Kalii v Republic (Criminal Appeal E089 of 2023)
[2025] KECA 1735 (KLR) (24 October 2025) (Judgment)

Neutral citation: [2025] KECA 1735 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MOMBASA

CRIMINAL APPEAL E089 OF 2023

SG KAIRU, AK MURGOR & KI LAIBUTA, JJA

OCTOBER 24, 2025

BETWEEN

CHARLES MUTUKU KALII ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Voi (Onyiego, J.) dated 14th July 2023 in HC. CR.C. No. 7 of 2017)

JUDGMENT

1. In this appeal, Charles Mutuku Kalii, the appellant, has challenged the judgment of the High Court at Voi (Onyiego, J.) delivered on 14th July 2023 in which he was convicted for the offence of murder and subsequently sentenced to death.

2. Based on Information placed before the High Court at Voi by the Director of Public Prosecutions dated 5th September 2017, the appellant was charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code, Laws of Kenya. The particulars of the offence being that between the night of 22nd August 2017 and the morning of 23rd August 2017 at Njukini Trading Centre in Taveta sub- county within Taita Taveta County, he murdered Gabriel Mutuku Kalii (Gabriel) and Evanton Paul Kalii (Evanton).

3. The facts are that the appellant and Gladys Muthoni Makina (PW5) (Muthoni) lived as husband and wife although, according to Muthoni's father, Paul Mahinda Kagoko (PW2), that union had not been formalized. According to Muthoni, her relationship with the appellant was turbulent as the appellant had fits of violence and drank alcohol excessively. They had from time to time separated, but were at the material time living together in a one bedroomed house in Njukini town. They had three children. Two boys, namely Gabriel and Evanton (both deceased) and a girl. Gabriel was born in 2009 while

Evanton was born in 2012. They were aged 8 and 5 years respectively when they were killed. The girl was born in April 2017 and was hardly four months old when her brothers died.

4. On 22nd August 2017, Muthoni got home from work, cleaned the house and made a meal. All three children were home. The appellant got home between 7.00 p.m. and 7.30 p.m. that evening when Muthoni was bathing the children. According to Muthoni, the appellant was "very drunk" and started shouting. Muthoni put the children to bed. She asked the appellant for money for food. He gave her Kshs.200.00. She explained that "on this occasion he came in and managed to beat me and chase me out of the house, so the children were left behind"; that she left the house carrying the youngest child, leaving the boys asleep in the house. Muthoni together with her daughter sought and were granted refuge by a neighbour, Anna Mumbua Nzioki (PW1) who hosted them that night.

5. PW1 testified that, on 22nd August 2017 at about 8.00 p.m. Muthoni went to her house carrying her daughter; that Muthoni explained to her that she was having arguments with her husband, and had ran away; that when she enquired from Muthoni where she had left the boys, Muthoni said she left them in the house sleeping; that Muthoni spent the entire night with her; and that, on 23rd August 2017, Muthoni woke up at about 7.00 a.m. and left. PW1 explained that, later that morning, she left her house to go to work; that she then saw people running towards the Chief's place; that she followed the crowd and found Muthoni near the Chief's place crying while supported by two people; and that she then heard that Muthoni's boys had been killed. In her words:

> " When I got near the Chief#s place, I saw Gladys Muthoni crying and was being supported by two (2) people. As we were standing there, a group of people from the plot she used to live in started screaming. I heard them say that her husband had killed their two (2) children. I then left and went back to the bus stage. People were saying that the children had been found dead in their house."

6. Chief Inspector David Kili (PW4), a scene of crime officer, arrived at the appellant's house, the scene of crime, at about 2.00 p.m. on 23rd August 2017 having been called by the DCI Taita Taveta who led him there. He was accompanied by other officers. He narrated that, on entering the appellant's house, "as you enter on the left side there were two children who had their throat slit and they were lying on a mattress"; that on top of one child was a kitchen knife; and that the children throats were "slit using the blood stained kitchen knife because it was very sharp." PW4 stated further that "the two deceased were lying on a mattress which was blood soaked"; and that the doors to the house showed no signs of external intrusion. He produced photographs of the scene, which he took alongside his report.

