IN THE COURT OF APPEAL AT NYERI

(CORAM: W. KARANJA, ALI-ARONI & GACHOKA, JJ.A.) CRIMINAL APPEAL NO. E041 OF 2021

BETWEEN

GODFREY MUCHUI.....APPELLANT

AND REPUBLIC

.....

RESPONDENT

(An appeal from the conviction and sentence by the High Court of Kenya at Meru (A. Ong'ijo & T. Cherere, JJ.) on 19th January 2021 and 25th February 2021 respectively

in

HCCRC No. 74 of 2018)

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JUDGMENT OF THE COURT

1. The appellant, Godfrey Muchui, was charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. The particulars of the offence were that between the nights of 15th August 2018 and 16th August 2018 at Tomboo village Kimachia location in Tigania West Sub- County within Meru County, jointly with others not before court, the appellant murdered John Thuranira.
2. When the appellant was arraigned before the trial court, he

pleaded not guilty to the offence at the Meru High Court in ***HCCRC No. 74 of 2018*.** After a full trial, *Ong'ijo, J*. convicted

the appellant as charged on 19th January 2021. He was sentenced on 25th February 2021 to serve 15 years' imprisonment by *Cherere, J.*

3. The appellant is aggrieved by those findings. He filed his notice of appeal dated 3rd June 2021. He also filed his memorandum of appeal, lodged on 3rd June 2021 and amended on 12th August 2025. The appellant raised 9 grounds of appeal disputing the findings of the trial court. We have taken the liberty to summarize those grounds as follows: that the evidence of the prosecution was shoddy, inconsistent and full of contradictions; that no exhibits were traced in his house as to tie him to the offence; his defence, though cogent, was wrongly rejected; the trial court improperly shifted the burden of proof to him; crucial witnesses were not called to the stand; and that the sentence meted out was harsh and excessive. For those reasons, the appellant prayed that his appeal be allowed by quashing the conviction and setting aside the sentence.
4. The appeal was heard on 4th September 2025 through the zoom link virtual platform. The appellant was present. He was represented by learned counsel Mr. Muchangi. On the part of the respondent, Principal Prosecution Counsel Miss

Mengo

was present. Parties relied on their respective written submission that were orally highlighted.

5. The appellant filed written submissions and a list of authorities both dated 14th August 2025. Mr. Muchangi submitted that the investigations fell below the constitutional and statutory threshold required under Article 50 of the Constitution and section 107 of the Evidence Act. He termed the prosecution's evidence as shoddy and incomplete. He pointed out that **PW4**, the area Chief, arrested the appellant without any reasonable cause since it is the appellant and **PW3** who first reported the crime to him.

6. Pointing out the contradictions in the evidence of the prosecution, learned counsel observed that **PW5** testified that he saw a bar of soap at the scene whereas the investigating officer, **PW6**, testified that no stolen items were recovered. He further argued that **PW6** conceded that there were no eye witnesses to the murder and that he made no effort to arrest the suspects who were named by **PW1** and who remained at large.

7. Relying on the oft-quoted case of ***Bukenya & others vs. Uganda*** [1972] EA 549, he submitted that where the

prosecution fails to call crucial witnesses, the court should draw an adverse inference. Mr. Muchangi further argued that the prosecution's evidence was full of contradictions. He pointed out that the evidence of **PW1** and **PW3** contradicted each other insofar as who killed the deceased; he took note of the fact that **PW1** accused the appellant whereas **PW3** stated that it was Kingori, Kimathi and Mwenda who murdered the deceased and escaped. Citing the case of ***Ndungu Kimanyi vs. Republic*** [1979] KLR 238, he submitted that the trial judge

erred in failing to address the material contradictions in the prosecution's evidence and also in failing to take into account the fact that material witnesses were not called.

8. Lastly, counsel submitted that the appellant's sentence was harsh and excessive as it failed to take into account the pre- sentence probation report. Fortifying his submissions with the *locus classicus* case of ***Francis Karioko Murautetu & Another vs. Republic*** [2017] eKLR, counsel submitted there

were no cogent reasons given to justify why the trial Judge refused to impose a non-custodial sentence as recommended in the pre-sentence report. He relied on the

case of ***Woolmington vs. DPP*** [1935] AC 462 to submit that the trial

Judge improperly shifted the burden of proof when he stated that he had considered the fact that the appellant did not explain how the body was moved to the house. He prayed that his appeal be allowed for those reasons.

