IN THE COURT OF APPEAL
AT NYERI

(CORAM: KANTAI, ALI-ARONI & MUCHELULE, JJ.A.)

CRIMINAL APPEAL NO. 98 OF 2016

BETWEEN

SIMON GITONGA NGARURI.....APPELLANT

AND

REPUBLIC
.....

RESPONDENT

(Being an appeal against the judgment and decree of the High Court at Embu
(J.F. Muchemi, J.) *dated 21st November 2016 in*
HCCR No. 2 of 2012)
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JUDGMENT OF THE COURT

1. The appellant, Simon Gitonga Ngaruri, was on 21st November 2016 convicted of murder contrary to **section 203** as read with **section 204** of the **Penal Code** and was sentenced to death. The particulars of the charge in respect of which he was convicted were that, on 25th December 2011 at Ndatu Village in Kithegi sublocation of Kithimu Location in Embu County he murdered Itila Ngaruri (the deceased).

2. Being dissatisfied with the conviction and sentence by the High Court (F. Muchemi, J.), the appellant appealed to this

Court asking that the conviction be quashed and the sentence set aside. The grounds were that circumstantial evidence on which

he was convicted was weak and not corroborated; the court have improperly relied on a dying declaration that lacked corroboration and had not met the threshold as regards admissibility; the prosecution evidence was contradictory and inconsistent; and the imposed death sentence was unconstitutional.

3. When the appeal came up for hearing on 16th June 2025, learned counsel Mr. Mshila Shuma appeared for the appellant while the State was represented by prosecuting counsel, learned Mr. Solomon Naulikha. Each side had filed written submissions on which they elected to rely.

4. This is a first appeal. The appellant expects that the entire evidence that was led before the trial court be subjected to a fresh and exhaustive review, and for this Court to reach its own conclusions on the same but while bearing in mind that it did not have the advantage of seeing and hearing the witnesses as they testified (see ***Okeno -vs- R.*** ***[1972] EA. 32***).

5. It was not in dispute that when the deceased's body was subjected to post mortem on 2nd January 2012 at Embu Provincial Hospital by Dr. Njiru, it was found to have wounds on the vertex, right lateral side of the head and right frontal region. It had bruises on the right lower limb. Internally, the deceased was found to have sustained brain contusion due to severe communited fractures with some bones depressed

into

the brain tissue on the right parietal region. The cause of death was cardio pulmonary arrest due to increased intracranial pressure from the head injury caused by a blunt object.

6. It was also evident that the deceased was the father of the appellant. PW 2 Tabitha Njura was the deceased's widow and mother of the appellant. PW3 Peter Njue Itila was the appellant's elder brother. PW 1 Joselyn Wawira Ndwiga was the wife of PW3.

7. The prosecution evidence was that earlier in the day on 25th December 2011 PW 3 and the appellant were taking alcohol in PW 3's home. Later that day, PW 3 went to a bar at Ndeto and continued to drink. It was about 3.00pm or 4.00pm. when the appellant went there and begun to assault him using fists, until he lost two teeth. PW 3 left the bar. On the way home, the appellant caught up with him. The appellant walked PW 3 home. They found PW 1 who helped PW 3 into the house. The appellant had left. Shortly thereafter, PW1 heard PW 2 calling her saying the appellant had injured the deceased. PW1 went to the deceased's home and saw the appellant coming from his (the deceased's) house while holding something like a stick. She entered the deceased's house and found him lying on the floor while bleeding profusely from the head.

8. PW2's evidence was that she was at home with the deceased when she heard noise coming from the road

nearby. She went to see what was happening, and found the appellant and PW 3

at the latter's gate. PW3 had an injury on the eye and was bleeding. The two were drunk. She asked the appellant what had happened. The appellant pushed her and asked her to leave him alone. The deceased had been attracted to the scene. He said –

> ***"Njura leave them alone even if they want to kill each other."***

"Njura" is PW2's name. The deceased ran towards his house. The appellant followed him. She heard a bang from the house. This was followed by the deceased saying, **"Gitonga you have killed me."** When she got closer, the deceased then said **"Owii Njura, I am dead."** At the door she met with the appellant leaving the house. In the house, the deceased was lying on the floor in a pool of blood with injury on the head. She called PW 1 who came and assisted in cleaning the deceased who was now vomiting blood and food. A motor vehicle was found which took both the deceased and PW3 to hospital where the deceased died the same day while being treated.