7. The investigating officer, Corporal Robert Kariuki (PW8) was stationed at DCI's office, Taita Taveta Sub-County at the time. He stated that, following a report made by Muthoni (PW5), he accompanied other officers to the scene where they found "two young boys aged 8 years Gabriel Mutuku and Evanton Paul aged 5 years" "lying on a mattress on a pool of blood"; that "they were cut on their necks. They were lifeless"; and that they recovered a kitchen knife under the mattress with blood stains, which they suspected to be the murder weapon. He stated that they started looking for the appellant, who was the suspect and who had fled and surrendered himself at the Police Post from where they picked him and took him to Taita Taveta Police Station.

8. PW8 stated that Muthoni reported that she had quarreled with her husband (the appellant) and had fled from home with the young baby and spent the night at PW1's house, and that she left the two young boys with their father in the house. He stated that on questioning the appellant, he did not give any explanation to exonerate himself and was later charged with the offence. He stated that he forwarded the knife, mattress, blanket, and a pair of black jeans recovered from the appellant's house

to the Government Chemist under cover of an exhibit memo. He produced the said items as exhibits before the trial court.

9. George Lawrence Oguda (PW7), the Principal Chemist at Government Department in Mombasa, stated that he received seven exhibits, under cover of an exhibit memo form, from the Criminal Investigation Department in Taveta, namely, a knife, a piece of mattress, a pair of jeans, blood samples from the two boys and the appellant, and a blood sample on cotton wool of the appellant. He stated that he was required to determine whether there was any relationship between the seven exhibits; that he generated DNA profiles; that the knife, piece of mattress and black jeans generated male DNA profiles; that the DNA profile from the mattress matched DNA profile from the black trousers.

10. Other witnesses for the prosecution were Dr. Charity Gaceri Kimathi (PW3), who performed the postmortem on the bodies of the deceased boys who found deep cut-throat wounds which she concluded were inflicted using a sharp object. Muthoni's father, Paul Mahinda Kagoko (PW2) witnessed the postmortem being performed, while the landlady of the house where Muthoni and the appellant resided, namely Fidelis Mkanyo Sakayo, testified as PW6.

11. In a ruling delivered on 22nd April 2022, the trial court held that the prosecution had established a prima facie case to warrant the appellant being called upon to make his defence. In his unsworn testimony, the appellant stated that on 22nd August 2017 he woke up and proceeded to his place of work at a construction site; that he thereafter proceeded home and on the way stopped at a club and "took two bottles of beer" after which he left for his home; that on reaching home she knocked and greeted his wife but she kept quiet and asked for money; that he gave her Kshs.300 and then left with the baby on her back. Thereafter he went to sleep and woke up the following morning and told the children to go for milk to prepare for tea, and he thereafter left and "went to the shamba." He stated that he later went back home and found the children dead in the house and was shocked and proceeded to the police station and made a report. That he was then taken into custody and subsequently charged.

12. After reviewing and analyzing the evidence, the learned trial Judge found that there was no doubt the deceased died out of deep cutthroat wounds. As to "who executed the unlawful act that led to the death of the children", the learned Judge found that "from the chain of events, the last person to have been left and seen with the children the whole night of 22nd August 2017 and on the morning of 23rd August 2017" was the appellant; that the recovery of the bodies from inside the appellant's house covered in a mattress full of blood with a kitchen knife next to them does not suggest, even remotely, that the execution was carried outside the house; and that the recovery of a bloodstained trouser, which was stained with the blood which matched with the blood sample of Gabriel the first deceased and blood from the knife and mattress, circumstantially placed the appellant at the scene of murder. The Judge concluded thus:

> "Although nobody saw the perpetrator of the cruel murder of the two children, circumstantial evidence is telling otherwise. Having held that the recovery of a blood stained trouser of the [appellant] marching with one of the deceased#s blood and that in the murder weapon (knife) it is logical to conclude that the unbroken chain of events irresistibly point a blame worthy finger towards the [appellant]."

13. The Judge held that the ingredients of the offence of murder were proved to the required standard, and as already stated, convicted the appellant and sentenced him to death. Hence the present appeal.

14. We heard the appeal on 26th February 2025. The appellant appeared virtually from Shimo La Tewa Prison and was represented by learned counsel Mr. A. Aminga. Learned Principal Prosecution Counsel

Miss. Nyawinda appeared for the Director of Public Prosecutions. Counsel relied on their respective written submissions with oral highlights from Miss. Nyawinda.

