IN THE COURT OF APPEAL
AT KISUMU

(CORAM: MUSINGA (P), KIAGE, ODUNGA,

JJ.A.) CRIMINAL APPEAL NO. 192 OF 2020

BETWEEN

LEONARD SITUMA.....1ST APPELLANT
BARASA NYONGESA MAMATI.....2ND APPELLANT

AND

REPUBLIC.....RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Bungoma (Ali-Aroni, J.) dated 19th July, 2018

in

***HCCC No. 18 of 2013*)**
****

JUDGMENT OF THE COURT

On 28th June 2013, **Ann Kusimba Masinde (PW1)** returned home from work at about 6.00pm and found her husband, **George Masinde** (deceased) standing at the road near their gate. At about 7.00pm he got back to the house and food was served. As PW1 rose from picking a basin and a jug of water to go wash her husband's hands, she saw about five (5) people coming from the kitchen and entering the verandah. One of them, whom PW1 identified in court as the 1st appellant, was wearing

spectacles and held a gun. They

had masked themselves with marvin hats except the one in spectacles who ordered PW1 to lie down while stating, *'mama tupe heshima yetu na ulale chini haraka.'* (which means "respect us and lie down fast"). PW1 did not lie down as instructed for fear of being raped. Instead, she started screaming while going towards the sitting room saying *'tumekufa'* (we are dead). That prompted the assailants to start beating her, causing her to fall down in the sitting room where her husband was. Three of the assailants, one with a gun, another with a *'shoka'*, (axe) and the third with a *panga* attacked PW1's husband. The one with a s*hoka* cut him near his ear. At the same time PW1 was also being beaten as they asked for money from her. The assaulters then took PW1's husband to the visitors' room while she was taken to the master bedroom where they rummaged through for money. The assailants then left as they hit the bulbs so as to put off the lighting.

PW1 crawled to the master bedroom where she accessed the key for the main door and opened it. She started screaming asking for help. Her grandson, **Peter Murunga Nalwelisie (PW2),** who was locked in the kitchen with other siblings including, **Vivian Nekoye Masinde (PW3),** called her and

asked her to open the door. She

opened, and as they entered the house to look for the deceased they saw the assailants flashing torches around the compound. PW1 fled to her elder son's house with PW3 while the other children fled towards the police station. After about 30 to 40 minutes, the children who ran to the police station came back with the police. PW1 then heard the children yelling saying that their dad was dead. Since she was also injured, her son's friend who had a car took her to Bungoma District Hospital for treatment. When she got back home, she found her husband's body on a police land rover.

Both **PW2** and **PW3** corroborated PW1's account, stating that on the fateful night after PW1 opened for them the door to the room where they had been locked, she asked PW2 to call their neighbour by the name John, and together with one Nixon, they went to report the incident to the AP Camp Nalondo, and they returned home in the company of the police. PW2 then learnt that his grandfather had been killed. He ran into the house and found him kneeling down, having been cut on the head and back. **John Mukwana Weswila (PW4)** confirmed receiving a distress call from PW2 informing him about the attack. He explained that upon receiving the call, they rushed to call the police and when they

returned, they

found the deceased dead. He was kneeling and had been cut on the backside. On 3rd July 2013, **Richard Nabwelisie Masinde (PW8),** a son to the deceased, identified the body and witnessed the post- mortem. **Dr. Raymond Damba,** a medical officer at Bungoma District Hospital carried out the post-mortem and observed that the deceased had a severe head injury caused by a blunt force. He concluded that the cause of death was severe hemorrhage.

PW1 recalled that the previous night, on 27th June 2013, a certain boy, **Lewis Matara Wafula (PW12),** who was a motor cycle (boda boda) rider, had arrived at their home panting. When they asked him what was wrong, he informed them that he had been ferrying a passenger who wanted to go to Tachoni but when they got to his house, he said he wanted to go to Nalondo to pick a phone. The passenger then told him that he was an army officer and that he wanted to see a friend. As they proceeded with the journey, PW12 saw three (3) men approaching. He dropped the bike and ran away as he sensed danger. He spent the night at PW1's home and left the following day early in the morning. PW1's account about **PW12**'s sudden visit was corroborated by **PW2, PW10, PW11** and **PW12** himself.

