

**IN THE COURT OF APPEAL  
AT MOMBASA**

**(CORAM: GATEMBU, MURGOR & NYAMWEYA,  
JJ.A.)**

**CRIMINAL APPEAL NO. E032 OF 2023**

**BETWEEN**

**PHILIP GACIENJA MUNGANIA.....APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

*(An appeal from the Judgment of the High Court of Kenya at  
Mombasa (A. Ongeru, J.) dated 26<sup>th</sup> October 2018*

*in*

***HC. CR.C. No. 26 of 2016)***

**\*\*\*\*\***

**JUDGMENT OF THE COURT**

1. The appellant, Philip Gachienja Mungania, was charged before the High Court of Kenya at Mombasa with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars of the offence were that on 2<sup>nd</sup> June 2016 at around 4.00 p.m. at Kongowea, Kisauni Sub-County within Mombasa County, he murdered Justus Kivwau Musyoka alias John.
2. At the trial, the prosecution called eleven witnesses. The appellant testified on his own behalf and did not call any witnesses. In a judgment delivered on 26<sup>th</sup> October 2018,

which is the subject of this appeal, the High Court **(Asenath Ongeru, J.)** found that the prosecution had proved its case to the required standard, found the appellant guilty of the offence and convicted him. Thereafter, the appellant was sentenced to suffer death.

3. Based on the appellant's self made Memorandum of Appeal, his main complaint is that the learned trial Judge failed to consider that there were no eyewitnesses and relied on circumstantial evidence and that the offence was not proved beyond reasonable doubt. Another complaint is that the time when the death of the deceased occurred could not be determined based on the postmortem report that was produced.
4. The other grounds of appeal set out in his memorandum of appeal do not appear to have any relation to the matter at hand. For instance, there is a complaint that the Judge failed to "consider that the alleged ATM cards were not found" in the appellant's possession. There is also a complaint that the Judge did not consider that the appellant was the first person "to report the matter to Bamburi Tourist Police unit about a missing person."
5. However, during the hearing of the appeal, the grounds of appeal that were canvassed before us by counsel were confined to the complaint that the Judge erred in failing to consider that there were no eyewitnesses and relied on

circumstantial evidence, and that the prosecution did not prove the case to the required standard. The Court was also urged to interfere with the death sentence meted out by the trial court.

6. The mandate of the Court on a first appeal such as this is well articulated in the often-cited decision of the predecessor to this Court in the case of **Okeno vs. Republic [1972] EA 32**, thus:

***"An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination ... and to the appellate court's own decision on the whole evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions...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 conclusion; 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..."***

7. The evidence presented before the trial court shows that the incident leading to the death of the victim, Justus Kivwau Musyoka *alias* John, deceased, occurred at the premises of Purity Mbithe Kioko who testified as PW4. She recalled that on 2<sup>nd</sup> June 2016 at 2.30 p.m. she was at her Café at Matopeni when the deceased, who was her customer, called in and ordered food. She served him. Shortly thereafter the appellant, to whom she referred by

the name Mureithi, also

arrived at the Café, ordered and was served food (Githeri) and started eating. She stated that the appellant then “took John’s food and poured it down” and a fight between them broke out. She explained:

***“They started fighting. I told John to keep quiet I would give him more food. He left the hotel and went out of the hotel to sit outside. Mureithi ate and went away. He returned after 5 minutes. I saw him removing a knife. He jumped on John and stabbed him. I was standing nearby I saw everything.”***

8. She went on to say that she shouted, and that people came and found the appellant lying on the deceased and that they separated them, and the deceased was taken to hospital where she later learnt that he had passed on.
9. The version of events as narrated by PW4 was corroborated by the testimony of her sister Peninah Jimi a resident of Kongowea Matopeni who testified as PW3. PW3 stated that she left the deceased at her sister’s café/hotel eating. She met the appellant, to whom she also referred by the name Mureithi, going towards the cafe. She then heard her sister’s voice shouting “stop it” and ran back to the hotel and saw the deceased lying down. The appellant “was lying there holding a knife” and the deceased was bleeding from the chest, she explained. She went on to say that, “Mureithi was also lying down holding a knife with his right hand”; that said there were many people and they took the deceased to hospital where they were told that he had died.

10. Emmanuel Mulangi Munyalo (PW2) a sugar cane seller went to the scene but did not witness the incident. He however saw the body of the deceased at the scene.
11. Omar Juma Hussein (PW6) a security guard and a resident of Kongowea Matopeni was at home on 2<sup>nd</sup> June 2016 at 3.00 p.m. when he heard people shouting outside that “he has killed him” and went to check. He saw a group of people and a man, whom he knew as Mureithi, lying down holding a knife. He then went to report the matter to the village elder Hamisi Suleiman (PW7).
12. Hamisi Suleiman (PW7) accompanied by PW6 went to the scene of the incident. They found the appellant, whom he knew as Mureithi, being assaulted by a group of people; that they took the appellant to the DO’s office and that he saw the police remove a knife from the appellant’s pocket.
13. Police Constable Nicolus Kimeu (PW8) was attached to Nyali Police Station Kongowea Patrol Base. With other officers, he was at DO’s office at Kongowea when PW7, a village elder from Matopeni made a report that someone had been stabbed. That the appellant was then brought there by members of the public who accused him of stabbing the deceased. That he rescued the appellant, took him to the D.O’s office, searched him and recovered a blood stained penknife in his right pocket; that he communicated with the

duty officer and the appellant was taken to Nyali Police Station. He then accompanied the duty officer to Jocham Hospital where they found the deceased with a fresh chest wound and his body was transferred to Coast General Hospital.

