**IN THE COURT OF APPEAL AT NYERI**

**(CORAM: KARANJA, KANTAI, & KORIR, JJ.A.) CRIMINAL APPEAL NO. 96 OF 2019**

**BETWEEN**

**DANIEL OYONDI MOYI.....APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

***(****Being an appeal against the Judgment of the High Court of Kenya at Nyeri (Matheka, J.) delivered on 17th May, 2019*

***in***

***HC.CR. No. 2 of 2017.)***

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## JUDGMENT OF THE COURT

This is a first appeal arising from the judgment of the High Court of Kenya at Nyeri (**Matheka, J.**) which found the appellant guilty of the offence of murder and sentenced him to death.

Our duty as a first appellate court involves the consideration of issues of both law and fact. This mandate is provided by **rule 31 (1)(a)** of the **Court of Appeal Rules, 2022** which states:

> **"31.(1) On an appeal from a decision of a superior court acting in the exercise of its original jurisdiction, the Court shall have power - to re- appraise the evidence and to draw inferences of fact."**

We shall set out the facts hereunder as we consider this appeal.

As earlier stated, the appellant was charged with the offence of murder contrary to **section 203** as read with **section 204** of the **Penal Code**. The particulars were that on 29th April, 2017 he murdered **Reginah Kiinyu**. The prosecution called 10 witnesses in support of its case while the appellant gave a sworn defence and called no witnesses.

**Dr. Moses Mwendwa (PW1)** did a psychiatric evaluation of the appellant and confirmed to the court that he was fit to take plea and stand trial.

**Jacinta Kithure**, (**Jacinta - PW2**) told the court that on 27th April, 2017, she was working as a bar attendant when the appellant and the deceased came to the bar at about 8 p.m. The following day at 7 p.m., the appellant returned to the bar looking for the deceased and saying that his calls to her were being answered by a man who he did not know. Jacinta rang the deceased's number and it was picked by one Ndirangu, a boyfriend to the deceased. The said Ndirangu asked her if that Luhya who the deceased was living with was at the bar. Ndirangu reportedly came to the bar and told Jacinta to tell the appellant to stay away from the deceased. An argument erupted, customers intervened and the two, i.e. Ndirangu and the appellant, eventually sat down and began drinking together. Jacinta realized that the two knew each other and were both friends to the deceased. The two later left. Two days later, on 29th April, 2017, Jacinta went to the bar at 7 a.m. where she rang the deceased to find out how she was. The deceased told her that they had not

slept well as the appellant had disturbed them the

whole night by pelting the roof with stones and this had led her to send her children to her sister's house. Jacinta asked the deceased to come to the bar where they could talk. The deceased came but due to work, the two ladies split up to assist Jacinta's aunty named Josephine. Jacinta testified that when she returned, she found the appellant, the deceased and her aunty Josephine talking. She heard the deceased tell the appellant that their relationship was over due to the way he was treating her in front of the children and had broken into her house and destroyed her curtains.

Jacinta later learned that the appellant was about to torch the deceased's house and they reported this to the police where they found the deceased making the same report. As they left they met the appellant on the way and the deceased expressed fear by stating "*Ngai-here is Evans, he will beat me.*" The appellant told the deceased "*unanibeba kama mtoto*" and he lifted his shirt and pulled out a panga. Jacinta, who was heavily pregnant at the time, ran screaming and when she looked back she saw the appellant attacking the deceased with the panga where he was cutting her up with it. She saw him throw the panga near where the deceased had fallen; he ran away by jumping over a fence of a nearby police station where he was arrested by amongst others CID officer **Aaron Omenge (PW8)** who was attracted by screams and had chased the appellant.

**Lucy Karimi (Lucy - PW3)**, a sister to Jacinta, upon receiving information that the appellant was about to set the

deceased’s house on fire was on her way to rescue a child who was in that

house. She was in company of Jacinta and one Esther and they were joined by the deceased. It was while they were enroute to the house that they met the appellant who confronted the deceased and reportedly told her "*unanibeba kama mtoto*". Lucy saw the appellant remove a panga from under his clothes and attack the deceased by cutting her repeatedly with it. She saw the appellant drop the panga and escape through the fence to the police station.

**Damaris Mukelti** (**Damaris - DW4**), a neighbour to the deceased testified on the events of the night of 28th April, 2017 when the appellant pelted the deceased's house with stones and the following morning he threatened to remove the main door. She heard the appellant repeatedly call the deceased a prostitute.

**Susan Kibue** (**Susan - PW5**), attended post-mortem and identified the body of the deceased to the pathologist.

**Dr. John Muthuri** (**PW6**), a pathologist performed a postmortem on the deceased on 4th May, 2017. His report indicated that the deceased had a deep cut on the head and a completely severed hand, as well as a deep cut wound on the arm.

