IN THE COURT OF APPEAL
AT NYERI

(CORAM: W. KARANJA, M'INOTI & ARONI,

JJ.A. CRIMINAL APPEAL NO. 39 OF 2017

BETWEEN

JOHN MBITI KATHUKU.....APPELLANT

AND

REPUBLIC.....RESPONDENT

*(Being an appeal from the Judgment of the High Court of Kenya at Meru by **(R.Wendoh, J.)** dated 9th February 2017 and delivered by (A. Mabeya, J.) on 16th February 2017*
in
HCCRA No. 45 of 2011)
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JUDGMENT OF THE COURT

1. John Mbiti Kathuku (the appellant), 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. 45 of 2011**. The particulars of the charge were that on 23rd October 2010 at Tiira Location, Igembe South District, within Meru County, he murdered Peter Karithi Kathuku. He pleaded not guilty to the charge and the matter went to full hearing, in which the prosecution called 6 witnesses.

2. The evidence adduced by the prosecution can be summarised as follows: Lucia Nkanja (PW1), narrated to the court that on

27th

October 2010 at around 9:00 p.m., she saw the appellant who was armed with a stick, wake up the deceased. When the deceased woke up, on sensing danger, he started running away but the appellant ran after him. Unfortunately, the deceased fell down a short distance away and the appellant started hitting him with the stick. He hit the deceased on his chest, stomach, legs, and hands. According to Lucia, the appellant also had a sword and he threatened to cut her if she dared to intervene.

3. She stated that following the threat, she left the deceased lying at the scene and went back to her house. The appellant is said to have dragged the deceased's body to his house from where he was collected by the police and taken to Maua hospital.

4. She stated that the deceased was her biological son, while the appellant was the son of her co-wife. She testified that she was the one who brought up the appellant and that he hated her. She stated that she lived with the deceased and she was bringing up his children. She stated that the appellant and the deceased hated each other and that there was a previous incident where the appellant had cut the deceased on the forehead and the case was pending in court as at time of the present incident.

5. James Ntonja Muthara (PW2) a tailor at a nearby market told the court that on 23rd October 2010 he was at about 8.00 pm working when he heard screams from the home of the deceased and rushed to the scene. He stated that when he arrived at the home of the appellant and the deceased, he found the appellant had cut the deceased on the forehead. He said that there were many people, but only he and one Gitonga dared approach the scene as the others feared being cut. He testified that PW1 and the appellant's and deceased's sisters were at the scene. It was his evidence that the appellant beat the deceased to death and he could see very clearly, because there was moonlight.

6. He stated that after the appellant killed the deceased, he pulled him for a distance of about 40 meters, where there was a footpath, and he ran to his house and came back with arrows and said he would kill anybody who went near the body. PW2 then went to the Chief's home and reported that the appellant had killed the deceased. The Chief said he would visit the scene the following morning. He stated that the Chief came the next morning, and they went to the scene where they found the deceased's body. He stated that the Chief went to Maua Police Station, where he reported the matter and was accompanied back to the scene by police officers who collected the body and took it to the mortuary.

7. He stated that he knew both the appellant and the deceased as they were his in-laws. He was married to the appellant's sister and he and the appellant were on good terms as he had nursed his sons when they were circumcised. Also, he related with the deceased well.

8. Julius Gitonga, (PW3), testified that he was at a nearby canteen chewing *miraa* when he heard screams for help coming from the deceased's house. He went to the deceased's home and found that the appellant had already cut the deceased, who had fallen near his door. He stated that he found the deceased's motherhat the scene. That when he reached the scene, there was a quarrel over land. The appellant was alleging that the deceased had built a house on his land. He stated that there was a lot of light as there was moonlight on that night. He stated that he saw that the deceased had been beaten and had fallen down and he witnessed the appellant dragging the deceased to the road.

9. He stated that he had known both the appellant and the deceased since he was born and that they were brothers, sons of Kathuku, his grandfather, and they were his uncles. He said that the appellant and the deceased were not in bad terms before the incident.

10. No. 74620 Joseph Kiminda (PW4), the investigating officer, testified that on 24th October 2010 a report was made and booked in the OB that a murder occurred at Tiira-Kinja village. The incident was said to have taken place 23rd October 2010 at 8. 00 pm. He stated that he and the OCS, Mr. Opiyo, proceeded to the scene and found the body lying by the roadside with visible cut wounds on the front of the face, head and that both legs seemed to be broken. That upon interviewing those present he was informed that it was the body of the deceased who had been killed by the appellant.

