IN THE COURT OF APPEAL

AT NYERI

(CORAM: JAMILA MOHAMMED, KIMARU & MUCHELULE JJ.A.)

CRIMINAL APPEAL NO. 71 OF 2019

BETWEEN

PAUL KITHINJI MARIGU.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Chuka (A.Mabeya J.) delivered on 27th June 2016)

in

H.C.CR. A. No. 24 of 2015

****

JUDGMENT OF THE COURT

Background

1) This is an appeal against the conviction and sentence imposed by the High Court sitting at Chuka **(A. Mabeya, J.)** on 29th June 2016 in Criminal Case No. 24 of 2015. **Paul Kithinji Marigu** (the appellant), despite pleading not guilty, was convicted of the offence of murder and sentenced to suffer death.
2) The appellant was charged by an information dated 19th November 2013 with the offence of murder contrary to **Section 203** as read

with **Section 204** of the **Penal Code, Cap 63 Laws of Kenya**. The particulars

of the offence were that on 14th November 2013 at Ngaani Village, Ntoroni Sub-Location, Tharaka North District within Tharaka Nithi County, the appellant murdered **Joel Gichari Mwathi** (the deceased).

3) The prosecution called nine (9) witnesses in support of its case. **Rebecca Karambu Marigu (PW1)** testified that on 14th November 2013 at about 7.00pm she was in her house when her husband, the deceased called her and asked her to go to the homestead of one **Mukathe** where they were drinking. That she proceeded to the homestead where she found the deceased selling traditional liquor. It was her further testimony that as the deceased was conversing with a customer, the appellant emerged from behind and shot the deceased with an arrow on his back. It was her further testimony that the appellant pursued the deceased who run to the homestead of **Jeremy Nyaga (PW3**).

4) It was PW1's further testimony that the deceased requested PW3 to remove the arrow from his back whereupon she went to inform relatives about what had transpired. It was her further testimony that she was later informed that the deceased was taken to the hospital but that he had succumbed to his injuries. In cross-examination PW3 confirmed that she knew the appellant, that she

had never had a grudge against him and that they lived in the same neighbourhood.

5) **Peter Gitonga (PW2)** testified that on the material day he was at the home of one **Mukathe Kamisoro (Mukathe)** drinking traditional beer with the appellant. That the deceased was selling the traditional beer to customers including the appellant. That the appellant refused to pay the Ksh. 10 to the deceased for his drink whereupon **Mukathe** paid for him. It was his further evidence that the deceased informed the appellant that because of the appellant's conduct, they would henceforth be stealing from each other. That the appellant left the premises and returned after about two (2) hours armed with a bow and arrows. That he demanded money from the deceased with arrows and bow ready. It was PW2's further evidence that he saw the appellant setting an arrow on the bow and thereafter heard the deceased scream that he had been shot. That he was subsequently informed that the deceased had succumbed to his injuries.

6) **Jeremy Nyaga (PW3)** testified that on the material day at about 7.30pm, the deceased stormed into his house screaming. That the deceased requested him to remove the arrow that was lodged in his back. That with the help of one **Gitura Kamwara** they managed to remove the arrow and assisted in taking the deceased to the hospital but that he died on arrival. In cross-examination PW3 testified that

the deceased informed him that the appellant had shot him with an arrow in the following

words: "***Tafathali Jeremy nitoe mshale nimedungwa na Kithinji."*** (Translation**: *"Jeremy, please remove the arrow, I have been shot by Kithinji."***

7) **Samuel Gitonga (PW5)** testified that he assisted with transporting the deceased to the hospital using a motorcycle but that the deceased succumbed to his injuries before reaching the hospital. **Edward Mwabi (PW6)**, the deceased's father testified that on the material day at about 7.30pm he received a call from **David Muchiri Nyaga (PW7)** who informed him that the deceased had been shot with an arrow.
8) **Chief Inspector Carlestus Orlando No 231661 (PW8)**, the Investigating Officer, testified that he found the deceased's body at the market with blood oozing from the back. The body was removed to Meru General Hospital Mortuary. The appellant was arrested by members of the public and taken to Makutano Police Station. The arrow blade was produced as an exhibit.
9) **Dr. Gacheri Kathiri (PW9**), a medical doctor from Meru Teaching and Referral Hospital, produced the post-mortem report prepared by **Dr. Koome Guantai.** The examination revealed an entry wound at the back around the left lumbar region, massive internal bleeding and severed abdominal arteries. The cause of death was

hemoperitoneum (loss of blood) due to decapitation of the abdominal aorta.