9. The respondent opposed the appeal in its entirety, praying that it be dismissed. Miss Mengo filed written submissions and a list of authorities, both dated 24th August 2025. She submitted that the prosecution ably discharged its burden of proof to establish beyond reasonable doubt that the appellant committed the offence that he was charged with.

10. Miss Mengo contended that the evidence tendered was direct and circumstantial in nature and met the threshold set out in law to sustain a murder conviction. She negated the appellant's submissions, advancing that the investigations were not shoddy and that the evidence was credible, complete and reliable, bereft of contradictions. Quoting the case of ***Republic vs. Kipkering Arap Koskei and Another*** [1949] 16 EACA 135 and ***Ahamad Abolfathi Mohammed & Another vs. Republic*** [2018] eKLR, Miss Mengo submitted

that there was both direct and circumstantial evidence

to sustain the conviction.

11. Miss Mengo submitted that the burden of proof was never shifted to the appellant. Finally, she submitted that since sentencing was at the discretion of the court, it was not bound to accept the findings of the pre-sentence report. Accordingly, the sentence that was imposed was lawful. She prayed that the conviction be affirmed and the sentence upheld.

12. We have anxiously considered the rival submissions, examined the record of appeal and analyzed the law. Our duty as a first appellate court is to re-evaluate, re-analyze and re- examine the evidence tendered afresh and arrive at our own independent findings while making due allowance to the fact that we did not have the advantage of hearing the witnesses and observing their demeanor. [See ***Mark Oiruri Mose vs. Republic*** [2013] KECA 67 (KLR)].

13. The prosecution called seven witnesses to prove that the appellant committed the offence that he was charged with. According to the evidence, **PW1** Jeremiah Kailemia, testified that on the night of 15th August 2018 at 11:00 p.m., he was at Musyoka's kiosk located in Tomboo market watching football. It was here that he was picked by the appellant, Mwenda and Mutwiri. They informed him that all

was well and would

explain the reason for picking him later. When he resisted, they beat him up. He stated that the appellant was armed with a slasher.

14. **PW1** continued that the appellant and the other two persons took him home aboard a motorcycle. Upon reaching home, he found his father lying down. He observed that he had suffered several cut wounds and was partly burnt. Though seriously injured, he was not dead. He stated that he also found Kingori and Muchui at the scene. When he inquired what was going on, King'ori hit him with a stick and the appellant cut him on the head with a slasher. They demanded the master key to the house, stating that his father had told them that he, **PW1**, was the key keeper. The appellant told **PW1** that 10 kg of maize and 2 bars of soap had been stolen from his house and that they were in possession of those stolen items. The appellant thus demanded that **PW1** hand over those stolen items or confess where those items had been sold.

15. The appellant then proceeded to siphon petrol from **PW1**'s motorbike. This led **PW1** to escape through the window and go into hiding in the banana plantation nearby. **PW1** stayed in hiding until 4:00 a.m. He was bleeding from

his head. On

emerging from his hiding place, **PW1** went to his sister, **PW2**

Mary Karimi and informed her what had transpired.

16. Upon returning home with **PW2**, **PW1** noticed that his father was inside the house lifeless. Thereafter, **PW1** and **PW2** alerted the members of the public, their family members and neighbors who came to the crime scene. The body was collected while **PW1** was treated on 16th August 2018 and issued with a P3 form on 20th August 2018.
17. **PW1** recalled that during his lifetime, his father, the deceased, used to herd the appellant's goats and sheep. On occasion, the deceased took care of the appellant's child. He, therefore, maintained that no grudge existed between his family and the appellant.
18. **PW2** confirmed that on 16th August 2018 at 4:00 a.m., her brother **PW1** came to her home and informed her that their father had been murdered. She observed that **PW1** was bleeding from the head and nose. After serving him two cups of tea, **PW1** explained to her what had transpired. Fearing that they would be killed, **PW2** convinced **PW1** to wait till dawn to go to the homestead where the deceased was. Her evidence

was that when they arrived, they found the chief who had already arrested the appellant. There was also a large crowd.

19. **PW2** testified that the body was found lying in the house. It had several cuts on the right hand. The body was collected at 9:00 a.m. and taken to the mortuary. She also recalled that her brother, **PW1**, was escorted by the police to the hospital where he received treatment. **PW2** knew the appellant as their neighbour. She maintained that she held no grudge against him. **PW2** added that since her phone was not charged, she was unable to make any phone calls that night. She also observed that her father sustained burns on the legs and cuts on the hands.

