

**IN THE COURT OF
APPEAL AT
NYERI**

(CORAM: JAMILA MOHAMMED, KIMARU, & MUCHELULE, JJ.A.)

CRIMINAL APPEAL NO. 134 OF 2017

BETWEEN

LUKURA ACHUKA HASSAN.....APPELLANT

AND

REPUBLIC.....RESPONDENT

*(Being an appeal against the judgment of the High Court
of Kenya at Nanyuki (Kasango, J.) delivered on 28th June
2017*

in

Criminal Case No. 18 of 2016)

JUDGMENT OF THE COURT

Background

- 1) **Lukura Achuka Hassan** (the appellant) was charged with the offence of murder contrary to **section 203** as read with **section 204** of the **Penal Code**. The particulars of the charge were that on 30th June 2016 at Thome Location in Laikipia West Sub-County, Laikipia County, he murdered his wife, **Monica Imoni** (the Deceased).
- 2) The prosecution called nine (9) witnesses in support of its case. **Pauline Nathu Lepuri (PW1)**, a neighbour to both the Deceased

and the appellant, testified that she saw the appellant chasing the
Deceased

while armed with a knife and a *rungu* and that he struck the Deceased's grandmother, **Mary Apokor (PW2)** first before fatally stabbing the Deceased in the back and neck. The Deceased's grandmother, **(PW2)**, testified that she was attacked with a *rungu* by the appellant before he fatally stabbed the Deceased. **Agnes Marion (PW3)**, the Deceased's sister who was working in the farm together with PW2 corroborated PW2's account.

3) **Joseph Ebenyo Ekiru (PW4)** and **Josphat Edungi Longor (PW5)**, testified that they apprehended the appellant as he fled the scene. They testified that the appellant had no weapon at the time of arrest, but that he confessed to having killed but did not disclose who he had killed. **AP Constable Benjamin Leparsoore (PW6)**, confirmed that the appellant was escorted to the AP camp by members of the public together with a knife which had allegedly been recovered by a police reservist. The postmortem report produced by **Dr. Joseph Kinyua (PW7)**, showed that the Deceased died from multiple stab wounds to the chest and neck which severed arteries and caused massive blood loss. **Martin Macharia Koge (PW8)**, the Chief, Thome Location and **Corporal Collins Shikuku (PW9)**, the Investigating Officer, testified about the recovery of the knife and the investigations respectively. The knife was produced in evidence as an exhibit.

4) In his defence, the appellant gave sworn testimony and denied the charge. He admitted being the Deceased's husband but claimed that he had been arrested at the market by *boda boda* riders, who falsely accused him of killing his wife. He denied of being in possession of a knife or running away, and alleged that some of the prosecution witnesses had grudges against him, particularly over dowry and livestock disputes. He maintained that he had lived peacefully with his wife and had no reason to kill her.

5) The High Court (**Kasango, J.**) found the evidence of the three eye witnesses, PW1, PW2 and PW3 credible and consistent, placing the appellant squarely at the scene as the assailant. It held that the cause of death was consistent with the prosecution's account. The trial court rejected the appellant's defence and convicted him, holding that the prosecution had proved all the ingredients of the offence of murder. The appellant was accordingly convicted of murder and sentenced to death as prescribed under **Section 204** of the **Penal Code**.

6) The appellant was dissatisfied with the conviction and sentence and filed this appeal. The appellant contends that the prosecution did not prove its case to the required standard. He further contends that the High Court erred in upholding his conviction in reliance on the purported identification at the scene of the crime by three

witnesses'

evidence without considering the conflicts of their evidence; that
crucial

witnesses such as the police reservist who allegedly recovered the knife were not called; that malice aforethought was not proved; and that the trial court failed to comply with **Section 169(1)** of the **Criminal Procedure Code**. He also contends that the mandatory death penalty is unconstitutional and that he was not afforded an opportunity to mitigate.

7) When the appeal came up for virtual hearing before us, **Mr. Mushila**, learned counsel for the appellant, relied entirely on the written submissions that he had filed. In the submissions, counsel reiterated that the contradictions concerning the knife and the failure to call key witnesses fatally weakened the prosecution's case; that motive was not established; and that the mandatory death sentence violated his right to a fair trial under **Article 50** of the **Constitution**. Counsel relied on the Supreme Court's decision in **Francis Karioko Muruatetu & another v Republic [2017] eKLR** in support of this argument.

8) **Mr. Naulikha**, learned counsel for the respondent, made brief oral submissions opposing the appeal. Counsel contended that the appellant was properly convicted of the offence of murder as he had armed himself with both a rungu and a knife, pursued the Deceased, who was his wife, and fatally stabbed her in the presence of her grandmother (PW2) and sister (PW3). He asserted that the attack

occurred in broad daylight,

around 10.00a.m., in circumstances where the witnesses knew the

appellant well, thereby leaving no room for mistaken identity. He emphasized that the evidence of the prosecution was direct and overwhelming, demonstrating malice aforethought as defined under **Section 206** of the **Penal Code**.