10) In his sworn defence, the appellant stated that on the material day he had gone hunting at Meru National Park unsuccessfully and later consumed traditional liquor at PW4's homestead. He stated that he had money and spent part of it, but a dispute arose when the deceased demanded Kshs. 10/= while pushing him. The appellant testified that while intoxicated, he picked an arrow to threaten the deceased but it accidentally slipped and struck him. He further testified that he went home and slept, and later learnt of the deceased's death. He maintained that he had no intention to kill the deceased.

11) The trial court rejected the defence of intoxication and accident and held as follows:

> ***"She (PW9) produced the Post Mortem Report (PExh 1) which concluded that the cause of death of the deceased was a result of Hemoperitonoum (sic) being excessive loss of blood in the abdomen caused by the penetrative wound at the back. That wound was caused by the arrow that the accused shot the deceased with. This court therefore makes a finding that Joel Gichari Mwathi, the deceased, died from the unlawful act committed by the accused of shooting with an arrow."***

12) On malice aforethought, the trial court stated as follows:

> ***"Since the deceased was shot from the back, he must have been facing away from the accused when he was shot. That is consistent with the testimony of***

PW2 and PW4 that the accused went away after his quarrel with the deceased and later returned with a bow and arrows and

shot the deceased on his back. I find the testimonies of PW2 and PW4 to be firm and consistent and I believe it. The accused knew that the arrow was a dangerous weapon. Even if he was just threatening the deceased with it, he must have known that if the arrow hit the deceased, as it actually did, the same would be fatal. There was no evidence that he was drunk at the time. This court finds that the accused intended to cause the death of the deceased. He went back to his home to procure the murder weapon with which he executed the unlawful act. The allegation that he was too drunk is but a self-induced intoxication which cannot afford a defence. PW8 confirmed that the accused was of sound mind. Accordingly, I am satisfied that the prosecution proved beyond reasonable doubt that the accused, of malice aforethought, caused the death of Joel Gichari Mwathi by an unlawful act. The accused is culpable of murder and I find him guilty and convict him accordingly."

13) Dissatisfied by that decision, the appellant filed this appeal on grounds that: malice aforethought was not proved; the defence was wrongly rejected; the mandatory death sentence was unconstitutional; and that mitigation was not considered.

Submissions by Counsel

14) At the hearing of the appeal, both parties were represented by counsel who had both filed their written submissions. Learned counsel, **Ms. Ng'ang'a** appeared for the appellant while **Ms. Nandwa,** the learned Prosecution Counsel appeared for the

respondent.

15) **Ms. Ng'ang'a** submitted that at the time of the commission of the offence, the appellant had been drinking. That the fundamental question is: whether under intoxication, the appellant was capable of forming an intention to kill the deceased who was his nephew and with whom he had no previous history of conflict? Counsel submitted that from the evidence of PW1, PW2 and PW4 the appellant started drinking traditional liquor at about 2pm and was therefore drunk by 7pm when he is said to have shot the deceased with a bow and arrow. Counsel submitted that under the influence of alcohol, the appellant was incapable of forming malice afore thought as defined under Section 206 of the Penal Code. Counsel urged us to find that the prosecution failed to prove malice aforethought on the part of the appellant.

16) Counsel relied on the decision of this Court in ***Bakari Magangha Juma v Republic [2016] eKLR*** which held as follows:

> ***"In this case, the appellant having raised the defence of intoxication and having led evidence of his state of intoxication on the material day, which was never challenged or controverted by the prosecution, the trial court was duty bound to take it into account for the purpose of determining whether the appellant was capable of forming malice aforethought, in the absence of which he could not be guilty of murder. If the trial court were to be satisfied that the appellant killed the deceased but without malice aforethought,***

it would have been

entitled to convict him of manslaughter rather than murder."

17) Counsel further submitted that the appellant was provoked by the fact that the deceased refused to give him his change after purchasing the alcohol. Placing reliance on the provisions of **Section 13 (4)** of the **Penal Code,** counsel submitted that the appellant acted in the heat of the moment and therefore he was entitled to benefit under **Section 207** of the **Penal Code** as it was held by this Court in the case of ***Stephen Cheboi vs Republic (2002) KECA 300 (KLR).***

18) We were urged to examine the appellant's conduct after the incident in that he surrendered himself to the police and that he was not aware that the deceased had succumbed to his injuries. Counsel submitted that it would only be prudent to find that the appellant's conduct was incompatible and inconsistent with the conduct of a person with a guilty conscience.

19) Counsel urged us to allow the appeal, quash the conviction for the offence of murder and substitute it with the offence of manslaughter contrary to ***Section 202*** as read with ***Section 205*** of the ***Penal Code***. Counsel urged us to set aside the death sentence and substitute it with a prison term of time already served as it was a sufficient sentence for

the offence of manslaughter. Counsel urged us to set the appellant at liberty forthwith.

20) **Ms. Nandwa** on behalf of the prosecution, refuted the contention that the appellant should be excused on grounds of intoxication. Counsel submitted that the evidence presented by the prosecution suggested otherwise through the testimonies of PW1, PW2 and PW4. Counsel asserted that the evidence adduced was that the appellant failed to pay Kshs. 10/= after taking the traditional liquor, which PW4 paid for on his behalf. Further, that the appellant left the premises and returned to the scene armed with a bow and arrows which he used to shoot the deceased at the back.

21) Counsel further submitted that the appellant committed the unlawful act which caused the death of the deceased. Counsel submitted that this evidence was further corroborated by the deceased's dying declaration made by the deceased to PW3 that the appellant was pursuing him (the deceased) and that he had shot him with an arrow. Counsel relied on the decision of this Court in ***Philip Nzaka Watu vs Republic*** ***[2016]***

eKLR where this Court stated as follows regarding the admission and reliance on a dying declaration:

> ***"Under section 33(a) of the Evidence Act, a dying declaration is admissible in evidence***

as an exception to

the rule against admissibility of hearsay evidence. Under that provision, statements of admissible facts, oral or written, made by a person who is dead are admissible where the cause of his death is in question and those statements were made by him as to the cause of his death, or as to any of the circumstances of the transaction leading to his death. Such statements are admissible whether the person who made them was or was not expecting death when he made the statements…While it is not the rule of law that a dying declaration must be corroborated to found a conviction, nevertheless, the trial court must proceed with caution and (sic) to get the necessary assurance that a conviction founded on a death declaration is indeed safe."

22) Counsel further submitted that PW2 and PW4 witnessed the appellant shoot the deceased. Further, that the evidence of PW1, PW2, PW3 and PW4 with regard to the injuries sustained by the deceased is consistent with the medical evidence on the postmortem of the deceased performed by PW9. Counsel submitted that the prosecution's evidence was sufficient to establish that the appellant was the person who committed the unlawful act which caused the death of the deceased.

23) Counsel further submitted that the identification of the appellant was by recognition and that he was positively identified by the prosecution witnesses. Counsel further submitted that the appellant had malice aforethought which is evidenced through his actions.

That following the disagreement with the deceased, the appellant left the premises and

returned after 2 hours armed with a bow and arrows. Counsel further submitted that the nature of weapon used, the manner in which it was used and the part of the body targeted all suggested malice aforethought.

24) Counsel further submitted that the prosecution evidence was clear, concise and consistent and that there were no contradictions. Counsel relied on the decision of this Court in ***Richard Munene v Republic***

[2018] eKLR that not every trifling contradiction or inconsistency in the prosecution evidence will be fatal to its case. Counsel further submitted that the appellant's defence was an afterthought and a mere denial. Counsel further submitted that there was no evidence to suggest that while the appellant had drunk alcohol that this had impaired his judgment when he chose to attack the deceased. Counsel asserted that in the circumstances, the defence of intoxication is not available to him.

25) Regarding sentence, counsel submitted that the sentence of death imposed was appropriate taking into consideration the weapon used by the appellant, the injury which was caused by the murder weapon, the reason behind the attach by the appellant and the fact that the appellant was not at all remorseful.

26) Counsel concluded that the prosecution proved its case beyond reasonable doubt against the appellant. That all the elements of murder

were established including malice aforethought. Counsel urged us to uphold both the conviction and sentence of the High Court.

Determination

27) This being a first appeal, this Court is under a duty to reconsider and re-evaluate the evidence on record and arrive at its own independent conclusions, bearing in mind that it did not see or hear the witnesses testify. This duty was well articulated in the case of ***Erick Otieno Arum v Republic (2006) KECA 385 (KLR)*** in the following terms:

> ***"It is now well settled, that a trial court has the duty to carefully examine and analyze the evidence adduced in a case before it and come to a conclusion only based on the evidence adduced and as analysed. This is a duty no court should run away from or play down. In the same way, a court hearing a first appeal (i.e) a first appellate court) also has a duty imposed on it by law to carefully examine and analyze afresh the evidence on record and come to its own conclusion on the same but always observing that the trial court had the advantage of seeing the witnesses and observing their demeanour and so the first appellate court would give allowance for the same."***

28) We have carefully re-analyzed the entire record of the trial court, the submissions by counsel, the authorities cited, and the applicable law. The appellant was charged with the offence of murder. This Court in the case of ***Kimani vs Republic (Criminal Appeal E096***

of 2023) (2024)

KECA 615 (KLR) **(24 May 2024)** as follows:

> ***"There are three elements that the prosecution must prove beyond reasonable doubt in order to secure a conviction for the offence of murder under Section 203. They are: (a) the death of the deceased and the cause of that death; (b) that the accused caused the death of the deceased and (c) that the accused had malice aforethought. (See-Nyambura & Others -Vs- Republic [2001] KLR 355)."***

29) The issues arising for determination are whether the prosecution proved the offence of murder beyond reasonable doubt; whether the defence of intoxication or provocation was available to the appellant; and whether the conviction and sentence imposed by the trial court were proper in the circumstances.

