head, arm and legs. PW2 on the other hand while responding to the deceased's screams met the appellant fleeing the scene while armed with a machete, while PW3 testified that upon being told the appellant was the attacker, pursued the appellant and upon catching up with him, the appellant threatened to cut him like he had cut the deceased. All these events occurred under the moonlight and the appellant was known to PW1, PW2, PW3 and PW4 since they were neighbours.

37. The appellant maintained that the post mortem report confirmed that the deceased died due to pulmonary embolism causing cardiorespiratory failure yet it was PW6's evidence that on the external appearance, the deceased's cut wounds had almost healed. This submission ignores the fact that pulmonary embolism is a blockage in one of the pulmonary arteries in the lungs, most often caused by a blood clot that travels from elsewhere in the body, typically the legs or pelvis. This blockage restricts blood flow to the lungs and can lead to serious complications, including death. (See Definition of pulmonary embolism, National Cancer Institute Dictionary of Cancer Terms). With this definition in mind, the chances of the blood clot originating from any of the wounds inflicted on the deceased to the lungs is higher than normal. Therefore, the cause of the death can be traced to the injuries. In any event, PW6 testified that the deceased was in hospital for two weeks and that his immobility could cause blood clots. The deceased was hospitalized owing to the injuries caused by the appellant, therefore, either of the above possible explanations for the death can directly be attributed to the injuries occasioned by the appellant.

38. Flowing from the foregoing analysis, we agree with the learned Judge that 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 threaten to mete the same violence against PW3 when he caught up with him while fleeing the scene.

39. The other ingredient is malice aforethought. It is important to underscore that malice aforethought is a crucial element in proving a charge of murder. Malice aforethought signifies the intention or state of mind of the accused at the time of the commission of the offence indicating a deliberate decision to cause death or grievous bodily harm. The statutory definition of malice aforethought is provided in section 206 of the Penal Code which reads:

> 206. Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances:
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> 1. 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;

2. knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;

3. an intent to commit a felony;

4. 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.

40. As was held by the Eastern Africa Court of Appeal in Rex vs. Tubere s/o Ochen [1945] 1Z EACA 63 in determining the existence or nonexistence of malice one has to look at the facts, the weapon used, the manner in which it is used and part of the body injured. Malice aforethought may also be inferred from the acts of the accused person. This Court in Ernest Asami Bwire Abanga alias Onyango vs. R. (CACRA No. 32 of 1990) stated that the question of intention can be inferred from the true consequences of the unlawful acts or omission of the brutal killing, which was well planned and calculated to kill or to do grievous harm upon the deceased. (See also: George Ngotho Mutiso vs. Republic [2010] eKLR & Karani & 3 Others vs. Republic [1991] KLR 622).

41. As decided cases suggest, there has to be intent to cause grievous harm or death or knowledge that an act can cause death or injury on the part of the accused person. Did the evidence establish the requisite mens rea on the part of the appellant? We have perused the evidence tendered before the trial court and the impugned judgment. We note that by attacking the deceased with a machete and inflicting such severe injuries, the appellant ought to have known that he would cause grievous bodily harm or death. He attacked the deceased without any lawful excuse. We also note that injuries were inflicted on the deceased's head (which is potentially fatal), hand and mid thigh. Such deep cuts inflicted thrice manifest a motive to fatally kill or maim, that is, the presence of mens rea. In Rex vs. Tubere s/o Ochen (Supra), it was stated that if repeated blows to the vulnerable parts of the body are inflicted, then malice aforethought can be inferred. Accordingly, it is our finding that malice aforethought was sufficiently proved to the required standard.

42. The appellant's counsel described the prosecution evidence as contradictory. Counsel maintained that PW3 testified that she found no one at the scene but later during cross-examination she said that she saw the appellant flee nor did she mention whether the alleged matchet had blood stains. Counsel further argued that PW4 confirmed that when he arrived at the scene, he found the deceased alone. As was held in Twehangane Alfred vs. Uganda [2003] UGCA 6, 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 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.

43. To our mind, contradictions in evidence of witnesses that would be fatal must relate to material facts and must be substantial. Minor or trivial contradictions do not affect the credibility of a witness and cannot vitiate a trial. It is only when such inconsistencies or contradictions are substantial and fundamental to the main issues in question before the Court and therefore necessarily create some doubt in the mind of the trial court that an accused is entitled to benefit therefrom. The correct approach is to read the evidence tendered holistically. We are not persuaded that the prosecution

evidence was marred by inconsistencies and if at all they existed, they are trivial and did not go into the substance of the charge.

