IN THE COURT OF APPEAL AT NYERI

(CORAM: KANTAI, LESIIT & ALI - ARONI, JJ.A.) CRIMINAL APPEAL NO. 61 OF 2020

BETWEEN

JAMES MUTEMI MITUGO.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal against the Judgment of the High Court of Kenya at Chuka (R. K. Limo, J.) delivered on 29th January, 2020

in

H.C. CR. No. 9 of 2018.)

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JUDGMENT OF THE COURT

This is a first appeal from the conviction and sentence of the appellant, **James Mutemi Mitugo**, for 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 the 1st May, 2018 at Magutuni Township in Tharaka-Nithi County he murdered one **Miriam Kathomi Kinyua**.

Being a first appeal our mandate is to re-appraise the evidence on record and come to our own independent conclusion and inferences of facts but bearing in mind that we did not have the opportunity to see witnesses testify to determine their demeanour – ***Okeno vs. Republic [1972] EA.32***.

It was a murder most foul. **Dr. Justus Kitili** (PW4 – the doctor) of Chuka County Referral Hospital conducted a post-mortem examination on the body of Miriam Kathomi Kinyua (the deceased) and he found: on external examination of the body eye balls removed (no eye); there were bruises on frontal skull; upper limbs- left arm had been chopped off; there was a deep cut on the left arm which had been chopped off; there was a deep cut on left buttock 10 cm long; the left thigh and left leg were depressed up to the bone; both breasts were cut off and all mucus membrane were pale indicating massive loss of blood.

The doctor formed the opinion that the cause of death was negligent shock due to severe haemorrhage due to multiple deep cut in the body. He produced a post-mortem report and a certificate as exhibit in the case.

The circumstantial evidence that led to the arrest, prosecution and conviction of the appellant was through the testimony of various prosecution witnesses. **Eslie Nkati Nkirote** (PW1- Nkirote) lived in the same compound as the appellant where there were 9 rental houses or rooms owned by a teacher, **Gilbert Gitonga M'rama** (PW6-Gitonga). At about 9 p.m. on 1st May, 2018 Nkirote was asleep in her house when she was woken up by screams and the sound of a person who sounded like she was being chocked. She quickly got out of her house, called other neighbours and they all went to the appellant's house where screaming had emanated from. Upon knocking at the door the appellant was at first reluctant to open and when he did so she

observed that he was stark naked. She was

accompanied by her neighbours **Rose Kinanu** (PW3 - Kinanu), **Nessy Gathomi** (PW2 - Gathomi), **Polysena Kawira** (PW5 – Kawira) and one Anne. All the women were shocked to see that the appellant was naked despite him having taken his time to open the door. Upon enquiring from him where the deceased was he informed them that she was asleep. The screaming had since stopped. Nkirote and the others retreated back to their respective houses and the next morning when Nkirote was outside her house she asked the appellant where the deceased was and he responded that the deceased had gone out at night for a short call but did not return to the house. After a short while the appellant who had returned to his house re-emerged carrying a bag and when asked what he was carrying he responded that he was taking the deceased's clothes to her grandmother. He left and did not return. Nkirote was informed by Gathomi on 4th July, 2019 that a body had been found partially buried behind the plot.

Gathomi resided in the same compound and was one of those who answered the distress call on hearing screams from the appellant's house. It is she who knocked at the appellant's door and even tried to force it open. The appellant on opening the door informed them that the deceased was asleep. On 4th May, 2018 the landlord (Gitonga) informed them of discovery of a partially buried body in a farm behind the plot. Gathomi visited the scene and saw a body facing down which had been partly eaten by dogs.

Her narration of facts was confirmed by Kinanu and Kawira who were the other ladies who answered to the distress call that night. They never saw the deceased alive again.

Gitonga (the landlord) testified that he owned the 9 single rooms; that the appellant was his tenant in room 4 where he initially stayed alone but was later joined by the deceased where they resided until the events of 4th May, 2018 where he visited the compound and upon gaining entry to the back of the plot where he planted maize he was shocked to find a body protruding from sand he had deposited there. He summoned his tenants to witness the shocking scene after which he reported the matter to Magutuni Police Station whose officers visited the scene and collected the body after processing the scene. He had been informed by other tenants of fights between the appellant and the deceased and when he saw her body he noted that her hands and breasts had been chopped off.