30) It is not in dispute that the deceased died and that the cause of death was massive internal bleeding following penetration of the abdomen by a sharp object. The post-mortem report produced by PW9 conclusively established that the deceased sustained a fatal arrow wound to the back, severing abdominal blood vessels and causing hemoperitoneum. The fact and cause of death were therefore proved beyond doubt.

31) The evidence of PW1, PW2 and PW4 placed the appellant at the scene shortly before the fatal incident. The evidence further established that following a disagreement over payment for alcohol, the appellant left the scene, armed himself with a bow and arrows,

returned after a lapse of

time, and deliberately shot the deceased from behind. From the record, the deceased was unarmed and posed no imminent threat to the appellant at the time of the attack.

32) The appellant's conduct of leaving the scene, arming himself, returning, and targeting the deceased demonstrates deliberation and purpose. This sequence of events was incompatible with an accidental act or a spontaneous reaction. The trial court correctly inferred malice aforethought from the nature of the weapon used, the part of the body targeted, and the manner in which the attack was executed, in accordance with **Section 206** of the **Penal Code**.

33) Intoxication as a defence is codified under **Section 13** of the **Penal Code**

which provides as follows:

> ***"(1) Save as provided in this section; intoxication shall not constitute a defence to any criminal charge.***
>
> ***(2) Intoxication shall be a defence to any criminal charge if by reason thereof the person charged at the time of the act or omission complained of did not know that such act or omission was wrong or did not know what he was doing and -***
>
> ***a. the state of intoxication was caused without his consent by the malicious or negligent act of another person; or***

b. the person charged was by reason of intoxication insane, temporarily or otherwise, at the time of such act or omission.

(3) Where the defence under subsection (2) is established, then in a case falling under paragraph

a. ***thereof the accused shall be discharged, and in a case falling under paragraph (b) the provisions of this Code and of the Criminal Procedure Code relating to insanity shall apply.***

(4) Intoxication shall be taken into account for the purpose of determining whether the person charged had formed any intention, specific or otherwise, in the absence of which he would not be guilty of the offence.

(5) ***For the purpose of this section, "intoxication" includes a state produced by narcotics or drugs***. [Emphasis supplied]."

34) Accordingly, it is clear that intoxication is not a defence unless it is shown that it deprived the accused of the capacity to form intent. The evidence on record does not support such a conclusion. Despite having consumed traditional liquor, the appellant was able to leave the scene, procure a weapon, return, demand money, and accurately shoot the deceased. These actions demonstrate awareness, coordination, and intention, inconsistent with a level of intoxication that would negate *mens rea.*

35) Similarly, we find that the defence of provocation was not available to the appellant. The alleged disagreement with the deceased over Kshs.10/=, which had already been settled by PW4, could not

amount to grave and sudden provocation within the meaning of **Section 207** of

the **Penal Code**. Moreover, the lapse of time between the disagreement and the fatal attack afforded the appellant sufficient opportunity for his passions to cool.

36) The appellant's subsequent conduct does not negate guilt. Whether he surrendered voluntarily or was arrested by members of the public is immaterial in light of the overwhelming evidence linking him to the offence.

37) We therefore find that the prosecution proved beyond reasonable doubt that the appellant unlawfully caused the death of the deceased with malice aforethought. The trial court properly rejected the defences raised and arrived at a correct conviction. The appeal against conviction therefore fails and is dismissed. The conviction for murder is upheld.

38) On sentence, guided by post ***Muruatetu & another V Republic [2017]***

KLR sentencing jurisprudence of this Court, including ***William Okungu Kittiny v Republic [2018] eKLR,*** and ***Samuel Muchomba***

Muthuri v Republic (Criminal Appeal 67 of 2019) [2025] KECA 2228

(KLR) and considering that the deceased sustained a single fatal injury and that there was no evidence of extreme brutality, a prolonged attack or torture, we are satisfied that the death penalty

was disproportionate in the circumstances of this case. We find that the objectives of punishment would be adequately met by a lengthy custodial term.

Accordingly, the sentence of death is hereby set aside and substituted with a sentence of thirty (30) years' imprisonment from the date of conviction by the trial court.

39) Orders accordingly.

Dated and delivered at Nyeri this 13th day of February, 2026.

JAMILA MOHAMMED

.....
JUDGE OF APPEAL

L. KIMARU

.....
JUDGE OF APPEAL

A. O. MUCHELULE

.....
JUDGE OF APPEAL

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