9) As regards the constitutionality of the death sentence imposed upon the appellant, counsel contended that the Supreme Court in **Francis Karioko Muruatetu & another v Republic** (supra) had upheld the legality of the death penalty, subject only to judicial discretion. He submitted that in the present case, the death sentence was proportionate to the manner in which the offence was committed and should not be interfered with. In conclusion, he urged this Court to affirm both conviction and sentence, arguing that the trial court's findings were sound, and that the sentence was deserved.

Determination

10) We have considered the record, the rival submissions, the authorities cited and the law. This being a first appeal, the duty of this Court is to re-analyze the entire evidence and reach its own conclusions, while bearing in mind that it did not see or hear the witnesses testify. See **Okeno v Republic [1972] EA 32** and **David Njuguna Wairimu v**

Republic [2010] eKLR.

11) The issues for determination before us are whether the prosecution proved its case beyond reasonable doubt; whether malice aforethought was proved; whether the impugned judgment accords with the provisions of **Section 169** of the **Criminal Procedure Code**; and whether the sentence imposed upon the appellant was constitutional in light of the Supreme Court decision in **Francis Karioko Muruatetu & another v Republic** (supra).

12) As regards the first issue, that is, whether the prosecution failed to prove the case beyond reasonable doubt, the evidence of PW1, PW2 and PW3 who were all present at the scene was consistent that the appellant pursued and fatally stabbed the Deceased. Their evidence was corroborated by the medical evidence which confirmed that the Deceased died from multiple stab wounds. While there were contradictions concerning the recovery of the knife, it is our view that the direct evidence of the eye witnesses was clear and compelling. The appellant was well known to them, as he was their relative and/or neighbor, and the incident occurred in broad daylight. The possibility of mistaken identity was therefore excluded. The fact that the weapon was not dusted for fingerprints or that the police reservist who allegedly recovered it was not called does not, in itself, negate the direct eyewitness testimony. The law is that failure to call

certain witnesses is

only fatal if their evidence would have been essential to the just

determination of the case as held in ***Bukenya v Uganda [1972] EA 549***. In the circumstances herein, the evidence on record was sufficient to sustain a conviction, even without the testimony of the police reservist.

13) On the issue of malice aforethought, **Section 206** of the **Penal Code** sets out the circumstances in which it may be inferred, including where there is intent to cause death or grievous harm. In ***Republic v Tubere***

s/o Ochen [1945] 12 EACA 63, the Court identified relevant factors in

the establishment of malice aforethought, such as the type of weapon used; the manner of its use; the part of the body targeted; and the conduct of the accused before and after the attack. In this case, the appellant repeatedly stabbed the Deceased on the chest and neck, severing major arteries. Such targeted and forceful blows leave no doubt as to an intention to cause death or serious harm. In our view, therefore, the attack was neither accidental nor spontaneous but deliberate, and the appellant's attempted flight from the scene further demonstrated his consciousness of guilt and the gravity of his actions.

14) On the issue whether the impugned judgment complied with **Section 169** of the **Criminal Procedure Code** which obliges a trial

court to set out the points for determination, the decision thereon, the reasons for that decision, and to date and sign the judgment in open court, we have carefully examined the record and note that the learned Judge

summarized the evidence, identified the issues which the prosecution was required to prove, and gave reasons for the conviction. Although the reasoning was not elaborate on every point raised, we are satisfied that the statutory requirements were substantially met. This ground of appeal therefore lacks merit.

15) In view of the foregoing, we are satisfied that the trial court properly analyzed the evidence tendered before it and came to the conclusion, rightly so in our view, that the appellant was guilty of murder as charged. The appellant's appeal against conviction is accordingly dismissed.

16) The final issue in this appeal concerns sentence. The appellant was sentenced to death as prescribed under **Section 204** of the **Penal Code**. However, in **Francis Karioko Muruatetu & another v Republic**

(supra), the Supreme Court declared the mandatory nature of the death penalty unconstitutional on the basis that it deprives courts of discretion to consider mitigating factors. Therefore, while death penalty itself remains lawful, it cannot be imposed mandatorily. We have perused the record and it does reflect that the appellant was accorded an opportunity to mitigate before sentencing. Counsel for the appellant, Mr. Bwonwonga stated as follows: ***"In view of the Court's judgment we don't have much to say."***

17) Having been informed by the prosecution that they did not have previous records in respect of the appellant and that he could be treated as a first offender, the High Court proceeded to sentence the appellant. The court stated in part as follows: ***“...This was a wanton and cruel murder of his wife and mother of his children. I sentence him to suffer death as provided under the law.”***

18) In the end, we are satisfied that the sentence imposed on the appellant was lawful. This appeal is therefore devoid of any merit and is accordingly dismissed in its entirety. It is so ordered.

Dated and delivered at Nyeri this 19th day of December, 2025

JAMILA MOHAMMED

.....
JUDGE OF APPEAL

L. KIMARU

.....
JUDGE OF APPEAL

A. O. MUCHELULE

.....
JUDGE OF APPEAL

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

Signed
DEPUTY REGISTRAR