Lydia Kanini Ndubi (PW7- Kanini), mother to the deceased who was a business woman in Nairobi knew the appellant who had been introduced to her by her daughter as her boyfriend. She received a call that forced her to travel home only to find that her daughter was dead, murdered. She attended post-mortem and identified her body for that purpose.

Then there was the evidence of police officers. **Sergeant William Mwanzia** (PW8) attached to Magutuni Police Post received report on 5th May, 2018 from Gitonga that there was a decomposing body in his compound. He and a colleague visited

the scene and he

later led officers from Criminal Investigation Department (CID) to the

appellant's rural home (which he knew) where the appellant was arrested.

The CID officer was **PC Isaiah Ugali Wanyama** (PW9) who took over the case and established that the deceased was last seen with the appellant on 1st May, 2018. The appellant had then escaped both from his rented quarters and from work at Kiera Hill Company in Magutuni town. They traced the appellant to his Kitui home where they arrested him and they charged him accordingly.

On closure of the prosecution case and upon being put on his defence the appellant elected to give an unsworn statement where he denied the offence stating that the deceased was his girlfriend and *"...there is a time she told me she could not stay with one man. I told her I was not comfortable..."* Further that he left for home in "Mwingi Kitui" from where he was called and informed that he had committed murder. According to him, while living with the deceased there were two men who used to threaten him and that was why he had decided to leave for his rural home; that he had been told that because he was from Kamba community he would be killed and burnt under a banana tree. He begged to be forgiven as he had never committed any crime.

As we have seen the appellant was convicted and sentenced to life imprisonment, findings that provoked this appeal.

When this appeal came up for hearing before us on 8th May, 2025 learned counsel **Miss Nelima** appeared for the appellant while learned counsel **Mr. Muriithi** appeared for the respondent.

Miss

Nelima had filed Supplementary Ground of Appeal where 4 grounds are set out. The learned Judge is faulted in law and fact for convicting the appellant based on circumstantial evidence that, according to the appellant did not meet the threshold required in law; that the Judge erred in convicting the appellant based on evidence that was adduced at the trial; that the conviction was against the weight of evidence and, finally, that the sentence passed was harsh and excessive. We are asked to quash the conviction and set aside the sentence and acquit the appellant.

The appellant in written submissions says that the evidence adduced by the prosecution was circumstantial and did not meet the threshold required in law; that circumstantial evidence must be firmly established; that circumstances must be of a definite tendency unerringly pointing to the guilt of the accused and that the inference must be the only logical conclusion that can be drawn from that evidence.

The appellant further submits that there are gaps which break the chain of prosecution evidence; that there was no evidence that it was the appellant who had buried the body of the deceased behind the compound; that the neighbours did not hear any noise that night leading to the burial of the deceased in the shallow grave. According to the appellant there are gaps between the night of 1st May, 2018 and the date when the body was found. Further, that the body on discovery was badly decomposed and there was no way of knowing the cause of death.

It was submitted for the appellant that there was no evidence to show how the body was buried in the shallow grave and that the Judge employed his own theory to make a finding that it was the appellant who had buried the body where it was found.

On sentence the appellant submits that it was harsh and excessive in the circumstances; that the Judge failed to take into consideration the appellant's age, the circumstances where there was a fight between the appellant and the deceased; that the appellant was a first offender. The Judge is also faulted for imposing the maximum sentence but we observe here that the maximum sentence for murder under section 203 as read with section 204 of the Penal Code is death. The Judge did not impose the death sentence; he sentenced the appellant to life imprisonment.

The respondent in written submissions gives a history of the case that was before the trial Judge; the court's mandate in a first appeal and in discussing essentials of the offence of murder and what constitutes malice aforethought, the respondent gives the ingredients that constitute that offence and what is malice aforethought. It is submitted on proof of death that tenants in the compound who testified as prosecution witnesses were woken up by screams from the room occupied by the appellant and the deceased; that the next morning the appellant was seen leaving while carrying a bag and a few days later the body of the deceased was discovered in the farm behind the compound. The death was confirmed by those witnesses and the doctor.