PW1 further recalled that one day in the year 2012, at 6.00am, as she went to milk cows, a neighbour by the name Wanjala arrived at their home wanting to see the deceased. When she asked him to go inside the house he declined. PW1 finished milking and went to wake the deceased to meet the neighbour. However, the deceased refused to see him and asked that he comes back at 2.00pm. When PW1 inquired what the issue was, she learnt that the visit concerned a land dispute. The 2nd appellant's father, one **Nyongesa Mamati**, had sold land to the deceased but failed to give him title and he later died without the title having been issued. In 2008, after the death of the 2nd appellant's father, the 2nd appellant laid claim to the land and sold to other people. The deceased went to court and sought an injunction. However, the 2nd appellant did not comply and was held in contempt for 3 months. **Silvester Wasiroma (PW9),** the Chief of Sirare Location, confirmed the dispute between the deceased and the 2nd appellant having been reported to him.

Annet Nyaukuri alias Mumalasi (PW13), an advocate of the High Court of Kenya, recalled that in the year 2008 the deceased went to her office and informed her that in 1967 he bought property

no. East Bukusu/South Nalondo/661, which measured 3.6 Hectares from Mzee Nyongesa Mukhende, the father of the 2nd appellant. The deceased showed her a search which indicated that in 2008, the property had been transferred to the 2nd appellant. Further, the 2nd appellant had attempted to unlawfully evict him. Together with the deceased they considered that he had a good case for adverse possession and they filed case no. 41/2008 at Bungoma High Court. They also sought an injunction and an inhibition against the 2nd appellant so that the Land Registrar could not register any transfer. The court granted them the orders which they served upon the 2nd appellant. The 2nd appellant, however, ignored the orders and continued to build on the disputed land. The deceased through PW13 lodged contempt proceedings. The court found the 2nd appellant to be in contempt and jailed him for 3 months with no option of a fine. PW13 indicated that the deceased had informed her that he had a strained relationship with the 2nd appellant.

Kennedy Wamalwa Barasa (PW5), the 2nd appellant's son, was put under witness protection. However, when he first testified on 23rd June 2015, the court noted that his evidence was different

from the statement that he had recorded with the police. The prosecution also pointed out that the witness was recanting his evidence and giving different information. The court warned him against committing perjury. On 3rd July 2015, PW5 was recalled to give evidence but once again the prosecution indicated that he was deviating from the statement that he had given to the police and urged the court to declare him a hostile witness. The court upon observing his demeanor declared him a hostile witness and directed that the statement be produced by the writer, one **Chief Inspector James Ochieng Onditi (PW6),** the OCS Nzoia Police Station.

PW6 testified that on 23rd May 2013 at about 5.20pm, officers from CID led by CPL Kinyua took **PW5,** a suspect, to the police station. Earlier, he had received a call from the DCIO requesting him to interview the suspect and record his statement under inquiry. PW6 introduced himself to PW5, told him his intentions and cautioned him. After confirming that he understood the exercise, PW5 signed and recorded a statement under inquiry on how the deceased was murdered. The statement was recorded in Kiswahili and PW5 signed a certificate showing that he gave the statement without duress. PW6 translated the statement to

English

and PW5 signed it under inquiry. He also indicated his ID number and affixed his thumb print. PW6 produced the statement in court. On the same day that PW6 testified, PW5 was re-called, once again, to give evidence. In his testimony, he denied having recorded most of the information in the statement. The trial court observed that PW5 was 'totally dishonest'.

CPl. Kennedy Omwamba, (PW10), of CID Bungoma and an Assistant Investigating Officer in this matter, testified that on 2nd September 2013 when PW5, a main suspect in the murder of the deceased was being interrogated, he said that he knew an accomplice who was hiding in Webuye. They accompanied him to Webuye where he took them to the 1st appellant's house and identified him as an accomplice. PW10 arrested the 1st appellant and took him to their Bungoma office where they later transferred him to Nzoia Station. While at Nzoia, they checked the phone number of the 1st appellant and that of PW5 and found that the two

(2) communicated several times before and after the incident. PW10 mentioned during trial their telephone numbers which he used to establish that there was communication between them. He got the 1st appellant's number from him, while PW5's

number had been

received from the chairman of *boda boda.* It happened that a day before the murder took place, PW5 had been transported by PW12 to Nalondo but when PW12 saw a group of people that PW5 was going to meet, he feared and fled. He left his motorbike behind and it was PW5 who took it to the chairman of *boda boda* and left his number with him. **Chief Inspector Bernard Chepkwony (PW11),** corroborated PW10's evidence that it was PW5 who named and led them to the 1st appellant as an accomplice in the murder of the deceased. Further, while interrogating PW5 he stated that he witnessed his father, the 2nd appellant, organizing the crime. PW11 confirmed that through print outs from Safaricom and the Registrar of Persons, they were able to establish that there had been communication between PW5 and the 1st appellant. Further that, PW12 had revealed to them that PW5 had hired him to transport him to Nalondo. He, however, fled when he saw a group of people in a dark alley. PW12 later took them to the exact place where he left PW5 and they realized that it was near the deceased's house. PW11 stated that he relied on the evidence of PW5 and PW12 to charge the appellants. The 1st appellant was arrested on 2nd September 2013 while the 2nd appellant was arrested on 23rd August 2013.