**PC Aaron Omenge** (**PW8**), as we have seen was the officer from DCI who upon being attracted by noise chased after and arrested the appellant. He visited the scene and found the deceased on the ground seriously injured. He recovered the severed hand and panga from the scene.

**Dr. Henry Sang** (**PW9**), a Government Analyst, prepared the analysis report that indicated that the panga received had no blood stains.

**Evans Omuga** (**PW10**) was at the police station on 29th April, 2017 at around 11 a.m. and was one of those who arrested the appellant who had escaped from the scene to the police station. When he went to the scene about 150 meters away he found the deceased on the ground bleeding profusely. The deceased was taken to the hospital but died on arrival.

**Chief Inspector Daniel Nzioka** (**PW11**), the investigating officer in the case recorded witness statements, organized the post mortem, took the appellant for psychiatrist evaluation, collected evidence and preferred the charges against the appellant.

At the close of the prosecution case, the appellant was placed on his defence and gave a sworn statement where he told the court that on 29th April, 2017, he went to buy meat at the local market, left his goods somewhere to pick up later and then decided to have a drink. He bought some alcohol, drank it and threw the bottle. He was summoned and informed that it was illegal to drink alcohol in the morning hours. He was taken to the police station and had been there for about 2 hours when he heard noise from outside. He stated that he saw police officers leaving the station armed and later saw people coming into the station. At 1 p.m., the police officer who had turned him in, came with three women who peeped in the cell and they said that they

knew him. The police officer then removed him from the cells and said he had killed the deceased.  He

protested, saying that he was arrested about alcohol and had been in custody during the incident. He said that he heard people talking especially the cousins to the deceased as they planned to frame him. He admitted that he knew the deceased who accused him months prior of sitting with prostitutes and he had not had a relationship with her since that day.

After considering the entire evidence, the learned Judge delivered judgment on 17th May, 2019 where she convicted the appellant and sentenced him to death.

The appellant being aggrieved by his conviction and sentence has filed the present appeal. In his grounds of appeal, he contends that malice aforethought was not proved to the required standard; that the witness evidence of Jacinta and Lucy was contradictory; that the Judge erred and lost direction in evidence of the mode of his arrest as no identification parade was conducted; that the evidence of police witnesses on mode of arrest was contradictory. He also states that his defence was not displaced by the prosecution evidence and should not have been rejected.

The appellant's submissions are dated 10th July, 2025 where he asserts that there was no identification parade conducted; that malice aforethought was never proved, and at most, a case was made out for manslaughter. He also submits that the court shifted the burden of proof to him to prove his innocence and the conviction was not safe. He also states that his mitigation was not considered and he asked this Court to substitute the sentence

given with a custodial sentence.

The appeal is opposed through the respondent's submissions dated 14th July, 2025. The respondent's position is that the death of the deceased was proved as required, that there was proof that the appellant committed the unlawful act leading to the death of the deceased and that there was proof of malice aforethought prior to the act. With regard to the sentence, the respondent submits that the same was lawful and was proper as the appellant killed a young unarmed mother.

This appeal was heard on 16th July, 2025 on the Court's virtual platform. The appellant was present in person and was represented by learned counsel **Mrs. Mutegi**. Learned Prosecution Counsel, **Ms. Kaniu** appeared for the respondent. Both sides relied on their written submissions entirely.

We have considered the record of appeal, the submissions by the parties and relevant statutes.

We reiterate the words of this Court in the case of ***Anthony Ndegwa Ngari vs. Republic*** **[2014] KECA 424 (KLR)** where it was stated that:

> ***"For the offence of murder, there are three elements which the prosecution must prove beyond reasonable doubt in order to secure a conviction. They are:***
> ***(a) the death of the deceased and the cause of that death;***
> ***(b) that the accused committed the unlawful act which caused the death of the deceased and***
> ***(c) that the accused had the malice***

***aforethought."***

Regarding the elements of death and causation of death, it is not in contention that the deceased died unlawfully on 29th April, 2017. The post-mortem report confirms that she suffered deep cut wounds on her head and her hand was cut off completely, which led to her death. Therefore, this element of the offence is confirmed.

Regarding whether the appellant caused the death of the deceased, Jacinta and Lucy were with the deceased when the appellant attacked her and they witnessed the appellant pull out a panga and strike her. He cut her up as they called for help - the deceased fell to the ground and the appellant dropped the panga near the severed hand and escaped to the police station. PW8 and PW10 were police officers who were near the scene and they intervened in the ensuing commotion, which led to the arrest of the appellant a short distance from the scene in the police station compound. Jacinta and Lucy gave direct evidence on what they saw and witnessed. The appellant, who was known to them before the incident confronted the deceased in their presence during the day and proceeded to cut her with the panga inflicting such serious injuries that led to her death.

The defence given by the appellant that he was not involved in the offence as he had been in prison for 2 hours, is unbelievable and an afterthought. The defence did not dislodge the strong evidence by the prosecution and it was rightfully dismissed by the trial court.

We now consider if the aspect of malice aforethought was

proved. In the case of ***Republic vs. Tubere*** **S/O Ochen [1945] 12**

**EACA 63**, the Eastern Africa Court of Appeal, set out the following factors to be considered in determining whether malice aforethought has been established;

> ***"The nature of the weapon used; the manner in which it was used; the part of the body targeted; the nature of the injuries inflicted either a single stab/wound or multiple injuries; the conduct of the accused before, during and after the incident."***

The evidence on record shows that the appellant was angry with the deceased out of a love triangle gone sour. According to Jacinta the deceased had a relationship with one Ndirangu for a while but had entered a new relationship with the appellant who was unhappy that the deceased retained the earlier relationship. He is also reported to have been harassing the deceased and threatening her outside her home two days prior to her death. On the material day, he armed himself with a panga and struck the deceased repeatedly; with enough force to severe her hand completely from her body and thereafter proceeded to cut her on the head. He inflicted injuries that he knew would cause grievous harm or death of the deceased and his actions were motivated by disagreements between himself and the deceased. This action by the appellant and the parts of the body targeted; the weapon used and the severity of the injuries were proof, as seen in **Republic vs. Tubere** (supra), showed a clear intention to kill. Malice aforethought was proved beyond reasonable doubt.

The conclusion on the foregoing is that the appeal on conviction has no merit and is dismissed.

With regard to the sentence, the appellant states in his submissions that the trial court did not consider his mitigation. The court had been told during mitigation that the appellant was in the prime of his life, that he was remorseful and that the court should exercise leniency.

Sentencing generally is at the discretion of the trial court and this Court in the case of ***Ahamad Abolfathi Mohammed & Another vs. Republic*** **[2018] KECA 743 (KLR)** said:

> ***"In Bernard Kimani Gacheru v. Republic, Cr App No. 188 of 2000 this Court stated thus:***
>
> It is now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account, some wrong material, or acted on a wrong principle. Even if, the Appellate Court feels that the sentence is heavy and that the Appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exist."

Having said that, the Supreme Court of Kenya was asked in **Francis Karioko Muruatetu & Another vs. Republic [2017] eKLR** to answer the question whether it was constitutional for Parliament to impose mandatory minimum sentence. It returned that it was unconstitutional for Parliament to do that and that Court clarified in what is today called "**Muruatetu 2**" (**Francis Karioko Muruatetu**

**& Another vs. Republic & Others [2015] eKLR [2021] KESC 31 (KLR) (6 July 2021) (Directions)**) that its finding related only to murder cases under **section 203** as read with **section 204** of the **Penal Code**.

The appellant here was charged with the offence of murder in what was proved to have been a pre-meditated plan to kill the deceased who was his girlfriend but she was also a girlfriend to another, something that angered the appellant. His feat of anger was out of control as witnessed by the events where he pelted the deceased's house with stones the whole night; threatened to set the house on fire where there were young children inside and even attempted to remove the main door to the house. He should have had better control of his faculties but he instead allowed himself to let his emotions where he felt rejected take better hold on him. On the morning in question he armed himself with a sharp panga, concealed it under his clothes and followed the deceased who he attacked by cutting her severely with the panga inflicting such injuries that led to her death. This was a heinous crime which society should not tolerate at all.

We have considered the plea given before the High Court in mitigation and are also guided by the holding of the Supreme Court on sentencing for murder.

Considering all relevant factors, we think that the appellant should benefit from emerging jurisprudence from that **Muruatetu** *(supra)* decision. We think that the appellant should be awarded a custodial sentence.

We dismiss the appeal on conviction which we find to have no merit. We set aside the sentence of death and substitute thereof a sentence of 30 years imprisonment from 15th May, 2017 when the appellant was first presented for plea.

**Dated and delivered in Nyeri this 30th day of January, 2026.**

**W. KARANJA**

**.....**
**JUDGE OF APPEAL**

**S. ole KANTAI**

**.....**
**JUDGE OF APPEAL**

**W. KORIR**

**.....**
**JUDGE OF APPEAL**

*I certify that this is a True copy of the original*
*Signed*
***DEPUTY REGISTRAR***