

**IN THE COURT OF
APPEAL AT NYERI**

**(CORAM: KARANJA, KANTAI & ALI-ARONI,
JJ.A.) CRIMINAL APPEAL NO. 94 OF 2017**

BETWEEN

FRANCIS MURAGURI MUIRURI.....APPELLANT

AND

REPUBLIC.....RESPONDENT

*(Being an appeal against the Judgment of the High Court at Nanyuki
(Kasango, J.) delivered on 24th May, 2017*

in

H.C. CR Case No. 8 of 2015.)

JUDGMENT OF THE COURT

This is a first appeal from the judgment of the High Court of Kenya at Nanyuki (**Kasango, J.**) where the appellant, **Francis Muraguri Muiruri**, was charged and convicted of the offence of murder contrary to **section 203** as read with **section 204** of the **Penal Code**. It was alleged in the Information that on 2nd day of August, 2009 at Gitugi Village in the then Laikipia East District, he murdered **Stephen Mururu Munuhe**. He was convicted and sentenced to death.

Our duty as a first appellate court is to reconsider the evidence, to re-evaluate the case, to retry the case as was stated in ***Okeno vs. Republic 1972 EA 32***, as follows:

“An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya v. R., [1957] E. A. 336) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (Shantilal M. Ruwala v. R., [1957] E.A. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters v. Sunday Post, [1958] E. A. 424.”

The events at Gitugi village in the evening of 2nd August, 2009 as presented by the prosecution, started in a rather innocent way but ended tragically with the death of Stephen Mururu Munuhe (the deceased). The appellant, who is an uncle to **Charles Mwangi (Mwangi-PW2)**, had taken a battery to the neighborhood for charging and at about 7 p.m. he sent Mwangi to collect it but Mwangi, then a teenager, declined to do so stating that it was late and he should not be sent out at night. According to Mwangi the appellant assaulted him, but according to the appellant, he only pinched his ears to teach him good manners, where he, the uncle and guardian, should be respected. Mwangi screamed, and this attracted the attention of the appellant's brother **Geoffrey Kinyua (Kinyua-PW3)**, who intervened asking why Mwangi was being assaulted. The appellant's mother

Gathoni Mururu (Gathoni-

PW1), also came to the scene. The appellant did not take this intervention kindly and fought with Kinyua telling those around that he had a right to discipline Mwangi. The fight between the appellant and his brother Kinyua ended when Kinyua disengaged and returned to his house. Meanwhile, their father (the deceased) came to the scene armed with an axe. The appellant told his father to go back to his house as the quarrel between him and Kinyua had ended. As the deceased walked back to his house Gathoni witnessed the appellant hit the deceased thrice on the head from behind using a metal bar according to her:

“...Mururu just dropped dead...”

She screamed, and this attracted the attention of neighbours and later the police; the deceased’s body was collected and taken to the mortuary.

Those facts stated by Mwangi were corroborated by Gathoni and Kinyua, with Kinyua adding that after his fight with the appellant had ended he heard his father say:

“...Muraguri do you want to kill me...”;

and that when he came out of his house, he found the appellant assaulting their father (the deceased). The appellant escaped but came back at midnight when he was arrested. Kinyua after disengaging from the fight with the appellant, had escaped the scene and ran to **Grace Karimi Mwangi’s (Karimi- PW4)** home in the neighbourhood.

Karimi confirmed that she had received Kinyua, who was escaping from the scene, and that the appellant, who was in pursuit of Kinyua, had passed through her compound. When she went to the scene, she found that the deceased had died.

Paul Nderitu Wangai (PW4), Assistant Chief of the area and a neighbour was attracted by screams, and when he went to investigate what was going on, he learnt that the appellant had killed his father. On further investigations, he established that there was a dispute in the appellant's family about the sale of family land.

Corporal David Gichuki (PW6) of Gitugi Administration Police Post was on patrol on the material day when he was attracted by noise and people crying. He went to the scene and was informed by Gathoni that the appellant had killed his father. He saw the body lying in a pool of blood; he arranged for the body to be removed to the mortuary, and later that night, while at the police post, the appellant was brought by members of the public and was re-arrested.