20. **PW3,** Joseph Kimathi Samwel, recalled that on 16th August 2018 at 7:00 a.m., the appellant visited him and informed him that he had differed with the deceased. The deceased was his father-in-law while the appellant had constructed a home in the deceased's parcel of land. He asked **PW3** to accompany him to the deceased's home to establish what had occurred. **PW3**'s evidence was that on arrival, they found that the deceased was dead. Thereafter, **PW3** and the appellant

reported the incident to the Chief who informed them to guard the crime scene.

21. **PW3** observed that the deceased's legs and body were burnt.

    He suffered cuts on the head and other parts of the body. According to **PW3**, the appellant told him that he had left the deceased alive at 5:00 a.m. He testified that they did investigations and learnt that it was Kingori, Kimathi and Mwenda who killed the deceased. It was his further evidence that it was the appellant, Kingori, Mwenda and Mutwiri who attacked the deceased.

22. **PW4** George Kimathi Josphat's evidence was that the deceased was his father-in-law. He received a phone call on 16th August 2018 at 8:20 a.m. from **PW3** that his father-in-law had been killed. **PW4** went to the crime scene where he found the body lying on the floor. The deceased had a cut on the head and the body was charred on the shoulders, back and legs. There were many people present. **PW4** also noted that **PW1** was bleeding from a cut wound on his head. **PW1** was taken to hospital while the deceased's body was taken to the mortuary. He was told that the deceased had stolen maize and soap from the

appellant’s house. He added that the appellant used to work

as a motorcycle operator. To his knowledge, no grudge existed between himself and the appellant. He also had no issues with the appellant.

23. **PW5** Henry Kaberia Daniel, the area Chief, testified that on 16th August 2018, **PW3** and the appellant came to his home and reported that the deceased was killed and burnt by a mob. He reported the incident to the OCS Nchiru police station. The appellant was an area resident. At the behest of the OCS, **PW5** met him at the scene. He confirmed that the deceased was lifeless with burns sustained on the entire body. The body was transferred to the mortuary. He discovered that the deceased had stolen 20 kg of maize and a bar of soap. The items allegedly belonged to the appellant. He also recalled that **PW1** was injured.

24. **PW6** PC Josephat Musyimi, the investigating officer, found the deceased, an elderly person aged 70 years, dead and with partial burns and bruises on the hands and head. After being photographed, the body was transferred to the mortuary. He conducted investigations, interrogated witnesses, recorded witness statements and gathered the evidence.

25. It was **PW6**'s further evidence that the investigations revealed that the appellant raised an alarm after discovering that 20kg of his maize had been stolen from his house. His prime suspect was the deceased, who was his neighbor. The appellant led the members of the public in beating and lynching the deceased.
26. He further testified that a post-mortem of the deceased took place at Miathene hospital mortuary on 22nd August 2018. The appellant was arrested and charged in court. He testified that he was unable to arrest the other suspects due to a lack of cooperation from stakeholders. He stated that though photographs were taken, they were not produced in court.
27. **PW7** Dr. Laban Chabari, a medical officer at Miathene Sub-County hospital, testified that Mr. Muthomi, a senior clinical officer prepared the autopsy report after conducting the postmortem on 22nd August 2019. He was familiar with his handwriting. According to the report, the deceased's body was burned. He had a cut wound on the head, skull, hand and left ear lobe. He had superficial burns on the leg and face. The author formed the opinion that the cause of death was head injuries and burns secondary to assault bleeding.

It was produced as prosecution exhibit 1.

28. At the close of the prosecution's case, the trial court formed the opinion that a *prima facie* case had been established against the appellant and put him on his defence. The appellant, **DW1** gave sworn evidence. He stated that on 15th August 2018, while returning home from work at 8:00 p.m., he found that his house was open. As he was parking his motorcycle, he found someone stealing 20kgs of maize and soap. He raised an alarm. That thief dashed out and escaped in the darkness. He neither chased him nor was he found. The following day, he learnt that the deceased was the identified thief and had been lynched.
29. Later that morning, he proceeded to the scene where he found the body of the deceased. He also located the 20kgs of maize that had been stolen together with the soap. The deceased was his neighbour. He did not report the incident of theft. In his opinion, the deceased was killed for stealing from him. He denied committing the offence.
30. **DW2** Geoffrey Kailemia Mberia, testified that he heard an alarm raised by **DW1** on 15th August 2018 that someone had run away from his house. He stayed at **DW1**'s home for 30 minutes as they opted not to follow the thief since it was dark.