On *actus reus* it is submitted that the prosecution witnesses who were tenants in the same compound as the appellant were woken by screams from his house; the next morning he fled the area to his rural home; that he was the last person to be seen with the deceased. It is submitted for the respondent that although the evidence was circumstantial, the same was sufficient and pointed irresistibly to the appellant as having committed the offence to the exclusion of any other reasonable hypothesis of his innocence. The cases of ***Dorcas Jebet keter & Another vs. Republic*** ***[2013] eKLR*** and ***Kipkorir Arap Koskei vs. Republic*** ***[1949] 16 EACA 13*** are cited in support of that proposition. It is submitted on *mens rea* that the appellant was the last person to be seen with the deceased; the recovery of her body in a shallow grave within the plot where they lived; the conduct of the appellant when prosecution witnesses responded to the screams; his fleeing from the area the following morning points to his guilt.

The respondent submits that the defence of alibi was properly considered and dismissed.

We have considered the whole record, submissions made and the law and this is how we determine this appeal.

Apart from the issue of sentence the appeal gravitates around whether circumstantial evidence met the threshold that would allow a conviction; whether there was evidence that permitted the trial court to find proof of the offence beyond reasonable doubt.

It is true as extensively submitted by both sides that the case for the prosecution was based on circumstantial evidence. This Court has had occasions to consider what is and what is the effect of circumstantial evidence and whether it can found a conviction.

In ***Ibrahim Chacha Mwita vs. Republic [2004] eKLR*** we held:

> ***"It is trite that in a case depending exclusively upon circumstantial evidence the Court must, before deciding upon a conviction, find that the inculpatory facts are incompatible with the innocence of the accused and incapable of explanation upon any other hypothesis than the guilt; see Simoni Musoke v R [1958] EA 715 where the following extract from Teper v R [1952] AC 480, 489, was quoted ([1958] E A at page 719):-***
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> > "It is also necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference."

So circumstantial evidence is good evidence, it is sometimes the best evidence as it enables the court to deduce a particular fact from circumstances or facts that have been proved.

The facts of the case that were before the trial Judge were that the appellant with the deceased occupied room 4 in a 9 room (single rooms) compound where, according to the landlord (Gitonga) 4 rooms were on one side while the other 5 rooms were right opposite. Which is to say that this would be a small compound where the tenants were in close proximity with each other.

At about 9 p.m. on 1st May, 2018 tenants Nkirote, Gathomi, Kinanu and Kawira were in their respective rooms when they heard

screams coming from room 4 occupied by the appellant and the deceased. Emanating from that room was a sound like that of a person being chocked. They all gathered outside the door at room 4, demanded that the appellant open the door and even tried to force it open. When the appellant eventually opened the door he was stark naked which embarrassed the ladies (witnesses) forcing them to flee back to their rooms after he had informed them that the deceased was asleep. When Nkirote asked the appellant the next morning where the deceased was he informed her that the deceased had left the room at night to answer the call of nature but did not return. Nkirote saw the appellant emerge from his room carrying a bag; he left the area and was not seen again until he was arrested from his rural home where, according to police, he had fled to. He was arrested after the landlord (Gitonga) had stumbled on the decomposing body of the deceased whose body had been buried in a shallow grave in the maize plantation behind the residential quarters.

For the offence of murder to be established the prosecution must prove beyond reasonable doubt that a person died; what caused the death of that person; did the accused cause that death and was the cause of death accompanied with malice aforethought.

There was no doubt that the deceased died. The landlord (Gitonga) stumbled on a body of a person which was protruding from the ground. That body was identified by Kanini (the mother) and tenants (witnesses) as belonging to the deceased and there

was

evidence of the doctor who performed post-mortem on the body of the deceased.

What was the cause of death? Gitonga saw the dead body which had missing body parts; a fact witnesses by Kanini at the post-mortem. According to the doctor the deceased died from severe haemorrhage caused by deep cuts.

The next question is who caused the death of the deceased.

We have already discussed in detail the circumstantial evidence pointing irresistibly to the conclusion that it was the appellant and no other who killed her.

On hearing screams and choking noises emanating from room 4 occupied by the appellant and the deceased neighbours Nkirote, Gathomi, Kinanu and Kawira confronted the appellant demanding to know what was happening. Tellingly the appellant opened the door after some reluctance. He was stark naked. He did not explain why the deceased had been screaming but he told them that she was asleep. The next morning he explained to Nkirote that the deceased had left the room they occupied at night to go to the toilet but she did not return. He did not look for her. He instead packed a bag and left the area not to return and police arrested him in his rural home where he had escaped to. The body of the deceased was found a few days later buried in a shallow grave in the maize farm behind the residential area. He was the last person seen with the deceased. He did not even report to his work place from 1st May, 2018 as testified by his workmate.

Prosecution witnesses who were the appellant's neighbours testified that they had constantly heard or observed the appellant and the deceased fighting or quarreling; that this happened every week; Gitonga testified that those fights had been reported to him and he had warned the appellant to stop it or he would evict him from the compound. He had even reported one incident to the police.

In those circumstances we agree with the trial Judge that the appellant was the only person who had the opportunity that night to commit the offence. He was the only person who was with the deceased. When Nkirote and the other neighbours were attracted by screams and the chocking sound and upon rushing to room 4 the screaming had stopped and was not heard again. It is reasonable in those circumstances to presume that by the time they got to room 4 the deceased was already dead.

We find, like the trial Judge, that the inculpatory facts are incompatible with the innocence of the appellant and there is no other reasonable hypothesis than his guilt.

Was there malice aforethought which must be proved for a conviction for murder to stand? Malice aforethought is defined in **section 206** of the **Penal Code** as follows:

> **"206. Malice aforethought**
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> **Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances-**
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> **(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 it is the appellant who killed the deceased in room 4 on the night of 1st May, 2018. He inflicted serious injuries on her as shown in post-mortem report prepared and produced in evidence by the doctor. A man who in a rage removes the eye balls of his victim; chops off her hand and both breasts; inflicts a cut on the buttocks 10 cm long and causes depression of the thigh up to the bone, amongst other injuries, is a man who intends to kill that person or inflict grievous harm upon that person. He intended to kill the deceased and he succeeded in doing so. He tried to conceal his acts by burying the body in a shallow grave after which he fled to his rural home from where he was later arrested. He was guilty of murder which offence on the facts related by prosecution witnesses was proved beyond reasonable doubt.

The appellant complains that the sentence imposed was harsh and excessive considering the circumstances of the case.

The judgment was delivered by **Limo, J.** on 29th January, 2020. The appellant, upon conviction, was said to be a first

offender

and in mitigation it was stated that he was a young man of 25 years and prayed for leniency.

The Judge considered what was and stated:

> **“This court has considered the mitigation from the convict but the manner in which he committed the murder exhibited extreme cruelty which calls for commensurate sentence. This is one of those cases that the law must take its course. The convict is hereby sentenced to serve life imprisonment…”**

This was on 29th January, 2020.

We are aware of emerging jurisprudence arising from the decision of the Supreme Court of Kenya in **Francis Karioko Muruatetu & Others vs. Republic [2017] eKLR** where that Court held, *inter alia*, that the mandatory nature of the death sentence under section 203 as read with section 204 of the Penal Code was unconstitutional. That Court also clarified that the death sentence remained part of the law of Kenya. That decision was rendered in 2017.

Limo, J. appears to have been aware of that emerging jurisprudence when he rendered himself on 29th January, 2020, about 3 years after what is now called “Muruatetu 1”. He considered the circumstances and the heinous nature of the crime and ordered that the appellant serve imprisonment for life.

Upon our own consideration and looking at the way the appellant killed the deceased and the nature of injuries he inflicted

on her we think that he deserved the maximum sentence provided in law. He was lucky to be imprisoned for life.

We fully agree and endorse the findings of the trial Judge both on conviction and sentence. We find this appeal to have no merit and dismiss it accordingly.

Dated and delivered at Nyeri this 6th day of March, 2026.

S. ole KANTAI

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JUDGE OF APPEAL

J. LESIIT

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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