44. The issue urged by the appellant is that the deceased's mother, a crucial was not called to testify as a prosecution witness. Section 143 of the *Evidence Act* which provides that no particular number of witnesses shall in absence of any provision of the law to the contrary be required for proof of any fact. This Court in Julius Kalewa Mutunga vs. 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.

45. The East African Court of Appeal in Bukenya & Others vs. Uganda (supra) cited by the appellant's counsel was categorical that: (a) the prosecution must make available all witnesses necessary to establish the truth, even though their evidence may be inconsistent, (b) the court has the right, and the duty to call any person whose evidence appears essential to the just decision of the case, (c) where the evidence called barely is adequate the court may infer that the evidence of uncalled witness would have tended to be adverse to the prosecution.

46. The court in the above case was uncompromising that the prosecution is not expected to call a superfluity of witnesses. The adverse inference will only be made by the court if the evidence by the prosecution is not or is barely adequate. Accordingly, it will not be inferred where evidence tendered is sufficient to prove the particular matter in issue or the entire case. In order for the adverse inference to be made, the evidence of the missing witness must be such as would have elucidated a matter. The appropriate inference to draw is a question of fact to be answered by reference to all the circumstances of the case. Our analysis of the entire evidence leaves us with no doubt that there were no gaps in the prosecution evidence and as discussed in the issues addressed herein above, all the ingredients of the offence were proved.

47. Arising from our analysis of the issues discussed above and the conclusions arrived at, we find no basis upon which we can interfere with the trial court's findings on conviction. Accordingly, the appeal against conviction is dismissed.

48. Regarding the sentence, section 379 (1) (a) & (b)of the Criminal Procedure Code provides for this Court's jurisdiction to entertain an appeal against sentence from the High Court as follows:

    1. A person convicted on a trial held by the High Court and sentenced to death, or to imprisonment for a term exceeding twelve months, or to a fine exceeding two thousand shillings, may appeal to the Court of Appeal-

        a. against the conviction, on grounds of law or of fact or of mixed law and fact;

        b. with the leave of the Court of Appeal, against the sentence, unless the sentence is one fixed by law.

49. In Francis Muruatetu & Ano. vs. Republic, the Supreme Court of Kenya Petition No. 15 & 16 of 2016, [2017] eKLR affirmed the importance of judicial discretion in sentencing. It emphasized that courts must weigh the specific circumstances of both the offender and the offence to ensure a just outcome.

50. The trial Judge in the ruling on sentence considered the Probation Officer's report filed on 7th October 2021 together with the appellant's mitigation that he was the sole bread winner of his family and that at the time of the offence the appellant and the deceased were both drunk and therefore his sense of judgment was impaired. Nevertheless, the learned Judge noted with concern that the appellant was not at all remorseful and that murder was premeditated and was executed in cold blood because

the deceased was opposed to the affair between his mother and the appellant. Having considered the aggravating circumstances, the learned Judge sentenced the appellant to death.

51. The Supreme Court in the Muruatetu case (supra) reiterated that in appropriate cases, the death penalty may be imposed. Ordinarily, sentence is within the discretion of the trial court. An appellate court's power to interfere with sentence imposed by courts below is circumscribed. It can only do so where there has been an irregularity that results in a failure of justice, or if the court below misdirected itself to such an extent that its decision on sentence is vitiated or the sentence is so disproportionate or shocking that no reasonable court could have imposed it. We have considered the decisions of this Court post the Muruatetu case, the majority of which have imposed definite prison terms in murder cases. We agree with the trial court that the murder was ruthless and an innocent live was lost. We are alive to the fact that the death penalty is still provided in our law books. We are however of the view that a prison term of 50 years will be adequate punishment.

52. The upshot of the above is that the appeal against the conviction is dismissed for lack of merit. As for the sentence, we hereby set aside the death penalty and substitute it with a prison term of 50 years.

DATED AND DELIVERED AT NAKURU THIS 3RD DAY OF OCTOBER, 2025.

J. MATIVO

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JUDGE OF APPEAL

M. GACHOKA C.Arb, FCIArb.

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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.

Signed.

DEPUTY REGISTRAR.