PW5 was also arrested on 25th August 2013, but handed over to witness protection.

The appellants were charged before the High Court at Bungoma with the offence of murder contrary to **section 203** as read with **section 204** of the **Penal Code, Chapter 63** of the **Laws of Kenya.**

The prosecution led its evidence against the appellants, as outlined above, through thirteen (13) witnesses. At the close of the prosecution case, the trial court (Ali-Aroni, J. as she then was) found that the prosecution had established a *prima facie* case against the appellants and put them on their defence.

The appellants gave sworn testimony with no witnesses. The second appellant **(DW1)** denied committing the offence, stating that the deceased was his neighbour for 3 years and they had a cordial relationship. He indicated they had no issues except that the deceased sued him for encroaching on his land in Nalondo, being East Bukusu/S.Nalondo/661, but in the end the court gave him back his land. Concerning events of the fateful night, DW1 claimed that on 28th June 2013 he left Nalondo at 8.00am to get some spare parts from town. After getting them, he went to hospital and then returned home. At 3.00pm he left for Saboti and

did not return as it

was late. He claimed to have been at his other wife's place in Saboti on that night.

The 1st appellant **(DW2)** equally denied committing the offence. He claimed that on the material day he was at home in Webuye and that he did not know the deceased. He stated that he started wearing spectacles in 2013. DW2 confirmed knowing PW5 whom they worked with as Masons, but denied being engaged in any criminal activity with him.

At the end of the trial, the learned Judge found the appellants guilty as charged and convicted them of the offence of murder. Upon the learned Judge considering their mitigation, she sentenced both of them to life imprisonment.

Aggrieved by that decision, the appellants lodged this appeal, raising six grounds in a memorandum of appeal, filed on their behalf by **Ogutu J. Ochieng, Advocate.** In summary, the grounds are that the learned Judge erred by:

1. Failing to evaluate the evidence as a whole and observe that the prosecution never proved the case beyond reasonable doubt.
2. Relying on circumstantial evidence of identification of the appellants.

3. Relying on the evidence of PW5 who was declared a hostile witness.
4. Failing to conclude that the required standard and burden of proof when passing conviction based on a dying declaration was not corroborated.
5. Sentencing the appellants to death without exploring other forms of punishment.

The appellants prayed that the appeal be allowed, their conviction be quashed, the sentence imposed be set aside and they be set free forthwith.

When we heard the appeal, learned counsel **Mr. Okoth Odero** appeared for the appellants, while **Ms. Mwaniki**, the learned Assistant Director of Public Prosecutions, appeared for the State. Both parties chose to rely on their filed written submissions.

For the appellants, it is contended that there was no direct evidence showing that they were with the deceased on the night he was killed. The only evidence was that of PW1 who alleged that the 1st appellant wore glasses similar to those worn by one of the perpetrators on the material night. It is urged that PW1's identification of the 1st appellant ought to have been tested through an identification parade to verify its correctness. On reliance of this Court's decision in ***AJODE Vs. REPUBLIC [2004]***

eKLR, the

appellants submit that identification of the 1st appellant at the trial amounted to dock identification, which is generally worthless. Accordingly, it is argued that the 1st appellant was not properly identified. Citing ***MAITANYI Vs. REPUBLIC [1986] KLR 198,*** it is

contended that since this case had only a single identifying witness, her evidence ought to have been treated with the greatest care, especially where the conditions for positive identification were difficult and the life of an accused was at stake. The appellants submit that the conditions on the material night were not suitable to enable PW1 to identify the 1st appellant. Further, PW1 did not see the 2nd appellant at the scene of crime, but only identified him at the dock as the son of the man who sold his land to her husband.