9. Both PW1 and PW3 testified that there was no dispute between the appellant and PW3. However, according to PW 3 the two did not get along for a long time. The appellant had been staying with PW 3 but by this time he had moved back home where he was staying in unfinished house. He had been asking the deceased to buy for him land far from PW 3, which the deceased had refused to do. The appellant never wanted to settle on his father's land at home.

10. PW2 did not see what the appellant was carrying when they met at the door to her house. According to P.C. Benson Kahiga (PW

7) of Itabua Police Station, when the report was made and they came to the scene, they recovered an axe (Exhibit 1) buried in the ground a few metres from the deceased's house. It was blood-stained. This axe was taken to the Government Chemist where the Government Analyst, Lawrence Kinyua Muthuri (PW

6) examined the blood against the blood sample that had been extracted from the deceased. He did the DNA profile of the blood, and found that the DNA profile of the blood from the deceased matched the DNA profile of the blood from the axe. The blood on the axe was on its blunt part. Police treated the axe as the murder weapon. PW 2's evidence was that that was her axe which she had kept in her house.

11. The appellant made an unsworn statement in defence, and did not call any witnesses. He denied the charge, and stated that on the material day he had returned home from Nakuru where he was working. It was Christmas day and therefore they were served beer and food by PW 1. When he wanted to go and sleep in PW 2's house, he found she was asleep and the door closed. He returned to sleep in PW 3's house. Next day at about 5.00pm, he was arrested on allegation that he had killed the deceased, something he hadn't done.

12. This is the evidence that the trial court considered and concluded that the appellant was the one who had murdered the deceased.

13. In the submissions on behalf of the appellant, it was urged that no witness had seen him attack or injure the deceased; and that his mere presence in the deceased's home did not make him the culprit, as it was possible that another person had killed the deceased. Regarding the axe, it was submitted that there was no evidence called to show that he had used it on the deceased. Learned counsel, citing the decisions in ***Republic -vs Kipkering Arap Koske & Another [1949] 16 EACA 135*** and ***Sawe -vs- Republic [2003] eKLR,*** submitted that the prosecution evidence had failed to satisfy the requirements governing circumstantial evidence as the indicated circumstances did not irresistibly point to the appellant as the culprit, and did not exclude the possibility that another person had killed the deceased.

14. On the dying declaration by the deceased that the appellant had killed him, learned counsel submitted that the evidence of PW 2 in this regard ought to have been treated with caution, now that it was not even corroborated by other evidence. We were referred to ***Choge -vs- Republic [1985] KLR 1*** and ***Kihara -vs- Republic [1986] Eklr,*** in which this Court held that uncorroborated dying declaration was unsafe to sustain a conviction.

15. Lastly, on the question of conviction, learned counsel submitted that the evidence of PW1, PW2 and PW3 was deficient, inconsistent and contradictory and ought not to have been relied upon by the trial court. In regard to PW1, it was submitted that he had initially stated that she had seen the appellant holding PW3, but later stated that she could not clearly see what was happening. As for PW2, it was submitted that she had admitted not having seen the appellant attack the deceased. As for PW -3, it was submitted that he stated that the appellant helped him to come home but that did not know how their father got to be killed. We were urged to find that this evidence, together, created a reasonable doubt which ought to have been resolved in favour of the appellant (see ***Philip Nzaka Watu -vs- Republic [2016] eKLR).***

16. Learned counsel Mr. Naulikha opposed the appeal. According to him, the prosecution evidence was consistent, credible and unshaken; that the axe was shown to be the murder weapon when it was found to have blood that was confirmed by forensic analysis to match that which was extracted from the deceased; and that the dying declaration was made immediately following the attack which strengthened its admissibility and credibility under **section 33(a)** of the **Evidence Act** in identifying the appellant as the assailant.

17. We have reconsidered the evidence upon which the appellant was convicted. Our task is to determine whether

the evidence

proved beyond doubt that the appellant was the person who caused the deceased's death; and whether, given the circumstances, the appellant had the necessary *mens rea.*

18. The deceased was assaulted by a blunt blow on the head inside the house and died the same night when he was being treated at the hospital. The blow to the head was so vicious that the skull depressed into the brain which eventually led to his death. In determining whether the attacker intended to cause the deceased's death, or at least cause him grievous bodily harm, we reiterate that malice aforethought can be inferred from the nature of injury, its brutality and the part of the body where it is aimed at. (See ***Korir -vs- Republic [2025] KECA 2002 KLR).*** We find that the attacker in this case had malice aforethought. This is because the vicious attack was aimed at the deceased's head.

19. Was the appellant the assailant? We consider that the attack was in the deceased's house. Immediately a bang came from the house, PW- 1 and PW -2 saw the appellant emerge from the house with an object that was not clearly identified. The two witnesses entered the house, and found the deceased lying on the floor with an injury on the head and was bleeding profusely. According to PW -2, the deceased declared that it was "*Gitonga*" (the appellant) who had killed him. He died the same day in hospital.

20. **Section 33** of the **Evidence Act** allows admission of evidence that would otherwise be excluded as hearsay. **Section 33(a)** of the **Act** relates to a statement made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death. Such statement is admissible whether the person who made it was or was not, at the time when it was made, under expectation of death. It is mandatory that a dying declaration as a basis for a conviction to be corroborated (see ***Peter Mwariri Mwangi -vs- Republic Criminal Appeal No. 1 of 2015 [2023] KECA 246 (KLR)).*** We find that the deceased did not only declare to PW2 that it was the appellant who had "killed him, both PW1 and PW -2 each met with the appellant coming from the house in which they found the deceased injured on the head and in a pool of blood. There was, therefore, sufficient corroboration. We agree with the learned Judge that it was the appellant who had attacked the deceased, and that the injuries led to the death.

21. Was the axe the murder weapon? PW2 testified that this was her axe which was kept in the house. When police came to respond to the incident, they dug out the axe from the ground in the compound. It was bloodstained, and the forensic examination revealed that the blood matched that of the deceased. We accept, as did the trial court, that this was the weapon used to attack the deceased. The deceased was hit using a blunt object. We find, as did the trial court,

that the blunt side of the axe was used to assault the deceased. The

weapon used strengthens our belief that the holder had the intention to kill or grievously injure the deceased.

22. On the question of sentence, the trial court allowed the appellant to mitigate before finding that death was the appropriate sentence in the circumstances. The court observed that the gravity and brutality of the offence outweighed the mitigating circumstances, and imposed the death penalty. It was submitted on behalf of the appellant that the death sentence was unconstitutional, given the decision in ***Francis Karioko Muruatetu & Another -vs- Republic [2017] eKLR***. We wish to point out that the Supreme Court in the above case did not say that death sentence is unconstitutional. It was the mandatory nature that was declared unconstitutional. Therefore, in an appropriate case, the trial court can, upon considering mitigation and the particular circumstances of the case, impose a sentence less than death penalty. Where the circumstances call for it, a death penalty can be imposed.

23. In this case, the court, after considering that the appellant was a first offender and having listened to his mitigation, preferred a death penalty. This exercise of discretion was not argued to be without basis. This Court will ordinarily not interfere with the High Court's discretion on sentence, unless it is demonstrated that the same was manifestly harsh or excessive in the circumstances of the case, or that the trial court overlooked some material fact, or took into account

some wrong

material, or acted on the wrong principle (see ***Bernard Kimani Gacheru -vs- Republic [2002] eKLR).***

24. We consider that the judgment in this case was on 21st November 2016, and therefore before the decision in ***Muruatetu*** case. When sentencing the appellant, therefore, the learned Judge was proceeding on the basis that death was the only penalty for the offence. Therefore, the court was not influenced by the particular facts of the case and the mitigation by the appellant. The result was that the death penalty was manifestly excessive in the circumstances. We consequently interfere by setting it aside. The appellant shall serve 30 years in jail from the date he took plea.

25. The result is that the appeal on conviction is dismissed, but that on sentence is allowed as indicated.

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

S. ole KANTAI

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JUDGE OF APPEAL

ALI-ARONI

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JUDGE OF APPEAL

A.O. MUCHELULE

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JUDGE OF APPEAL

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

SIGNED

DEPUTY REGISTRAR