15. For the appellant, it was submitted that malice aforethought as defined in Section 206 of the Penal Code was not established; that there was evidence by Muthoni that the appellant was extremely drunk and prone to violence when intoxicated, especially when jobless, and that Muthoni's father (PW2) corroborated this. It was urged that, on account of his intoxication, he could not be guilty of the offence. Counsel cited the case of Said Karisa Kimunzu vs. Republic, Criminal Appeal No. 266 of 2006 in support of the argument that drunkenness should be considered when assessing a person's capability to form specific intentions for an offence; that, in the present case, the appellant reportedly drank two beers before the incident and that financial burdens could have contributed to a degree of insanity.

16. It was submitted further that the trial Judge erred by relying on circumstantial evidence; that the chain of events was broken and many facts unproven; and that the finding by the Judge that the children were killed in the morning by the appellant is inconsistent with the evidence showing that the appellant had left for work in the morning.

17. It was submitted further that the Judge erred in admitting DNA evidence that was retrieved contrary to legal requirements under Section 122A of the Penal Code; that the DNA sampling procedure was not conducted by a medical practitioner; and that neither did the appellant give written consent as required by law.

18. Furthermore, it was submitted, the appellant's alibi defence of alibi was not adequately considered; that, having left the house in the morning to go to work, he could not have been present when the children were killed; and that the police did not investigate this alibi, yet the prosecution had the burden of proving guilt which it failed to do.

19. As regards the sentence, the appellant argued that the death sentence imposed was severe, and that the trial judge erred by imposing it. The Supreme Court of Kenya decision in Francis Karioko Muruatetu & Another vs. Republic; Katiba Institute & 5 others (amicus curiae) [2019] eKLR was cited in support of the argument that mandatory death sentence for murder was unconstitutional.

20. On those grounds, the appellant prays that the appeal be allowed, the conviction quashed, and the sentence set aside.

21. Opposing the appeal, learned counsel for the respondent submitted that, under Section 206 of the Penal Code, malice aforethought is established by evidence proving intent to cause death or grievous harm, knowledge that the act will probably cause death or grievous harm. Citing the case of Republic vs. Tubere S/O Ochen [1945] 12 EACA 63 and Nzuki v Republic [1993] KLR 191, it was submitted that malice aforethought can be inferred from the nature of the weapon, the part of the body targeted, the manner of use, and the accused's conduct. In this case, the deep cut-throat wounds inflicted on the two children aged 8 and 5 years respectively with a sharp kitchen knife strongly indicate an intention to kill in cold blood, thereby sufficiently proving malice aforethought.

22. As regards the complaint that the learned judge overlooked cogent evidence on the appellant's state of intoxication, it was submitted that, as a rule, intoxication is not a defence, but that Section 13 of the Penal Code provides exceptions if the intoxication was caused without consent, led to insanity, or prevented the formation of specific intent. Cited was the decision in Said Karisa Kimunzu vs. Republic [2007] eKLR. However, in the present case, it was urged, the appellant did not raise a defence of insanity by intoxication during the trial. Moreover, the appellant's testimony of having consumed "two bottles of beer" the previous evening does not suggest severe intoxication, and his clear recollection of events contradicts a state of drunkenness.

Furthermore, there was no evidence that the appellant drank on the morning the children were murdered.

23. Regarding the claim that his alibi defence was not considered, it was submitted on the strength of the decision in R vs. Sukha Singh S/o Wazir Singh and others, (1939) 6 EACA 145 that an alibi defence must be disclosed early to allow for police investigation; that, in this case, it was raised too late, which denied the prosecution the opportunity to cross-examine and test its credibility; and that the alibi defence was a mere afterthought, baseless, and did not dislodge the prosecution case.

24. It was submitted that the prosecution did prove the charge beyond reasonable doubt; that the prosecution was required to prove the death of the deceased, an unlawful acts/omission by the appellant, and malice aforethought. In that regard, it was submitted that the death of the two children was undisputed; that there was overwhelming circumstantial evidence pointing to the appellant as the murderer, including evidence showing that the children were killed on the morning of 23rd August 2017 while in the appellant's sole custody after his wife left following a disagreement; that the lifeless bodies were found in the house on a mattress with a knife nearby; that the doors and windows were intact, ruling out external intrusion; that a pair of black jeans trouser stained with blood was recovered from the appellant's house, and DNA analysis confirmed the blood matched the deceased child, Gabriel Mutuku; that the appellant failed to explain how the children met their death or how his trousers became blood-stained, despite admitting he was with them until that morning; and that the appellant was under a duty, based on the "doctrine of last seen," to explain what befell the deceased when they were last seen together. The decision of Moingo & Another vs. Republic [2022] KECA 6 (KLR) was cited in support. It was urged that the act of the appellant going to the police post to report the deaths, rather than immediately alerting neighbours, also points to guilt. That all those circumstances, coupled with the DNA evidence, lead to the inference that the appellant committed the crime.