The appellants contend that the trial court relied on circumstantial evidence to link the 2nd appellant to the crime, and it was the evidence of PW5 that led the court to convict the 2nd appellant. On the strength of this Court's decision in ***ABANGA alias ONYANGO Vs. REPUBLIC Criminal Appeal No 32 of 1990,***

where this Court set out the tests to be satisfied by circumstantial

evidence, it is argued that this case did not meet any of those tests since the witness whose testimony linked the 2nd appellant to the

commission and planning of the crime was declared hostile by the court. Referring to the decision in ***BATALA Vs. UGANDA [1974] EA 402,*** it is submitted that the evidence of a hostile witness is of little value. Upon invoking **sections 203** and **206** of the **Penal Code** on the definition of murder and malice aforethought as well as the decision in ***JOSEPH KIMANI NJAU Vs. REPUBLIC [2014] eKLR*** on

the need to establish both a*ctus reus* and *mens rea* in criminal trials, the appellants contend that the circumstances of this case, as explained by witnesses, does not bring out the motive of the murder, if any. They argue that even though there was an earlier disagreement over a parcel of land sold to the deceased by the 2nd appellant's father, the said dispute was resolved and parties accepted the outcome. It is asserted that the prosecution did not prove malice aforethought beyond reasonable doubt, and neither did they create any direct link between the appellants and the commission of the offence. Citing ***FRANCIS KARIOKO MURUATETU Vs. REPUBLIC [2017] eKLR,*** it is urged that the

appellants should benefit from the Supreme Court's holding in that case to the effect that the mandatory nature of the death

sentence under **section 204** of the **Penal Code** is unconstitutional. Further

that, in view of the objectives of the **Sentencing Policy Guidelines**, **2016,** the appellants should be deemed to have spent a considerable period of time in custody, being 6 years, during which they reformed and thus they should be released back to society. In conclusion, the appellants pray that should we uphold their conviction then we should substitute the death sentence imposed with a term sentence.

In addition to the submissions filed by the appellants' counsel, the appellants filed another set of submissions in person. The undated but thumb printed submissions are titled, 'supplementary written submissions.' The appellants raise one single issue in those submissions, that while their counsel requested for 3 weeks to file submissions, as exhibited at page 51 of the record, the court went ahead and directed that the defence should file and serve their submissions within 30 days, and the state to respond within 30 days of service. They allege that those proceedings happened in their absence.

In opposition to the appeal, counsel for the State defends the conviction of the appellants, contending that it was based on credible and consistent evidence including, eye witness testimony

which placed the appellants at the scene of crime; medical and post-mortem evidence which established the cause of death of the deceased as being severe head injury secondary to blunt force injury; and, the motive of the killing being the land dispute. Counsel argues that the trial Judge properly analysed the evidence and correctly applied the law in arriving at a guilty verdict. On the contestation that identification was based on insufficient circumstantial evidence, it is asserted that the totality of the circumstantial evidence met the test in ***REPUBLIC Vs. KIPKERING ARAP KOSKE & ANOTHER [1949] 16 EACA 135*** being, the

inculpatory facts are incompatible with the innocence of the accused; and, the facts cannot be explained on any other reasonable hypothesis except that of guilt. Moreover, the trial court gave reasons as to why it found the appellants' version of account unconvincing, and why the inference drawn from the "last seen" evidence was the most logical.

Counsel concedes the ground faulting the learned Judge for relying on the evidence of PW5 who was declared a hostile witness. She, however, adds that since the statement that PW5 made before the police was produced before court, the Court may

consider it in

view of the witness' changed stance or reluctance. To buttress that argument, this Court's decision in ***DANIEL ODHIAMBO KOYO Vs. REPUBLIC [2011] eKLR*** is cited. On whether the standard of proof

was met and the ingredient of *mens rea* established, it is urged that *mens rea* was firmly established through the testimonies of PW1 and PW13. They gave evidence to the effect that the deceased and the 2nd appellant had a long-standing dispute in court and a strained relationship.

On the question of sentencing, it is submitted that the apex Court did not outlaw the death penalty in ***MURUATETU***, but rather

held that trial courts must consider mitigating factors before imposing the sentence. Counsel urges that in this case the court considered both the mitigating and aggravating factors and found that the offence warranted the maximum penalty and therefore, the sentence was lawful, constitutional and appropriate. In the end, counsel implores us to dismiss the appeal and uphold the conviction and sentence.