Dr. Ayub Gitaka Macharia (PW7) a pathologist at Nanyuki Teaching and Referral Hospital produced the post-mortem report which showed that the deceased was aged 70 years; the skull was deformed and there were multiple segmental skull bone fractures; there was avulsion of teeth with dislocation of right temple mandibular joint; there was lateral bloody auricular and runi area (oozing of ear and nose). On the head there were multiple lacerations and

bruises of the skull at the impact sight; there was deformed skull bones depressed multiple segreal fractures, including the frontal right temple and the cause of death was severe head injury caused by a solid object. The doctor produced the post-mortem report into evidence.

Inspector Lesa Mutuku (PW8), then stationed at Umande Police Post, visited the scene together with villagers and met many people among them some administration police officers gathered. He found the deceased's body lying in a pool of blood. He was informed by Gathoni that the appellant had attacked and killed his father. He removed the body to Nanyuki Hospital Mortuary.

Stephen Matinde Joel Waithe (PW9), Assistant Government Chemist received items from Umande Police Post including a blood sample of the deceased which was group "A"; a blood sample of the appellant, which was group "B"; a pair of trousers and an axe. On examination he found that the trousers and the axe were stained with the blood of the deceased. He produced his report into evidence.

PC Stephen Agutu (PW10) was at the material time stationed at Umande Police Post. He visited the scene of the crime on the material day and found administration police officers and members of the public. He saw the body of the deceased and recovered a panga and an axe. He drew a sketch map of the area which he produced into evidence. He arrested the appellant after he re-

appeared, and the following day he recovered the appellant's trousers which were bloodstained.

At the close of the prosecution case and upon being put on his defence the appellant elected to give a sworn statement where he stated that he was a farmer dealing with French beans. He denied the charge stating that on the material day he sent Mwangi to collect a TV Battery and when Mwangi refused to run the errand he pinched his ears which made Mwangi scream; that the scream attracted the appellant's brother Kinyua who came to the scene and was aggressive; that they fought; that he (the appellant) was drunk and was losing the fight; people gathered to watch the fight and the appellant lost the battle and the declared "fight is over." He and his brother Kinyua retreated to their respective houses, but Kinyua re-emerged five minutes later armed with a metal bar. The appellant picked a panga. Kinyua hit him on the head and hand with the metal bar; the panga fell to the ground; the appellant screamed attracting the attention of their father (the deceased) who came to the scene armed with an axe; the appellant left the scene and left the deceased and Kinyua quarreling while he went to Gitugi Police Station but the police ignored him because he was drunk. According to the appellant, it was Kinyua who had attacked their father.

Those were the respective cases made by both sides, and as we have seen, the appellant was convicted and sentenced.

There are four grounds of appeal in the homegrown “Grounds of Appeal” which appear to have been amended through written submissions by the appellant’s counsel, **M/s Mshila Juma & Company Advocates**.

The first ground of appeal relates to whether the trial court failed to appreciate that the prosecution’s case was full of discrepancies and inconsistencies; second ground- whether the trial court erred in law and fact when it found that the appellant was properly identified as the perpetrator; third ground - whether the trial court erred in law and fact in rejecting the appellant’s defence and finally, whether the trial court erred in law and fact when it found that the evidence produced was sufficient to convict the appellant - whether the prosecution proved the case beyond reasonable doubt.

It is submitted in respect of the first ground that the evidence of PW1 (Gathoni), PW2 (Mwangi) and PW3 (Kinyua) was not in harmony yet they claimed to have been at the scene at the same time. It is submitted that Gathoni contradicted herself in evidence on whether she had seen the appellant hit the deceased, and the weapon the deceased was carrying; that she contradicted herself when she testified that Kinyua and the appellant had retreated to their house after the fight but at the same time testified that Kinyua witnessed the appellant assaulting the deceased. The case of **Mohamed Barisa Guyo vs. Republic [2019] eKLR** is cited for the

proposition: *“...All these inconsistencies should have been resolved in favour of the appellant.”*

On the issue of identification it is submitted by the appellant that the prosecution did not establish that he was the perpetrator of the offence; that relying on the testimonies of Gathoni, Mwangi and Kinyua is prejudicial to the appellant as their testimonies are inconsistent and unreliable; they are not corroborated.

On the ground of appeal that the trial court erred in law and fact in rejecting the appellant's defence it is submitted that the appellant gave an account of where he was at the time of the incident; that his defence was credible and was not shaken by the prosecution. It is submitted further that the appellant had fled the scene and that it was Kinyua who assaulted the deceased but blamed the appellant for the crime.

