

**IN THE COURT OF  
APPEAL AT  
NYERI**

**(CORAM: W. KARANJA, M'INOTI & ALI-ARONI, JJ.A.)**

**CRIMINAL APPEAL NO. 148 OF 2019**

**BETWEEN**

**DAVID MURIUNGI M'ITIMBURI.....APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

*(An appeal from the judgment of the High Court of Kenya at Meru  
(A. Ong'injo, J.) dated 25<sup>th</sup> July  
2019 in  
**HCCRA No. 70 of 2015)***

\*\*\*\*\*

**JUDGMENT OF THE COURT**

1. The appellant, David Muriungi M'itimhuri, was charged with the offence of murder contrary to **section 203** as read with **section 204** of the **Penal Code** at the High Court at Meru in **HCCR Case No. 70 of 2015**. It was alleged that on 27<sup>th</sup> April 2011 at Nyumbaitui Village, Akirang' Ondu Location in Igembe Central sub-County, within Meru County, jointly with others not before the Court, murdered Patrick Mutembei. He pleaded not guilty to the charge, and the matter went to a full hearing.
2. The prosecution case stood on the testimony of 7 witnesses. Alice Kathure Mutembei (PW1), was the deceased's wife. She testified that on 27<sup>th</sup> April 2011, the appellant, his wife Joanina, and

Mugambi Kobia, came to her home while armed with *rungus*. She narrated how the appellant tied the deceased's hands and neck with a rope and dragged him for about 150 meters, and that they started to beat him with the *rungus*. She stated that she raised an alarm and the deceased's friends came and tried to intervene, pleading with the three to leave the deceased alone but they refused. She stated that they beat the deceased and left him lying helpless before departing for their homes.

3. She testified that later that night, her husband's condition worsened with a swollen neck and inability to speak, she and the deceased's friends took him to Laare Hospital from where he was transferred to Meru General Hospital, where he died on 10<sup>th</sup> May 2011, while undergoing treatment. In cross-examination, she stated that the appellant and the deceased had a land dispute.
4. Morris Mutwiri (PW2), Nahashon Limiri (PW3), and Oresti Theuri (PW5) testified that they were picking miraa nearby when they heard screams and rushed to the scene. They found the appellant and two others beating the deceased who was tied up. They stated that the appellant claimed the deceased, was a thief, and he ignored pleas to stop beating him. The witnesses left and returned later to help PW1 take the deceased to the hospital. They confirmed a land dispute

between the appellant and the deceased.

5. Joseph Mwithalie (PW4) testified that he was called by the appellant on 27<sup>th</sup> April 2011, who claimed to have caught a miraa thief in his farm and that the thief was the deceased. He stated that he went to the appellant's home, and when he arrived, he found the deceased tied, bleeding from the mouth and ear and unable to talk due to injuries.
6. No. 65168 Sergeant Victor Jairus (PW6) was the investigating officer who received the report of the deceased's death from PW1. He stated that the deceased died on 10<sup>th</sup> May 2011. He conducted the investigation and arranged for a post-mortem which was conducted by Dr. Mutuku. He stated that the appellant fled from the area and remained at large until 2015, when he was arrested.
7. Dr. James Kihumba(PW7), a medical officer, at Meru Teaching and Referral Hospital identified the post-mortem report prepared by Dr. Mutuku on 18<sup>th</sup> May 2011. He stated that the cause of death of the deceased was determined to be cardiorespiratory arrest due to septicaemia, a blood infection which could result from a localized infection that spreads through the blood vessels. He also stated that a blunt injury could lead to pneumonia which can cause death.

8. Upon being placed on his defence, the appellant elected to give a sworn statement and called two witnesses. David Muriungi, DW1, denied any close relationship with the deceased, claiming the deceased's grandfather was merely an employee of DW1's grandfather. He alleged a land dispute, claiming that part of his father's land was wrongly given to the deceased's relatives, PW2, PW3, and PW4 during land demarcation in 2015.
9. He denied assaulting the deceased on the date of the incident stating that he was at his other home in Muiri village. He claimed that the entire story was a fabrication by PW3 and others due to the land dispute.
10. He testified that the deceased suffered from cancer of the mouth, neck, and leg and that he had previously taken him to the hospital for treatment. He stated that the deceased was taken to the hospital on the day of the incident by another individual, Joel Thona, not because of an assault by him, but because of his disease.
11. Ibrahim Kimathi, (DW2) testified that both the appellant and the deceased were known to him. He stated that the deceased had cancer of the neck and he was limping and that he died while he was at the hospital in Laare.

12. David Karamani, DW3 testified that both the deceased and appellant are known to him. He stated that he knew the appellant as they used to sell *miraa* together and he used to buy *miraa* from his farm. Further, the deceased used to pick *miraa* for him. Also, the deceased had a septic wound on the neck and that he did not know what caused the wound. He stated that on 27<sup>th</sup> April 2011, he was at the appellant's home as he had gone looking for the appellant who wanted to buy some land they had seen, but he did not find him at home and he was told he was at his Kiengu home where he proceeded and found him.

13. After considering the evidence adduced by both sides, the learned Judge rendered the judgment, now impugned. In the judgment, the learned Judge found that the post mortem report indicated the cause of the deceased's death was cardiorespiratory arrest due to septicemia infection within the blood. The doctor who did the post mortem noted that the cardiorespiratory arrest may be due to pneumonia. That pneumonia may be caused by a blunt object. He, however, noted that there were no traces of strangulation. The trial court concluded that the cause of death was established.

14. As to whether the appellant caused the death of the deceased, the learned Judge held that five witnesses testified seeing the appellant assault the deceased and they confirmed that they

assisted PW1 to take the deceased to the hospital on the material day. PW1 testified that the appellant, his wife Joanina and one Mugambi Kobia went to their home while armed with *rungus* and told the deceased he had to vacate their land and that the appellant tied the deceased with a rope around his neck and hands and started beating him using *rungus*. The Judge held that

the injuries suffered by the deceased on 27<sup>th</sup> April 2011 resulted

in him being taken to hospital, and he subsequently succumbed to those injuries. The Judge held that those injuries were proximate to the death of the deceased and that it is, therefore,

clear that the unlawful act or omission on the part of the appellant

resulted in the death of the deceased.

15. On malice aforethought, the Judge held that from the evidence

placed before the court, the appellant demanded that the deceased

vacates the land or he would demolish his house. The appellant is

also said to have claimed that the deceased had stolen his *miraa*

and hence the reason for beating him up. The learned Judge held that there was every motive on the part of the appellant to commit the felony. The learned Judge, therefore, found that

the prosecution had proved malice aforethought.

16. The learned Judge dismissed the appellant's claims that the deceased died of cancer, noting there was a total lack of medical

evidence to support this assertion. The appellant's alibi was also rejected as it was not raised in a timely manner for investigation and interrogation by the prosecution. Accordingly, the learned judge convicted the appellant and sentenced him to death.

17. Aggrieved by the said verdict, the appellant moved to this Court on appeal challenging the conviction and sentence. The grounds were, *inter alia*, that the trial Judge failed and erred in law and fact: in making a finding that the prosecution established the ingredients of murder against the appellant; on a point of law in rejecting the appellants defence; in relying on the evidence of the prosecution to convict the appellant without regard to the existing grudges and the contradictions that existed in the prosecution case; and that, without prejudice, the sentence which was imposed upon the appellant was excessive in the circumstances of this case.
18. We heard this appeal virtually on 1<sup>st</sup> September 2025. Learned counsel, Ms. Atieno, held brief for Mrs. Ntarangwi for the appellant, while learned counsel, Ms. Mengo, appeared for the respondent. Both counsel entirely relied on their written submissions, dated 29<sup>th</sup> August 2025, and 16<sup>th</sup> August 2025 respectively.

19. On behalf of the appellant, Mrs. Ntarangwi submitted that the prosecution did not establish the ingredients of murder against the appellant. It was contended that PW1, PW2, PW3, PW4 and PW5 whose evidence the prosecution heavily relied on and which evidence the court based the appellant's conviction, was basically to the effect that the appellant together with 2 others, beat up the deceased. It was contended that PW1's evidence was that the deceased was being asked by the appellant to vacate the land while the other prosecution witnesses' evidence was that he was being beaten because it was alleged that he had stolen *miraa*.
20. It was contended that it was necessary for the prosecution to prove that the deceased's death resulted from the beatings that were said to have been inflicted on him. It was submitted that for the prosecution to prove the case of murder against the appellant, the death should have occurred as a result of an unlawful act or omission by the appellant.
21. Counsel submitted that the deceased was said to have been admitted at Laare Nursing Clinic on the same night; and later at Meru General Hospital, yet no records were availed by the prosecution to prove what he had been treated for. It was contended that it was necessary for the prosecution to avail the said treatment documents as part of the evidence as this

would

have enabled the trial court to ascertain whether or not the deceased was being treated for the injuries which were alleged to have been inflicted on him. It was submitted that there was an assumption throughout the prosecution case that the deceased died from the said injuries.

22. We were urged to take into account the findings which are contained in the post-mortem report, that there were no physical injuries noted and also that the doctor noted a deformity of the leg at the hip joint and shortening of the leg and a surgical wound on the neck. It was submitted that, had the medical notes been availed by the doctor, he could have explained why surgery was performed on the neck or whether the same was for purposes of treatment. It was contended that it was not proved by the prosecution that the said wounds arose from any unlawful act or omission by the appellant.
23. It was, further submitted that the deceased had an infection on his respiratory system and that the doctor testified that the deceased was not in a good nutritional status, and also that the infections and features which were found to be on the lungs were as a result of pneumonia. It was contended that the cause of death was septicaemia which the doctor explained to be an infection within the blood.

24. According to learned counsel, it was not established beyond reasonable doubt that the infection and the pneumonia that lead to death arose from the beatings which are alleged to have been inflicted on the deceased. It was contended that it was incumbent upon the prosecution to exclude any co-existing facts and circumstances that would have led to the death of the deceased which they did not, and as such there is serious doubt as to the cause of death and that the appellant was entitled to the benefit of that doubt.
25. In regard to the prosecution witness's credibility, it was submitted that the prosecution witnesses were not credible and that their testimonies had contradictions, which indicated a potential fabrication of the evidence.
26. It was submitted that the appellant raised an alibi defence, stating he was not at the scene, and that the court should have tested the alibi against the prosecution evidence, emphasizing that the burden of proof always remains with the prosecution and that the evidence did not displace the appellant's defence of alibi. It was finally contended that taking into account the cause of death as set out on the post-mortem report and as per the evidence of the

doctor, had the court believed PW1 and PW2, it ought to have found a conviction for the lesser offence of assault and not murder.

27. On the sentence, it was submitted that the sentence imposed was excessive, taking into account the mitigation, the fact that the appellant was a 1<sup>st</sup> offender, and the period which he had stayed in custody.
28. We were urged to allow the appeal, quash the conviction and set the appellant at liberty.
29. On her part, learned counsel for the respondent, Ms. Mengo, submitted on malice aforethought that the trial Judge did not err by finding that malice aforethought was proven. It was contended that the appellant and his accomplices who are not before the court, by their act of viciously attacking the deceased, as clearly analyzed by the trial court, knew that it was highly probable that their acts would result in death or serious bodily harm. It was contended that this ground lacks merit and should be dismissed. It was submitted that the totality of the evidence on record clearly demonstrated that the appellant and his accomplices who were not before the court, by their act of viciously attacking the deceased, as clearly analyzed by the trial court, knew that it was highly

probable that their act would result in death or serious

bodily harm, and malice aforethought had, therefore, been demonstrated.

30. Turning to the elements of the offence of murder counsel relied on the case of **Anthony Ndegwa Ngari -vs- Republic 2014 eKLR.**

**Citing cases like Hyam -vs- DPP [1974]AC and Ernest Asami**

**Bwire Abanga alias Onyango -vs- R. CACRA No. 32 of 1990,** it

was contended that malice aforethought can be inferred from the nature of the weapon used, the body part targeted, and the conduct of the accused.

- 31.** On the ground that prosecution evidence adduced was not enough to sustain a conviction, counsel relied on **Anthony Ndegwa Ngari -vs- Republic [2014] eKLR** and **Nzuki -vs- Republic (1993) KLR**

**171** to support the argument that the prosecution proved the elements of the offence of murder.

32. It was submitted that PW1, PW2, PW3, PW4 and PW5 gave direct evidence of how the appellant grievously injured the deceased and how the deceased was hospitalised before succumbing to his injuries. The doctor's evidence was that the cause of death was cardiorespiratory arrest due to septicaemia

infection within the blood. It is not in dispute that the deceased died and it is the actions of the appellant that led to the grievous injuries that he

finally succumbed to 13 days after the incident. It was contended that the deceased had malice afterthought as he knew that his actions would cause death. It was submitted that the prosecution produced sufficient evidence that proved beyond any reasonable doubt that the appellant committed the murder.

33. As regards the failure to consider the appellant's defence, it was submitted that the trial court considered the appellant's defence and stated that the claim that the deceased had cancer, only came during his defence. That he failed to raise his alibi in good time for the prosecution and the investigating officer to establish the authenticity of his claim. It was contended that the appellant's defence was a mere denial and too weak to dislodge the solid case that was presented by the prosecution.
34. Finally, counsel urged that the prosecution proved its case against the appellant beyond reasonable doubt. We were urged to dismiss the appeal and not to interfere with the sentence.
35. This is a first appeal against the appellant's conviction and sentence for the offence of murder. As such, it is the duty of this Court to reconsider, analyze and re-evaluate the evidence

adduced before the trial court with a view to reaching its own  
independent

determination on whether or not to uphold the conviction and sentence of the trial court. See **Okeno vs. Republic [1972] EA 32.**

36. We have reconsidered the evidence outlined above, the grounds of appeal and the rival submissions by counsel. We decipher the issues falling for our consideration as:

- i. Whether the elements of murder were proved;
- ii. Whether the appellant was responsible for the murder of the deceased;
- iii. Whether the prosecution evidence was inconsistent and contradictory;
- iv. Whether the trial court disregarded the alibi defence; and
- v. Whether the sentence was excessive.

**37.** The appellant was convicted of the offence of murder. For the offence of murder to be established, the prosecution must prove three elements. First, the death of the deceased must be established; secondly, that the death of the deceased was caused by an unlawful act or omission by the accused person(s); and finally, that the accused persons committed the unlawful act or omission with malice aforethought. See **Roba Galma Wario -vs- Republic [2015] eKLR.**

38. In the instant case, the fact of the deceased's death is not in dispute. All of the prosecution witnesses confirmed that, after he was assaulted by the appellant with others not before the court, on 27<sup>th</sup> April 2011, the deceased was taken to the hospital where he succumbed on 10<sup>th</sup> May 2011. The evidence of the doctor PW7 was that death was caused by cardiorespiratory arrest due to septicaemia-infection within the blood which he said is caused by localized infection that spread through blood vessels. He stated that if the infection is not treated or if the treatment fails, the infection spreads through blood vessels and it becomes fatal. According to the doctor, the infection spread to other organs in the deceased which that led to death. It was indicated that pneumonia can also occur after a blunt injury. The post mortem indicated that the cause of death was cardiorespiratory arrest due to septicaemia.

39. Whereas it is not in dispute that the appellant and others assaulted the deceased, the crux of this appeal is whether the proximate cause of the deceased's death was the beating. PW7 produced the post mortem report on behalf of the doctor who carried out the autopsy on the deceased. He had not seen the body himself. From the post mortem report, the deceased died from cardiorespiratory arrest due to septicaemia-

infection within the

blood. The deceased is also said to have contracted pneumonia, but that was not the cause of death, as pneumonia cannot cause septicaemia.

40. The test must remain what the proximate cause of the death was.

Learned counsel for the appellant emphasized that the appellant was admitted in hospital for 13 days. The clinical notes to show what he was being treated for were not produced in evidence. She specifically pointed out the surgical scar on the deceased's neck. The postmortem report did not explain how the scar came to be, and specifically whether the scar had anything to do with the beating the deceased had received from the appellant and his accomplices.

41. In our considered view, the post mortem report failed to link the injuries caused by the appellant to the proximate cause of death. As submitted by counsel for the appellant, if the appellant was guilty of any offence, it should have been assault. We have mulled over whether the conviction can be reduced to one for assault, but in the absence of a P3 form and the clinical notes to show the nature, the age and the degree of the injuries, there cannot be any substitution of the charges.

42. Having not linked the cause of death to the acts attributed to the appellant, it will not be necessary to analyse the other elements of the offence of murder. We are not persuaded that the charge of murder was proved beyond reasonable doubt.
43. Consequently, we find the appeal meritorious. We allow it, quash the conviction and set aside the death sentence meted out on the appellant. We order that he be set at liberty unless he is otherwise lawfully held.

**Dated and delivered at Nyeri this 25<sup>th</sup> day of March 2026.**

**W. KARANJA**

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

**K. M'INOTI**

.....  
**JUDGE OF**

**APPEAL ALI-  
ARONI**

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

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

**SIGNED**

**DEPUTY**

**REGISTRAR**