The following day, he learned that the deceased had been lynched. He was emphatic that members of the public responded to **DW1**'s alarm. **DW2** visited the crime scene. He found the maize and the bar of soap that had been stolen from **DW1**'s house. He also stated that the deceased had a propensity to steal from area residents. In fact, he had been charged with the offence on several instances.

31. Having summarized the evidence at trial, we find that the main issue for determination in this appeal is whether the trial court arrived at a correct finding in convicting the appellant as charged. Put differently, did the prosecution discharge its burden of proof to the required standard?

32. In order to sustain a conviction for the offence of murder, the following conjunctive elements must be proved beyond reasonable doubt: the death of the deceased, the cause of death, that the death of the deceased was caused by an unlawful act or omission; that the said unlawful act or omission was caused by the accused person; and malice aforethought. We shall address those ingredients sequentially.

33. On the death of the deceased and the cause of the death, **PW1**

and **PW2**, the deceased's children, all confirmed that the

deceased was lifeless on the morning of 17th August 2018. This was corroborated by **PW3**, **PW4**, **PW5** and **PW6**. According to **PW7**, an autopsy was conducted on 22nd August 2018. The deceased was found to be bleeding below the skin. He had a cut wound on the head, skull, hand and left ear lobe. He had superficial burns on the leg and face. The author formed the opinion that the cause of death was head injuries and burns secondary to assault bleeding. This proves the fact of the death and the cause of the deceased's death.

34. The next crucial element that must be established to secure a conviction is whether the deceased died as a result of an unlawful act or omission committed by the appellant herein. In this appeal, though none of the witnesses saw the appellant murder the deceased, the prosecution relied on circumstantial evidence to place the appellant as the offender. This Court in ***Sawe vs. Republic (2003) KLR 364*** set the following parameters when considering circumstantial evidence:

> ***"In order to justify on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other co- existing***

***circumstances weakening the chain of circumstances relied on*.”**

35. The star witness in this case is **PW1**. From his evidence, **PW1** was coerced into going to his father's house on the night of 16th August 2018 by the appellant. He was in the company of Mutwiri and Mwenda, suspects who remain at large. On arrival at the house, **PW1** found that the deceased was severely injured from burns and cuts. He was unconscious. In his presence, the appellant demanded that **PW1** give him the master key and the maize that had allegedly been stolen. **PW1** was also physically assaulted when he inquired what was going on. The appellant slashed him.

36. From that evidence, it is apparent that the appellant was substantially involved in the infliction of injuries to the deceased. We note that **PW1** was watching football on the night in question. At around 11:00 p.m., the appellant and two others, still at large, found **PW1** watching football at Musyoka's kiosk. The appellant was armed with a slasher. The three men, accosted **PW1** and forcefully placed him on a motor bike. They took him to the deceased's house where he was lying down having sustained injuries and burns. The appellant demanded the master keys to the house, stating that the deceased had informed him that **PW1** was in

possession of the

house keys, where the stolen items had been hidden. When **PW1** indicated that he did not have the keys, the appellant cut him with a slasher. **PW1** managed to run away when the appellant was siphoning fuel from his motorbike.

37. The sequence of events reveals that it is the appellant, and others who were not arrested, that attacked the deceased. The appellant, armed with a slasher, picked **PW1** under duress and transported him to his father, the deceased's house. The appellant demanded for the keys from **PW1**, stating that it was the deceased, who was unconscious at that time, who told him that **PW1** had the house keys where the stolen items were placed.
38. The evidence clearly establishes that the deceased was attacked and the appellant was an instrumental figure in that attack. It is his goods that were allegedly stolen. Jointly with others, he forcefully went for **PW1**, assaulted him at the scene of the crime in the presence of the deceased, who lay on the ground unconscious with visible injuries.
39. Cognizant that the burden of proof always rests on the prosecution, the evidence on record establishes that the appellant was at the crime scene and indeed, he is the one who

informed **PW3** on the morning of 16th August 2018 at around 7:00 a.m., that he had differed with the deceased. He would coercively take **PW1** to the house of the deceased in a bid to recover his stolen maize and bar of soap. From the uncontroverted evidence, the appellant told **PW3** that when he left the deceased at around 5:00 a.m., he was alive.

40. It is clear that the appellant was part of the group that assaulted the deceased. It is not denied that the other culprits, Mwendwa, Mutwiri and Kingori, fled after the incident and have not been apprehended. This may be so but this does not exonerate the appellant from the offence.

41. This Court finds that the appellant was part of the group that assaulted the deceased bringing into play the doctrine of common intention. Section 21 of the Penal Code provides as follows:

> ***"When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence."***

42. The crucial ingredients giving rise to the said doctrine were enunciated by this Court in the case of ***Eunice Musenya Ndui vs. R*** [2011] eKLR as follows:

> ***1. There must be two or more persons;***
> ***2. The persons must form a common intention;***
> ***3. The common intention must be towards prosecuting an unlawful purpose in conjunction with one another;***
> ***4. An offence must be committed in the process; The offence must be of such a nature that its commission was a probable consequence of the prosecution of the unlawful purpose.***

43. We find that the circumstances set out by **PW1** draw an inference of guilt that the appellant, jointly with others, unlawfully inflicted fatal injuries on the deceased person without any other conclusion that can be drawn from those facts.

44. The last ingredient is that of malice aforethought as provided in section 206 of the Penal Code. This Court in ***Nzuki vs. Republic*** (1993) KLR 171, stated that malice aforethought is

proved in the following ways:

> ***"Before an act can be murder, it must be aimed at someone and in addition, it must be an act committed with one of the following intentions, the test of which is always subjective to the actual accused:***
> ***The intention to cause death;***
> ***The intention to cause grievous bodily harm;***

Where the accused knows that there is a serious risk that death or grievous bodily harm will ensue from his acts, and commits those acts deliberately and without lawful excuse with the intention to expose a potential victim to that risk as the result of those acts.
It does not matter in such circumstances whether the accused desires those consequences to ensue or not and in none of these cases does it matter that the act and the intention were aimed at a potential victim other than the one who succumbed. The mere fact that the accused's conduct is done in the knowledge that grievous harm is likely or highly likely to ensue from his conduct is not by itself enough to convert a homicide into a crime of murder. (See Hyman – v- Director of Public Prosecutions, [1975] AC 55."

45. It was established before the trial court that the deceased died as a result of head injuries and burns secondary to assault bleeding. On account of that fact, we are of the considered opinion that the appellant must have known that the injuries inflicted upon the deceased were likely to cause his death. We therefore find that the ingredient of malice aforethought was proved beyond reasonable doubt and shall not disturb that finding.

46. The appellant raised a defence accusing the deceased person of stealing his maize and soap. In his view, the deceased was murdered for stealing his items. Though he called another witness, their evidence was not only in

harmony to corroborate

each other but also failed to dislodge the evidence of the witnesses of the prosecution.

47. The appellant also complained that the prosecution's evidence was riddled with inconsistencies and contradictions. We find no contradictions that affected the main substance of the prosecution's case. In any event, any contradictions were minor and did not meet the threshold set out in the *locus classicus* case of ***Twehangane Alfred vs. Uganda*** Criminal Appeal No. 139 of 2001, [2003] UGCA.

48. Ultimately, it is our finding that the prosecution ably discharged its burden of proof to the required standard that the appellant committed the offence as charged. The evidence was sufficient to arrive at that finding. Contrary to the appellant's assertions, the trial court did not shift the burden of proof to him. Accordingly, we find that the appeal against the conviction lacks merit. It is hereby dismissed.

49. The appellant was sentenced to serve 15 years' imprisonment.

This is after the trial court took into account the victim's report assessments and the pre-sentence report. As rightly stated by Miss Mengo, the trial court was not bound to

adopt the findings of the pre-sentence report to commute him to a non-

custodial sentence. The appellant committed an egregious offence. His assault on the deceased ultimately led to his death. Indeed, he is lucky to have received a lenient sentence.

50. For that reason, we find no reason to interfere with the findings on sentence. The appeal on conviction and sentence is dismissed in its entirety. Orders accordingly.

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

W. KARANJA

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JUDGE OF

APPEAL ALI-

ARONI

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JUDGE OF APPEAL

M. GACHOKA C.Arb, FCIArb.

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR