Kaunyangi v Republic (Criminal Appeal E057 of 2021)
[2026] KECA 662 (KLR) (25 March 2026) (Judgment)

Neutral citation: [2026] KECA 662 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NYERI

CRIMINAL APPEAL E057 OF 2021

W KARANJA, A ALI-ARONI & PM GACHOKA, JJA

MARCH 25, 2026

BETWEEN

JULIUS KAUNYANGI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Meru (T.W.Cherere, J.) dated 22nd July 2021 in HCCR No.119 of 2018)

JUDGMENT

1. The appellant, Julius Kaunyangi, 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. 119 of 2018. It was alleged that on 8th September 2018 at Kautine Village, Nkanda Sub-Location, Antuambui Location, Igembe North Sub- County within Meru County, he murdered Ken Koome.

2. As a first appellate Court, we are obligated to consider the evidence presented before the trial court and arrive at our own independent conclusions. However, we must remain conscious of the fact that unlike the trial court, we did not have the benefit of hearing and observing the witnesses testify in order to gauge their demeanor. In this regard, this Court in Dickson Mwangi Munene & another - vs- Republic [2014] eKLR stated:

> "This being a first appeal, this Court is obliged to re-evaluate the evidence on record to determine if the trial court's decision was based on evidence and is legally sound. On matters of fact, as appellate court we have to bear in mind the caution that having heard and seen the witnesses testify, the trial court was better placed to assess their demeanor. We should therefore be slow to reverse the trial judge's finding of fact unless it is supported by the evidence on record."

3. It is with this mandate in mind that we proceed to re-analyse and re-evaluate the evidence that was adduced before the trial court.

4. The prosecution case stood on the testimony of 7 witnesses, which we summarise as hereunder.

5. Joseph Muthee (PW1) was the deceased's father. He testified that he was at home on September 8, 2018, when he heard screams. Shortly after, Mutwiri (PW2) knocked at his door and he informed him that his son (PW1) was being beaten by the appellant and one Stanley. He went to the scene near the appellant's gate and found the deceased lying in a ditch with panga cuts. He said that he found the appellant and Stanley at the scene, armed with pangas.

6. He told the court that he asked the appellant and Stanley why they had killed the deceased and they told him that the deceased had formed a habit of stealing their miraa. He stated that he found no miraa at the scene. He stated that when the deceased heard his voice he called out and told him that he was dying and that the deceased and Stanley had killed him. He testified that he asked the appellant and Stanley to remove the deceased from the ditch where he lay with panga cuts and to take him to the hospital. Stanley went to look for a vehicle but the deceased passed away. He stated that the appellant and Stanley are his neighbours and he was able to see them at the scene with light from a torch.

7. He stated that he called the sub-area, Mr. Ntongai, who came and accompanied him to Laare Police Station where they reported the murder. He stated that the police went to the scene, collected the deceased's body and took it to the mortuary and that on 14th September 2018 he identified the body for post mortem, which was done.

8. He stated that the appellant and Stanley went into hiding after the incident.

9. Patrick Mutwiri Kobia (PW2), was a miraa businessman and a neighbor. He testified that he heard screams at around 3:30 am on the night of the incident, and when he went there, he saw Stanley and the appellant beating the deceased with pangas at the appellant's gate. He stated that he saw the appellant and Stanley when he shone a torch at them and he feared when he saw them armed and ran to call a neighbor, Richard Mwirigi (PW3), and later the deceased's father). He saw the appellant and Stanley put the deceased into a ditch. He confirmed the deceased had cuts on the head and leg.

10. Richard Mwirigi (PW3) was a businessman and a neighbor. He was asleep in his house on the material night when he was woken by PW2 at around 4:00 am and told to go and see how the deceased had been cut. He stated that he went to the scene where he found the deceased lying down and Stanley and the appellant standing over him, while armed with pangas. He confirmed seeing a cut on the back of the deceased's head and identified the appellant and Stanley using a torch. He stated that he knew the appellant and Stanley as they were neighbours.