11. He stated that they searched the area and the house of the appellant. That outside the appellant's house, they found a large stick which had blood stains and was hidden among some banana plants. They took the body to Maua Methodist Mortuary to await post-mortem. That he learned that the appellant and the deceased were half-brothers and that they had a land dispute where the appellant was alleging that the deceased had built on his land. He stated that the appellant fled after the incident and was arrested by a police officer from Tigania on 17th August 2011, taken to Maua Police Station and charged with the offence of murder.

12. By consent of both counsel, the witness produced, as exhibit,

the post-mortem report conducted by Dr. Kanake on 29th October 2010 pursuant to **sections 32** and **77** of the **Evidence Act.** The doctor's

findings were that the cause of death was cardiopulmonary arrest due to multiple injuries from sharp and blunt objects, including a compound fracture to the head and multiple cuts on the scalp.

13. On being placed on his defence, the appellant elected to give a sworn statement. He testified that before his arrest, he was staying at home in Kiinja-Tiira in Maua and he is a Miraa farmer. He stated that the deceased was his brother. He stated that on 23rd October 2010, he spent the day at Maua where he had gone to buy some things and he stayed till 4.00 p.m. and went back home. That at Kiinja Market, he started to take alcohol with his brother, the deceased, and other people. That his brother left with three other people whose names he did not know at 7. 00 p.m. That he drank until 8.30 p.m. and went home. The distance from the market to his home is about I km. That he stayed home until 9.00 pm when he heard screams and his wife woke him up because he was asleep.

14. He stated that he took the weapon he used to guard *miraa* and went to the place where screams were coming from. He took arrows and a *panga*. He said that he found his brother lying down where the screams were coming from and that he had been beaten. That he tried to talk to him but there was no

sound. He denied having killed the deceased, maintaining that he and the deceased lived in peace.

15. He further testified that he was in a good relationship with all the witnesses except for PW1 who is his step-mother. That his father left him with miraa and a banana farm and PW1 used to drink alcohol and he used to give her money and whenever there was no money, there was a problem. He stated that he was framed.

16. In re-examination he stated that he had no dispute with the deceased over land. The learned Judge was not persuaded by the appellant's defence and found that the same had not displaced the strong prosecution case.

17. In the impugned judgment, as to whether the appellant caused the death of the deceased, the learned Judge found that there was no doubt that the deceased was murdered at his home. That PW1 was with the deceased in his home at the time of the attack. PW2 and PW3 were attracted to the deceased's home by the screams. The appellant also confirmed that the scene was at the deceased's home.

18. On identification, the Judge held that the offence was committed at night between 8.00 pm and 9.00 pm. That PW1 to PW5

testified that there was very bright moonlight which enabled them to see what was happening. That these were people who knew each other well. The Judge concluded that the appellant also confirmed that

there was bright moonlight on that night, so identification was not an issue.

19. As to whether malice aforethought was proved, the Judge held that the injuries inflicted on the deceased and the appellant's action of dragging the body to the road are all evidence of his intention to

end the life of the deceased, which he did. The learned Judge

concluded that the charge of murder had been proved and convicted the appellant of the same.

20. On the sentence, the Judge considered the mitigation by the appellant that he was remorseful, had four children and a wife and was the sole breadwinner. The Judge stated that no other sentence was provided by the law for the offence of murder and hence sentenced the appellant to suffer death as provided by that law.

21. Aggrieved by the said verdict, the appellant seeks to overturn it citing the following grounds, *inter alia,* appearing in the undated grounds of appeal. He complains that there were contradictions and inconsistencies in the prosecution evidence; that the learned Judge failed to consider the fact that the weapon allegedly used to murder the deceased, was not presented to a

government chemist for analysis and a report prepared; by failing to consider the appellant’s defence; by finding and holding that the prosecution

had proved its case beyond reasonable doubt and by giving the appellant a harsh and excessive sentence.

22. We heard this appeal virtually on 1st September 2025. Learned counsel Mr. Mutegi appeared for the appellant, while learned counsel Ms. Mengo appeared for the respondent. Both counsel relied on their written submissions entirely and made no oral highlights. The submissions by the appellant and the respondent are dated 6th August 2025 and 17th August 2025, respectively.

23. On behalf of the appellant, it is submitted that there were significant inconsistencies between prosecution witnesses' evidence pertaining to the colors of the clothes worn by the deceased; the weapon used to hit the deceased; whether he was sitting down or sleeping when hit; the date; the position of the body when the witnesses arrived at the scene and other minor discrepancies.

24. Counsel submitted that the matter was marred with contradictions and that this Court ought to quash the judgment of the trial court and set the appellant free. Reliance was placed on ***Pius Arap***

Maina -vs- Republic [2013] eKLR and ***Miller -vs- Minister of***

Pensions [1947]2 ALL ER 372-373.

25. Further, it was submitted that there is no doubt that the deceased died but the prosecution was unable to prove that it was the appellant who caused the death. We were urged to find that the respondent did not prove the case beyond reasonable doubt as required by the law.

26. With regard to hearsay evidence, it was submitted that PW3 testified that he heard screams on the material day while he was chewing *miraa,* and he found that the appellant had cut the deceased. It was submitted that PW3 was not a credible witness in the matter, since his evidence was purely hearsay in that he did not see the appellant cut the deceased.

27. Counsel contended that it is trite that hearsay evidence is inadmissible. Reliance was placed on ***Kinyatti -vs- R. CR. Appeal No. 60 of 1983(CA).***

28. On production of the exhibit, it was submitted that PW4 stated that the doctor who prepared the post-mortem report was in a seminar in South Africa. It was contended that he failed to produce any documentary evidence in support of the allegation and the trial court proceeded to believe the allegation. It was contended that this was tantamount to the court entering to the arena and making a case against the appellant. Reliance was

placed in ***Burunyi & Anor***

-vs- Uganda* CR Appeal No 1968 EA 123** and ***R -vs- Julius Karisa

***Charo* [2005] eKLR**.

29. Counsel submitted that the weapon that was allegedly used to murder the deceased was never presented to the relevant authorities for analysis and, therefore, it was not clear whether the blood stains on the same were from the deceased's body and who had used the weapon.

30. On sentencing, counsel relied on the Supreme Court decision of ***Francis Karioko Muruatetu -vs- Republic* [2017] eKLR** regarding the guidelines for sentencing. Reliance was further placed on ***Benard Kimani Gacheru -vs- Republic* [2002] eKLR.** Counsel urged us to exercise our discretion and set the appellant at liberty and/or to substitute the death sentence with a definite sentence.

31. In opposing the appeal, Ms. Mengo, with regard to the consistency of the prosecution evidence, submitted that the three eyewitnesses, PW1, PW2, and PW3, provided credible and consistent accounts of the appellant beating the deceased with a stick. It was submitted that the trial Judge noted that the witnesses were at the scene at different times and their

evidence cannot be exactly the same because it depends on what stage the witnesses arrived at the scene.

It was contended that the trial Judge found no serious inconsistencies in the evidence.

32. With regard to the appellant's submissions that the murder weapon, a stick, should have undergone DNA analysis, it was submitted that failure to subject the stick to DNA analysis was not fatal to the prosecution's case as already sufficient evidence was tendered in court to show that the appellant committed murder.

33. With regard to proof beyond reasonable doubt, the respondent submitted that all ingredients of murder were proved, including the cause of death which was cardio-pulmonary arrest from multiple injuries.

34. With regard to the severity of the sentence, the respondent contends that under **Section 204** of the **Penal Code**, death is the prescribed punishment for murder and that the trial Judge exercised proper discretion. We are urged not to interfere with the conviction or sentence, as the case was proven beyond reasonable doubt.

35. This being a first appeal, the Court is required to subject the entire evidence adduced before the trial court to a fresh evaluation and analysis and reach its own conclusion, always

bearing in mind that

it neither saw nor heard any of the witnesses and has to give due allowance. See ***Okeno vs. Republic* [1972] EA 32.**

36. Having carefully considered the record of appeal, submissions by respective counsel, the authorities cited, and the law, we decipher the issues that arise for determination to be: whether the offence of murder was proved beyond reasonable doubt to sustain a conviction, and if so, whether we should interfere with the sentence.

37. To sustain a conviction on the charge of murder, the prosecution must prove that the death of the deceased occurred; that the death was caused by the appellant; and that the appellant had the required malice aforethought. These three essential ingredients must be proved beyond any reasonable doubt. The essential ingredients of murder were outlined in the case of ***Anthony Ndegwa Ngari -vs- Republic [2014] eKLR*** as follows:

> ***"…that the death of the deceased occurred; that the accused committed the unlawful act which caused the death of the deceased; and that the accused had malice aforethought."***

38. In the instant case, that the deceased died on the date in question is not in doubt. This is informed by direct evidence, more precisely, the evidence of PW1 , PW2, PW3 and the post

mortem report dated 29th October 2010, in which the pathologist confirmed the death of the deceased and the cause of death as cardio pulmonary arrest

secondary to haemorrhage from multiple injuries inflicted by blunt and sharp objects.

39. The second element is proof of causation of death, which the law provides must be unlawfully caused. In this case, there was the direct testimony from PW1, Lucia Nkanja, the mother of the deceased and the step-mother of the appellant, on the events as they unfolded on the fateful day. She narrated to the court how the appellant attacked the deceased, from the beginning to the end.

40. Her evidence was corroborated by that of PW2, who ran to the scene on hearing screams for help. He stated that when he arrived, he found the appellant had cut the deceased on the forehead. He stated that the appellant was beating the deceased with a stick and he beat him to death and that after killing him he pulled the deceased and said he would kill whoever went near the body. He is the person who went and reported to the chief that the appellant had killed the deceased. Although PW3 arrived at the scene after the beating, he found the appellant and the other witnesses at the scene and also saw the deceased's body lying at the scene.

41. From the sum total of the evidence of the prosecution witnesses, it is clear that the appellant is the one who attacked

the deceased and caused his death. There was no other evidence to even remotely

implicate any other person in the death of the deceased. From the foregoing, it is clear that it was the appellant who beat up the deceased, which beating resulted in the deceased's death.

42. On identification, the appellant and the deceased were stepbrothers.

PW1 was their mother/stepmother and PW2 and PW3 were neighbors. All these people were very familiar with one another, and there was no case of mistaken identity. The trial Judge having considered the direct evidence of the witnesses held that all the witnesses saw the appellant assault the deceased and in fact that they all saw when the appellant pulled the deceased's body towards the roadside and guarded it threatening to kill anybody who dared to go near him.

43. The appellant alluded to 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 inconsistencies and 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."***

44. On the issue of inconsistencies, the trial Judge's conclusion was

that PW1 to PW3, were all at the scene at different times and their evidence cannot be exactly the same because it mattered at what

stage the witness arrived at the scene. The Judge found no serious inconsistencies in their evidence. Further, the Judge noted that PW1 was a very old lady who could not recall her age, and after observing her demeanour, found that she was truthful. The witnesses described the events as they had unfolded and as they remembered them. The trial Judge believed the witnesses despite the minor inconsistencies, which she found not serious.

45. We appreciate the fact that the trial Judge had the advantage of seeing the witnesses testify and was able to assess their demeanor. The learned Judge, having found the witnesses truthful, we have no basis for holding otherwise. Having considered the discrepancies in the evidence as highlighted by the appellant's counsel, we find that the aforesaid inconsistencies and discrepancies are immaterial and do not affect the substratum of the evidence or the case before the Court. In any event, they are curable under **section 382** of the **Criminal Procedure Code.**

46. As to whether the prosecution proved malice aforethought, **Section 206** of the **Penal Code** defines what malice aforethought is. It provides as follows:

> ***"Malice aforethought shall be deemed to be established by evidence proving any one or***

more of the following circumstances:

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."

47. Malice aforethought was succinctly discussed by this Court in ***Nzuki vs. R. [1993] KLR 171*** in the following terms:

"Before an act can be murder, it must be aimed at someone and in addition, it must be an act committed with one of the following intentions, the test of which is always subjective to the actual accused:

i) The intention to cause death;

ii) The intention to cause grievous bodily harm;

iii) Where the accused knows that there is a serious risk that death or grievous bodily harm will ensue from his acts, and commits these acts deliberately and without lawful excuse with the intention to expose a potential victim to that risk as the result of those acts.

It does not matter, in such circumstances, whether the accused desires those consequences to ensue or not, and in none of these cases does it matter that the act and the intention were aimed at a potential victim, other than the one who was killed. The mere fact that the accused's conduct is done in the knowledge that grievous harm is likely or highly

likely to ensue from his conduct, is by itself enough to establish malice aforethought.”

48. In the instant appeal, a pertinent question is whether there was sufficient evidence on record, to establish that the appellant intended to cause the death of the deceased or cause him grievous harm.

49. The appellant killed the deceased by beating him with a stick and dragged his body and guarded it to prevent any sympathisers from offering him any assistance. The trial Judge held that even if the deceased was alive nobody, could offer him any assistance or take him to hospital. From this, the intention of the appellant was explicitly clear, he had a single mission in his mind, to ensure that the deceased died. The chain of events or actions by the appellant clearly demonstrate that he intended to kill the deceased or inflict upon him grievous harm.

50. Considering the nature of the injuries inflicted on the deceased i.e ; multiple cuts in different sizes on the scalp, left and right hand, forearm, lower limbs, all penetrating to the bones, compound fractures of the left humerus, right radius and ulnar, right tibia and fibular, left tibia and fibular and bruises on all limbs and face. On the head, the deceased had a deep compound fracture, parietal penetrating with subdural haematoma; the fact that the appellant dragged the deceased's body up to the road and guarded it and threatened anyone not

to go near, and that the deceased was

unarmed and had not attacked and/or provoked the appellant, it would be safe to draw the conclusion that the appellant clearly intended to kill the deceased. The prosecution, therefore, proved malice aforethought and, all the ingredients of murder were established.

51. On the issue of failure to call the doctor who performed the post-mortem, the appellant submitted that PW5 testified that Dr. Kanake, who conducted the post-mortem was away for studies in South Africa and hence could not attend court. It was contended that no evidence was produced by the prosecution to confirm that indeed Dr. Kanake was away. Firstly, this Court notes that the death of the deceased was not disputed by the appellant and indeed that the evidence of PW1 to PW3 ,was a compelling conclusion that the assault on the deceased by the appellant was what resulted in death. Secondly the report was produced by consent and the appellant's advocate had no issue with the same. We hold that the failure to call the doctor to produce the post-mortem report in the circumstances of this appeal, was not fatal to the prosecution case and the report was produced in accordance with the rules of evidence.

52. On the appellant’s complaint that the murder weapon was not taken to the government chemist for analysis, in the instant case,

there were direct eyewitness accounts of the attack by PW1 to PW3. We find that there was no need, for the forensic analysis of the weapon for a conviction to be sustained.

53. We find that the appellant's conviction was based on sound evidence. The appellant's appeal against conviction, therefore, lacks merit and is hereby dismissed.

54. As regards the sentence, a perusal of the trial court's record shows that the appellant presented his plea in mitigation saying he was remorseful and had four children and a wife and was the sole breadwinner. The learned Judge considered the mitigation but held that there was no other sentence provided by the law for the offence of murder and sentenced the appellant to suffer death.

55. It is not lost to us that sentencing is a matter that falls within the discretion of the trial court; and an appellate court can only intervene in circumscribed circumstances. This was clearly stated by this Court (Chunga, CJ, A.B. Shah & Bosire, JJ.A.) in ***Bernard***

***Kimani Gacheru -vs- Republic* [2002] KECA 94 (KLR),** as follows:

> ***"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, sentence must depend on the facts of each***

case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court

overlooked some material factor, or took into account, some wrong material."

56. The learned Judge already took into consideration the mitigation, and sentenced the appellant to suffer death which we acknowledge at the time, was mandatory in nature. Subsequent to the delivery of the judgment herein, there was a shift of paradigm in sentencing in murder cases which was set in motion by the now famous Supreme Court decision in ***Francis Karioko Muruatetu -vs-***

Republic (supra) The said case declared the mandatory aspect of

the death sentence provided for under **section 204** of the **Penal Code** as unconstitutional. In as much as the death sentence still remains in our laws, the death sentence under **section 204** of the **Penal Code** is no longer the minimum sentence.

57. In view of the foregoing, we can interfere with the discretion of the trial Judge in sentencing the appellant. We allow the appeal on sentence and set aside the death sentence.

58. Having considered the recent jurisprudence created by the ***Muruatetu*** decision (supra) and the sentencing guidelines, the

circumstances under which the offence was committed, the malice and brutality exhibited by the appellant, and the

mitigation offered by the appellant at the trial court, substitute the death sentence

that was imposed on the appellant, with a sentence of forty (40) years imprisonment.

59. The record shows that the appellant was in custody since he was arraigned in court on 24th August 2011; and by dint of **Section 333(2)** of the **Criminal Procedure Code**, the imprisonment term

shall be computed to begin running from that date.

W. KARANJA

.....
JUDGE OF APPEAL

K. M'INOTI

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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