We have given due consideration to those submissions and weighed them in light of all the evidence tendered on record,

which we have carefully and exhaustively evaluated and analyzed with a

fresh and independent eye so as to draw our own inferences of fact. This is our duty as a first appellate court proceeding by way of a rehearing, although we do not have the advantage of hearing and observing the witnesses in live testimony. See ***PANDYA vs. REPUBLIC*** ***[1957] EA 336; OKENO vs. REPUBLIC*** ***[1972] EA 32***;

Naturally, therefore, we accord the necessary respect to the findings of the trial Judge, especially those turning on the credibility witnesses.

We think the issues for determination in this appeal are two-fold namely; whether the prosecution proved its case against the appellant beyond reasonable doubt, and, whether the sentence meted out should be reviewed in light of the decision of the apex Court in ***MURUATETU*** (supra).

The appellants dispute their identification as the perpetrators of the offence, arguing that there is no evidence that directly linked them to the scene of crime on the material night, except the evidence of PW1 which ought to be handled with great care, being the evidence of a single identifying witness. We remind ourselves of the need for testing with the greatest care the evidence of PW1,

being a single identifying witness, as was delineated in ***MAITANYI Vs. REPUBLIC*** (supra) thus;

> ***"1. Although it is trite law that a fact may be proved by the testimony of a single witness, this does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult.***
>
> ***2.When testing the evidence of a single witness a careful inquiry ought to be made into the nature of the light available conditions and whether the witness was able to make a true impression and description.***
>
> ***3.The court must warn itself of the danger of relying on the evidence of a single identifying witness. It is not enough for the court to warn itself after making the decision, it must do so when the evidence is being considered and before decision is made.***
>
> ***4.Failure to undertake an inquiry of careful testing is an error of law and such evidence cannot safely support a conviction."***

In her testimony, PW1 explained how she identified the 1st appellant as follows, *'I bent to pick a basin and a jug as I rose I saw people come from the kitchen and entering the verandah, one had a gun and was wearing spectacles, another a shoka, they were 5 of them. The one in spectacles was not covered the rest were wearing marvins. The one in specks looked shocked and he*

told me 'mama tupe heshima yetu na ulale chini haraka.' We think PW1 had some

considerable time to look at the 1st appellant and recognise him, as he spoke to her. It is also logical that since the 1st appellant was the only one wearing spectacles besides not being masked in a marvin like the rest, then he was easily distinguishable. It was argued that the conditions on the material night were not suitable to enable PW1 identify the 1st appellant. However, the evidence of PW1 was that they had just served food and as they were readying to eat, the assailants struck. They assaulted her and her husband and at one point took them to separate rooms. The proximity of PW1 and the assailants was therefore too close for PW1 to have made an improper identification. Moreover, she narrated how as the assailants were leaving, they hit the light bulbs and left them in darkness. We are, therefore, not persuaded that the conditions on the fateful night were not suitable for a correct identification.

Further, we note that the 1st appellant was not linked to the crime by PW1 only, but by **PW5, PW10** and **PW11** as well**.** Although **PW5** recanted the statement he had made under inquiry to the police, which according to the learned Judge was *'so detailed with precision giving every move, time and people involved in the execution of the murder of the deceased herein,*

including sums paid

out', he admitted knowing the 1st appellant and the 1st appellant equally recognised him. They were workmates. **PW10** and **PW11,** the investigating officers, testified how PW5 led them to finding the 1st appellant in Webuye, where he was arrested. While being interrogated, PW5 had allegedly informed the police that the 1st appellant was an accomplice to the offence. During their investigations, **PW10** and **PW11** checked the phone data of PW5 and the 1st appellant from Safaricom and found that the two had communicated severally before and after the murder. We are of the considered view that in the face of the corroborative evidence by **PW10** and **PW11,** the 1st appellant was positively identified as one of the assailants by PW1.

The learned Judge is faulted for relying on the evidence of PW5 when he had been declared a hostile witness. While the respondent conceded this ground, we note that even after the witness being proclaimed a hostile witness on application by the prosecution, the learned Judge upon observing his demeanour, made a finding that he was a 'totally dishonest' witness.

The appellants further contend that the 2nd appellant was identified purely through circumstantial evidence, yet the

circumstances of this case did not meet the tests of circumstantial evidence. The law of circumstantial evidence is settled. This Court in ***CHIRAGU & ANOTHER Vs. REPUBLIC [2021] KECA 342 (KLR)***

held as follows:

> ***"Further, the conditions for the application of circumstantial evidence in order to sustain a conviction in any criminal trial have been laid down in several authorities of this court. Sufficeto mention Abanga alias Onyango v. Republic CR. App NO. 32 of 1990(UR) in which this court held as follows:***
>
> *"It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests: (i)the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established, (ii) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused; (iii) the circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else."***"**

Similarly, in ***SAWE Vs. REPUBLIC [2003] KLR 354*** the Court rendered itself as follows;

> ***"1. 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 reasonable hypotheses than that of his***

guilt.

2. ***Circumstantial evidence can be a basis of a conviction only if there is no other existing***

circumstances weakening the chain of circumstances relied on.

3. The burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution. This burden always remains with the prosecution and never shifts to the accused."

It was PW1's evidence that the 2nd appellant was known to him since he was the son of the person who sold to them land. PW1 recalled that the 2nd appellant's father had sold to her husband land but he had not given him title and when he died, the 2nd appellant invaded the land and sold to other people. PW9, the area Chief, attested that the 2nd appellant had complained to him that the deceased had claimed that he threatened him. PW13, an advocate of the High Court of Kenya, testified that the deceased had approached her, protesting that he had bought land from the father of the 2nd appellant but in 2008 he learnt that the property had been transferred to the 2nd appellant, who had lodged succession proceedings without informing him. Subsequently, the 2nd appellant invaded the land and started building mud structures. PW13 sued on behalf of the deceased for adverse possession and sought an injunction. They obtained both

orders but the 2nd appellant refused

to comply with the orders upon service. PW13 filed for contempt and the 2nd appellant was jailed for 3 months. PW13 stated that the deceased had revealed to her that he had a strained relationship with the 2nd appellant. Bearing in mind the foregoing facts, along with the relationship that the 1st appellant had with PW5, a son to the 2nd appellant, we think the circumstances in this case unerringly point towards the guilt of the 2nd appellant. Moreover, taken cumulatively, the circumstances form a chain so complete that there is no escape from the conclusion that the 2nd appellant was one of the perpetrators of the crime.

It is urged that the circumstances of this case do not bring out the motive of the murder and therefore the prosecution did not prove malice aforethought. **Section 206** of the **Penal Code** defines **Malice aforethought** in the following manner:

> **"Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances—**
>
> **(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;**
>
> **(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) an intent to commit a felony;

(d) an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony."

Pursuant to **section 206(b)**, the manner in which an act is committed can attest to the accused's state of mind and the prosecution does not have to establish a separate or specific motive. All that is required is malice aforethought and as was held by this Court in ***JOHN MUTUMA GATOBU Vs. REPUBLIC [2015] eKLR***

> ***"There is nothing in that definition that denotes the popular meaning of malice as ill will or wishing another harm and all the related negative feelings. Nor, for that matter, is it to be confused with motive as such. Our law does not require proof of motive, plan or desire to kill in order for the offence of Murder to stand proved, though the existence of these may go to the proof of malice aforethought. We are satisfied from the nature of the injuries sustained by the deceased that the appellant did inflict them of malice aforethought and that his conviction for Murder was fully merited."***

PW1 testified that the assailants were armed with a gun, a

shoka, and *a panga* and she observed one of then cut the deceased

with *a shoka* near the ear. When she later saw his body, it had a cut on the right side of the head, a cut on the scalp and 13 other cut wounds. Similarly, PW2 and PW4 stated that when they entered the house after the incident, they found the deceased kneeling with a cut on the head and back. PW7, the doctor who carried out the post mortem, observed that the deceased had a severe head injury caused by a blunt force and that he died due to severe hemorrhage. It is our considered view that the manner in which the deceased was killed pointed towards malice aforethought of the appellants. Ultimately, we hold that the prosecution proved its case against the appellants beyond reasonable doubt and their conviction was safe.

On sentencing, while we appreciate that the learned Judge did not mete out the maximum sentence prescribed, which is death sentence, we are of the considered view that the life sentence meted out was rather harsh, considering that the appellants were first offenders.

In the premises, while we uphold the appellant's conviction, we quash the life sentence imposed upon the appellant and substitute therefor a sentence of 40 years' imprisonment. Pursuant to section 333(2) of the Criminal Procedure Code, the

said sentence to run

from 11th September 2013 when the appellants were first arraigned in court since they were in custody during the trial.

Order accordingly.

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

D. K. MUSINGA, (PRESIDENT)

.....
JUDGE OF APPEAL

P. O. KIAGE

.....
JUDGE OF APPEAL

G. V. ODUNGA

.....
JUDGE OF APPEAL

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

DEPUTY REGISTRAR