25. As regard the sentence, it was submitted that, as pronounced by the Supreme Court in the Muruatetu case, death sentence itself remains a lawful sentence as contemplated under Article 26(3) of *the Constitution*; that the trial court's decision to impose the death penalty was a proper exercise of discretion considering the aggravating circumstances as per the Judiciary Sentencing Policy and the "brutal and crude manner" in which the children were executed, the extreme vulnerability of the victims (aged 8 and 5), and the abuse of trust by their father; and that the "untold pain and suffering" endured by the children justifies upholding the death penalty, and that the appellant deserves no mercy.

26. It was submitted in conclusion that the High Court properly evaluated the evidence and arrived at a correct decision; that both the conviction and sentence were safe; and that the appeal should be dismissed in its entirety.

27. We have considered the appeal in keeping with our mandate on a first appeal. As stated by the Court in the case of Joseph Kimani Njau vs. Republic [2014] KECA 229 (KLR), on a first appeal:

> "...we are obliged to consider and analyse all the evidence on record and make our own findings without overlooking the findings of the trial court and bearing in mind that we did not have the advantage of seeing and hearing the witnesses testify. In Okeno -vs- R., [1972] EA 32 at p. 36 the predecessor of this Court stated:-
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> „An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (PANDYA V. R. [1957] EA 336) and to the appellate court#s own decision on the evidence. The first appellate court must itself weigh conflicting

evidence and draw its own conclusions. (SHANTILEL M. RUWAL V. R. [1957] EA 570)#".

28. So guided, the main issue for determination in this appeal is whether the ingredients of the offence of murder were established to the required standard. In that regard, there is the question as to whether the element of malice aforethought was proved and whether the same was negated on account of the appellant's intoxication. Other issues are whether DNA evidence was properly admitted; whether the appellant's alibi defence was adequately considered, and whether there is a basis for this Court to interfere with the sentence.

29. As to whether the ingredients of the offence of murder were established to the required standard, the prosecution was required to prove, beyond reasonable doubt, the death of the deceased and the cause of the death; that the appellant committed the unlawful act which caused the death; and that the appellant had the malice aforethought. As recently restated by the Court in Nyaga v Republic (Criminal Appeal 18 of 2020) [2025] KECA 1280 (KLR):

> "It is old hat that the prosecution, in a charge of murder, has the singular task of proving the following three ingredients in order to secure a conviction: that the death occurred; that the death was caused by the unlawful act of commission or omission by the appellant; and that the appellant had malice aforethought as he committed the said act. See Nyambura & Others v Republic [2001] KLR 355."

30. There is no dispute regarding the fact of the death of the deceased. Chief Inspector David Kalii (PW4) and Corporal Robert Kariuki (PW8) found the lifeless bodies of the deceased lying in a pool of blood in the house of the appellant and his wife Muthoni (PW5). The pathologist, Dr. Charity Gaceri Kimathi (PW3) performed the postmortem on the deceased witnessed by PW2 and produced her report confirming the death.

31. As to the cause of death, again Chief Inspector David Kalii (PW4) and Corporal Robert Kariuki (PW8) testified that both deceased minors had deep cut-throat wounds; that next to the bodies was a blood-stained kitchen knife. The blood on the knife was matched to that of the first deceased through DNA profiling, and the evidence of George Lawrence Oguda (PW7) the Principal Chemist at the Government Chemist in that regard was not challenged during the trial. Similarly, Dr. Kimathi (PW3) who performed the autopsy testified that, on examining the bodies of the deceased, externally, she found deep cutthroat wounds involving the trachea, oesophagus, larynx, and carotid artery. PW3 concluded that the cause of death was deep throat cut wound; that the wind pipes were severed and there was severe blood loss; and that the wounds were caused by use of a sharp object.