11. Ibrahim Ntongai (PW4), Sub-area of Irindi Village testified that he was called by Joseph Muthee (PW1) around 4:00 am and went to the scene, where he confirmed Ken Koome had died. He found the body and neighbours gathered. He accompanied PW1 to the Police Station to report the murder. He said that the appellant was not at the scene when the police arrived and picked up the body. He stated that the deceased's body was at the appellant's gate.

12. Dr. Sammy Githu Wachira, (PW5), a medical officer who produced the post-mortem report prepared by Dr. Michael Ndungu Kariuki stated that the post-mortem was conducted on 14th September, 2018. The deceased was an 18-year-old male with multiple cuts externally, including deep cuts on the temporal and mastoid regions of the head, left elbow, left wrist, and left knee. He testified that the report stated the cause of death was cardiopulmonary arrest due to multiple body cuts with sharp objects, skull fracture, and brain oedema.

13. CPL Josephat Chebar (PW7) was the investigating officer. He visited the scene with a sub-area (PW4) and observed that there were blood stains at the scene. He said he did not trace the two suspects, the appellant and Stanley Maore, at that time. He established that the deceased was assaulted by the suspects and the allegation was that he was a miraa thief, but no miraa was found at the scene. The appellant was later arrested by a mob after being spotted by the deceased's father.He was rescued from the mob by police officers, sustaining injuries in the process.

14. Upon being placed on his defence, the appellant elected to give a sworn statement and called five witnesses. He stated that at about 6.00 am on the material date, his wife informed him that the deceased had been killed near their gate for allegedly stealing miraa. He also went to the scene and saw the deceased's body and was later arrested on 8th December, 2018 and charged with the murder of the deceased, an offence he denied.

15. Catherine Kathure, appellant's wife stated that she was the one who informed the appellant that the deceased had been killed and his body was lying outside their gate. Gerald Kithia(DW2), the area senior Chief was called to the scene by PW4. He told the court that he found the body at the scene, but the suspects were not there. He said that he was informed that the appellant had been caught stealing miraa. He could not tell who had assaulted the deceased. DW3, Alex Koome and DW4, Joseph Mithike were among the witnesses who rushed to the scene on the morning in question. They arrived after the event and were not able to say how the deceased had been assaulted, and by whom. They were more of character witnesses who were called to testify to the effect that the appellant was a law-abiding citizen, while the deceased was a known miraa thief.

16. Having considered the above evidence, submissions and the relevant law, the learned Judge found that the death of Ken Koome was proved through the prosecution and defence witnesses and was corroborated by the post-mortem form, which revealed that the deceased died of cardiovascular arrest due to multiple body cuts with sharp objects, skull fracture and brain oedema.

17. As to whether the appellant caused the death of the deceased, the Judge held that the prosecution relied on the evidence by PW2, Patrick Mutwiri Kobia, who stated he saw his neighbours Kaunyangi and Stanley who were armed with pangas assaulting the deceased. In conclusion the learned Judge held that from the evidence on record, she was persuaded that although only PW2 witnessed the incident, the evidence by PW1 and PW3 carried a high degree of probability that the appellant was one of the persons that murdered the deceased.

18. On malice aforethought, the court held that, having considered the multiple body cuts, skull fracture and brain oedema as indicated in the post mortem report, the attack on the deceased was vicious and the appellant must have known that the act of cutting the deceased severally with a sharp object was likely to cause him grievous harm or death.

19. The learned Judge dismissed the appellant's defence, convicted and sentenced him to 25 years imprisonment, from 11th December 2018.

20. Aggrieved by the said verdict, the appellant seeks to overturn it, citing several grounds contained in the amended grounds of appeal dated 12th August 2025. The trial Judge is faulted for upholding both conviction and sentence without considering that the prosecution evidence was full of inconsistencies and contradictions hence unworthy to be relied upon; failing to note that the prosecution did not prove their case to the required standards as required by the law; failing to take into consideration the defence of the appellant which was credible regarding what happened at the scene; failing to note that the sentence was harsh and excessive; failing to note that after investigations no exhibits were found in the appellant's house; by refusing the application to recall prosecution witnesses PW1 to PW4.

21. We heard this appeal virtually on 4th September 2025. Learned counsel Mr. Muchangi appeared for the appellant, while learned counsel Ms. Mengo appeared for the respondent. Both counsel relied on their written submissions, which they highlighted orally. The submissions by the parties are dated 12th August 2025 and 10th August 2025 respectively.

22. On behalf of the appellant, it is submitted that the trial Judge explicitly stated the evidence carried a high degree of probability of guilt. The appellant contends that this is a reversible error as the mandatory legal standard is beyond reasonable doubt.

23. On the issue of identification, it was submitted that the incident occurred between 3:30 am and 4:00 am in complete darkness. It was contended that witnesses relied on torchlight from a distance and admitted to being fearful which the appellant submits affects the accuracy of identification. It was, further submitted that the sole eyewitness (PW2) admitted he did not see the actual cutting and only changed his story during cross-examination to mention blood on the pangas.

24. With regard to the material inconsistencies, it was submitted that there were time discrepancies as the witnesses gave conflicting times for the incident some saying 3:30 am while others said 4: 00 am. Further, there were distance discrepancies as there was conflict between the father of the deceased and the investigating officer regarding how far the body was from the home.

25. It was submitted that there was lack of physical evidence as no murder weapon was recovered from the appellant's home and no forensic or physical evidence linked him to the deceased. It was contended that the trial court dismissed the appellant's defense, that he was at home sick, and failed to analyze his hospital records produced in court or his wife's corroborating testimony.

26. According to counsel for the appellant, the appellant was denied a fair trial when the court refused an application to recall key prosecution witnesses (PW1 to PW4) for cross-examination by his new counsel. It was contended that this was a constitutional violation.

27. Finally, with regard to the sentence, it was submitted that the 25- year sentence is manifestly excessive for a first offender who was a teacher and a church secretary.

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 that the prosecution's evidence was watertight and consistent; that the eyewitnesses, PW1, PW2, and PW3 provided a matching chronology of seeing the appellant and an accomplice, Stanley attacking the deceased with pangas.

30. On proof of murder, it was submitted that all three ingredients of murder were proved beyond reasonable doubt: the death, the unlawful act by the appellant, and malice aforethought. It was contended that malice was inferred from the use of lethal weapons, pangas targeting vulnerable body parts, the head.

31. It was submitted that the appellant's mob justice defense was dismissed as an afterthought and unsubstantiated because it was never raised during the cross-examination of key witnesses and no evidence of the alleged miraa theft was found at the scene.

32. In regard to the sentence, it was submitted that the 25-year sentence was a proper exercise of judicial discretion and that the sentence is actually lenient given the gruesome way the deceased met his death.

33. We were urged to dismiss the appeal in its entirety.

34. Having carefully considered the record of appeal, submissions by counsel, the Court's mandate and the law, the main issue that falls for determination is whether the prosecution proved the ingredients of the offence of murder beyond reasonable doubt against the appellant and whether the sentence meted against the appellant was appropriate.

35. To sustain a charge of murder, the prosecution has to prove three things. First, the death of the deceased, and cause of death; second, that the death of the deceased was a result of an unlawful act or omission on the part of the accused person; and third, that the unlawful act or omission was committed with malice aforethought. (See Roba Galma Wario -vs- Republic [2015] eKLR).

36. It is not in dispute that the deceased died, as confirmed by several prosecution witnesses who testified that the deceased died at the scene after sustaining panga cuts. This evidence was corroborated by the post-mortem report, and the evidence of Dr. Sammy Githu Wachira, which showed that the deceased died as a result of cardiopulmonary arrest due to multiple body cuts with sharp objects, skull fracture, and brain oedema.

37. The next question is whether the death of the deceased occurred as a result of the unlawful act or omission of the appellant and whether there was malice aforethought.

38. From the totality of the evidence adduced before the trial court, like the trial court, we are satisfied that it was the appellant and his accomplice who caused the injuries that eventually killed the deceased. PW2 saw the appellant and another attacking the deceased with pangas and went and alerted the deceased's father and others who rushed to the scene and found the appellant still at the scene. The deceased, the appellants and the witnesses were all neighbours who knew one another well before that date. A torch was used to light the scene where they all were in close proximity; they spoke, and there was no evidence of the existence of any grudges between the parties. The appellant was clearly identified at the scene. This was a case of recognition as opposed to identification of a stranger as was in this Court's decision in Anjononi & Others -vs- Republic [1980] KLR where the Court expressed as follows:

> " This, however, was a case of recognition, not identification, of the assailants; recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other."

39. We find that the prosecution proved that the unlawful act that caused the death of the deceased was occasioned by the appellant and the other person not in court.

40. Turning to the issue as to whether malice aforethought was proved, the appellant contended that this was not proved as the pangas used to assault the deceased were not produced in court.

41. Malice aforethought is defined in section 206 of the Penal Code in the following terms:

    a. An intention to cause death or to do grievous harm to any person whether such person is the person actually killed or not.

    b. Knowledge that the act or omission causing death will cause the death of or grievous harm to some person, whether such person is the person 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 be caused.

    c. An intent to commit a felony.

d. An intention to facilitate the escape from custody of a person who has committed a felony.

42. It must be borne in mind, though, that failure to recover or produce a murder weapon in evidence at the trial does not necessarily mean that an accused person should be acquitted. In effect, a court can convict an accused person if they believe a weapon existed at the time of the crime, even if the weapon is not produced as was the case here. In Katana -vs- Republic [2024] KECA 463 (KLR), this Court held that:

> "In our opinion, malice aforethought may well be inferred from the force applied and the weapon used by the assailant. In this case, the post mortem report revealed that the death of the deceased was due to severe head injury resulting from assault. In fact, the injury exposed the crushed brain matter of the deceased, a clear indication of the extent of the force or the nature of the weapon used. The only inference that can be made in those circumstances is that the assailant intended to cause death or at least grievous harm to the deceased and, either way, that proves the existence of malice aforethought. We are also satisfied that the documentary evidence in the form of the post mortem report, which was produced without objection clearly revealed the cause of death, and the submission that the cause of death was not established does not hold."

43. In Ekai -vs- R. [1981] KLR 569, this Court held that failure to produce the murder weapon was not of itself fatal to a conviction and that, as long as the post mortem report had established beyond reasonable doubt the injury from which the deceased died, a conviction could still stand. If there is sufficient evidence on record that prove that the homicide was committed, the court may well convict the accused person. In light of these decisions, nothing turns on failure by the prosecution to produce the murder weapon. See also Karani -vs- R. [2010] 1 KLR 73.

44. The appellant alluded to the contradictions and inconsistencies in the prosecution case. This Court stated in Joseph Maina Mwangi -vs- Republic [2000] eKLR, that;

> "In any trial, there are bound to be discrepancies. An appellate court in considering those discrepancies must be guided by the wording of section 382 CPC, viz whether such discrepancies are so fundamental as to cause prejudice to the appellant or they are inconsequential to the conviction and sentence."

45. The contradictions and inconsistencies cited by the appellant concerned the time when PW2 and PW3 heard screams and the distance the deceased lay after the assault. The aforesaid discrepancies are immaterial and do not affect the substratum or the main issue before the Court. They do not go to the root of the evidence and do not impeach the credibility of the witnesses.

46. The appellant also complained that his right to fair trial was violated when the court declined an application to recall key prosecution witnesses (PW1 to PW4) for cross-examination by his new counsel. The operative law that provides for recall of witnesses is section 150 of the Criminal Procedure Code which provides as follows:

> " A court may, at any stage of a trial or other proceeding under this Code, summon or call any person as a witness, or examine any person in attendance though not summoned as a witness, or recall and re-examine a person already examined, and the court shall summon and examine or recall and re-examine any such person if his evidence appears to it essential to the just decision of the case: Provided that the prosecutor or the advocate for the prosecution or

the defendant or his advocate shall have the right to cross-examine any such person, and the court shall adjourn the case for such time (if any) as it thinks necessary to enable the cross-examination to be adequately prepared if, in its opinion, either party may be prejudiced by the calling of that person as a witness."

47. It is important to state that a court has inherent power to do justice to all, and if justice is going to be done by recalling a witness, the decision ought to be within the law, whether the application for recall is made by the prosecution or the defence. However, good reason(s) must be provided, and in this case, counsel for the appellant indicated that she wished to cross-examine the said witnesses. From our perusal of the record, we note that the appellant was represented by a Mr. Marete at the time the witnesses testified. Ms. Aketch later took over the matter from Mr Marete acting for the appellant. On 22.1.2020 the matter proceeded for hearing with PW5 to PW7 testifying and the prosecution closed its case.

48. From the record, on 3rd February 2020 the appellant through Ms. Aketch made an application to recall PW1, PW2, PW3 and PW4 for purposes of further cross examination. She contended that she wanted to clarify the appellant's personal relationship with the deceased, to confirm the photos of the site visit and to confirm that PW4 the sub-area came from another area. Having perused the record we have noted that when PW1 to PW4 were testifying, the appellant was represented by Mr. Marete who substantially cross- examined witnesses. The court in its discretion held that the appellant was represented by a competent advocate who cross- examined all the prosecution witnesses during the initial phase of the trial. She held that all the issues raised could be dealt with at the defense if at all the appellant was found to have a case to answer.

49. Whereas the law allows an accused person the right to recall a prosecution witness who has already testified, that right is not absolute. The trial court will be guided by the reasons given by an accused person or his counsel in seeking the recall of a witness and the broader interest of justice.

50. In our view the mere change of advocate is not sufficient ground for the recall of a witness especially when the previous counsel had already cross-examined the witnesses at length. Upon evaluating the record in that regard, we are satisfied that, in the circumstances of this case, and the reasons given for the application to recall the witnesses, the learned Judge exercised her discretion judiciously in declining the application to recall the witnesses. Based on the above this Court finds that there was no violation of the appellant's right to a fair trial under Article 50(2) of *the Constitution*.

51. As to whether the appellant's defence was considered, we find that the learned Judge did consider the same but found it insufficient to cast any doubt on the overwhelming evidence adduced by the prosecution and convicted the appellant.

52. For the foregoing reasons, after a fresh re-evaluation of the evidence adduced before the trial court, the appellants grounds of appeal, the submissions by both counsel and the law, we have no hesitation in finding the appeal on conviction devoid of merit and we dismiss it accordingly.

53. With regard to the sentence the appellant was sentenced to 25 years imprisonment. According to the appellant, the learned Judge failed to consider his mitigation, otherwise the sentence would have been lighter. We have been asked to interfere with and reduce the sentence.

54. An appellate court does not arbitrarily interfere with a lawful sentence meted out by the trial court. It cannot just reduce the sentence on a whim or because, in its view the sentence was harsh. This is more so if the trial court has considered the appellant's mitigation, the sentencing guidelines and given reasons for the sentence arrived at.

55. In S. -vs- Malgas 2001 (1) SACR 469 (SCA), it was held at para 12 that:

> "A Court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court, approach the question of sentence as if it were the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would be to usurp the sentencing discretion of the trial court…However, even in the absence of material misdirection, an appellate court may yet be justified in interfering with the sentence imposed by the trial court. It may do so when the disparity between the sentence of the trial court and the sentence that the appellate court would have imposed had it been the trial court is so marked that it can properly be described as 'shocking', 'startling', or 'disturbingly inappropriate'."

56. This Court in Bernard Kimani Gacheru -vs- Republic [2002] KECA 94 (KLR), expressed a similar opinion when it held that:

> " 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, the sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with the sentence unless that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, took into account some wrong material, or acted on a wrong principle. Even if, 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 anyone of the matters already stated is shown to exist."

57. In the instant case, the trial court considered the appellant's mitigation, the circumstances surrounding the matter and gave reasons for the sentence she imposed which she found proportionate to the offence. We note that the appellant committed a heinous and unprovoked offence against the deceased. Having considered the circumstances under which the offence was committed, the brutality displayed by the appellant, and the traumatic effect of the heartless and fatal assault on the deceased , a jail term of 25 years imprisonment meted by the trial court was appropriate. There is nothing to persuade us that the learned Judge's exercise of discretion in sentencing was improper.

58. The upshot is that this appeal lacks merit and is dismissed.

DATED AND DELIVERED AT NYERI, THIS 25TH DAY OF MARCH 2026.

W. KARANJA

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JUDGE OF APPEAL

ALI-ARONI

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JUDGE OF APPEAL

M. GACHOKA C.Arb, FCIArb.

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR