Muthuri v Republic (Criminal Appeal 67 of 2019)
[2025] KECA 2228 (KLR) (19 December 2025) (Judgment)

Neutral citation: [2025] KECA 2228 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NYERI

CRIMINAL APPEAL 67 OF 2019

J MOHAMMED, LK KIMARU & AO MUCHELULE, JJA

DECEMBER 19, 2025

BETWEEN

SAMUEL MUCHOMBA MUTHURI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against the judgment of the High Court of Kenya at Meru (R.P.V. Wendoh, J.) delivered on 30th June 2016 in Background Criminal Case No. 44 of 2009)

JUDGMENT

1. Samuel Muchomba Muthuri (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 19th April 2009 at Gakurungu Location, Tharaka Central, he murdered one John Mati Nkurui (the deceased).

2. At the trial, the prosecution called ten (10) witnesses. PW1, James Kamakia Kirigia, testified that on 19th April 2009 at about 10.00p.m., he heard screams, and on rushing to the scene with Zakaria Murithi Mutiga (PW2) saw two women fighting. With the aid of his torch, he saw the appellant, whom he knew before, stab the two women and thereafter fatally stab the deceased, who had tried to restrain him. PW2 testified that it was too dark for him to see the assailant, but the deceased, while still conscious, told him that it was the appellant who had stabbed him.

3. No. 88264 PC Jeremiah Seme (PW3), the Investigating Officer, testified that he received a report of an assault on the night in question and later confirmed that the deceased had died of the injuries sustained. He recorded witness statements and said that when the appellant later presented himself at the police station, he was identified by the deceased's brother as the assailant.

4. Joseph Mutugi Kamwara (PW4), testified that he heard screams, rushed to the scene, and with the help of torchlight saw the appellant stab both women and later stab the deceased as he pursued him. John Machira Nkurui (PW5), the deceased's brother, testified that he was informed of the stabbing, went to the mortuary where he identified his brother's body and later reported the matter at the police station, where he also found the appellant, though he had not known him prior to the incident.

5. Mary Gatiria Ndege, (PW6), testified that she had visited her aunt identified as Tabitha and at about 8.00 p.m., she heard Tabitha shouting that she had been stabbed. When she tried to assist her aunt, she too was stabbed. She confirmed having been injured, but testified that she did not see who stabbed her; did not know the appellant; and could not identify the person who stabbed the deceased.

6. John Barugah, (PW7), the husband of one of the stabbed ladies (Tabitha), testified that while in his house, he heard someone outside shouting that he would stab and kill somebody. Shortly afterward, he heard his wife, Tabitha, ask why she had been stabbed. He rushed out, got a torch, and found that both Tabitha and PW6 had been stabbed. He flashed the torch and saw the appellant running into the bush. He further testified that the deceased informed him that the same person who stabbed the women had stabbed him. He accompanied the injured to hospital, but the deceased died on the way.

7. Dr. Eric Kirimi, (PW8), and Dr. Briam Kiprop Bett, (PW9), were both called in connection with the postmortem report but were stepped down because they did not know the author of the post mortem report. They did not give substantive testimony.

8. Dr. Isaac Macharia, (PW10), was the last witness presented by the prosecution. He produced the postmortem report prepared by Dr. Ogombe, who had conducted the postmortem. The postmortem revealed a large stab wound on the left side of the abdomen below the ribcage, with the intestines protruding. There were multiple perforations of the gut and internal bleeding. The doctor concluded that the cause of death was a penetrating abdominal injury inflicted by a sharp object.

9. In his unsworn defence, the appellant denied committing the offence and raised an alibi. He stated that on the material day he was working as a mason at Mituguu area and only returned home on 21st April 2009 after being informed that his wife had left. On arrival, he found that his wife had gone to live with PW1, James Kamakia, despite his earlier warnings about her association with him. He went to Marimanti Police Station on 22nd April 2009 to report the matter, but before his complaint was booked, PW1 arrived and accused him of killing someone. The police declined to listen to his explanation and from that point he was treated as a suspect. He insisted that PW1 and PW2 had fabricated the case against him because of his wife and that he was innocent of the charge.

10. The High Court (R.P.V. Wendoh, J.) considered the evidence and found that although the incident occurred at night, PW1, PW4, and PW7 had torches and recognized the appellant whom they knew well. Their testimony was corroborated by the deceased's dying declarations to PW2 and PW7 naming the appellant as the one who stabbed him. The court rejected the appellant's alibi, found that the prosecution had proved malice aforethought, and convicted the appellant of the offence of murder. He was sentenced to death pursuant to Section 204 of the Penal Code.

11. The appellant, being dissatisfied by both the conviction and sentence, filed the instant appeal. The appellant faulted the trial court for relying on contradictory evidence of eyewitnesses; for relying on a knife exhibit allegedly interfered with; and for convicting on evidence that did not prove the charge beyond reasonable doubt. He also contended that conditions for identification were difficult and thus the trial court erred by finding that he had been positively identified as the assailant. Lastly, the appellant asserts that the sentence meted against him was unconstitutional in light of the provisions of Article 50(2) of *the Constitution*.

Submissions by Counsel

12. At the hearing of the appeal, learned counsel Ms. Wakahu appeared for the appellant and contended that the appellant's conviction was unsafe as it rested on contradictory and unreliable evidence. Counsel submitted that the testimonies of the prosecution eyewitnesses were inconsistent, particularly between PW1, who claimed to have seen the appellant stab the deceased under torchlight, and PW2, who stated that it was too dark and that he did not see the appellant at the scene. According to counsel, such contradictions raised serious doubts as to the credibility of the witnesses.

13. Counsel further challenged the reliance on the knife said to be the murder weapon, noting that it was recovered a week later by a child, lacked any unique identifying features, and was not subjected to forensic testing to connect it to him. According to counsel, this exhibit was interfered with and could not form a credible basis for conviction.

14. On whether the prosecution proved its case beyond reasonable doubt, counsel submitted that it did not, as required under Section 107 of the *Evidence Act* and Article 50(2)(a) of *the Constitution*, stressing that suspicion or speculation cannot ground a conviction.

15. Ms. B. Nandwa the learned Prosecution Counsel for the respondent, opposed the appeal and contended that the prosecution discharged its burden of proof and that the conviction was safe. Counsel submitted that the death of the deceased was not in dispute, and that multiple witnesses including PW1, PW4 and PW7, placed the appellant at the scene of the crime. PW1 and PW4 testified that they saw the appellant stab two women before fatally stabbing the deceased, while PW2 confirmed that the deceased named the appellant as his assailant in a dying declaration. PW7 corroborated the identification, stating that he used his torch to recognize the appellant. Counsel emphasized that identification was by recognition, the appellant having been well known to the witnesses, which is considered more reliable than identification by a stranger. The post-mortem evidence by PW10 confirmed that the deceased died from a penetrating abdominal stab wound consistent with the eyewitness accounts.

16. On malice aforethought, counsel alluded to the fact that the appellant stabbed three individuals in succession, causing the deceased's intestines to protrude, which clearly demonstrated an intention to cause death or grievous harm. Counsel dismissed the appellant's claims of contradictions as minor discrepancies that did not go to the root of the prosecution case.

17. Regarding the defence mounted by the appellant, counsel asserted that it was an afterthought and incapable of displacing the strong prosecution case.

18. Lastly, as regarding the sentence, counsel submitted that the sentence of death was lawful and appropriate, given the brutality of the killing. In this regard, counsel prayed that both conviction and sentence be upheld.

Determination

19. 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 nor hear the witnesses testify. See Okeno v Republic [1972] EA 32 and David Njuguna Wairimu v Republic [2010] eKLR .

20. The issues that presented themselves for determination in this appeal are whether the appellant was positively identified as the assailant; whether the prosecution proved its case beyond reasonable doubt

notwithstanding the contradictions alleged; whether malice aforethought was established; and whether the sentence imposed upon the appellant was constitutional.

21. As regards the issue of identification, it is settled that where a conviction rests on visual identification in difficult circumstances, the court must exercise the greatest caution. This Court in Wamunga v Republic [1989] KECA 47 (KLR) held, inter alia, that the court must warn itself of the special need for caution before convicting a defendant in reliance on the correctness of the identification. In R v Turnbull [1976] 3 All ER 549, Lord Widgery, CJ., emphasized that recognition, though generally more reliable, is not free from error.

22. At the hearing, PW1 testified that he saw the appellant stab two women and subsequently the deceased. He knew the appellant beforehand, and he described how his torchlight illuminated the scene, thereby enabling him to see the appellant clearly. His testimony was consistent and detailed as to the sequence of events, the weapon used, and the injuries inflicted. PW2, while initially saying it was dark, confirmed that he heard the women and the deceased immediately naming the appellant as the assailant. He further stated that the deceased, whom he was assisting after the stabbing, expressly said that it was the appellant who had inflicted the fatal blow.

23. This Court in Reuben Taabu Anjononi, Benjamin Akisa Anjononi and Monya Anjononi v Republic [1980] KECA 23 (KLR) held thus:

> "...This was, however, a case of recognition, not identification, of the assailants; recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other."

24. In this case, the witnesses were consistent that they knew the appellant well, lived in the same locality and had no reason to mistake him for someone else. In addition, the testimony of PW1 and PW4 who witnessed the stabbing of the deceased was corroborated by the deceased's dying declaration made to both PW2 and PW7 that the appellant was the person who had stabbed him. This dying declaration was, in our view, admissible under section 33(a) of the *Evidence Act*, without the need of corroboration and was made in extremity when the deceased was at a point of death and his mind is induced by the most powerful considerations to tell the truth. See Simon Kiptum arap Choge & 3 others v Republic [1984] KECA 4 (KLR).

25. In light of the foregoing, we are satisfied that the appellant was positively and reliably recognized by multiple witnesses who were familiar with him and their evidence was further reinforced by the deceased's dying declaration which directly implicated him. The possibility of mistaken identity was therefore effectively excluded and the recognition evidence coupled with the dying declaration provided a cogent and consistent evidentiary foundation that he is the person who stabbed the deceased leading to his death.

26. On whether the prosecution proved its case beyond reasonable doubt, the appellant sought to rely on perceived contradictions between the testimony of PW1, who positively identified him at the scene, and PW2, who stated that he did not. The law, however, is clear that not every inconsistency is fatal to the prosecution's case. This Court stated in Richard Munene v Republic [2018] KECA 186 (KLR) thus:

> "It is a settled principle of law however, that it is not every trifling contradiction or inconsistency in the evidence of the prosecution witness that will be fatal to its case. It is only when such inconsistencies or contradictions are substantial and fundamental to the main

issues in question and thus necessarily creates some doubt in the mind of the trial court that an accused person will be entitled to benefit from it."

27. In the circumstances herein, PW2's inability to see the appellant at the scene did not, in our view, negate the evidence of PW1, PW4 and PW7, who saw the appellant, nor did it negate the dying declaration made to him.

28. With respect to the knife which was recovered approximately a week after the incident and which the appellant claims weakened the prosecution case, the testimony of PW1 that it was the same knife he observed at the scene, corroborated by PW4, sufficiently linked the weapon to the assault. The absence of forensic examination did not in itself vitiate this otherwise cogent direct evidence. Indeed, PW1, PW4, and PW7 all gave consistent and mutually reinforcing accounts that the appellant fatally stabbed the deceased and their testimony was corroborated by the medical evidence confirming that death resulted from a deep penetrating stab wound to the abdomen. Even if we were to exclude the knife exhibit from the evidence, it would not dent the otherwise strong culpatory evidence that was adduced by the prosecution witnesses identifying the appellant as the one who fatally stabbed the deceased.

29. We are therefore not persuaded that the alleged contradictions in the prosecution evidence were material as to cast doubt on the case. Equally, the recovery of the knife some days after the incident and the failure to subject it to forensic analysis did not undermine the prosecution's case in light of the clear and credible direct evidence identifying both the weapon and the assailant. We are satisfied that, notwithstanding the shortcomings raised by counsel for the appellant, the prosecution discharged its burden of proof to the requisite standard.

30. On malice aforethought, Section 206 of the Penal Code provides that it may be inferred from the nature of the weapon used, the part of the body targeted, and the severity of the injuries. 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 the circumstances herein, the deceased suffered a deep stab wound to the abdomen causing evisceration of the intestines which wounds were inflicted with a knife. The appellant had already stabbed two women before turning on the deceased who was trying to maintain order. The brutality of the attack, the weapon used, and the target area all demonstrate malice aforethought beyond reasonable doubt.

31. Lastly, on the issue of sentence, the trial court imposed the mandatory death penalty under Section 204 of the Penal Code. The record reflects that in passing the sentence, the trial court did consider the appellant's mitigation. The Supreme Court in Francis Karioko Muruatetu v Republic [2017] eKLR declared the mandatory nature of the death penalty unconstitutional to the extent that it denies courts discretion to consider mitigating and aggravating factors. Therefore, whereas death penalty remains lawful, it is no longer mandatory. In the present case, the aggravating factors include the repeated stabbing of multiple victims and the particularly cruel fatal injury inflicted on the deceased. These circumstances call for a severe custodial sentence.

    Nonetheless, in line with Francis Karioko Muruatetu v Republic (supra), we are inclined to set aside the sentence of death imposed on the appellant and substitute therefor imprisonment of thirty (30) years which, in our view, appropriately balances retribution, deterrence, and the constitutional requirement of individualized sentencing.

32. In the end, the appeal against conviction is dismissed. The conviction for murder is upheld. However, the appeal on sentence succeeds to the extent that the sentence of death is set aside and substituted with imprisonment for thirty (30) years from the date of conviction by the trial court.

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