

**IN THE COURT OF
APPEAL AT NYERI**

**(CORAM: KARANJA, KANTAI & ALI-ARONI,
JJ.A.) CRIMINAL APPEAL NO. 54 OF 2020**

BETWEEN

BAARIU JULIUS MUCHEKE.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal against the Judgment of the High Court at Meru (F. M. Gikonyo, J.) delivered on 9th December, 2019

in

H.C. CR Case NO. 107 of 2013.)

JUDGMENT OF THE COURT

This is a first appeal from the judgment of the High Court at Meru where the appellant, **Baariu Julius Mucheke** was charged with the offence of murder contrary to **section 203** as read with **section 204** of the **Penal Code**. It was alleged in the Information that the appellant had murdered **Samuel Ntela Mucheke** on 12th October, 2013 at Njia location in Meru County. The prosecution called 4 witnesses in support of its case; the appellant gave sworn testimony and upon considering both sides of the case **Gikonyo, J.** convicted the appellant and sentenced him to 20 years' imprisonment in the sentence awarded on 9th December, 2019.

Our mandate as a first appellate court is to re-consider and re- evaluate the evidence, to retry the case- see **Okeno vs. Republic 1972 EA 32** where that mandate was identified as follows:

“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] E. A. 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. (Shantilal M. Ruwala v. R., [1957] E.A. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters v. Sunday Post, [1958] E. A. 424.”

To establish the offence of murder the prosecution must prove beyond reasonable doubt that a person died; what caused that person's death; that the accused caused the death through an unlawful act or omission and that the accused caused the death with malice aforethought as defined in **section 206** of the **Penal Code**.

The prosecution called **John Mutembei Ntela (PW1 - Mutembei)**, a son of the deceased who testified that on 12th October, 2013 he was at his house when at 5 p.m. he heard a commotion and upon stepping outside he saw his father (the

deceased) being attacked by the appellant (brother to the deceased)

with a hammer. The appellant was joined by his son Kimathi, who was armed with a metal rod and another person who was armed with a piece of wood. Mutembei screamed for help which attracted the attention of **Joseph Mbaabu Kaunga (PW2-Mbaabu)** who came to the scene and upon the appellant and his accomplices seeing Mbaabu they fled the scene. Mutembei and Mbaabu took the deceased first to Kangeta Police Post and then to Meru Hospital but the deceased died two days later at Kenyatta National Hospital where he had been transferred to. According to Mutembei he could not assist his father when he was being attacked as the appellant and the other two were armed with dangerous weapons: He testified as follows:

“...when he was attacked he was seriously injured on the head. He was not talking. The person who hit him first was his brother. I know him. He is in the dock. I enquired why he had attacked him and found out that he wanted to kill his brother so that he can take his land. He was given his land by our grandfather but he sold all his land...”

Mbaabu testified that he was at his shamba that day when he was attracted by screams at 5 p.m. and upon rushing to the home of the deceased he found the appellant, his son (Kimathi) and another attacking the deceased who had fallen to the ground and that upon the attackers seeing him they fled the scene. He and Mutembei rushed the deceased to hospital and he learnt two days later that the deceased had died. He is related to the appellant who is his cousin and he saw him holding a hammer on the material day.

PC Athman Mbuya of Maua Police Station received a report from Kangeta Police Post of assault of the deceased by the appellant and others. He visited the home of the deceased and received information from Mutembei, Mbaabu and other members of the public that it was the appellant, his son and another who had attacked the deceased with a hammer and other weapons. He attended post mortem with family members of the deceased and preferred a murder charge against the appellant.

Dr. Maria Muthoni Mwangi of Meru Level 5 Hospital produced post-mortem report of the deceased who had died at Kenyatta National Hospital. Cause of death was acute head injury due to blunt force trauma to the head consistent with injury to left frontal parietal scalp haemorrhage.

At the close of the prosecution case and upon being put on his defence the appellant in a sworn statement stated that he was a miraa trader; that the deceased was his elder brother and that on 10th October, 2013 he left Kangeta town and upon reaching home he found the deceased and other unnamed people hiding in a shamba; that the deceased attacked him with a whip threatening to kill him; that the deceased hit him with a stone and they wrestled to the ground but he was able to free himself and ran away. When he went to Kangeta Police Post to report the attack he found the deceased there who was making a report against him. He later learnt that the deceased had died. He knew Mbaabu (PW2) who he had caught stealing a sewing machine.

As we have seen the appellant was convicted and sentenced, findings that provoked this appeal which is based on homemade “Grounds of Appeal” where he complains that there was an error of law because he was convicted based on prosecution evidence which had a lot of contradictions and inconsistencies; that the Judge erred in law by not noting that key witnesses were not called to prove the allegations by the prosecution; that the Judge erred in law by not finding that the prosecution relied on hearsay evidence and that investigations were shoddy; that the Judge erred in law in not finding that he (the appellant) had become paralyzed during incarceration; that the Judge erred by not considering his defence which was credible.

When the appeal came up for hearing before us on 19th June, 2025 the appellant was present represented by learned counsel **Mr. Mahugu** while the late State counsel **Mr. Muriithi** appeared for the respondent. Both sides had filed written submissions which they fully relied on.

It is stated by the appellant in written submissions that the appeal is against conviction only and:

“We shall urge the following 1 ground of appeal for purposes of these submissions: -

(a) That the learned trial judge erred in matters of law by failing to note that the testimonies of the prosecution witnesses were contradictory and inconsistent contrary to section 162 of the Evidence Act.”

It is submitted that PW1 (Mutembei) testified before the trial court that the appellant used a hammer to hit the deceased but that this was not witnessed by PW2 (Mbaabu); that Mutembei testified that three (3) people attacked his father but that there was no direct evidence on who first attacked the deceased or what weapon was used; that because the deceased died later in hospital malice aforethought could not be proved against the appellant. The case of ***Ali vs. Republic (Criminal Appeal No. 51 of 2021) [2024] KECA 1168 (KLR) (20 September 2024) (Judgment)*** is cited in support of that proposition.

It is further submitted by the appellant that it was wrong for the court to convict him where the murder weapon was not produced. It is urged that we quash the conviction.

The respondent submits that there were no contradictions in the prosecution evidence and that all witnesses gave credible and consistent evidence; that Mutembei after hearing a commotion left his house and saw the appellant hitting the deceased with a hammer; that the appellant was joined by two (2) others and Mutembei saw what each of them did and the weapons they had; that Mbaabu arrived at the scene and also witnessed the attack. It is submitted that there were no inconsistencies in the prosecution case and even if there were they are not material or substantial. ***MTG vs. Republic Criminal Appeal No. E247 of 2021 [2022] KEHC 189 (KLR)*** is cited for the proposition:

“... it is not every trifling inconsistency in the evidence of the prosecution witness that is fatal to

its case. 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 there from. Minor or trivial contradictions do not affect the credibility of a witness and cannot vitiate a trial...

Although the appellant has submitted on only one (1) ground of appeal the respondent proceeds to submit on other grounds.

On whether there were key witnesses not called the respondent submits that the deceased died as was proved by the doctor; the cause of death was acute head injury due to blunt force trauma to the head. Mutembei and Mbaabu were at the scene and saw the appellant and two others hitting the deceased with crude weapons; that there was evidence that the deceased died due to the unlawful act by the appellant and malice aforethought can be seen from the way the appellant armed himself with a hammer that he used to hit the deceased on the head. It is denied that investigations were shoddy and it is submitted by the respondent that the appellant's defence was considered and was properly rejected.

We have considered the whole record, submissions made and the law and this is how we determine this appeal.

The record shows that the principal parties in the matters that led to the death of the deceased were well known to each other. The deceased was a brother of the appellant; Mutembei was a son of the deceased and a nephew to the appellant while

Mbaabu was a

relative and a neighbour. It was Mutembei's evidence that upon being attracted by a commotion in the compound he emerged from his house to find the appellant having wrestled the deceased to the ground and he was hitting him with a hammer on the head. The appellant was joined by his son (one Kimathi) and a third person and all of them continued attacking the deceased with various weapons as Mutembei watched and as witnessed by Mbaabu who arrived as the attack was taking place. So there is no issue of identification of attackers in the circumstances where the attack took place at 5 p.m. in broad daylight by attackers who were well known to Mutembei and Mbaabu. The evidence of these two witnesses was direct and credible and there was no contradiction or inconsistency in the prosecution's case in those premises.

We agree with the trial Judge that the defence by the appellant that he found the deceased and others hiding waiting to attack him was not credible and was an afterthought properly displaced by the strong prosecution case where it was proved that the deceased was attacked by the appellant who injured him seriously on the head leading to fatal injuries as proved by evidence by the doctor.

There was malice aforethought. The appellant, by hitting the deceased on the head repeatedly with a hammer intending to kill him or do grievous harm to him; he knew that by hitting the deceased on the head the way he did could cause death or grievous harm to him; he intended to commit the felony called murder.

The totality of evidence by Mutembei, Mbaabu and the doctor showed that the appellant killed the deceased with malice

aforethought. The appellant complains that key witnesses were not called. He does not say who those witnesses were. That issue was succinctly addressed as follows in **Bukenya vs. Uganda** [1972] EA 549, at page 550 that:

“It is well established that the Director has a discretion to decide who are the material witnesses and whom to call, but this needs to be qualified in three ways. Firstly, there is a duty on the Director to call or make available all witnesses necessary to establish the truth, even though their evidence may be inconsistent. Secondly, the court itself has not merely the right, but also the duty to call any person whose evidence appears essential to the just decision of the case. Thirdly, while the Director is not required to call a superfluity of witnesses, if he calls evidence which is barely adequate and it appears that there were other witnesses available who were not called, the court is entitled, under the general law of evidence, to draw an inference that the evidence of those witnesses, if called, would have been or would have tended to be adverse to the prosecution case.”

We find that the witnesses called in the case proved the case against the appellant to the required standard.

On the issue of the murder weapon not being produced as part of the evidence the answer is to be found in **Keino vs. Republic** (Criminal Appeal 203 of 2020) [2024] KECA 710 (KLR) (21 June 2024) (Judgment) where this Court observed:

“29. We now proceed to address the effect of the failure by the prosecution to produce the murder weapon as an exhibit. The starting point is to note that the record shows that

although

the panga was identified by the witnesses, it was never produced as an exhibit. This failure was, however, not fatal to the prosecution's case. As has been stated by this Court again and again, where there exists sufficient evidence for a court to believe that a certain type of weapon was used, the failure to produce the weapon is not fatal to the prosecution's case. Addressing the effect of the failure by the prosecution to produce the murder weapon, the Court in Kyalo Kalani v. Republic [2013] eKLR, cited with approval the earlier holding in Karani v. Republic [2010] 1KLR 73 that:

“The offence as charged could have been proved even if the dangerous weapon was not produced as an exhibit as indeed happens in several cases where the weapon is not recovered. So long as the court believes, on evidence before it, that such a weapon existed at the time of the offence, the court may still enter and has been entering conviction without the weapon being produced as exhibit.”

Kimathi (the appellant's son) and the other unnamed person were not charged alongside the appellant. There is no evidence on record why they were not charged. There was, however, as we have seen, direct evidence that the appellant was clearly seen by Mutembei and Mbaabu attacking the deceased with a hammer.

Section 20 of the **Penal Code** on “Principal Offender” is to the following effect:

“20. Principal offenders

- (1) When an offence is committed, each of the following persons is deemed to have taken part in committing the offence and to be guilty of the offence, and may be charged with actually committing it, that is to say-**

- (a) every person who actually does the act or makes the omission which constitutes the offence;**
- (b) every person who does or omits to do any act for the purpose of enabling or aiding another person to commit the offence;**
- (c) every person who aids or abets another person in committing the offence;**
- (d) any person who counsels or procures any other person to commit the offence, and in the last-mentioned case he may be charged either with committing the offence or with counselling or procuring its commission.”**

The appellant was a principal offender in the offence and he was properly convicted.

We find this appeal which is on conviction only to have no merit and we dismiss it.

Dated and delivered in Nyeri this 5th day of December, 2025.

W. KARANJA

.....
JUDGE OF APPEAL

S. ole KANTAI

.....
JUDGE OF APPEAL

ALI - ARONI

.....
JUDGE OF APPEAL

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

Signed
DEPUTY REGISTRAR