It is submitted by the appellant on the last ground of appeal - whether the prosecution proved its case beyond reasonable doubt - that the prosecution failed to prove the 3 ingredients of murder beyond reasonable doubt. It is submitted that it was not proved who killed the deceased and whether there was malice aforethought.

It does appear that the respondent had not seen the appellant's written submissions by the time it filed its own submissions.

After identifying the role of the Court in a first appeal the respondent, in its written submissions cites the case of **Makube vs. Nyamiro [1983] KLR**, where it was held:

"A court on appeal will not normally interfere with the finding of fact by a trial court unless it is based on no evidence, or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching his conclusion."

It is submitted in response to grounds 1 and 3 that **section 13** of the **Penal Code** recognizes that intoxication can be a defence in criminal cases but that is subject to certain considerations for such a defence to be considered plausible in a trial. It is submitted that even in his defence the appellant related events of the material night and he knew exactly what had happened; that there was no evidence that he was drunk or the level of intoxication. Further, that defence of self-defence could not hold considering the injuries inflicted on the deceased on the back of the head.

It is submitted that the evidence of the Government Analyst found the deceased's blood on the part of the trousers the appellant wore on the evening in issue; that was evidence that the appellant and the deceased were in close proximity. It is submitted by the respondent that the prosecution's evidence did not have contradictions or any gap at all; that the prosecution witnesses were truthful and gave an accurate account of the events of that night. The respondent submits that the appellant was properly identified as the assailant having lived in the

same compound as

the deceased; that additional witnesses outside the family were called and corroborated the events that followed the attack including the conduct of the appellant.

On whether the appellant's defence was rejected, it is submitted that the alibi raised by the appellant was not supported by any evidence and was dislodged by the prosecution case; there was evidence of how the appellant attacked the deceased and he was attacked shortly after the incident had occurred.

It is submitted on the issue of sentence that the decision of the Supreme Court of Kenya in **Petition No. 15 and 16 (Consolidated) of 2015. Francis Karioko Muruatetu & Another vs. Republic & Others [2015] eKLR [2021] KESC 31 (KLR) (6 July 2021) (Directions)**, that death sentence remains legal, valid and proper sentence based on circumstances of the case. We are asked, should we be minded to alter the sentence, to consider the circumstances and give a sentence of not less than 50 years imprisonment.

When the appeal came up for hearing before us on 2nd July, 2025 the appellant was present from Nyeri Prison and was represented by learned counsel **Mr. Mshila** while learned State counsel **Mr. Naulikha** appeared for the respondent. Both sides relied fully on written submissions which we have summarized in this judgment and did not find it necessary to highlight any point.

We have considered the whole record, submissions and the

law and this is how we determine this appeal.

The offence of murder is defined in section 203 of the Penal Code, and its penalty is given at section 204 thereof. To establish that offence the prosecution must prove beyond reasonable doubt that a person died; who caused that death and that in causing that death the action was accompanied with malice aforethought. Malice aforethought is defined at **section 206** of the said Code to be:

“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.”**

As we have seen the events of the material evening started when Mwangi, a teenager, cried or shouted after a confrontation with the appellant. The disturbance attracted the attention of

Kinyua, the appellant's brother, who came to the scene questioning why the appellant was beating or punishing their nephew Mwangi.

This did not go down well with the appellant, and a vicious fight, which lasted about an hour, took place between them. The fight was witnessed by their mother Gathoni and Mwangi. When that fight ended, their father (the deceased) came to the scene. They all lived in different houses in the same compound. The appellant ordered his father to go back to his house, and according to Gathoni (she walked with the deceased) and Mwangi, the appellant followed the deceased and hit him 3 times on the head with a metal bar. The deceased fell to the ground, and the appellant continued to attack him even after he had fallen to the ground. Kinyua had re-emerged from his hiding place and witnessed the last part of the attack, where the appellant was attacking their father, who was lying on the ground.

