IN THE COURT OF APPEAL AT KISUMU

(CORAM: MUSINGA (P), KIAGE & ODUNGA, JJ.A)

CRIMINAL APPEAL NO. E003 OF 2020

BETWEEN

BONIFACE BARASA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

*(Being an appeal from the Judgment of the High Court of Kenya at Busia (**Kiarie Waweru Kiarie, J**.) dated 8th April, 2020*

in

Criminal Case No. 28 of 2017)

****

JUDGMENT OF THE COURT

1. The appellant was charged with murder contrary to ***section 203*** as read with ***section 204*** of the **Penal Code**. The particulars of the offence were that on the 22nd day of November 2017 at Nambale Township location within Busia County he murdered ***Boniface Ekesa***, hereinafter referred to as "***the deceased***". After a full trial in the High Court of Kenya at Busia (**Kiarie Waweru Kiare, J.**), the appellant was convicted of murder and sentenced to death. Being

aggrieved

by the conviction and sentence, the appellant preferred this appeal.

2. The prosecution's case was that the appellant suspected that the deceased was having an affair with his wife and on the material day, he armed himself with a machete and forcefully entered the house of the deceased and struck him to death.

3. The prosecution called four witnesses. ***PW 1, Victor Barasa***, testified that the appellant was his neighbour at Nambale Trading Centre; that on 12th November 2017 at 7.00 pm, when he was in his house he heard screams of a person coming from the deceased's house, that was approximately ten metres away; that he rushed there and found the appellant struggling with the deceased; that the appellant had a machete but the deceased had no weapon; and the deceased was bleeding from the head and the right hand.

4. PW 1 further stated that there was no light in the house, but he had a spot light. He heard the appellant accusing the deceased of having an affair with his wife. PW 1 decided to dash to Nambale Police Station to report the incident and he returned with police officers after about ten minutes.

5. ***Corporal Geoffrey Jefwa, PW 4***, who was then stationed at Nambale Police Station, testified that when he went to the deceased's house with PW 1, they found the appellant still beating the deceased. They rescued the deceased and arrested the appellant. The deceased had a deep cut on both hands and foot. They rushed him to hospital and took the appellant to the police station. Subsequently the deceased was discharged from hospital and went to the police station and recorded a statement. He was also issued with a P3 Form and the appellant was charged with assault. However, after ten days the deceased passed away.

6. ***Pascal Ekesa Onyango, PW 2***, the deceased's father, had visited the deceased when he was hospitalized. He saw several cut wounds that he had sustained. The witness said that the deceased subsequently passed away.

7. The postmortem on the deceased body was conducted by one Dr. Mukabi, who was then working at Busia County Referral hospital. The postmortem report was produced by ***Dr. Angira Steven, PW 3***, who was familiar with the handwriting of Dr. Mukabi. The postmortem report showed that the deceased had a cut wound on the head and another one on the right leg.

The deceased's gall bladder was perforated and had leakage of bile. There was also injury to the liver, and the spleen was enlarged. The cause of death was identified as chemical peritonitis secondary to gall bladder perforation due to blunt injury.

8. In his sworn defence, the appellant said that he was arrested on 12th of November 2017 on the allegation that he had assaulted the deceased. However, on the material day he returned to his home at 9.00 pm and found his two children lying on a sofa set. When he went to his bedroom he found his wife and the deceased naked and asleep on their matrimonial bed.

9. The appellant further testified that he raised an alarm and shortly thereafter PW 1 arrived. But after a short while, PW 1 rushed out and returned with police officers, who found him fighting with the deceased outside the house. The appellant denied having gone to the house of the deceased. Subsequently, he was charged for assault, but after a few days the charge of assault was dropped and he was charged with murder of the deceased.

10. In cross examination, the appellant said that he did not attack the deceased with a machete; that they engaged in a fight with the deceased after he found him in bed with his wife.

11. The trial court held that the incident occurred at the deceased's house and not in the appellant's house; that there was sufficient evidence that the appellant assaulted the deceased; that although the appellant did not plead provocation, that is what his defence amounted to, but the same was not a sufficient defence in the circumstances of the case. The trial court cited the provisions of ***section 208 (1***) of the **Penal Code** which defines provocation as follows:

> ***"The term provocation means and includes, except as hereinafter stated, any wrongful act or insult of such a nature as to be likely, when done to an ordinary person or in the presence of an ordinary person to another person who is under his immediate care, or to whom he stands in conjugal, parental, filial or fraternal relation, or in the relation of master or servant, to deprive him of the power of self-control and to induce him to commit an assault of the kind which the person charged committed upon the person by whom the act or insult is done or offered."***

12. The learned judge also cited this Court's decision in ***Peter King'ori Mwangi & 2 Others vs Republic [2014] eKLR***

where the court held:

"We start from the premises, that provocation is not a complete defence that if advanced and proved would entitle the accused to an automatic acquittal. It is a partial defence, the effect of which is to leave it open to court to return a verdict of guilty to manslaughter if the court is satisfied the killing was as a result of provocation. So what is provocation? In the case of Duffy (1949) I ALL ER 932; provocation was defined as "some act, or series of acts, done by the dead man to the accused which would cause in any reasonable person, and actually causes in the accused, a sudden and temporary loss of self-control, rendering the accused so subject to passion as to make him or her for the moment not master of his mind …."

Consequently, the trial court rejected the appellant's defence and convicted him of murder and sentenced him to death as earlier stated.

13. The appellant's appeal raises three main issues:

(i) Whether the trial court erred in law and fact by failing to consider and apply the defence of provocation.

(ii) Whether the trial court properly established that there was malice aforethought and premeditation under section 206 of the Penal Code.

(iii) Whether the trial court misapprehended and misapplied the medical evidence as to the cause of death.

14. When the appeal came up for hearing on 1st September 2025, ***Ms. Annitta Lumallas*** appeared for the appellant, while **Ms. Mutellah**, ***Assistant Director of Public***

Prosecutions

appeared for the respondent. Both counsel chose to rely entirely on written submissions that they had filed.

15. On the first ground of the appeal, Ms. Lumallas submitted that the appellant testified that he found his wife and the deceased naked and asleep on his matrimonial bed; and that even if the appellant did not expressly plead provocation, his evidence raised a strong inference of provocation in law. She cited the provisions of section 208 (1) of the Penal Code. She faulted the trial court for wrongly dismissing that defence simply because it was not explicitly pleaded. Counsel submitted that in ***Peter Kingori Mwangi & 2 Others vs Republic*** **(supra)**, it

    was held that once evidence of provocation is raised, whether pleaded or not, the trial court has a duty to consider it. Counsel further cited ***Steven Kipkeror Cheboi vs Republic*** ***(2019) eKLR*** where it was held that provocation can be inferred from sudden discovery of adultery, reducing murder to manslaughter.

16. On the second ground, that is, whether the trial court properly established that the appellant had malice aforethought, counsel cited the provisions of ***section 206*** of the **Penal Code** which provides the circumstances under

which malice

aforethought is deemed established, including intent to kill, cause grievous harm or knowledge that death would probably result. It was submitted that the learned judge's conclusion that the appellant ***"plotted his action, armed himself with a machete and viciously attacked the deceased"*** was inconsistent with the evidence that had been adduced. She said that the appellant denied having armed himself with a machete or planning to attack the deceased, insisting that they both fought. Counsel added that when PW 4 went to the scene he did not recover any weapon.

17. On the third ground of appeal, that is, whether the trial court misapprehended and misapplied the medical evidence as to the cause of death, Ms. Lumallas submitted that the cause of death was stated as chemical peritonitis secondary to gall bladder perforation due to blunt abdominal trauma; and that the postmortem report specifically showed that the cause of death was not directly attributable to external injuries. Learned counsel's view was that the prosecution's theory of a vicious machete attack on the deceased by the appellant was doubtful.

18. The appellant's learned counsel cited ***Rex vs Tubere s/o Ochen*** ***(1945) 12 EACA 63*** where it was held that malice

aforethought must be inferred from the weapon used, the manner of attack and the part of the body targeted, with medical evidence being central to that determination. She submitted that there was no sufficient evidence to demonstrate that the appellant had any malice aforethought, and that the deceased's death was directly attributable to any assault by the appellant. She therefore urged us to allow the appeal, quash the conviction and set aside the death sentence, or in the alternative substitute the conviction and impose a just and proportionate sentence.

19. For the respondent, it was submitted that the appellant's contention that the trial court erred in law and fact by failing to consider and apply the defence of provocation was inconsistent with the evidence tendered by the prosecution as there was no demonstration that there was ***"a sudden and temporary loss of self-control"*** on his part as defined under ***section 208*** of the **Penal Code**. That is because the evidence revealed that the appellant

attacked the deceased at his house and not in the appellant's house. Ms. Mutellah referred to the

evidence of PW 1 and PW 4 who demonstrated that they found the appellant and the deceased engaged in a vicious struggle outside the deceased's house. The learned judge was therefore right in holding that given the circumstances under which the offence was committed, the defence of provocation did not lie.

20. As to whether malice aforethought was established, the respondent's learned counsel submitted that the eye witness account of Victor Barasa, PW 1, and the medical report showed that the deceased was attacked with a sharp object. PW 1 specifically testified that the appellant had a machete. She added that the absence of recovery of the machete does not negate malice aforethought. She cited this Court's decision in ***Osoro & 2 Others vs Republic (Criminal Appeal No. 5 of 2019) [2025] KECA 544 (KLR)*** where it was held that there is no mandatory requirement in law for a murder weapon to be produced in a criminal trial.

21. It was submitted that the prosecution tendered evidence that demonstrated that the elements of malice aforethought as defined under section 206 (a) and (b) of the Penal Code being that: the appellant inflicted repeated

blows to the deceased’s abdomen, resulting in gall bladder perforation and chemical

peritonitis. The intent was to cause grievous harm to the deceased.

22. On the third ground, that is, whether the court misapprehended and misapplied the medical evidence as to the cause of death, it was submitted that the internal trauma was a direct result of the assault, and the medical expert did not exclude the possibility of combined blunt and sharp force trauma. The internal injuries were consistent with the nature of the attack described by key prosecution witnesses, the respondent submitted.

23. As regards sentence, the respondent submitted that the appellant's conduct demonstrated premeditation and brutality warranting the maximum penalty. We were therefore urged not to disturb the sentence.

24. We have carefully perused the record of appeal and considered the grounds of appeal and submissions by the appellant and the respondent. This being the first appellate court, we have a legal duty to reevaluate, reanalyze and reconsider the evidence that was tendered before the trail court and arrive at our own independent conclusion, though we must bear in

mind that we did not have the advantage of hearing and seeing the witnesses and must therefore make due allowance for that.

25. Turning to the first ground of appeal where it is alleged that the learned trial judge erred in law and fact by failing to consider and apply the defence of provocation, we have already set out the definition of provocation as captured under section

208 (1) of the Penal Code. Although the appellant in his defence wanted the trial court to believe that he was deeply provoked by the sight of his wife and the deceased lying naked on their matrimonial bed inside his own house, the evidence of PW 1 and PW 4 shows that the attack occurred in the deceased's house and not as alleged by the appellant. There was therefore nothing that could have deprived the appellant of the power of self-control as to induce him to commit the assault. The learned judge was therefore right in holding that:

> ***"In the instance case, I find that though the accused may have had a genuine belief that his wife had an affair with the deceased, he had time to seek redress without resulting to taking the law into his hands. He plotted his action, armed himself with a machete and forcefully entered into the house of the deceased and attacked him. This***

was premeditated."

We therefore reject the first ground of appeal.

26. The above finding by the learned judge disposes of the second ground of appeal as to whether the trial court established that the appellant had malice aforethought, which is defined under ***section 206*** of the **Penal Code**:

> ***"206. Malice aforethought***
>
> ***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."***

The appellant armed himself with a machete and proceeded to the deceased's house with an intention of assaulting him because he suspected that the deceased was having an affair with his wife. In the circumstances, it must be inferred that the attack was premeditated.

27. The fact that the machete was not recovered at the scene does not in any way water down the prosecution evidence regarding proof of malice aforethought, and the fact that the appellant's premeditated action caused the unlawful death of the deceased. Non-recovery of the machete was of no consequence in so far as the prosecution case was concerned. In ***Karani vs Republic (2010) eKLR 73*** the court noted that:

> ***"the offence as charged could have been proved even if the dangerous weapon was not produced as exhibit as indeed happens in several cases where the weapon is not recovered."***

We find this ground unmeritorious and dismiss it.

28. Turning to the third ground of appeal where it was contended that the trial court misapprehended and misapplied the medical evidence as to the cause of death, PW 1 testified that he found the appellant struggling with the deceased, who was bleeding from the head and the right hand. After he reported the incident at Nambale Police Station and returned to the scene with PW 4, Corporal Geoffery Jefwa, PW 4, said that:

> ***"we found the accused still beating the deceased…. He was using blows and kicks to beat the deceased."***

The P3 that was produced by PW 3 revealed that there was bruising on the deceased abdomen. There was also a

perforated gall bladder with leakage of bile and injury to the liver and spleen. These injuries must have been occasioned by the vicious assault occasioned to the deceased by the appellant. The doctor who conducted the postmortem concluded that:

> ***"the cause of death was the chemical peritonitis secondary to gall bladder perforation due to blunt trauma."***

29. We agree with the respondent's submission that the internal trauma was a direct result of the assault. We find the third ground of appeal unmeritorious. In the circumstances, we dismiss the appeal against conviction.

30. Turning to the sentence that was pronounced by the trial court, the record shows that the appellant's mitigation was considered by the trial court on 8th April 2020. It is evident that the learned judge did not consider the Supreme Court decision in ***Francis Muruatetu & Another vs Republic [2017] eKLR*** where the Supreme Court held that the mandatory nature of death sentence as provided under ***section 204*** of the **Penal Code** was unconstitutional.

31. The trial court considered itself bound by the provisions of section 204 of the Penal Code that spell out the sentence for

murder as death. The learned judge did not therefore exercise any discretion on his part.

32. Having considered the circumstances under which the offence was committed and the fact that the appellant has been in custody since November 2017, we are inclined to set aside the death sentence, which we hereby do, and substitute therefor imprisonment for a term of **25 years** with effect from **17th November 2017** when he was arrested. Orders accordingly.

Dated and delivered at Kisumu this 30th day of January, 2026.

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