32. As to whether it was the appellant who committed the unlawful act that caused the deaths, the learned trial Judge stated that the circumstances under which the children were found dead led to the irresistible inference that the appellant caused their death. In that regard, it is common ground that nobody saw the appellant inflict the fatal wounds on his children. The learned Judge relied on circumstantial evidence to convict the appellant. Did the learned Judge have a basis for doing so? In the case of Kipkering Arap Koske vs. Republic (1949) 16 EACA, 135, the predecessor to this Court stated that, for a court to convict an accused person based solely on circumstantial evidence:

    a. the inculpatory facts must be incompatible with the innocence of the accused; and

    b. the facts must be capable of no other conclusion or explanation except the guilt of the accused-

33. Subsequent to that decision, the predecessor to this Court in the case of Simon Musoke vs. R (1958) EA 915 stated that:

> " It is also necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference."

34. With that in mind, there is cogent evidence that, during the evening of 22nd August 2017, both the appellant and his wife Muthoni were at their home with their three children; that there was a disagreement between the appellant and Muthoni, which led to Muthoni leaving the house with the youngest child leaving behind in the house the two older boys with their father, the appellant. It was also established that Muthoni sought refuge and spent the entire night with PW1. The boys were then to be found dead the following morning in their house with their throats slit. Next to them was the blood-stained kitchen knife, the smoking gun as it were. Then there was the appellant's blood stained trouser recovered from the house. The Chemist (PW7) established through DNA profiling that the blood on the trouser matched that of the deceased. The appellant readily accepted that he was home with his wife Muthoni in the evening of 22nd August 2017. Based on the foregoing, we fully agree with the conclusion reached by the learned Judge when he stated that he was persuaded:

> " ...that the circumstances under which the children were found dead in their house where they were left in company of their father by their mother and further considering that his long trouser was tainted with blood from one of the deceased children and further compounded by the accused reporting to the police the incident after members of the public sought to kill him in revenge of what he had done, it is logical to draw an inference that he was responsible for the death of the children."

35. The appellant readily accepted that he was at home with Muthoni on the evening of 22nd August 2017. He acknowledged that Muthoni asked him for money, although there is no concurrence whether it was Kshs. 200 or Kshs. 300, and that he obliged before she left the house with the youngest child leaving the appellant in the house with the two boys who were found dead the following morning. The appellant was the last person to have been with them.

36. In Moingo & Another vs. Republic (supra) the Court stated:

> " On the doctrine of Last Seen, the court in the Indian case of Deepack Sauna v State of Delhi CRL. A .174 /2004 had this to say:
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> „In the case of murder where there is no explanation for the death or disappearance of the deceased and the accused was the last person to be seen in the company of the deceased, the circumstantial evidence can be used to link the accused with the death of the deceased and prove the charges against the accused beyond reasonable doubt. There is no burden on the accused to prove his innocence and explain the death of the deceased but the burden remains on the prosecution to lead sufficient evidence to establish prima facie case against the defendant to require an explanation for the disappearance of the deceased and absence of a reasonable explanation can support the inference of guilt.#"

37. Invoking that doctrine in that case, the Court went on to state as follows:

> " 22. The fact that the deceased was last seen in the hands and restraint of the appellants, a prima facie case was established to require the appellants to give a

reasonable explanation as to what befell him. Even though the onus of proof in criminal cases always rests squarely on the prosecution at all times, the Last Seen doctrine in the prosecution of murder or culpable homicide cases is that, where the deceased was last seen with the accused, there is a duty placed on the accused to give an explanation relating to how the deceased met his/or her death. In the absence of any explanation, the court is justified in drawing an inference that the accused killed the deceased (see the Nigerian case of Moses Jua v the State [2007] PELR-CA/11 42/2006)."

38. Similarly, the appellant in the present case being the person who was in the house with the boys during the night and in the morning in question, had a duty to give an explanation how the boys met their death. All the evidence leads to the inescapable conclusion that the appellant caused the death of the deceased.

39. As to whether malice aforethought was established, Section 206 of the Penal Code provides that:

> " Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances -
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> a. an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;
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> b. knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person 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;
>
> c. ...;
>
> SUBPARA (d)
>
> d) ...."

40. In the case of N M W vs. Republic [2018] KECA 676 (KLR) the Court stated that:

> " Interpreting those provisions, the Court in Roba Galma Wario vs Republic [2015] eKLR, stated that it is imperative, for the conviction of murder to be sustained, for the prosecution to prove that the death of the deceased was caused by the appellant and that he had the required malice aforethought; that without malice aforethought, the appellant would be guilty of manslaughter, as it would mean the death of the deceased was not intentional. See also Nzuki vs. Republic [1993] K. L. R.171."

