



REPUBLIC OF KENYA



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**Basilio v Republic (Criminal Appeal 69 of 2019)
[2026] KECA 511 (KLR) (13 March 2026) (Judgment)**

Neutral citation: [2026] KECA 511 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CRIMINAL APPEAL 69 OF 2019
J MOHAMMED, LK KIMARU & AO MUCHELULE, JJA
MARCH 13, 2026**

BETWEEN

SELINA MUKWANJAGI BASILIO APPELLANT

AND

REPUBLIC RESPONDENT

((Being an appeal against the judgment of the High Court of Kenya at Chuka (Limo, J.) dated 20th May, 2019 in Criminal Case No.10 of 2017))

JUDGMENT

1. Selina Mukwanjagi Basilio ('the appellant') was tried before the High Court of Kenya at Chuka for 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 21st May, 2017, at Ngururu Village, Karimba Sub-location, in Karimba Location, within Tharaka Nithi County, the appellant, jointly with others not before court unlawfully murdered Jeremiah Kithuci. The appellant denied the charges.
2. The prosecution's case was that the appellant, together with a group of other people, attacked the deceased on 21st May 2017, claiming that he was a witch, and that they set him ablaze. The deceased sustained fatal injuries. PW1, Pamela Kendi, told the court that the deceased and one, Betasia Mukwanjeru (PW2), came to her house to find out why she had not been attending church services at Revelation Mission Centre, where they worshiped together. The deceased was a prophet at the said church. It was PW1's evidence that at about 7.00 p.m., the appellant arrived at her house accompanied by four other people, among them her children. PW1 stated that they entered her house and dragged the deceased out of the house. They accused him of being a witch doctor. The appellant's son, Viekas Mutwiri, took pieces of timber from PW1's shed, which the appellant used to strike the deceased on the head. PW1 testified that the rest of the people the appellant was with joined her in assaulting the deceased. She stated that she left the scene to notify the sub -area chief. When she came back, she saw the appellant and her accomplices drag the deceased to the roadside, where they set him ablaze using maize



- stalks. She stated that the area sub-chief, Flavian Nkunge (PW3), came to the scene and instructed one Mwiti (PW4), to take the deceased to Chuka Hospital. The deceased was later transferred to Chogoria Hospital where he succumbed to his injuries.
3. PW2, Betasia Mukwanjeru, another eye witness, told the Court that she heard PW1 raise alarm, and that when she arrived at the scene, she saw the deceased being beaten. She was however hesitant to state who the assailant was for fear that she might lose her life. PW4, Mwiti Nyaga, received a call from PW2, informing him that the deceased was being attacked. When he arrived at the scene, he saw the deceased being attacked by the appellant and her children for allegedly practicing witchcraft. PW4 stated that he rushed to get help but to no avail. When he came back, he found the deceased had been lynched, but was still alive. He took the deceased to Chuka Hospital.
 4. PW5, Dr. Justus Kitili, from Chuka County Referral Hospital, conducted a post mortem examination on the deceased's body. It was his testimony that the deceased sustained injuries to his left eye and back, a deep cut in the back of his head, parietal scalp, second degree burns on his left and right forearm and on both of his legs. He stated that the deceased sustained a fracture on his occipital skull bone, and a blood clot on the occipital lobe of his brain. He formed the opinion that the cause of death was severe head injury due to blunt force trauma to the head.
 5. PW6, Corporal Stephen Nudenei, investigated this case. It was his evidence that a report of the attack on the deceased was made by the area assistant chief (PW3). He stated that he visited the scene where he recovered two pieces of timber with protruding nails, a heap of ashes which was by the road side, a partly burnt rope, and a partly burnt mobile phone. He produced these items as prosecution exhibits 1-5. He stated that the appellant was arrested by members of the public on 9th June, 2017. PW6 visited the deceased in hospital on 11th June 2017, but that the deceased was unable to record a statement in his condition. PW6 arraigned the appellant in court where she was charged with the offence of causing grievous harm, which was later amended to murder, when the deceased died in hospital on 15th June, 2017.
 6. The appellant, in her sworn defence statement, told the Court that the deceased was unknown to her. It was her evidence that on the material date of 21st May, 2017, she attended a church service and was back home at 4.00 p.m., where she stayed for the remainder of the day. The following day, she saw ashes near PW1's gate. Strangers informed her that a witch had been lynched. She was later arrested on 9th June, 2017. It was her testimony that PW1, who was her daughter in law, and PW4 conspired to frame her with the charges.
 7. At the end of the trial, the learned trial Judge found that the prosecution had sufficiently established its case against the appellant to the required standard of proof. Upon conviction, the appellant was sentenced to serve life imprisonment.
 8. The appellant, dissatisfied with the decision of the trial court, lodged an appeal before us, against her conviction and sentence. The appellant faulted the learned trial Judge for failing to acknowledge that the offence was committed by five persons. She was aggrieved that the learned trial Judge failed to find that the prosecution had not established its case against her beyond reasonable doubt. She took issue with the fact that the learned trial Judge failed to acknowledge that the prosecution witnesses had a vendetta against her. She faulted the learned Judge for rejecting her defence without giving any valid reasons. She was aggrieved that the learned trial Judge failed to note that her advocate violated her right to a fair trial, by failing to represent her adequately. She was of the view that the sentence meted by the learned trial Judge was draconian. She urged us to allow her appeal, quash her conviction, and set aside the sentence that was imposed upon her.



9. The appeal was heard by way of written submissions. The appellant was represented by learned counsel Ms. Nelima. It was her submission that the testimonies of PW1 and PW4 differed greatly from the initial statements that they made to the police. She stated that PW1 and PW4 never mentioned the appellant as the assailant in their statements to the police. She asserted that it was not clear from the evidence of the identifying witnesses who inflicted the fatal injury that caused the death of the deceased. She urged that the doctrine of common intention cannot be used to attribute the actions of others on the appellant, especially when the said persons had not been arrested or subjected to a trial. Counsel submitted that the deceased's cause of death was said to be blunt force trauma to the back of the head, and that none of the prosecution witnesses testified that the appellant struck the deceased at the back of his head. She maintained that the element of malice aforethought was not established by the prosecution, and that the learned trial Judge delved into extraneous matters, specifically that it was common in the region where the incident occurred for persons practicing witchcraft to be lynched. Regarding the sentence, counsel urged that the life sentence meted on the appellant was harsh and excessive. It had denied the appellant a chance to mitigate her sentence. She invited us to allow the appeal as prayed.
10. The appeal was opposed. Learned Prosecution Counsel, Ms. Nandwa, made submissions to the effect that the prosecution established its case against the appellant to the required standard of proof beyond any reasonable doubt. It was her submission that the death of the deceased was not in dispute, and that the prosecution proved that the appellant committed an unlawful act, which caused the death of the deceased. She asserted that the evidence of PW1 established that the appellant, together with four other persons, who were still at large, dragged the deceased from PW1's house, beat him up on suspicion that he practiced witchcraft, and then set him ablaze using maize stalks. She stated that the appellant participated in the assault that was occasioned upon the deceased, and that she was the one that brought the maize stalks and rope, which were used to tie up the deceased and thereafter lynch him. She asserted that the evidence by PW1 was corroborated by that of PW3. It was her submission that the appellant was well known to PW1 and PW4, who were identifying witnesses.
11. Regarding malice aforethought, counsel submitted that the evidence on record established that the appellant and her accomplices attacked the deceased on suspicion that he practiced witchcraft. She urged that the eye witnesses told the Court that the appellant accused the deceased of passing by her house to bewitch her. She maintained that the manner in which the appellant and her accomplices attacked the deceased was meant to cause him grievous harm, as was evidenced by the injuries sustained by the deceased, detailed in the post mortem report. It was her submission that the appellant's alibi defence was an afterthought. She urged that the sentence awarded by the trial court was not harsh or excessive, as the court considered the gruesome manner in which the deceased lost his life. She urged us to dismiss the appeal for lack of merit.
12. This is a first appeal. The duty of the first appellate Court was stated by this Court in *Gabriel Kamau Njoroge v Republic* [1987] eKLR as follows:

“As this court has constantly explained, it is the duty of the first appellate court to remember that the parties to the court are entitled, as well as on the questions of facts as on questions of law, to demand a decision of the court of first appeal, and that court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions, though it should always bear in mind that it has neither seen or heard the witnesses and to make due allowance in this respect. (see *Pandya v R* [1957] EA 336, *Ruwalla v R* [1957] EA 570)”.



13. On re-evaluation of the evidence adduced before the trial court, the memorandum of appeal and the submission made before us, the issues that emerged before us for determination are the following:
 1. Whether the prosecution proved the case on the charge of murder as against the appellant to the required standard of proof.
 2. Whether the appellant's defence was considered.
 3. Whether the sentence meted upon the appellant was harsh and excessive and whether it should be re-considered by this Court.
14. This Court in *Ngeno V Republic* [2024] KECA 757 (KLR) set out the ingredients that must be established by the prosecution in order to establish the charge of murder under section 203 of the Penal Code:
 - “ 15. In order to prove a charge of murder, the prosecution must establish the fact and the cause of death of the deceased, that it is the accused whose actions or omissions led to the deceased's death, and, that the accused person had malice aforethought. Thus, in *Roba Galma Wario v Republic* [2015] eKLR, the court identified the ingredients for the charge of murder as follows:

“For the conviction of murder to be sustained, it is imperative to prove that the death of the deceased was caused by the appellant, and that he had the required malice aforethought. Without malice aforethought, the appellant would be guilty of manslaughter, as it would mean the death of the deceased during the brawl was not intentional.”
15. In the present appeal, the prosecution was able to establish the fact and the cause of the deceased's death. PW5 Dr. Justus Kitili performed a post mortem on the body of the deceased. He produced a post mortem report in evidence before the trial court. In his report, he observed that the deceased had died due to multiple injuries on his head, arms and legs which were caused by sharp and blunt objects exhibited by, inter alia, a deep cut on the back of his head and second degree burn injuries on his arms and legs. PW5 established that the deceased died due to severe head injury caused by blunt force trauma to the head. The deceased therefore died an unnatural death that was caused by being assaulted.
16. As regards who assaulted the deceased, it was PW1's testimony that on the material day of 21st May, 2017, she saw a group of people led by the appellant attack the deceased claiming that he was a witch. The appellant was accompanied by her children, including her son one Viekas Mutwiri. They dragged the deceased from his house, assaulted him using sticks and pieces of timber. PW1 saw the group drag the deceased to the roadside before they set the deceased on fire with the maize stalks that the appellant had brought to the scene of crime. The evidence of PW1 in regard to seeing the appellant and her children assault the deceased was corroborated by PW4 who was attracted to the scene of crime by screams raising alarm. He testified that he saw the appellant and her children attack the deceased allegedly because he was practising witchcraft. PW4's effort to prevent the deceased from further assault was thwarted by the appellant and her children. It was only when PW3, the area assistant chief arrived at the scene of crime that the assault on the deceased stopped. The deceased was rushed to hospital for treatment. He later succumbed to his injuries.
17. The appellant disputes this version of events as narrated by the prosecution witnesses. She gave an alibi defence. She denied that she was at the scene of crime on the material day. She attributes the charge to a frame up by PW1 who is her daughter in-law.



18. Our re-evaluation of the evidence adduced before the trial court leads us to the same conclusion as was reached by the trial court; PW1 and PW4 adduced direct evidence. They saw the appellant and his children assault the deceased on the allegation that he was a witch practising witchcraft in the village. PW1 and PW4's description of what the appellant and her children did to the deceased at the scene of crime was corroborated by the testimony of PW5, who documented the injuries that the deceased had suffered during the assault. The injuries were consistent with the beating with sticks and timber that the deceased was subjected to. The trial Court saw and heard the witnesses as they testified. The trial Court believed the prosecution witnesses as contrasted with the evidence adduced by the appellant in her defence. We too are not persuaded that the alibi defence adduced by the appellant is worthy of credit. It was raised as an afterthought. The appellant's defence did not dent the otherwise strong, corroborative, consistent, cogent and credible evidence that was adduced by the prosecution witnesses.
19. We therefore hold that it was the appellant and the group, who included her children, that assaulted the deceased and caused the deceased to sustain fatal injuries. It did not matter who administered the fatal blow. The appellant prosecuted a common purpose as recognized under section 21 of the Penal Code. She is culpable as her co-perpetrators for the unlawful killing of the deceased.
20. The other ingredient that the prosecution was required to establish was whether the appellant killed the deceased with malice aforethought. Section 206 of the Penal Code provides the circumstances under which malice aforethought may be established. It includes having the knowledge that the act or omission may probably cause the death of the deceased, failing that, cause grievous harm.
21. In the present appeal, it was clear from the evidence adduced by the prosecution witnesses that the appellant and her accomplices intended to seriously injure the deceased if not cause his death. Apart from hitting him with sticks and timber on vulnerable parts of his body, including his head, the appellant caused the deceased to be set ablaze when he was still alive. The post mortem report paints a grim picture of the injuries that the deceased sustained. He indeed suffered a horrible death all because spurious allegations had been made by the appellant that he was a witch. Malice aforethought was established by the prosecution to the required standard of proof.
22. The appellant was correctly convicted of the charge of murder. Her appeal against conviction, in the circumstances, lacks merit and is hereby dismissed.
23. On sentence, the appellant was sentenced to serve life imprisonment. This Court has noted that the appellant was convicted and sentenced before the new jurisprudence pronounced by the Supreme Court in the case of Francis Karioko Muruatetu V Republic [2017] eKLR became the norm. In the decision, the Supreme Court declared mandatory death sentences under section 204 of the Penal Code to be unconstitutional. In addition, the Court declared that convicted accused persons should be given a chance to mitigate before they are sentenced.
24. In the present appeal, the appellant has pleaded with the Court to consider reviewing her sentence so that she may serve a term sentence. We agree with the appellant that the sentence that was imposed upon her was clearly harsh and excessive in the circumstances. However, we note that the appellant was the brain behind the assault of the deceased. She was the one who made the spurious and unsubstantiated allegation that the deceased was a witch. She made this allegation despite the fact that she was related by marriage to the deceased. The manner in which the appellant and his accomplices cause the death of the deceased deserves an appropriate punishment. The sentence of life imprisonment is set aside. It is hereby substituted with a sentence of thirty (30) years imprisonment with effect from the date that the appellant was sentenced by the trial court.

DATED AND DELIVERED AT NYERI THIS 13TH DAY OF MARCH, 2026.



JAMILA MOHAMMED

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JUDGE OF APPEAL

L. KIMARU

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JUDGE OF APPEAL

A.O. MUCHELULE

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