14. Police Constable James Njoka (PW11) who was attached to Nyali Police Station was the investigating officer. He received information of the arrest at Matopeni of the appellant for allegedly having stabbed a person who had died while undergoing treatment at Jocham Hospital. He received a knife from PW8 (PC Kimeu) recovered from the appellant. He recorded witness statements and after the postmortem was done at Coast General Hospital, he released the body of the deceased to the family before charging the appellant with the offence.
15. Police Constable Geoffrey Ouma (PW10) was attached to Criminal Investigations Department Headquarters Mombasa working as scene of crime personnel and was on duty on 8<sup>th</sup> June 2016 when he received a call from the O.C.S. Nyali who required photography services at Coast General Hospital. He proceeded there and took photographs of the deceased's body which he produced before the trial court.
16. George Lawrence Oguda (PW5) a Principal Government Chemist received a knife and two blood samples. The blood samples had been drawn from the deceased and from

the

appellant respectively. They were transmitted to him at Nyali Police Station under cover of an exhibit memo dated 2<sup>nd</sup> June 2016. He was required to find out whether there was any relationship between the blood samples and the knife. He found that the knife was blood stained with human blood. He found, and concluded that the DNA profile generated from the knife showed a mixture of the DNA profiles generated from the two blood samples of the deceased and the appellant and produced his report.

17. Dr. Jillian Njambi Muiruri (PW9) a Medical Officer at Coast General Hospital produced a postmortem report in respect of the deceased on behalf of Dr. Uba Hemed. The postmortem was witnessed by PW1, Antony Musyoka Kivwau, the father of the deceased. Based on the postmortem report, the deceased had a stab wound anteriorly on the chest approximately 5x2 cm; fracture of the sternum, lower part with massive bilateral hemothorax; cut wound on the right ventricle and pericardium and hemopericardium. The pathologist formed the opinion that the cause of death was hemorrhagic shock, with massive hemothorax and torn ventricle secondary to stab wound.
18. In his sworn statement in defence, the appellant after explaining at length his background and how he ended up in Mombasa undertaking different assignments having been raised in Meru, told the trial court that on 1<sup>st</sup> June, 2016, he

woke up at 3 a.m. and went to Kongowea market, bought 15 crates of tomatoes which he sold until 1 p.m.; that enroute to buy boxes, he decided to go to Mama Ali to pay her for food; that before reaching Mama Ali's place, he met four boys sniffing drugs; that he then paid Mama Ali, who he had known for many years; that as he was leaving, one of boys hit him and he fell down; that many people came and started calling him a thief and started beating him; that the deceased witnessed the beating and defended him; that he sustained a cut on the left side of his hand; that someone said he should be taken to the police station if he was a thief.

19. He stated further that "one person came in between John (sic) was stabbed by one of the boys and I was cut on the left hand."; that he was taken to the DO's office and accused of stealing a motorcycle the previous night and threatened with death; that he was taken to Nyali police station and after 3 days was taken to a Dispensary at Kongowea, where his blood samples were taken.
20. He denied having a knife at Kongowea. He stated that he knew PW4 and her sister PW3; that he used to eat at PW4's place but they disagreed in December 2016 and he stopped eating there. He stated that he had known the deceased for three years; that they used to work together at Kongowea and he used to buy tomatoes from him; that the day the deceased

was stabbed, he ate at Mama Ali's and did not eat at PW4's place; that he was at loss why he was blamed for the incident

21. Upon reviewing the evidence, the trial Judge, as already stated, found the appellant guilty, convicted him and sentenced him to death and hence this appeal.
22. Urging the appeal before us, learned counsel **Ms. Aoko Otieno** holding brief for **Ms. Nzamba** for the appellant relied on written submissions dated 20<sup>th</sup> June 2025. Counsel submitted that the High Court committed an error by failing to consider the absence of eye-witnesses and by relying on circumstantial evidence; that the prosecution case in its entirety rested upon inferences drawn from various facts in the absence of direct testimony. Citing the case of **Sawe v Republic (2003) KLR 364** among others, it was urged that for a conviction to be sustained based on circumstantial evidence, the events leading to the death of the deceased must form a chain so closely knit together without any breakage or interruption and that suspicion, however strong, cannot be the basis for inferring guilt.
23. As regards the sentence, it was submitted that the death sentence imposed in this case is harsh and excessive; that the appellant had no intention of committing the offence of murder and is remorseful and that the sentence should be reduced for the appellant to rejoin his family.

24. Learned Prosecution Counsel **Mr. Sirima** holding brief for **Miss. Kanyuira**, relying on the respondent's written submissions dated 20<sup>th</sup> June 2025 submitted that the prosecution proved all the ingredients of the offence of murder namely, death of the deceased; that the death was caused by the unlawful act on the part of the appellant; and that in causing the death of the deceased, the appellant had malice aforethought. Cited in support was the case of **Ali vs. Republic (Criminal Appeal 51 of 2021) [2024] KECA 1168 (KLR).**

25. As regards the sentence, it was submitted that the Judge considered the circumstances leading to the death of the deceased; and that there are aggravating circumstances that render the appellant undeserving of reduction of the death sentence meted on him.

26. We have reviewed the record and considered the submissions by learned counsel. The main issue for consideration is whether the appellant's complaint that the trial Judge erred in relying on circumstantial evidence and failing to consider that there were no eyewitnesses is well founded.

27. As this Court stated in the case of **Ahamad Abolfathi Mohammed & Another vs. Republic [2018] KECA 743 (KLR):**

**“... the guilt of an accused person can be proved by either direct or circumstantial evidence. Circumstantial evidence is evidence, which enables a court to deduce a particular fact from circumstances or facts that have been proved. Such evidence can form as strong a basis for proving the guilt of an accused person just like direct evidence.”**

28. In the same case the Court cautioned that before circumstantial evidence can form the basis of a conviction, it must satisfy several conditions, which are designed to ensure that it unerringly points to the accused person, and to no other person, as the perpetrator of the offence and in that regard referred to the decision in **Sawe vs. Republic (supra)** on which counsel for the appellant in the present case also relied.

29. In the present case however, it is clear to us, based on the evidence presented before the trial court as reviewed above, that the conviction of the appellant was based primarily on direct evidence. The testimonies of PW4, PW3 and PW6 were eyewitness accounts of what they saw. The trial Judge was particularly impressed by the eyewitness account of PW4 and stated:

**“I find that the prosecution has proved the guilty (sic) of the accused person to the required standard. PW4 Purity Mbithe Kioko is an eye-witness who saw the accused person stab the deceased in broad daylight at 2.30 pm.”**

30. To buttress the eyewitness accounts, there is other overwhelming evidence, which the defence put forth which the appellant did not displace, and which proved all the

ingredients of the offence were proved to the required standard. There is for instance the blood stained penknife recovered from the appellant; the forensic report by PW5 that links the appellant to the knife; and the postmortem report that shows the cause of death consistent with stab wounds.

31. The complaint that the Judge erred by failing to consider that there were no eyewitnesses and that she relied on circumstantial evidence that did not meet the required standard is totally misconceived, not well founded and is without merit.

32. As regards the sentence, the Court in the case of **Bernard Kimani Gacheru vs. R [2002] eKLR** stated as follows:

***“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, any one of the matters already stated is shown to exist...”***

33. Subsequently in the case of **Muruatetu & Another vs. Republic; Katiba Institute & 5 Others (Amicus Curiae)**

**(Petition 15 & 16 of 2015) [2021] KESC 31 (KLR)** the

Supreme Court of Kenya gave guidance on some of the aggravating and mitigating factors to guide the court in sentencing including: age of the offender; being a first offender; whether the offender pleaded guilty; character and record of the offender; commission of the offence in response to gender-based violence;

the manner in which the offence was committed on the victim; the physical and psychological effect of the offence on the victim's family; remorsefulness of the offender; the possibility of reform and social re-adaptation of the offender; and, any other factor that the court considered relevant.

34. In the present case the learned Judge in sentencing the appellant to death stated that the appellant is "a very dangerous element in society." The court also considered the appellant's mitigation, noted that he was a first offender and that he was not remorseful for having attacked the deceased "after a trivial fight and killed him in full broad daylight" and that a deterrent sentence is deserved.

35. The appellant himself explained in his testimony that he had known the deceased for three years and that they had worked together at Kongowea and that he would carry tomatoes for customers for which the appellant used to pay him. The appellant was said to be aged 56 years. The circumstances under which the offence was committed were well explained

by PW4 and as the trial Judge noted the “trivial fight” between them should never have escalated.

36. In the case of **Ali vs. Republic (Criminal Appeal 51 of 2021) [2024] KECA 1168 (KLR)**, this Court upheld a custodial sentence of 30 years imprisonment meted out in that case for the offence of murder. We are persuaded that the sentence of death in the present case is manifestly harsh. We set it aside and substitute therefor a custodial sentence of 35 years to run the date of his arrest on 2<sup>nd</sup> June 2016.

37. Orders accordingly.

**Dated and delivered at Mombasa this 27<sup>th</sup> day of February 2026.**

**S. GATEMBU KAIRU, FCI Arb, C.Arb.**

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**JUDGE OF APPEAL**

**A.K. MURGOR**

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

**P. NYAMWEYA**

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

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

*Signed*  
**DEPUTY REGISTRAR**