It is submitted by the appellant that there were gross inconsistencies in the prosecution's case and that there was no positive identification of the appellant. From the record, this position is not supported by the evidence. This was a family which lived in close proximity in different houses within the same compound. When Mwangi, who lived with the appellant, cried out, it attracted the attention of Kinyua who came to the scene, and when the two started fighting, Mwangi was present. Their mother Gathoni emerged from her house and witnessed the fight between her two sons. When the fight ended, the deceased emerged armed with a panga and an axe, and the appellant ordered him back to his house. Mwangi and Gathoni were still at the scene and witnessed the appellant hit the deceased 3 times on the head from behind,

making the deceased fall to the ground, where he continued assaulting him, which was also witnessed by Kinyua who had re-emerged from his hiding place at Karimi's compound. There were family members who witnessed the patriarch of the home being viciously attacked by his own son, and there was no question as to who the attacker was. Looking at the totality of the evidence it was proved beyond reasonable doubt that it was the appellant who attacked the deceased that night. There were no contradictions in the prosecution's evidence, which was straight forward. The appellant's alibi defence - that he was not at the scene carried no water; it was displaced by the strong prosecution evidence. The evidence adduced proved the case as required in law, and the trial court's rejection of the appellant's defence was right in the circumstances of the case.

It was proved through Gathoni, Mwangi and Kinyua and the medical evidence that the deceased had been attacked and died at the hands of the appellant.

On malice aforethought Gathoni and Mwangi testified that the deceased, on being ordered by the appellant to go back to his house, complied but as he was walking back, accompanied by Gathoni, the appellant followed and attacked him from behind, hitting him on the head using a metal bar. He hit him 3 times, the deceased fell to the ground and the appellant continued to hit him as witnessed by Gathoni, Mwangi and Kinyua. The post-mortem report produced by the doctor showed that the deceased suffered a

deformed head, especially on the scalp region and right facial region; there were multiple segmental skull bone fractures; there was avulse teeth with dislocation of the right temple mandibular joint and there was bilateral bloody otorrhea and rhinorrhea. On internal examination the doctor found multiple lacerations and bruises of the scalp at the impact site; the skull was deformed, there was depressed multiple segmental skull bone; there was fractures of the frontal and right temporal squamous, zygomatic, orbital maxillary, nasal occipital bones and bilateral parietal bones; multiple avulsed teeth with dislocation of the right temporal mandibular joint; ruptured right eye ball; multiple sutural diastasis; macerated brain parenchyma subdural and intracranial haematomas. The doctor opined that the deceased died due to cardiorespiratory arrest due to severe head injury resulting from being hit with a solid blunt object.

A man who attacks another from behind and hits him 3 times on the head using a solid blunt object does not mean well at all for him - he wants to cause grievous harm or kill that person. In the words of Eastern Africa Court of Appeal in **Republic vs. Tubere S/O Ochen [1945] 12 EACA 63:**

“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 conduct of the appellant before, during and after the incident falls on all fours with the **Tubere** (supra) **case**. After the fight with his brother Kinyua had ended, his father (the deceased) came to the scene, and he attacked him viciously from behind, killing him on the spot. He thereafter escaped from the scene. He intended to kill his father, and he did so. The injuries he inflicted on him, the parts of the body targeted, the nature of injuries inflicted, the manner of attack, where he hit him 3 times on the head from behind and continued to attack him even when he fell to the ground, fit the definition of malice aforethought under section 206 of the Penal Code. All the ingredients of murder were proved, and we are persuaded the appellant was guilty of murder.

The appellant was sentenced to death, Kasango, J., finding that he engaged in a heinous act where he attacked his father with an iron bar, killing him. Asked to mitigate, the appellant stated that he was remorseful; he was a family man who should be treated with leniency. The Judge observed that that the offence attracted a mandatory death sentence and awarded that sentence.

Emerging jurisprudence from the Supreme Court of Kenya is to the effect that it is unconstitutional for Parliament to prescribe a mandatory death sentence in murder cases. In **Francis Karioko Muruatetu & Another vs. Republic [2017] eKLR**, that Court found that a trial Judge in a murder case should have the latitude to award a sentence depending on the circumstances of the case before the Judge.

In the instant case, there is no doubt, as observed by the learned Judge, that the appellant engaged in a heinous act where he viciously attacked his own father, killing him. Such conduct, we agree, is a matter of grave concern to society. It is conduct which should not be tolerated and perpetrators, like the appellant, should be kept away from the society which they have removed themselves from by their own conduct.

In view of the emerging jurisprudence in murder convictions we think that the appellant is entitled to a custodial sentence. In the premises we find that the appeal on conviction has no merit and is dismissed. We set aside the death sentence and substitute therefo a sentence of 40 years imprisonment from 13th August, 2009 when the appellant was presented at the High Court for plea taking.

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

W. KARANJA

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

ALI - ARONI

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JUDGE OF APPEAL

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

Signed
DEPUTY REGISTRAR