41. PW3 testified on the nature, extent and severity of the injuries inflicted on the boys. When that evidence is considered alongside the nature of the weapon used, and the way the children were literally slaughtered, counsel for the respondent is absolutely right that the only inference is that the appellant intended to kill the boys. We concur with the learned trial Judge that malice aforethought was proved.

42. As regards the claim that the appellant could not be held responsible on account of intoxication, Section 13(4) of the Penal Code provides that, "Intoxication shall be taken into account for the purpose of determining whether the person charged had formed any intention, specific or otherwise,

in the absence of which he would not be guilty of the offence." In Said Karisa Kimunzu vs. Republic, Criminal Appeal No. 266 of 2006[2007] eKLR, this Court held:

> " In a charge of murder such as the one under consideration, the specific intention required to prove such an offence is malice aforethought as defined in section 206 of the Penal Code. If there be evidence of drunkenness or intoxication then under section 13(4) of the Penal Code, a trial court is required to take that into account for the purpose of determining whether the person charged was capable of forming any intention, specific or otherwise, in the absence of which he would not be guilty of the offence."

43. See also Anthony Ndegwa Ngari vs. Republic [2014] KECA 424 (KLR) and also Julius Obare Angasa vs. Republic, Criminal Appeal No. 271 of 2008 where this Court observed:

> "As this Court pointed out in David Munga Maina –vs- Republic [2007] eKLR, a party who says he had taken some liquor is not necessarily raising the defence of insanity. Such a person may only be asking the court to take into account the fact of his having consumed liquor and whether that state had deprived him of the ability to form the specific intent to kill. The court is under a duty to consider such a defence where it is raised..."

44. The circumstances in the present case are distinguishable from those in the afore-cited Karisa Kimunzu vs. Republic (above) where it was shown that the appellant therein was on a drinking spree all night onto the morning. In this case, the evidence led by the appellant was that, in the evening of 22nd August 2017, he left work and went home after taking two bottles of beer and, on getting home, his wife asked for money for food which he gave her before she left and did not return, and that he slept till morning. Although the wife (Muthoni) stated that the appellant was very drunk, the appellant did not share that view. There was no suggestion by the appellant that he was intoxicated to the extent that he did not know what he was doing, and the trial court cannot be faulted for not having addressed the matter. The appellant's narration in his testimony of the events of that evening is indicative of a person with clarity of mind of what transpired that evening. There is no merit in this complaint.

45. As for the admission of the DNA evidence, no objection was raised to the evidence of PW7 during the trial. Had that been done, the trial court would no doubt have had the opportunity to address itself to the question as to whether, in sampling for DNA, there was compliance with Section 122A of the Penal Code or whether the appellant voluntarily consented to the DNA sampling. It is indeed instructive that counsel for the appellant opted not to cross examine PW7. Accordingly, there is no merit in this complaint.

46. As regards the appellant's complaint that his alibi defence was not considered, what he stated in his unsworn testimony was that, on 22nd August 2027, he woke up, went to work, spent the whole day there until 5.30 p.m., and then went home after taking "two bottles of beer", and that he gave his wife Kshs. 300 after she asked for money for food; that the wife then "left with the baby on her back" and that he went to sleep and, on waking up the following morning, he told the children to go for milk to prepare for tea; and that he then went to the shamba and later went back home and found the children dead in the house, was shocked, and then proceeded to the police station.

47. Quite apart from the fact that the appellant, by his own statement, spent the entire night and the morning of 22/23rd August 2017 at home, the appellant did not, in keeping with good practice, bring forward in good time, the claim that he had gone to the shamba to give the prosecution an opportunity to look into it. Moreover, the prosecution evidence was so overwhelming so as to displace that defence.

48. Lastly, on the sentence, the learned Judge, in our view, correctly exercised his discretion in sentencing the appellant to death, having regard to the circumstances already stated and the beastly manner in which the children were killed by their own father. We can see no basis for interfering with the sentence.

49. In conclusion, we find that the appeal fails and is accordingly dismissed.

DATED AND DELIVERED AT MOMBASA THIS 24TH DAY OF OCTOBER 2025.

S. GATEMBU KAIRU, C.Arb, FCIArb.

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JUDGE OF APPEAL

A.K. MURGOR

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JUDGE OF APPEAL

DR. K. I. LAIBUTA, CArb, FCIArb.

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR